1944

CANADA
LAW REPORTS

Supreme Court of Canada

REPORTERS

ARMAND GRENIER K.C.

S. EDWARD BOLTON K.C.

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JUDGES

OF THE

SUPREME COURT OF CANADA

DURING THE PERIOD OF THESE REPORTS

The Right Hon. Sir LYMAN POORE DUFF, G.C.M.G., C.J.C.
The " THIBAUDEAU RINFRET C.J.C.
" " HENRY HAGUE DAVIS J.
" " PATRICK KERWIN J.
" " ALBERT BLELLOCK HUDSON J.
" " ROBERT TASCHEREAU J.
" " IVAN CLEVELAND RAND J.
" " ROY LINDSAY KELLOCK J.
" " JAMES WILFRID ESTEY J.

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA:
The Hon. Louis St-Laurent K.C.

MEMORANDA

On the seventh day of January, 1944, the Right Honourable Sir Lyman Poore Duff, Chief Justice of the Supreme Court of Canada, whose term of office had been extended by statutes for four years beyond the usual retiring age of seventy-five years, retired from the bench.

On the eighth day of January, 1944, the Honourable Thibaudeau Rinfret, Puisne Judge of the Supreme Court of Canada, was appointed Chief Justice of the Supreme Court of Canada.

On the thirtieth day of June, 1944, the Honourable Henry Hague Davis, Puisne Judge of the Supreme Court of Canada, died.

On the third day of October, 1944, the Honourable Roy Lindsay Kellock, a Justice of the Court of Appeal for Ontario, was appointed a Puisne Judge of the Supreme Court of Canada.

On the sixth day of October, 1944, James Wilfrid Estey, one of His Majesty King's Counsel, was appointed a Puisne Judge of the Supreme Court of Canada.

ERRATA

in volume 1944

Page 57, f.n. (1) should be [1916] 2 A.C. 569.

Page 215, at the 8th line, "enjoying" should be "enjoining".

Page 299, insert f.n. (1) (1913) 28 O.L.R. 506.

Page 332, f.n. (2) should be (1919) 46 O.L.R. 31.

Page 405, f.n. should be [1931] S.C.R. 437.

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.

Ludditt v. *Ginger Coote Airways Ltd.* [1942] S.C.R. 406. Special leave to appeal granted, 4th May, 1944.

Montreal Coke and Manufacturing Co. v. *Minister of National Revenue.* [1942] S.C.R. 106. Appeal dismissed with costs, 3rd May, 1944.

Montreal Light, Heat and Power Consolidated v. *Minister of National Revenue.* [1942] S.C.R. 89. Appeal dismissed with costs, 3rd May, 1944.

Spun Rock Wools Ltd. v. *Fiberglas Canada Ltd. et al.* [1943] S.C.R. 547. Special leave to appeal granted, 19th July, 1944.

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CASES

DETERMINED BY THE

SUPREME COURT OF CANADA ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

JAMES KARAS, MARY KARAS AND JOHN PEARL (DEFENDANTS)..... APPELLANTS;

AND

CHARLES ROWLETT (PLAINTIFF).... RESPONDENT.

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*Oct. 19, 20, 21.

*Dec. 15.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA EN BANC

Damages—Quantum—False representation to deprive lessee of benefit of contractual right to renew lease—Measure of damages—Special damages—Loss of profits—Questions as to mitigation of loss—Matters for consideration in assessing loss—General damages not recoverable.

Plaintiff bought as a going concern from defendant K. a store business, which he called the "Oasis", in the city of Halifax, and took a lease from K. of the store premises for five years with right of renewal for a like term, subject only to sale of the premises by K., and with a first option to purchase. During the term of the lease K. represented to plaintiff that he had decided to sell the premises and had an offer of $25,000, which was beyond what plaintiff was willing to pay. Plaintiff, being told that the property was sold, and pursuant to notice to quit, and failing to get a renewal, which he was anxious to have, vacated the premises by the end of the term and moved the business to another store (called the "Rendezvous") operated by him. He later sued K. and the other defendants (K.'s wife and her brother) for damages, claiming that the representation of such sale was false and that defendants conspired to defraud him. At trial, the jury found that the alleged sale was not a *bona fide* sale, and found for plaintiff special damages of $18,000 and general damages of $2,000, for which amounts plaintiff recovered judgment, which was sustained by the Supreme Court of Nova Scotia *en banc*, that Court, however, dividing equally as to sustaining the assessment of damages (17 M.P.R. 124). Defendants appealed to this Court as to the assessment of damages.

The special damages awarded were (as assumed in this Court from items claimed and the charge to the jury) mainly on account of loss of profits which plaintiff would have made in a renewal term; other items being moving expenses, loss on forced sale of fixtures, etc., and loss by closing business for moving.

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

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After receiving notice to quit but while the lease was running, plaintiff acquired another business, called the "White Cross", his purpose being, so he said, to try to recoup the loss to be suffered by losing the "Oasis". He operated all said stores (the three at one time before vacating the "Oasis") successfully. Some time after he vacated the premises held under said lease, they were reopened under management of K. or his wife.

Defendants contended, *inter alia,* that the trial Judge's instructions to the jury on the question of plaintiff's loss of profits through losing the "Oasis" for a renewal term should have included a direction to take into account in mitigation of damages the probable profits of plaintiff's "White Cross" business during the same period.

Held: The judgment at trial should stand as to the amount awarded for special damages, but no general damages should be allowed. Davis J., dissenting, would order a new trial as to damages.

Per the Chief Justice and Rand J.: (1) The damages from the deceit in this case were the same as the consequences of a breach of the obligations from which plaintiff's rights and interests arose, and were to be determined on the rules applicable to contractual defaults. The person who has suffered from such a wrong is entitled, so far as money can do it, to be placed in as good a position as if the contract had been performed. With this there is the parallel duty on his part to take all reasonable measures to mitigate the loss consequent upon the breach. Any steps required by such duty must arise out of the consequences of the default and be within the scope of what would be considered reasonable and prudent action. The duty is limited by considerations of class of venture and risks; but where there has been an actual performance within those consequences, whether or not within the duty, the benefit derived may be taken into account. But the performance in mitigation and that provided or contemplated under the original contract must be mutually exclusive, and the mitigation, in that sense, a substitute for the other; or, stated from another point of view, by the default or wrong there is released a capacity to work or to earn; that capacity becomes an asset in the hands of the injured party, and he is held to a reasonable employment of it in the course of events flowing from the breach. In the present case the question was whether or not the "White Cross" business could be looked upon as incompatible with that closed by the fraud; or, in the other sense, whether the capacity to be released to plaintiff by the result of the fraud was necessary to the continuance of the "White Cross" business. The facts did not admit of any such conclusion; and there was no evidence on the basis of which a jury should have been instructed to take account of the "White Cross" earnings. Also there was no evidence that the trading situation in Halifax was such as to offer to plaintiff the conditions and inducement of still another successful business venture; and this was sufficiently decisive, as once a *prima facie* case for damages is presented, the onus at least for proceeding with the evidence is then cast upon the party asserting a claim for mitigation. It may be that, as in the ordinary case of dismissal from employment, the facts raising a *prima facie* case for damages do themselves contain evidence of potential earning power and raise a presumption that the capacity to work has a calculable value; but in the present case there was no evidence from which a necessary or reasonable transfer of earning capacity from the one store to another could be inferred, and that was decisive on the point.

(2) It was not a case where the damages should be limited to the value of the leasehold interest of which plaintiff was deprived (*Re Schulte-United Ltd.*, [1934] O.R. 453, distinguished).

(3) It could not be said that the jury, acting as reasonable men, could not have found special damages in the amount awarded.

(4) As to general damages: Where actual damages themselves are the gist of the remedy, the causing of those damages being itself the wrong done, the rule of general damages has no application. As to allowance of "general damages" in the sense in which that expression is, for instance, applied to allowance for pain and suffering in the case of personal injury through negligence: It is not clear in the present case how any such matters (referred to in the trial Judge's charge as "general worry, upset of business, being subjected to what he regards as illegal action") could be treated as natural and direct consequences of the fraudulent representations, but, in any event, there was no attempt made to prove them.

Per Kerwin J.: The jury were entitled to award as damages such amount of profits as they considered plaintiff would have secured under a renewal lease for five years (taking into consideration profits previously made and all the vicissitudes of business enterprises) subject always to sooner determination in the event of a *bona fide* sale; such profits were neither too remote nor too uncertain to serve as the basis of estimate of the amount of damages. There was no basis for a deduction from such amount of an annual sum, such as a yearly salary at one time earned, as the value of plaintiff's yearly earning ability. Nor should there be any deduction of the amount of profits made or likely to be made at plaintiff's other stores; the starting or acquiring of them could not, under the circumstances, be said to have arisen "out of the consequences of the breach" (applying the rule in breach of contract cases). The amount awarded for special damages was such as a jury, doing their duty, could award. On plaintiff's cause of action, he was not entitled to anything beyond what he proved in the way of special damages.

Per Taschereau J.: Though the amount awarded as special damages seemed high, this Court would not be justified in interfering. The case was not one where general damages might be awarded.

Per Davis J., dissenting: What plaintiff was illegally deprived of was his right to obtain the renewal term—an estate in land. Where one is deprived of a right to acquire a freehold or a leasehold interest in land, whether the deprivation arose out of contract or in tort, his damage is the difference between the price at which he was entitled to obtain the property, and the value of the interest in the property to him. In the present case, based on his rental under the contract for renewal and a rental representing what the renewal would be worth to him, it would be the present value of the probable and reasonable difference, subject to the ordinary contingencies, which should determine the loss. The estimated profits or earnings that might be made on the property in the conduct of a particular business by a particular person, when other business premises more or less advantageous are available, is not the proper test of the loss suffered; in other words, the personal element in the management and conduct of the business is the determining factor in whether profits, large or small, may be reasonably anticipated and is too remote a test to be regarded as the basis for the calculation of damages for the loss of a right to acquire leasehold (or freehold) interest

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in real property (*Re Schulte-United Ltd.*, [1934] O.R. 453, referred to). But the present action was fought out on the footing that the profits which might reasonably be expected on a renewal term were the measure of damages, and the jury were charged along that line without objection; and that might cause a disposition to let the assessment stand. But the total amount awarded was grossly excessive on the evidence. The jury were in effect told, contrary to defendants' contention, that nothing should be allowed by way of deduction from gross profits for the cost of the management of the store, which was the personal labour of plaintiff himself; and, even on the basis of estimated profits of a business, something substantial should be deducted from gross earnings for the personal management of the business. There should be directed a re-assessment of the damages.

APPEAL by the defendants from the judgment of the Supreme Court of Nova Scotia *en banc* (1) dismissing their appeal from the judgment given on trial of the action before Chisholm C.J. with a jury.

The defendant James Karas, on March 15, 1937, sold to the plaintiff as a going concern the good-will, stock-in-trade, fixtures, effects and equipment of the trade or business of a fruit, magazine and confectionery store then being carried on by Karas at premises in the city of Halifax, and also leased to the plaintiff for five years from March 15, 1937, the premises in which the business was carried on; with an option of renewal for a further term of five years at the same rental, subject only to the sale of the said premises by the landlord; and it was agreed that, in the event that the landlord decided to sell the premises, the plaintiff should have the first option to purchase.

During the term of the lease the said Karas represented to the plaintiff that he had decided to sell the premises and had an offer of $25,000, which was beyond what the plaintiff was willing to pay, and the plaintiff, being told that the property was sold and pursuant to notice to quit, and failing to get a renewal, which he was anxious to have, vacated the premises on or about March 15, 1942, the date of expiration of the lease. The plaintiff later sued the defendants (the said Karas and his wife and her brother) for damages, claiming that the representation to him of such sale was false, such sale not being a *bona fide* sale, and that the defendants conspired with each other to defraud him by carrying out a feigned or pretended sale of the premises by said Karas to the defendant Pearl and falsely represented or caused to be represented to the plaintiff that a sale had taken place.

(1) 17 M.P.R. 124; [1943] 2 D.L.R. 622

At the trial the jury found that the sale was not a *bona fide* sale and found that the plaintiff sustained special damages of $18,000 and general damages of $2,000; and judgment was given for recovery by the plaintiff against the defendants of the said sums. An appeal by the defendants, asking that the findings and judgment at trial be set aside and that a new trial be had, was dismissed by the Supreme Court of Nova Scotia *en banc* (1), but two of the four judges who heard the appeal held that there should be a new trial limited to the question of damages sustained; that there was misdirection in the trial judge's charge to the jury, in dealing with the question of special damages, in regard to the loss of profits; and that a loss to the extent awarded in that regard could not reasonably have been found on the evidence.

The defendants appealed to this Court, the appeal being limited to the finding of the jury as to the damages sustained and to the judgment of the said Court *en banc* in so far as it related to the dismissal of the motion for a new trial in respect of the damages awarded.

The questions involved in the appeal sufficiently appear in the reasons for judgment in this Court now reported and are indicated in the above head-note.

F. D. Smith K.C. for the appellants.

J. T. MacQuarrie and *A. S. Pattillo* for the respondent.

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

RAND J.—This action arises out of a lease to the respondent by the appellant, James Karas, of a building used as a store at the corner of Morris and Barrington streets, Halifax. The lease was for a term of five years from March 15, 1937, with a right of renewal for a like term "subject only to the sale of the said premises by the landlord". Upon a sale, the tenant was to be given six months' notice of termination. There was also a provision that, should the landlord decide to sell, the tenant should have "the first option to purchase".

In the summer of 1941 the landlord intimated that he was willing to sell and had received an offer of twenty-five thousand dollars, which he presented to the tenant under

(1) 17 M.P.R. 124; [1943] 2 D.L.R. 622

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the option clause. It was not accepted and, in September, the six months' notice was given for the end of the first term of five years. In the meantime, a deed of the property had been given by the landlord to the appellant, John Pearl, and from then on the latter was treated as the owner. The respondent, as the end of the tenancy approached, became exceedingly anxious to retain the property, and from time to time importuned Pearl for its sale, but without success; and at the expiration of the term he vacated.

The business carried on by the respondent, called the "Oasis", which as a going concern he had purchased from the landlord. was the sale of fruit, confectionery, tobacco, etc., and from the beginning it had grown rapidly. In January, 1941, he had taken on another business of the same kind, called the "Rendezvous". In October of the same year, after the notice given him, he added still another to his holdings, originally, at least, for the purpose, as he expressed it, of trying to "recoup the loss" (to be) of the "Oasis". This was known as the "White Cross". In March, 1942, therefore, he was operating the three stores, and, from the returns in evidence, successfully; and it is of importance to observe that, whatever might have been his intentions in October, he was then most urgent in his endeavours to purchase the leased property from Pearl, and, so far as appears, prepared to continue indefinitely the businesses he had built up.

In April, 1942, a deed of the leased property dated September 28, 1941, from Pearl to the appellant Mary Karas, his sister and the wife of James Karas, was registered. The "Oasis", on June 22, 1942, was reopened under the management of either Karas or his wife. The suspicions of the respondent were aroused by the latter circumstance and investigation, disclosing the conveyance to Mrs. Karas, satisfied him that the sale to Pearl had been fictitious and part of a scheme to defraud him of the lease and business. He thereupon brought this action which, by election at the trial, became one for deceit.

The jury found the allegations of fraud established and awarded eighteen thousand dollars special and two thousand dollars general damages. The former consisted substantially of the loss of profits from the business of which the respondent had been defrauded. The latter

represented, in the language of the charge, "general worry, upset of business, being subjected to what he regards as illegal action". They were likened to the pain and suffering of a person injured through negligence. An appeal to the Supreme Court *en banc* against the finding of fraud was unanimously dismissed but on the damages there was an equal division, Carroll and Archibald JJ. finding nothing objectionable in the charge or the sum allowed, and Hall and Smiley JJ. being for a new assessment on the ground of misdirection in the failure to deal with mitigation; and the appeal to this Court is limited to damages.

The first question before us is, therefore, whether that failure in the charge was, having regard to the instructions given, a misdirection as to the basis upon which the special damages should be estimated. This, in turn, centres largely around the circumstance that, in October of 1941, the third business was opened, professedly for the purpose already mentioned. It is contended that the jury should have been instructed that they were to take into account, not only the loss of profits from the original business during the second term of five years, but also what they might estimate as the probable profits during that period from the third business, the "White Cross".

The *injuria* here was intended to and did bring about a fraudulent termination of the lease and loss of the business. The damages from the deceit are, therefore, the same as the consequences of a breach of the obligations from which the rights and interests of the plaintiff arose; and they are to be determined on the rules applicable to contractual defaults.

It is well settled that the person who has suffered from such a wrong is entitled, so far as money can do it, to be placed in as good a position as if the contract had been performed. With this there is the parallel duty on his part to take all reasonable measures to mitigate the loss consequent upon the breach. The latter rule has been dealt with in a number of clarifying decisions, and the considerations to be taken into account are now well settled: *British Westinghouse Electric & Manufacturing Co. Ltd.* v. *Underground Electric Railways Co. of London Ltd.* (1); *In re Vic Mill Ltd.* (2); *Hill and Sons* v. *Edwin Showell & Sons Ltd.* (3).

(1) [1912] A.C. 673; (2) [1913] 1 Ch. 465.
(3) (1918) 87 L.J.K.B. 1106.

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Under the rule so enunciated, the steps which ought to be taken by an injured party must arise out of the consequences of the default and be within the scope of what would be considered reasonable and prudent action. There are obviously limitations to the class of venture, for instance, in respect of which the duty would arise, but, where there has been an actual performance within those consequences, whether or not within the duty, the benefit derived may be taken into account. When, however, it is a question of future action, we must keep in mind the limitation to be put upon that duty towards undertakings involving more than ordinary risks and have regard to the fact that losses might be suffered which could not be added to the burden of the wrongdoer.

It is settled, also, that the performance in mitigation and that provided or contemplated under the original contract must be mutually exclusive, and the mitigation, in that sense, a substitute for the other. Stated from another point of view, by the default or wrong there is released a capacity to work or to earn. That capacity becomes an asset in the hands of the injured party, and he is held to a reasonable employment of it in the course of events flowing from the breach.

In the language of Hamilton L.J., in the case of *In re Vic Mill supra* (1) at page 473:

> The fallacy of that is in supposing that the second customer was a substituted customer, that, had all gone well, the makers would not have had both customers, both orders, and both profits. In fact, what they did, acting reasonably, and I think very likely more than reasonably in the interests of the Vic Mill, was to content themselves with earning the profit on the second contract at the cost of adapting the machines, which has been taken at £5; but they are still losers of the profit which they would have made on the Vic Mill contract, because they could, if they had been minded, have performed both the contracts, and have made the profit on both the contracts but for the breach by the Vic Mill Company of their contract.

Applying those considerations to the case in hand, the question is whether or not the business commenced in October can be looked upon as incompatible with that closed by the fraud: or, in the other sense, whether the capacity to be released to the respondent by the result of the fraud was necessary to the continuance of the business so commenced. The unquestioned facts do not admit of any such conclusion. At the time of surrendering the

(1) [1913] 1 Ch. 465.

lease, three businesses were being carried on profitably and the respondent was doing his utmost to purchase the premises of the "Oasis" in order to continue that scale of operations. There is, therefore, before the Court, no evidence on the basis of which a jury should have been instructed to take account of the earnings from the "White Cross" actually or potentially arising from a capacity set free to the respondent by the fraudulent action of the appellants. Nor is there any evidence that the trading situation in Halifax was such as to offer to the respondent the conditions and inducement of still another successful business venture. We are not called upon to decide more than that. Once a *prima facie* case for damages is presented, the onus at least for proceeding with the evidence is then cast upon the party who asserts a claim for mitigation. As Hamilton L.J., in the *Vic Mill* case (*supra*) at page 472, says:

> Certainly the case is not one in which the very nature of the undertaking shews that they could not carry on more than one contract at one time. No authority has been cited for the contention that it rests upon the maker who is claiming damages by way of lost profit, not only to prove that he was ready and willing to perform, but that he was able to utilize his time, as he did, and in addition to have taken on and carried through these particular appellants' contract. As the evidence stands, there was a *prima facie* case that the makers could have made this profit as well as the profits on all the other contracts that they had. There was not only no evidence to rebut that, but no suggestion to the contrary was made in cross-examination.

It may, of course, be that the facts raising a *prima facie* case for damages do themselves contain evidence of potential earning power as in the ordinary case of dismissal from employment. There, in the absence of evidence to the contrary, a presumption in fact may arise that the capacity to work has a calculable value. But there was no evidence here from which a necessary or reasonable transfer of earning capacity from the one store to another could be inferred, and that is decisive on the point raised.

It was urged by Mr. Smith that the damages should be limited to the value of the leasehold interest of which the respondent was deprived, and the case *Re Schulte-United Limited* (1) was cited in support. No doubt, in the situation there presented and in the ordinary case of expropriation of the residue of a term of years, the rule laid down in that decision applies. But what is the ground

(1) [1934] O.R. 453.

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for that rule? Surely this, that what is taken is merely the site of a business and not the business itself. The lessee is simply forced to move to other premises but on the assumption that his business continues; into that business field no new competitive factor or influence is introduced. Conceivably, there might be a situation where no other site was available and that circumstance might, in such a case, have to be considered. But here the object and accomplishment of the fraud was not only the site but the business itself. The continuance of the latter maintained the existing competitive pressure in the class of business in which the respondent was engaged and, on the evidence, no inference in fact could be drawn that, adding another competitor to what might be a saturated field, was warranted in reasonableness or prudence.

A further question arises in the award of two thousand dollars for general damages. Strictly speaking, general damages are those which, upon the breach of a legal duty, the law itself presumes to arise, and they can be shown by general evidence of matters which are accepted as affected by such a breach. But where actual damages themselves are the gist of the remedy, in which the causing of those damages is itself the wrong done, the rule of general damages has no application: *Dixon* v. *Smith* (1); *Craft* v. *Boite* (2). The expression is at times used somewhat loosely to signify elements of special damage which, in a sense, are at large, and in the ascertainment of which the limits of estimation are indefinite. Such, for instance, is the amount allowable for pain and suffering in the case of personal injury through negligence. There, damages are actual but are lacking in precise measures or standards of determination.

In this case it is not clear how any such matters could be treated as natural and direct consequences of the fraudulent representations but, in any event, there was no attempt made to prove them. In my opinion, therefore, the item of two thousand dollars allowed under this head cannot stand.

A final point is made that the special damages are excessive. No serious complaint is raised against the directions of the charge in this aspect; in fact, at the trial, counsel for all parties, in reply to the trial judge, stated there was

(1) (1860) 29 L.J. Ex. 125. (2) 1 Wms. Saund. at 243 (*d*).

nothing further they wished given the jury. There is no doubt that the business from which the respondent was ousted by a calculated scheme of roguery was prosperous and growing, and I find myself unable to say that the jury, acting as reasonable men, could not have found the amount awarded.

I would, therefore, allow the appeal to the extent of the item of two thousand dollars with costs to the appellant in this Court but without costs in the Court *en banc* below. Otherwise the judgment of the trial Court stands.

DAVIS J. (dissenting).—This is an appeal limited to the quantum of damages awarded by a jury and confirmed, by an equal division, on an appeal to the Supreme Court of Nova Scotia *en banc*.

The action was in tort founded upon the deceit of the appellants (defendants) in depriving the respondent (plaintiff) of his right to obtain a certain leasehold interest in business premises in the city of Halifax. The jury gave $20,000 damages.

The respondent by an agreement in writing under seal and dated March 15, 1937, had purchased from the appellant James Karas as a going concern the good-will, stock-in-trade, fixtures, effects and equipment of the fruit, magazine and confectionery business of the said James Karas and had leased from him the store premises for a period of five years from that date, at a rental of $80 per month. The agreement for purchase and sale of the business was carried out and the term of the five-year lease was had and enjoyed by the respondent. But the agreement contained an option in favour of the respondent for a renewal of the lease for a further term of five years from the expiry date of the original lease,

> at the same rental, subject only to the sale of the said premises by the landlord; and in the event of a sale of the premises herein, the said tenant shall be given six months' notice in writing to vacate the said premises.

It is important to bear in mind that, however unlawful or malicious the appellants were towards the respondent, what the respondent was deprived of was the right, which he undoubtedly intended and desired to exercise, to obtain the second term of five years of the leasehold premises, and that what the respondent was entitled to in the action was damages for the illegal deprivation of this right. It was an

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estate in land of which the respondent was deprived, and, whether an action lies in contract or in tort, the proper measure of the damages must be first determined. As has often been said, damages is a branch of the law on which one is perhaps less guided by authority laying down definite principles than on almost any other matter. I have been unable to rid myself of the proposition that when one is called upon to assess damages in respect of the loss of a right to purchase or acquire a freehold or a leasehold interest in land, whether the denial of that right arose out of contract or in tort, the damage is the difference between the price at which the aggrieved person was entitled to obtain the property and the value of the interest in the property was to the person deprived of it. In this case the respondent was suspicious that the property had in fact not been sold and thought the notice to quit was an effort to force a higher rental for the next five years. He says he then offered $125 a month instead of $80—and later in his exasperation offered up to $200 a month. On the highest figure mentioned the difference spread over the five-year period would be $7,200, and it would be the present value of the probable and reasonable difference, subject to the ordinary contingencies, which, in my opinion, should determine the loss. I fail to see that the estimated profits or earnings that might be made on the property in the conduct of a particular business by a particular person, when other business premises more or less advantageous are available, is the proper test of the loss suffered. In other words, it seems to me that the personal element in the management and conduct of the business is the determining factor in whether profits, large or small, may be reasonably anticipated and is too remote a test to be regarded as the basis for the calculation of damages for the loss of a right to acquire a freehold or leasehold interest in real property. Some observations along the same line were made by me while in the Ontario Court of Appeal in the case of *Re Schulte-United Limited* (1), and on that branch of that case were expressly concurred in by two very able and experienced Judges, Riddell and Masten JJ.A. That was a case in contract and not in tort, but I cannot see how loss of profits *qua* estimated profits is recoverable as such in either case. They are too

(1) [1934] O.R., 453, at 462.

remote, even in tort, as the "immediate and natural" result of the wrongful act.

Considerable emphasis during the argument was laid upon the fact that the respondent had another similar business called "The White Cross", but the respondent said in evidence that he did not take that over until after he had received notice to quit the premises now in question. He described the White Cross as located "across the road a little further south". The only reason, he said, he started the White Cross was to try to recoup the loss of the other premises.

But this action was fought out by the parties on the footing that the profits which might reasonably be expected to have been made by the respondent, had he obtained and enjoyed a second term of five years, were the measure of damages, and the learned Chief Justice of Nova Scotia accordingly charged the jury along that line, without any objection from counsel. Under those circumstances I should have been disposed to let the assessment stand. But the total amount, $20,000, awarded by the jury, appears to me to be grossly excessive on the evidence. The jury were in effect told, contrary to the contention advanced by counsel for the appellants, that nothing should be allowed by way of deduction from gross profits for the cost of the management of the store, which was the personal labour of the respondent himself. The respondent had said in his evidence that the statement of profits did not take into consideration any salary for himself—he said he considered what he called the net profits to be his salary, his own earnings as manager of the business. He was asked:

Q. What would you consider a proper salary for yourself?
A. I did not figure that.
Q. For the amount of work you did? If you were managing the business for someone else, what would you consider your own services worth?
A. For running one store three thousand a year. I was making that much before I went into this business.

When the learned Chief Justice came to charge the jury, he said in part:

If he [i.e., the respondent] was put out improperly he is entitled to the probable loss of profit for the period during which he was entitled to be a tenant. It is difficult for you to determine. There is evidence the business was growing since he took it on. The profit was $5,105 for 1941. He made that profit after paying all expenses. Mr. Walker

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[counsel at the trial for the appellants James and Mary Karas] spoke of salary. Salary has nothing to do with it. If you are carrying on business you have to pay out money to get money in. If at the end of the year you have twenty-five hundred net profit, that is your money. You are entitled to recover it back. Rowlett says he cleared five thousand odd dollars. It is contended we should subtract three thousand dollars salary. Rowlett was not working for somebody else. He had made that money by his own efforts. If he lost that money by reason of illegal action of somebody else he can surely recover the money back.

Whether you call it salary or a deduction for the value of the personal services does not much matter to a jury; even on the basis of estimated profits of a business something substantial should be deducted from gross earnings for the personal management of the business.

In my opinion, the appeal should be allowed with costs and a re-assessment of the damages directed.

KERWIN J.—This is an appeal by the three defendants, James Karas, his wife Mary Karas, and the latter's brother John Pearl, from a judgment of the Supreme Court of Nova Scotia *en banc*. The plaintiff is the respondent, Charles Rowlett, who, after the trial of the action before the Chief Justice of Nova Scotia with a jury, was given judgment for $20,000 damages against the appellants. The four members of the Court *en banc* were satisfied that the appellants were responsible in damages but they divided equally as to whether a new trial should be granted as to the quantum. In the result, the appeal was dismissed *in toto*. The appeal to us is confined solely to the question of damages and it is immaterial whether the damages are treated as having been awarded against the appellants for defrauding the respondent by a fraudulent sale from James Karas to Pearl or for conspiracy by and among the three appellants to effectuate, and accomplishing the same result.

In 1937, the respondent purchased from the appellant James Karas, the latter's fruit and confectionery business carried on at the southwest corner of Morris and Barrington streets, in the city of Halifax, in premises known as number 290 Barrington street. These premises were owned by Karas who, at the same time, entered into a lease thereof to the respondent for a period of five years from March 15, 1937. The lease contained the following clauses:

It is Further Agreed by and between the said Landlord and the said Tenant that the Tenant shall have an option for the rental of the said premises for a further term of five years from the expiry date of this Lease, at the same rental, subject only to the sale of the said premises by the Landlord; and in the event of a sale of the premises herein, the said Tenant shall be given six months' notice in writing to vacate the said premises.

It is Also Further Agreed that in the event the said Landlord decides to sell the premises herein, that the Tenant above mentioned shall have the first option to purchase.

The respondent entered into possession under the sale and lease and conducted the business for some years under the name of the Oasis. The net profits from this business for the remainder of the year 1937 were $1,486, and for the years 1938 to 1941 inclusive were as follows:

1938—$1,180	1940—$4,522
1939—$2,642	1941—$5,105

In August, 1940, on the instructions of James Karas, a letter was written to the respondent that an offer of $25,000 had been received for the premises. Unknown to the respondent this statement was a deliberate falsehood. In January, 1941, the respondent opened another fruit and confectionery store, which he called the Rendezvous, at 307 Barrington street, on the opposite side of the street from the Oasis and a few buildings to the north.

In July, 1941, the appellant Pearl purported to purchase the Oasis premises. A conveyance therefor was executed by James Karas and his wife on August 12, 1941, and was recorded on August 16, 1941. The respondent was advised of this conveyance. In the meantime, by a notice dated July 28, 1941, James Karas called upon the respondent to deliver up possession of the Oasis premises on the expiration of the current lease, i.e., on March 14, 1942. On September 28, 1941, Pearl executed a deed to Mary Karas of the same premises but this deed was not recorded until April, 1942 (after the respondent had left the premises), and its existence was not known to the respondent until June of that year. In October, 1941, the respondent acquired another fruit and confectionery business called the White Cross, on Barrington street practically opposite the Oasis. Until he moved out of the premises where the Oasis business was conducted, he continued to inquire if he could not buy the property, or rent it at an increased rental.

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Upon discovery of the fraud perpetrated upon him, the respondent commenced this action. He claimed general damages, and the following special damages as itemized in the statement of claim (numbers have been added for the purpose of convenience):

1.	Moving expenses from the southwest corner of Morris and Barrington streets, including damage by breakage...	$ 368.75
2.	Loss on forced sale of fixtures and stock, necessitated by moving	530.00
3.	Loss of profits sustained in closing down business for purpose of moving.....	44.00
4.	Loss of profits that would have been earned at southwest corner of Morris and Barrington streets, March 15 to June 22, 1942.....	1,219.80
5.	Additional expense in enlarging and altering 307 Barrington street	4,725.00
6	Interest on money borrowed to make such alterations....	350.00
7.	Loss of profits 307 Barrington street during period business was closed for alterations.....	600.00
8.	Fixed charges of 307 Barrington street while business was temporarily closed	550.00
9.	Depletion of profits at other Barrington street stores during period June 22, 1942, to date of Writ.....	45.00
10.	Loss of future profits at southwest corner of Morris and Barrington streets, from June 22, 1942, to March 15, 1947.	24,000.00
11.	Loss of future profits at other Barrington street stores to March 15, 1947.....	7,500.00

Items 7 and 8 were withdrawn by counsel for the respondent before the case went to the jury. No objections were taken to the charge although the Chief Justice inquired of counsel if there were any matters he had omitted and if there was anything further they wished put to the jury. The jury found $18,000 special damages.

After reading the charge, bearing in mind all that has been urged against it by counsel for the appellants, I am satisfied that the Chief Justice left to the jury, as the only items of special damage to be considered by them, numbers 1, 2, 3, 4, and 10. Counsel for the appellants stated that he was not pressing any objections as to Item 1 but, in any event, in my opinion the charge is unimpeachable as to that or as to the second and third items. The real complaint is with reference to the profits of $25,219.80 that the respondent alleged he would have earned for the five years from March 15, 1942. Whatever the jury gave under this heading is included in the sum of $18,000, and deducting therefrom the total of the first three items, $942.75,

leaves a balance of $17,057.25, allowed the respondent as damages for loss of profits suffered by him because he did not secure a lease for the five years.

The respondent had testified to the profits he had made while he was in possession of the premises. The trial judge referred to the amount so made in 1941, $5,105. It is true that shortly thereafter he stated: "The difficulty is you are left largely to guess what the loss of profits is" but he immediately continued:

> It does not follow because he made five thousand he will get the same this year or the next. It depends on so many circumstances of varying kind one cannot be certain of it. Probably the war has made it easier to get a profit, the presence of a number of people in Halifax who did not live here before, the building that is going up, all these things. That may stop this year, next year or perhaps not for ten years. You have to exercise your own good judgment. Take all events that may take place, perhaps promoting a business or helping to destroy it. You have to arrive at what you consider a reasonable figure. You may say so much and another man may say something else. You cannot prove the other was wrong.

The jury undoubtedly understood from all this that they should estimate the damages on the basis of the profits previously made by the respondent, taking into account all the vicissitudes of business enterprises. Later in the charge it was made abundantly clear that during the five-year period there might be a sale of the premises at any time, whereupon the lease could be determined upon six months' notice. The Oasis was an established business and the jury were therefore entitled to award as damages such amount of profits as they considered the respondent would have secured under a lease of the Oasis premises for five years from March 15, 1942, subject always to the sooner determination of the lease in the event of a *bona fide* sale. Such profits are not either too remote or too uncertain to serve as the basis of estimate by the jury of the amount of damages suffered by the respondent.

It is said first, however, that the jury should have been instructed to deduct from any such amount an annual sum of $3,000 as being the yearly salary the respondent had received from a company for which he worked before he made the original purchase of Karas' business and as being a fair estimate of the value of his yearly earning ability during the period in question. There is no basis for any such deduction.

Secondly, it was contended that the profits the respondent made and would likely make at the Rendezvous and

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White Cross should be deducted. I am also unable to agree with this. In breach of contract cases the rule was stated in *British Westinghouse Electric and Manufacturing Co.* v. *Underground Electric Railways* (1) by Viscount Haldane with the concurrence of all the Lords present that "the subsequent transaction, if to be taken into account, must be one arising out of the consequences of the breach and in the ordinary course of business." The same rule applies in an action such as this. The Rendezvous business was started in January, 1941, before the execution of the fraudulent conveyance of August 12, 1941, although after the respondent had been informed that an offer of $25,000 had been received for the Oasis premises. The respondent had no knowledge of the falsity of this information, and, in any event, hoped that the premises would not be sold. It is true the White Cross business was acquired after the conveyance and that the respondent stated in an unresponsive answer to his own counsel at the trial, that he had purchased it to recoup his loss, but up to the time that he moved out of the Oasis premises (about March 15, 1942) he persisted in endeavouring to purchase or lease those premises. He managed the three businesses at one time, so that it is not the case that quite often arises in an action for damages for breach of a contract of employment. Nor is it at all similar to the problem before this Court in *Cockburn* v. *Trusts and Guarantee Company* (2). The respondent did not know of the fraud until after he had opened the Rendezvous and acquired the White Cross, and these transactions, therefore, did not arise out of the consequences of the breach.

The third contention on this branch of the case is that the amount is excessive. I am clearly of opinion that the amount is such as a jury, doing their duty, could award.

The jury also awarded the respondent $2,000 general damages. With reference to general damages, the trial judge stated to the jury:

> General damages a jury is entitled to give for general worry, upset of business, being subjected to what he regards as illegal action. It cannot be determined in dollars and cents. I will illustrate it by saying take the case of a man who is injured in an accident, a motor car accident, and goes to hospital and pays out money and so forth for doctors,

(1) [1912] A.C. 673, at 690. (2) (1917) 55 Can. S.C.R. 264.

nurses, hospital, loss of business. That is "special damages". He is also entitled to general damages to pay for his pain and general suffering.

In a case like this the plaintiff might be entitled to something for worry and trouble if you regard the acts of the defendants as illegal.

This, in my opinion, was misdirection. "General damages are those which the law implies * * * in every violation of a legal right" (Halsbury, vol. 10, par. 102). Here the cause of action is the respondent's having suffered damage by acting on the false representation made to him by the appellants, or his having suffered damage in pursuance of the false representation made as a result of the conspiracy entered into by the appellants. The respondent is not entitled to anything beyond what he proved in the way of special damages. This conclusion renders it unnecessary to consider the argument of counsel for the respondent as to what is described indiscriminately as exemplary, vindictive, penal, punitive, aggravated, or retributory damages, or in some cases in the United States as "smart money". The appeal should, therefore, be allowed to the extent of reducing the judgment by the sum of $2,000.

The appellants are entitled to their costs of the appeal to this Court but there should be no costs of the appeal to the Supreme Court of Nova Scotia *en banc*.

TASCHEREAU J.—Although the amount awarded by the jury as special damages seems high, I do not think that this Court would be justified in interfering.

I am of opinion, however, that this is not a case where general damages may be awarded, and I would therefore allow the appeal as to the item of $2,000, with costs to the appellant in this Court, but without costs in the Supreme Court *in banco*.

Appeal allowed in part with costs.

Solicitor for the appellants Karas: *W. C. Dunlop.*

Solicitor for the appellant Pearl: *F. D. Smith.*

Solicitor for the respondent: *Donald McInnis.*

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*Nov. 8.
*Dec. 15.

BAY-FRONT GARAGE, LIMITED (DEFENDANT) ..... APPELLANT;

AND

RIKA EVERS AND CORNELIUS JAN EVERS (PLAINTIFFS) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Negligence—Person on leaving garage injured by tripping over sill in doorway—Whether operator of garage liable in damages—Whether sill a concealed danger to a person exercising ordinary care.

Plaintiff was driven (about 1.30 p.m.) into defendant's public garage in a motor car driven by B. who left the car there to be parked. The car entered the garage through a large folding door composed of four sections, which door was opened to admit the car and then closed. In one of the sections there was a small exit door, which had a sill, 10½ inches high, to provide stability for the section, since the large door was suspended from the top and did not quite touch the floor. In leaving the garage, B. opened the small door and stood aside for plaintiff to go through. Plaintiff did not see the sill and tripped on it and was injured. She was wearing spectacles equipped with bi-focal lenses. She sued defendant for damages. The trial Judge, on motion for non-suit, dismissed the action, holding that plaintiff by the exercise of ordinary care could have seen the sill and avoided injury. His judgment was reversed by the Court of Appeal for Ontario ([1943] O.W.N. 179; [1943] 2 D.L.R. 291), which held that the sill constituted a concealed danger. Defendant appealed.

Held (the Chief Justice and Kerwin J. dissenting): The appeal should be allowed and the judgment at trial restored. The sill did not constitute a concealed danger to any person exercising ordinary care.

APPEAL by the defendant from the judgment of the Court of Appeal for Ontario (1), which allowed an appeal by the plaintiffs from the judgment of the trial Judge, Plaxton J., dismissing, on a motion for non-suit, the plaintiffs' action, which was for damages for personal injuries suffered by the plaintiff Rika Evers (wife of the other plaintiff) which the plaintiffs alleged were caused by the defendant's negligence.

Mrs. Evers had been driven into the defendant's public garage in a motor car driven by one, Mr. Baird, who left the car there to be parked. As they were proceeding to leave the garage, through a small exit door in one of the sections of the large door through which the car had entered (and which, after entry of the car, had been

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

(1) [1943] O.W.N. 179; [1943] 2 D.L.R. 291.

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closed), Mrs. Evers, in passing through the small door, tripped on a sill, which extended across the bottom of it, and received the injuries complained of. The facts are dealt with in more detail in the reasons for judgment in this Court now reported and in the reasons for judgment in the Court of Appeal for Ontario (1).

At trial, on motion for non-suit, Plaxton J. dismissed the action, holding that Mrs. Evers by the exercise of reasonable care could have seen the sill and avoided her injuries. His judgment was set aside by the Court of Appeal for Ontario (1), which gave judgment for Mrs. Evers for $3,000 and for her husband for $1,002, holding that the sill constituted a concealed danger. The defendant appealed to this Court (special leave to appeal being granted to defendant by the Court of Appeal for Ontario in respect to the judgment recovered by the husband).

Aimé Geoffrion K.C. and *E. L. Haines* for the appellant.

Guy Roach K.C. for the respondents.

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

KERWIN J.—I am not impressed with the suggestion by counsel for the appellant that the judgment of the Court of Appeal is a serious matter for all people engaged in a business such as that of the appellant. It chose to call no evidence and on the record before us I am satisfied that that Court came to the right conclusion.

In dismissing this action, the trial judge proceeded, at least in part, on what he called his own knowledge of the prevalence of doors in garage doors of the kind in question in this action. That, however, is contrary to the evidence given in the witness box. From that evidence it appears that it is common practice to build what are called "escape doors" in larger garage doors but they are not for the use of the public and they are of such a size that, if any members of the public should happen to use them, they would necessarily be on their guard.

The conditions under which the photographs produced by the appellant were taken were not proved and at least one was described by a witness as deceitful. Mrs. Evers was an invitee and on the uncontradicted evidence as to

(1) [1943] O.W.N. 179; [1943] 2 D.L.R. 291.

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the appearance of the door through which she attempted to pass, she should not have been subjected to the danger created by it. The Chief Justice of Ontario has, in my opinion, dealt satisfactorily with the argument that the accident was attributable to the fact that Mrs. Evers was using bifocal glasses.

I would dismiss the appeal with costs. At the argument the cross-appeal was abandoned and it should be dismissed without costs.

The judgment of Davis, Hudson and Rand JJ. (the majority of the Court) was delivered by

DAVIS J.—The appellant operates a large public garage in downtown Toronto near the corner of Front and Bay streets. At the entrance to the garage, some fifteen feet from the sidewalk, a large folding door composed of four sections is opened to admit an automobile and closed afterwards by an attendant in the garage. In one of the sections of the large door there is a small door which may be used to leave the garage after your car has been handed over to the attendant for parking. This small exit door has a baseboard, called a "sill", 10½ inches high, to provide stability for the section, since the large door, with its four sections, is suspended from the top and does not touch the floor by an inch or so.

The female plaintiff had driven into the garage with a friend of hers—the large door had been opened and then closed and the car handed over to the attendant. In the course of leaving the garage her friend had opened the small door (it was daylight outside, 1.30 p.m.), and stood aside for her to go first. Unfortunately she did not see the sill and fell over it through the open doorway and was seriously injured. Her sight was impaired; she was wearing spectacles equipped with bi-focal lenses—the lower lens for reading and the upper for seeing at a distance. Her disability was such that to look down at her feet she would have to lower her head so as to see through the upper lens. She said in evidence that she was "looking straight forward" at the time and to look at the baseboard through the lower lens, standing six feet away, "would not be clear to me".

The section of the large door which contained the small door was, by consent of counsel, set up in the courtroom at the trial and used by the witnesses to illustrate their

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evidence. It was not, however, made an exhibit and was not before the Court of Appeal or before this Court. The trial judge had an opportunity to observe the manner in which the female plaintiff walked about the courtroom and he commented that he noticed when she stepped into the witness box she bent her head quite a bit. The trial judge dismissed the action on the ground that a person exercising reasonable care for his or her own safety ought to have seen the sill when the door was open and that the female plaintiff could have avoided her injury by the exercise of reasonable care on her part.

The Court of Appeal reversed the judgment, taking the view that the sill was a concealed danger and that there was a duty of warning upon the defendant. With the greatest respect, I cannot accept that view of the evidence. I do not think the sill constituted a concealed danger to any person exercising ordinary care. The findings of the trial judge should stand.

I should allow the appeal and restore the judgment at the trial with costs throughout.

Appeal allowed with costs.

Solicitors for the appellant: *Haines & Haines.*

Solicitors for the respondents: *Roach & Roach.*

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*Oct. 7, 8, 12, 13.
*Dec. 15.

CITY OF VANCOUVER (DEFENDANT).....APPELLANT;

AND

THE ATTORNEY-GENERAL OF CANADA, THE ATTORNEY-GENERAL FOR BRITISH COLUMBIA AND THE CANADIAN NORTHERN PACIFIC RAILWAY COMPANY (PLAINTIFFS) } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Taxation (municipal)—Crown's interests—Tax levied against owner of land leased to Crown—Buildings erected on such land by the Crown—Valuation of land including value of buildings as improvements—Whether property "vested in or held by" the Crown has been taxed—Whether tax has been levied on

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

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CITY OF VANCOUVER v. ATTORNEY-GENERAL OF CANADA AND OTHERS.

Crown's interests—Vancouver Incorporation Act, B.C. Statute, 1921 (2nd session), c. 55, ss. 2 (9) (10) (11), 37, 39, 40, 45, 46, 48, 49, 55, 56, 57, 58, 59, 60, 63, 67, 69, 73, 323—Land Registry Act, R.S.B.C., 1936, c. 140, s. 143—B.N.A. Act. s. 125.

The respondent, The Canadian Northern Pacific Railway Company, owner of a large tract of land within the city of Vancouver, leased a vacant portion of it, on the 1st of January, 1923, to His Majesty represented by the Minister of Agriculture for the Dominion and the Minister of Agriculture of British Columbia jointly; and subsequently, as required by the lease, His Majesty, represented as above, erected thereon a building known as the "Vancouver Fumigation Station Building". On the 1st of May, 1940, His Majesty, represented by the Minister of Munitions and Supply of the Dominion, leased from the respondent company another vacant portion of the same land, and subsequently a building known as the "Boeing Aircraft Building" was erected thereon for and at the expense of the Crown pursuant to a contract made between the Crown and the Boeing Aircraft of Canada Limited. An action was brought by the Dominion and Province for a declaration that these buildings were not subject to taxation and by the railway company for a declaration that it was not liable to be assessed or taxed in respect of these buildings and was entitled to recover back taxes already paid by it thereon. The procedure laid down by the *Vancouver Incorporation Act, 1921,* (B.C.—12 Geo. V, c. 55) for the taxation of land is outlined in the judgments now reported. Briefly, it is enacted that the City Treasurer, or the Collector of Taxes, "shall make out a tax roll" in which there are set down, *inter alia,* "the name * * * of the assessed owner", "the value at which the land and improvements * * * are assessed" and "the total amount of taxes imposed for the current year" (s. 59); it is also enacted that "all rates, taxes or assessments * * * shall be due and payable * * * by the owner of the property upon which they are imposed * * * " (sec. 63); and it is further enacted (s. 46) that "all land, real property, improvements thereon * * * shall be liable for taxation, subject to the following exemptions: (1) All property vested in or held by His Majesty or for the public use of the Province * * * and either unoccupied or occupied by some person in an official capacity". On behalf of the respondents, it was contended that the buildings were the property of the Dominion and Provincial Governments and as such were non-assessable and non-taxable: their contention being that these buildings had been assessed as improvements and that the taxes had been unlawfully levied and wrongfully collected in respect of them. The trial judge maintained the respondents' action, except that the railway company's claim for repayment was restricted to one year's taxes which had been paid under protest, this decision being based on the Crown's ownership of the two buildings and also on the ground that the buildings were "held by" His Majesty within the meaning of section 46 of the Vancouver charter. The Court of Appeal, Sloan J.A. dissenting, affirmed the judgment of the trial judge.

Held, reversing the judgment appealed from (58 B.C.R. 371), Hudson J. dissenting, that the respondents were not entitled to the relief claimed. The provincial statute does not operate by way of attempting to impose any liability on the Crown in respect of any interest under the leases, and there has been no attempt by the city appellant to impose such liability on the Crown. The respondent railway

company, as registered owner of the land, is liable to taxation in respect of its value as assessed in conformity with the statute. The provisions of the statute do not contemplate the assessment, as a separate subject, of improvements in an assessed parcel of land. There has been a separate valuation of the buildings as improvements; but the value of the buildings has been taken into account only for the purpose of valuing the parcel of land and calculating the tax to be paid in respect of it, and also in order to permit of the operation of other sections of the statute. The Crown's exemption, provided by section 125 B.N.A. Act or by section 46 (1) of the Vancouver charter, remained unimpaired.

Per The Chief Justice and Rinfret J.—The "assessed owner" is liable for taxation, and he is liable in virtue of his ownership: the "assessed owner", in light of the provisions of the statute, must be construed as meaning the registered owner in fee. The holder of a lease, if registered, and the owner of a structure erected on a land of which he is not the owner, cannot be registered otherwise than as owner of a charge. The property in this case has been valued in precisely the same way as it would have been valued if the lessees had been subjects, and not the Crown.

Per Davis J.—The parcel of land is wholly owned by the respondent railway company and the only levy of rates has been made against it on an assessment of the land and buildings thereon made under the valid provisions of statute. No attempt has been made by the appellant city to assess or levy rates against the rights or interest of the Crown or to tax the Crown in respect of the buildings.

Per Kerwin J.—The proper construction of the provisions of the statute is that what is rateable or taxable is "land" as defined in the interpretation section. Such taxation is founded upon the appearance in the assessment roll of such rateable land, together with the name of the registered owner. The rateable land includes buildings erected on it, but the land and improvements are assessable and taxable as a unit. The levy under the Act is not only a tax on "land", but is also a tax against the owner. As to the former, the statute must be read as not applying to the Crown and the operation of the statute imposing the tax is limited to the respondent railway's interest. As to the latter, there is no constitutional objection to taxing the respondent company on the basis of the total value of the land and improvements thereon, even though the improvements are the property of, or are held by, the Crown and are themselves not liable to taxation.

Per Taschereau and Rand JJ.—The general scheme of taxation provided by the statute is one of imposing, upon the interest of the private owner of the freehold estate or the private person in possession of Crown land, a tax based on the value of the totality of interest in the land, including improvements, thus including the value of the leasehold interest of property rented to private individuals or to the Crown. Assuming that the exemption in section 46 includes a leasehold interest of the Crown, that does not affect the fact that "rateable parcel of land" includes land so leased, or that the valuation of that parcel is without exclusion of the separate or exempt leasehold interest: the latter, possessed by the Crown, is neither taxed itself nor made the subject-matter of a tax lien. Its value is included in that of the owner's interest as if the owner were in occupation, but that circumstance is unobjectionable and not in conflict with section

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125 B.N.A. Act. Moreover, the inclusion, in the content of value, of an element created or added to the land by the Crown, does not constitute an indirect taxation of the Crown, contrary to section 125 B.N.A. Act.

Per Hudson J. (dissenting).—As to the Boeing Building: The lease was of vacant land, the building was erected at the sole expense of the Crown and was occupied and used exclusively for Crown purposes, and it was the intention of the parties to the lease that the building should be removed at the end of the term. Thus the Crown had the sole beneficial use and ownership of the building and the latter never became the property of the owner of the land. Therefore the tax levy based upon the assessed value of the building is a tax imposed on property "belonging to" the Crown within the meaning of s. 125 B.N.A. Act and "held by" the Crown under s. 46 (1) of the Vancouver charter. As to the Fumigation Station building: The lease differs in some material respects from that of the Boeing property. It contained a covenant by the Crown to erect the building, but there was no provision as to its disposition at the termination of the lease. The Crown had no more than a right to exclusive possession during the term; but there was sufficient to justify a finding that the property was "held by" the Crown within the meaning of section 46. The legislature has not chosen to make provision for distinguishing the interest of the Crown when a tenant and that of a registered owner of the freehold; nor has the appellant city attempted to make such distinction in the assessment and taxation of the land. When the tangible property is rightfully in the possession of the Crown and "held by" the Crown within the meaning of the statute, then such property is exempt as long as the term and possession continue. What remains, that is the intangible property, be it either legal or equitable, which belongs to the owner, may be taxed but, if it is the intention of the legislature to impose such tax, it should provide for the segregation of such interest and the imposition of the tax by a positive enactment.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), affirming by a majority (Sloan J.A. dissenting) the judgment at the trial of Coady J. and declaring that certain buildings either belonged to or were held by the Dominion of Canada and the province of British Columbia and that the respondent railway company was not liable for payment of taxes in respect of these buildings and that the latter should recover from the appellant an amount of $1,178.40 paid under protest by way of taxes.

(1) (1942) 58 B.C. Rep. 371; [1943] 1 W.W.R. 196; [1943] 1 D.L.R. 510.

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

O. M. Biggar K.C. and *W. H. Campbell* for the respondents.

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

THE CHIEF JUSTICE.—The procedure laid down by the *Vancouver Incorporation Act* for the taxation of land may, so far as we are concerned with it on this appeal, be outlined briefly.

The assessor is to prepare an assessment roll in every year (section 40) in which he is required to set down in respect to "each and every rateable parcel of land" certain particulars. These include::

(1) A short description by which the parcel of land can be identified on the books of the Land Registry Office.

(2) The name of the registered owner thereof.

(3) The value of the land estimated separately from the value of the improvements on it.

(4) The value of the improvements estimated separately from the value of the land.

The assessment roll is subject to revision, in a manner with which we are not concerned, and when it has been finally revised it is the duty of the Council (section 57) to "pass a by-law for levying a rate or rates on all the rateable property" on the roll. By section 58 the rate or rates shall "in respect of improvements, be levied upon not more than fifty per cent of the assessed value". The process of collection goes forward as prescribed by sections 59, 60 et seq. By section 59 it is the duty of the City Treasurer, or Collector of Taxes, to make out a tax roll or rolls in which there are "set down with respect to each parcel of land upon which taxes have been imposed" the following particulars *inter alia:*

(1) The name and address of the assessed owner or owners.

(2) The value at which the land and improvements are assessed.

(3) The total amount of taxes imposed for the current year.

Upon the completion of this roll it is the duty of the Collector (section 60) to proceed to collect the taxes thereon set out and "with respect to each parcel of land, transmit by post to the owner" a statement showing "what taxes are due upon such parcel of land". This statement must contain the particulars just mentioned, namely, the

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name and address of the assessed owner, the value at which the land and improvements are assessed, and the total amount of taxes imposed for the current year.

By section 63 it is enacted:

> All rates, taxes, or assessments under this Act shall be due and payable not only by the owner of the property upon which they are imposed, but also by the possessor or occupant of the property, and by the tenant or lessee of such property, to the extent to which the possessor, occupant, tenant, or lessee is indebted to such owner, and the payment by any such person shall be a discharge of the property for the amount so paid, and shall also be a discharge to the possessor, occupant, tenant, or lessee of so much of his indebtedness to the owner as he shall have so paid.

By section 67 the taxes "accrued on any land" are a special lien on such land. By section 69 the Council is required in each and every year to pass a by-law providing for the sale by auction of each and every parcel of land and improvements thereon upon which taxes have been delinquent for a period of two years. By section 73 the Collector is obliged, after selling any land by public auction to any person other than the city, to give a certificate to the purchaser stating *inter alia* that a certificate of indefeasible title will issue to the purchaser at the expiration of one year from the date of sale on payment of the balance of the purchase money and other sums mentioned.

The statute gives a right of redemption to the owner and certain other persons having an interest in the land during the period of one year succeeding the sale. If the land is not redeemed, the purchaser is entitled to be registered as owner and to have issued to him a certificate of indefeasible title.

The land with which we are concerned on this appeal is described in the assessment roll as Parcel "G", D-L 2037. The letters D-L are an abbreviation of District Lot. This parcel so described admittedly was at the date of the assessment the property of the respondent railway company which was the registered owner in fee simple. Part of the parcel was by a lease dated the 1st of January, 1923, leased to His Majesty the King in right of the Dominion of Canada and to His Majesty the King in right of the province of British Columbia for a period of twenty years from the 1st of January, 1923. Pursuant to the provisions of this lease, certain buildings and erections were placed by the lessees on the premises; and another part of the parcel was by lease dated the 1st of May, 1940, leased to

His Majesty the King in right of the Dominion of Canada and on these premises buildings were also erected by the lessee.

In the year 1941 the whole of the parcel of land in question was assessed as the property of the respondent railway company, the value of the improvements being set down as $521,900 and that of the land as $283,650. The Court of Appeal of British Columbia, by the judgment appealed from, held that the respondents are entitled to a declaration that the city of Vancouver was not entitled to assess the buildings mentioned erected on the parcel of land in question by the Crown in the right of the Dominion in the case of the Boeing Aircraft Building and by the Crown in right both of the Dominion and of the province of British Columbia in the case of the Vancouver Fumigation Building. The Court also held that the respondent, the railway company, was entitled to recover from the municipality the sum of $1,178.40, part of the taxes levied for the year 1941 pursuant to the assessment of that year.

On behalf of the respondents it is contended that the buildings mentioned are as to one of them the property of the Dominion Government and as to the other the property of the Dominion and Provincial Governments and as such are non-assessable and non-taxable. The contention is that these buildings have in the assessment in question been assessed as improvements and that the taxes have been unlawfully levied and wrongfully collected in respect of them.

The appeal turns upon the validity of this contention. I think that in considering it it is more convenient to examine the situation first of all as if the lessees were subjects and the interests of the Crown were not in any way involved. The respondent railway company being the registered owner in fee, the assessor rightly entered the company as the assessed owner. If the leases and the rights incidental thereto had been registered as charges, the lessees would have been entitled to give notice under subsection 4 of section 40 requiring notices of assessments and taxation proceedings to be sent to them and they would have been in a position to challenge the assessment before the Court of Revision and would have apparently been invested with a right of redemption on a sale of the property for default in payment of taxes; but the property

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assessed is, nevertheless, a parcel of land with its improvements. In my opinion, the provisions of the statute, to which I have referred, do not contemplate the assessment (as a separate subject) of improvements in an assessed parcel of land. There is a separate valuation of improvements, because in calculating the tax to be paid in respect of a particular parcel of land the rate is levied in respect only of fifty per cent of the assessed value of the improvements. The language is perhaps not as precise as it might be, but it seems very clear to me that what is assessed is the land as it stands with its improvements. The holder of a lease and the owner of a structure erected upon the land, not being the owner of the land, cannot be registered otherwise than as the owner of a charge. By section 143 of chapter 140, R.S.B.C. 1936, it is enacted:

> The owner of the surface of land shall alone be entitled to be or remain registered as owner of the fee simple. The owner of any part of land above or below its surface who is not also the owner of the surface shall only be entitled to register his estate or interest as a charge * * *

This view is supported by reference to the provisions of sections 59 and 60 and the terminology thereof, as well as to those of section 40. I think, moreover, that section 63 is conclusive upon this point. I have no doubt that "owner" of property in that section must be construed in light of sections 59 and 60, as well as section 40, and so construed it means the "assessed owner" and, therefore, in such a case as that before us, the registered owner in fee.

The owner, to whom the Collector is required by section 60 to post the notice therein provided for, can be none other than the owner whose name it is the duty of the assessor to set down in the roll under subsection (1) of section 40, that is to say, the registered owner.

As regards possessors or occupants, tenants or lessees, the taxes are due and payable only to the extent to which such person is indebted to the registered owner. The liability is primarily the liability of the registered owner; and where the possessor or occupant, tenant or lessee, is liable, his liability is only to pay out of the property of (his indebtedness to) such owner. The statute imposes no liability upon the owner of a charge, other than this limited responsibility of occupants, possessors, tenants and lessees under section 63. This limited liability is not imposed in respect of the interest of such persons in the

property assessed, but is a liability only to discharge to the extent of the owner's monies in his hands the responsibility of the owner which is imposed upon the owner in respect of his ownership. I repeat, it is the rateable parcel of land entered and described in the assessment roll under subsection (1) of section 40 in respect of which the registered owner is liable to assessment and taxation. Emphasis is given to this by reference to the language of section 59 where the Collector is required to make out a tax roll or rolls "which may be an extension of the assessment roll" and in which shall be set down "with respect to each parcel of land upon which taxes have been imposed" the particulars therein mentioned, which include the assessed owner.

In the case I have supposed, therefore, in which, that is to say, the lessees, under such leases as those before us, are subjects, the assessed owner is liable; and section 63 shows that he is liable in virtue of his ownership. I repeat, his lessees are liable to the extent of monies of his they have in their hands. The equities and rights as between the owner and occupants, possessors, tenants or lessees, arising out of his liability to taxation on the full assessed value of the property, including improvements, is left by the statute to be adjusted by the parties themselves. The same principle seems to have been adopted as regards the owners of other charges.

I think counsel for the appellant corporation is right in his contention that for the purposes of the *Land Registry Act* and the *Assessment Act* the buildings in question are part of the land and the property of the owner of the registered fee, subject to the rights of the lessees under the leases. But, even if the respondents' contention is right, they are still taken into account only for the purpose of valuing the parcel of land, including the improvements, of which the respondent railway company is the registered owner and, as such, the assessed owner.

The lessees, however, in the case actually before us, are the Crown. In each case there is a term of years, created by an instrument of demise, in which the lessee has certain rights and obligations. It follows, therefore, that the liability imposed on occupants and tenants by section 63 is not operative in this case. It follows also that the enactments of the statute providing for the sale of lands for unpaid taxes and the vesting in the purchaser of an indefeasible title to such lands must equally be inoperative.

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Section 67 is also inoperative so far as any interest of the Crown is concerned. The statute, that is to say, does not operate by way of attempting to impose any liability on the Crown in respect of any interest under or in relation to the leases in question and, in particular, in respect of the two buildings mentioned.

Moreover, the respondent company is assessed, that is to say, its property is valued, in precisely the same way in which it would be valued if the lessees were subjects. The tax rate is levied upon the assessed value of the assessed parcel of land, including improvements, and it is in virtue of its ownership in fee that, according to the legislative scheme, the rate is computed on this value.

It is perhaps proper to say in passing that there is nothing necessarily unfair or exceptional in such a method of taxation. The legislature may very well have thought it just that the registered owners in fee simple of land which is leased and occupied should be taxed upon a valuation proceeding upon the same basis as if the land were occupied by the owner or were vacant. Similarly the legislature has evidently considered it just to make the owner of the registered fee liable in respect of the full value of the parcel of land, including the improvements, leaving the equities to be adjusted between the owner of the fee and the owner of any charge. In *City of Montreal* v. *Attorney-General for Canada* (1), it was held that a provision in the charter of Montreal, under which persons occupying Crown property for commercial or industrial purposes should be taxed as if they were the actual owners of such immoveables, was not constitutionably objectionable.

It is clear enough, I think, from the judgment in *Smith* v. *Vermillion Hills Rural Council* (2), and the judgment in *City of Halifax* v. *Fairbanks* (3), that section 125 of the *British North America Act* must always control the enactments of any such statute as that before us, and, moreover, that the provisions of the statute ought to be construed by the light of that section, unless, at all events, there is language which is necessarily repugnant to it.

(1) [1923] A.C. 136, at 138. (2) [1916] 2 A.C. 569.
(3) [1928] A.C. 117.

The position of the Crown is dealt with in section 46 and I turn now to the consideration of that section. The pertinent provisions are as follows:

46. Except as otherwise in this Act provided, all land, real property, improvements thereon, machinery and plant, being fixtures therein and thereon, in the city shall be liable to taxation, subject to the following exemptions, that is to say:

(1) All property vested in or held by His Majesty or for the public use of the Province, and also all property vested in or held by His Majesty or any other person or body corporate in trust for or for the use of any tribe or body of Indians, and either unoccupied or occupied by some person in an official capacity:

* * *

(3) When any right or interest, whether legal or equitable, in any property mentioned in subsection (1) of this section is held, possessed, or enjoyed by any person other than in an official capacity, the owner of any such right or interest therein shall be assessed in respect of such right or interest, and shall be personlly liable to taxation in respect thereof.

I cannot agree that the registered fee in the property in question here is "held by His Majesty" in the sense of subsection (1). In any case, subsection (1) must be read with subsection (3) and, applying subsection (3) to the circumstances in this case, it would appear that if the language of subsection (1) is to be stretched in such a way as to comprehend such a case as this then subsection (3) would quite plainly extend to the ownership of the respondent railway company. The respondents' registered ownership in fee is certainly a "right" and must, therefore, be assessed as such a right is assessed, that is to say, as the registered fee is assessed. I should be disposed to think, however, that reading subsection (1) by the light of the first limb of subsection (3), "property" in subsection (1) must be construed (so far as concerns us now) as extending to any interest in property and that what is exempted by that subsection is any interest in property vested in or held by His Majesty. The interest so held by His Majesty in virtue of the leases before us, or of any rights arising therefrom, is not subject to taxation under this statute, but the registered owner of the land is liable to taxation in respect of its assessed value, in virtue of its registered ownership.

As to section 125 of the *British North America Act.* I have already referred to that section, but I think it proper to add that, in the view of the statute to which I

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have given effect, its operation does not involve the imposition of taxation upon any lands or property of Canada, or of the province of British Columbia.

The appeal should be allowed and the action dismissed with costs throughout.

DAVIS J.—This is an appeal by the city of Vancouver from the judgment of the Court of Appeal for British Columbia which affirmed (Sloan J.A. dissenting) the judgment of Coady J. at the trial—holding that the respondents were entitled to a declaration that the city of Vancouver was not entitled to assess for any sum of money two buildings erected on lands belonging to the respondent, Canadian Northern Pacific Railway Company, by the Crown in right of the Dominion in the case of one building and by the Crown in right both of the Dominion and of the province of British Columbia in the case of the other building, and holding further that the respondent railway company was entitled to recover from the city the amount of a payment it made "under protest" of part of the taxes in and for the year 1941, upon an assessment of the respondent railway company for the aggregate of the land and improvements thereon.

The *Vancouver Incorporation Act, 1921,* and amendments thereto, provides for the annual raising of money for the purposes of the municipality by the levy of rates on land within the municipality. Buildings and other things erected upon or affixed to the land, and all machinery and other things so fixed to any building as to form in law a part of the realty, are by s. 2 (10) of the statute included within the definition of the word "land". And by s. 2 (9), "improvements" shall extend to and mean all buildings and structures erected upon or affixed to the land and all machinery and things so fixed to any building as to form in law a part of the realty.

It was agreed by counsel at the trial (*a*) that the buildings in question are substantial structures attached to the freehold; (*b*) that the respondent railway company is and has been the registered owner of the land at all material times; (*c*) that both buildings are on the property of the said company; and (*d*) that no question arises in the action as to whether the taxes were regularly levied by the city pursuant to its regular practice.

Notwithstanding a rather loose and sometimes interchangeable use by the draftsman of the words "assessment" and "valuation", the effect as I read the statute is that the basis of computation for the assessment of an improved "rateable parcel of land" upon which the annual rate of taxation shall be levied is to take the estimated actual cash value of the land, as if it were unimproved, and then add not more than one-half the amount of the estimated value of the improvements (sections 39, 46 and 58). It is not right, as I see it, to say, as contended by the respondents, that the buildings or improvements are to be taken separate and apart from the land taken by itself; that is the fallacy that undermines, it seems to me, the position taken in the relief sought by the respondents in this action. That there may be different interests or estates held by different persons in rateable property, whether vacant or improved, is recognized by the statute, but that does not involve the levying of rates against buildings or improvements as distinct and separate from the land upon which they are erected or to which they are affixed.

The parcel of land involved in this litigation is wholly owned by the respondent Canadian Northern Pacific Railway Company, and there was but one levy of rates for the year in question, 1941, and that was against the railway company, the owner of the land, on an assessment of the land and buildings thereon. But in respect of two large buildings erected by the Crown upon the land there are certain outstanding leases or agreements with the Crown, either in right of the Dominion or in right of the province of British Columbia. It is unnecessary to detail the provisions of the documents; sufficient to say that it is admitted by the city that the Crown, either in right of the Dominion or in right of the province, has certain rights or interests in the buildings. But no attempt was made by the city to assess or levy rates against the right or interest of the Crown, whatever it may be, or to tax the Crown in respect of the buildings or either of them. The owner of the parcel of land was the only one assessed and taxed and it was a levy of the annual municipal rates in respect of the entire parcel of land, including the improvements erected thereon.

Ample statutory provision is made for a Court of Revision for hearing all complaints against assessments,

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which Court, after hearing the complaints, as well as the Assessor, and such evidence as may be adduced, shall alter or amend or confirm the assessment roll accordingly (s. 48). Any person complaining of an error or omission or as having been undercharged or overcharged in the roll, may apply to the Court of Revision (s. 49). Then by s. 56 there is the right of appeal from the Court of Revision to a Board of Assessment Appeals and a further right of appeal from the Board to the Court of Appeal, which Court may raise or lower or otherwise correct the assessment of any property in respect of which such appeal is taken. By s. 55 the assessment roll as revised or confirmed and passed by the Court of Revision shall, except in so far as the same may be further amended on appeal, be valid, final, and binding on all parties concerned, subject, however, to such alterations, if any, as are made on appeal to the Board of Assessment Appeals or to the Court of Appeal, as the case may be.

The statement of claim in this action acknowledges that appeals were duly taken by all the respondents to the Court of Revision and to the Board of Assessment Appeals in respect of the assessment of the two buildings and that the said appeals were dismissed. This action then sought a declaratory judgment in favour of the respondents the Attorney-General of Canada and the Attorney-General for British Columbia and the company, and judgment in favour of the railway company for the return of a payment of the taxes made under protest.

The substantial answer to the action is that the city of Vancouver does not and did not assert any right to tax the Crown's interests, and those interests are not in any way affected or touched by the assessment and levy of the rates in question. The Crown's exemption by s. 125 of the *British North America Act* remains unimpaired; in fact the city's Act of Incorporation specifically provides by s. 46 (1) for the exemption from municipal taxation of all property "vested in or held by His Majesty or for the public use of the Province".

It is contended, however, that if the owner of the land has to pay taxes on the whole parcel, that will necessarily throw a portion at least of the taxes ultimately against the Crown, either by way of increased rental or by virtue of a covenant to indemnify in the leases or agreements between the owner and the Crown. But that argument is not a new

one in the field of municipal taxation in this country and has been authoritatively rejected. It is no answer to the statutory liability to taxation that rests upon the owner of the land. *Calgary & Edmonton Land Co.* v. *Attorney-General of Alberta* (1); *Smith* v. *Vermillion Hills Rural Council* (2); *City of Montreal* v. *Attorney-General of Canada* (3); *City of Halifax* v. *Fairbanks Estate* (4).

In this view of the case, it becomes unnecessary to consider the question whether the payment of a portion of the taxes that had been made by the owner, the railway company, could be recovered back as an involuntary payment when the payment was made merely "under protest".

I should allow the appeal with costs and dismiss the action. The appellant should have its costs of the action and of the appeal to the Court of Appeal from the Canadian Northern Pacific Railway Company.

KERWIN J.—The defendant in this action, the city of Vancouver, appeals from the judgment of the Court of Appeal for British Columbia affirming the judgment at the trial. The respondents, the Attorney-General of Canada, the Attorney-General for British Columbia, and the Canadian Northern Pacific Railway Company are the plaintiffs in the action. By the judgment complained of, it is declared that the Boeing Building, being on a portion of lot "G", plan 1341, in the city of Vancouver, and assessed as improvements on the said lot by the appellant at the sum of $42,500, is the property of His Majesty the King in right of his Dominion of Canada, or held by His Majesty in the right of his Dominion of Canada within the meaning of section 46 of the *Vancouver Incorporation Act, 1921,* and that the said building is not liable to taxation by the appellant. It is declared that the building known as the Fumigation Station and being on another portion of said lot "G" and assessed as improvements on the said lot by the appellant at the sum of $6,600, is the property of His Majesty the King, as in the right of his Dominion of Canada and His Majesty the King as in right of the province of British Columbia or held by His Majesty the King as in right of his Dominion of Canada and His Majesty the King as in right of the province of British Columbia within the meaning of section 46 of the

(1) (1911) 45 Can. S.C.R. 170.
(2) [1916] 2 A.C. 569.
(3) [1923] A.C. 136.
(4) [1928] A.C. 117.

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Vancouver Incorporation Act, 1921, and is not liable to taxation by the appellant. It is also declared that the respondents are not liable to be assessed and are not liable for payment of taxes in respect of the said buildings.

It is admitted or may be assumed that these two buildings are "property belonging to Canada or any Province" within the meaning of section 125 of *The British North America Act* or "property * * * held by His Majesty" within clause 1 of section 46 of the *Vancouver Incorporation Act* and are therefore not liable to taxation by the municipality. It should be emphasized, however, that the appellant never contended that it could assess the fabric of either building as land or improvements or that either building qua building was liable to taxation by it. Furthermore, it never claimed that the Attorney-General of Canada or the Attorney-General for British Columbia was liable to be assessed or was liable for payment of taxes in respect of either building.

The position adopted by the appellant is shown by what occurred in 1941. In that year the Vancouver assessor *valued* the land of the respondent Railway Company (lot G) and the improvements erected thereon, separately. Such improvements included not only the two buildings in question but also other buildings in which the Crown, either in right of the Dominion or province, had no interest. The Railway Company received from the office of the Assessment Commissioner a memorandum showing how the value of these improvements was arrived at and included therein were the sum of $42,500, for the Boeing Building and $6,600 for the Fumigation Station Building. However, neither these two buildings nor any of the other buildings were assessed. The land and all the improvements thereon were assessed as a unit, as appears from the following extract from the assessment roll:

Roll No.	Description of Parcel	Name and Address of Registered owner	Value of Improvements	Land Value
			$	$
K-9568 9569	Parcel "G" D. L. 2037.	Canadian Northern Railway, c/o R. R. Nichol, Canadian National Railways, Winnipeg, Manitoba.	521900	283650

It is admitted that the respondent Railway Company owns Lot (or parcel) "G" and that it is the Company described as owner in the assessment roll. It is also admitted that no question arises as to whether the taxes were regularly levied by the city pursuant to its regular practice.

Although not put precisely in this form, the contention of the respondents really amounts to this,—that the *Vancouver Incorporation Act* requires the appellant to assess and tax the fabric of buildings separate and distinct from the land upon which they stand. Whether that contention be right or wrong depends upon the construction of the provisions of the statute relating to assessment and taxation.

It conduces, I think, to a better understanding of the scheme of the Act as to these two matters if reference be made first to taxation. By section 57, the Council of the city shall in each year after the final revision of the assessment roll, pass a by-law for levying a rate or rates on all the rateable property on the said roll. "Rateable", as here used, is synonymous with "liable to taxation" as found in section 46, which enacts:

> Except as otherwise in this Act provided, all land, real property, improvements thereon, machinery and plant, being fixtures therein and thereon, in the City shall be liable to taxation, subject to the following exemptions

and then continues with certain named exemptions, such as property vested in or held by His Majesty, city property, etc.

The words "land" and "real property" which here appear are referred to in clause 10 of section 2 as follows:

> (10) The words "land", "real property", and "real estate", respectively, shall include all buildings and other things erected upon or affixed to the land, and all machinery and other things so fixed to any building as to form in law a part of the realty:

and by clause 9 of section 2, "Improvements", (which word also appears in section 46),

> shall extend to and mean all buildings and structures erected upon or affixed to the land and all machinery and things so fixed to any building as to form in law a part of the realty.

By section 58 the annual rate referred to in section 57 shall, in respect of improvements be levied upon not more than fifty per cent of the assessed value thereof, and by section 45, power is given the Municipal Council to

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exempt from taxation, wholly or in part, any improvements, erections, and buildings erected on any land within the city, notwithstanding that they may be part of the real estate.

So much for taxation. Before turning to assessment, two sections dealing with valuation require to be noticed. By section 37 it is the duty of the assessor annually to make a valuation of all rateable property in the city, and section 39 provides how this valuation shall be made:

39. All rateable property, or any interest therein, shall be estimated at its actual cash value as it would be appraised in payment of a just debt from a solvent debtor, the value of the improvements (if any) being estimated separately from the value of the land on which they are situate.

The separate estimate of the value of the improvements is necessary because of the provisions of such sections as 58 and 45.

Section 40 deals with the assessment roll. The relevant parts of subsection 1 thereof are as follows:

40. (1) The Assessor shall once in every year prepare an assessment roll in which he shall set down with respect to each and every rateable parcel of land within the city:

(*a*) A short description thereof by which the same can be identified on the books of the Land Registry Office for the Vancouver Land Registration District: Provided, however, that in the case of lands the fee of which is in the Crown either in the right of the Province or of the Dominion, but which have been leased agreed to be sold, granted, or conveyed, or which have been sold, granted, or conveyed, and the lessee, purchaser, grantee, or any one of them has not registered his lease, agreement, or conveyance in the said Land Registry Office, the Assessor shall assess and enter the same on the roll with the best description available to him in the name of such lessee, purchaser, or grantee, where known:

(*b*) The value thereof:

(*c*) The value of all improvements thereon:

(*d*) The name or names of the registered owner thereof:

(*e*) The addresses of all such owners as provided in subsection (2) hereof;

This subsection requires a critical examination. The phrase "rateable parcel of land" is used therein, and by clause 22a of section 2:

22a. "Rateable parcel of land" shall mean any lot or parcel of land, and may include two or more lots or parcels of land on which improvements have been constructed so as to form a single unit situate upon such lots or parcels.

By clause 11 of section 2 the word lot

shall mean any one of the portions or subdivisions into which a block of land has been or shall be divided.

The effect of these provisions is that the assessor shall set down in the assessment roll a short description of each rateable portion or subdivision into which a block of land has been divided, the value thereof, the value of all improvements thereon and the name or names of the owner of such portion or subdivision recorded in the Land Registry Office. By subsection 10 of section 40, the assessor, for the purposes of information and record, is to enter every year upon the assessment roll, in addition to each rateable parcel of land, every exempt parcel of land.

The progress from assessment to taxation is accomplished in this way. By section 59, after the final revision of the assessment roll as provided in intervening sections, the City Clerk is to deliver it to the City Treasurer, who is to be the Collector of Taxes unless some other person is appointed by resolution of the Council as such Collector. Forthwith, after the passage of the by-law levying a rate as provided for in section 57, such collector is to make out a tax roll "which may be an extension of the assessment roll" and in which shall be set down, with respect to each parcel of land upon which taxes have been imposed:

(*a*) A short description of the land:

(*b*) The name and address of the assessed owner or owners:

(*c*) The value at which the land and improvements (exclusion of exemptions) are assessed:

(*d*) The total amount of taxes imposed for the current year.

In section 60 the tax roll becomes the Collector's roll, and the Collector shall, with respect to each parcel of land, transmit by post to the owner a statement or notice showing what taxes are due upon such parcel of land, which statement shall contain certain information,—and then follow clauses (*a*) to (*d*) as in section 59.

Finally, by section 63, all rates, taxes or assessments are due and payable by the owner of the property upon which they are imposed, and by section 323 the rates, taxes and assessments, due, owing or payable to the city may be recovered, and collection thereof enforced by suit or action instituted in any court of competent jurisdiction.

At this point I desire to quote certain words of Lord Atkinson in *City of Victoria* v. *Bishop of Vancouver Island* (1). I do not refer to this decision to compare the provisions there under review with those with which we

(1) [1921] 2 A.C. 384.

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are concerned, nor for any of the purposes for which the decision was referred to in the courts below or at bar. Speaking for the Judicial Committee, Lord Atkinson decided that an exemption in the British Columbia *Municipal Act* from municipal rates and taxes of "every building set apart and in use for the public worship of God" applied to the land upon which a building of the description mentioned was erected as well as to the fabric itself. After stating that it was impossible to conceive the public worship of God being carried on in a building without the use of the land which it embraces within its walls as it was impossible to conceive walls existing without the support, direct or indirect, of the soil of the earth, he continued (p. 389):

> The conception of such things is not the less impossible because the Legislature has by statute made the attempt fancifully to divide for the purpose of taxation concrete entitles notionally into sections or portions which are presumably mutually exclusive and independent of each other. Their attempt will be abortive unless the language used be clear and plain.

Similarly, the language used would have to be clear and plain in the present case to justify the respondents' contention that the *Vancouver Incorporation Act* authorized and required the city to assess and impose a tax on the fabric of buildings. But in my opinion the Legislature has not made such an attempt. While some confusion appears to have existed in the draftsman's mind, in my opinion the proper construction of the provisions of the Act, relevant to the present case, is that what is rateable or taxable is "land" as defined in the interpretation section and that taxation is founded upon the appearance in the assessment roll of such rateable land, together with the name of the registered owner thereof. The rateable land includes buildings erected on it but the land and improvements are assessable and taxable as a unit,—the separate valuation of the buildings being merely to permit of the operation of such sections as 58 and 45. Provision is made of course for the assessment and taxation of interests in land and for special cases, such as lessees of Crown land, but with these we are not concerned.

The levy under the Act is not only a tax on "land" but is also a tax against the owner. As to the former, in accordance with the well-known rule, the statute must be read as not applying to the Crown, and the operation of the

statute imposing the tax is limited to the Railway Company's interest. *Smith* v. *Vermillion Hills Rural Council* (1). As to the latter, there is no constitutional objection to taxing the company on the basis of the total value of the land and improvements thereon even though the improvements are the property of, or are held by, the Crown, and are therefore themselves not liable to taxation. *City of Halifax* v. *Fairbanks' Estate* (2).

This conclusion disposes of the respondent's contention as to the declaration made by the Courts below and also of the claim of the Railway Company to recover back from the appellant the sum of money paid under protest.

The appeal should be allowed with costs and the action dismissed. The appellant should have its costs of the action and of the appeal to the Court of Appeal from the Canadian Northern Pacific Railway Company.

HUDSON J. (dissenting).—In this action the plaintiffs claimed and by the judgments in the court below were granted:

1. A declaration that the building known as the Boeing Aircraft Building situate on a portion of Lot "G", Plan 1341, city of Vancouver, and assessed as an improvement on the said Lot "G" by the defendant at the sum of $42,500 is the property of His Majesty the King in the right of his Dominion of Canada or held by His Majesty the King in the right of Canada; that this building is not liable for taxation by the defendant and that the plaintiffs are not liable to be assessed and are not liable for payment of taxes in respect thereof.

2. A similar declaration that the building known as the Vancouver Fumigation Station Building situate on another portion of said Lot "G" and assessed as an improvement thereon by the defendant at the sum of $6,600 is the property of His Majesty the King in the right of the Dominion of Canada and of the province of British Columbia.

3. An order that the plaintiff Canadian Northern Pacific Railway Company should recover against the defendant the sum of $1,178.40 paid as taxes on these two buildings under protest.

(1) [1916] 2 A.C. 569, at 574. (2) [1928] A.C. 117.

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The Canadian Northern Pacific Railway Company owned Lot "G" which covered a considerable acreage, part of which was unsubdivided. A vacant portion of this acreage was on the 1st of May, 1940, leased by the Railway Company to His Majesty the King in the right of the Dominion of Canada, represented by the Minister of Munitions and Supply. The purpose of the Minister in acquiring this lease was the establishment of a plant for manufacturing aircraft parts. The lease provided for the payment of an annual rental by the Crown to the Railway Company of $1,125. It also provided that all buildings, erections and improvements thereon should be subject to the approval of the lessor and should during the existence of the lease be moved, removed, altered, improved, repaired or maintained by the lessee at the lessee's own cost and expense, and in accordance with such instructions as might be given from time to time by the lessor.

There was also a covenant by the lessee to indemnify and save harmless the lessor from the payment of all taxes that might become due during the existence of the lease in respect of the lands and premises demised. There was also a provision enabling the Crown to surrender the lease to the lessor at any time on six months' notice; and finally, it was provided by paragraph 15

> that at the termination of this lease or any renewal thereof, whether by effluxion of time or otherwise, the lessee shall forthwith remove his buildings or structures from the demised premises, failing which the lessor shall be entitled to remove the same at the expense of the lessee or to retain the same free of compensation as the lessee may see fit.

In due course a building for the purpose intended was erected on this land by and at the expense of the Crown and since completion this building has been occupied and used exclusively for the Crown's business. It is known as the Boeing Aircraft Building.

The whole area of lot "G" was assessed by the defendant as one parcel but, in making the assessment roll for the year 1941, an amount of $42,500 was added as representing the value of the building constructed by the Crown.

At the instance of the Crown, objection was raised to this assessment on the ground that the building being Crown property was not taxable. This objection was overruled and the sum of $1,178.40 was paid by the Railway Company, representing the amount of the tax levy for the

year 1941 appropriated to the assessed value of the Boeing Building and the Fumigation Station Building, which I shall afterwards discuss.

The claim of the Crown for exemption is based on:

1. Section 125 of the *British North America Act* which reads as follows:

> No lands or property belonging to Canada or any province shall be liable to taxation.

2. Section 46 of the *Vancouver Incorporation Act* which which reads as follows:

> All property vested in or held by His Majesty or for the public use of the Province, and also all property vested in or held by His Majesty or any other person or body corporate in trust for or for the use of any tribe or body of Indians, and either unoccupied or occupied by some person in an official capacity.

It was strongly contended on behalf of the defendant that as admittedly the building in question was of a substantial character and affixed to the soil, it was in law part of the freehold of which the railway company was the owner and, for this reason, liable to taxation.

The lease was of vacant land. The rental reserved was for the land alone because there was no covenant by the Crown to erect buildings. The building in question was erected at the sole expense of the Crown and was occupied and used exclusively for Crown purposes. The final clause of the lease was a recognition of ownership by the Crown and, more important, shows that it was the intention of the parties that the building should be removed at the end of the term.

The landlord had no real beneficial interest in the building. Its powers in respect of the same were only inhibitory. The possible reversionary interest under paragraph 15 depended on the Crown and was merely in the nature of a provision for compensation in case the Crown failed to perform its duty of removal.

The result is that the Crown had the sole beneficial use and ownership of the building. The real situation is that the building never became the property of the landlord and, for that reason, no conveyance from it was called for. The exemption from taxation under section 125 is of "lands and property belonging to the Crown". There is no limitation on the kind of property. It may be real or personal, tangible or intangible, with a title legal or

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equitable. The words "belonging to" are more comprehensive than the words "owned by". That the equitable title of the building is in the Crown could hardly be open to doubt and, for the purposes of exemption, beneficial ownership does not differ from legal ownership (6 Halsbury at 736 et seq.) and was recognized by this Court in the case of *Quirt* v. *The Queen* (1).

For some purposes or as between some parties the building might be considered as part of the freehold but this, I think, is beside the question. Here we are construing the application of a fundamental law overriding any provincial enactment. Moreover, it is by no means clear that, even at law, this building could be considered as a fixture. It is quite clear that the parties intended that the building should be removed at the end of the term, so that if a fixture in any degree it was only of a limited character. The maxim *cujus est solum ejus est usque ad coelum* gives way to the intention of the parties. A recognition of this is found in the case of *Corbett* v. *Hill* (2). At page 673 Sir W. M. James, V.C., said:

> Now the ordinary rule of law is, that whoever has got the *solum*—whoever has got the site—is the owner of everything up to the sky and down to the centre of the earth. But that ordinary presumption of law, no doubt, is frequently rebutted, particularly with regard to property in towns.

Examples of separation of ownership of property are given in Broom's Legal Maxims at pages 263 and 264.

That the legislature may by properly framed legislation authorize the imposition of taxation on the interest of the landlord in property let to or occupied by the Crown, or the converse, on the interest of a tenant or purchaser of land owned by the Crown, is definitely settled by a number of decisions of this Court and of the Judicial Committee.

In the case of *City of Halifax* v. *Fairbanks' Estate* (3), the charter of Halifax, under authorization of the provincial legislature, imposed a tax called a business tax to be paid by every occupier of real property for the purposes of any trade, profession, or other calling carried on for the purposes of gain: the tax was assessable according to the capital value of the premises. By section 394 of the charter any property let to the Crown or any person, corporation, or association exempt from taxation, was to be deemed for business pur-

(1) (1891) 19 Can. S.C.R. 510. (2) (1870) 9 L.R. Eq. Cas. 671.
(3) [1928] A.C. 117.

poses to be in the occupation of the owner, and was to be assessed for business tax according to the purposes for which it was occupied. The respondent owned the premises let to the Crown, represented by the Minister of Railways, for use as a ticket office of the Canadian Northern Railway, the lessee agreeing to pay the business tax. The premises were used exclusively for the purpose above stated. The city assessed the respondent estate for the business tax under section 394 of the charter. What is said in the judgment applies in most part to an argument that this tax was *ultra vires* under section 92 (2) of the *British North America* Act as indirect taxation, but it was further contended that the premises were exempt from taxation by reason of section 125 as being property belonging to the Crown. Their Lordships, without much discussion of principle, held that the tax was specifically imposed on the owner of premises and not on the property of the Crown and, therefore, section 125 did not apply.

The converse of this was the case of *City of Montreal* v. *Attorney-General of Canada* (1). There the charter of the city of Montreal had provided that persons occupying for commercial or industrial purposes Crown buildings or lands should be taxed as if they were the actual owners, and should be held liable to pay the annual and special assessments, the taxes and other municipal dues. The city brought action against a tenant who had failed to pay taxes and it was held by the Judicial Committee that the taxation was in respect of his interest as lessee and accordingly was not a tax on Crown lands so as to be *ultra vires* under section 125. Lord Parmoor who gave the judgment of the Board stated after reviewing previous decisions of the Board, at page 142:

> The question to be determined is the simpler one, whether the taxation, which is impeached, is assessed on the interest of the occupant, and imposed on that interest. In the opinion of their Lordships the interest of an occupant consists in the benefit of the occupation to him during the period of his occupancy * * *

It will be observed that in these cases there was a special enactment imposing liability on the tenant in one case and the landlord in the other. Where there was no such special provision, this court took a different view. In a case of *Attorney-General of Canada* v. *City of Montreal* (2), it was held that where the Dominion Government had leased

(1) [1923] A.C. 136. (2) [1885] 13 Can. S.C.R. 352.

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certain property in Montreal for the use of Her Majesty, with the condition that the Government should pay all taxes and assessments which might be levied and become due on the said premises, the Corporation of Montreal brought an action against the owners of the property for the municipal taxes accruing during the period of time the property was so leased and occupied by the Government. It was decided that the property in question was exempt from taxation and the action dismissed. It was pointed out by Sir W. J. Ritchie, C.J., at page 355:

> It cannot, I should think, be disputed that the property of the Crown, or property occupied by Her Majesty or Her servants for Her Majesty, is exempt from taxation, and it seems to me equally beyond dispute that this exemption can only be taken away by express legislative enactment.

In this he followed what was said by Mr. Justice Blackburn giving the opinion of the judges to the House of Lords in the case of *Mersey Docks* v. *Cameron* (1).

It was contended that this decision of the Court should no longer be taken as law in view of subsequent decisions, but it has been referred to on a number of occasions, both here and in provincial courts, and I cannot find any occasion in which its authority has been successfully disputed. I think the distinction is fairly clear, namely, that the property "belonging to" the Crown or "held by" the Crown is exempt. If the individual landlord or the individual tenant, as the case may be, has an interest, that is an intangible interest, it may be taxed but, if so, only by positive language.

The exempting section of the Vancouver Act is followed immediately by provisions imposing liability on the tenants or occupants of Crown lands or of persons having interest therein, in respect of such interest.

There is no provision similar to that in the *Fairbanks'* case (2), imposing liability on the owner in respect of property occupied by the Crown.

Expressio unius est exclusio alterius.

On the assessment roll the whole large area of Lot "G" appears as one item for the value of all the lands and one item for the value of all of the buildings thereon appearing under the heading of "Improvements". It is admitted,

(1) [1864] 11 H.L. Cas. 443. (2) [1928] A.C. 117.

however, by the Assessment Commissioner that there was added to the roll for 1941, after the erection of the Boeing building, a figure of $42,500 to represent the value of that building. There was sent or delivered to the Railway Company a notice appearing to show that the Boeing building was assessed at the above-mentioned figure, and when the Railway Company paid the amount in question it was done with a voucher which was produced by the defendant and in material part read as follows:

Date of Account 1941				Amount
	For this amount being to cover 1941 taxes being paid under protest on the ground that the buildings concerned are the property of the Crown and exempt from taxation, as follows:—			
	Vancouver			
	Block G, D.L. 2037, Fumigation Plant Bldg. Assd.		$ 6,600	
	Boeing Aircraft Bldg.		42,500	
			49,100	
	50% taxable $24,500			
	$24,500 at 50 mills	$1,227.50		
	4% discount	49.10		
				$1,178.40
	Pay June 25/41			
	Disc. July 3/41			
	Per cheque Paid under protest			

Received Eleven Hundred and Seventy-eight and.....40/100 Dollars $1178.40 in full settlement of the above account.

June 24, 1941.

Upon these facts it seems impossible to say that the tax is not imposed on property "belonging to" the Crown within the meaning of section 125 of the *British North America Act*, and "held by" the Crown under section 46 (1) of the *Vancouver Incorporation Act*.

For these reasons I would hold that the first declaration in the judgment below is well founded.

The lease of the Fumigation Station property differs in some material respects from that of the Boeing property. It was made to the Dominion and Province jointly in 1923.

It contained a covenant by the Crown to erect the building.

It did not contain any provision similar to paragraph 15 of the Boeing lease.

There was a right in the lessees to surrender the term on notice but no provision as to disposition of the building.

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There was a right of re-entry by the lessor in case of breach of the covenant.

It cannot be said here that the Crown had more than a right to exclusive possession during the term, but there was sufficient to justify a finding that the property was held by the Crown within the meaning of section 46 of the *Vancouver Incorporation Act*.

An early interpretation of these words is found in the case of *Shaw* v. *Shaw* (1), where it was held that property, whether leasehold or freehold, in the use or occupation of the Crown, or of any person or persons in his or their official capacity as servants of the Crown, is not assessable, and that property held by the Crown under lease or by any person in an official capacity under the Crown is not assessable either at present or as a charge upon the reversion. Where property was assessed in the occupation of a Crown official and not appealed against, and taxes collected thereunder upon replevin. Held, that it was the assessor's duty to ascertain and assess the proper parties, and that it is not the duty under such circumstances of the party assessed to appeal to the court of revision, the improper assessment being of itself a nullity.

This decision was affirmed in the case of *The Principal Secretary of State for War* v. *The Corporation of the City of Toronto* (2), where the land was leased to a commissariat officer on behalf of the Secretary of State for War and occupied by Her Majesty's troops. It was held exempt from taxation and that a provision in such lease binding the lessee to pay all taxes to which the premises should be liable could make no difference.

The words of the relevant Upper Canada statute under consideration in these cases were "all property vested in or held by His Majesty", precisely the same as in the Vancouver Act.

Under the lease of the Fumigation Station the landlord held an interest not only in the land but in the building which, in this instance, might be one of substance because there is no evidence that it was the intention to remove or destroy the building at the end of the term, such as existed in the Boeing case.

(1) (1862) 12 Upper Can. C.P. Rep. 456.

(2) (1863) 22 Upper Can. Q.B. 551.

The Fumigation Station building has apparently been included in the general assessment of land and buildings during each of the years 1923 and following until 1941, when objection was first raised. The amount placed on the roll in respect of this building was of an estimated value of $6,600. Otherwise, the procedure was the same as in the case of the Boeing building.

We must assume that the taxes on the land, without the building, have been paid. The amount in question paid under protest was calculated on the assessed value of the building alone. The Legislature has not chosen to make provision for distinguishing the interest of the Crown when a tenant and that of a registered owner of the freehold; nor has the defendant municipality attempted to make such distinction in the assessment and taxation of the land in question. This difficulty was avoided in the *Fairbanks* (1) and *Montreal* (2) cases by special provisions, but there are none such to cover the case here.

In my view, when the tangible property is rightfully in the possession of the Crown and "held by" the Crown within the meaning of the statute, then such property is exempt as long as the term and possession continue. What remains, that is the intangible property, be it either legal or equitable, which belongs to the owner, may be taxed but, if it is the intention of the legislature to impose such tax, it should provide for the segregation of such interest and the imposition of the tax by a positive enactment.

For these reasons, I come to the conclusion that the second declaration in the judgment should be sustained.

The right to question the validity of the assessment in this action would seem to be settled by the decision of this Court in *Donohue* v. *Corporation of the Parish of St. Etienne de la Malbaie* (3), and by the Judicial Committee in *Toronto Railway Company* v. *City of Toronto* (4).

With respect to the order for the return of the moneys paid, what has been said above is sufficient, in my opinion, to dispose of any claim of the defendant to any right to impose a personal tax. The personal liability must necessarily fall with the validity of the tax.

On the other matters involved, I agree with the Court of Appeal and would dismiss the appeal with costs.

(1) [1928] A.C. 117.
(2) [1923] A.C. 136.
(3) [1924] S.C.R. 511.
(4) [1904] A.C. 809.

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TASCHEREAU J.—For the reasons given by Mr. Justice Rand, I would allow this appeal with costs and dismiss the action. The appellant Corporation should have its costs of the action and of the appeal to the Court of Appeal against the Canadian Northern Pacific Railway Company.

RAND J.—The question raised in this appeal is the right of the city of Vancouver to impose certain taxes against the respondent, The Canadian Northern Pacific Railway Company. That Company is the owner of a large tract of land within the city, two parcels of which are the subject of the taxes challenged. One of these was leased to the Crown for the Departments of Agriculture of both the Dominion and the Province for a term of twenty years from January 1st, 1923. By the provisions of the lease, the Crown undertook within six months to erect a building and plant suitable for fumigation purposes under *The Destructive Insect and Pests Act*. The second parcel was leased on the 1st of May, 1940, to the Dominion Crown represented by the Minister of Munitions and Supply for one year and thereafter from year to year. On it a large plant has been erected for the construction of airplanes under a contract with the Boeing Aircraft of Canada Limited. In each lease there was a clause giving the lessor a limited regulatory control over buildings and improvements "now or hereafter made or placed upon the said demised premises". The second contained a clause (15) as follows:

> Provided further that, at the termination of this lease or any renewal thereof, whether by effluxion of time or otherwise, the lessee shall forthwith remove his building or structures from the demised premises, failing which the lessor shall be entitled to remove the same at the expense of the lessee or to retain the same free of compensation as the lessor may see fit.

Both these buildings, by admission of counsel,

> are substantial structures, attached to the freehold and sunk in the soil.

In addition to those set up on these two parcels by the Crown, there were on the remaining portions of the tract many other buildings. For the whole of the block there was a single item of assessment and of taxation, but the case contains particulars of valuations of the land and the various buildings from which the total assessed value and the taxes are constructed and calculated.

The assessment and taxation of land in Vancouver are provided for in the *Vancouver Incorporation Act, 1921*. By section 37

> It shall be the duty of the Assessor annually to make a valuation of all rateable property in the city, and to report the same with such particulars as the Council may require.

Section 39 directs that

> All rateable property, or any interest therein, shall be estimated at its actual cash value as it would be appraised in payment of a just debt from a solvent debtor, the value of the improvements (if any) being estimated separately from the value of the land on which they are situate.

By section 40, various items of information are to be set out on the assessment roll: these include a description of every rateable parcel of land, its value and the value of all improvements, the name and address of the registered owner, the name and address of any person requesting notice and being the holder of a registered agreement to purchase, the names of all tenants, and the name of every person having an assessable interest in land, the fee simple of which is held in the name of the Crown, and the value of that interest. By section 46,

> All property vested in or held by His Majesty or for the public use of the Province

is exempted from taxation but, by subsection 10 of section 40, every exempt parcel, including lands the title to which is in the Crown, shall, for purposes of information and record, be set down on the assessment roll with the same particulars as are required for rateable land. Section 45 authorizes the Council by by-law to exempt from taxation wholly or in part any improvements or buildings, "notwithstanding that they may be part of the land on which they stand". By subsection 3 (*a*) of section 46, specific provision is made for the taxation of a lessee or sub-lessee of His Majesty in lands "vested in or held by His Majesty", and he is to be assessed in respect of his right or interest on the basis of the actual cash value of the lands and improvements so occupied "as if he were the actual owner of such lands and improvements".

Upon the completion of the assessment roll, which is, in fact, a valuation roll, the City Treasurer is to make out a tax roll with appropriate particulars. Sections 63 and 67 are as follows:

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63. All rates, taxes, or assessments under this Act shall be due and payable not only by the owner of the property upon which they are imposed, but also by the possessor or occupant of the property, and by the tenant or lessee of such property, to the extent to which the possessor, occupant, tenant, or lessee is indebted to such owner, and the payment by any such person shall be a discharge of the property for the amount so paid, and shall also be a discharge to the possessor, occupant, tenant, or lessee of so much of his indebtedness to the owner as he shall have so paid.

* * * *

67. The taxes accrued on any land shall be a special lien on such land, having preference to any claim, lien, privilege, or encumbrance of any party except the Crown, and whether the same are registered or not, and shall not require registration to preserve it.

As can be seen, the general scheme of the taxation is the simple one of imposing upon the interest of the private owner of the freehold estate or the private person in possession of Crown land, a tax based on the value of the totality of interest in the land, including improvements. That includes the value of the leasehold interest of property rented to private individuals or to the Crown. In this way a uniformity of valuation arises in respect of all properties which possess taxable interests either possessory or reversionary.

It was admitted in argument that the buildings on both lots could be removed only by complete dismantling: they have no removable identity. The mode of annexation has already been mentioned. The whole tract, owned by the railway company, is adjacent to railway trackage and operations, and it requires no stretch of the imagination to appreciate potential railway uses for which it might be required as railway operations expanded. The express obligation to remove, therefore, in the Boeing lease, is for the benefit of the lessor. Subject, then, to the contentions now to be dealt with, there can be no doubt that in both cases the improvements have become incorporated in and integral parts of the land leased: *Whitehead* v. *Bennett* (1).

It was argued that the Boeing building, by agreement, remained a chattel and was not within the taxing provisions. There is no stipulation in the lease that it shall be deemed a chattel, but the contention is put on the fact of its erection at the cost of the lessee, of the obligation to remove by the lessee, and that it was not intended to be used or enjoyed by the lessor. I am unable to draw any such con-

(1) (1858) 27 LJ. Ch. 474.

clusion from these circumstances. But even an express agreement would operate only in the way of an estoppel between the parties, and without effect as to the taxing authority: *Hobson* v. *Gorringe* (1).

It is then urged that actually the building belongs, in a colloquial sense, to the Crown, that no beneficial interest in it was ever intended to enure to the lessor, and that the technical conceptions of incorporation of improvements in lands ought to give way to the common sense notion of real ownership at all times in the Crown. Alternatively it is put that, if the building has become in fact incorporated in the land, the Crown, by force of the real transaction, is vested with an ownership in it as part of the land in the nature of a vertical section. This would be analogous to the creation of title to a seam or stratum of minerals.

As to the former, the governing rules are free from doubt. This building has become a portion of the land and its title subsumed in that of the owner of the fee: *Whitehead* v. *Bennett* (2). The beneficial enjoyment enures to the Crown during its possession under the lease, and if there should be sufficient salvage value to constitute an object of its removal, that likewise would be a right under the lease and not otherwise. It is sufficient to say that, apart from statute, such a notional estate or interest is unknown to the law of real property.

Nor is the alternative contention of any greater validity. Doubtless, by appropriate formality, a freehold interest in the area of the land comprising the building could be vested in the Crown (although its precise character, in view of the purpose of the lease and its special provisions, would call for some ingenuity in the language of limitation); but no such estate has been created here nor has the Crown bargained for it.

A fortiori do these considerations apply to the buildings occupied by the Agricultural Departments.

Mr. Biggar urged that the scheme of municipal taxation generally throughout this country was fundamentally a tax on possession, as exemplified by the case of *City of Montreal* v. *Attorney-General of Canada* (3); and that where the Crown was in possession, no tax could properly be imposed on any other interest. But that is precisely what *City of Halifax* v. *Fairbanks' Estate* (4) decided

(1) [1897] 1 Ch. 182.
(2) (1858) 27 L.J. Ch. 474.
(3) [1923] A.C. 136.
(4) [1928] A.C. 117.

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could be done. In that case, under the Halifax charter, there were three classes of interests taxed: the ownership of the land assessed on the capital value; the occupation for business purposes assessed at 50 per cent of the capital value; the occupation for residential purposes assessed at 10 per cent of the capital value. Section 394 expressly provided that property leased to the Crown should be deemed to be in the occupation of the owner for the purposes of the business and residential tax. The business tax there imposed on the owner was held to be on the reversion or on the owner in respect of the reversion but on the basis of the value of the occupation determined under the charter.

It should be particularly observed that there too the value of the leasehold interest as such was already included in the capital valuation of the property; but that possessory interest was the valuation basis of the business tax as well. There was, therefore, a double tax in relation to some portion, at least, of the value of the leasehold interest. That same situation is present here. There is no objection to the taxation of the capital value of the land apart from the building, nor is there any suggestion that that taxation, without any deduction for the valuation of the leasehold interest, is an infringement of section 125; neither is it contended that such a deduction would be permissible under the charter. On the footing that the buildings are within the legal title of the land, what distinction can be made between occupancy of the land with and without the improvement? The case of a lease for nine hundred and ninety-nine years is offered to demonstrate the absurdity of treating such a tax as not being one directly on the interest of the Crown. But the answer is that if the Crown sees fit to employ a mode of acquiring real property interests that entails a certain taxing consequence to other interests, it must accept that consequence, so far as it may be affected by it, as a necessary concomitant of that quality of interest.

By a number of decisions, i.e. *Calgary and Edmonton Land Company* v. *Alberta* (1), *Smith* v. *Vermillion Hills Rural Council* (2), *City of Montreal* v. *Attorney-General of Canada* (3), *City of Halifax* v. *Fairbanks' Estate* (4),

(1) (1911) 45 Can. S.C.R. 170.
(2) [1916] 2 A.C. 569.
(3) [1923] A.C. 136.
(4) [1928] A.C. 117.

certain propositions are now beyond controversy. First, provincial legislation may provide for the taxation of any private beneficial interest in land in which the Dominion Crown also may have an interest; second, the taxation of such an interest may be on a basis of the valuation of the Crown's interest, i.e., in the case of a lease by the Crown as if the tenant were the owner of the fee (*Smith* v. *Vermillion Hills Rural Council* (1), *City of Montreal* v. *Attorney-General of Canada* (2); and in the case of a lease to the Crown, as if the owner were in actual occupation of the land (*City of Halifax* v. *Fairbanks' Estate* (3)); third, the taxation of such an interest on such a basis of valuation is direct taxation, regardless of the actual incidence of the tax in any particular case.

Two questions, therefore, remain here: first, do the provisions of the Vancouver charter, on a reasonable construction, embrace the taxation of private beneficial interests in lands on the foregoing valuation basis while leaving the interest of the Crown untouched, or do they require us to say that they are directed against the interest of the Crown and are consequently in conflict with section 125; and secondly, does the inclusion in the content of value of an element created or added to the land by the Crown take the case out of the principles of the decisions mentioned and constitute an indirect taxation of the Crown contrary to section 125? Let us consider each of these questions.

As the first becomes a matter of exemption or non-exemption of a private interest which is subject to the general taxing power of the province, if the language of the taxing statute on a reasonable construction can extend to such an interest, it will be held to do so; that has to be the rule followed in the cases mentioned: *Calgary and Edmonton Land Company* v. *Attorney-General of Alberta* (4), *Smith* v. *Vermillion Hills Rural Council* (5). Interpreting the provisions of the Vancouver charter from the point of view of that rule and in the light of the constitutional barrier to the taxation of Crown interests or property, I find no difficulty in holding that the charter does bring within its ambit the private interests which are present

(1) [1916] A.C. 569.
(2) [1923] A.C. 136.
(3) [1928] A.C. 117.
(4) (1911) 45 Can. S.C.R. 170, at 192.
(5) (1914) 49 Can. S.C.R. 563, at 573; [1916] 2 A.C. 569, at 574.

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Rand J.

here and on the foregoing valuation basis. I assume that the exemption in section 46 includes a leasehold interest of the Crown; but that does not affect the fact that "rateable parcel of land" includes land so leased, or that the valuation of that parcel is without exclusion of the separate or exempt leasehold interest. The latter, possessed by the Crown, remains untouched by any taxation effect. It is neither taxed itself nor made the subject-matter of a tax lien. Its value indeed is included in that of the owner's interest as if the owner were in occupation, but that circumstance is unobjectionable. If section 40 had specifically directed the valuation of the land leased to the Crown "as if the owner were in possession" the situation would have been the same as *City of Halifax* v. *Fairbanks' Estate* (3). But that is what the section does by necessary intendment, and its propriety has not been challenged either in the Halifax real property tax or in the separate land assessment here.

The remaining question, in my opinion, presents the real and narrow point for decision. Is there, in such a case, a limitation upon the basis of valuation which the provincial jurisdiction can prescribe for the taxation of a private interest in land? Can that basis reach to an increment of value created and added to the land by the Crown in respect of which no enjoyment or benefit on the part of the lessor is contemplated? Admittedly, the Crown's interest created out of the existing property by the lease—which is the conjoint act of the Crown—may be used as the measurement of taxation of the owner's interest *Halifax* v. *Fairbanks* (3): how, then, can the mere enhancement of the value of that possessory interest, by enlarging its content through improvements added by the Crown, take the case out of the rule laid down by those decisions. I am unable to see how it can do so.

I would, therefore, allow the appeal with costs and dismiss the action. The appellant will have its costs of the action and of the appeal to the Court of Appeal as against the Canadian Northern Pacific Railway Company.

Appeal allowed with costs.

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

Solicitor for the respondents: *Wm. H. Campbell.*

(3) [1928] A.C. 117.

W. J. GREENBANK (DEFENDANT)..... APPELLANT; 1943

*Oct. 14, 15.
*Dec. 15.

AND

THE NATIONAL SUPPLY COMPANY LTD., AND OTHERS (PLAINTIFFS)..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Equity—Enforcible right against fund—Subrogation—Sublessees of oil rights in land financing drilling of well by issue of royalty certificates—Sublessees failing to complete, and committee for royalty holders completing well after arranging with holders of mechanics' liens for postponement of liens in favour of cost of completion and operation—Production not sufficient, after payment of cost and prior claims, to pay lienholders—Royalty holders' committee receiving dividend on claim against estate of a deceased sublessee—Claim by lienholders against fund created by said dividend.

M. and W. were sublessees of petroleum and gas rights in certain land. In the sublease they had covenanted to drill a well to commercial production or to a certain depth. As a financing plan, they entered into an agreement with T. Co. as trustee (in which they covenanted, *inter alia,* to carry out their covenants in the sublease), under which royalty certificates were issued and sold covering 70 per cent. of the production of the well (the remaining 30 per cent. being set aside for prior rights, etc.). M. and W., after drilling for a time, were unable to complete. The royalty holders appointed a committee with full powers to assume the position of M. and W. to complete the well and make arrangements and settlements with others having claims. To that committee M. and W. assigned their rights and interests in the well, and all property and equipment connected therewith. Plaintiffs had supplied materials to M. and W. and had registered mechanics' liens, which (as declared later in an order of court) attached the interests of M. and W. and all others claiming by, through or under them in the petroleum and natural gas in and under the land, and the right to take same, and the well drilled, etc. An arrangement was made between the committee and plaintiffs by which the committee might proceed to complete the well and, subject to costs of completion and operation and certain prior claims, the lienholders were to have the first claim against production proceeds. The committee completed the well and operated it for a time but production was only sufficient to pay their costs so incurred and claims having priority to plaintiffs' claims, and plaintiffs remained unpaid. Meanwhile M. had died and the committee filed a claim against his estate for money expended in bringing the well into production, the basis of the claim being that such expenditure was incurred because of breach by M. and W. of their covenant to drill the well. Said claim against the estate was allowed and a dividend paid thereon, which was paid to T. Co. to be held in trust, pending disposition of the present action, in which plaintiffs (who had also claimed against M.'s estate and received a dividend, which they credited) claimed payment out of said trust fund. Defendant G. (appellant) was by an order of court named to defend the action for the benefit of all persons interested.

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

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Held (affirming judgment of the Supreme Court of Alberta, Appellate Division, [1943] 1 W.W.R. 42): Plaintiffs were entitled to the fund to the extent of the unpaid balance of their claims.

Per Rinfret, Kerwin, Hudson and Taschereau JJ.: Plaintiffs had a right enforcible in equity. Plaintiffs had waived their liens only to the extent of the committee's expenses and payments, for which the committee had reimbursed itself out of production. If the committee were now paid the fund in question, its cost of bringing the well into production would be reduced *pro tanto;* and the result would be a surplus of proceeds of production to which plaintiffs' liens attached.

Per Rand J.: The royalty holders, through their committee, were entitled to recoup their outlay for completion of the well out of two funds: their claim against M.'s estate and the proceeds of production of the well. As to the latter fund, plaintiffs had postponed their charge. The right against the estate was unquestionably the primary source for payment of said outlay; the proceeds of production, under the postponement, became the secondary or surety fund for that payment; and upon satisfaction by the royalty holders of their debt out of production, plaintiffs became entitled to be subrogated to the committee's claim against the estate. The proof made by the committee against the estate was, therefore, in trust for plaintiffs to the extent of plaintiffs' claims. Viewing the transaction in the converse aspect, if the estate dividend had been paid before completion of the well (or even before appropriation of the proceeds of first production), the committee would have been under a duty in relation to plaintiffs to apply the dividend toward the cost of that work; and this would have augmented the production proceeds to a like extent and that increase would have been available to the satisfaction of plaintiffs' claims.

APPEAL by the defendant Greenbank from the judgment of the Supreme Court of Alberta, Appellate Division (1), dismissing (Harvey C.J.A. and Lunney J.A. dissenting) his appeal from the judgment of Ives J. ordering that a certain trust fund of $7,187.64 and interest accumulated thereon, held by the defendant The Toronto General Trusts Corporation as trustee, should be paid (subject to prior charges allowed for getting in the fund and for certain costs) by the trustee to the plaintiffs to the extent of the unpaid balances of principal and interest of the respective liens of the plaintiffs, with interest from the date of judgment on each respective lien.

The material facts of the case, so far as relevant to the grounds of decision in this Court, appear in the reasons for judgment in this Court now reported. It might be added that the agreement between Myers and Wright (of the one part) and The Toronto General Trusts Corporation

(1) [1943] 1 W.W.R. 42.

(trustee), referred to in the reasons for judgment, contained a covenant by Myers and Wright that they would carry out all their covenants and agreements set forth in the sublease to them and would observe and perform all the terms and provisions thereof by them to be observed and performed.

M. B. Peacock K.C. for the appellant.

Leo H. Miller for the respondents.

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

HUDSON J.—This is an appeal by the defendant Greenbank from a judgment of the Appellate Division of the Supreme Court of Alberta dismissing an appeal by the said defendant from a judgment of Mr. Justice Ives at the trial, holding that the trust funds in the hands of the Toronto General Trusts Corporation as trustee should be paid to the plaintiffs to the extent of the unpaid balances of their respective liens.

The statement of facts by Mr. Justice Ewing in the court below is fairly complete and I shall adopt much of it here. Myers and Wright were sublessees of the petroleum and gas rights in a parcel of land in Alberta. In this sublease they covenanted to drill a well on the land "to commercial production or to a depth of 300 feet in the limestone, whichever should first occur".

In order to finance the drilling of the well, Myers and Wright adopted a method, common in Alberta, of selling in advance the production of the well in definite proportions to individuals. To carry out this plan, they entered into an agreement with the Toronto General Trusts Corporation to act as trustee and assigned to such trustee the total production of the well, less costs of recovery and prior rights of the Crown and head lessee, for which purpose and other incidentals 30 per cent. of such production was to be set aside. The remaining 70 per cent. might be disposed of by Myers and Wright through the issue and sale of royalty certificates to be distributed by the trustee. Such disposition was made and royalty certificates issued covering all or approximately all of the said 70 per cent.

Provision was made in the trust agreement for calling by the trustee of a meeting of all the holders of royalty certificates in case of default by Myers and Wright.

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Myers and Wright commenced drilling of the well but after some months of work fell into financial difficulties and notified the trustee that they were unable to complete the well in accordance with their covenant.

In consequence of this, the trustee called a meeting of royalty holders in accordance with the terms of the trust agreement. At this meeting it was decided that the well should be taken over and completed if possible and, for that purpose, a committee was appointed and given full powers to assume the position of Myers and Wright to complete the well and to make all necessary arrangements and settlements with others having claims. Myers and Wright then assigned to this committee all their rights and interests in the well, and all property and equipment connected therewith. Meanwhile, it was necessary for the committee, in order to proceed with the completion and operation of the well, to make arrangements with those having claims against Myers and Wright in respect of the work already done. Among these were the plaintiffs, who had supplied materials for the drilling of the well, and thereby had become entitled to mechanics' liens which they had duly registered. These liens attached the interests of Myers and Wright and all other persons claiming through, by and under them in the petroleum and natural gas in and under the parcel of land in question, and the right to take same and the oil and gas well drilled on the said land, and all improvements and accessories thereto and property held in connection therewith. This was later held by the court in an order binding on all of the parties interested.

An arrangement was then made between the committee and the plaintiffs which is evidenced partly by a letter written to the committee by the National Supply Company which reads as follows:

904-10th Ave. West,
CALGARY, ALBERTA,
December 22nd, 1934.

Mr. H. M. Mack, Chairman
Pacalta Royalty Owners Committee,
317 Alberta Corner,
Mr. W. B. O'Regan, Secretary,
Mr. E. J. Gregory,
Mr. C. S. McKenzie,
Mr. Geo. Harris,

GENTLEMEN:—

In accordance with our conversation of Dec. 18th, it is our understanding that you have secured a waiver of 65 royalty units to allow

your committee to proceed to finish the Pacalta well and use the first production to pay the cost of completion and pay off Myers & Wright creditors with claims against the well.

It is also our understanding that you can make arrangements with the Calmont Oils Ltd. for the use of a Rotary outfit and a contract with Messrs. Wilkinson & Head on a 10 per cent. cost plus basis, using the first production to pay the following expenses incurred after December 8th on a pro-rata basis:

Wilkinson & Head Sept. 27th contract on a 10 per cent. cost plus basis, including any moneys due them prior to Dec. 8th.

Calmont Oils Ltd. rental on Rotary Outfit including $2,000 due them prior to Dec. 8th.

Repay new money advanced after Dec. 8th for completion account.

On Dec. 10th we filed a Lien for $4,917.43 covering an account against Myers & Wright on the Pacalta well and we will not admit any prior claims other than those above mentioned. This applies to production only.

Yours very truly,

THE NATIONAL SUPPLY COMPANY LIMITED

"TOR"

TOR/B

and by oral evidence given at the trial by Mr. Mack, who was Chairman of the Committee and which is as follows:

Q. In other words, subject to the payment of those costs of completion, the lien holders were to get the production until their liens were paid?

A. They were to get it after we paid off the necessary completion and operation charges and other things necessary to be paid.

Q. And there was no money, none of that production was to go to the royalty holders until after the lien holders were paid?

A. That is true.

Q. That is true?

A. The lien holders were to get paid before the royalty holders got anything, before any money was paid over to the royalty holders, the lien holders; I think that in the main is the essence of the agreement which we made, that the royalty holders would stand back and when there was surplus money the lien holders would get it and we would not come in until afterwards.

Having secured this concession from the plaintiffs and made arrangements with some others, the Committee proceeded to complete the well and for a time to operate it. From the proceeds of production they were entitled to repay and did repay all operating costs, all expenditures incurred by them in bringing the well into production, and to settle the claims having priority to the plaintiffs. But they claimed that there was no surplus to pay the plaintiffs. It is admitted in the pleadings that the defendants were paid out of production for their entire expenditure and also that they had paid nothing to the plaintiffs.

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Meanwhile, Myers had died in 1935 and a claim was filed on behalf of the Committee against his estate then in the hands of the Trusts and Guarantee Company as administrators. This claim was for the money expended by the Committee on behalf of the royalty holders in bringing the well into production, the basis of this claim being that such expenditure had been incurred by reason of Myers and Wright's breach of their covenant to complete drilling the well.

In December, 1937, the plaintiffs not having received anything from the defendants on account of their liens, the plaintiffs' solicitors wrote the Chairman of the Committee as follows:

December 3rd, 1937.

LOUIS K. BOWDEN,
Chairman of the Pacalta Royalty Holders Committee.

DEAR SIR:

Re: The National Supply Company Limited

We are instructed to advise you that unless the indebtedness owing to the National Supply Company, Limited, for casing and materials supplied by the said Company and used in the drilling of the Myers and Wright well on L.S.D. 7 of Section 28, Township 18, Range 2, West of the 5th Meridian, is paid within one week from this date, our instructions are to commence action on the Mechanics' Lien filed by The National Supply Company Limited, against said L.S.D. 7, in December, 1934.

The amount owing to our client is $5,438.39 with interest thereon from the 31st of March, 1936.

Our instructions herein are definite.

Yours truly,

FORD & MILLER.

To that letter they received the following reply:

December 4th, 1937.

Mr. LEO MILLER,
%Ford & Miller,
Barristers & Solicitors,
502-504 Maclean Block,
Calgary, Alberta.

DEAR SIR:

Re: National Supply Co. Ltd.

We are in receipt of your letter of December 3rd, 1937, referring to the above account. In accordance with the writer's telephone conversation with you as of to-day, I am enclosing a financial statement taken off October 2nd, as of July 31st, 1937, by William Ireland, chartered accountant of Pacalta well.

As to the state of the above claim, the writer has discussed the matter with the other members of the Committee, and we definitely feel and go on record to say that as soon as it is possible for Mr. Skene, our

solicitor, to arrange that the Trust Co. have distribution of the monies now held by them, to the creditors credit, we will definitely protect the National Supply Co. along with the other creditors of the Pacalta well and see that all monies received by us from the above estate is paid first to the creditors before any distribution is made to the Royalty Holders. We feel that this is only fair to the creditors who have been patient and given such consideration to date.

Hoping that you will give this your consideration.

Yours very truly,

PACALTA OPERATING ROYALTY HOLDERS' COMMITTEE,

Per Louis K. Bowden,
Managing Director.

On December 20th, the solicitors for the Committee wrote a letter to the plaintiffs' solicitors confirming this position.

The claim of the Committee on behalf of the royalty holders against the Myers estate was subsequently allowed at $32,988.74, and a dividend thereon paid to Mr. Greenbank, the present defendant, as representing the Committee, which payment, on the advice of the Committee's solicitors, was made to the Toronto General Trusts Corporation to be held by them in trust pending the disposition of this action. Subsequently the present plaintiffs, having received nothing from the Committee, took action to enforce their liens and a receiver was appointed to operate the well for a time, but it was found that under the limitations imposed by governmental regulations it was impossible to operate at a profit and so far the plaintiffs have received nothing from this source.

The plaintiffs also put in a claim against the Myers estate and on this account received a dividend which has been credited on their claim.

This action was commenced against Mr. Greenbank, who had been acting as Chairman of the Committee for the royalty holders, and against the Toronto General Trusts Corporation, who was trustee under the trust agreement and also was the depositary of the funds in question. A number of claims were made but only one need be considered and that is that the plaintiffs had a charge for principal and interest due and owing under their liens, and for an order directing the defendant, the Toronto General Trusts Corporation as trustee, to pay the respective sums so due to the plaintiffs, together with the costs of this action, out of the said trust fund.

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The status of the defendant Greenbank was settled by an order of the Appellate Division (1) in the following terms:

> It is ordered that the Defendant, W. J. Greenbank, be authorized to and do defend this action on behalf of and for the benefit of all persons interested in a certain Trust Fund referred to in the pleadings of $7,187.64 and interest held by the Defendant, The Toronto General Trusts Corporation as trustee;
>
> And it is further ordered that no judgment shall be given under which recovery may be had personally against the Defendant, W. J. Greenbank, or against any of the persons interested in the said Trust Fund.

The action was tried before Mr. Justice Ives, who ordered that the trust fund in question with accumulated interest should be paid by the Toronto General Trusts Corporation to the solicitor on record for the plaintiffs, with the consent of the lienholder plaintiffs, to the extent of the unpaid balances of principal and interest of the respective liens of the plaintiffs, and also gave certain directions as to costs.

In the Appellate Division it was contended on behalf of the plaintiffs that the letters of December, 1937, above referred to amounted to an equitable assignment to the plaintiffs of the fund to the extent of their claims. Chief Justice Harvey was of the opinion that it was not sufficiently established that those purporting to represent the Committee had the power to make an assignment and, in any event, he thought that these letters did not amount to an assignment. Mr. Justice Ewing, speaking on behalf of the majority, took a different view. He stated:

> A perusal of the letter, Exhibit 25 above quoted, indicates that it is much more than a mere promise by the Committee to pay the debt due to respondents when the fund in question was received by the Committee. The letter is an undertaking on the part of the Committee "to see that all moneys received by us from the above estate is paid first to the creditors before any distribution is made to the Royalty Holders".

In the view I take of the case, it is not necessary to decide either of these points. The letters at least recognize what the agents and solicitors of the Committee regarded as equitable under the circumstances. In my opinion, independently of these letters, there was a right enforcible in equity.

The plaintiffs had liens on the property, including the oil, gas and other products. They waived these liens only

(1) See [1941] 3 W.W.R. 711.

to the extent of enabling the Committee to reimburse themselves for expenditures incurred in bringing the well to production and paying the other charges mentioned. The Committee did reimburse themselves out of production and, if now paid the money in question, their cost of bringing the well into production would be reduced *pro tanto*. The result would be a surplus of proceeds of production to which plaintiffs' liens attached.

I agree with the majority of the Appellate Division and would dismiss the appeal with costs.

RAND J.—The respondents recovered a judgment in a mechanics' lien action declaring them to be entitled to a lien against an oil well, property appurtenant to it and its production.

The lien was for materials supplied by the respondents to the sub-lessees of an oil lease covering a legal subdivision granted by the Province of Alberta. The sub-lessees had charged seventy per cent. of the net production and proceeds under a trust for the benefit of purchasers of units of interest, called "royalties", in these proceeds. The sub-lessees assumed the obligation of drilling a well on the subdivision, but before the work was finished they met with financial difficulties and finally threw up the job, leaving substantial liabilities outstanding, including the claims of the respondents. The trustee at once convened a meeting of the royalty holders, who decided to try to salvage something of their investment through completion of the well. A committee was appointed for that purpose and was given full authority to deal with matters necessary to that end. It obtained from the respondents and other secured creditors waivers or postponements of their charges on the production proceeds to, or in favour of, the cost of completion and certain other pressing claims; and under that arrangement the well was brought in. The output, however, did not come up to expectations and was insufficient to meet more than current costs and preferred claims. Out of the production proceeds a sum of approximately thirty-two thousand dollars was paid for work for which the sub-lessees, under their contract with the trustee, were responsible.

In the meantime one of the sub-lessees died and the other became evidently insolvent. The two estates were, by arrangement between all creditors, combined for the

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purpose of proof and distribution. The committee proved for the amount so expended, namely, thirty-two thousand dollars, on which a dividend of something over seven thousand dollars was received. It is the right to that money which forms the subject-matter of this controversy. It is claimed both by the respondents and by the committee.

A great deal of discussion took place over the authority of the committee from time to time to make binding arrangements with the respondents and other secured creditors. Apart from the fact that about sixty-five units out of a total of seventy were represented at all meetings and approved all action taken by the committee, no holder except the defendant—who was presented with a qualifying interest of a small fraction of one unit—has in this action challenged any agreement made by the committee with the respondents. There can be no doubt that the claims of the respondents were agreed to and accepted by the committee as being secured by a first charge on the production of the well, and for that reason the postponement was obtained. But under the declaratory judgment, that charge was incontestable and, in the view I take of its consequences, I do not find it necessary to pass upon the question whether the committee did in fact assign to the respondents the benefit of the proof made against the estate.

The situation is, therefore, clear. The production of the well became, by reason of the arrangement, subject to a first charge in favour of the committee to the extent of the cost of completing the well, to a second charge in favour of the respondents, and then to the trust charge for the royalty holders. At the same time the committee held the right to prove against the estate for the completion cost. The royalty holders, therefore, through their committee, were entitled to recoup their outlay out of two funds, to one of which the respondents had postponed their charge. The right against the estate was, unquestionably, the primary source for the payment of the completion cost: the production proceeds, under the postponement, became the secondary or surety fund for that payment; and upon the satisfaction by the royalty holders of their debt out of those proceeds, the respondents become entitled to be subrogated to the claim of the committee

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against the estate. The proof that was made by the committee was, therefore, in trust for the respondents to the extent of their claims.

Viewing the transaction in the converse aspect and as Ewing J.A. observes, if this dividend from the estate had been paid in before the completion of the well (or even before the appropriation of the proceeds of first production), the committee would have been under a duty in relation to the respondents to apply it toward the cost of that work. This, in turn, would have augmented the production proceeds to a like extent and that increase would have been available to the satisfaction of the claims of the respondents.

The appeal should, therefore, be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Peacock, Skene & Gorman.*

Solicitor for the respondents: *Leo H. Miller.*

HIS MAJESTY THE KING ON THE RELATION OF CARL POWIS TOLFREE. } APPLICANT;

1943

*Oct. 12.

AND

JAMES H. CLARK AND OTHERS..... RESPONDENTS.

ON PROPOSED APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Appeal—Refusal of special leave to appeal—State of facts to which proceedings in lower courts related and upon which they were founded no longer existing.

An application was made to this Court under s. 41 of the *Supreme Court Act* for special leave (this having been refused below) to appeal from the judgment of the Court of Appeal for Ontario ([1943] O.R. 501) affirming the striking out by Hope J. ([1943] O.R. 319) of notice of motion in the nature of *quo warranto* for an order that respondents show cause why they, as was alleged, did each unlawfully exercise or usurp the office, functions and liberties of a member of the Legislative Assembly of Ontario during and since the month of February, 1943, contrary to the provisions of the *B.N.A. Act* (s. 85), whether or not the same were lawfully amended by *The Legislative Assembly Act* (R.S.O. 1937, c. 12, s. 3), notwithstanding *The Lesgislative Assembly Extension Act, 1942* (Ont., 6 Geo. VI, c. 24), which, it was alleged, was *ultra vires*. Since the date of the judgment of the Court of Appeal, the "then present" Legislative Assembly was dissolved.

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

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THE KING EX REL. TOLFREE v. CLARK ET AL.

Held: Leave to appeal should be refused. Though the application by way of *quo warranto* was for the purpose of obtaining a judicial pronouncement upon the validity of said Ontario enactments, yet the direct and immediate object of the proceeding was to obtain a judgment excluding respondents from sitting and exercising the functions of members of the "then present" Legislative Assembly; and, that Assembly having been dissolved since the judgment of the Court of Appeal, the judgment sought could not now be executed and could have no direct and immediate practical effect as between the parties (except as to costs). It is a case where, the state of facts to which the proceedings in the lower courts related and upon which they were founded having ceased to exist, the sub-stratum of the litigation had disappeared; therefore, in accordance with well-settled principle, the appeal could not properly be entertained. The fact that some important question of law of public interest was or might be pertinent to the consideration of the issue directly and immediately raised by the proceedings does not affect the application of the principle.

MOTION by the relator under s. 41 of the *Supreme Court Act* (R.S.C. 1927, c. 35) for special leave to appeal from the judgment of the Court of Appeal for Ontario (1) dismissing his appeal from the order of Hope J. (2) striking out the notice of motion by the relator in the nature of *quo warranto* for an order that respondents show cause why they, as was alleged, did each unlawfully exercise or usurp the office, functions and liberties of a member of the Legislative Assembly of Ontario during and since the month of February, 1943, contrary to the provisions of the *B.N.A. Act* (s. 85), whether or not the same were lawfully amended by the provisions of *The Legislative Assembly Act* (R.S.O. 1937, c. 12, s. 3), notwithstanding the provisions of *The Legislative Assembly Extension Act, 1942* (Ont., 6 Geo. VI, c. 24), which, it was alleged, was *ultra vires*.

A notice of the proceedings and of the intention to bring in question the constitutional validity of the said Ontario enactments had been served upon the Attorney-General of Ontario and upon the Attorney-General for Canada.

The Court of Appeal for Ontario refused to grant special leave to appeal to this Court (3).

V. E. Gray K.C. for the motion.

C. R. Magone K.C. contra.

(1) [1943] O.R. 501; [1943] 3 D.L.R. 684.

(2) [1943] O.R. 319; [1943] 2 D.L.R. 554.

(3) [1943] O.R. at 524; [1943] 3 D.L.R. at 699.

The judgment of the Court was delivered by

THE CHIEF JUSTICE.—We are satisfied it would not be proper to grant leave to appeal in this case.

The Legislature of the Province of Ontario, by a statute passed in 1942 as chapter 24 and known as *The Legislative Assembly Extension Act, 1942,* enacted as follows:—

1. Notwithstanding anything in *The Legislative Assembly Act* or in any other Act contained, the present Assembly shall continue until the 19th day of October, 1943, and it shall not be necessary to hold any general election to choose members of the Assembly until such date.

2. Nothing in this Act shall affect or amend the provisions of section 4 of *The Legislative Assembly* Act, nor be taken or deemed to affect or abridge any prerogative of the Crown or the power of the Lieutenant-Governor to dissolve the Assembly at an earlier date than that mentioned in section 1.

3. This Act may be cited as *The Legislative Assembly Extension Act, 1942.*

But for this statute, the twentieth Legislative Assembly of Ontario would have expired, we are informed, by operation of law on or before the 19th of October, 1942; but pursuant to its enactments a session of the Legislative Assembly was convoked for and continued to sit from the 9th of February, 1943. On the 30th of June, 1943, the "then present" Legislative Assembly was dissolved by the Lieutenant-Governor of the Province.

On the 15th of March, 1943, notice of motion in the nature of *quo warranto* was given on behalf of the relator, Carl Powis Tolfree, for an order that the respondents should show cause why they did unlawfully exercise or usurp the office, functions and liberties of a Member of the Legislative Assembly of Ontario during and since the month of February, 1943, contrary to the provisions of the *British North America Act,*

whether or not the same are lawfully amended by the provisions of *The Legislative Assembly Act* (R.S.O. 1937, cap. 12, s. 3), notwithstanding the provisions of an *"Act to Extend the Duration of the Present Legislative Assembly Act"* (6 Geo. VI, cap. 24).

The respondent then moved to strike out this notice of motion as frivolous and vexatious and as disclosing no reasonable cause of action. On the 17th of April, 1943, an order was made by Mr. Justice Hope striking out the notice of motion. An appeal to the Court of Appeal was dismissed on the 11th of June, 1943, and on the 23rd of June, 1943, an application to the Court of Appeal for leave to appeal to this Court was refused.

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Duff C.J.

Admittedly the application by way of *quo warranto* was for the purpose of obtaining a judicial pronouncement upon the validity of the statute of 1942 extending the life of the Legislative Assembly, as well as section 3 of *The Legislative Assembly Act*. Nevertheless, the direct and immediate object of the proceeding was to obtain a judgment forejudging and excluding the respondents from sitting and exercising the functions of members of the "then present" Legislative Assembly; and obviously, the Legislative Assembly having been dissolved since the delivery of the judgment of the Court of Appeal, such a judgment could not now be executed and could have no direct and immediate practical effect as between the parties, except as to costs. It is one of those cases where, the state of facts to which the proceedings in the lower Courts related and upon which they were founded having ceased to exist, the sub-stratum of the litigation has disappeared. In accordance with well-settled principle, therefore, the appeal could not properly be entertained. The fact that some important question of law of public interest was or might be pertinent to the consideration of the issue directly and immediately raised by the proceedings does not affect the application of the principle. *Archibald* v. *Delisle* (1); *Delta* v. *Vancouver Rly. Co.* (2).

The application must be dismissed with costs.

Application dismissed with costs.

Solicitor for the applicant: *W. A. Toogood.*

Solicitor for the respondents Clark and Conant and for the Attorney-General of Ontario: *C. R. Magone.*

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(1) (1895) 25 Can. S.C.R. 1, at 14, 15.

(2) (1909) Cameron's Supreme Court Practice, 3rd edit. (1924), p. 93.

DOUGLAS R. BEATTY..... APPELLANT;

AND

HIS MAJESTY THE KING..... RESPONDENT.

1943
*Oct. 6, 7.
1944
*Jan. 6.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law—Murder—Written confession—Statement in confession admitting theft of a revolver—Evidence at trial that revolver was weapon with which deceased killed—Admissibility of whole confession —Relevancy of theft—Effect of judgment of this Court in Thiffault v. The King [1933] S.C.R. 509—Comments as to extent of that decision as to the admissibility of a confession in whole or in part.

On a charge of murder the possession by accused of the weapon (revolver), with which the murder was committed, at the time of the killing was a relevant fact to be proved by the Crown. The evidence of the theft of the revolver was admissible; it was admissible because it was relevant as showing how the accused obtained possession of the revolver. Therefore the mention of the fact that the revolver was stolen in the confession of the accused did not vitiate that confession as evidence.

In *Thiffault* v. *The King* ([1933] S.C.R. 509), the decision of this Court was that the evidence pointed to the conclusion that the statement tendered in evidence was not a correct statement of what the accused had said and intended to say; and it was also held that a document, professing to embody the effect of admissions obtained in the way the admissions were obtained in that case and containing *inter alia* a record of an admission of a fact that would be inadmissible as evidence against the accused and was calculated to prejudice him, ought not to be admitted as evidence against him.

The decision of this Court in the *Thiffault* case does not lay down that, where a document contains a true record of a declaration by an accused which, it is established to the satisfaction of the trial judge, was a voluntary statement in the pertinent sense, the whole declaration must necessarily be excluded because it contains a statement of some irrelevant fact. If the declaration was obtained in circumstances and in a manner which makes it otherwise unobjectionable, and if the statement of the irrelevant fact can be separated from the rest of the document without in any way affecting the tenor of it, then the trial judge in most cases would probably be able to effect the exclusion of the objectionable statement while permitting the unobjectionable part of the document to go before the jury. To this course in such circumstances there could be no objection. *Rex* v. *Sampson* (62 C.C.C. 49, at 51) approved, subject to the observations in the judgment. But where a written declaration by an accused contains statements of facts prejudicial to the accused and not relevant to the issue, the trial judge may find it necessary to scrutinize with exceptional care the circumstances in which the declaration has been obtained.

Judgment of the Court of Appeal ([1943] 2 W.W.R. 449; [1943] 3 D.L.R. 584) affirmed.

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

1943

BEATTY v. THE KING.

Duff C.J.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), affirming the conviction of the appellant on a charge of murder.

The accused (appellant), when being interviewed by the police with respect of the theft of revolvers from a barracks, handed over a revolver then in his possession and confessed that he had stolen it. After a third and final interview had been apparently concluded, the accused blurted out "I killed Phil Davis", a taxi-driver. No mention of Davis had previously been made during the first two interviews. The usual warning had been given and the accused's confession was taken down in writing and signed by him; it included the theft of the revolver. The written statement embodying both confessions was admitted in evidence at the trial, after it had been found, following a "trial within the trial", to have been free and voluntary. The trial judge instructed the jury they could find the appellant guilty of murder, either on the confession itself, or apart from it, on his evidence given in the witness-box when he repudiated the confession and explained his possession of the deceased's watch and flashlight. The accused was convicted of murder. On appeal to the Court of Appeal, it was contended that the testimony of the theft was not material, since there was ample evidence of the accused's possession of the revolver, and that such testimony was not only irrelevant to the charge of murder but was also prejudicial to the accused. The majority of the appellate court held that, under all the circumstances, the fact of the illegal possession of the revolver was admissible and that the appeal should be dismissed. The accused appealed to this Court, and the appeal was dismissed.

P. D. Murphy for the appellant.

J. A. Clark K.C. for the respondent.

At the conclusion of the argument by the appellant's counsel, without calling upon counsel for the respondent, the Chief Justice, speaking for the Court, delivered the following oral judgment:

THE CHIEF JUSTICE.—Mr. Clark, we think it will not be necessary to call upon you.

We have had the advantage of an admirable argument from Mr. Murphy; and what I am saying now, in a very

(1) [1943] 2 W.W.R. 449; [1943] 3 D.L.R. 584.

summary way, is, first, that we are satisfied that evidence of the theft of the revolver was admissible and that mention of the circumstance that the revolver had been stolen in the confession does not vitiate it.

As regards the application that has been made, we have come to the conclusion that we ought not to accede to that application, because we are satisfied there is no conflict between the decision of the Court of Appeal in this case and the decision referred to, in the relevant sense.

I must add, however, that a decision of this Court in the *Thiffault* case (1) was the subject of discussion in the Court below and we think it is possible that there has been some misapprehension of the effect of that judgment in that case, and for that reason we think some explanation should be given on that point. We will, therefore, give some reasons later.

The appeal will be dismissed.

Some time later, the following written reasons for judgment were delivered by the Chief Justice speaking for the Court.

THE CHIEF JUSTICE.—In the reasons given on the 7th of October, 1943, in this appeal, it was stated that there would be further reasons dealing with a point raised as to the application of *Thiffault* v. *The King* (1). As was stated in those reasons, we are satisfied that the evidence of the theft of the revolver was admissible; it was admissible because it was relevant as showing how the accused obtained possession of the revolver. Therefore, the mention of the fact that the revolver was stolen in the confession of the accused does not vitiate that confession as evidence.

In *Thiffault* v. *The King* (1) it was necessary to consider a declaration which had been received in evidence against the accused. The accused on the occasion on which the declaration was signed had been interrogated by a detective whose questions were directed to ascertaining not only the connection of the accused with the fire in which his wife had lost her life, but also to obtaining admissions of damaging facts in his past history. The clerk who was present made what professed to be a record of the effect of the statements of the accused, which the latter signed after it had been read to him. Admittedly

(1) *Thiffault* v. *The King* [1933] S.C.R. 509.

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Duff C.J.

the statement contained one most serious error, highly prejudicial to the accused. It also contained a statement that the accused had once been arrested for fighting and that he had paid the costs. The clerk who drew up the statement was not produced as a witness and no adequate explanation for his absence was given. Other witnesses who were present during the interrogation were not produced. Apart altogether from any question touching the voluntariness of the statement, this Court took the view that

> the evidence points to the conclusion that, although the document was read over to him before he signed it, it is not a correct statement of what the accused said and intended to say.

We also considered that a document professing to embody the effect of admissions obtained in the way the admissions were obtained in that case, and containing *inter alia* a record of an admission of a fact that would be inadmissible as evidence against the accused and was calculated to prejudice him, ought not to be admitted as evidence against him.

The judgment in that case does not lay down that where a document contains the record of a declaration by an accused which, it is established to the satisfaction of the trial judge, was a voluntary statement in the pertinent sense, the whole declaration must necessarily be excluded because it contains a statement of some irrelevant fact. If the declaration was obtained in circumstances and in a manner which make it otherwise unobjectionable, and if the statement of the irrelevant fact can be separated from the rest of the document without in any way affecting the tenor of it, then the trial judge in most cases would probably be able to effect the exclusion of the objectionable statement while permitting the unobjectionable part of the document to go before the jury. To this course in such circumstances there could be no objection.

Subject to what has just been said, we are in agreement with the judgment of Mellish J. in *Rex* v. *Sampson* (1).

Of course, where a written declaration by an accused contains statements of facts prejudicial to the accused and not relevant to the issue, the trial judge may find it necessary to scrutinize with exceptional care the circumstances in which the declaration has been obtained.

Appeal dismissed.

(1) (1934) 8 M.P.R. 237; 62 Can. Cr. Cas. 49, at 51; 18 Can. Abr. 901.

1943

Oct. 29.

THE TRAVELERS INDEMNITY COMPANY AND THE TRAVELERS FIRE INSURANCE COMPANY (GARNISHEES) ..... APPELLANTS;

AND

HILDA POWERS (PLAINTIFF)..... RESPONDENT;

AND

FRANK DEAN (DEFENDANT).

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

Insurance (Automobile)—Accident—Injury to passenger—Policy issued to automobile company—Use of a motor car by an official—"Omnibus" clause eliminated from policy—Endorsement clause providing for liability in case of "pleasure use"—Liability of the insurer—Whether company only person "insured" under policy.

The appellant companies issued an indemnity policy to an incorporated company doing business as "garage and automobile sales agency". One Dean, an official of the latter company, invited the respondent for a drive in an automobile belonging to that company and met with an accident. The respondent was severely injured, obtained a judgment against Dean for $2,532.50 damages and seized in the hands of the appellant companies all sums of money which they might owe to Dean as being his insurer. The appellant companies declared that they had issued a policy to the automobile company and that no insurance by the terms of the policy extended to the defendant Dean. A clause of the policy provided that the insurer agreed to pay on behalf of the "insured" all sums which the insured would be by law obligated to pay, and another clause, known as the "omnibus" clause, had been by consent eliminated from the policy; but an endorsement clause provided that the policy would apply *inter alia* to any damages caused by "the ownership, maintenance or use of any automobile * * * and also for pleasure use". The respondent contended that, even if the defendant Dean was not protected as the result of the elimination of the omnibus clause, he was nevertheless entitled to the benefits of the policy on the ground that the user of the automobile "for pleasure" not connected with the business of the automobile company was covered by the terms of the endorsement clause. The trial judge and the appellate court held that the policy extended to the defendant Dean. On appeal to this Court

Held, reversing the judgment appeal from ([1943] K.B. 479), that under the policy the only person insured was the automobile company and that it was only on behalf of the latter that the obligation to indemnify would arise. In this case, it was not the "insured", but the defendant Dean who had been obligated to pay damages to the respondent: the judgment was against Dean personally and, as he was not the "insured", the appellant companies were not liable.—The endorsement clause attached to the policy did not change the

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

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THE TRAVELERS INDEMNITY COMPANY ET AL. v. POWERS.

"insured", which remained the automobile company; it merely described the risk. The words "for pleasure use" cannot have the effect of re-establishing the "omnibus" clause which had been eliminated. The policy, as amended, did not provide that all persons driving an automobile belonging to the insured company for "pleasure use" would be protected by its terms; but the proper construction of the endorsement clause was that the insured automobile company was entitled to be indemnified when one of its automobiles would be used for "pleasure" in such a way that its liability would be involved.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), affirming the judgment of the trial judge, Verret J., maintaining a seizure by way of garnishment in the hands of the appellant companies and condemning the latter to pay to the plaintiff respondent the sum of $2,532.50. The appeal was allowed.

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

John T. Hackett K.C. for the appellants.

R. F. Stockwell K.C. and *W. A. Merrill K.C.* for the respondent.

The judgment of Rinfret, Kerwin, Taschereau and Rand JJ. (2) was delivered by

TASCHEREAU J.—This is an appeal from a judgment rendered on the 28th May, 1943, by the Court of King's Bench, appeal side, province of Quebec, sitting at Montreal. The appellants were condemned to pay to the plaintiff respondent Hilda Powers $2,532.50 with interests and costs, and this judgment was unanimously confirmed by the court of appeal.

The appellants are insurance companies, and in November, 1939, they issued an indemnity policy to Hibbard Motor Sales Limited, whose business is described as "garage and automobile sales agency". In September, 1940, an employee of the insured invited the respondent Hilda Powers for a drive in an automobile belonging to

(1) Q.R. [1943] K.B. 479.

(2) Reporter's note:—Sir Lyman P. Duff, then Chief Justice of Canada, participated in the judgment rendered on the 29th of October, 1943; but, at the date of the delivery of the reasons for judgment, i.e. on the 1st of February, 1944, Sir Lyman P. Duff had ceased to be a member of the Supreme Court of Canada.

the insured. He met with an accident with the result that the respondent was severely injured. She brought action against Dean and recovered judgment for $2,532.50.

Later, in October, 1941, the respondent seized in the hands of the appellants all sums of money which they might owe to Dean, as being his insurer. The appellants then declared that they had issued a policy to Hibbard Motor Sales Limited, and that no insurance by the terms of that policy extended to defendant Dean. The respondent contested this declaration of the garnishees, and the contention is briefly that Dean, who was driving the automobile for "pleasure" is an insured entitled to be indemnified for all damages that he may be obligated to pay, and that he is a person contemplated by the terms of the policy. The trial judge and the court of appeal held that the policy extended to Dean, and maintained the contestation.

The following clause of the policy (section A) defines the obligations of the appellants:

> The insurer agrees to pay on behalf of the insured all sums which the insured should become obligated to pay by reason of the liability imposed upon him by law for damages because of bodily injury, etc.

By the terms of the policy, the insured is the Hibbard Motor Sales Limited, and the insurer is bound to pay when the insured is by law obligated to pay. It happens frequently in these indemnity policies that their protection extends to third parties driving automobiles and who are held liable for damages, but, in the present case, what has been called the "omnibus" clause, covering such third parties, has been, by consent, eliminated from the policy. This clause thus struck off, reads as follows:

> The company agrees with the insured to extend this insurance if the actual and stated uses of the automobile are "Private Purposes Only" as defined in Item 5 of the Declarations, and then only, in the same manner and under the same conditions as this insurance is afforded the insured, to any person or persons while riding in or legally operating the automobile, and to any person, firm or corporation legally responsible for the operation thereof; but upon condition that such use or operation is with the permission of the insured; or if the insured is an individual, with the permission of an adult member of the insured's household other than a chauffeur or domestic servant; provided that the insurance payable hereunder shall be applied first, to the protection of the insured and the remainder, if any, to the protection of the other persons entitled to insurance under the terms of this section as the insured shall in writing direct. The provisions of this paragraph (5) shall not be available (*a*) to any person, firm or corporation engaged in the business of garaging, repairing, servicing, storing or dealing in automobiles or to the agents

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Taschereau J.

or employees of such person, firm or corporation, if such injury or destruction arises out of such business; or (*b*) to any person, firm or corporation in respect of a claim arising out of damage to the person or property of the insured or of any person operating the automobile.

The only person insured is, therefore, the applicant, the Hibbard Motor Sales Limited; and it is only on behalf of this person that the obligation to indemnify arises. No other person, in charge of the automobile, whether employee or not, legally obligated to pay damages personally, may claim to be indemnified; only the liability of the company is insured, and the driver's is not. But, the respondent submits, and the courts below held that she was right, that Dean was made an "insured" under the policy by a "Canadian garage endorsement" attached thereto, and reading as follows:

This policy is hereby amended from and after its effective date in the following particulars:

Insuring agreements:—Section A (Legal liability for bodily injuries or death) and section B (Legal liability for damage to property of others) of this policy shall apply as herein stated in lieu of as stated in the policy.

To such bodily injuries or death, or damage to property of others caused by:

(*a*) The ownership, maintenance, occupation or use of the premises herein disclosed, including the public ways immediately adjoining, for the purposes of an automobile sales agency, public garage, service station, or repair shop, and all operations either on the premises or elsewhere which are necessary and incidental thereto, including mechanical or structural repairs to automobiles or their parts, and ordinary repairs of buildings on the premises and the mechanical equipment thereof.

(*b*) The ownership, maintenance or use of any automobile for all purposes in connection with the above-described operations, and also for pleasure use, but excluding the renting or livery use of any automobile or the carrying of passengers or property for a consideration.

Paragraphs (1), (2), (3) and (4) of the agreements of the policy in respect to sections A and B shall apply thereto.

Paragraph (5) of the agreements of the policy in respect to sections A and B is eliminated in its entirety.

It is the contention of the respondent that if Dean is not protected as a result of the elimination of the "omnibus" clause, he is entitled to the benefits of the policy, and that the user of the automobile "for pleasure" not connected with the business of the company is covered by the terms of the endorsement.

With great deference, I cannot agree with these views. The amendment to the policy did not change the insured, which remained the Hibbard Motor Sales Limited. It

merely states that section A dealing with legal liability for bodily injury or death, and section B, dealing with legal liability for damage to property, found in the policy, shall apply in the way mentioned in the endorsement. That is to say, that the appellants will indemnify the insured for bodily injuries caused by the

> ownership, maintenance or use of any automobile for all purposes in connection with the above described operations, and also for "pleasure use."

The extent of the liability of the insurer is defined and ascertained in a more detailed manner, but the definition of "insured" is in no way enlarged, and the words "pleasure use" cannot have the effect of re-establishing the "omnibus" clause which is eliminated. The policy as amended does not say that all persons driving an automobile belonging to the insured for "pleasure use" are protected by its terms. It says that the insured, the Hibbard Motor Sales Limited, are entitled to be indemnified when one of their automobiles is used for "pleasure", in such a way that their liability is involved.

And it is far from impossible to imagine a case, where the insured would be held liable, as a consequence of an accident while one of their automobiles is used for "pleasure", in the same way as it would, if the automobile were being operated for purposes connected with the business of the company. But in both cases, the insured must have been obligated to pay by reason of the liability imposed by law for damages because of bodily injury or damage to property of others.

In the present case, it is not the insured, but Dean, who has been obligated to pay. The judgment is against him personally, and as he is not the insured, the appellants are not liable.

The appeal should be allowed with costs throughout.

Appeal allowed with costs.

Solicitors for the appellants: *Hackett, Mulvena, Foster, Hackett & Hannen.*

Solicitor for the respondent: *R. F. Stockwell.*

1943
*Nov. 1, 2.
1944
*Feb. 1.

THE LONDON & LANCASHIRE GUARANTEE & ACCIDENT COMPANY OF CANADA (PLAINTIFF) ..... APPELLANT;

AND

LA COMPAGNIE F. X. DROLET (DEFENDANT) ..... RESPONDENT.

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

Negligence—Elevator—Sudden fall from upper floor—Injury to passengers—Damages paid by insurer of owner—Claim by insurer, under subrogation, against contractor who installed elevator—Liability resulting from offence or quasi-offence—Probable failure of safety blocks—Blocks made of cast iron—Expert evidence such material used at time of construction—Whether forged steel should have been employed—Quaere as to liability of owner of building—Certificate of inspection—Statement therein that elevator was in good order—Duties of inspector—Failure to mention kind of material of safety blocks—Whether in certain cases certificate should mention improvements since date of construction.

On February 24, 1938, one of the elevators in use in the Hôpital du St-Sacrement, at Quebec, fell from the second floor of the building to the bottom of the elevator pit, causing injuries to a number of passengers. Under the terms of its insurance policy with the hospital, the appellant company made a settlement of the claims filed by the injured persons, and disbursed a total sum of $7,453.48 which included the costs of repairs to the elevator, for which sum the appellant took subrogation from its assured and the injured persons. The appellant company then brought an action to recover that amount against both the general contractor for the building of the hospital and the present company respondent, which under a sub-contract had built and installed in 1926 the elevator; but the appellant company proceeded only against the latter. As there could not be any contractual fault of the respondent, the action had to proceed on the basis of its delictual or quasi-delictual responsibility, and the burden of proof was on the appellant. The precise cause of the failure of the elevator, the cause of its fall, has not been clearly demonstrated; but the injuries to its passengers were probably brought about by the failure of the brake appliance consisting of safety blocks, with which the elevator was equipped, to arrest the descent of the elevator and their rupture in the emergency which arose at the time of its fall. The main ground raised by the appellant was that the respondent furnished safety blocks made of cast iron, alleged to be a defective material and too weak to stand a violent shock, while such appliances should, in accordance with good practice, have been fabricated of cast or forged steel, thus effecting more security. The other ground of appeal was that, for many years, periodical inspections of the equipment were made by the respondent company, and, on the very day of the accident, an inspection had been made by an employee of the respondent and, as in previous occasions, a certificate was given to the

*PRESENT:—Rinfret, Davis, Kerwin, Taschereau and Rand JJ.

appellant company attesting that the elevator was in good order. The trial judge maintained the appellants' action, but the appellate court reversed that judgment, holding that the evidence of the expert witnesses, as to the propriety or impropriety of using cast iron at the time the elevator was constructed from the point of view of safety, was contradictory and conflicting and permitted of no definite conclusion upon the point.

Held, affirming the judgment appealed from (Q.R. [1943] K.B. 511), that, under the circumstances of this case, the respondent company was not liable. The result from the evidence of the expert witnesses, although somewhat contradictory, is to the effect that, at the time the elevator was built and installed, safety blocks of either cast iron or forged steel were used by experienced and competent contractors and were both giving entire satisfaction. So, at that time, the respondent company was at liberty to choose between two methods of construction then usually employed by leading men of art, more so for an elevator as the one in this case, and there has been neither imprudence nor negligence on the part of the respondent company to have adopted one of these methods rather than the other, i.e. to have given preference to cast iron safety blocks.

Quaere whether, if the action for damages had been brought against the hospital, owner of the building, the same conclusion would have been arrived at when determining the liability of the hospital, i.e. whether the hospital, as owner of the elevator, may be held to be bound to modify its construction along with the modern improvements made from time to time for the safety of the users of the elevator.

Held, further, that the respondent company was not liable on the ground that the certificate of inspection ought to have contained a statement that the safety blocks were of cast iron or did not mention improvements made since the construction of the elevator. The duties of the inspector were to verify, as a prudent man would do, the condition of the elevator and to report any defects which may imperil the safety of the passengers. Under the circumstances of this case, to ask more from the inspector and to exact from him more than a reasonable competency and the care of a prudent man, would be tantamount to constitute him a warrantor or a re-insurer of the appellant company. Rand J. *dubitante.*

Per Rand J.: The inspection and certification may, under certain circumstances, extend to features of construction, and the inspection is not necessarily that of the machine or thing as it is merely. The scope of the duty of an inspector is one which, in the absence of express terms, is to be gathered from the circumstances of its being undertaken; but *quaere,* whether, in the ordinary case, an inspection should not require disclosure of a defect in design or material which was or should have been apparent to the inspector and which, since construction, experience has shown to be hazardous, and general and approved practice has condemned.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), reversing the judgment of the Superior Court, Verret J., and dismissing the appellant company's action.

(1) Q.R. [1943] K.B. 511.

1944

THE LONDON & LANCASHIRE GUARANTEE & ACCIDENT CO. OF CANADA v. LA CIE F. X. DROLET.

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

J. P. A. Gravel K.C. and *Wilfrid Desjardins K.C.* for the appellant.

J. A. Gagné K.C. and *André Taschereau K.C.* for the respondent.

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

TASCHEREAU J.—Il s'agit dans la présente cause d'une réclamation de l'appelante contre l'intimée au montant de $7,453.48.

Le 24 février 1938, à l'Hôpital du St-Sacrement, dans la cité de Québec, un ascenseur est tombé, blessant plus ou moins gravement les onze personnes qui y avaient pris place. L'appelante, assureur de l'hôpital, paya aux victimes les dommages soufferts, obtint des reçus avec subrogation contre les personnes qu'elle croyait responsables de l'accident, et institua la présente action contre C. Emile Morissette Ltée et F. X. Drolet Ltée.

La première de ces deux compagnies avait obtenu le contrat pour la construction de l'hôpital, en 1925, mais confia à l'intimée le soin d'installer les ascenseurs, et en particulier celui qui fait l'objet de ce litige. L'appelante procéda seulement contre l'intimée, et la Cour Supérieure a accueilli son action, mais la cour d'appel l'a unanimement rejetée.

Les causes qui ont déterminé cet accident ne sont pas clairement expliquées. La preuve révèle que cet ascenseur était retenu à la partie supérieure du puits par un câble qui s'enroulait sur un cylindre, où étaient pratiquées des cavitées destinées à prévenir tout glissement. Une hypothèse est à l'effet que, par suite de l'usure de ces cavités, le câble a glissé, permettant ainsi la chute de l'ascenseur.

Mais ce n'est pas pour cette raison que l'appelante prétend que la responsabilité de l'intimée est engagée. De chaque côté de l'ascenseur, se trouvaient des freins, appelés "blocs ds sécurité" destinés à l'immobiliser dans le puits, au cas de bris ou de défaut de mécanisme. Or, ce sont ces appareils qui dans l'occurrence se sont cassés parce qu'ils auraient été d'un matériel défectueux, trop faible pour supporter un choc de cette violence. C'était de la fonte

qu'on avait employée; on prétend que l'acier eût offert plus de sécurité. C'est la position prise par l'appelante dans son plaidoyer.

Cette action, dirigée contre le constructeur, repose en premier lieu sur l'article 1053 C.C. (Nous verrons plus tard le second motif invoqué par l'appelante.)

Il n'y a aucune relation contractuelle entre les parties qui sont devant cette Cour, et pour que la responsabilité de la défenderesse soit engagée, il est donc nécessaire qu'elle se soit rendue coupable d'un délit ou d'un quasi-délit. Il faut trouver dans sa conduite l'élément générateur de la responsabilité, la faute, que l'appelante a indiscutablement le fardeau de prouver. Le simple fait dommageable du bris ne peut engendrer la faute; il faut aussi un fait fautif, et ce fait n'aura ce caractère que s'il est le résultat de l'imprudence, de la négligence, ou de l'inhabileté de l'intimée.

L'appelante l'a bien compris. Aussi, a-t-elle tenté d'établir cette faute, et de démontrer par des gens du métier que la fonte est un métal cassant, moins apte que l'acier à résister à la violence d'un choc.

Comme dans la plupart des causes de cette nature, la preuve est contradictoire, mais il ressort cependant des témoignages que si certains manufacturiers ont employé l'acier dans la fabrication de ces blocs, d'autres non moins expérimentés, étaient satisfaits de la fonte, qui d'après eux, donnait entière satisfaction. C'est ce que nous disent plusieurs témoins dont Arthur Langevin, qui a une expérience de 33 ans dans l'installation des ascenseurs, et qui sur ce point est corroboré par Frédérick Nöel Jodry, Louis Leclerc, etc. D'autres témoins émettent l'opinion que malgré que la résistance de la fonte soit moindre que celle de l'acier, cette déficience est compensée par le fait que les blocs de fonte sont plus lourds et plus gros que les autres.

Quoi qu'il en soit, il semble, maintenant que les ascenseurs modernes dans les grands édifices atteignent une vitesse de près de 1,000 pieds à la minute, que l'acier plus résistant est préférable à la fonte, et qu'il a des propriétés que l'autre n'a pas. Mais il est également vrai qu'en 1925, époque de l'installation, la fonte était employée par des constructeurs réputés, dans une substantielle proportion des cas. L'ascenseur qui est tombé, a été construit il y a au-delà de 15 ans, et sa vitesse maxima ne devait être que

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Taschereau J.

120 pieds à la minute. A cette date, l'intimée avait donc à choisir entre deux méthodes habituellement employées par les hommes de l'art, particulièrement pour les ascenseurs de ce genre. Est-ce une imprudence ou une négligence d'avoir adopté l'une de ces méthodes plutôt que l'autre, d'avoir préféré la fonte à l'acier? Je ne le crois pas.

La règle sur ce point est bien connue. Elle a été affirmée maintes fois par les tribunaux de la province de Québec et résumée récemment par la cour d'appel, dans la cause de *Bouillon* v. *Poiré* (1). C'est que le praticien ou le manufacturier n'est pas tenu d'employer exclusivement le moyen ou l'instrument qui est réputé le meilleur, mais qu'il peut employer le moyen, le matériel ou l'instrument couramment employé dans des conditions identiques. Et, ajoute M. le juge Dorion:

> Dans ces matières où le progrès de la science est constant, et produit des changements qui ne triomphent définitivement qu'après de longues années d'expérimentation, il n'y a rien d'absolu, et tout se réduit aux règles de la prudence ordinaire.

Le Conseil Privé a aussi posé la même règle dans une cause où se présentait également une question de responsabilité, et où l'on voit, dans le cas qui nous occupe, la similitude des principes du droit commun et du code civil. (*Vancouver General Hospital* v. *McDaniel et al.* (2).) Parlant pour le comité judiciaire, Lord Alness s'exprime ainsi:

> A defendant charged with negligence can clear his feet, if he shows that he has acted in accord with general and approved practice.

(Voir aussi *Higgins* v. *Comox Logging and Railway Co.* (3).)

Il est certain que ce qui n'était pas une faute autrefois peut le devenir aujourd'hui, maintenant que l'homme découvre des moyens nouveaux qu'il met à la disposition de ses semblables. Certaines méthodes employées dans le passé par nos devanciers nous paraissent désuètes, et les découvertes à venir, en nous dévoilant de nouvelles notions scientifiques, modifieront forcément plusieurs de nos conceptions actuelles. Ainsi, nous pouvons maintenant au moyen d'appareils précis soumettre les métaux à de hautes pressions pour éprouver leur résistibilité, et il nous est même permis, à l'aide des rayons-X, de scruter l'intérieur

(1) (1937) Q.R. 63 K.B. 1, at 12. (2) (1934) 162 Law Times R. 56.
(3) [1927] S.C.R. 359.

de la matière pour en déceler les faiblesses et prévenir les catastrophes. Autrefois, on ignorait ces méthodes modernes, et en se servant des moyens et matériaux connus et employés dans le temps, on ne commettait certes pas une négligence.

Cette conclusion à laquelle j'arrive pourrait peut-être être modifiée s'il s'agissait de déterminer la responsabilité de l'hôpital. Nous pourrions nous demander alors jusqu'à quel point le propriétaire est tenu de munir son ascenseur des perfectionnements modernes de nature à assurer la sécurité de ceux qui l'emploient. Mais nous n'avons pas à juger ici la cause de l'hôpital. C'est contre le constructeur que l'action est dirigée par des tiers, à qui il incombe de prouver la faute, et celle-ci ne peut être établie que par la preuve de négligence au moment de la construction et de l'installation. Je crois que cette négligence n'a pas été établie, que l'intimée a agi avec prudence, comme tout homme raisonnable aurait agi en employant dans le temps, un matériel habituellement employé dans des cas identiques, et qu'il ne pouvait pas raisonnablement prévoir ce qui est arrivé.

L'appelante base également sa réclamation sur le fait que depuis de nombreuses années, l'intimée, pour la somme de $1.50, lui fournissait périodiquement un certificat d'inspection attestant que l'ascenseur était en bonne condition. Le jour même de l'accident, l'inspection avait été faite par Arthur Tardif, employé de l'intimée, et comme précédemment, il avait donné un certificat à l'effet que ledit ascenseur n'avait rien de défectueux. Il est vrai que ce certificat n'a été délivré qu'après l'accident, mais il était semblable aux autres donnés antérieurement, et il y a lieu de présumer qu'ils sont légalement devant la cour.

Dans sa déclaration, l'appelante allègue que la cause de l'accident est l'usure des cavités qui a déterminé le glissement des câbles. Tardif explique qu'il a vérifié si oui ou non il y avait un tel glissement, et il indique même la méthode employée pour faire cette constatation. La preuve révèle qu'au moment de l'inspection, le câble ne glissait pas sur le cylindre; et d'ailleurs, il n'est nullement prouvé que ce soit là la cause première de cet accident qui demeure dans le domaine des conjectures.

Cependant, dans son factum, l'appelante prétend que Tardif aurait dû lui signaler dans ses certificats que les "blocs de sécurité" étaient en fonte au lieu d'être en acier.

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Je ne puis partager cette prétention. L'inspecteur Tardif n'avait pas d'autre obligation que de vérifier, en homme prudent, l'état de l'ascenseur, son mécanisme, son fonctionnement et de rapporter les défectuosités qu'il pourrait y rencontrer et de nature à mettre en péril la sécurité des passagers. Dans les circonstances de cette cause, demander davantage à cet inspecteur, et exiger de lui plus qu'une habileté raisonnable et l'attention d'un homme prudent dans l'exercise de ses devoirs, serait faire de lui un garant ou un ré-assureur de l'appelante. Je ne crois pas que le défaut de signaler les améliorations ou les découvertes des hommes de l'art, incorporées aux ascenseurs plus modernes, soit de nature à engager sa responsabilité ou celle de son employeur. C'est l'ascenseur tel que construit que Tardif devait inspecter.

Je crois donc que ce second motif invoqué par l'appelante n'est pas fondé, et qu'en conséquence le présent appel doit être rejeté avec dépens.

DAVIS J.—On February 24th, 1938, at about 9.30 p.m., one of the elevators in use in the hospital called "Hôpital du St. Sacrement" in the city of Quebec, while carrying eleven passengers therein, fell from the second floor of the building to the bottom of the elevator pit, causing injuries to the passengers. The appellant, an insurance company, seeks to recover from the respondent, a manufacturer, the amount of damages sustained as a result of the accident. Without delaying to refer to the appellant's status as plaintiff and the somewhat unusual form of the action and several difficult subsidiary questions of law raised in the action and argued before us, one question is fundamental to the whole action, as will appear from a short recital of the facts.

The accident occurred, as stated, in 1938. The hospital had been built in 1924 and 1925 under a contract signed in August, 1924. There were to be four elevators in the hospital and the general contractor gave a sub-contract for the elevators to the respondent, the Drolet company, which company as sub-contractor built and installed the four elevators during the year 1925. There was no direct contract between the hospital and the sub-contractor. The elevators were examined and tested by the hospital authorities at the time of their installation and were in operation

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Davis J.

for about a year before they were finally accepted. These elevators were operated without interruption and satisfactorily from about the time of their installation until the day of the accident—a period of some twelve or thirteen years.

This action seeks to hold the sub-contractor, the Drolet Company, responsible financially for the personal injuries suffered and expenses incurred by the passengers who were injured and for the expenses of the hospital itself for repairs to the elevator. The total sum sued for is $7,453.48. Judgment was awarded the appellant for this sum by the Superior Court of Quebec but was unanimously reversed on appeal and the action dismissed by the Court of King's Bench (Appeal Side).

No proof is given of the cause of the sudden collapse of the elevator. All that appears to be known is that visitors in the hospital who were about to leave at the hour of the accident on the evening in question, had entered the elevator to descend from the second to the first floor when, all of a sudden, the cage fell to the bottom of the pit. The elevator was what is known as a two-system operating elevator. It could be operated, as it appears to have been, in the daytime by an employee of the hospital, and in the evenings and at off hours the passengers themselves could operate it automatically by pressing a button, a self-serving device.

All elevators appear to have some brake appliance to catch and hold the cage if it should fall beyond the control of the person at the time in charge. The common form of brake appliance appears to be safety blocks such as were installed with this elevator. These safety blocks, however, never come into play, are not called upon to perform their function, unless and until the elevator in some way gets out of control. It is suggested that one thing that may happen at times is that the cables which pass over wheels at the roof of the building or at the top of the elevator machinery get out of position and throw the cage of the elevator out of alignment. One may be a little surprised to learn that for the twelve or thirteen years this elevator was continually used, and at times by strangers attempting to work it themselves without the presence of an elevator man, nothing should have happened until the evening of the accident in question. As I have already said, there is really no explanation of what caused the elevator to drop that evening; but it did.

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Davis J.

The dropping of the elevator brought into play, then, what are known as the safety blocks as a brake appliance. They appear to work automatically if and when the elevator gets out of control. On this occasion they failed to work effectively because they broke and did not operate to catch and hold the falling cage.

I should have thought that eleven passengers in the elevator at the time might have put an unnecessary strain upon its equipment, but that point, like several others which appeared to me to be of some importance, was not advanced. It seems to be admitted that the estimated weight of the eleven passengers was within the capacity of the elevator. At any rate the safety blocks broke and undoubtedly the injuries to the passengers were directly attributable to the fall of the elevator due to the failure of the brake appliance to work. I should have mentioned that wherever the safety blocks are located there are two of them opposite each other. I presume that if one broke, the strain on the other would break that other also; in this case at any rate both of them broke. In the very nature of things it does not appear to be known how often, if at all, the elevator had momentarily got out of control and been held by these safety blocks. It has been assumed that it never happened before.

It seems to me to be a far cry to call upon the sub-contractor who manufactured and installed this elevator in 1925 to make good all the damages sustained by the passengers as well as by the hospital itself. It is admitted by counsel for the appellant that the action lies solely within article 1053 of the civil code. That means that fault must be established against the defendant—a fault that caused the accident and to which the damages are directly attributable.

What then is the fault set up against the defendant? Based on the theory that if the safety blocks had been made out of cast steel instead of out of cast iron they would have stood the strain and the accident would not have happened, it is contended that the defendant was at fault in 1925 when it manufactured and installed this elevator with safety blocks made out of cast iron instead of out of cast steel. It is said that because cast iron is more brittle and breaks more easily than cast steel which has greater strength and elasticity, cast steel is the proper

material for use in the safety blocks. That theory, until recently at any rate, has not become an established practice. In the development of the art of the manufacture of elevators the evidence shows, I think, that by 1938 it had become pretty fairly agreed in the Canadian trade by engineers and experts in the business that cast steel should be used rather than cast iron in at least high-speed elevators, which have a speed of from 600 to 900 feet per minute; this elevator was low speed, not exceeding 120 feet per minute. But that does not establish fault back in 1925. In fact the evidence shows that some manufacturers are still using cast iron instead of cast steel and that at the time of the manufacture and installation of this particular elevator it was quite common practice in Canada to make the safety blocks of cast iron. Apart from other difficulties which arise in seeking to hold the manufacturer liable for an alleged imperfection in an article it manufactured and installed twelve or thirteen years ago and which meantime has been out of his control and has been in daily and continuous use by all sorts of people, the fundamental fact on the evidence is, as I see it, that proof of actionable fault on the part of the respondent has not been made out in this case. The safety blocks had been made according to the rules of the art and with material which at the time was generally accepted in Canada as sufficient. If that is the correct view, then all the other matters which were debated and argued before us at considerable length and which raised many difficult questions of law, such as assignment of claims, subrogation, prescription, sufficiency of proof of damages, etc., fail to arise for consideration.

The Court of King's Bench (Appeal Side) dismissed the action with costs and I should dismiss with costs this appeal from that judgment.

RAND J.—With some doubt, I concur in dismissing the appeal.

I desire to reserve my opinion, however, upon the view that the inspection and certification could, under no circumstances, extend to features of construction. I am not satisfied that the inspection is necessarily that of the machine or thing as it is merely. The scope of the duty is one which, in the absence of express terms, is to be

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Rand J.

gathered from the circumstances of its being undertaken but that, in the ordinary case, it could not require disclosure of a defect in design or material which is or should be apparent to the inspector and which, since construction, experience has shown to be hazardous, and general and approved practice has condemned, is a proposition from which I must withhold assent.

Appeal dismissed with costs.

Solicitors for the appellant: *Demers & Desjardins.*

Solicitors for the respondent: *St-Laurent, Gagné & Taschereau.*

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*Oct.13, 14.

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*Feb. 1.

HIGHWOOD-SARCEE OILS LIMITED....APPELLANT;

AND

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Income Tax—Income War Tax Act (Dom.)—Computing amount to be assessed—Deductions claimed for losses—Nature of business carried on—Capital losses—Whether investments were of fixed or circulating capital.

Appellant claimed that in computing the amount of its assessment for income tax under the Dominion *Income War Tax Act* certain losses which it suffered should have been allowed as deductions; that in the taxation year in question and previously it was carrying on the business of financing other concerns engaged in or interested in the development of prospective oil properties and in trading and dealing in oil lands, leases, oil stocks, etc., and in the taxation year in question it was not in receipt of income within the meaning of said Act but made a loss. Respondent claimed that appellant's business in respect of which it claimed the deductions was the development of oil or gas properties by the investment of its capital for said purpose, and for its benefit of a share in the production of such properties as gains or profits to it from such outlay of capital, and that no deduction could be allowed for such investments or outlay by virtue of s. 6 (1) (*b*) of the Act.

Held (affirming judgment of Maclean J., [1942] Ex.C.R. 56): The deductions claimed for by appellant should not be allowed.

Per Rinfret, Davis, Hudson and Taschereau JJ.: On the evidence it could not be said that appellant carried on the business of buying and selling

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

oil shares or oil properties; it acquired shares and properties but there was no record of its having sold any; the only reasonable inference from the method of conducting its business was that its purpose was to acquire oil properties and hold them with the hope that ultimately they might become producing wells, as was the case in the particular enterprise which resulted in profits; its real business was aptly described as "oil operators"; its moneys invested in oil shares and its loans made were in their nature capital investments; and were investments in the nature of fixed, and not of circulating, capital.

Per Kerwin J.: On the facts, what appellant sought to deduct from its admitted income was a loss of capital, and that was prohibited by s. 6 (1) (*b*) of the Act.

APPEAL from the judgment of Maclean J., late President of the Exchequer Court of Canada (1), dismissing the appellant's appeal from the decision of the Minister of National Revenue affirming an assessment of the appellant for income tax under the *Income War Tax Act* (R.S.C. 1927, c. 97, and amendments) in respect of the appellant's fiscal year ended June 30, 1935, and disallowing as deductions certain losses which the appellant claimed it was entitled to set off against profits. The appellant claimed that in the taxation year in question and in previous years it was carrying on the business of financing other concerns engaged in or interested in the development of prospective oil properties and in trading and dealing in oil lands, leases, oil stocks, and other properties and securities, and that in the taxation year in question it was not in receipt of income within the meaning of the said Act, but on the contrary made a loss in the said taxation period; that it had been assessed on the basis which had been applied to the taxation of companies engaged in the development of prospective oil properties and that said basis of assessment was not applicable to the business which it had carried on. The respondent claimed that the business of the appellant in respect of which it claimed the deductions was the development of oil or gas properties by the investment of its capital for the said purpose, and for the benefit of the appellant of a share in the production of such properties as gains or profit to the appellant from such outlay of capital, and no deduction could be allowed for such investments or outlay by virtue of s. 6 (1) (*b*) of said Act; that the basis of assessment on which the appellant had been assessed for income tax pur-

(1) [1942] Ex. C.R. 56; [1942] 3 D.L.R. 38.

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poses for the said taxation period was the basis applicable to the business carried on by the appellant, according to its income tax return.

H. S. Patterson K.C. for the appellant.

R. Forsyth K.C. and *A. A. McGrory* for the respondent.

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

HUDSON J.—This is an appeal from a judgment of the late President of the Exchequer Court (1), which dismissed with costs an appeal by the appellant against its assessment for income tax for the taxation year 1935.

The appellant filed a return for the period in question showing a net loss, but the Minister adjusted the income and declared that the appellant had taxable income of $30,254.94 for the period in question. This amount was arrived at after making certain customary allowances and disallowing a sum of $74,011.28, the amount of investments written off by the appellant's return. The decision of the Minister was that the

> investments in shares of and advances to other companies and persons were not expenditures of the taxpayer wholly, exclusively and necessarily laid out or expended for the purpose of earning its income, but were in fact capital in their nature, specifically disallowed for income tax purposes under the provisions of section 6 of the Act.

The appellant company was incorporated by letters patent and given a wide range of powers, only two of which need be referred to. They are:

> (*a*) 1. To search for and recover and win from the earth petroleum, natural gas, oil, salt, metals, minerals and mineral substances of all kinds, and to that end to explore, prospect, mine, quarry, bore, sink wells, construct works or otherwise proceed as may be necessary to produce, manufacture, purchase, acquire, refine, smelt, store, distribute, sell, dispose of and deal in petroleum, natural gas, oil, salt, chemicals, * * *
>
> (*k*) To purchase, underwrite, guarantee the principal and interest of, subscribe for and otherwise acquire and hold and vote upon the shares, debentures, debenture stock, * * * of any company * * *

The appellant, by its income tax return, stated the nature of its business to be that of "oil operators".

The transactions giving rise to the profit were as stated by the learned President:

> On July 20, 1933, a written agreement was entered into between T. O. Renner, S. J. Davies and C. H. Snyder, therein called "the

(1) [1942] Ex. C.R. 56; [1942] 3 D.L.R. 38.

Operators", of the one part, and the appellant company, therein called "the Company", of the other part. This agreement may be summarized by saying that the Company made available to the Operators, upon terms and conditions, $60,000 for the purpose of drilling a well on a lease which the Operators had secured from the trustee of a bankrupt. The Company was to be paid back the said $60,000 out of production and to receive a 65 per cent. interest in the well, its production and equipment. There are clauses in the agreement providing for the payment of prior charges, the termination of the agreement, and so on, but these provisions are unimportant. It is to be noted, however, that the Operators were to assign to the Company an undivided 65 per cent. interest in the lease. This venture proved successful and a producing well resulted which became known as Highwood-Sarcee Well No. 1. The lease also provided for participation by the Operators and the Company in drilling further wells if desired.

On these facts the learned President held that the profit arising on this transaction was income.

The transactions giving rise to losses which the appellant claims the right to set off appeared in the balance sheet of the company as of June 30, 1935, as follows:

Investments and Advances written off—		
Pine Hill Petroleums Limited	$56,511.28	
Western Alberta Oils Limited	15,000.00	
Sheldon Burden of Canada Limited	2,500.00	74,011.28

These transactions arose out of the purchase of shares in two other companies engaged in oil development and in loans to these companies or to persons connected with their operations. They were held by the learned President to be in the nature of capital investment and, for that reason, the claim to set off these losses was disallowed.

It appears from the evidence that the appellant did not carry on the business of buying and selling oil shares or oil properties. They acquired shares and properties but there is no record of their having sold any. The only reasonable inference from the method of conducting their business was that their purpose was to acquire these properties and to hold them with the hope that ultimately they might become producing wells, as was done by them in the case of the particular enterprise which resulted in profits. The real business of the company is, I think, aptly described in their return as "oil operators".

The argument pressed most strongly by Mr. Patterson is that the transactions in the case of the losses were essentially of the same character as those in the profitable transactions and that if the profits were taxable in the one, losses in the others might properly be set off. He con-

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tended that the activities of the company were analogous to those of an insurance company which did marine, fire and life insurance and lost in one branch and made profits in the other, and it was held that the business of all should be read as one for the purpose of ascertaining taxable income.

Hudson J.

It could not, I think, on the facts be successfully contended that the moneys invested in these shares and the loans made were not in their nature capital investments, and the only point that has caused me some difficulty is whether or not this capital investment could be considered as in the nature of circulating capital and not fixed.

The illustrations are those of manufacturers having purchased raw material and of merchants trading in goods which they got for resale, or loans made by a brewery company to its customers. In each of these cases capital moneys are used and yet losses were allowed.

In the present case the shares were not acquired to be turned over like a merchant's stock of goods, but to be held with a view of future profit from development. The loans were not made for the purpose of furthering the day to day business of the company. For these reasons, I think the investments were in their nature of fixed and not of circulating capital.

The appeal should be dismissed with costs.

KERWIN J.—On the facts of this case, what the appellant seeks to deduct from its admitted income is a loss of capital. That is prohibited by the provisions of section 6 (*b*) of the *Income War Tax Act*. The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Patterson, Hobbs & Patterson.*

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

VINCENT DAIGLE (PLAINTIFF)..... APPELLANT;

AND

ROSE ALBERT (DEFENDANT)..... RESPONDENT.

1943

*Oct. 25.
*Nov. 8.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK, APPEAL DIVISION

Motor vehicles—Negligence—Plaintiff, after getting off standing vehicle and starting to cross road, colliding with passing motor car driven by defendant, who had not sounded horn—Suit for damages—Court holding, in the circumstances of the case, that plaintiff's damages were caused by the fault of both parties and that (under The Contributory Negligence Act, N.B.) damages should be apportioned equally between them.

APPEAL by the plaintiff from the judgment of the Supreme Court of New Brunswick, Appeal Division (1), reversing (Richards J. dissenting in part) the judgment of LeBlanc J. given in favour of the plaintiff for damages for injuries suffered by him by reason of a collision between him and a motor car driven by the defendant who was passing, without having sounded horn, a standing motor vehicle from which the plaintiff had alighted and was proceeding to cross the road. The last-mentioned vehicle was a tractor to which a trailer, on which was a load of straw, was attached.

P. J. Hughes K.C. for the appellant.

J. F. H. Teed K.C. for the respondent.

THE COURT.—We are all of the opinion that it was by the fault of both parties to the action that the plaintiff's damages were caused and that the liability to make good the damages should be apportioned, by virtue of the provisions of *The Contributory Negligence Act* of New Brunswick, equally between them.

We refrain from expressing any view upon the interpretation, or the application to the facts of this particular case, of sections 38 and 42 of *The Motor Vehicle Act* of New Brunswick which gave rise to considerable divergence of opinion among the judges in the Courts below. We rest our judgment upon the failure by both parties in the circumstances of the case to use reasonable care.

*PRESENT:—Davis, Kerwin, Hudson, Taschereau and Rand JJ.

(1) 16 M.P.R. 532; [1943] 2 D.L.R. 764.

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DAIGLE v. ALBERT.

The Court

The appeal is allowed and judgment directed to be entered in favour of the plaintiff (appellant) against the defendant (respondent) in the sum of $2,453.18, being one-half the amount of damages assessed by the trial judge. The appellant shall have one-half of the costs of the action and trial, and all the costs of his appeal to this Court. The respondent shall have her costs of her appeal to the Appeal Division of the Supreme Court of New Brunswick.

Appeal allowed with costs.

Solicitor for the appellant: *P. J. Hughes.*

Solicitor for the respondent: *A. M. Chamberland.*

1943

*Oct. 18, 19.

1944

*Feb. 1.

CANADIAN PACIFIC RAILWAY COMPANY (DEFENDANT) ..... APPELLANT;

AND

WASYL KIZLYK IN HIS OWN BEHALF AND ALSO AS AND BEING THE ADMINISTRATOR OF THE ESTATE AND EFFECTS OF HIS DAUGHTER MARY KIZLYK, DECEASED (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Negligence—Railways—Child, while passing between cars on spur track in railway grounds, crushed by cars being moved by switching operations —Railway company sued for damages—Action dismissed at trial on motion for non-suit—New trial ordered on appeal—Whether there were questions which should have been submitted to jury—Railway company's duty to child—Whether child a trespasser.

At the end of a spur track in defendant's grounds at a flag station on defendant's line of railway, a railway car, acquired and converted into a school-room by the Department of Education of the Province of Manitoba, was, under an agreement with defendant, located and used as a school for the settlement in the vicinity. A barricade was erected on the spur track so that no railway operations thereon could extend to the track where the school car rested. For about two months before the accident in question a line of box cars had been on the spur track, with a gap of 1½ or 2 feet between the two cars thereof nearest the school car, the nearer of said two cars being about 90 or 94 feet from the steps of the school car. A school girl, 12 years old, who, with some companions, had left the school earlier than usual (as examinations were being held), went from the school along a

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

certain used way beside the spur track but left the way and proceeded to go through the said gap and was crushed by the coupling of the cars by a switching engine operating at the farther end of the line of cars, and died from her injuries. The children had no warning of movement of the cars. Defendant's employees did not know that children were outside the school and near the train. There were facts in evidence, discussed in the judgments, as to previous warnings to children with regard to the railway tracks and cars, as to ways used or available for going home from school, as to distances and directions, and other circumstances.

Defendant was sued for damages. The trial Judge, on motion for nonsuit, held that the girl was a trespasser in entering said gap, took the case from the jury and dismissed the action. The Court of Appeal for Manitoba, 51 Man. R. 33, ordered a new trial. Defendant appealed.

Held (Kerwin and Rand JJ. dissenting): Defendant's appeal from the order for a new trial should be dismissed. On the evidence, there were questions which should have been submitted to the jury.

Discussion as to duty to trespassers, and as to whether the girl should be considered a trespasser under the circumstances.

Per Davis J.: Whether a person is really a trespasser is a question of fact (*Grand Trunk Ry. Co.* v. *Barnett,* [1911] A.C. 361, at 370) and was for the jury on a proper direction. The jury should have been asked whether on the evidence they thought that defendant knew or should have known of the likelihood of school children being about the cars at the time, and, if the jury thought so, then, was there a neglect of duty to the girl on defendant's part that caused the accident.

Per Kerwin and Rand JJ., dissenting: The trial Judge was right in taking the case from the jury and dismissing the action, as there was no evidence to submit to the jury upon which they might return a verdict that would justify a judgment against defendant. A finding that the girl was upon the tracks by defendant's permission would have been perverse, there being no evidence to justify it. It was not a case where defendant's employees knew or should be held to have known or expected at the time in question that children were or were likely to be on or about the cars. There was no allurement. On its own property defendant was performing a normal and usual operation. The girl was a trespasser in entering the gap, and, putting defendant's duty towards her as such on the highest ground, it did nothing in breach of such duty. (*Canadian Pacific Ry. Co.* v. *Anderson,* [1936] S.C.R. 200, at 203, 208, cited).

APPEAL by the defendant from the judgment of the Court of Appeal for Manitoba (1) allowing (Trueman J.A. dissenting) the plaintiff's appeal from the judgment of Donovan J. at trial.

The plaintiff's daughter, twelve years of age, was crushed while passing between two box-cars, about 1½ or two feet apart, at the end of a line of box-cars on a spur track of the

(1) 51 Man. R. 33; [1943] 2 W.W.R. 1; [1943] 3 D.L.R. 194.

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defendant in its grounds at Darwin station, Manitoba, a flag station on the defendant's railway, and she died from her injuries. While she was passing between the two box-cars as aforesaid the line of cars was moved by a switching engine operating at the farther end of the line of cars. The material facts and circumstances of the case sufficiently appear in the reasons for judgment in this Court now reported.

The action was brought by the plaintiff, in his own behalf and also as the administrator of the estate and effects of his said daughter, against the defendant for damages.

The action was tried before Donovan J. with a jury. On a motion for non-suit, Donovan J. (who held that the child was a trespasser in entering upon the space occupied by the rails and the space in between them) took the case from the jury and dismissed the action. The Court of Appeal set aside the judgment at trial and ordered a new trial (Trueman J.A., dissenting, would have dismissed the appeal). The defendant appealed to this Court.

H. A. V. Green K.C. and *Ian Sinclair* for the appellant.

F. Heap K.C. for the respondent.

The judgment of Rinfret and Hudson JJ. was delivered by

HUDSON J.—The facts are fully set forth in the judgment of Mr. Justice Robson in the court below and by my brother Davis in his judgment, which I have had an opportunity of reading. I shall say no more than to emphasize a few of these facts which, in my mind, should determine the disposition of this appeal.

The children were young. They were bound by law to attend the school. To reach the school car, those whose homes were north of the railway had to cross two main railway tracks and to travel through the railway company's property for several hundred yards. The road through these yards usually travelled by the children in going to and returning from school lay to the south of the side track. For some distance before reaching the school, this roadway was immediately adjacent to the track without any fence or ditch intervening. The two rear cars on the side track with the gap between them had remained in the same position for two months before the accident. It was ad-

mitted by the defendant that there was also available a road or way to the north of the side track which the children might take if so minded and, in that event, it would be necessary for them to cross this side track at some point.

The whole situation was one which demanded great care on the part of the defendant.

There was no negligence in placing the cars on the side track and leaving them there, but the immediate cause of the accident was the movement of these cars. As stated by Lord Justice Scrutton in *Mourton* v. *Poulter* (1):

> The liability of an owner of land to trespassers does not arise where there is on the land a continuing trap, such as that which was considered in a case in the Supreme Court of the United States of an innocent looking pond which contained poisonous matter: *United Zinc and Chemical Co.* v. *Britt* (2). There, as the land remains in the same state, a trespasser must take it as he finds it, and the owner is not bound to warn him. That, however, is a different case from the case in which a man does something which makes a change in the condition of the land, as where he starts a wheel, fells a tree, or sets off a blast when he knows that people are standing near. In each of these cases he owes a duty to these people even though they are trespassers to take care to give them warning.

The gap between the cars here could not be considered a trap while the cars were stationary, but was that so when the cars were put in motion under all of the circumstances here?

In a note with reference to the cases of *Excelsior Wire Rope Co.* v. *Callan* (3), and *Mourton* v. *Poulter* above (4), in 46 L.Q.R. 393, Sir Frederick Pollock says:

> But the kind and amount of warning called for must, in any case, depend on the circumstances, among which the apparent capacity of endangered persons to take care of themselves may have to be counted.

The plaintiff's daughter was not a trespasser when she was on the roadway to the south of and within a foot or two of the spur track, nor would she have been a trespasser on the north side of this track. Must she then be considered as a trespasser when passing from one side to the other under the circumstances here?

The effect of the most recent authoritative decisions is fairly stated in Winfield on Torts, 1937 Ed., at page 607:

(1) [1930] 2 K.B. 183, at 191.
(2) (1922) 258 U.S. 268.
(3) [1930] A.C. 404.
(4) [1930] 2 K.B. 183.

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Hudson J.

The disposition of children of tender years to mischief has given their elders nearly as much trouble in the law Courts as outside them, and the law about dangerous structures has been modified with respect to them in a way which may be thus formulated:

An occupier must take reasonable care to see that children, of whose presence he knows or ought to know or to anticipate and who are too young to appreciate the danger of some attractive object under his control and within his knowledge, are protected against injury from that danger either by warning which is intelligible to them or by some other means.

* * *

The only respect in which a child differs from an adult is that what is reasonably safe for an adult may not be reasonably safe for a child and what is a warning to an adult may be none to a child.

At page 610:

The result of [certain cases referred to] is that if a child is a trespasser, he cannot recover unless the danger were put there expressly to injure him or unless the defendant knows that it is extremely likely that he will be exposed to grave danger.

In my view, there was evidence here sufficient to warrant a submission of the questions of fact to the jury. For this reason, I would dismiss the appeal with costs.

DAVIS J.—The facts of this case are very unusual. Practically all negligence actions turn upon their own facts but this case peculiarly does so. Decisions in other cases on different facts are a very doubtful guide in determining the issue in this appeal.

The action arose out of the unfortunate death of a twelve-year-old schoolgirl who was caught between two box cars of the Canadian Pacific Railway when they were being coupled up. The main defence of the railway company is that the child was a trespasser to whom the railway company was under no duty. The trial judge thought the unfortunate child was a trespasser and took the case from the jury and dismissed the action on a motion for non-suit. The Court of Appeal for Manitoba, Trueman J.A. dissenting, ordered a new trial; the railway company appealed to this Court from that order.

The facts are simple and are really not in dispute, although exceptional in their character. The Department of Education of the Province of Manitoba acquired, we are not told from whom, a railway passenger car and converted it into a schoolroom. The purpose appears to have been to use this school car in deserted parts of the province

as has somewhat recently, I understand, become a practice in the Province of Ontario, of having a school car go from settlement to settlement in the sparsely populated northern sections of the province so as to afford the children of those districts an opportunity to receive some schooling. In this case, whatever the original intention was, the Department of Education decided to leave this particular school car more or less permanently at a definite location, Darwin, there to be used instead of building a schoolhouse. Darwin is a flag station in Manitoba on the main line of the Canadian Pacific Railway running between Winnipeg, Manitoba, and Kenora, Ontario. Trains stop at the station only when flagged to do so; it is not a regular stopping place. There is not even what one could call a village at the location; there are a few houses scattered in the vicinity; it is not an agricultural section of the country but there is some cutting and shipping of timber as cordwood or railway ties and the like. An agreement was made between the Canadian Pacific Railway Company, the School District of Darwin Station and the Minister of Education whereby, for a money consideration, this school car was run down the railway spur track (which runs easterly from a connection on the south side of the main line), to be left permanently within the railway company's station grounds at the end of the spur track.

Some eighteen or twenty children from the neighbourhood appear to have attended school in the railway car. While the doors at one end of the car had been closed up, a door at the other end was left open on the south side of the car for the children to go in and out; children living north of the railway, as the deceased child did, would have to cross both the spur and the main tracks to and from school; there was no fenced-in approach to or exit from the car to or from any public highway. The railway company in its factum admits that "the school car was situated where it was landlocked by property of the company". A good deal was said about a cinder path that ran along the south side of the spur track as being a safe and adequate road available to the children, but it could scarcely be called in any sense a roadway. To that improvised school building—the railway car fitted up as a school—the children of the neighbourhood went day by day and at their recess periods had no other place to play than around the car and about the tracks.

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Davis J.

The most significant fact is that the railway company had left six box cars standing on the same spur track on which the school car was placed. The fifth and sixth cars were standing apart, a distance of a foot and a half or two feet between them. The rear of the sixth car (nearest the school car) was approximately ninety feet from the nearest end of the school car.

These box cars had stood there on the spur track near the school car undisturbed, empty and with the doors open, for a period of some two months before the day of the accident, and it would not be unnatural if the school children had come to regard them as fixtures there. There was evidence that the school children played in and around these cars—playing tag, hide-and-seek, and other children's games. One of the children said in evidence that they would hide "sometimes around the wheels of the box cars and sometimes in the cars". It is in evidence that on different occasions three different foremen of the railway company (one of them a section foreman) warned the children not to play around the cars, but a jury might well take the view that that sort of warning would be ineffective with a lot of school children. That evidence establishes, however, that the railway company knew of the practice of the school children and of the danger inherent in the situation.

On the day of the accident it was not a question of the children playing around the cars. School had been let out a little earlier at the noon hour because they had had some examinations and four of the children were making their way northerly across the tracks in the direction in which their homes lay; and the jury might well have inferred that they were on their way home for their dinner. They proceeded to pass through the open space between the fifth and sixth box cars, but just at the moment that this twelve-year-old girl was going through the gap the cars were suddenly moved by a switching engine up at the front of the six cars and she was caught, in the coupling process, between the fifth and sixth cars and died within a few hours from her injuries. There is no suggestion that there was the slightest warning or notice given that after the cars had stood there for a couple of months they were at that moment to be moved and the two end cars coupled up. With the hindsight of an adult, many explanations

were offered us on behalf of the railway company as to how this child could have crossed the tracks without any harm coming to her—of course it is suggested that there were ninety feet between the end of the school car and the end of the sixth car, and the children might have crossed at that point, or they might have walked alongside the spur track till they got to the front of the six cars and then have crossed. Those are all very easy statements to make after an event. They fail however to take into account the element of human nature and offer little assistance to me on the question so strongly advanced and argued on behalf of the railway, that the child was at the moment and place of the accident a trespasser in the strict legal sense of the word, to whom the railway company owed no duty of warning.

It is said that the railway did not know the child was there at the time. No one suggests that it did; but if the railway company knew that there was the likelihood of the school children being in or about those box cars, I should have no doubt that there was a duty on the railway to see that children were not then about the cars, and if they were, to warn them of the impending movement of the cars.

I do not think the case should have been taken from the jury. Whether a person is really a trespasser is a question of fact, as said in the judgment of the Privy Council in *Grand Trunk Railway Company of Canada* v. *Barnett* (1), and was for the jury on a proper direction. I think the jury should have been asked whether on the evidence they thought the railway company knew or should have known of the likelihood of the school children or some of them being about the box cars at the time and if the jury thought so, then, secondly, was there a neglect of duty on the part of the railway company to the deceased child that caused the accident? The question whether the accident was caused or contributed to by the child's own negligence is, of course, also a question of fact for the jury.

It was strenuously contended by counsel for the railway company that knowledge of likelihood is not sufficient in law; that the person charged with neglect must either have seen the child or at least have known that the child was there. With that contention I do not agree. The

(1) [1911] A.C. 361, at 370.

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Davis J.

American Law Institute has done an invaluable work of legal research, particularly in the field of modern tort problems, and those in English common law jurisdictions are under a heavy debt for its Restatement on Torts. Section 334 states the law thus:

> 334. A possessor of land who knows, or from facts within his knowledge should know, that trespassers constantly intrude upon a limited area thereof, is subject to liability for bodily harm there caused to them by his failure to carry on an activity involving a risk of death or serious bodily harm with reasonable care for their safety.

To much the same effect I take the language of Lord Atkin to be when he said very recently in the House of Lords in *East Suffolk Rivers Catchment Board* v. *Kent* (1):

> * * * every person whether discharging a public duty or not is under a common law obligation to some persons in some circumstances to conduct himself with reasonable care so as not to injure those persons likely to be affected by his want of care.

I am loath to believe that the law of this country will recognize the position of this school child in the special circumstances as only that of a trespasser in the sense in which that word is strictly and technically used in law, to whom no obligation to take care existed.

For the above reasons I think the case should go back to be tried with a jury. That was the order of the Court of Appeal for Manitoba which was appealed from. I should therefore dismiss the appeal with costs.

The judgment of Kerwin and Rand JJ., dissenting, was delivered by

KERWIN J.—My sympathy goes out to the parents of Mary Kislyk, who was killed in the unfortunate occurrence giving rise to these proceedings, but, as Lord Justice Farwell remarked in *Latham* v. *Johnson* (2), "sentiment is a dangerous will-o-the-wisp to take as a guide in the search for legal principles". On the legal principles applicable, the trial judge was right, in my opinion, in taking the case from the jury and dismissing the action brought by the girl's father. He was right in so doing because there was no evidence to submit to the jury upon which they might return a verdict that would justify a judgment against the Railway Company. To demonstrate this

(1) [1941] A.C. 74, at 89. (2) [1913] 1 K.B. 398, at 408.

requires a statement of the evidence, including various distances or measurements which, while put in exact figures, will be understood as only approximate.

By an agreement of December 28th, 1940, the School District of Darwin Station No. 1950, in the Province of Manitoba, was given permission by the Company to place and maintain a railway school car on the easterly one hundred feet of the Company's spur line at Darwin. Darwin is merely a flag station on the through line of railway between Kenora and Winnipeg. There are two main lines of tracks, the east-bound one being north of the west-bound line, and there is a private crossing that runs north and south over both main lines. Ten feet east of the east limit of this crossing is the switch for the spur line, which runs in a general southeasterly direction (including a slight curve) for 760 feet. The spur line is entirely on the Company's property.

In pursuance of the agreement, the school car, 64 feet long, was duly placed at the very end of the spur. The only entrance to and exit from it was by means of steps at its west end. Forty-eight feet west of these steps the tracks were narrowed and a barricade of railway ties erected so that no railway operations on the spur line could extend to the tracks on which the school car rested. From the steps, a roadway 10 feet in width ran along the south side of the spur track for some distance and then curved southwesterly and north to meet the road forming the private crossing. This roadway was cindered in places where it adjoined the tracks and could be used by teams, automobiles and foot passengers, except in very wet weather.

It was used by people in the vicinity to bring railway ties to be loaded on railway cars placed from time to time for that purpose on the spur line. On the day of the accident, June 24th, 1941, there were six such cars, numbered for convenience from west to east as 1 to 6. The first five were coupled together while between cars 5 and 6 was a gap of two feet. The length of each car may be taken as about 40 feet. The distance from the east end of car 6 to the barrier of railway ties was 46 feet. It was therefore 94 feet from the steps of the school car to the east end of car 6 and 134 feet to the gap between cars 5 and 6. Except that one car had been loaded with ties and taken out, the

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Kerwin J.

situation as to these cars had remained the same for approximately two months, including the gap between cars 5 and 6.

The roadway was also used by the pupils attending school in the school car. These pupils were mainly, if not entirely, the children of the Company's employees and among them were Mary Kislyk and Joe Moroz, each about twelve years of age. The latter lived about one-quarter of a mile to the west of the private crossing and to the north of the tracks. Mary also lived to the west of the private crossing and north of the tracks but a little east of Joe. There were other pupils whose homes were north of the tracks, and we know of at least one, Alfred Barclay, who, during the school term, lived with relatives to the south of the Company's right-of-way.

School was held in the car from Christmas, 1940, to the date of the accident. According to Joe Moroz, on the first day of school, the teacher warned the pupils, including Mary Kislyk, to go to and from school along the ten-foot-wide roadway that led from the school car and not any other way, and not to play around any cars that might be on the spur track, and not to get on the spur track or the main line. His father told him not to play on the box cars or on the spur track. On another occasion, when Joe and other children not identified were playing around the cars on the spur track, a section foreman dove them away. Alfred Barclay said that he and other children played hide and seek for a time soon after the school commenced being held in the railway car, going underneath and around the cars. He remembered being warned by the teacher about playing around and on the cars and on the line, and he was warned by two different section foremen not to play near the cars. The area generally used by the children as a playground was to the south, and east of the railway car.

On the day of the accident, examinations were being held in the school. Alfred Barclay was the last to arrive that morning. Although school generally commenced at nine o'clock, for some reason he did not come until about eleven. The pupils were dismissed half an hour earlier than usual, i.e., at 11.30. About five minutes before such dismissal, what are described as railway cook cars or boarding cars came in from the east on the south main line track and were left standing on such main line track a little to the west of the school car. Upon school being dismissed,

the first pupils to leave were Joe Moroz, Mary Kislyk and two other children. Joe was in the lead and ran along the roadway and then walked through the gap between the fifth and sixth cars. It will be recollected that the distance from the school steps to the gap was only about 134 feet. He then saw an engine backing up on the spur line. He called to Mary not to follow him but his warning came too late and Mary was crushed between the fifth and sixth cars.

Much was attempted to be made in argument as to why Joe or any pupil should go through the gap at this particular time. It was suggested that they would be allured by the cook cars which contained several men, and also emphasis was laid upon the fact that across a ditch, between the spur line and the west-bound main line, were laid some poles, and at another spot a single tie, and upon the fact that the grass approaching these poles and tie was trampled down. In truth the evidence as to the grass and the poles and tie over the ditch is that the poles and tie were placed some time before by railway men for their own convenience. There was no path and there is not even a suggestion that Joe Moroz ever attempted to go home that way or that he was considering doing so on the 24th of June. In cross-examination he was asked: "Q. It was just a mischievous prank to run between the cars?" to which he answered "Yes". The trial judge then intervened when the following occurred:

Q. The Court: Do you know what that means? Do you know what a mischievous prank is?—A. Yes.

Q. What is it?—A. When you are up to something.

The Court: I thought perhaps he didn't understand that.

There is no evidence that the Company ever permitted, much less invited, any of the school children, including Mary Kislyk, to play or walk or be upon any of its cars or any of its tracks, including the tracks of the spur line. This being so, and on the evidence referred to, if the jury had been asked as the jury in *Grand Trunk Railway Co.* v. *Barnett* (1) was asked, if the victim of the accident was upon the tracks by permission of the Company, and had answered Yes, there would be no evidence to justify the answer and the finding would be perverse.

I agree with the trial judge that Mary was a trespasser in entering upon the space occupied by the rails and the space in between them, and that it is not a case where the

(1) [1911] A.C. 361.

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Kerwin J.

Railway employees knew, or should be held at the time in question, 11.30 a.m., to have known or expected that children were, or were likely to be, playing around the stationary cars or on the tracks. There was no allurement and, even if the duty of an occupier of premises to a trespasser may be placed on such a high plane, there was no reason, I repeat, why the employees of the Company should in this case have known or anticipated that it was likely that any school children would be on or about the empty cars on the spur line at 11.30 in the morning.

The authorities were exhaustively considered by the Chief Justice of this Court in *Canadian Pacific Railway Co.* v. *Anderson* (1). His remarks, at page 203, are applicable to the present case:

> They [meaning the Railway Company] are engaged in the execution of statutory powers and are, therefore, under an obligation to take reasonable care not to cause unnecessary harm to those who may be injured by a careless or unreasonable exercise of their rights. But they are under no obligation to intending trespassers to prevent them effectuating a trespass upon their cars, which are a part of the railway; whether they be children or adults. If they permit children to climb upon their cars they may find themselves in the position of tacit licensors and, in consequence, affected by duties towards them as licensees; but nobody suggests (such a suggestion is negatived by the evidence) that the respondent was a licensee.

The *Anderson* case (1) was, of course, tried by a judge without the intervention of a jury but in the present case there was no evidence upon which a jury could find that Mary Kislyk was a licensee.

On its own property, the Railway Company was performing a normal and usual operation on the spur line track. The following remarks of the Chief Justice at page 208 of the *Anderson* case (1) are, I think, relevant:

> So long as a person is actually using his vehicle in the ordinary and accustomed way, he is, it would appear, entitled to the enjoyment of it without the curtailment of his rights by trespasses or encroachments of anyone. The fact that the vehicle may present an irresistible allurement to children in the street can make no difference. There is neither negligence nor nuisance in making use in the ordinary way of a vehicle presenting attractions of such a character to infants. If, unfortunately, children of an age too tender to possess the capacity to take care of themselves put themselves in a position of danger by getting into it without the consent of the persons in charge of the vehicle, and without their knowledge, then there arises just one of those risks to which such children, when left unguarded, will unhappily be subject. The person who is making use of a vehicle he employs in the usual way, having committed no wrong, is not chargeable with responsibility for them.

(1) [1936] S.C.R. 200.

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Kerwin J.

Mary Kislyk was a trespasser and the only duty owing to her by the Company was not intentionally to injure her or "not to do a wilful act in disregard of humanity towards her" or "not to act with reckless disregard of the presence of the trespasser". Even if the duty of an occupier of premises towards a trespasser be put on the highest ground, the Railway Company did none of these things. The appeal should be allowed and the judgment at the trial restored with costs throughout.

Appeal dismissed with costs.

Solicitor for the appellant: *H. A. V. Green.*

Solicitors for the respondent: *Heap, Arsenych & Murchison.*

D. STANLEY McLEOD AND STEWART MORE (PLAINTIFFS) ..... } APPELLANTS;

AND

R. SWEEZEY (DEFENDANT)..... RESPONDENT.

1943

*Nov. 15, 16.

1944

*Feb. 22.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Trust—Mines and Minerals—Prospector given mission under agreement, with knowledge disclosed to him as to mineral area—Subsequent staking by him of claims in same area for benefit of himself and others—Whether fiduciary relationship between him and other parties to first agreement—Whether latter entitled to share in prospector's interests acquired through said subsequent staking—Constructive trust.

Plaintiffs and defendant were prospectors. Plaintiffs had in 1923 come across indications of asbestos in a place north of Bird river in Manitoba, and had staked and recorded claims, which lapsed; and had later at times prospected in the area. In 1937 plaintiffs disclosed the area to defendant and an agreement was made whereby defendant undertook "to stake and record a certain group of Asbestos Mineral Claims in the Bird River area of Manitoba" for the consideration of a one-fourth interest therein; plaintiffs were to pay the cost of recording and, for that and for "imparting the special knowledge in directing [defendant] to the geographical location for these staking operations", plaintiffs were to hold a three-fourths interest in the claims so staked. As found by this Court on the evidence, though the presence of asbestos was emphasized, any other discovery was contemplated; the parties knew that the district generally was mineralized and that any staking would embrace all possibilities. Plaintiffs furnished defendant with a small sketch and description of the location and directed where he could find a cache of mining tools.

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

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Defendant went to the district and on his return reported that he had staked four claims but that there was no asbestos and it was not worth while to record them; and consequently plaintiffs did nothing further. At a subsequent time defendant communicated with other parties regarding what he thought were good prospects in said district and recommended them for further examination; and in the result, under agreements, defendant made visits to the area and staked claims, which were recorded, and which ultimately became subjects of options, defendant being entitled to an interest in what might be realized for the claims. Against this interest of defendant plaintiffs asserted a right.

Held: Plaintiffs had bargained for defendant's mature judgment and for that not only on the possibility of asbestos; the expression in the agreement "asbestos mineral claims" was descriptive of what had been originally staked (there was no such thing in the mining law as an "asbestos mineral claim"; a claim staked and recorded covered all minerals except a few specifically reserved by statute); plaintiffs desired an expert opinion on those claims in the totality of their possibilities. That was the measure of defendant's duty as the fiduciary of plaintiffs in acting upon their disclosure of their special knowledge of mineral indications; defendant undertook to apply his experience to everything found in the area of the claims and, on the strength of the opinion so formed, to stake, if that was called for, and to advise plaintiffs of that opinion. Defendant owed to plaintiffs the utmost good faith in his examination of the structure, formation, and other evidence of the land to which he was directed, and a duty to give them an unreserved account of what he had found and what, in his judgment, the mineral prospect was. He failed to observe that duty. Therefore, as to any interest held by defendant, acquired through the conversion and realization of property which he obtained through information gained in the course of the service he undertook for plaintiffs, he held it as a constructive trustee, and was liable to account to plaintiffs for their share of monies realized. (It would have been proper to take his outlays into account, had there been evidence of any.) Plaintiffs' share of that interest and monies was three-fourths (whether they were entitled to that only—as the Court was inclined to think—or to all, was not in question in this Court). (This Court directed amendment of the judgment for plaintiffs at trial, so as to exclude from its effect certain properties which this Court held were not within the area in respect of which plaintiffs' rights applied.)

Judgment of the Court of Appeal for Manitoba, 51 Man. R. 129, reversed.

APPEAL by the plaintiffs from the judgment of the Court of Appeal for Manitoba (1) reversing the judgment of Major J. (2) which (by the formal judgment) declared that 75 per cent. of all the benefits which the defendant had received or to which he was or might thereafter become entitled under certain agreements (agreement between

(1) 51 Man. R. 129; [1943] 2 W.W. R. 497; [1943] 4 D.L.R. 391.
(2) 51 Man. R. 129, at 131-140; [1943] 1 W.W.R. 287; [1943] 1 D.L.R. 471.

defendant and Mac's Mining Syndicate and the members thereof other than defendant, and agreement between defendant and Page; which are referred to in the reasons for judgment in this Court *infra*) were and would be received by him as trustee for the plaintiffs, declared that the defendant had received under the terms of said agreements certain sums which were received by him as trustee for the plaintiffs, and adjudged their recovery by the plaintiffs from the defendant with interest, granted an injunction and appointed a receiver, ordered that the defendant as trustee for the plaintiffs account to the plaintiffs for 75 per cent. of all money and shares of stock received by him under the provisions of said agreements, and ordered assignment on demand of shares of stock. By the formal judgment in the Court of Appeal, the appeal to that Court was allowed, the judgment of Major J. set aside, the order for receiver vacated and the action dismissed.

The material facts and circumstances of the case and the questions in issue are dealt with and discussed in the reasons for judgment in this Court now reported and in the reasons (reported as above cited) in the Courts below.

E. K. Williams K.C. for the appellants.

P. C. Locke and *H. B. Monk* for the respondent.

The judgment of the Court was delivered by

RAND J.—This appeal grows out of a transaction between three mining prospectors of Winnipeg. The plaintiffs, as early as 1923, had come across indications of asbestos in some rough country lying to the north of the Bird River in the Lac du Bonnet mining district of Manitoba and had staked four claims covering about two hundred acres. These were recorded but for lack of money were allowed to lapse. Between that time and 1937, however, on various occasions they visited the area and from time to time did prospecting on it.

The defendant had a high reputation as a prospector in Manitoba. He was acquainted with the plaintiffs and on one occasion when they happened to be together, towards the end of September, 1937, the latter intimated that they knew what they thought was a promising mineral spot in an out-of-the-way place, indicating its general location

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and that, with his assistance, something might be made of it. He readily took up the suggestion with the result that they went to the office of two mining brokers and there drew up a memorandum as follows:

> It is hereby agreed by the party of the first part that he will undertake to stake and record a certain group of Asbestos Mineral Claims in the Bird River area of Manitoba, for the consideration of a one-fourth or 25 per cent. interest in the group of claims so staked.
>
> It is hereby agreed by the parties of the second part that they will provide the necessary funds for the cost of recording such claims in the Mining Recorder's office in the Province of Manitoba, and for the further consideration of imparting the special knowledge in directing the party of the first part to the geographical location for these staking operations, that for so doing these things the parties of the second part are to receive a three-fourths or 75 per cent. interest in the claims so staked.
>
> It is further agreed by the party of the first part that he will execute the necessary transfers of the said claims at the time of recording. These transfers to be executed in blank and delivered to the parties of the second part.
>
> It is further agreed that the parties of the second part shall have full power to act in all matters respecting the business affairs in connection with the said claims. It is understood that such business affairs shall mean to include that of the disposal of the said claims.

The evidence of the plaintiff More and the witnesses Wither and Ward makes it clear that, although the presence of asbestos was emphasized, any other discovery was contemplated. The parties knew that the district generally was mineralized and that any staking would embrace all possibilities.

The plaintiffs furnished Sweezy with a small sketch and description of the location and indicated where he would be able to find a cache of mining tools. With this information the defendant, shortly thereafter, went out to look over the land. According to his own statement, he reached a section of bush in which he found evidences of previous prospecting and found also a few tools which he took to be those of the plaintiffs. He says also that he staked four claims.

On his return, as he gives it, he reported having done the staking, but protested somewhat violently that there was no asbestos and that it was not worth while to record the claims. On the strength of that opinion, which the plaintiffs accepted with all confidence, nothing further was done.

Some time in November, when the thirty days for recording had elapsed, the defendant communicated with a Captain Page, manager of a shipping company, and also with a barrister named Buhr, regarding what he thought were good prospects in the district in question, and recom-

mended them for further examination. In the result, under agreements with both, he went back in the early part of December, 1937, and in February of 1938, and either personally or by others under his direction staked twenty-four claims which included the four said to have been staked in October as well as the four originally staked by the plaintiffs in 1923. Later on other stakings were made, both in that area and some distance from it. These claims were recorded and on some, at least, of them assessment work was done by him. In 1942 chrome was discovered in the district. Ultimately, an option was given by Page to the Hudson Bay Exploration and Development Company Limited, covering all of the stakings done by Sweezey and under his direction. For his share in the claims called Page, Smelter and Ace, numbering twenty-seven, Sweezey became entitled to 22½ per cent. of what might be realized for them. On the balance of the stakings, twelve in number, which cover what were known as the Robin and Buhr claims, he held a one-quarter interest in the Mac Syndicate, to which they had been transferred, and the total interests of which had been, in turn, optioned to Page for the considerations mentioned in a memorandum in evidence.

The trial judgment declared the defendant to hold all of these interests as to 75 per cent. of them under a constructive trust in favour of the plaintiffs, and in respect of cash received by Sweezey, the plaintiffs recovered the proportion that should have been paid over to them. On appeal that judgment was reversed; and the plaintiffs bring the controversy here.

The first question that arises is this: what was the precise undertaking of the defendant? Was it, as contended by him, merely an employment of his labour to stake the described claims without the benefit of his judgment on them or of the area in which they were to be found? I do not think so. The plaintiffs had special knowledge of mineral indications in this limited field off the beaten track of prospectors, and it was of value to them. To disclose that information meant to give up once and for all any advantage they thereby held; all would then be at large; and they did what they thought necessary to protect themselves accordingly. The obligation assumed by the defendant was what they took in return and it was all that remained to them.

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They had bargained for his mature judgment and for that not only on the possibility of asbestos. The expression in the memorandum of agreement, "asbestos mineral claims", was descriptive of what had been originally staked. The plaintiffs desired an expert opinion on those claims in the totality of their possibilities and not on one of them only. That, therefore, was the measure of the defendant's duty as the fiduciary of the plaintiffs in acting upon the disclosure of all the plaintiffs had of value; he undertook to apply his experience to everything found in the area of the claims and, on the strength of the opinion so formed, to stake, if that was called for, and to advise the plaintiffs of that opinion. There was no such thing in the mining law as an "asbestos mineral claim". A claim staked and recorded covered all minerals except a few specifically reserved by the statute. He, therefore, owed to the plaintiffs the utmost good faith in his examination of the structure, formation, and other evidence of the land to which he was directed, and a duty to give them an unreserved account of what he had found and what, in his judgment, the mineral prospect was.

The trial judge has found that he failed to observe that duty. Instead, he deliberately misled the plaintiffs into discarding the claims as prospects by falsely misrepresenting as to asbestos, and concealing as to other minerals, his own judgment of them.

Trueman J.A. conceded the existence of a fiduciary relation but treated the original undertaking as at an end in October upon the report of the defendant and acquiescence in it by the plaintiffs. I find difficulty in following this reasoning. That acquiescence was induced by fraud. How can a termination of such a relation so brought about be held to be effective while the fraud still operates? The fraud continued to have effect both on the plaintiffs in their acceptance of the misrepresentation of opinion and on the defendant in his acquisition and capitalization of the claims, and the original duty remained: *Carter* v. *Palmer* (1). I agree, therefore, that as to any interest held by him, acquired through the conversion and realization of property which he obtained through information gained in the course of the service he undertook, the de-

(1) (1842) 8 Cl. & Finn. 657 (8 E.R. 256).

fendant holds it as a constructive trustee and that he is liable to account to the plaintiffs for their share of the monies received in cash.

In the opinion of Robson J.A., this is not a case in which the plaintiffs are entitled to follow assets as on a breach of trust, and he cites *Lister* v. *Stubbs* (1) as authority for that view. There the agent for purchase of goods had accepted from the seller substantial rebates, and action was brought to recover these monies as having been received to the use of the plaintiff. An application was made for an interim injunction to restrain the defendant from dealing with property into which it was alleged the monies received had been put or invested, and it was on appeal from a refusal of this injunction that the judgment relied upon was given. The holding, however, was strictly limited and it was to the effect that, until the right of the plaintiff to money of the sort in question had been established by a judgment, the court would not assist him in pursuing it into other forms of property. We are dealing here with quite a different situation. The duty of the defendant still attached to the acquisition of the claims and, in his negotiations with Page and Buhr, he must, because of his breach of confidence, be treated as acting on behalf of the plaintiffs as well as himself. It is not a question of receiving money belonging to other persons as was the case in *Lister* v. *Stubbs* (1), but rather of acquiring in the first instance property which in equity he must hold as a trustee: and any *res* into which it may be converted carries likewise the impress of the trust.

Robson J.A. refers also to the case of *Lydney* v. *Bird* (2) in respect of allowances that would have to be made the defendant for expenditures properly attributable to the acquisition of the trust property. Since he must be treated as acting on behalf of the three included in the venture, outlays properly made would have to be taken into account, but there is no evidence that he made any. So far as appears, he was paid for all the work he did, and the interests which he now holds under his agreement with Page and in the Mac Syndicate result solely from the transfer to them of the claims. If there had been such disbursements, they should have been brought to the

(1) (1890) 45 Ch.D. 1. (2) (1886) 33 Ch.D. 85, at 95.

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attention of the trial court and, in the absence of any evidence bearing on them, I must assume that there was none.

My only difficulty is as to the extent of the property that was so acquired by him. The area described by the plaintiffs, on which Sweezey was to exercise his judgment and act, cannot, I think, be held to take in the eight Smelter claims that lie across the Bird River, nor the three Ace claims. These are too far removed from the Page, Robin and Buhr locations admitted by Sweezey to be included in the area of his original staking in October, 1937, to be considered within the range of his instruction and mission.

But his agreement with Page covers an interest in the twelve Page, the twelve Smelter, and the three Ace claims, and that interest is 22½ per cent. Four of the Smelter claims are within the plaintiffs' area. There is nothing in the agreement or in the evidence to indicate the relative values of the claims, but if there is any implication in fact it is, I think, that all the claims were dealt with as a unit and without regard to any difference in value. It is as of the time of the agreement fixing that percentage that any relative value would have to be determined and as if the plaintiffs then owned the Page and four of the Smelter claims, and the defendant the balance, and that the 22½ per cent. of total interest was divided between them. Of the twenty-seven claims, sixteen were, therefore, taken for the plaintiffs. The proportion attributable to them on a numerical basis would be 59·3 per cent., but three of the four Smelter claims in the plaintiffs' area appear from the map to be about equal in size to any one of the other claims. I would, therefore, allot as a proper proportion 56 per cent. as being the basis upon which a division should be made. No question arises as to whether the plaintiffs are entitled to all of the defendant's interest or only 75 per cent. of it, because counsel for the plaintiffs stated that he was satisfied with the latter proportion. Even without this statement, I am inclined to think that the claim should be thus limited.

The appeal, therefore, should be allowed and the original judgment amended by limiting the share of the plaintiffs in the property to which the defendant may become en-

titled under the Page agreement to 75 per cent. of 56 per cent. of that interest, and by reducing the judgment for $2,025 to $1,134. The plaintiffs should have their costs throughout.

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Appeal allowed with costs.

Judgment at trial amended.

Solicitor for the appellants: *N. E. Munson.*

Solicitor for the respondent: *P. C. Locke.*

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

AND

EMILE HALIN (CLAIMANT) ..... RESPONDENT.

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*Nov. 3, 4, 5.
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*Feb. 1.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Expropriation—Lease of municipal airport by Crown—Expropriation of land surrounding it—Residue of land remaining property of owner—Land subdivided into building lots—Amount of compensation—Method of valuation—Evidence as to value of land—Damage to adjoining land caused by operation of airport—Damages due to noise, dust or danger to persons or property—Servitude of "non aedificandi" created by Federal orders in council—Whether claimant entitled to such damages as owner of adjoining land.

On the 10th of July, 1940, the Federal Government, as a war measure, leased a municipal airport, already existing since 1936, at Cap de la Madeleine, Quebec, where an aviation school had also been established. In order to enlarge the runways, the Crown expropriated some land, surrounding the airport, belonging to the respondent, the latter remaining owner of property adjoining the airport and the expropriated land. The property of the respondent had been subdivided into lots some years previously. On the 28th of February, 1942, as the Crown had made no move to compensate him, the respondent obtained a fiat authorizing him to claim by petition of right due compensation. The respondent claimed $162,911.51, being the value at 9½ cents a square foot of 514,648 square feet of the expropriated land and damages at the same rate to 1,200,210 square feet of adjoining land belonging to him. These damages, it was alleged, resulted from the general operation of the airport, and more especially from the noise, from the dust raised by the starting and the landing of the air machines and from the danger to persons and property; and damages were also alleged to have been created by a servitude or easement "non aedificandi" or "altius non tolendi" established by certain orders in council and zoning regulations passed by the Federal authorities. The Crown offered an indemnity of $3,000.

*PRESENT:—Rinfret, Davis, Kerwin, Taschereau and Rand JJ.

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The Exchequer Court of Canada granted to the respondent a sum of $36,278.16, being $23,159.16 as the value of the expropriated land, i.e. 514,648 square feet at 4½ cents per foot, and $13,122 for damages to the respondent's property adjoining such land and the air-port, this latter amount being arrived at by allowing 30 per cent depreciation on the value of the land estimated at the same price as the expropriated land. The Crown appealed to this Court, first on the ground that the value of 4½ cents per square foot fixed by the trial judge was too high, and secondly that the respondent had no right to claim damages caused to his adjoining property, even if any existed.

Held, reversing the judgment appealed from, that the amount which the respondent was entitled to recover from the Crown, for the land expropriated, should be reduced to $10,292.96. Upon the evidence, the amount of 4½ cents per square foot fixed by the trial judge is clearly excessive, and the price per square foot should be reduced to two cents.

Held, further, that the respondent was not entitled to any damage which may have been caused to the residue of his property adjoining the expropriated land and the airport.

Per Rinfret, Taschereau and Rand JJ.—The respondent's claim was brought under the *Expropriation Act,* which provides that the party expropriating must pay, besides the value of the land actually expropriated, a compensation for land "injuriously affected" as a result of the expropriation. But, in this case, it is not the expropriation itself which had "injuriously" affected the respondent's adjoining land. As to the depreciation, if any, resulting from orders in council and regulations, passed under the *War Measures Act,* creating a servitude of "non aedificandi" or "altius non tolendi", these orders in council were antecedent to the expropriation and would have created the same servitude, if there had been no expropriation. The respondent, therefore, must suffer such prejudice, the same as citizens generally suffer from different kinds of restriction imposed under the present state of war. The depreciation alleged to have resulted from the operation of the aeroplanes, especially from noise, dust raised by them and danger to person and property, may present a different aspect, as these inconveniences would have existed even in the absence of the orders in council; but the respondent is also precluded from claiming any relief on that account. The respondent having subdivided his land into lots, each of them possessed a different entity with no relation to the neighbouring lot; and, although the respondent remained the owner of all the lots, each of them was independent from the other. The principle laid down by the decision of the Judicial Committee in *Holditch* v. *Canadian Northern Ontario Ry.* ([1916] 1 A.C. 536, at 540) should be applied to the present case. Each lot taken apart does not confer any advantage to the neighbouring lot; and, therefore, the respondent is not entitled to compensation from the fact that, upon the compulsory taking of some of the lots, he is prejudiced in his ability to use or dispose of the remaining lots: the respondent is in no better position than he would be, if the expropriated lots would have been the property of another person. The mere unity of ownership does not add any value to the lots: there is a lack of such a connection between all the lots from which it would follow that, through the loss of some of them, the others would be depreciated

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by the privation of the advantages that they had and which were derived from the expropriated lots. Therefore no compensation ought to be awarded on account of noise, dust or danger which may result from the use of the expropriated land. *City of Montreal* v. *McAnulty Realty* Co. ([1923] S.C.R. 273) discussed.

Per Davis and Kerwin JJ.—In a claim arising under expropriation proceedings, the mere fact that a property has been subdivided into lots does not preclude, in all cases, the owner from claiming that lots still retained by him have been injuriously affected when others have been expropriated. But, in this case, there is no evidence of the existence, in relation to the adjoining land, of that unity of possession and control conducing to the advantage or protection of the property as one holding. Therefore, the respondent is not entitled to any allowance for depreciation of any lots retained by him due to the construction or operation of the airport.

Per Davis J.—The respondent's claim in respect of his adjoining property, for damages caused by the general operation of the airport, has never been made the subject-matter of any petition of right and, consequently, no fiat was ever granted by the Crown to litigate such claim: there was no power in the trial judge to amend the claim in the petition of right by allowing this additional and totally different claim in respect of other lands than those expropriated and covered by the petition of right.

APPEAL by the Crown from the judgment of the Exchequer Court of Canada, Angers J., awarding to the respondent the sum of $36,278.16, in full compensation for the lands expropriated by the Crown under the *Expropriation Act,* R.S.C. 1927, p. 64, and also for damages arising out of such expropriation. The Crown had offered $3,000, and the respondent had claimed $162,911.51.

Aimé Geoffrion K.C. and *François Lajoie K.C.* for the appellant.

John Ahern K.C. for the respondent.

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

TASCHEREAU, J.—Il s'agit dans cette cause de déterminer l'indemnité due à l'intimé, dont certains terrains ont été expropriés par le gouvernement fédéral.

A quelques milles, au nord du Cap de la Madeleine, dans la province de Québec, une école d'aviation a été établie il y a quelques années, et c'est pour agrandir le champ d'envolée et d'atterrissage que les terrains en question ont été requis. Il est admis par les parties, que les lots expropriés ont une superficie de 514,648 pieds carrés, pour

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lesquels le gouvernement fédéral a offert la somme de $3,000. C'est l'intimé qui a pris l'initiative de faire déterminer le montant, et dans sa pétition de droit, telle que définitivement amendée, il réclame $162,911.51 pour la valeur des terrains expropriés et pour dommages causés au résidu. En Cour d'Echiquier du Canada, le juge a accordé $23,156.16 pour les terrains expropriés, soit 4½ sous le pied pour 514,648 pieds carrés, et $13,122 pour dommages aux terrains voisins.

L'appelant appelle de ce jugement, et prétend en premier lieu que le montant de 4½ sous le pied carré est trop élevé, et en second lieu que l'intimé ne peut rien réclamer pour dommages au résidu de la propriété.

Etudions d'abord le premier grief. La partie du lot 420 qui fait l'objet de cette expropriation est située, comme nous l'avons vu, à quelques milles au nord de la cité du Cap de la Madeleine, et constitue aussi la partie la plus au nord du champ d'aviation lui-même. Elle est bornée au nord-est par la voie du chemin de fer Pacifique-Canadien; au nord par le lot 419; au sud par le lot 421; et à l'ouest par la partie non expropriée du lot 420, qui touche à la route provinciale conduisant des Trois-Rivières à Shawinigan.

Après de nombreuses transactions entre J. B. H. Courteau, F.-X. Vanasse, Georges Morrissette, L. T. B. de Grosbois, et le notaire Lebrun qui fut le liquidateur de la Three Rivers Annex Land, l'intimé devint propriétaire de la plupart des subdivisions des lots 418, 419 et 420. Au cours de ventes et de réorganisations qui se sont opérées, l'obligation fut contractée de construire une fonderie sur le lot 416, et une manufacture de balais sur le lot 419. Environ 75 hommes ont été employés à la fonderie durant un certain temps, mais en 1920 elle a cessé d'opérer, et fut rasée par un incendie. Le lot est demeuré vacant jusqu'au 14 avril 1931, date où il a été vendu par le shérif à U. W. Rousseau. C'est évidemment la construction de cette fonderie qui, avant 1920, a provoqué dans la région la vente de plusieurs lots, qui pour la plupart, cependant, sont demeurés vacants. Quant à la manufacture de balais, elle n'a jamais été en opération, et elle fut vendue le 15 juin 1920, par F.-X. Vanasse à dame Célina Dugré, et plus tard démolie. Il est important de signaler, que les lots 418, 419

et 420 sont depuis longtemps subdivisés, et que des plans indiquant ces subdivisions avec rues et ruelles ont été déposés au bureau d'enregistrement.

Pour déterminer l'indemnité à être accordée en matière d'expropriation, plusieurs éléments peuvent et doivent être pris en considération. Ainsi, il est loisible au juge à qui l'affaire est soumise d'examiner le prix d'achat, la valeur municipale, les prix payés dans la région pour des terrains semblables, les dépenses pour améliorations, les revenus provenant de l'immeuble, l'usage que le propriétaire peut en faire, l'augmentation de valeur des terrains voisins, les opinions des experts, et d'autres circonstances particulières qui peuvent aider à trouver une solution. Et quand, après avoir examiné ces divers éléments, le juge de première instance arrive à une conclusion où il n'y a pas d'erreur de droit, et que le montant accordé est justifié par la preuve, un tribunal d'appel n'interviendra pas. C'est la jurisprudence de cette Cour, établie depuis longtemps, et réaffirmée récemment dans la cause de *Elgin Realty Co.* vs. *The King* (1).

Mais si au contraire le tribunal d'appel est d'opinion que le tribunal de première instance appuie son jugement sur des principes erronés, ou que le montant accordé est évidemment excessif, cette Cour alors doit intervenir. (*Canadian National Railway Co.* vs. *Harricana Gold Mine Inc.* (2).)

Dans la cause qui nous est soumise, il y a lieu tout d'abord de faire observer (et c'est l'opinion de presque tous les experts entendus) que les lots situés près de la route Trois-Rivières-Shawinigan ont une valeur plus considérable que les lots expropriés. Cette région est beaucoup plus susceptible de développement, et les faits justifient cette prétention de l'appelant. C'est là que des maisons ont été érigées, qu'une église et une école ont été construites il y a quelques années, et qu'un modeste bureau de poste a été ouvert. A cette église se rendent les fidèles de la Mission de St-Odilon, échelonnée le long de la grande route sur une distance assez considérable, et c'est là aussi que les enfants de la même région fréquentent la classe. Plusieurs personnes y ont acheté des lots sur les subdivisions de 418, 419, 420, et si toutes n'ont pas construit de maisons, il y en a plusieurs qui semblent s'y être définitivement fixées.

(1) [1943] S.C.R. 49. (2) [1943] S.C.R. 382.

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Depuis 1915, presque tous les lots en bordure de cette grande route ont été vendus; et l'intimé a également trouvé des acheteurs pour les lots situés sur la 1ère, la 2ème, la 3ème, la 4ème, la 5ème et la 6ème rues qui sont parallèles à la route Trois-Rivières-Shawinigan. Mais naturellement à mesure que l'on s'éloigne de l'artère principale, et que l'on se dirige vers l'est, les ventes se font de moins en moins nombreuses, si bien qu'à la 6ème rue, quelques lots seulement ont été vendus depuis 1914. Or, dans cette région plus propice au développement, et certes plus attrayante pour quiconque veut construire une demeure, quel est le prix payé par les acquéreurs? Il me semble impossible, pour déterminer la valeur actuelle des lots expropriés, de prendre comme base le prix d'achat des lots vendus de 1915 à 1924. Il est, je crois, cependant, utile de rappeler ces prix afin de faire voir si la propriété dans cette région a gagné ou perdu de la valeur.

Durant cette période de temps, à l'endroit où les terrains ont le plus de valeur, des lots ont été vendus à des prix qui ont fluctué quelque peu. Ainsi, en 1915, les prix ont varié de 7 à 12 sous le pied. En 1916, la moyenne s'établit entre 8 et 9 sous. En 1917, 7 sous est le prix généralement obtenu, et il en est de même pour 1918, alors que trois lots ont été vendus. En 1919, deux lots ont été vendus au prix de 4 sous; en 1921, un lot à $6\frac{1}{4}$ sous, et enfin en 1924, un lot à 10 sous. Durant les premières années, il faut nécessairement attribuer le nombre de ventes assez considérable, au fait que la fonderie et la manufacture de balais ont été construites, mais il semble évident que l'impulsion donnée à la vente a considérablement ralenti avec la disparition de ces deux établissements.

De 1924 à 1927, il n'y eut aucune vente, et au cours de cette dernière année, sur la route Trois-Rivières-Shawinigan 5 lots ont été vendus au prix de 1 sou et $1\frac{1}{2}$ sou. Après cette période, les affaires semblent particulièrement inactives, car la vente subséquente est en date du 7 août 1938, sur la route Trois-Rivières-Shawinigan, et ne rapporte que 2 sous le pied carré. Une autre vente est faite en décembre de la même année toujours sur la même grande route, au prix de 3 sous. Je laisse de côté les deux autres transactions effectuées la même année, car il s'agit de lots donnés en paiement de services rendus, et elles ne peuvent en aucune

façon aider à établir la valeur des terrains expropriés. En 1939, 15 lots ont été vendus, tous situés sur la 1ère rue et sur la route Shawinigan pour le prix moyen de 2½ sous; et en 1940, jusqu'à la date de l'expropriation, le prix moyen obtenu pour 12 lots a été 3 sous le pied carré. Ces prix démontrent clairement que si à l'origine, lors de l'établissement des deux industries, certains lots ont été vendus 9 et 10 sous le pied, les prix ont sensiblement baissé depuis 1927 pour les lots situés dans le quartier le plus avantageux. Je n'ai tenu compte jusqu'à maintenant que des ventes faites avant la date de l'expropriation, qui est celle où les plans ont été déposés, le 11 juillet 1940. J'entretiens des doutes sérieux sur la légalité de la preuve de la vente des lots faits après cette date, mais elle ne peut pas affecter le résultat de cette cause. Car depuis le 11 juillet 1940, jusqu'au 21 septembre 1942, 9 ventes ont été faites, comprenant 23 lots, situés depuis la route principale à la 6ème rue, à des prix qui ont varié de 7½ sous à 3¼ sous, faisant une moyenne d'environ 5 sous le pied.

La preuve révèle également que des ventes ont été faites ailleurs dans la région, non loin des lots 418, 419 et 420. C'est ainsi qu'au sud du lot 420, C. N. de Grandmont a vendu le 22 septembre 1938 à la corporation du Cap de la Madeleine, pour l'agrandissement du champ d'aviation, 85 arpents (partie du lot 423) pour le prix de $3,250, ce qui fait $38 l'arpent, moins de ⅕ de sou le pied.

Le 22 avril 1935, le notaire Philippe Mercier a vendu à Georges Bilodeau, sur le boulevard Madeleine, au nord de la ville, un endroit où le terrain a infiniment plus de valeur que les lots expropriés, 60 arpents pour le prix de $1,400, soit moins de $25 l'arpent, ou une petite fraction de sou le pied. Pierre Loranger a également vendu, en 1939, à l'International Foils partie du lot 157 avantageusement située sur la route Montréal-Québec, 13 arpents de terrain au prix de $250 l'arpent, soit moins d'un sou le pied. Enfin, pour ne signaler que ceux-là, à peu près à la date où les plans ont été déposés, l'Electric Steel a acheté de Philippe Mercier, Antonin Rocheleau, et A. Perreault, au prix de 4/10 de sou des terrains situés sur le boulevard St-Laurent et dans les environs.

Si pour déterminer la valeur des terrains expropriés, l'on prend comme base la vente des terrains voisins, il me semble que la preuve ne justifie pas le prix de 4½ sous

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accordé par le juge de première instance. La grande majorité des ventes faites dans la région voisine pour des terrains situés dans des localités plus avantageuses n'ont pas rapporté ce prix. Au contraire, le prix obtenu a été de beaucoup inférieur. Qu'il s'agisse des ventes faites au cours des plus récentes années sur la route Trois-Rivières-Shawinigan, sur les parties les plus avantageuses des lots 418, 419, 420, ou sur les boulevards Madeleine ou St-Laurent, plus près du centre de la ville du Cap de la Madeleine, on voit que les prix obtenus par des personnes non obligées de vendre, et offerts par des personnes non forcées d'acheter, varient d'une fraction de sou à 3 ou 4 sous le pied carré.

Et c'est sur le prix obtenu au cours des ventes des dernières années qu'il faut s'appuyer pour déterminer la valeur de ces lots. Ce serait une erreur, je crois, d'essayer d'évaluer le terrain exproprié en tenant compte des prix obtenus en 1914, 1915, 1917 ou 1921, car à cette époque, certaines conditions existaient, qui sont disparues maintenant, et qui ne sauraient par conséquent jeter aucune lumière sur ce litige. Si j'en ai tenu compte, c'est afin de démontrer que cette région expropriée a moins de valeur qu'autrefois, que les lots se vendent à meilleur marché, et la comparaison faite en est la meilleure preuve à offrir. Le développement y est particulièrement lent, et les possibilités d'avenir ne donnent certes pas à ces terrains une valeur actuelle de $4\frac{1}{2}$ sous le pied.

Si l'on ajoute à cette preuve que je viens d'analyser, le prix payé par Halin lorsqu'il est devenu propriétaire des lots 418, 419, 420, ainsi que la valeur municipale, l'on verra la différence entre ces chiffres, et le prix accordé à l'exproprié. Il est vrai que le prix payé par Halin était singulièrement peu élevé, et que la preuve révèle que l'évaluation municipale ne correspond pas à la valeur réelle de ces lots, mais tout de même l'écart est tellement frappant qu'il est utile de le signaler.

Le 17 janvier 1914, F.-X. Vanasse et Georges Morrissette ont acheté de J. B. H. Courteau tout le lot 420 pour la somme de $500. Ces mêmes personnes étaient déjà propriétaires des lots 418 et 419, et au cours de la même année, ils vendirent à Halin et à de Grosbois ce même lot 420 pour

le prix de $8,000 payable $166.67 par mois. En 1915, Halin acheta 121 subdivisions du lot 419 et 84 subdivisions du lot 418 au prix de $25 le lot.

Après la liquidation de la société Halin et de Grosbois en 1916, le notaire Lebrun, en sa qualité de liquidateur, vendit à Vanasse et Morrissette la plupart des subdivisions du lot 420. A la même date, Vanasse et Morrissette revendirent à Halin 422 subdivisions du lot 420, 459 subdivisions du lot 418 et 493 subdivisions du lot 419, faisant en tout 1,374 lots pour le prix de $12,000, soit moins de $10 le lot. Plus tard, cet acte non enregistré fut modifié, et il fut convenu que le prix de vente pour tous les lots serait de $2,500 payable $500 par année avec l'obligation de payer $5 par subdivision vendue, faisant un total de $7 par lot, d'à peu près 2,000 pieds carrés. Et ceci ne représente qu'une valeur moyenne, et les lots à l'ouest valant plus, il résulte que Halin a payé moins de $7 pour les lots expropriés.

Quant à la valeur municipale, elle est de $2 par lot. Evidemment, elle ne représente pas la valeur réelle; mais à $4\frac{1}{2}$ sous le pied chaque lot de 2,000 pieds vaudrait $90 et comme il reste 1,700 lots environ non vendus, ceci représenterait une valeur d'au delà de $150,000, à rapprocher d'une valeur municipale de $2,400.

Plusieurs personnes ont été entendues de part et d'autre pour donner leur opinion sur la valeur de ces lots; toutes ne sont pas des "experts", mais il y a un grand nombre de personnes d'expérience qui connaissent les lieux et qui ont donné une évaluation qu'elles croyaient juste. Ainsi J. A. Roy, constructeur de maisons, évalue ces lots à $\frac{1}{2}$ sou le pied. A la question qu'on lui pose:

"En quoi était le terrain?"

Il répond:

"C'était du petit bois qui poussait, du cyprès, des bleuets."

Pierre Loranger, propriétaire de terrain au Cap de la Madeleine, décrit le terrain de la même façon que J. A. Roy, et Siméon Lapointe, évaluateur du Cap de la Madeleine durant 10 ans, croit que les lots à l'ouest valent $25, mais que la valeur va en diminuant jusqu'à un dollar par lot en arrivant aux lots expropriés. M. Ernest Fleury, ingénieur de la cité du Cap de la Madeleine, connaît très bien la ville. Il a fait un relevé des ventes, et a produit un

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plan, où il indique la valeur des lots dans les diverses parties de la ville. Dans son opinion, les lots de Halin valent 1 sou le pied carré. Rodolphe Houde, arpenteur de la cité des Trois-Rivières, a expliqué à la Cour qu'à $4\frac{1}{2}$ sous le pied carré, le terrain de Halin aurait une valeur de $1,842 l'arpent; aucun autre terrain dans la région ne s'est jamais vendu à un prix aussi élevé.

Enfin, M. Charles Marquette témoigne à peu près dans le même sens que les témoins précédents. M. Marquette a été durant plusieurs années en charge des expropriations pour le département de la voirie de la province de Québec. Il a été évaluateur du Canadien-National et a figuré dans un très grand nombre de causes. Il est d'opinion que $20 par lot pour les lots expropriés représenterait la valeur maximum.

De son côté, l'intimé a fait entendre M. J. H. Laframboise, de Montréal. Comme M. Marquette, M. Laframboise a une grande expérience en matière d'expropriation. Il a rendu un témoignage très fouillé et très détaillé, mais je crois qu'il procède sur une base qui est fausse. Il nous dit dans son témoignage qu'il a examiné les ventes depuis 1914, et que la moyenne établit un prix de 0.063 sou le pied carré. Pour en arriver là, il a nécessairement pris en considération toutes les ventes faites le long de la route Trois-Rivières-Shawinigan, ainsi que celles des autres lots situés sur les 1ère, 2ème et 3ème rues, où la valeur est incontestablement supérieure. En second lieu, il a également tenu compte des ventes faites en 1914, 1915, 1916, 1917, date où, à cause de conditions spéciales, les prix les plus élevés ont été obtenus. En procédant ainsi, il a de beaucoup augmenté la moyenne du prix de vente, et il s'ensuit que son calcul ne représente pas la valeur réelle de ces lots. De plus, M. Laframboise donne aux lots expropriés une valeur de 8 sous, soit $1\frac{2}{3}$ sous de plus que la moyenne à laquelle il est arrivé pour les autres lots.

Rosaire Gratton corrobore entièrement le témoignage de J. H. Laframboise de même que Omer Lacroix, qui lui cependant donne à ces lots une valeur de 7 sous.

Avec beaucoup de déférence, je ne puis accepter ces prétentions, pour les raisons données précédemment, et aussi, parce que ces évaluations donneraient à chaque lot une valeur de $150, soit près de $3,000 l'arpent. Et malgré

que j'aie lu et relu la preuve volumineuse soumise par les parties, je n'ai trouvé aucune vente, soit sur la route Shawinigan, le boulevard Madeleine, le boulevard St-Laurent ou ailleurs, où le prix stipulé approche ce chiffre fantastique. La preuve me paraît révéler au contraire que ces lots n'ont pas la valeur qu'on leur attribue, et qu'il n'y a aucun marché permettant à l'intimé d'en disposer au prix qu'on lui a accordé.

Après avoir examiné les divers éléments qui peuvent être considérés tels que le prix d'achat, la valeur municipale ainsi que celle des lots voisins, les améliorations apportées, les possibilités futures susceptibles de faire connaître la valeur actuelle, après avoir lu les témoignges des experts, et pesé les raisons qu'ils donnent à l'appui de leurs prétentions respectives, je suis d'opinion que deux sous le pied carré est le maximum auquel peut prétendre l'intimé.

Je lui accorderais en conséquence pour les lots expropriés qui représentent 514,648 pieds carrés, la somme de $10,-292.96 avec intérêts au taux de 5 pour 100 depuis le 10 juillet 1940, jusqu'à la date du jugement de cette Cour.

L'appelant a soumis en second lieu que l'intimé n'a pas droit au montant de $13,122 qui lui a été accordé pour dommages aux terrains voisins de ceux qui ont été expropriés. Le juge de première instance en est venu à la conclusion que ces autres terrains avaient la même valeur que les terrains requis par les autorités fédérales. Le nombre de pieds affectés serait de 972,000, ce qui, à raison de $4\frac{1}{2}$ sous le pied donnerait un total de $43,740; mais comme la dépréciation n'est évaluée qu'à 30 pour 100, nous arrivons au chiffre de $13,122.

C'est en vertu de la *Loi d'Expropriation,* chapitre 64, statuts revisés du Canada, que les présentes procédures sont instituées. Cette loi prévoit que la partie qui exproprie doit payer non seulement la valeur des terrains actuellement expropriés, mais qu'elle doit aussi payer une compensation pour les terrains "injuriously affected" comme résultat de l'expropriation.

Le jugement de la Cour d'Echiquier du Canada mentionne que plusieurs éléments ont contribué à déprécier ces terrains, et en particulier un ordre en conseil et des règlements fédéraux passés en vertu de la *Loi des mesures de guerre,* qui ont créé une servitude de *non aedificandi,* ou

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altius non tolendi sur les terrains voisins de l'aéroport. Le jugement mentionne aussi comme autres causes de dépréciation, le bruit causé le jour et la nuit par le vol des avions, la poussière qu'ils soulèvent lors de leur démarrage ou atterrissage, le danger constant de dommages à la personne ou à la propriété.

Il me semble qu'on ne peut considérer comme une cause de dépréciation provenant de l'expropriation, l'ordre en conseil et les règlements précédemment mentionnés. Ce n'est pas en effet l'expropriation qui affecte "injuriously" le résidu du terrain, mais bien les ordonnances édictées en vertu de la *Loi des mesures de guerre,* qui dans l'occurrence sont antérieures à l'expropriation, et qui auraient été en vigueur, et créé la servitude même s'il n'y avait eu aucune expropriation. L'intimé doit nécessairement souffrir ce préjudice, comme tout autre citoyen du pays souffre des restrictions imposées par les nécessités de l'heure. Le remède, s'il y en a un, se trouve dans la *Loi* (même) *des mesures de guerre* (art. 7), qui prévoit à des compensations en certains cas; mais nous n'avons pas à nous en occuper ici, car aucune référence n'a été faite par le ministre de la Justice.

La dépréciation causée par le vol des avions, par la poussière qu'ils soulèvent, par le danger à la personne et à la propriété dû à leur constante activité, présente un aspect différent. Même s'il n'y avait pas eu d'ordre en conseil créant la servitude, ces inconvénients indiscutablement réels auraient existé, au moins durant un certain temps.

Mais comme nous l'avons vu, l'intimé depuis plusieurs années a subdivisé ses terrains en lots à bâtir, et chacun de ces lots constitue une entité différente, n'ayant aucune relation avec le lot voisin. L'intimé est bien propriétaire de tous, mais tous sont indépendants les uns des autres. Or, dans la cause de *Holditch* vs. *Canadian Northern Ontario Railway,* jugée par le Conseil privé (1), il a été décidé ce qui suit:

> The lots had been bought for speculation. They had little individuality. They were chiefly distinguished by the numbers assigned to them and the name of the street on which they fronted. They were sold out and out. No restrictive covenants were taken. There was no building scheme other than the lay-out shown on the registered plan, and this derived its fixity from the legislation affecting it, and not from any

(1) [1916] 1 A.C. 536, at 540.

notice to the purchaser or any private obligation entered into by him. It is plain that, so far as in them lay, the proprietors of this building estate had parcelled it out in lots, made an end of its unity (other than bare unity of ownership), and elected once for all to treat this multitude of lots as a commodity to trade in.

The basis of a claim to compensation for lands injuriously affected by severance must be that the lands taken are so connected with or related to the lands left that the owner of the latter is prejudiced in his ability to use or dispose of them to advantage by reason of the severance. The bare fact that before the exercise of the compulsory power to take land he was the common owner of both parcels is insufficient, for in such a case taking some of his land does no more harm to the rest then would have been done if the land taken had belonged to his neighbour.

Le Comité Judiciaire en est donc venu à la conclusion qu'il y avait bien unité de possession de tous ces lots, mais que cette unité

did not conduce to the advantage or protection of them all as one holding.

Dans la même cause, on a également dit ce qui suit:

As soon as it is decided that the lands taken and the lands in respect of which the claims in question arise are in fact separate and disjoined properties, so that these claims have no connection with the lands taken, it follows upon authority which cannot now be questioned that the arbitrators were right in holding that the claims in respect of noise, smoke and vibration were beyond their jurisdiction.

Cette décision du Conseil privé a été maintes fois citée devant cette Cour et en particulier dans la cause de *City of Montreal* vs. *McAnulty Realty Co.* (1) où il a été décidé que l'intimé avait droit en outre de la valeur des lots expropriés à une compensation pour les lots voisins dépréciés comme résultat de l'expropriation. Il est vrai que cette Cour est arrivée à la conclusion que les termes de l'article 421 de la charte de la cité de Montréal, couvrant les dommages aux terrains voisins, étaient différents de ceux employés dans la loi fédérale d'Expropriation; mais il appert également au jugement que la cause *Holditch* (2) ne trouve pas d'application parce que les raisons qui, en fait, ont justifié cette décision ne se rencontraient pas dans la cause *McAnulty* (1).

Dans cette dernière cause, la Cour a jugé que comme résultat de conditions imposées dans les actes de vente et d'autres circonstances particulières, il existait une telle relation entre les divers lots expropriés et ceux qui restaient, qu'il y avait lieu d'accorder une compensation pour indem-

(1) [1923] S.C.R. 273.

(2) [1916] 1 A.C. 536.

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niser l'exproprié des dommages soufferts. Le fait de rompre l'unité de propriété créait nécessairement une situation désavantageuse pour le reste des lots, tandis que dans la cause *Holditch* (1), la seule unité de propriété de lots séparés, que rien ne reliait les uns aux autres, ne faisait pas naître un avantage commun à tous les lots.

Voici ce que dit sir Lyman Duff, à la page 288:

> On the other hand, I am bound to say that if one were entitled to govern oneself by *Holdritch's* case (1), *Cowper-Essex's* case (2), and the case of the *Sisters of Charity* (3), there appears to be abundant evidence of the existence in relation to Montreal Park of that unity of possession and control, conducing to the advantage or protection of the property as one holding, which was held to exist in *Cowper-Essex's* case (2), and to be absent in *Holditch's* case (1).

Et M. le juge Anglin, à la page 289:—

> If the principles of those English decisions should be applied, in my opinion, upon the facts in evidence, there was sufficient connection between the lots taken and other lots in the building subdivision still owned and controlled by the respondents to bring this case within the authority of the *Cowper-Essex's* case (2), and the very recent *Sisters of Charity of Rockingham* case (3), and to render inapplicable the decision in the *Holditch* case (1).

Je suis d'opinion que la présente cause doit être régie par ces principes. Les lots pris isolément ne confèrent pas d'avantages aux lots voisins, et, par conséquent, le fait pour l'intimé d'être privé de certains lots ne lui fait subir aucun dommage appréciable au sens de la loi d'expropriation. Il est dans la même situation qu'il serait si les lots expropriés avaient appartenu à une autre personne. La seule unité de propriété n'ajoute pas à la valeur des lots. Il manque cette relation entre les divers lots qui ferait que par la perte de certains, les autres seraient dépréciés par la privation des avantages qu'ils avaient et qui provenaient des lots expropriés.

Et quant une cour en arrive à cette conclusion, alors, comme conséquence de la décision du Conseil privé dans *Holditch* vs. *Canadian Northern Ry. Co.* (1) il ne peut être question d'accorder aucune compensation pour le bruit, la poussière ou le danger qui résultent de l'usage du terrain exproprié.

L'appel doit donc être maintenu avec dépens contre l'intimé devant cette Cour. Ce dernier aura droit à une

(1) [1916] 1 A.C. 536. (2) (1889) 14 A.C. 153.
(3) [1922] 2 A.C. 315.

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indemnité de $10,292.96 avec intérêts au taux de 5 pour 100 depuis le 10 juillet 1940 jusqu'à la date du jugement de cette Cour (*Elgin Realty Co.* vs. *The King* (1) et aux deux tiers de ses frais et déboursés en Cour d'Echiquier du Canada.

DAVIS J.—I am in general agreement with the judgment of my brother Kerwin and concur in the disposition of the appeal which he proposes should be made. I have only a word or two to add.

Dealing first with the actual lands taken. During the somewhat extended review of the evidence as to value which we were afforded by counsel, the conclusion became inescapable from my mind that the amount of compensation fixed by the learned trial judge was excessive. The location and the nature of the land, and the almost total absence of any relevant and substantial evidence from which an assessment of present values can be drawn, make it difficult to fix compensation; but I am satisfied that the amount of $10,292.96 arrived at by my brother Kerwin will do no injustice to the suppliant and that judgment for that sum by this Court is a much preferable method of disposing of this branch of the appeal than sending the case back for a reassessment with the delays and expenses which would inevitably be involved.

On the other branch of the case, that is, the claim in respect of other lands which were not expropriated, for damages for the noise and general operation of the airport and the zoning regulations, I think the short answer to the claim is that it was never made the subject-matter of any petition of right and consequently, of course, no fiat was ever granted by the Crown to litigate the claim. There was no power in the trial judge to amend the claim in the petition of right by allowing this additional and totally different claim in respect of other lands than those expropriated and covered by the petition of right. Some very nice questions of law may well arise for determination in some other case as to the liability, if any, of the Crown for damages to the owner of lands adjoining or adjacent to a military airport which lands may be adversely affected by the operations carried on at or from the neighbouring airport, or damages for the interference with the freedom

(1) [1943] S.C.R. 49, at 53.

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of the use of such land by virtue of zoning regulations such as have been passed by Orders in Council under the War Measures Act, but no such question is open upon the record in this case.

KERWIN J.—This is an appeal from a decision of the Exchequer Court of Canada awarding the respondent suppliant, on a petition of right, $23,159.16 compensation for 514,648 square feet of his land expropriated at 4½ cents per square foot; and $13,122 for damages to other land of his which adjoins the part expropriated and the airport at Cap de la Madeleine, in the province of Quebec. This latter amount is arrived at by allowing thirty per centum depreciation on the value of 972,000 square feet at 4½ cents per foot and was awarded (*a*) for damages suffered by the respondent to such other land, due to the noise and general operation of the airport, and (*b*) for damages due to what is described as the servitude or easement established by certain Orders in Council and regulations.

I am satisfied that the allowance of 4½ cents per square foot is unreasonably high. A block of land, including the lots expropriated, was purchased by the respondent in 1914. During the first few years a number of lots were sold but practically none from 1927 to 1938, and since then very few. Many of the lots thus disposed of front on the road from Three Rivers to Shawinigan Falls and a number of these brought only 2 cents per square foot. The lots in question are far removed from this highway. While the municipal assessment is not a decisive factor, the very low assessment in the present case is additional evidence that the price awarded is excessive. In any event, the trial judge did not take into consideration the fact that the prices obtained on the sale of individual lots should not be applied to the disposal by the respondent of a great number of lots at one time. In view of these considerations, the price per square foot, for the lots expropriated, should be reduced from 4½ cents to 2 cents.

The land expropriated and the land claimed to have been injuriously affected had been subdivided into lots some years previously. In a claim arising under the *Exchequer Court Act* and the *Expropriation Act,* I am far from saying that that mere fact precludes the owner from claiming that lots still retained by him have been injuriously affected when others have been expropriated.

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Kerwin J.

In *City of Montreal* v. *MacAnulty* (1), this Court had to consider the provisions of the Montreal city charter but Duff and Anglin JJ., as they then were, stated that if the decision in that case were to be governed by *Holditch's* case (2), there was evidence of the existence in relation to Montreal Park of that unity of possession and control conducing to the advantage or protection of the property as one holding, which was held to exist in *Cowper-Essex* case (3), and to be absent in *Holditch's* case (2). Here, there is no such evidence and the respondent, therefore, is not entitled to any allowance for depreciation of any lots retained by him due to the construction or operation of the airport.

The first Order in Council referred to is P.C. 3867, dated November 28th, 1939, made under the provisions of the *War Measures Act,* R.S.C. 1927, chapter 206. This Order in Council made and established what are known as The Airport Zoning Regulations, 1939. By them a prohibition was enacted against any person erecting or constructing on land adjacent to any airport in Canada, designated by the Minister of Transport for direct or indirect use for military purposes, any building, chimney, pole, tower or other structure exceeding a height of one foot for every twenty feet that such building is located from the boundary of such airport, or exceeding the height of one foot for every fifty feet that such building, etc., is located from such boundary when the location is within the "flightway". The second Order in Council, P.C. 322, dated January 17th, 1941, amends P.C. 3867, but its provisions need not be detailed.

The airport at Cap de la Madeleine, which had been established by that municipality, was leased by the latter to the appellant as of June 3rd, 1940, for the duration of the war and as long thereafter as the appellant required. The expropriation occurred on July 10th, 1940, and it was only on November 12th, 1940, that the Minister of Transport designated the airport for direct or indirect use for military purposes and thus made it subject to the Airport Zoning Regulations, 1939. I doubt if the petition of right, even as amended, is sufficient to include any claim by the respondent for damages caused by such designation but, even if it were, neither the *Expropriation Act* nor the

(1) [1923] S.C.R. 273. (2) [1916] 1 A.C. 536.
(3) (1889) 14 A.C. 153.

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THE KING v. HALIN.

Kerwin J.

Exchequer Court Act provides for any such claim even where part of his lands was actually taken by the appellant. It is unnecessary to consider whether there has been an appropriation under the *War Measures Act* of any part of the respondent's lands not actually expropriated, as no order of reference has been made under section 7 thereof.

The judgment *a quo* should be amended by substituting the following for clauses 3 and 4 thereof:—

This Court doth order and adjudge that the said Suppliant, upon his delivering to His Majesty the King a valid and sufficient release or releases of any claim, liens, charges or encumbrances of any kind or nature whatsoever which may have existed upon the lands expropriated, including any seigniorial dues which may affect the land expropriated, is entitled to recover from the appellant the sum of $10,292.96 for 514,648 square feet of land expropriated at two cents per square foot; and this Court doth further order and adjudge that the Suppliant is not entitled to any damage that may have been caused to the residue of his property adjoining the said lands and the airport at Cap de la Madeleine, either for noise and general operation of the airport or by reason of the said airport having been designated a military airport under and by virtue of Orders in Council no. 3867, dated November 28th, 1939, and no. P.C. 322, dated January 7th, 1941, and the Airport Regulations, 1939.

This Court doth further order and adjudge that the said Suppliant is entitled to recover from His Majesty the King two-thirds of his costs of the action to be taxed.

The respondent is entitled to interest on the said sum of $10,292.96 at the rate of five per centum per annum from July 10th, 1940, to the date of the judgment of this Court but must pay to the appellant the latter's costs of the appeal to this Court.

Appeal allowed with costs and judgment varied.

1944

*Jan. 14.
*Jan. 29.

AU CHUNG LAM ALIAS OU LIM..... APPLICANT;

AND

HIS MAJESTY THE KING..... RESPONDENT.

ON PROPOSED APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA, EN BANC

Criminal law—Appeal—No possible appeal to Supreme Court of Canada under s. 1025, Cr. Code, by person found guilty on summary conviction.

There is no possible appeal to the Supreme Court of Canada under s. 1025 of the *Criminal Code* by a person found guilty on summary conviction under Part XV of the Code. S. 1025, under the special conditions

*Rinfret C.J. in Chambers.

therein mentioned, applies to an appeal by a person convicted of an indictable offence, and this really means a conviction on indictment as would appear from s. 1013. (S. 765, and *Attorney-General of Alberta* v. *Roskiwich*, [1932] S.C.R. 570, also cited.)

APPLICATION under s. 1025 of the *Criminal Code* for leave to appeal from the judgment of the Supreme Court of Nova Scotia *en banc* affirming (on appeal by way of stated case under s. 761 of the *Criminal Code*) the conviction of the present applicant by a police magistrate on the trial on the information and complaint that he did "without lawful authority or without a permit signed by the Minister or some person authorized by him in that behalf, have in his possession a drug, to wit, opium, contrary to the Opium and Narcotic Drug Act, 1929, and amendments thereto".

Gordon Henderson for the applicant.

C. Stein for the respondent.

THE CHIEF JUSTICE.—In this case the appellant was found guilty on summary conviction under Part XV of the *Criminal Code.*

I have come to the conclusion that the case does not come within section 1025 of the *Criminal Code.* That section, under the special conditions therein mentioned, applies to an appeal by a person convicted of an indictable offence; and this really means a conviction on indictment as would appear from section 1013 of the Code.

There is no possible appeal under section 1025 by a person found guilty on summary conviction.

Moreover, the judgment *a quo* was rendered on a stated case and, under sec. 765 of the *Criminal Code,* such an order is final and conclusive upon all parties. (*Attorney-General for Alberta* v. *Roskiwich* (1)).

The motion, therefore, will be dismissed.

Application dismissed.

Solicitor for the applicant: *F. W. Bissett.*

Solicitor for the respondent: *The Attorney-General of Nova Scotia.*

(1) [1932] S.C.R. 570.

1943
*Oct. 21, 22.
1944
*Feb. 22.

HOCHELAGA SHIPPING & TOWING COMPANY LIMITED (SUPPLIANT).. APPELLANT;

AND

HIS MAJESTY THE KING (RESPONDENT) ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Shipping—Damages—Crown—Claim against the Crown for damage to vessel—Assessment of damages—Basis for assessment—Amount awarded—Disallowance of interest—Petition of Right on behalf of and for benefit of underwriters—Allowance for loss of profits during period for repairs.

In a previous judgment, [1940] S.C.R. 153, this Court held that the Crown was liable in damages to the suppliant by reason of the suppliant's vessel having struck a submerged portion of a jetty; but (by a majority) refused to allow the amount claimed, which was for a total loss of the vessel and its equipment, which occurred; the Court sustaining a finding at trial that after the collision the vessel's officers were negligent in not discovering sooner than they did the extent of the damage and in continuing the voyage; and being of opinion that the total loss would have been avoided had an attempt been made to return the vessel to the wharf or to beach it; and remitted the case for determination of the damages on the basis of the suppliant being entitled to all such damages as were directly and naturally attributable to the collision. The present appeal was by the suppliant from the subsequent determination of the damages.

Held: The trial Judge had, in assessing the damages in respect of the vessel itself, correctly appreciated and properly applied the directions of this Court; and had also properly disallowed interest on the amount awarded: the Crown is not liable to pay interest unless the statute or contract provides for it; but the amount awarded should be increased by allowance for loss of certain supplies; and also by allowance for loss of profits during the period which would have been required for repairs: the fact that the suppliant's petition of right was submitted on behalf of and for the benefit of underwriters (subrogated to the suppliant's rights) did not justify disallowance for such loss of profits; the underwriters stood in the place of the suppliant and were "entitled to succeed to all the ways and means by which the person indemnified might have protected himself against or reimbursed himself for the loss" (*Simpson* v. *Thomson*, 3 App. Cas. 279, at 284).

APPEAL by the suppliant from a judgment of Angers J. in the Exchequer Court of Canada.

The action had been brought by way of petition of right to recover damages against the Crown (in the right of the Dominion of Canada) for the loss of the suppliant's tow-boat *Ostrea* (which was equipped for salvage operations)

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

and its equipment and salvage equipment, resulting, so it was alleged, from its striking the submerged portion of the outward end of a jetty, the top portion of which outward end had been broken away by a storm. The facts as to the jetty and as to the accident now in question are discussed at length in a previous judgment of this Court reported in [1940] S.C.R. 153. That judgment was on an appeal and a cross-appeal from a previous judgment of Angers J. in the action (1). Angers J. had held that the jetty was a public work within the meaning of s. 19 (*c*) of the *Exchequer Court Act* (R.S.C. 1927, c. 34), that the *Ostrea* struck the aforesaid submerged portion of the jetty, that the collision was attributable to the negligence of officers or servants of the Crown while acting within the scope of their duties or employment upon a public work (within said s. 19 (*c*)), and that the Crown was liable in damages; and those holdings were sustained by the said judgment of this Court (2). But Angers J. had held that,

> after the accident, the master of the *Ostrea* was negligent in not taking the means of ascertaining the extent of the damage caused to his vessel by the collision, before proceeding to sea. Had he found that the vessel was leaking, as I think he should have, if he had made a proper inspection of the hull immediately after the impact, he would not or at least should not, assuming he had acted prudently, have proceeded on his voyage but should have brought back his vessel to the wharf. He would thus have avoided the loss of his ship and of her equipment.
>
> * * *
>
> I have no doubt that the extent of the damage caused to the ship by the collision would have been detected if a proper inspection had been made immediately after the collision.
>
> In the circumstances, I believe that the damage for which the respondent is responsible is limited to the cost of the repair of the vessel. Unfortunately there is no evidence in the record enabling me to determine the said cost. If the parties cannot agree on an amount, they will be at liberty to refer the matter to me and to adduce evidence for the purpose of establishing, as exactly as possible, what the repair of the vessel would have cost.

and by the formal judgment in the Exchequer Court, the relief had been limited to

> the damages to the vessel directly attributable to the collision with the obstruction in the vicinity of the pier as alleged, had such damages been ascertained immediately after the said collision, the amount thereof to be established by reference to the Court if the parties cannot agree.

In this Court, the Chief Justice and Davis J., dissenting on this question, would have allowed the suppliant the

(1) [1940] Ex. C.R. 199. (2) [1940] S.C.R. 153.

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amount of damages claimed in its appeal, but the majority of the Court (Rinfret, Crocket and Kerwin JJ.), the judgment of whom was written by Crocket J., were of opinion:

> that there was sufficient evidence to support the learned trial judge's finding that after the collision there was negligence on the part of the steamboat's officers in not discovering sooner than they did the extent of the damage caused to the vessel's hull in passing over the obstruction and that had they acted promptly and prudently in this regard, the vessel would not have continued its voyage for 3½ miles into the open bay.
>
> There can be little doubt that the total loss of the vessel and its equipment would have been avoided had an attempt been made either to return her to the wharf or to beach her at some nearby point. For this reason, though not convinced of the correctness of the statement appearing in His Lordship's reasons that the damage should be limited to the cost of the repair of the vessel, I concur in the terms of the formal judgment in so far as it declares that the suppliant is not entitled to compensation as for a total loss as claimed, but is entitled to recover the damages directly attributable to the collision. I would not, however, restrict the condemnation to damages to the vessel alone and would delete from the order the words "had such damages been ascertained immediately after the said collision", and leave the assessment open generally to such damages as are directly attributable to the collision. It is not at all clear upon the existing evidence that, had the extent of the damage to the steamer's hull been promptly discovered and the master brought her back to the dock or beached her at the nearest possible place, no further loss would have been sustained than the damages to the vessel itself, which were ascertainable immediately after her collision with the submerged obstruction.
>
> * * *
>
> For the above reasons I would dismiss the appeal with costs, allow the cross-appeal to the extent of varying the declaration of the formal judgment of the learned trial judge limiting the assessment of damages in the manner stated, and, failing an agreement between the parties, remit the case to the Exchequer Court for their determination on the basis of the suppliant being entitled to all such damages as are directly and naturally attributable to the collision. The suppliant, I think, is in the circumstances entitled to costs on its cross-appeal as well as on the appeal.

and by the formal judgment in this Court, the Crown's appeal was dismissed, the suppliant's cross-appeal was allowed, and the judgment of Angers J. was varied "by directing an assessment of damages in the manner stated in the reasons for judgment of Mr. Justice Crocket", and, failing agreement as to the amount, the case was remitted to the Exchequer Court for the determination of such damages.

The matter of assessment of damages, on the basis laid down by this Court, came before Angers J. By his judg-

ment (from which the present appeal is taken by the suppliant), he held: that the contention that it was impossible to bring back the *Ostrea* to the wharf or to beach her safely and that the loss of the vessel and her equipment was unavoidable, had been finally disposed of and was no longer at issue; and, on the evidence, that the *Ostrea* could have been brought back to the dock, securely, had someone on the vessel investigated carefully, immediately after the impact, to ascertain the extent of the damage, and in any case there was no difficulty in the way of beaching her on the west side of the breakwater, and further she could have been beached to the eastward, but, as there was a rocky bottom there, her hull would very likely suffer additional damage; that, with competent and prudent handling after the collision, the vessel, with her equipment, could have been saved; that if she had been brought back to the dock she probably would have sunk alongside the dock and would have had to be refloated; that it was reasonable to assume that the captain of a vessel, having two courses at his disposal, viz., taking her back to the dock or beaching her, would, the chances being equal, adopt the first one, thus avoiding the possibility of aggravating the damage in beaching the ship. He held that the suppliant should be allowed $3,000 for the cost of refloating and temporary repairs, $150 for a survey of the vessel, $500 for cost of repairing (a further allowance for taking her to a shipyard for repair would have been made had there been any evidence of such cost), $600 for the cost of salvaging the equipment, $60 for certain items of damage to the equipment (that, there being no amounts mentioned in connection with certain other items, nothing could be allowed therefor, the evidence was quite inadequate and unsatisfactory, and the burden of prooof was upon the suppliant; that much of the equipment would not have been damaged at all); that, as the petition was submitted on behalf and for the benefit of the underwriters, the question of loss of profits which the suppliant might have incurred need not be considered, as the underwriters had no interest in the profits, but had an amount been allowed, he would have been inclined to fix it at $400, representing the loss incurred during the period within which the repairs could have been properly effected. In the result, judgment was given for the suppliant for $4,310; without

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interest, as the Crown was not liable to pay interest except when provided for by statute or by contract. The suppliant was given the costs of the action.

The items referred to in the reasons for judgment in this Court *infra* as "supplies described as disbursements", as to loss of which no allowance was made in the judgment of Angers J., were: "coal, water, oil, waste, grease, dynamite, batteries, fuse, electric wires, food, lanterns, cutlery."

The suppliant appealed to this Court, alleging errors in the findings and holdings of Angers J., and asking for allowance of a largely increased amount.

W. C. Macdonald K.C. for the appellant.

F. D. Smith K.C. and *C. Stein* for the respondent.

The judgment of the Court was delivered by

RINFRET J.—We think that in the assessment he made of the damages representing the loss of the *Ostrea* the learned trial Judge correctly appreciated and properly applied the directions contained in the judgment of this Court of the 9th of December, 1939 (1). We also agree with the learned Judge that no interest should be allowed on the amount awarded to the suppliant. The Crown is not liable to pay interest, unless the statute or contract provides for it; and such is not the case here.

It appears to us, however, that the suppliant is entitled to compensation for the loss of supplies described as disbursements. It is true that the evidence in respect of these disbursements was not altogether satisfactory; but, in our view, it establishes a loss to the value of at least $1,500, as a minimum.

Further, there is the question of the profits lost. The learned Judge said he felt inclined to fix them at $400, representing the loss incurred during a period of fifteen days within which repairs, in his opinion, could have been properly effected. He did not, however, allow the amount to the suppliant, on the ground that the petition was submitted on behalf of and for the benefit of the underwriters; and that the latter, according to him, had no interest in the profits. The judgment of this Court had already indicated that the appellant was entitled to the loss of profits while the *Ostrea* was undergoing repairs; and, moreover,

(1) [1940] S.C.R. 153.

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HOCHELAGA SHIPPING & TOWING CO. LTD. v. THE KING.

Rinfret J.

with respect, in a case of this kind, the underwriters stand in the place of the suppliant and they are "entitled to succeed to all the ways and means by which the person indemnified might have protected himself against or reimbursed himself for the loss". (*Simpson* v. *Thomson* (1)). We are disposed to accept the amount mentioned by the learned Judge as representing the loss of profits, and we think that sum should be added to the award made.

In the result, the judgment appealed from should be modified and an additional sum of $1,900 added to the amount allowed to the suppliant. Otherwise the appeal should be dismissed. In view of the divided success, there should be no costs in this Court to either party.

Judgment below modified by allowing additional sum to appellant; otherwise appeal dismissed.

Solicitor for the appellant: *L. A. Lovett.*

Solicitor for the respondent: *C. J. Burchell.*

1944

*Feb. 4.

MARY MURDOCK (PLAINTIFF)..... APPELLANT;

AND

JAMES O'SULLIVAN AND AGNES O'SULLIVAN (DEFENDANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Motor vehicles—Negligence—Action by gratuitous passenger in motor car against owner and driver thereof for damages for personal injuries sustained in accident—Whether "gross negligence" by driver contributing to injury (s. 74B of Motor Vehicle Act, R.S.B.C., 1936, c. 195, as amended by Statutes of 1938, c. 42, s. 3, and of 1941-42, c. 25, s. 4).

APPEAL by the plaintiff from the judgment of the Court of Appeal for British Columbia (2) which reversed the judgment of Farris C.J.S.C. for the plaintiff. The action was for damages against the defendant James O'Sullivan as the owner and the defendant Agnes O'Sul-

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

(1) (1877) 3 App. Cas. 279, at 284.
(2) [1943] 3 W.W.R. 162; [1943] 3 D.L.R. 773.

1944

MURDOCK v. O'SULLIVAN.

Rinfret J.

livan as the driver of a motor car, for personal injuries sustained by the plaintiff in an accident which occurred while the plaintiff was a gratuitous passenger in the motor car. The plaintiff alleged that the accident was caused by gross negligence of the defendant driver. For an action to lie against the defendants by the plaintiff, it was required, under s. 74B of the *Motor Vehicle Act* of British Columbia (R.S.B.C. 1936, c. 195, as amended by the statutes of 1938, c. 42, s. 3, and of 1941-42, c. 25, s. 4), that there had been "gross negligence" on the part of the driver which contributed to the injury. The Court of Appeal held that no case of gross negligence had been made out. (As the amount in controversy in the appeal to this Court did not exceed the sum of $2,000, special leave to appeal was granted by the Court of Appeal for British Columbia.)

J. W. deB. Farris K.C. for the appellant.

C. H. Locke K.C. for the respondents.

At the conclusion of the argument of counsel for the appellant, and without calling on counsel for the respondents, judgment was given orally by the Chief Justice for the Court, dismissing the appeal with costs and confirming the Court of Appeal on the ground that, on the record, no gross negligence had been established.

Appeal dismissed with costs.

Solicitors for the appellant: *Crux & Kennedy.*

Solicitor for the respondents: *W. S. Lane.*

LOUIS EDGAR CARON (DEFENDANT IN SUB-WARRANTY AND INTERVENANT). } APPELLANT; 1944 *Feb. 1.

AND

ALICE FORGUES (PLAINTIFF) ..... RESPONDENT;

AND

ALEXANDRE NADEAU (DEFENDANT AND PLAINTIFF IN WARRANTY)

AND

J. B. SAVARD (DEFENDANT IN WARRANTY AND PLAINTIFF IN SUB-WARRANTY)

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

Practice and procedure—Motion to quash by respondent and motion for leave to appeal by appellant—Principal action, action in warranty and action in sub-warranty—Amount awarded by principal action less than $2,000—Defendant in sub-warranty condemned to pay that amount plus costs of principal action and of action in warranty—Whether such costs may be added to amount granted by principal action so as to raise the "amount of value of the matter in controversy" to a sum of $2,000—Supreme Court Act, R.S.C., 1927, c. 35, s. 40.

Section 40 of the *Supreme Court Act* provides that "where the right of appeal * * * is dependent on the amount or value of the matter in controversy such amount or value * * * shall not include * * * any costs". These "costs" are the costs of the action which a party to that action is condemned to pay. The costs of other suits, connected with the main action, which costs a party is condemned to pay in addition to the amount granted by the main action, really form part of, and should be added to, that amount in order to determine the "amount or value of the matter in controversy".

In the present case, the amount granted to the plaintiff by the main action was a sum of $1,882; but the appellant, defendant in sub-warranty, besides being condemned to pay that amount, was also ordered to indemnify in full the defendant in warranty and indirectly the principal defendant. The costs incurred by these two defendants, which the appellant was thus obliged to pay, should be added to the principal amount for the purpose of determining "the amount or value of the matter in controversy". With such addition, the amount in this case exceeded a sum of $2,000, and, therefore, this Court has jurisdiction to entertain the appeal *de plano*.

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

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CARON v. FORGUES.

MOTION by the respondent to quash the appeal, for want of jurisdiction, from the judgment of the Court of King's Bench, appeal side, province of Quebec, on the ground that the amount or value of the matter in controversy was less than $2,000; and

MOTION by the appellant for leave to appeal to this Court from that judgment which reversed the judgment of the Superior Court, Gibsone J. and dismissed the appellant's intervention, thus maintaining the principal action and the actions in warranty and sub-warranty.

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

André Taschereau K.C. for the appellant.

L. A. Pouliot K.C. for the respondent.

The judgment of the Court was delivered by

TASCHEREAU J.—Dans cette cause, deux motions différentes ont été soumises à la Cour. La première en est une présentée par l'intimée pour rejet d'appel, parce que le montant en jeu ne serait pas supérieur à la somme de $2,000. La seconde est faite par l'appelant, qui par mesure de précaution, demande la permission d'appeler.

L'intimée, demanderesse principale, a poursuivi un nommé Nadeau, alléguant une chute sur un trottoir dans la cité de Québec. Nadeau a appelé son locataire en garantie et celui-ci, à son tour a appelé en arrière-garantie Louis-Edgar Caron, contracteur chargé d'enlever la neige. Caron a produit une intervention demandant le rejet de l'action principale et M. le juge Gibsone a maintenu cette intervention, a rejeté l'action principale avec dépens, ainsi que les deux actions en garantie, mais sans frais.

La Cour de Banc du Roi en est arrivée à une conclusion différente. Elle a rejeté l'intervention, maintenu l'action principale pour la somme de $1,882, avec intérêts et dépens, maintenu l'action en garantie, et condamné le défendeur en garantie à indemniser le demandeur en garantie de la condamnation prononcée sur l'action principale en capital, intérêts et frais, y compris les frais de l'action en garantie

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CARON v. FORGUES.

Taschereau J.

ex parte. La Cour du Banc de Roi a également maintenu l'action en arrière-garantie contre le défendeur en arrière-garantie, qui a par conséquent, été condamné à indemniser le demandeur en arrière-garantie de la condamnation prononcée contre lui en capital, intérêts et frais, y compris les frais de l'action en garantie, et les frais de l'action en arrière-garantie *ex parte*.

La demanderesse intimée Forgues invoque, à l'appui de la motion, l'article 40 de *l'Acte de la Cour Suprême du Canada*, qui dit:

> Lorsque le droit d'appel ou de demander une permission spéciale d'appel dépend de la somme ou valeur de l'affaire en litige, cette somme ou valeur peut se prouver par une attestation sous serment, et elle ne doit pas comprendre l'intérêt postérieur à la date du prononcé du jugement porté en appel, ni aucuns frais.

Elle allègue que le montant de la condamnation, soit $1,882, plus le montant des intérêts susceptibles d'être considérés pour déterminer la juridiction de cette Cour, n'est que de $1,945.96.

La prétention de l'appelant intervenant est qu'à cette somme de $1,946.96 il faut ajouter les frais de l'action principale, ainsi que les frais de l'action en garantie, car ces montants font partie de la condamnation, en outre du capital de $1,882 et des intérêts.

Nous sommes d'opinion que ce raisonnement de l'appelant est juste, et que c'est l'interprétation qu'il faut donner au mot "frais" rencontré dans l'article 40 de *l'Acte de la Cour Suprême du Canada*. Evidemment il ne peut être question de tenir compte dans la détermination du montant en jeu, des frais de l'intervention, ni des frais de l'action en arrière-garantie, qui sont les frais de l'action dans laquelle l'appelant est condamné; mais il en est autrement des frais des autres actions qui sont entre des parties différentes et qui font partie du capital que l'appelant doit payer, en vertu du jugement qui le condamne à indemniser le défendeur en garantie, et indirectement le demandeur principal.

Comme le montant de $1,882 plus les intérêts et les frais de l'action principale, ainsi que ceux de l'action en garantie forment un montant supérieur à $2,000, il s'ensuit que cette Cour a juridiction *de plano* pour entendre cet appel, et que la motion doit être rejetée avec dépens. (*Vide* dans la même sens *Labrosse* v. *Langlois* (1).

(1) (1908) 41 Can. S.C.R. 43.

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CARON v. FORGUES.

Taschereau J.

Dans la seconde motion qui a été soumise en même temps, l'appelant demande une permission spéciale d'appeler devant cette Cour. Comme cette Cour a juridiction pour entendre cette cause *de plano*, il s'ensuit que cette motion est inutile, et elle doit être rejetée avec dépens.

Both motions dismissed with costs.

1944

*Feb. 1.
*March 10.

HYMIE SAPERSTEIN (PLAINTIFF) ... APPELLANT;

AND

KENNETH CHARLES DRURY (DEFENDANT) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Appeal—Jurisdiction—Amount in controversy in the appeal (Supreme Court Act, R.S.C. 1927, c. 35, s. 39).

MOTION to quash for want of jurisdiction an appeal by the plaintiff from the judgment of the Court of Appeal for British Columbia (1) in that the amount or value in controversy in the appeal to this Court did not exceed the sum of $2,000 and no special leave to appeal had been obtained.

The plaintiff had claimed damages (claimed in the statement of claim at $10,000 general damages and $735 special damages) against the present respondent and three other persons for breach of an alleged agreement to lease to the plaintiff certain premises owned by the defendants. Two of the defendants, who resided outside the jurisdiction, were not served with the writ of summons, and the action proceeded against the present respondent and the other defendant. The trial Judge, Robertson J., in a judgment written subsequent to the trial, held that the present respondent had no authority from his co-owners to enter into the agreement (as the trial Judge found he had done) and dismissed the action as against the said other defendant, but he held that the present respondent would be liable for damages for breach of warranty of authority and that the plaintiff should be allowed to amend his statement of claim by pleading a claim therefor. The formal

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

(1) 59 B.C. Rep. 281; [1943] 3 W.W.R. 193; [1943] 4 D.L.R. 191.

judgment at trial gave the plaintiff liberty to amend his statement of claim by inserting therein a claim for damages against the present respondent for breach of warranty of authority, adjudged that the plaintiff was entitled to damages against the present respondent for such breach of warranty, to be assessed, and directed an enquiry as to damages. No assessment of damages was made. (No evidence as to damages under the original claim for damages was given at the trial, it being agreed that if there should be a finding for the plaintiff, there should be a reference as to the damages). An appeal by the present respondent was allowed by the Court of Appeal for British Columbia (1), which dismissed the action as against him. The plaintiff appealed to this Court and the respondent moved to quash the appeal as aforesaid.

G. Henderson for the motion.

G. J. McIlraith contra.

THE COURT.—This is a motion to quash for want of jurisdiction an appeal by the plaintiff from the judgment of the Court of Appeal for British Columbia reversing the judgment at the trial and dismissing the action. As pointed out by the Chief Justice of British Columbia, the judgment at the trial afforded the plaintiff a relief that had not been sought, upon a ground that was not pleaded or suggested in argument. In accordance with leave granted by the trial judgment, the plaintiff amended his statement of claim but did not claim any specific amount of damages in connection with the alleged new cause of action.

The sums which had already been claimed have reference only to the cause of action originally put forward by the plaintiff, upon which he did not succeed even before the trial judge. The most that the plaintiff could secure by his appeal to this Court would be the restoration of the trial judgment. The material filed on this application does not establish that more than two thousand dollars is involved in the appeal; neither does it appear from the record; and the application must therefore be granted with costs.

Motion granted with costs.

Solicitor for the appellant: *P. J. Sinnott.*

Solicitors for the respondent: *Crease, Davey, Fowkes, Gordon & Baker.*

(1) 59 B.C.R. 281; [1943] 3 W.W.R. 193; [1943] 4 D.L.R. 191.

1944

*Feb. 28.
*March 10.

JAMES WALTER GRAVESTOCK..... APPELLANT;

AND

GEORGE W. PARKIN AND FRANKLIN L. WELDON..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

*Appeal—Jurisdiction—Appeal to Supreme Court of Canada—Supreme Court Act (R.S.C. 1927, c. 35), s. 38—Judgment appealed from "made in the exercise of judicial discretion"—Exception in s. 38 of "proceedings in the nature of a suit or proceeding in equity * * *".*

On motion to quash an appeal to this Court from the judgment of the Court of Appeal for Ontario, [1944] O.R. 49, which (reversing an order of Mackay J.) denied to the present appellant a mandamus to compel the warden and the treasurer of a county to execute and deliver a tax deed of land of which the present appellant had become the purchaser at a tax sale:

Held: Motion to quash granted. One ground on which the judgment appealed from was based was that in the circumstances the discretion of the Court should be exercised against allowing the mandamus; and therefore the judgment was one "made in the exercise of judicial discretion" and appeal was barred by s. 38 of the *Supreme Court Act* (R.S.C. 1927, c. 35); the case did not fall within the exception in s. 38 of "proceedings in the nature of a suit or proceeding in equity * * *": while power resided in the Court of Chancery in England and now exists in the Supreme Court of Ontario to grant mandatory injunctions in suits or proceedings in equity, such jurisdiction was not and is not exercised against public officers to compel them to do their duty.

MOTION to quash, for want of jurisdiction, an appeal to this Court from the judgment of the Court of Appeal for Ontario (1), which (reversing an order of Mackay J.) dismissed the present appellant's motion for a mandamus to compel the warden and the treasurer of the County of Victoria to execute and deliver a tax deed of certain land, of which the present appellant had become the purchaser at a tax sale; and also MOTION by the appellant for special leave to appeal, if in the opinion of the Court such leave was necessary. (Leave to appeal to this Court had been refused by the Court of Appeal for Ontario.)

J. E. Anderson K.C. for the motion to quash and against the motion for special leave to appeal.

E. G. Gowling against the motion to quash and for the motion for special leave to appeal.

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

(1) [1944] O.R. 49; [1944] 1 D.L.R. 417.

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THE COURT.

THE COURT.—In accordance with the Ontario Rules of Practice, J. W. Gravestock applied, by originating notice of motion, for a prerogative mandamus to compel the Warden and Treasurer of the County of Victoria to execute and deliver a tax deed of certain lands of which he had become the purchaser at a tax sale. The mandamus was granted by the judge of first instance but the Court of Appeal dismissed the application. So far as appears from the judgments, the lands are of very little value but, if jurisdiction exists in this Court, Gravestock is entitled to proceed with the appeal he has launched from the order of the Court of Appeal and the motion to quash should not be granted.

The reasons for judgment of the Court of Appeal were given by Mr. Justice Kellock and concurred in by the Chief Justice and Mr. Justice Gillanders. It was therein determined that one Wood, who appears to have had no interest in the lands but who had paid to the Treasurer the amount necessary to redeem the lands, was a person entitled to redeem within the meaning of the phrase "any other person" as used in section 177 of *The Assessment Act,* R.S.O. 1937, chapter 272. If Gravestock decided to institute an action for a mandamus, he would be faced with this decision. However, he is also met with the objection that his appeal to this Court is barred by section 38 of the *Supreme Court Act* because Mr. Justice Kellock proceeded to declare that in the circumstances the discretion of the Court should be exercised against the applicant and the prerogative mandamus refused.

Section 38 reads as follows:—

> 38. No appeal shall lie to the Supreme Court from any judgment or order made in the exercise of judicial discretion except in proceedings in the nature of a suit or proceeding in equity originating elsewhere than in the province of Quebec.

The judgment of the Court of Appeal is based on two distinct grounds, neither of which may be treated as *obiter,* and is therefore a judgment made in the exercise of judicial discretion. While power resided in the Court of Chancery in England and now exists in the Supreme Court of Ontario to grant mandatory injunctions in suits or proceedings in equity, such jurisdiction was and is not exercised against public officers to compel them to do their duty. This case, therefore, does not fall within the exception in sec-

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tion 38 of "proceedings in the nature of a suit or proceeding in equity originating elsewhere than in the province of Quebec".

The motion to quash is granted with costs. Even if special leave to appeal could be given, this is not a case where it should be granted and the motion therefor is dismissed with costs.

Motion to quash granted with costs. Motion for special leave to appeal dismissed with costs.

Solicitors for the appellant: *Frost & Frost.*

Solicitors for the respondents: *McLaughlin, Fulton, Stinson & Anderson.*

1944

*Feb. 7, 8, 9.
*April 25.

IN THE MATTER OF THE ESTATE OF ALBINA POIRIER, DECEASED.

YVETTE LEGER AND JOSEPH ADRIEN MICHAUD..... } APPELLANTS;

AND

HECTOR POIRIER ..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK, APPEAL DIVISION

Will—Validity—Testamentary capacity—Onus of proof.

Held, that a document propounded for probate as a deceased's last will should be declared not to be her last will, because it did not satisfactorily appear that it was executed by a competent textatrix. (Judgment of the Supreme Court of New Brunswick, Appeal Division, 17 M.P.R. 147, which, by a majority, had affirmed judgment in the Probate Court admitting the document to probate, reversed.)

Per the Chief Justice and Kerwin, Taschereau and Rand JJ.: Facts in evidence cast on the whole case such a doubt of the competency of the testatrix as required the Court to say that the onus of showing the document to be the will of a "free and capable" person had not been met.

There may be testamentary incapacity accompanied by a deceptive ability to answer questions of ordinary and usual matters: that is, the mind may be incapable of carrying apprehension beyond a limited range of familiar and suggested topics. A "disposing mind and memory"

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

is one able to comprehend, of its own initiative and volition, the essential elements of will-making, property, objects, just 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, and this was not present here.

Per Hudson J.: Once testamentary capacity is called in question, the onus lies on those propounding a will to affirm positively the testamentary capacity (*Robins* v. *National Trust Co.*, [1927] A.C. 515, at 519). The trial Judge's decision was on the assumption that the onus was on those attacking the will, and in this (on the issue of testamentary capacity) he was mistaken. In view of that mistake and of the doubts he expressed in reaching his conclusion, the rule, suggested from decisions in this Court, against disturbing concurrent findings of fact in the courts below did not apply, and it was the duty of this Court to review the evidence and come to its own conclusion, subject, of course, to the normal weight to be given to the trial Judge's findings and to the opinions of the Judges in appeal. On the evidence, the deceased's mental capacity at relevant times was open to some doubt, and the rule is that wherever a will is prepared and executed under circumstances which raise the suspicion of the court, it ought not to be pronounced for unless the party propounding it adduces evidence which removes such suspicion and satisfies the court that the testator knew and approved the contents of the instrument. (Hudson J. expressed "some hesitation" in his conclusion against validity of the will. Also, dealing with the issue of undue influence, he pointed out that the onus was on those asserting undue influence, and held that the findings below that undue influence had not been proved should not be disturbed.)

APPEAL from the judgment of the Supreme Court of New Brunswick, Appeal Division (1), dismissing (Fairweather J. dissenting) the present appellants' appeal from the judgment of the Honourable Edward G. Byrne, Judge of Probate for the County of Gloucester, admitting to probate the document propounded as the last will and testament of Albina Poirier, late of Bathurst, New Brunswick, deceased, in proceedings taken (in view of caveat filed on behalf of the present appellants) by the present respondent, the executor appointed by the said document, to have the same proved in solemn form. The main grounds alleged against validity of the document as a will were testamentary incapacity and undue influence.

J. F. H. Teed K.C. for the appellants.

C. T. Richard for the respondent.

(1) 17 M.P.R. 147.

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Rand J.

The judgment of the Chief Justice and Kerwin, Taschereau and Rand JJ. was delivered by

RAND J.—This is an appeal from a judgment of the Supreme Court of New Brunswick, Fairweather J. dissenting, affirming the finding of the Probate Court of Gloucester County that the document propounded for probate by the respondent was the last will of Albina Poirier. The probate was opposed by two grandchildren, the appellants, children of a deceased daughter, and the grounds were undue influence on the part of a son, the respondent, and incompetency.

The testatrix at the time of executing the document, November 21st, 1941, was about seventy-nine years of age. Her husband had been a merchant in Bathurst and from the time of his death in 1918 she continued the business until 1935 or 1936 when it was transferred to the son. She had been a vigorous and capable woman but in the fall of 1941 her health began to fail rapidly, ending in her death on March 2nd, 1942. The instrument was prepared by a solicitor, Mr. Robichaud, and he states that at the time she was in a very feeble condition.

From the spring of 1939 until her death, her home was occupied by her son with his wife and family. The number of the children is not given but the family is described as large. In August, 1941, it was thought necessary to have someone in attendance to help the deceased look after herself and get about the house, and a young grandniece, Rose Gosselin, was engaged who remained until some time in January, 1942. She was a bright girl of over seventeen years who, through close association, probably had a better opportunity than any other person to observe the actual state and progress of the mother.

This girl tells us that, from September until she left, in spite of the mother's protests, the front door of the home was kept locked and the key retained by the son or his wife. Persons calling to see the mother were admitted only after they had passed the scrutiny of the one or the other. Both the wife of the appellant grandson and a Mrs. Lasnier, who had been brought up in the family, were told by the mother to enter the house by the back door and to go upstairs to her room without regard to the family below. On at least two occasions the son showed such anger and hostility to their visiting as to order them

out of the house. In the spring of 1939 he had done that to Mrs. Lasnier at the time of a short visit but, on the mother's plea, she had remained. These two young women were both thoughtful and considerate of the older woman who had for them a cordial regard; but to the son, particularly in the later stages, obsessed with a determination to control his mother's property, they appeared as if bent on frustrating him. So far as the evidence goes, such a notion was utterly groundless. All of this conduct, of course, was with reference to a home, not of his own, but of his mother's. That she desired to live alone is beyond doubt. She had spoken to a Father McKenna about it. She disliked the son's wife. In August, 1941, she had consulted Robichaud as to means by which the family could be forced out. Later, she protested to the son that he must go away, that the children bothered her and she wanted to be alone; but to no purpose.

On the morning of November 21st, 1941, the son arranged with Robichaud to come to the home and prepare a will, but it does not appear who raised the matter in the first instance. In the afternoon, before Robichaud arrived, he had a conversation with his mother. The Gosselin girl was present part of the time and what was said is of much importance. She recounts the colloquy in which the mother's words were drawn out by the questions of the son:

> He came and talked to her before Mr. Robichaud came how she was going to fix her affairs. . . . He asked her how much money she wanted to give.
>
> * * *
>
> Q. What were the first words he told her that you do remember?
> A. "How do you want to fix that?"
> Q. What did Mrs. Poirier say?
> A. She didn't talk.
> Q. Did Mrs. Poirier repeat anything that Hector had said to her?
> A. Yes. When he asked her "How do you want to fix that?", she repeated that.
> Q. The exact words?
> A. Yes.
> Q. Did she do that often, repeat the exact words?
> A. She nearly always repeated.
>
> * * *
>
> Q. What did she say?
> A. She repeated what he said, "What do you want to do? You want to give $2,000 to Adrien, $2,000 to Yvette?"
>
> * * *
>
> Q. After she repeated these words to Hector, what did Hector say?
> A. Hector spoke next. Hector said "You want to give $2,000 to Adrien, $2,000 to Yvette." Mrs. Poirier would repeat behind what he said.

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COURT: Just what words did she say?

A. She repeated the same thing, "$2,000 to Adrien, $2,000 to Yvette." That's what Mrs. Poirier said. "You want to give $2,000 to Adrien." She repeated the same thing for Yvette. "2,000 for Adrien, $2,000 for Yvette."

* * *

Q. Now what conversation was said after that?

A. About the house. Hector said, "The house, to whom do you want to give it?" She said, "The house, I want to give it to Yvette."

Q. Next?

A. He said, "You don't want to give it to Marcelle?"

Q. Who is Marcelle?

A. The oldest girl at Hector Poirier's.

Q. What did she say to that?

A. She said "Give the house to Marcelle? No."

Q. What was said next?

A. Hector said "Give it to me."

Q. What did she say?

A. She said "No."

Q. Then what?

A. Then I went away.

Q. How did Hector address her, calmly?

A. Yes.

Q. Did that change?

A. Yes, when she wouldn't give him the house.

Q. Did Hector get angry?

A. He was not in good humour.

Shortly after three o'clock Robichaud was shown upstairs by the son who remained in his mother's presence at least until the gifts of $2,000 were mentioned. He told the granddaughter, Mrs. Yvette Leger, when the will was produced by him to be read, that he did not know its contents: but a letter to Mrs. Lasnier of December 1st in evidence, the fact that the document had been handed to him by Robichaud following its execution, and his complete assumption of authority over his mother's affairs thereafter, refute that statement.

Now, the mother had made a will in 1939 in which the son was bequeathed $2,000, the grandson $5,000, and the residue, less a small bequest for masses, left to the granddaughter. The executors were the last named and a Father Robichaud. This distribution was repeated in another drawn in 1940 in which a Father Poirier was named executor, the circumstances of the execution of which, however, on the objection of the respondent, were not allowed to be proven. Father McKenna, who drew both wills, says, apropos of having a lawyer, that she seemed "to have some kind of fear of lawyers and implicit faith in the clergy".

The first of these instruments was executed in the home of the grandson. The will of 1941, of an estate of approximately $24,000, gave to each of the grandchildren $2,000 and, with a provision of $300 for masses, the residue to the son. This gives the latter about $17,500 more than he would receive under the prior instruments.

Apparently the will of 1940 was kept in a locked satchel, the key of which was carried by the mother in a small bag. Some time in October the Gosselin girl got it for the mother who kept it for a week or so and then had it locked up again. About the 14th of November, a date remembered by the girl in relation to wages due on the 13th which the mother, for the first time, forgot to pay, the small bag, in which money also was kept, disappeared. On the next day, when the loss was noticed, the mother, as she then so often did, began to cry. The girl went to Hector about it. He told her the bag had been dropped into the toilet from which he had recovered it and that he had put it in the safe in the store where it would remain. Whether the explanation given was true or not there is no way of deciding. This incident is clearly recalled by the girl as happening after the mother's mind and memory had become seriously weakened, from the effect of which her habits and controls, even as to natural functions, had become disorganized: and as the date is not disputed, it becomes a most material circumstance in her story. The satchel remained in the house and beyond doubt came into the possession of the son, but we know nothing more of its contents. This concurrence of circumstances, in which the son comes into the control of the satchel containing the will and a new document appears within a week, while the mother is in or approaching a critical stage of illness, is too striking to be quite disregarded.

The mother had visited Yvette in Ottawa in 1940 and had written the granddaughter if she might spend the winter of 1941-42 with her, but later on decided she was not well enough to travel so far and would have to put the visit off. There is no doubt of the affectionate regard in which she held the granddaughter: and on several occasions, when alone with the Gosselin girl, she had remarked that her "property" was "for Yvette".

The grandson had enlisted in 1940 and left Halifax for overseas on July 21st, 1941. About a week before this

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departure, his grandmother had visited him at Sussex, New Brunswick, in camp there and what passed between them can best be given in his words:

> Yes, when my grandmother was down to see me in Sussex, we were left alone about an hour and my wife and my mother-in-law were away. My grandmother mentioned at the time that even if I were going overseas, that she was looking after my family in spite of the fact that I mightn't return from overseas. She told me that she was leaving me $5,000. The way the conversation led to that was that she asked me if there was anything she could do for me and I mentioned the fact that I would be very glad if she would keep an eye on my family. It was a young family and anything she could do to help them out would be very much appreciated by myself. That led to her statement, saying she was leaving me $5,000 in her will.

In 1935 or 1936 the mother had conveyed to the son the land adjoining her home on which the store building stood, with, so far as the evidence goes, the business carried on in it. There is nothing in the case to indicate what the value of this property was.

The deceased had been attended by Dr. Coffyn and during either November or the early part of December suffered a nervous disturbance which brought about a severe mental confusion. There are documents in evidence which purport to record visits on November 25th and December 3rd and he fixes the latter as the date of the minor stroke; but admittedly this was only his recollection of the occurrence in May, 1942. Admittedly, too, none of the documents brought forward by him were originals; they were said to be copies made in May, 1942, or later after the controversy had arisen; and the trial judge was quite justified in declining to place any reliance in them whatever. His comment, too, that "this witness displayed, in my opinion, some of those attributes of advocacy which, however unconscious, are not wholly devoid of partiality", was quite warranted. On the 15th of December, Mrs. Michaud, wife of the grandson, after having had almost to force her way into the house, found the mother dishevelled, "terribly failed", helpless in mind and body. Around Christmas Mrs. Leger paid a hurried visit to Bathurst but the son had given orders before she arrived that she was not to be left alone at any time with her grandmother and she was not. Mrs. Poirier was at the height of her confusion at this time and it is doubtful if she recognized the granddaughter. Later on, in January, when it is claimed she was somewhat improved, the son paid the

Gosselin girl off before the month was up, ostensibly on the ground that his mother was then able to look after herself. Toward the end of February a more severe paralysis set in, from the effects of which she died in a few days.

Now, although the condition of the mother in August and September was fair, there is no doubt of marked deterioration as the fall wore on. The girl stresses the loss of memory, loss of initiative, a disintegration of habits, inability to carry on conversation, childishness, a tendency to repetition of words addressed to her, and apathy; "she would ask us something that had no sense. If we refused her she would cry"; "we would talk to her and she wouldn't answer". The girl tells us also that the failure of memory was commented on by the son's wife in connection with a remark, made by the latter, that the mother had asked the son "to make her will", but whether before or after November 21st is not clear. Neither is it wholly clear whether the marked change in memory, insisted upon by the Gosselin girl as taking place before the making of the will, was a result of the minor nervous seizure, "not exactly a stroke, although her face was twisted and her tongue refused to talk properly", as Dr. Coffyn puts it. Some time in November she presented a "glassy stare" to the wife of the grandson. No doubt to some degree she could be aroused but the picture is clear of a pronounced declension in her physical and mental condition. Although Dr. Coffyn spoke of "visits that I cannot remember the dates" of in November, his records show only one attendance. In any event, he would be concerned chiefly with questions as to which memory would play little, if any, part:

> When I talked to her about her own condition, she was able to answer me perfectly straightforward.

He was asked to comment on the following question and answer in the evidence of Rose Gosselin:

> Q. I am going to read you part of the evidence given by Rose Gosselin. "Can you place the date when you first noticed any material change in her mental condition?" (Page 78). She replies "About the beginning of November, I think." Is that correct?
>
> A. Not as far as my recollection goes.

The veracity of this girl, the chief witness to the essential facts, is conceded; the only challenge is as to the accuracy of her recollection of the precise time when the breakdown in memory took place. But the fact on which she was

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most emphatic was that that collapse preceded the will; she felt the elderly lady was being put to something beyond her condition; "she had no commonsense in November".

Now, we know the intentions of this woman as to the disposition of her property at a time when she was in good health and able to look after her own affairs, and that those intentions, so far as the evidence discloses them, continued up to the day of signing the impeached will. Although the solicitor knew of her relatives, he made no enquiries of any sort regarding them, or her property, or an existing will. His opportunity to judge of her memory was of the most limited kind. According to the second witness, Meahan, throughout the time he was present, during which the will was read aloud and executed, not a word was uttered by Mrs. Poirier and she was unable to sign her name to the document.

These facts cast on the whole case such a doubt of the competency of the testatrix as, in my opinion, requires us to say that the onus of showing the document to be the will of a "free and capable" person has not been met. The direct evidence of Rose Gosselin remains uncontradicted by either of the only persons actually in a position to do it, the son and his wife. Neither took the stand; and the sudden and radical reversal of benefits remains unexplained, save by the state of mind and memory portrayed by the girl.

The findings of the trial judge on the point of capacity are neither clear nor satisfactory. He says:

> The proponents of the Will at the time this case was tried, must have realized that the evidence was confusing and I find it hard to understand why other evidence was not adduced by the proponents, for certainly these people living with the testatrix and who were in association with her on the day that the Will was made should be in a position to state facts concerning the conversation, actions and doings of the testatrix on the day that the Will was made, which would have been of great value.
>
> After considering all of the evidence and having in mind my observations as to the partiality of certain witnesses in the matter, it is very difficult to arrive at a conclusion. I am satisfied, however, that prior to the making of the Will, the testatrix at times did not have her normal mental faculties and further I am satisfied that for some time prior to the making of the Will, her mental faculties were more impaired than would be normal for a woman of her age and I am accepting the testimony of Dr. Baxter and also of Dr. Coffyn that she was suffering from senile dementia. In saying this, however, I am not overlooking the fact that the testatrix could have and may have enjoyed what is known as a lucid interval on the date that the Will was made and further, in spite

of the fact that her normal mental faculties were impaired, I am not prepared to say that the testatrix did not have sufficient mental capacity to make a Will on the 21st November, 1941, for even though her mentality could not be considered normal, she still could have had sufficient powers of mind to make a valid will.

He then proceeds to examine the question whether the proponents of the will had adduced preponderating evidence that there was sufficient testamentary capacity when the instructions were given and he concludes:

> And I come to a very dubious conclusion based not only on the evidence of the witnesses, but also on the examination of the will itself which is in evidence and having in mind that the testatrix has executed what is apparently on its face a normal will, that the weight of evidence is slightly in favour of the proponents. But, as I say, it is dubious. Because of this, I am prepared to admit the will to probate, but it is with doubt that I do so.

Throughout the trial he seemed to labour under the impression either that the prior wills and other evidences of intention were irrelevant or that they could be proved only by means that seemingly were not open to the appellants. He had previously stated that the evidence brought forward by the appellants had "not satisfied the onus placed on them of proving conclusively that the testatrix was unduly influenced".

Now, in the majority judgment below, it is clear that both Baxter C.J. and Grimmer J. were powerfully influenced by the view that a pronouncement against the will necessarily involved a reflection upon the integrity of Robichaud, which was repelled by both his standing as a solicitor and the finding of the trial judge. But there is no doubt whatever that we may have testamentary incapacity accompanied by a deceptive ability to answer questions of ordinary and usual matters: that is, the mind may be incapable of carrying apprehension beyond a limited range of familiar and suggested topics. 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 claims to consideration, revocation of existing dispositions, and the like; this has been recognized in many cases:

Marsh v. *Tyrrell and Harding* (1):

> It is a great but not an uncommon error to suppose that because a person can understand a question put to him, and can give a rational

(1) (1828) 2 Hagg. Ecc. R. 84, at 122.

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answer to such question, he is of perfect, sound mind, and is capable of making a will for any purpose whatever; whereas the rule of law, and it is the rule of common sense, is far otherwise: the competency of the mind must be judged of by the nature of the act to be done, and from a consideration of all the circumstances of the case.

Quoting from the *Marquess of Winchester's Case* (2), Sir John Nicholl adds:

> By the law it is not sufficient that the testator be of memory, when he makes his will, to answer familiar and usual questions, but he ought to have a disposing memory so as to be able to make a disposition of his estate with understanding and reason.

Murphy v. *Lamphier* (3):

> Again the words of Sir John Nicholl are apposite: "To support a paper thus revoking and altering this will and substituting a disposition quite different from and the very opposite to it, would require the clearest and most indisputable evidence": *Dodge* v. *Meach* (4).

Menzies v. *White* (5).

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, and this I am satisfied was not present here.

I would, therefore, allow the appeal and direct that the judgment of the Probate Court be reversed and the document propounded be declared to be not the last will of the deceased. Because of special circumstances surrounding the controversy, however, all costs should be out of the estate.

HUDSON J.—This is a contest as to the validity of the will of Albina Poirier, deceased.

The due execution of the will is now conceded but it is claimed on behalf of the appellants that such execution was secured by undue influence of the respondent and that the testatrix lacked mental capacity at the time the will was executed.

The deceased left an estate of an estimated value of $24,000. By the will each of the appellants was given a legacy of $2,000 and the residue was bequeathed to the respondent with a direction that he should pay $300 to have masses offered for the repose of the testatrix's soul.

(2) 6 Coke's Rep. 23.
(3) (1914) 31 Ont. L.R. 287, at 308.
(4) (1828) 1 Hagg. Ecc. 612, 617.
(5) (1862) 9 Gr. 574.

The respondent was a son and the sole surviving child of the deceased. The appellants were her grandchildren, whose mother was the daughter of the deceased and who had died some years previously. These beneficiaries were the only surviving descendants of the deceased, except a large family of the respondent to whom nothing was bequeathed.

The provisions of the will do not in themselves raise any suspicion, much less a presumption of either undue influence or mental incapacity.

On the issue of undue influence, the learned trial Judge held:

> Although, as I say, I am not quite satisfied that the testatrix was not unduly influenced, I am satisfied that by the evidence adduced the opponents of the will have not satisfied the onus placed on them of proving conclusively that the testatrix was unduly influenced and on this ground the will should be admitted to probate.

This finding was affirmed by a majority of the learned Judges in appeal.

On the issue of mental incapacity, the learned trial Judge found as follows:

> After considering all of the evidence and having in mind my observations as to the partiality of certain witnesses in the matter, it is very difficult to arrive at a conclusion. I am satisfied, however, that prior to the making of the will, the testatrix at times did not have her normal mental faculties and further I am satisfied that for some time prior to the making of the will, her mental faculties were more impaired than would be normal for a woman of her age and I am accepting the testimony of Dr. Baxter and also of Dr. Coffyn that she was suffering from senile dementia. In saying this, however, I am not overlooking the fact that the testatrix could have and may have enjoyed what is known as a lucid interval on the date that the will was made and further, in spite of the fact that her normal mental faculties were impaired, I am not prepared to say that the testatrix did not have sufficient mental capacity to make a will on the 21st November, 1941, for even though her mentality could not be considered normal, she still could have had sufficient powers of mind to make a valid will.

A majority of the Court of Appeal affirmed the decision of the trial Judge. Chief Justice Baxter said:

> I have no hesitation in coming to the conclusion that the testatrix was competent to make her will at the time it was executed.

Mr. Justice Grimmer said:

> There is in my opinion evidence to sustain the judgment which I think should have been rendered without the least hesitation

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Hudson J.

It is suggested on behalf of the respondent that there were concurrent findings of fact and that by a long series of decisions of this Court it is now well settled that such findings should not be disturbed.

In respect of the finding as to undue influence, I would say at once that if that stood alone the Court would, in my opinion, not be justified in disturbing the judgment. The onus on the issue of undue influence is clearly on those who assert it. *Craig* v. *Lamoureux* (1), and in the case of *Robins* v. *National Trust Company* (2), Viscount Dunedin after discussing the onus in the case of a charge of mental incapacity proceeds, at p. 522:

> No question of this sort arises as to the procuring of the will by fraud or undue influence, because it is admitted that in that case the onus is always on the person who attacks the will.

On the second ground, however, that of mental incapacity, the situation is different. The learned trial Judge came to his conclusion because he assumed that the onus was on the appellants. In this I think he was mistaken. The authorities on the point are numerous. In the above-mentioned case of *Robins* v. *National Trust Company* (2), Viscount Dunedin states at page 519:

> 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 testamentary 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.

It was also stated by Viscount Dunedin in the same case at page 518, in regard to the rule of concurrent findings of fact:

> If it can be shown that the finding of one of the Courts is so based on an erroneous proposition of law that if that proposition be corrected the finding disappears, then in that case it is no finding at all.

In view of the doubts expressed by the trial Judge and his mistake as to the onus, it would seem that the rule of concurrent findings does not apply and that it is the duty of this Court to review the evidence and come to its own conclusion, subject, of course, to the normal weight to be given to the findings of the trial Judge and the opinion of

(1) [1920] A.C. 349. (2) [1927] A.C. 515.

the learned Judges in appeal. In this instance the findings of the trial Judge really conflict with his conclusion. On the other hand, Chief Justice Baxter and Mr. Justice Grimmer on appeal had no hesitation in concluding on the evidence that the testatrix had mental capacity. Mr. Justice Fairweather dissented and came to an opposite conclusion.

I was much impressed by the careful analysis of the evidence by Chief Justice Baxter, but an anxious perusal of the whole evidence has led me to the conclusion that the mental capacity of the deceased at relevant times was open to some doubt and, as said in *Tyrrell* v. *Painton* (1), the true rule is that wherever a will is prepared and executed under circumstances which raise the suspicion of the court, it ought not to be pronounced for unless the party propounding it adduces evidence which removes such suspicion and satisfies the court that the testator knew and approved the contents of the instrument.

In the present case the respondent, with whom the deceased was then living, was in the house at the time the will was prepared and executed. He was the chief beneficiary under and the proponent of the will in these proceedings but he was not called as a witness and no explanation was offered for his failure to testify. For these reasons and with some hesitation I conclude that the appeal should be allowed.

As both courts below have found in favour of the will and as, in my view, the charge of undue influence against the respondent fails, I think the costs of all parties should be paid out of the estate.

Appeal allowed. All costs to be paid out of the estate.

Solicitors for the appellants: *Friel & Friel.*

Solicitor for the respondent: *C. T. Richard.*

(1) [1894] Probate 151.

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*April 25, 26, 27.

AMYLITA G. COLE (DEFENDANT)..... APPELLANT;

AND

HOWARD COLE (PLAINTIFF)..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Property (timber licenses) purchased by husband and assignment thereof taken in his wife's name—Husband suing her to recover the property —Rebuttal of presumption of gift—Alternative contention against husband of intent to protect property from creditors.

APPEAL by the defendant from the judgment of the Court of Appeal for British Columbia (1) dismissing her appeal from the judgment of Sidney Smith J. holding that certain timber licenses which had been purchased by the plaintiff and of which assignment had been taken in the name of the defendant, who was then the plaintiff's wife, were the property of the plaintiff. The Court of Appeal held that, on the evidence and the trial Judge's findings, the presumption of gift to the defendant had been rebutted; and also held against an alternative contention by the defendant that it should be found that the plaintiff had taken the property in the defendant's name so as to protect it from creditors and therefore should be refused assistance of the Court in recovering it.

C. F. H. Carson K.C. and *G. E. Housser* for the appellant.

D. N. Hossie K.C. for the respondent.

On the conclusion of the argument for the appellant, the judgment of the Court was delivered orally, as follows:

THE CHIEF JUSTICE (orally, for the Court).—We do not find it necessary to call on counsel for the respondent in this case.

We have had an opportunity fully to consider it and, moreover, Mr. Carson has presented to us not only a very complete argument, but, we may say, a very fair one, for which the Court is greatly indebted to him.

For the purpose of his argument, Mr. Carson accepted the testimony of the respondent. We have no doubt that on that testimony, taken in conjunction with the docu-

*Rinfret C.J. and Kerwin, Hudson, Taschereau and Rand JJ.

(1) 59 B.C. Rep. 372; [1943] 3 W.W.R. 532; [1944] 1 D.L.R. 37.

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Rinfret C.J.

mentary evidence, and despite the presumption that arises when a property is purchased by a husband in the name of his wife, the finding of the two Courts below cannot be interfered with.

As for the second point raised here, the respondent did not set up an agreement which, on the face of it, shows an illegal object; and in fact he denied such an object. The trial Judge and the Court of Appeal have determined that it does not appear that the respondent had any illegal object in view and we are not prepared to say that they were wrong.

In the circumstances, the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Walsh, Bull, Housser, Tupper, Ray & Carroll.*

Solicitors for the respondent: *Walkem & Thomson.*

WALTER GLEN LUMBERS ..... APPELLANT;

AND

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

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*Mar. 15, 16.
*April 25.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Income tax—Exemptions—"Income"—Annuities—Exemption claimed as to monthly payments received from an insurance company—Whether income derived from "annuity contract" "like" Government annuity contracts—Decision of the Minister—Income War Tax Act (R.S.C. 1927, c. 97, and amendments), ss. 3 (1) (b), 5 (k) (and, by reference, s. 3 of c. 24, 1930, and s. 6 of c. 43, 1932).

The *Income War Tax Act* (R.S.C. 1927, c. 97, and amendments) defines "income" as including (*inter alia*) annuities received under any contract "except as in this Act otherwise provided" (s. 3 (1) (*b*)), but, by s. 5 (*k*), exempts "the income arising from any annuity contract entered into prior to" June 25, 1940, "to the extent provided by" s. 3 of c. 24 of 1930 and s. 6 of c. 43 of 1932; and declares, as did said legislation of 1930, that "the decision of the Minister in respect of any question arising under " such exempting provision shall be "final and conclusive".

Said legislation of 1930 had exempted the income to the extent of $5,000 "derived from annuity contracts with the dominion or provincial governments or any company incorporated or licensed to do business in Canada effecting like annuity contracts".

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

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Said legislation of 1932 had exempted $1,200 only, "being income derived from annuity contracts with the Dominion Government or like annuity contracts issued by any Provincial Government or any company incorporated or licensed to do business in Canada", but preserved, as to income arising out of annuity contracts entered into prior to the 1932 legislation, the exemption provided by said legislation of 1930.

Appellant in 1918 entered into a contract with an insurance company which entitled him, after paying premiums for 20 years, to receive, at his option, either a lump sum, or monthly payments during his lifetime with the payments going thereafter to his wife, if surviving him, during her lifetime, and with a guaranteed period of payment of 20 years. During the payment of the premiums the contract constituted a policy of insurance and on appellant's death the monthly sums would become payable to his wife, if then living, for her lifetime, with the same guarantee of 20 years. There was provision in the contract for payment of dividends, for cash surrender values, loan values and paid-up term insurance options. After paying the premiums for 20 years, appellant elected to receive the monthly payments, commencing January 1, 1939. For the amount so received in 1940, $1,500, he claimed exemption from income tax, for the whole amount or alternatively for $1,200.

Held, affirming judgment of Thorson J., [1943] Ex. C.R. 202, that the payments so received were subject to income tax, without exemption.

Per the Chief Justice, Kerwin and Hudson JJ.: The income from a company, in order to be exempt under said legislation of 1930 as properly interpreted, must be derived from an annuity contract which was *"like"* annuity contracts being issued by the Dominion or a province, and, in order to be exempt under said legislation of 1932, must be derived from an annuity contract which was "like" annuity contracts being issued by the Dominion. The contract of 1918, in question, was not, on the evidence, a "like" contract, as required. It was of no avail to say that by 1939 the insurance feature had gone and there was then only an annuity contract like those of the Dominion: the rights and obligations upon appellant's exercise of his option were determined by the contract of 1918, the company's payments were in fulfilment of its promise of 1918, and pursuant to what was really appellant's direction as to how the benefits which had accrued to him should be satisfied. Dealing with a further point, raised only before this Court, it was held that in view of s. 3 (1) (*b*) of the Act as it now stands (so enacted since the decision in *Shaw* v. *Minister of National Revenue,* [1939] S.C.R. 338), taxation of the payments was not objectionable on the ground that they were in the nature of a return of capital.

Per Rand and Taschereau JJ.: The language used in the legislation of 1930, on its true construction, must be taken to refer not only to the company but to the contract out of which the payments arise; and the question is whether appellant's contract was an annuity contract like those at the time issued by the Governments mentioned. In the exempting legislation now in question, what is dealt with is an "annuity contract entered into" prior to certain dates. The contract here was "entered into" in 1918 and it is that contract which must be considered, not the situation existing after January 1, 1939

(when, so appellant contended, all insurance features had dropped and, whatever the contract was before, it was then an annuity contract with the characteristics of Government contracts): the payments arising in 1939 flowed from the obligations created in 1918; what the legislation contemplated was an annuity contract as of the time it was made, not as of any moment thereafter which might mark the beginning of some stage of performance under it. Assuming that the contract in question could properly be described as an "annuity contract" (of which doubt was expressed), the circumstance of insurance and other features differentiating it from a Government annuity contract were ample grounds upon which the Minister could rule, as he did, that the contract in question was not "like" a Government annuity contract; no error in the interpretation of the statute on his part had been shown and his exercise of judgment in this case should be held to be, under the legislation, within his exclusive field of determination. (It was remarked that no question arose as to whether the sums received by appellant were or were not income within the statutory definition; the amount received during 1940 was included in his return, and it was only on the question of the right to the exemption claimed that this appeal turned.)

APPEAL from the judgment of Thorson J., President of the Exchequer Court of Canada (1), dismissing the appellant's appeal from the decision of the Minister of National Revenue affirming an assessment of the appellant for the year 1940 for income tax under the provisions of the Dominion *Income War Tax Act* (R.S.C. 1927, c. 97, and amendments). The main question in dispute was as to appellant's right to exemption, under s. 5 (*k*) of said Act (and with reference to provisions of s. 3 of c. 24 of the statutes of 1930 and of s. 6 of c. 43 of the statutes of 1932) in respect of the amount received in the year 1940 in monthly payments under a contract with The Mutual Life Assurance Company of Canada.

A. L. Fleming K.C. and *A. L. Smoke* for the appellant.

Robert Forsyth K.C. and *E. S. MacLatchy* for the respondent.

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

HUDSON J.—The appellant made a return for the year 1940, showing as income received in that year $1,500 from an annuity paid by the Mutual Life Assurance Company. He claimed an exemption in respect of same to the extent of $1,200. This claim to exemption was disallowed by the Minister on the ground

(1) [1943] Ex. C.R. 202; [1943] 4 D.L.R. 216.

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that under the provisions of Section 3 (*b*) of the Act, income includes annuities or other annual payments received under the provisions of any contract except as in this Act otherwise provided; that the provisions of paragraph (*k*) of Section 5 of the Act are not applicable as the said annuity contract was not similar to those issued by the Dominion Government and the decision of the Minister in this respect is final and conclusive and that under no other provisions of the Act is the said annuity exempt from tax.

An appeal to the Exchequer Court was dismissed.

In 1918 the appellant insured his life with the Mutual Life Assurance Company. Under the terms of the policy, upon paying his premiums for twenty years he became entitled at his option to either a lump sum or annual payments for the remainder of his life. In case of his death his representative was entitled to substantial benefits. It was in fact what is commonly called an endowment policy.

The appellant completed his annual payments and on the 2nd of December, 1938, he signed what was called a "direction *re* optional settlement" by which he elected to receive annual payments rather than a lump sum. It is the amount received from this source in the taxation year of 1940 which gives rise to the present controversy.

Although the appellant claimed in his return exemption to the extent of $1,200 only, in these proceedings he has claimed alternatively that the whole amount received is exempt under the provisions of the amendment to the statute of 1930, or in the alternative to an exemption to the extent of $1,200 under the provision of 1932. He also claims that the payments were in the nature of a return of capital and, therefore, not taxable under the Act.

The relevant statutory provisions are as follows:

3. For the purposes of this Act, "income" means the annual net profit or gain or gratuity * * * received by a person from * * *

* * *

(*b*) annuities or other annual payments received under the provisions of any contract except as in this Act otherwise provided.

The deductions and exemptions allowed are specified in section 5 of the Act as follows:

5. "Income" as hereinbefore defined shall for the purposes of this Act be subject to the following exemptions and deductions.

* * *

(*k*) The income arising from any annuity contract entered into prior to the twenty-fifth day of June, 1940, to the extent provided by section three of chapter twenty-four of the statutes of 1930 and section six of chapter forty-three of the statutes of 1932 * * *

The decision of the Minister in respect of any question arising under paragraphs * * * and (*k*) hereof shall be final and conclusive.

By the Statutes of 1930, chapter 24, section 3, paragraph (*k*), it was provided:

(*k*) the income to the extent of five thousand dollars only derived from annuity contracts with the dominion or provincial governments or any company incorporated or licensed to do business in Canada effecting like annuity contracts * * *

By the Statutes of 1932, chapter 43, paragraph (*k*) above referred to was repealed and the following substituted therefor:

(*k*) twelve hundred dollars only, being income derived from annuity contracts with the Dominion Government or like annuity contracts issued by any Provincial Government or any company incorporated or licensed to do business in Canada.

To entitle the appellant to total exemption under the Statutes of 1930 the payment must arise from an annuity contract with a company "effecting like annuity contracts" (that is, annuity contracts like those being issued by the Dominion or a province).

It is fairly clear on the evidence that the contract entered into in 1918 was not like any contract then being issued by the Dominion or by the provinces. It was so held by the Minister and by the learned President in the court below and I agree with them.

But it is contended that the exemption given by the statute extends to annual payments made by companies who in fact sold annuities similar to those issued by the Dominion or a province, even if the particular contract in question was unlike any of those so issued.

The wording of the section lends some colour to this argument, but when Parliament was legislating about annuities it gave exemption to some but not all annuities and the purpose seems to have been to extend such exemption to those issued by companies. No reason is suggested for granting a greater privilege in respect of money paid under contracts of private companies than those procurable from the Government. I am of the opinion that this contention fails.

Under the amendment of 1932 this question does not arise. The language is "annuity contracts with the Dominion or like annuity contracts with companies".

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Hudson J.

It is next contended that when the exercise of the option became effective in 1939 the contract had been stripped of all insurance benefits and what remained was in fact only an annuity contract similar to those issued by the Dominion. The rights of the appellant and the obligations of the company upon the exercise of the option were determined by the contract of 1918. The payments made by the company to the appellant were made in fulfilment of its promise made in 1918. What is spoken of as an exercise of an option was properly called in the instrument itself a "direction" and it was a direction as to how the benefits which had accrued to the appellant should be satisfied. I am of the opinion that the appellant fails on this point.

The appellant also raised in this Court for the first time a claim that the payment in question was in the nature of a return of capital, citing the decision of this Court in *Shaw* v. *Minister of National Revenue* (1). Subsequent to that decision, paragraph (*b*) of section 3 of the Act as considered in the *Shaw* case was repealed and there was substituted therefor the following:

> (*b*) annuities or other annual payments received under the provisions of any contract, except as in this Act otherwise provided.

It was argued on behalf of the Minister that this amendment no longer left room for the argument which was successful in the *Shaw* case (1) and with this I agree.

Another argument pressed upon us was that by the final clause of paragraph (*k*) of section 5 the decision of the Minister was final and conclusive. Having come to the same conclusion as the decision of the Minister that there was no like annuity contract in the present case, it becomes unnecessary to decide whether or not the decision of the Minister is conclusive.

I would dismiss the appeal with costs.

The judgment of Taschereau and Rand JJ. was delivered by

RAND J.—This is an appeal from the Exchequer Court which upheld a ruling by the Minister of National Revenue that a payment of $1,500 received by the appellant during the year 1940 was not income arising from an annuity contract within the exemption provisions of the *Income War Tax Act*.

(1) [1939] S.C.R. 338.

The contract, under which monthly payments of $125 were made, was entered into in the year 1918. In general, its terms provided for the payment of annual premiums for twenty years, upon the completion of which the insurance company, subject to a lump sum commuted value option, would pay to the appellant, the insured, the sum mentioned during his lifetime, and, at his death, to his wife for her lifetime. Underlying both these life interests was a guaranteed period of twenty years. During the payment of the premiums the contract constituted a policy of insurance and, on the death of the insured, the monthly sums would become payable to his wife, if then living, for her lifetime, with the same guarantee of twenty years. There was provision also for the payment of dividends both during the endowment period and thereafter, and as well for cash surrender values, loan values and paid-up term insurance options. Both the assured and his wife were living on January 1st, 1939, when the policy matured and when the monthly instalments became payable.

In 1930 the *Income War Tax Act* was amended to the effect that income to the extent of $5,000 derived from annuity contracts with the dominion or provincial governments or with a properly licensed incorporated company "effecting like annuity contracts" should be exempt from taxation. In 1932 this was in turn amended by reducing the amount of exemption to $1,200 but preserving the exemption of the 1930 legislation to all contracts entered into prior to May 26th, 1932, when the 1932 Act came into force. In 1940 a further amendment was made by which the exemption was limited to the income arising from an annuity contract entered into before the 25th day of June, 1940, to the extent provided by the legislation of 1930 and 1932.

No question arises as to whether these annual sums are or are not income within the definition of that term in the *Income War Tax Act*. The amount received during 1940 was included in the return of the appellant and it is only on the question of the right to the exemption claimed that this appeal turns.

The amendment of 1930 provided that the decision of the Minister in respect of any question arising under the paragraph dealing with annuities should be final and conclusive. Such a question did arise under that paragraph,

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Rand J.

section 5, par. (*k*), and it was whether the contract of the appellant was one "like" an annuity contract of the governments mentioned. Some point was made that the language of the 1930 amendment, "income * * * derived from annuity contracts with * * * any company incorporated or licensed to do business in Canada effecting like annuity contracts", characterized only the company and not the actual contract and it was argued that, as admittedly the insurance company in question did both in 1918 and 1939 issue contracts of the same sort as those made by the dominion and provincial governments, the contract in the case, being an annuity contract issued by such a company, was, therefore, within the exempting legislation. On its true construction, however, the language used in 1930 must be taken to refer not only to the company but to the contract out of which the payments arise, and the question remains whether or not the contract upon which the appellant stands is an annuity contract like those at the time issued by the two governments.

Whether, at the time it was made, the contract could properly be described as an "annuity contract" is extremely doubtful. It was argued to be a contract of insurance plus annuity. But it is also contended that, whether or not it was so before 1939, on January 1st of that year all insurance features had dropped and that at that moment it had become both an annuity contract and one with the characteristics of government contracts: it is then urged that in each case the question to be asked under the *Income War Tax Act* is this: what is the nature of the obligation under which the income is paid at the moment when it is paid? and from these premises the conclusion of exemption is drawn.

In the amendments made in 1930, 1932 and 1940, what is dealt with is an "annuity contract entered into" prior to certain dates. That language is plain and well understood. The contract here was entered into in 1918 and the payments arising in 1939 flow from the obligations then created. What is contemplated is an annuity contract as of the time of its being made and not as of any moment thereafter which may mark the beginning of some stage of performance under it.

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Rand J.

The essential characteristic of the government annuity agreement is that the benefits shall be fully purchased by the annuitant. That may be either by one payment or by a series of payments, but until the price has been received the right to the annuity does not arise. In the contract in question, for the first twenty years there was present a fundamental obligation of insurance for which there was no purchase in the annuity sense. Assuming, then, that it was an annuity contract, a point which I do not find it necessary to decide, the circumstance of insurance and the other differentiating features mentioned were ample grounds, I should say, upon which the Minister could rule that the contract was not "like" a government annuity contract. No error in the interpretation of the statute on his part has been shown and, if this exercise of judgment is not within his exclusive field of determination, I should feel at a loss to know in what circumstances such a ruling would not be reviewable.

The decision of the President of the Exchequer Court was, therefore, right and the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Fleming, Smoke & Mulholland.*

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

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*Feb. 29; Mar. 1. *Apr. 25.

DAME LAURETTA JEAN (DEFENDANT).. APPELLANT;

AND

HECTOR GAGNON (PLAINTIFF)..... RESPONDENT.

ON APPEAL FROM THE COURT OF KINGS BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Succession duties—Quebec Succession Duties Act—Provision that no transmission of property of deceased be valid unless and until duties paid—Statutory suspensive condition, fulfilment of which has retroactive effect—Distinction between transmission of ownership and legal possession or seizin—Sale by heir without certificate as to payment of duties—Action by buyer for resolution of sale on ground of absolute nullity—Subsequent payment of duties or certificate that no duties exigible—Validation of contract—Certificate tendered by

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

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seller to buyer, before plea, with costs then incurred—Contract held valid and action dismissed—Quebec Succession Duties Act, R.S.Q., 1941, c. 80, s. 15, ss. 7a—Articles 401, 607, 891, 918, 1065, 1488 C.C.

Subsection 7a of section 15 of the *Quebec Succession Duties Act*, R.S.Q., 1941, c. 80, provides that "no transmission of any property belonging to any deceased person at the time of his death shall take place, nor shall any transfer thereof be valid, nor shall any title therein or thereto vest in any person, *unless and until* the duties exigible * * * have been paid in full (*tant que* les droits exigibles * * * n'ont pas été complètement payés * * *)".

These provisions must be construed in the sense that the payment of the succession duties and the issuing of the required certificate as to such payment constitute a statutory suspensive condition, the fulfillment of which has a retroactive effect and renders valid deeds entered into by the heirs or legatees at a time when the exercise of their rights had been so suspended.

Consequently, must be dismissed an action in nullity brought by a buyer against a vendor, on the ground that the latter had not paid the duties exigible upon the thing sold which formed part of the estate of a deceased or that a certificate to the effect that no such duties were exigible has not been delivered by the collector to the vendor, in as much as, before the filing of the plea, the vendor had delivered to the buyer a certificate of the collector showing that there were no duties exigible.—The validity of the contract between the parties depends upon the law of sale, and the character of the sale in this case presents the ordinary case of an obligation, the performance of some part of it being delayed: the seller was thus entitled until judgment to remove the default. This the appellant has done before the pleadings were closed and, having also tendered the amount of costs then incurred, has discharged her obligation under the contract. *Gagnon* v. *La Coopérative Fédérée de Québec*, (Q.R. 43 K.B. 57) approved.

Per The Chief Justice and Kerwin, Hudson and Taschereau JJ.—The lawful or testamentary heir inherits of right at the death of the *de cujus;* but it does not follow necessarily that he will be entitled to take immediate possession of the estate, or, in other words, that he will have the seizin. In principle, the ownership of the thing is transferred simultaneously with the seizin; but the simultaneity of the transmission of both should not lead to confuse these two entirely distinct operations of the law, the former being related to the ownership of the thing while the latter affects only the legal possession of it; one may claim the ownership of a thing although admitting that its legal possession was subject to certain formalities, while inversely one may have the seizin of a thing without yet having the ownership of it.—When the seizin is thus suspended through some provisions of the law, it has a retroactive effect to the date of the death of the *de cujus,* whenever the condition imposed has been fulfilled or the bar to its operation has been removed.—The prohibition contained in subsection 7a that "no transmission of any property * * * shall take place * * *" does not come into conflict with the recognized principle of civil law that an heir inherits *operatione legis* of the estate of the deceased: the *transmission* of the property, from the moment of the death of the *de cujus,* is not subordinated to the

payment of the succession duties: the condition imposed by the statute merely suspends the *transmission of the property,* or, in other words, the legal possession of that property, i.e., the seizin. It cannot be presumed that the legislator, by that subsection, intended to enact that, as long as the duties would not have been paid, the estate would not have any owner, with the result that the economy of the law would be destroyed and serious legal situations would thus be created: the sole purpose of the legislation is to safeguard the payment of the duties to the Crown.—The contract between the parties is not tainted with absolute nullity, and the appellant has validated the transfer made to the respondent. The only recourse of the respondent would have been by way of an action in resolution of the contract or for damages, if the appellant had failed to deliver to the respondent a valid title to the thing sold.

Per Rand J—.The language of subsection 7a cannot be construed as an absolute suspension of the transmission and as a prohibition of any contract which purports to deal with the transfer of property of a decedent before the certificate mentioned has been obtained. The subsection does not forbid the execution and delivery of an instrument of transfer, much less does it prohibit a contract the effect of which could not in any manner defeat its purpose. What the subsection does is to suspend final validity of a transfer so long as the conditions mentioned are not met: it contemplates the accomplishment or execution of assumed rights upon the payment of the duties. To declare that no transfer shall be valid *while* duties are unpaid is to assume the possible existence of acts or relations which, upon the payment, become *eo instanti* of full legal efficacy. Interpreted in conjunction with the implied rights in the heirs or legatees, it becomes in effect a statutory suspensive condition. It negatives any implication that until the duties are paid no binding engagement can be entered into. So construed, the necessities of the practical handling of estates are accommodated and the administrative sanctions of the statute left unimpaired.

Judgment of the Court of King's Bench (Q.R. 1943 K.B. 314) reversed.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), reversing the judgment of the Superior Court, Prévost J. (2) and maintaining the respondent's action.

The action claimed a declaration of nullity *ab initio* of a sale, made by the appellant to the respondent, of an insurance agency business, on the ground that the succession duties of the business, which had belonged for half of it to the late husband of the appellant, had not been paid at time of the sale.

Gustave Monette K.C. and *A. Talbot K.C.* for the appellant.

L. E. Beaulieu K.C. for the respondent.

(1) Q.R. [1943] K.B. 314. (2) (1941) Q.R. 79 S.C. 466.

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

TASCHEREAU J.—Cette cause présente de sérieuses difficultés, et en Cour Supérieure et en Cour du Banc du Roi, elle a donné lieu à des expressions d'opinion diamétralement opposées.

L'appelante, dame Lauretta Jean, défenderesse en Cour Supérieure, avait épousé Ferdinand Bergeron, sans contrat de mariage, et par conséquent, sous le régime de la communauté légale. Celui-ci est décédé le 28 janvier 1941, et par testament, légua tous ses biens à son épouse, dont son commerce d'assurance. Environ quinze jours plus tard, par contrat authentique reçu devant le notaire Jules Gauthier, elle vendit ce commerce, y compris clientèle, achalandage, commissions de renouvellement, etc., à monsieur Hector Gagnon, pour la somme de $4,000 payable $1,000 comptant, et la balance à terme sans intérêt.

Le 27 février, soit exactement quatorze jours plus tard, l'intimé Gagnon institua contre l'appelante une action, où il demande en premier lieu une déclaration à l'effet que le contrat est nul de nullité absolue, parce que les droits successoraux n'auraient pas été payés, et en second lieu, alternativement, il demanda que le contrat soit annulé, parce que entaché d'erreur, de dol et de fraude.

La cour de première instance a rejeté cette action, mais la cour d'appel l'a accueillie, les honorables juges Galipeault et Marchand dissidents.

Devant cette Cour, seule la demande de nullité, résultant de ce que les droits seraient impayés, a été invoquée, l'intimé par ses procureurs ayant renoncé à se prévaloir des autres moyens.

Au moment de l'institution de l'action, soit le 27 février 1941, il est admis que l'appelante n'avait pas produit de déclaration au percepteur du revenu, qu'elle n'avait pas payé les droits exigibles s'il y en avait, ou qu'elle n'avait pas obtenu comme le veut la loi, un certificat constatant qu'aucun droit n'était payable. Cependant, le 19 mars, l'appelante obtint du percepteur du revenu un certificat à l'effet qu'aucun droit n'était exigible, le fit offrir au deman-

deur, avec les frais de l'action à date, et vu le refus d'accepter de ce dernier, renouvela ses offres avec son plaidoyer. C'est ainsi que s'est engagé le débat.

Dans les Statuts Refondus de la province de Québec, 1925, la section 14, sous-section 7, chap. 29, *Loi des Droits sur les Successions,* se lit ainsi:

Sujet aux dispositions de l'art. 13, nul transport de biens d'une succession n'est valide et ne constitue un titre, *si* les droits payables en vertu de la présente section n'ont pas été payés.

Cependant en 1930, la loi fut amendée, et aujourd'hui l'on trouve dans les Statuts Refondus de 1941, section 15, sous-section 7a, chap. 80, cet article modifié qui se lit ainsi:

Subordonnément aux dispositions de l'article 13, nulle transmission de biens appartenant, lors de son décès, à une personne décédée ne peut se faire, et un transport de ces biens n'est valide, et ne constitue un titre à ou pour ces biens, *tant que les droits* exigibles en vertu de la présente section n'ont pas été complètement payés. * * *

C'est ce dernier amendement qui régit la cause qui nous est soumise, et sur lequel se base le demandeur-intimé pour conclure à la nullité du contrat.

Avant d'examiner les effets juridiques de cette disposition de la loi et les conséquences qu'elle entraîne, il est nécessaire, semble-t-il, de rappeler certains textes de notre code civil, ainsi que certains principes que nous essaierons de concilier avec la loi que nous venons de citer, et qu'il est important de ne pas oublier, si l'on veut éviter certaines contradictions, cependant plus apparentes que réelles.

Il est certain, en premier lieu, que par le décès du *de cujus* l'héritier légitime ou testamentaire hérite de plein droit. "Le mort saisit le vif", et c'est ce que Pothier a exprimé dans les termes qui suivent:

Suivant notre droit français, une succession est acquise à l'héritier que la loi y appelle, dès l'instant même qu'elle lui est déférée, et avant qu'il en ait encore la moindre connaissance, c'est-à-dire, dès l'instant de la mort naturelle ou civile du défunt qui a donné ouverture à sa succession. C'est ce que signifie cette règle de notre droit français qui est en la Coutume de Paris, art. 310, et en celle d'Orléans, art. 301: "Le mort saisit le vif, son hoir plus proche et habile à lui succéder." Cette règle a lieu dans toutes les provinces du Royaume, et quoiqu'elle soit diamétralement opposée aux principes du droit romain, elle ne laisse pas d'être suivie dans les provinces du Royaume régies par le droit romain. (Traité des Successions, ch. 3, sec. 11.)

Ainsi que le signale Pothier, il y a sur ce point une différence fondamentale entre le droit romain et le droit fran-

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çais. A Rome, les héritiers désignés par la loi ou par la volonté du défunt avaient simplement la faculté de devenir héritiers, de sorte que la succession était d'abord simplement offerte ou déférée (*delata*), à l'appelé. Celui-ci n'acquérait la succession que s'il acceptait cette offre et cette manifestation de sa volonté se nommait adition d'hérérité (*adire hereditatem*). C'était le principe reconnu, sauf quelques exceptions, dont parle M. Petit dans son "Traité élémentaire de Droit Romain".

Cependant, en France et chez nous, le système est différent. Par la mort, la propriété se transmet et s'acquiert de plein droit dans toute la succession. Il n'y a pas deux moments distincts, comme chez les Romains, séparés par un intervalle de temps plus ou moins long, *la délation* et *l'adition*. Et à cause de cette différence essentielle, on voit le danger qu'il y aurait de s'inspirer du droit romain en la présente matière. Le droit français ne connaît pas l'*Heriditas Jacens* du droit romain. C'est ce que Planiol et Ripert soulignent de la façon suivante (Traité de Droit Civil, 10e éd. vol. 3, page 447):

> De quelle manière se fait la transmission aux héritiers des biens laissés par le défunt? Cette transmission est *immédiate* et elle a lieu *de plein droit*. Le patrimoine du défunt est donc acquis à ses héritiers sans qu'il se produise une solution de continuité dans la propriété. Nous n'avons plus en droit français de *jacence de l'hérédité*, comme il s'en produisait en droit romain; les biens d'une succession ouverte ne sont jamais *res nullius*, en supposant bien entendu qu'il y ait des héritiers disposés à l'acquérir.

Ce changement instantané de propriété s'opère en faveur non seulement des héritiers légitimes et testamentaires, mais aussi en faveur des héritiers irréguliers, comme l'Etat dans le cas de biens vacants et sans maîtres. Les biens héréditaires en effet ne peuvent demeurer sans propriétaires. Dès l'instant de l'ouverture de la succession, les héritiers sont investis des droits qui résultent pour eux de l'ouverture de la succession.

Fuzier-Herman (Répertoire du droit français, vol. 35, page 82, n° 943) s'exprime ainsi:

> Quel que soit le titre auquel une personne est appelée à une succession, qu'elle y vienne comme héritière, ou en qualité de successeur irrégulier, la transmission en propriété tant de l'hérédité elle-même que des biens la composant a lieu immédiatement et de plein droit à son profit. Cette personne devient donc, dès l'instant de la mort du défunt, propriétaire, créancière, débitrice à sa place.

Dalloz (Répertoire Pratique, vol. XI, page 569, n° 11) dit lui aussi:

En matière de succession, la transmission de la propriété des biens du défunt s'opère de plein droit au profit des successeurs du *de cujus*, sans distinction entre les héritiers et les successeurs irréguliers.

Planiol et Ripert (cité *supra*, page 446) partagent les mêmes opinions:

Cette règle s'applique sans distinction aux successeurs irréguliers aussi bien qu'aux héritiers légitimes; les uns comme les autres sont, aussitôt après la mort du défunt, propriétaires, créanciers, débiteurs à sa place.

Mais si les héritiers sont ainsi investis de plein droit de la propriété des biens du *de cujus*, ceci ne signifie pas nécessairement qu'ils aient la possession de ces biens, en d'autres termes qu'ils en aient la saisine. En principe, la propriété des biens est transmise simultanément avec la saisine. Mais la simultanéité de la transmission de la propriété et celle de la saisine ne doit pas faire confondre ces deux opérations légales entièrement distinctes l'une de l'autre. La première touche la propriété des biens, la saisine au contraire n'affecte que la possession légale de ces mêmes biens. On peut fort bien, en effet, être propriétaire d'un bien, tout en admettant que la possession légale soit soumise à certaines formalités, comme inversement on peut avoir la saisine d'un bien sans en avoir la propriété. C'est bien le cas de l'exécuteur testamentaire, qui n'a aucun titre à la propriété des biens qu'il administre, mais qui a tout de même la saisine des biens meubles. C'est l'article 918 C.C. qui dit:

918. L'exécuteur testamentaire est saisi comme dépositaire légal, pour les fins de l'exécution du testament, des biens meubles de la succession, et peut en revendiquer la possession même contre l'héritier ou le légataire.

Cette saisine dure pendant l'an et jour à compter du décès du testateur, ou du temps où l'exécuteur a cessé d'être empêché de se mettre en possession.

La confusion née jadis du défaut de faire cette distinction nécessaire est aujourd'hui disparue, et tous les auteurs reconnaissent maintenant les différences essentielles qui les caractérisent.

Pandectes françaises (vol. 54, page 181, n° 1676):

Le code distingue entre la propriété et la possession des biens qui composent l'hérédité. Tandis que la propriété s'acquiert et se transmet de plein droit dans toute la succession, et que les successeurs irréguliers

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l'obtiennent au même titre et de la même manière que les héritiers légitimes, la possession au contraire se transmet d'une manière différente aux héritiers légitimes et aux successeurs irréguliers.

Idem (page 182, n° 1684):

La saisine, comme on le verra, ne concerne que la transmission de la possession.

Planiol et Ripert (page 451):

La saisine n'a aucun rapport avec la transmission de la propriété, qui s'accomplit immédiatement, aussi bien au profit des héritiers qui en sont privés que de ceux qui la possèdent.

Dalloz (Répertoire Pratique, vol. XI, page 569, n° 12):

La saisine est l'investiture légale de la possession des biens de la succession qui s'acquiert au profit de l'héritier en même temps que la transmission de la propriété des biens héréditaires.

Juris-Classeur Civil (art. 724, n^{os} 3 et 4):

La saisine peut se définir: "L'investiture légale et de plein droit de la possession des droits héréditaires au profit de l'héritier." C'est en cela, et en cela seulement qu'elle consiste. La transmission de la propriété n'a rien de commun avec la saisine. Héritiers, successeurs, légataires, sont dès le moment de la mort du *de cujus* investis de la propriété des droits qui résultent pour eux de l'ouverture de la succession ou de l'efficacité du testament.

Mais, le Juris-Classeur contient ensuite ce passage particulièrement intéressant qui fait bien voir la différence entre la propriété et la saisine, et qui démontre bien que cette dernière est un complément de la propriété, en ce sens qu'elle permet aux propriétaires "de mettre en œuvre les droits dont ils sont investis". C'est bien ce que dit l'article 607 du code civil:

Les héritiers légitimes, lorsqu'ils succèdent, sont saisis de plein droit des biens, droits et actions du défunt, sous l'obligation d'acquitter toutes les charges de la succession; etc.

Et en ce qui concerne les héritiers testamentaires, l'article 891 C.C. est dans le même sens.

L'on peut donc dire, je crois qu'en règle générale, chez les héritiers légitimes et testamentaires, la propriété des biens ainsi que leur possession légale, quoique différentes entre elles, se transmettent simultanément. Mais, il n'en est pas ainsi des héritiers irréguliers, comme l'Etat, qui dans le cas de biens sans maître devient, par le décès du *de cujus,* instantanément propriétaire, mais qui pour obtenir la possession ou la saisine, doivent remplir certaines formalités qu'on appelle l'envoi en possession.

L'article 401 C.C. dit en effet:

> Tous les biens vacants ou sans maître, ceux des personnes qui décèdent sans représentants, ou dont les successions sont abandonnées, appartiennent au domaine public.

Et l'article 607 C.C. qui dit que les héritiers, lorsqu'ils succèdent, sont saisis des biens, droits et actions du défunt, ajoute:

> Mais le Souverain doit se faire envoyer en possession par justice dans les formes indiquées au code de procédure civile.

Ceci signifie évidemment que, comme les héritiers, l'Etat hérite de plein droit la propriété des biens, mais n'a la saisine que par l'effet de l'envoi en possession.

C'est la théorie que les auteurs enseignent.

Fuzier-Herman (vol. 35, page 82, n° 945):

> Mais ainsi traités de même façon par la loi quant au fond du droit, l'héritier et le successeur irrégulier diffèrent profondément quant à la manière d'appréhender l'hérédité, et de devenir possesseur des biens héréditaires individuellement envisagés, de se mettre en situation d'exercer activement et passivement les actions héréditaires.

Dalloz (Répertoire Pratique, vol. XI, page 569, n° 11):

> L'acquisition de la possession au contraire n'a lieu de plein droit par l'effet de la saisine héréditaire, qu'au profit des héritiers à l'exclusion des successeurs irréguliers.

Et voici ce que disent Planiol et Ripert (page 455):

> Comme les héritiers légitimes, les successeurs irréguliers sont propriétaires des biens de la succession ou de leur part dans ces biens dès le jour du décès, mais ils n'ont pas la saisine.

Et, à la page 447:

> Malgré cette ressemblance sur le fond du droit, il existe cependant une différence grave entre les successeurs légitimes et les successeurs irréguliers sur la manière de prendre possession de l'hérédité, ce qui n'est, à vrai dire, qu'une question de forme, mais à laquelle on a donné dans notre droit une importance véritablement excessive: les uns ont la saisine; les autres ne l'ont pas et sont obligés de demander l'envoi en possession.

C'est aussi l'opinion exprimée par Laurent (tome 9, n° 207) et par Demolombe (tome 13, n° 123).

Quand cet envoi en possession a eu lieu, suivant les formalités légales, il s'ensuit donc que l'Etat qui n'était que propriétaire, a en outre acquis la possession légale des biens par l'effet de cette saisine judiciaire, et qui rétroagit à la date du décès. Dans ce cas, la rétroactivité de la saisine ne peut être mise en doute, et voici la doctrine enseignée par les auteurs:

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Juris-Classeur Civil, art. 769 à 772, Successions, n° 45:

Une fois envoyé en possession, le successeur se trouve, vis-à-vis de l'héritier, dans la même situation que s'il était héritier. Il ne lui manquait que la saisine de l'exercice des droits; elle lui a été conférée par la justice, et la différence entre lui et l'héritier a été ainsi effacée.

Juris-Classeur Civil, art. 769 à 772, n° 4:

L'envoi en possession n'est pas pour le successeur le moyen d'acquérir le droit, mais seulement la condition de sa mise en exercice. Le droit lui-même est acquis dès le jour de l'ouverture de la succession; dès cet instant, il fait partie du patrimoine du successeur, et au point de vue de la propriété et à celui de la possession.

N° 5:

Il s'ensuit que si le successeur décède avant d'avoir soit accompli les formalités nécessaires, soit renoncé à la succession, il transmet son droit à ses propres héritiers.

Planiol et Ripert (page 456):

Quand l'envoi en possession a été prononcé, le successeur irrégulier se trouve dans la même situation que s'il était héritier légitime. La saisine lui était refusée par la loi, mais l'envoi en possession la remplace exactement. On peut dire qu'il donne au successeur irrégulier une saisine judiciaire et cette saisine rétroagit au jour de l'ouverture de la succession. Le successeur a dès lors tous les bénéfices de la possession, pour laquelle il est réputé avoir succédé au défunt à partir du décès, et il a l'exercice actif et passif des actions dépendant de l'hérédité.

Fuzier-Herman (Répertoire du Droit Français, vol. 35, n° 1020, page 87):

L'envoi en possession régulier a pour effet de mettre les successeurs irréguliers dans la même situation que s'ils étaient héritiers légitimes. C'est une sorte de saisine judiciaire qui remplace pour eux la saisine légale, et cette saisine rétroagit au jour de l'ouverture de la succession.

Baudry-Lacantinerie et Wahl (Droit Civil, vol. 7, Des Successions, 1, page 609, n° 817):

Les successeurs irréguliers, pourvu qu'ils se fassent envoyer en posession, ont la propriété dès le jour du décès; cela résulte de l'article 711, Code civil, d'après lequel la propriété se transmet par succession; c'est-à-dire que l'attribution est rétroactive.

L'envoi en possession est donc la condition de l'exercice du droit de propriété, mais ne lui sert pas de point de départ. Et le même auteur ajoute aussi à la page 611, ce qui suit:

En outre, le successeur irrégulier continue dès le jour du décès, s'il se fait envoyer en possession, la prescription acquisitive commencée au profit du défunt.

Et à la page 612, n° 821:

Les successeurs, une fois envoyés en possession, ont droit aux fruits dès le jour du décès. C'est l'application du principe que l'accessoire suit le principal; les fruits sont une conséquence du droit de propriété et nous avons montré que le successeur irrégulier, envoyé en possession, est propriétaire dès le décès; un texte formel eût été nécessaire pour le dépouiller des fruits. On a exprimé la même idée en se basant sur la rétroactivité de l'envoi en possession.

Enfin, Planiol et Ripert (page 450) ajoutent qu'il y a également rétroactivité de la saisine en faveur de l'héritier appelé comme résultat d'une renonciation à une succession:

Mais si la saisine n'est pas collective, elle est tout au moins sucessive, c'est-à-dire qu'elle passe aux héritiers de second degré par l'effet de la renonciation du premier, et ainsi de suite: chaque catégorie appelée à défaut des précédentes arrive à la succession avec la saisine, en supposant qu'elle y ait droit par son titre, c'est-à-dire qu'il s'agisse d'héritiers légitimes, et non d'un successeur irrégulier, comme le conjoint. Cette saisine leur est dévolue rétroactivement, par l'effet de la renonciation du rang précédent, qui est censé n'avoir jamais été héritier.

Il résulte de tout cela qu'il faut se bien garder de confondre la transmission de propriété des biens du défunt avec la saisine qui n'affecte que la possession légale de ces mêmes biens, indépendamment de la possession de fait qui se réalise par l'appréhension matérielle d'une chose. En outre, quand par l'effet de la loi, la saisine est suspendue, elle agit rétroactivement à la date du décès, quand la condition imposée est réalisée, ou que l'obstacle qui l'empêchait d'opérer est écarté.

Dans la cause soumise à cette Cour, la section 15, sous-section 7a, de la Loi des Successions, déjà citée, comporte que "nulle transmission de biens * * * ne peut se faire, et un transport de ces biens n'est valide * * * tant que les droits exigibles * * * n'ont pas été complètement payés."

Je ne puis arriver à la conclusion que les mots "nulle transmission de biens" viennent en conflit avec le principe reconnu de notre droit civil qui veut, comme nous l'avons vu, que l'héritier hérite *operatione legis* des biens du défunt. Il me semble impossible en effet d'admettre que ce texte de la *Loi des Droits sur les Successions* ait ainsi révolutionné les dispositions du code civil, et que l'on ait voulu que tant que les droits successoraux ne sont pas payés, la propriété des biens demeure suspendue, et que ceux-ci n'appartiennent à personne.

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Quand la législature a voulu que *la transmission de la propriété* à un héritier fût suspendue jusqu'au paiement des droits, elle l'a dit en termes clairs et explicites. En effet, au chapitre 30 des Statuts Refondus de la province de Québec, 1925, on y trouve la loi concernant *La Saisine de Certains Bénéficiaires* qui est cependant maintenant rappelée. Cette loi stipulait que:

> nonobstant toute loi à ce contraire, l'héritier légitime domicilié ou résidant ordinairement en dehors de la province, à qui est transmis par le décès d'une personne qui est domiciliée dans cette province la propriété * * *n'est pas saisi de plein droit de la propriété,* de l'usufruit ou de la jouissance des biens qui lui sont transmis par ce décès, etc., etc.

Les expressions employées dans cette loi démontrent bien que la législature avait véritablement l'intention de suspendre la transmission de la propriété, et elle a fait usage pour le dire de termes non équivoques. C'est la *transmission de la propriété* qu'elle a frappée, et non seulement la possession des biens, et pour qu'il n'y ait pas d'erreur, elle a également stipulé par amendement en 1930 (20 Geo. V, chap. 30), que la loi de la "saisine" devait s'appliquer nonobstant les dispositions des articles 607 et 891 du code civil. On ne trouve, dans la *Loi des Droits sur les Successions,* aucun texte de cette nature, et il eût cependant été bien facile d'y en incorporer un semblable, si véritablement la législature eût voulu donner à la *Loi des Droits sur les Successions* la même portée qu'elle a jugé à propos de donner à la loi de *La Saisine de Certains Bénéficiaires.*

Les résultats provoqués par l'admission de la théorie de l'intimé détruiraient l'économie de notre droit et créeraient des situations légales que certainement la loi n'a jamais voulues. Où serait l'intérêt susceptible d'assurance si les biens du défunt sont des *res nullius?* Comment concilier les lois de la prescription avec la théorie que des biens peuvent ne pas avoir de propriétaires? Qu'advient-il de l'héritier qui décède sans payer les droits successoraux? S'il n'hérite pas, il ne peut donc pas transmettre ces mêmes biens à ses propres héritiers. Qui enfin portera la responsabilité du dommage causé par la ruine du bâtiment arrivée par défaut d'entretien ou par vice de construction, si le propriétaire que l'article 1055 C.C. tient responsable n'existe pas? Evidemment, comme le dit M. le juge Prévost, la loi n'a jamais songé à de pareilles absurdités, et il n'était pas nécessaire d'en arriver là pour assurer l'exécution de la loi.

La seule conclusion qui me semble possible est que la *transmission de la propriété* des biens, dès l'instant de la mort du *de cujus*, n'est pas conditionnée au paiement des droits successoraux. La condition que la loi impose ne fait que suspendre, comme le dit le texte lui-même, la *transmission des biens*, ou, si l'on préfère, la possession légale de ces ces biens, ou la saisine.

Et l'héritier n'a pas en conséquence, "tant que les droits ne sont pas payés", la plénitude de ses droits, et il ne jouit que d'un titre incomplet. Et à cause de l'imperfection de son titre, il ne peut évidemment, tel que le dit l'article 15, sous-section 7a, faire un transport valide de ce même bien à un tiers. Il est dans la situation du successeur irrégulier qui doit se faire envoyer en possession pour être sur le même pied que l'héritier légitime. Et si dans ce cas, la saisine agit rétroactivement à la date du décès, et si elle rétroagit avec les mêmes effets dans le cas de l'héritier appelé comme conséquence d'une renonciation à une succession, ou pour permettre à l'héritier saisi tardivement de continuer sans suspension la prescription acquisitive au profit du défunt, pourquoi en serait-il autrement de la saisine conférée à l'héritier par le paiement des droits?

Le but de la loi n'est que de protéger la créance de la Couronne. Aussi pour s'assurer que le transport n'est pas valide "tant que les droits ne sont pas payés", elle défend au registrateur d'enregistrer les titres, à l'exécuteur de payer les legs, aux agents de transfert d'insérer à leurs livres aucune transmission d'action, aux assureurs de payer les bénéfices de polices d'assurance, aux banquiers de remettre les dépôts d'argent. Les héritiers qui en sont les propriétaires dès le jour du décès n'obtiennent un titre parfait qu'à la date du paiement des droits, avec l'effet rétroactif dont nous avons parlé précédemment.

Evidemment, c'est une condition essentielle que les droits soient payés avant qu'un héritier puisse poursuivre pour réclamer une créance faisant partie du patrimoine du défunt; s'il instituait semblable action avant d'avoir rempli cette obligation, le débiteur pourrait lui répondre que la loi lui défend de remettre au créancier la possession des argents réclamés. Au contraire, le paiement préalable des droits n'est pas nécessaire si une personne poursuit pour se faire

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déclarer uniquement héritière, parce qu'alors elle ne réclame que le titre de propriétaire, et non la possession des biens. (*DesRochers et DesRochers* (1).)

Quand l'appelante a vendu à l'intimé le commerce d'assurance de son mari, elle était donc propriétaire. Il lui manquait la saisine légale subordonnée au paiement des droits successoraux. Elle avait un titre incomplet, corrigé cependant plus tard par l'obtention du certificat constatant qu'aucun droit n'était exigible, avec effet à la date du décès.

Je ne puis voir que les caractères de la nullité absolue entachent la transaction à laquelle l'appelante a été partie. Elle a validé le transport fait à l'intimé, tout comme la loi valide la vente de la chose qui n'appartient pas au vendeur, quand ce dernier en devient subséquemment propriétaire. (Art. 1488 C.C.)

Le recours de l'intimé était par voie d'une demande en résolution du contrat, ou en dommage (art. 1065 C.C.) si on ne lui donnait pas un titre parfait à la chose dont il se portait acquéreur. Au contrat qui fait l'objet de ce litige, il n'y a pas de clause de résolution, mais il existe tout de même un pacte commissoire tacite, qui permet à l'une des parties d'en demander la résolution, à défaut par l'autre d'exécuter ses obligations. Mais cette résolution n'opère pas de plein droit: elle doit être demandée et doit également être prononcée. Comme le dit M. Mignault (vol. 5, page 450):

> Le contrat tient toujours; il reste valable tant que la résolution n'en a pas été sur la demande du vendeur prononcée en justice.

L'appelante pouvait éviter cette résolution en accomplissant son obligation, c'est-à-dire en complétant son titre de son propre gré ou après mise en demeure. Et cela, tant que le jugement n'est pas prononcé annulant le contrat. C'est l'opinion des auteurs et c'est aussi celle de M. le juge Dorion qui, parlant pour la cour d'appel dans la cause de *Gagnon* v. *La Coopérative Fédérée de Québec* (2), s'exprime ainsi:

> L'intimée prétend de son côté qu'elle n'est pas dans le cas de l'article 1092, et que, admettant qu'il y a lieu à l'annulation du contrat par suite de son défaut d'en exécuter les obligations en négligeant de donner les garanties promises, cette annulation en vertu du pacte commissoire tacite, n'a pas lieu de plein droit, que par conséquent, elle peut, en exécutant

(1) (1937) Q.R. 63 K.B. 352. (2) (1926) Q.R. 43 K.B. 57, at 59.

son obligation avant que jugement intervienne, empêcher cette annulation et se prévaloir de son droit de payer par anticipation et de déduire l'intérêt.

Cette distinction est parfaitement juridique et elle est admise par la doctrine française citée par l'intimée.

Planiol dit aussi (vol. 2, 8e éd., page 437):

La résolution, étant l'œuvre du juge, et non de la volonté des parties, ne se produit qu'au moment du jugement * * * le défendeur peut jusqu'au jugement empêcher la résolution par une offre d'exécuter son engagement.

Baudry-Lacantinerie (Des Obligations, vol. 2, page 189), s'exprime ainsi:

Au contraire, lorsque les sûretés promises n'ont pas été fournies, ce fait peut être réparé aussi longtemps qu'un jugement n'est pas venu déclarer la dette exigible, et, par suite, tant que cette décision n'a pas été rendue, le débiteur peut, en exécutant sa promesse, éviter la déchéance, etc., etc.

Sur réception de l'action dirigée contre elle, et malgré que ce fut une action en déclaration de nullité, et non en résolution, l'appelante a obtenu le certificat nécessaire du percepteur des droits de succession, l'a offert à l'intimé avec les frais de l'action à date, et vu le refus de ce dernier d'accepter, elle a renouvelé ses offres avec son plaidoyer. Par cette mise en demeure fait au moyen de l'action qu'il a instituée, l'intimé a obtenu ce qui lui manquait, et ce à quoi il avait droit. C'est à tort qu'il a persisté dans son action.

Je suis d'opinion que le présent appel doit être accueilli et que le jugement de M. le juge Prévost, siégeant en Cour Supérieure, doit être rétabli avec dépens de toutes les cours.

RAND J.—The narrow question raised by this appeal is whether a contract for the sale of an insurance business, entered into by the universal legatee and widow of a testator before the issue of a certificate from the Collector of Succession Duties that no duties were payable, is void *ab initio*. The deceased died on January 28th, 1941, and the contract was entered into on February 13th. The purchaser went into immediate possession and held it until about February 27th when this action was brought for a declaration of nullity and alternatively for annulment on the ground of fraud. On March 19th the certificate was issued and on the next day served on the respondent with a tender of costs up to that time. That tender was continued in the pleading. The issue of fraud was found

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against the purchaser and it is not in question here. In the Superior Court the action was dismissed but on appeal the Court of King's Bench by a majority decision reversed that judgment and directed the declaration claimed.

The nullity is put on the language of section 15, ss. 7 (a) of the *Quebec Succession Duties Act*, 1941, the material provisions of which are the same as those in force at the time of the sale. The subsection reads as follows:

> Subject to the provisions of section 13, no transmission of any property belonging to any deceased person at the time of his death shall take place, nor shall any transfer thereof be valid, nor shall any title therein or thereto vest in any person, unless and until the duties exigible under this division have been paid in full and unless a certificate, describing the property, to the effect that such duties have been paid or that none are exigible, has been delivered by the proper collector of provincial revenue, or by the collector of succession duties appointed for the Province or for the proper district, or by a revenue officer specially appointed for that purpose by the Lieutenant-Governor in Council.

This language has been construed as an absolute suspension of the transmission and as a prohibition of any contract which purports to deal with the transfer of property of a decedent before the certificate mentioned has been obtained. That construction introduces a new conception into the civil law of Quebec and raises serious questions in the practicable and workable administration of estates of deceased persons: and whether we must accept it in its bald simplicity and implications is what we are called upon to decide.

As means of enforcing payment of the duties, the statute has created a personal liability on those to whom the property passes and has placed the restrictions of the subsection quoted as well as others on dealings with the property generally.

Section 13 provides that

> Every heir, universal legatee, legatee by general or particular title * * * shall be personally liable for the duties due in respect of his share in the succession, and for no more;

and that although the notary, executor, trustee or administrator shall not be under that liability,

> nevertheless the executor, the trustee or the administrator may be required to pay such duties out of the property or money in his possession belonging or owing to the beneficiaries, and, if he fail so to do, may be sued for the amount thereof, but only in his representative capacity.

The restraints on dealings are in substance a total arrest of title and a fixation of possession of that part of the property in the hands of third persons, including debts or other obligations toward the deceased: but, except as to the delivery or payment of bequests to legatees, nothing in the Act purports to restrict or control the possession of or any dealing with other property by the executor, heirs or legatees.

It is important to observe that no charge is created upon any part of the assets to secure the duties. The statute does not, therefore, interfere with any interest or title in the succession otherwise than as it has created specific incapacities to deal with it effectively.

It is to be observed also that, notwithstanding the language of ss. 7 (a), the Act assumes rights in the executor or the heirs or legatees to have arisen as a result of the death; and these are rights in or to the property and not merely rights of election to take or accept. If in fact no right or interest of any sort or description is transmitted or created upon the death, how can the statute properly and in the legal sense of the law of Quebec speak of heirs or legatees? It would, therefore, I think, be to misconceive the statute to treat it as not recognizing in some form or to some degree the existence of rights in the property of the estate; and whether these are to be looked upon as a residue of the normal transmission which has escaped the effect of ss. 7 (a) or as rights, arising from a statutory implication, to acquire property the title to which by transmission is suspended pending payment of the duties, is not, I should say, of materiality. The legatee by the Act is not only assumed to be entitled to a legacy mentioned in a will but he is declared to be personally liable for the duty on that particular legacy and nothing more. It cannot be taken that a person named as a legatee would by statute become liable for a tax, involving as to him the transmission of property, before that transmission takes place, without creating or recognizing in him a legal right, subject, it may be, to conditions, to obtain that particular property.

In this case, no duties were in fact payable and it is instructive to consider the situation of such an estate if the literal construction of ss. 7 (a) urged by the respondent should be maintained. No part of the property, however

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insignificant, could, except in violation of the statute, be disposed of before the issue of the certificate. Such an estate might find its sole property ruined because of a necessary delay, quite within the time provided by the statute, in conforming to what at best can only be described as a perfectionist formality. Unless compelled by the language of the statute to do so, we ought not to attribute to the legislature an intention so unnecessary to its purpose and entailing such possible consequences.

But does that language bind us to such an interpretation? The statute contemplates not only that those who will become entitled do take possession of property held by the deceased at his death, but that they shall be liable to pay it over to the Crown in discharge of duties. We must also, in my opinion, take it that the executor and legatee may pay debts of the estate out of monies in their hands. It has been suggested in the courts below that such persons would be entitled to take measures to preserve the estate; I quite agree and these might inure not only to the benefit of those ultimately entitled but conceivably of the province itself; they might also call for the disposal of property perishable either physically or in market value. Nor is there anything to indicate that the policy of the Act is against a substitution of money for property in the hands of executors or successors. Although it is forbidden to reduce the funds or property in their possession by payment or delivery of legacies, the conversion of the property into another form such as money is nowhere banned.

Now, the statute deals in particularity with the restrictions, penalties and obligations to enforce payment of the duties. But as that compulsion is their sole purpose and not to subject the estate to unnecessary loss or interference, I take it to mean that no further injunction is intended upon the property or the persons interested than is specifically provided. The language of ss. 7 (a) does not forbid the execution and delivery of an instrument of transfer, much less does it prohibit a contract the effect of which could not in any manner defeat its purpose. What the subsection does, and in this I take the French version to indicate more clearly the real intent of the language, is to suspend final validity of a transfer so long as the con-

ditions mentioned are not met: it contemplates the accomplishment or execution of assumed rights upon the payment of the duties. To declare that no transfer shall be valid "while" duties are unpaid is to assume the possible existence of acts or relations which, upon the payment, become *eo instanti* of full legal efficacy. Interpreted in conjunction with the implied rights in the heirs or legatees, it becomes in effect a statutory suspensive condition. It negatives any implication that until the duties are paid no binding engagement can be entered into. So construed, the necessities of the practical handling of estates are accommodated and the administrative sanctions of the statute left unimpaired.

The validity of the contract between the parties to this appeal depends, therefore, upon the law governing sales. The appellant was, under the community of property, the owner of half of the business sold but the sale undoubtedly was of the business as an entirety. What, then, is the standing of a contract of sale in which the seller transfers to the purchaser an interest in the nature of a right to obtain title to the property upon the happening of a condition which the seller is in a position to bring about, and has given to the purchaser lawful possession; and what is the effect of steps such as those taken by the respondent and the appellant thereafter? As the sale is not within section 1487 of the Civil Code, it presents the ordinary case of an obligation, the performance of some part of which is delayed. The remedy of the buyer, arising from that default, is well settled. It is a case of *pacte commissoire tacite* and as it is laid down in Mignault, vol. 5, p. 450:

> L'inexécution de ses obligations par l'une des parties ne suffit point, à elle seule, pour amener la résolution du contrat. Ainsi, l'acheteur n'a pas payé son prix à l'échéance du terme, bien qu'il ait été sommé de le payer: le contrat tient toujours; il reste valable, tant que la résolution n'en a pas été, sur la demande du vendeur, prononcée en justice.

And where, as here, the default is of such technical nature and there is no rule that excludes the giving of delay for fulfilling the obligation, it is well settled that, until judgment, the seller is entitled to remove the default if he can: *Gagnon* v. *La Coopérative Fédérée de Quebec* (1). This the appellant did before the pleadings were closed and the tender of costs discharged her obligation under the contract.

(1) (1926) Q.R. 43 K.B. 57, at 59.

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I would, therefore, allow the appeal and restore the judgment of the Superior Court dismissing the action, with costs to the appellant throughout.

Appeal allowed with costs.

Solicitor for the appellant: *Antonio Talbot.*

Solicitor for the respondent: *Raoul Gagnon.*

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*Feb. 21, 22.
*Apr. 25.

AIME A. MARTINEAU (PLAINTIFF)..... APPELLANT;

AND

HIS MAJESTY THE KING (DEFENDANT). RESPONDENT.

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

Negligence—Motor vehicle—Injury to pedestrian on highway—Presumption of fault created by section 53 of the Quebec Motor Vehicles Act —Such presumption of fault may be rebutted by defendant—Quebec Motor Vehicles Act, R.S.Q., 1941, c. 142, s. 53.

The presumption of fault created by section 53 of the *Quebec Motor Vehicles Act* against the owner or driver of an automobile is merely a presumption which is rebuttable: it does not constitute a liability defeasible only by evidence of fortuitous event or superior force (*cas fortuit ou force majeure*) or of a foreign cause not attribuable to defendant.

The judgment of the trial judge should be restored, as, upon the evidence, the respondent has entirely failed to rebut such presumption. The appellate court had reduced by half the amount of damages granted by the trial judge on the ground that there had been contributory negligence.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec, varying the judgment of the Superior Court, Sévigny C.J., and reducing by half the amount of damages awarded.

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

J. A. Gagné K.C. and *W. Desjardins K.C.* for the appellant.

Gaston Esnouf K.C. for the respondent.

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

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The judgment of the Court was delivered by

TASCHEREAU J.—In the village of Sillery near Quebec city, a truck belonging to the respondent struck and seriously injured appellant's wife who at the time was attempting to cross the road. The appellant, who is common as to property with his wife, as chief of the community, instituted the present action in which he claims $13,495.68.

The trial judge awarded him $6,970.18, but the Court of King's Bench reduced this amount to $3,485.09 on the ground that there was contributory negligence.

The liability of the respondent cannot be questioned. The trial judge found that the truck driven by an employee of the Highway Department was going at an unreasonable rate of speed in the village of Sillery, at a time when the traffic was heavy, thus endangering the safety of pedestrians. The Court of King's Bench reached the same conclusion, and this concurrent finding of facts relieves us of the duty of dealing any further with this point.

But the Court of King's Bench thought that the imprudence of appellant's wife in crossing the road contributed to the accident in such a way, and to such an extent, that the liability of the respondent should be reduced by fifty per cent.

With great respect, I believe that this appeal should be allowed and the judgment at the trial restored. The sole and determining cause of the accident was the speed at which the truck was driven, and the failure of respondent's employee to exercise a proper control over his truck and bring it to a stop in order to avoid hitting appellant's wife.

The preponderance of the evidence, and the trial judge so found, is to the effect that when the victim proceeded to cross the street with her friend, there was no obstruction on the highway in the immediate vicinity. In order to cross the road, the victim had to walk approximately twenty feet, and before doing so, she looked to her right and to her left to make sure that the road was clear and that she could go ahead in all safety. Seeing nothing coming, she had the right to assume that no driver, in violation of the law of the road and of the most elementary prudence, in this village of Sillery which has been termed by respondent's driver himself, as a "dangerous place". would emerge at such a rate of speed and imperil her life, before she had finished crossing the road.

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It was her undisputable right to cross where she did, and before doing so, she took the ordinary precautions of a reasonable person. By her conduct, she created no sudden emergency which would strengthen respondent's case, and the evidence reveals nothing that she did that might have in any material way contributed to the accident.

Although I agree with the trial judge in his disposition of this case, I do not wish it to be understood that I also concur in his too sweeping statement that the presumption of fault created by section 53 of the *Motor Vehicles Act* can be destroyed only

> par la preuve d'un cas fortuit ou de force majeure, ou d'une cause étrangère qui ne lui soit pas imputable.

It is not a liability defeasible by "cas fortuit ou force majeure" which the law has created against the owner or driver of an automobile, but merely a presumption of fault which is rebuttable by the defendant.

In the present case, the respondent has entirely failed to rebut this presumption, and therefore the present appeal must be allowed with costs, and the judgment of the trial judge restored.

Appeal allowed with costs.

Solicitor for the appellant: *Wilfrid Desjardins.*

Solicitor for the respondent: *Gaston Esnouf.*

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*Feb. 2, 3, 4.
*Apr. 25.

PACIFIC GREAT EASTERN RAILWAY COMPANY (DEFENDANT) ..... APPELLANT;

AND

BRIDGE RIVER POWER COMPANY LIMITED (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Railways—Contract—Negligence—Transportation by railway of locomotive crane embodying a car structure on wheels—Shipper undertaking to "get it ready for shipment"—Insecure fastening of crane body to frame of its car, causing derailment of crane-car and of other cars in the train—Claim against railway company for damage to crane—

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

Counterclaim by railway company for damage to its property—Nature of contract—Haulage—Duties, liability, of shipper, of railway company—Railway Act, R.S.B.C. 1936, c. 241.

Appellant was a railway company subject to the British Columbia *Railway Act* (R.S.B.C. 1936, c. 241). Respondent delivered to it for movement over its railway a locomotive crane which embodied a car structure on wheels by which it could be moved over railway tracks. Respondent (by its employees who engaged the railway service) had agreed to "get it ready for shipment". Appellant's train, in which was the crane-car, had gone only a few miles (on a very curved road), when, at a curve, owing to insecure fastening of the crane body to the frame of its car, the wheels of the crane-car left the rails and it and other cars of the train were derailed. Respondent claimed for damage to its crane, and appellant counter-claimed for expenses of repairing cars and track, clearing the wreck, etc., and for a freight charge for transporting, at respondent's request, the crane-car and its attachments to Vancouver.

Held (reversing judgment of the Court of Appeal for British Columbia, 58 B.C.R. 420, and of Sidney Smith J., 57 B.C.R. 247): Respondent's claim should be dismissed and appellant's counterclaim allowed (Hudson and Rand JJ. dissenting as to part of the counterclaim).

Per the Chief Justice and Kerwin J.: There was nothing to indicate that appellant was a common carrier of cranes such as the one in question. The contract was one for haulage of the crane on the terms offered by respondent that it would "get it ready for shipment", and in view of those terms and the cause of the accident, the damages arose from respondent's neglect. At common law, while a common carrier of goods was an insurer, it was a condition precedent to its liability that any loss occurring while the goods were in its custody should not arise from the personal neglect or wrong or misconduct of the owner or shipper; and, on principle, that rule should apply to the contract of haulage; and the operation of the condition precedent is not affected by the provisions of s. 242 of the *Railway Act* (B.C.) against impairment of liability in respect of the carriage of traffic (the crane was within the statutory definition of "traffic" as being "rolling stock", not as being "goods"). On the evidence, the imperfect nature of the preparation of the crane for shipment was not known to appellant, and (despite the rules of the Association of American Railways, of which association appellant was an associate member, but which rules embody "recommended practice" only as among, and for the benefit of, the railways themselves) was not something which appellant should have known.

Per Davis J.: The contract was one of haulage; and therefore appellant became merely a bailee for hire, and liable only for negligence after taking delivery. It did not appear that appellant in any sense undertook any supervision over the preparation of the crane for shipment or that appellant had at the place of shipment any employee competent, as compared with respondent's employees, to judge of the sufficiency of measures taken in such preparation. Respondent undertook to get the crane "ready for shipment", and there was no paramount duty on appellant to see that the crane was in proper condition for shipment. The issue of the action should be

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determined upon the basis of the particular contract and not on the general duty of a common carrier to a shipper of goods or to passengers. As to the counterclaim, appellant's damages were the direct consequence of respondent's negligence and were recoverable.

Per Hudson and Rand JJ.: The crane was not "goods" (it was assumed it could be brought within the expression "rolling stock" and was therefore required by the Act to be accepted as traffic by railways) nor was the service one of carriage; it was a form of haulage (not less so because for reward or because it was a movement of the crane as crane) in respect of which appellant was not a common carrier. The matter for determination was the nature, scope and effect of respondent's undertaking to make the crane "ready for shipment" (a work which appellant could properly have required to be done by respondent). That undertaking formed a precedent condition to appellant's undertaking and was not an infringement of s. 242 of the *Railway Act* (B.C.) (which provides against impairment of liability in respect of the carriage of traffic). On the facts and circumstances in evidence, it must be held that respondent did not in fact rely upon appellant to confirm respondent's judgment that the measures taken in preparing the crane for the transportation were sufficient, nor, as a matter of law, should appellant be held to have had such reliance placed upon it, or be held to a knowledge of the best or "recommended" practice in such preparation. Respondent took the risk of what it had done in preparation; there was no paramount duty on appellant towards respondent involving responsibility for the mode of security followed. Respondent acted on its own judgment alone, and offered the crane to be transported in the condition to which it had brought it; and it was that act, done in performance of respondent's own duty or engagement, that caused the derailment; and the failure of the means adopted was, therefore, chargeable against it (as to its claim) and its claim must be rejected. As to appellant's counterclaim: Though, no doubt, appellant did in fact rely upon respondent's work as sufficient for the train's safe operation, yet appellant knew the general nature of the hazard presented to the transportation; and, though not all of the safety means taken were disclosed, yet, in the situation and from the standpoint of appellant's own interest, there was sufficient known to place upon appellant the obligation of enquiry if anything further had been required. In such circumstances, the warranty implied in law against dangerous goods, assuming the principle, by analogy, to apply, did not arise. Nor could it be said that there was an undertaking implied in fact that the crane was sufficiently secured for the safety of train operation. There was no evidence to justify the conclusion that respondent took the steps it did otherwise than to protect its own property (*semble*, if that were not so, if in fact the security of the train had been a controlling purpose in the mind of respondent, it would be liable for all the consequences). Respondent was prepared to accept the risk involved to its own property in the transportation of the crane as it was, but there was no evidence that it was accepting responsibility for that risk to any other property. Respondent, therefore, was not liable for the damage done to appellant's property. But appellant was entitled to recover on its counterclaim to the extent of the freight charge.

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APPEAL by the defendant (a railway company, subject to the British Columbia *Railway Act*, R.S.B.C. 1936, c. 241) from the judgment of the Court of Appeal for British Columbia (1) dismissing (McDonald C.J.B.C. dissenting) its appeal from the judgment of Sidney Smith J. (2) in favour of the plaintiff for damages and dismissing the defendant's counter-claim. The action was for damages by reason of damage to the plaintiff's locomotive crane while being transported in the defendant's train, the damage being caused by derailment of the train. The defendant's counter-claim was for damages for expenses of repairing cars and track, clearing the wreck, etc., incurred as a result of the derailment, which it claimed was caused by the plaintiff's negligence in not properly preparing and securing the crane for safe travel, in breach of an alleged undertaking, and for a freight charge for transporting, at the plaintiff's request, the crane-car and its attachments to Vancouver. (McDonald C.J.B.C., dissenting in the Court of Appeal, would have dismissed the plaintiff's action; but he would also dismiss the defendant's counter-claim so far as it claimed for damage to its property and for costs of clearing up the wreck; he would have allowed the counter-claim for transportation charges.)

C. H. Locke K.C. for the appellant.

J. W. deB. Farris K.C. and *J. L. Farris* for the respondent.

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

KERWIN J.—There is nothing to indicate that the appellant railway company was a common carrier of cranes such as the one in question. The appellant is subject to the British Columbia *Railway Act* and the first question is as to which of its provisions are applicable to the contract between the parties.

"Goods" and "traffic" are defined in the Act as follows:—

"Goods" includes personal property of every description which may be conveyed upon the railway or upon steam-vessels or other vessels connected with the railway.

"Traffic" means the traffic of passengers, goods, and rolling-stock.

(1) 58 B.C. Rep. 420; [1943] 1 W.W.R. 413; [1943] 1 D.L.R. 729.
(2) 57 B.C. Rep. 247; [1942] 1 W.W.R. 529; [1942] 2 D.L.R. 78.

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In my opinion, the crane is not "goods" but "rolling-stock", and, as such, is covered by the prohibitions relating to the carriage of traffic, contained in section 242:—

242. (1) No contract, condition, by-law, regulation, declaration, or notice made or given by the company, impairing, restricting, or limiting its liability in respect of the carriage of any traffic, shall, except as hereinafter provided, relieve the company from such liability, unless such class of contract, condition, by-law, regulation, declaration, or notice shall have been first authorized or approved by order or regulation of the Minister by certificate under his hand and seal of office.

(2) The Minister may, by certificate as aforesaid, determine the extent to which the liability of the company may be so impaired, restricted, or limited.

The next question is whether this section is applicable under the circumstances. The appellant's contract with the respondent was one for haulage of the crane from Bridge River to Vancouver on the terms offered by the respondent that the latter would "get it ready for shipment". At common law, while a common carrier of goods was an insurer, it was a condition precedent to its liability that any loss occurring while the goods were in its custody should not arise from the personal neglect or wrong or misconduct of the owner or shipper. The rule to this effect laid down in Story on Bailments was adopted by Willes J. in *Blower* v. *Great Western Railway Company* (1), and is referred to with approval in subsequent decisions. There is now no dispute that the damages were caused by the insecure fastening of the body of the crane, which means that, in view of the terms of the offer by the respondent, the damages arose from the latter's neglect. On principle, there is no reason that the rule should not apply to the contract of haulage, and the provisions of section 242 do not affect the operation of the condition precedent.

It is unnecessary to pursue the question as to whether in a case of carriage of goods a railway company would be absolved by the neglect of the shipper (such as in bad packing), which had been obvious to the carrier when the goods were tendered. In *Gould* v. *South Eastern and Chatham Railway Company* (2), Lord Justice Atkin laid it down that in such circumstances the knowledge of the carrier of the improper packing did not make it liable. Lord Justice Younger did not specifically agree with that statement as, on that point, he said the plaintiff's contention was not

(1) (1872) L.R. 7 C.P. 655, at 662, 663. (2) [1920] 2 K.B. 186.

supported by the facts. In the House of Lords, in *London and North Western Railway Company* v. *Richard Hudson and Sons, Limited* (1), Lord Atkinson, at page 340, affirmed the law to be otherwise, or, as stated in the second edition of Leslie's Law of Transport by Railway, at page 40, the traditional view. I am unable to read the judgments in *Great Northern Railway Company* v. *L.E.P. Transport and Depository, Limited* (2), as expressing any conclusion upon the point. In that case, the defendants shipped in carboys goods described by them

> as oxygen water, a description of something which is regarded in this country as innocuous. Further, they tendered these goods, which by the description they applied to them they represented as being innocuous, in what was apparently a safely packed condition; because the carboys had wooden plugs or stoppers in them in which there had been vents, but the vents had been closed up by the action of the contents upon the wood, and the stoppers themselves were covered with a wicker cover, so that it was impossible for anybody, by a mere examination of the outside of the carboys, to ascertain whether they were properly stoppered or not. These were the goods which were tendered. [*per* Lord Justice Bankes at page 760.]

On the evidence in this case, I am satisfied that the imperfect nature of the preparation of the crane for shipment was not known to the appellant, and that, despite the rules of the Association of American Railways, the appellant should not have known of the imperfect preparation of the crane for shipment. The appellant was an associate member of this association but the rules embody "recommended practice" only as among, and for the benefit of, the railways themselves.

The appeal should be allowed, the claim of the respondent dismissed, and the counter-claim of the appellant allowed, with costs throughout.

DAVIS J.—The question in issue in the action turns upon the contract between the parties. If it is an ordinary contract of carriage of goods by rail, the railway company would be a common carrier and liable as an insurer. But my view of the evidence is that the contract was one of haulage and different considerations prevail than in the case of a contract of carriage of goods. If it is a haulage contract, the railway company became merely a bailee for

(1) [1920] A.C. 324. (2) [1922] 2 K.B. 742.

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hire, and liable only for negligence after it took delivery of the crane. See: *Watson* v. *North British Ry. Co.* (1); *William Barr & Sons* v. *Caledonian Ry. Co.* (2).

The locomotive crane, the property of the Power Company, had its own flat car to which it was attached, with wheels of standard gauge so that the unit could be moved about on the ordinary railway tracks. There was a turntable swinging mechanism in the floor of the flat car so that the crane could swing around as desired for any particular operation. The Power Company, having some arrangement for the sale of this locomotive crane, desired to have it conveyed by rail from the Power Company's plant some miles north of Vancouver, to Vancouver. It was obvious, of course, that the crane would have to be fastened or secured in some way for the trip so that it could not swing around in transit. The Power Company employees, who had been operating this crane for some six years and were familiar with it and its mechanism, were the natural persons, I think, to devise ways and means of adequately fastening the crane so that it could not move on the turntable during the journey by rail. At any rate the evidence makes it plain that the Power Company, in arranging with the railway to move the crane, undertook to "get it ready for shipment". That was the contract. And I think the employees of the Power Company did what they thought would be adequate and sufficient by way of cables or wiring to put the crane in condition for the purpose. But the fact is that there were not adequate and sufficient measures adopted by the Power Company to hold the machine in place while being conveyed by rail over a somewhat rough and very curved road. It does not appear that the railway company in any sense undertook any supervision over the preparation of the crane for shipment or that it had at the place of shipment any employee competent, as compared with the Power Company's own employees, to judge of the sufficiency of any measures to be taken to prevent the crane moving in transit.

The crane was picked up by the railway at the Power Company's siding and, travelling on its own flat car and wheels, became one of several railway cars that made up a freight train. Unfortunately the train had only gone a

(1) (1876) 3 R. Session Cases 637.

(2) (1890) 18 R. Session Cases 139.

few miles when, taking one of several curves in the road, the crane broke from its fastenings and the crane car and five other cars of the train were derailed.

This action was brought by the Power Company against the railway company for damages to its crane on the ground that there was a paramount duty, over and beyond any undertaking of the Power Company to get the crane ready for shipment, to see that the crane was in proper condition for shipment and to carry it safely. I cannot accept that contention. There was, in my opinion, a contract of haulage between the parties, and the issue of the action falls to be determined upon the basis of the particular contract and not on the general duty of a common carrier to the shipper of goods or to passengers on a train. The learned trial judge found the cause of derailment, which finding is accepted by all the learned Judges of the Court of Appeal, as follows:—

> I accept the opinion of Mr. Bates, the Chief Engineer of the defendant company, as to the cause of the accident. He says in effect that the swinging of the crane car around these curves gradually slackened the wires, and the increased play eventually broke the wires and dislodged the wedge, thus allowing the crane body to swing round at an angle to the car with the ballasted and outboard causing the derailment. I think there can be no doubt that the crane car was the first to leave the rails and that the cause of the derailment was the insecure fastening of the crane body to the frame of its car.

But the trial judge gave effect to the argument on the general duty of a railway to a shipper of goods, and held the railway company liable for the damages. The Court of Appeal for British Columbia affirmed the judgment, the Chief Justice dissenting.

I agree, so far as the claim in the action is concerned, that the appeal must be allowed and the action dismissed with costs throughout.

I am inclined to think that the error into which the learned trial judge fell in reaching his conclusion on the question of liability was in approaching the solution of the problem as "a transportation problem" involving the duty of a railway, instead of a matter of contract between the two parties to the transaction, and by thinking of the train in terms of a ship at sea. In his reasons for judgment he said:—

> The question before me is whether the onus for securing the crane was on the plaintiff or on the defendant. In other words, whether the

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owner of the crane or the Railway Company had the duty of seeing that the crane was in proper condition for the journey it was about to undertake. In my opinion this duty is one for the Railway Company. It is a transportation problem. It does not concern the question of whether goods are properly packed. It is a matter of the Railway Company taking into its train something that imperilled the train itself. Adopting a term from the sea, by analogy, the train was "unrailworthy". I think there can be no doubt that the duty of securing the crane so as to make the train "railworthy" was upon the Railway Company.

In *Trickett* v. *Queensland Insurance Co. Ltd.* (1), their Lordships, referring to dicta of a judge in a previous case cited in argument in the *Trickett* case as ground for considering the matter in question in terms of "roadworthiness" by analogy to "seaworthiness" of a ship at sea, said that they were

> not able to assimilate, as did the learned judge, the position of a ship at sea with that of a motor-car on land, and rigidly apply the same code of law to both cases. For reasons which are too obvious to be stressed in detail, their Lordships think the analogue imperfect and indeed misleading. They are of opinion that the argument based by the appellant on the identity of the conditions which govern the seaworthiness of a ship at sea and the roadworthiness of a car on land is unsound.

The railway company counter-claimed for damages arising out of the derailment to two flat cars and two box cars owned by the railway and one Canadian National Railway box car. The damages were for repairing these cars; clearing the wreck; re-railing, loading and transporting the damaged equipment, repairing the track, etc.; these damages being claimed in the sum of $3,507.48. There was a further and separate item in the counter-claim for the subsequent delivery at the Power Company's request of the crane car and its attachments to the Power Company at Vancouver. That item was claimed at $370.24. The learned Chief Justice of British Columbia, who dissented in the Court of Appeal on the main claim, did not think, however, that the railway company was entitled to its counter-claim except in respect of the item for the return of the crane car to the Power Company. But the cause of the derailment being, as found by the trial judge, "the insecure fastening of the crane body to the frame of its car", the damages for which the counter-claim was made were the direct consequence of plaintiff's

(1) [1936] A.C. 159.

negligence and are damages recoverable, in my opinion, by the defendant railway company from the plaintiff Power Company.

I should therefore allow the appeal as to the counter-claim with costs throughout.

The judgment of Hudson and Rand JJ. was delivered by

RAND J.—This controversy arises out of a simple transaction in which the respondent delivered to the appellant for movement over its railway from Bridge River to Squamish a locomotive crane. The crane embodied a car structure on wheels by which it could be moved over railway tracks. It also possessed power by which it could propel itself by means of internal gears. There was a boom which, for the purpose of being transported, was partly disconnected from the crane and loaded on a railway flat car, with a second flat car to serve the purpose of what is known as an idler, over which the end of the boom projected. The respondent, by its employees who participated in the engagement of the railway service, agreed to put the crane in proper condition for the transportation, "to get it ready for shipment". Before the train had proceeded more than seven or eight miles from Bridge River the fastenings of the crane broke, the revolving superstructure became loose, the wheels of the crane-car left the rails and the train was wrecked.

The respondent brought action for damages to the crane and the appellant counter-claimed for the expenses of clearing up the wreck, repairing equipment and track, and repairing and transporting the crane to Vancouver. The judgment at the trial upheld the claim on the ground that, as between the two parties, the duty of determining the sufficiency of the means by which the crane was secured rested upon the appellant and that it was liable for the consequences which followed from their failure; and the counter-claim was dismissed. In the Court of Appeal this judgment was affirmed, with the Chief Justice dissenting as to the claim. On the counter-claim, however, he took the view that, although as between the parties the respondent had undertaken to put the crane in proper condition for conveyance, the appellant, in relation to the train opera-

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tion, both as to its own property and property in its custody as carrier, assumed the risk of the adequacy of the work done by the respondent.

Section 202 of the *Railway Act* of British Columbia places upon railways the obligation to accept as traffic not only passengers and goods, but also "rolling stock", and I will assume in what follows that the crane can be brought within that expression. I am unable to agree that it was "goods" or that the service was carriage: it was a form of haulage, not less so because for reward or because it was a movement of the crane as crane, in respect of which the appellant was not a common carrier. The controversy reduces itself to a determination of the nature, scope and effect of the undertaking on the part of the respondent to make the crane "ready for shipment".

Mr. Locke for the appellant puts it as being one of fact: first, that the respondent, by making the crane safe for conveyance, completes the subject-matter of the haulage, that what is to be conveyed by the railway is the crane so prepared; and secondly, that the respondent not only does the work of making the crane secure, but takes upon itself responsibility in all respects for the sufficiency of that work. The latter lies in an implied warranty of fitness for the purposes of the service. As a further defence to the claim, there is set up an estoppel from the implied representation to the appellant that the crane was so fit.

Mr. Farris interprets the engagement as a qualified obligation: that the respondent will do the actual work needed to bring about security of travelling condition but in reliance upon the appellant's judgment as to its sufficiency for that purpose. As a complement to this and also, as I understand it, independently of it, he invokes above any such obligation or requirement the paramount duty of the railway towards all shippers, including the respondent, to do whatever may be necessary to make its train operation safe. That would entail assumption of responsibility for the mode of security followed here by the respondent.

These contentions involve two distinct aspects of the act of preparing goods for shipment or conveyance. Ordinarily that preparation is concerned only to enable them to withstand the incidents of the transportation. It is the

interest of the shipper in his property that is primarily regarded and, apart from special circumstances, if the goods are insufficiently packed or otherwise secured, the shipper must bear the resulting loss or damage. That is the first aspect.

But there is another, though one not ordinarily met with, and it is that of the interest of the carrier in the safety of his own property or the property of others in his custody. In addition to the obligation placed upon the shipper of making his goods carriageable, the carrier is entitled to require that the transportation of the goods should not involve danger to his operations, or vehicles or their contents. In this aspect, it is now settled that where goods dangerous in fact are presented to a carrier, in the absence of a disclosure of that danger, there is implied a warranty that the goods can be carried with safety; and if damage results from that cause, the shipper is responsible. The warranty does not arise where the carrier is informed or ought to know of the danger: *Great Northern Ry. Co.* v. *L.E.P. Transport and Depository Ltd.* (1).

Now, the preparation of things or articles for conveyance is antecedent to the main undertaking of the carrier. In the argument before us it was admitted that the appellant could have refused to prepare and secure the crane itself and that it could properly require that work to be done by the respondent. This precedent condition, therefore, is not an infringement of section 242 of the provincial *Railway Act* which forbids the impairment of liability in respect of the carriage of traffic.

What, then, are the terms of the preliminary act of preparing property for conveyance, which go to the conditions under which the obligation to accept on the part of the railway arises? In the absence of statutory provision, I know of nothing to qualify the transaction from being one depending upon its facts, subject, as in other relations between public carriers and shippers, to the general rule of reasonableness. The particular feature which this dispute presents is the element of reliance: and the question is, what of that element have we here in relation to both aspects of the act of making the crane safe for conveyance?

Did the company in fact rely upon the railway to confirm its judgment that the measures of safety taken were

(1) [1922] 2 K.B. 742.

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sufficient for the journey? The evidence on examination for discovery of the witnesses Grant and Heinrich would seem to me to be conclusive on that point:—

Grant:

Q. What happened then?

A. Then—I think that was all there was to it. I asked him if everything was O.K. and satisfied and he said yes, it was all right.

Q. What do you say about being satisfied?

A. I asked Mr. Newton if everything was O.K. and he said yes, that would be all right.

Q. When was that ?

A. That was right then when we finished.

Q. That was when you finished with the boom?

A. Finished the boom.

Q. You were not asking this man for advice as to how to fasten the crane?

A. No.

Q. You were the one who knew about the crane?

A. Yes.

And Heinrich:

Q. Were you there when that was done?

A. Part of the time. I didn't superintend the whole thing.

Q. Do you feel qualified to express an opinion as to whether that was sufficient to keep the crane from turning?

A. I do.

Q. And your opinion was what?

A. It was secure.

Newton had been stationed at the point, Shalath, a mile or so from Bridge River, for about three years. He had done ordinary work of inspecting shipments such as lumber and was, in general, the medium of communication between the respondent and the appellant. But his functions were well known by the company and it is impossible to suppose, as the evidence quoted concedes, that he had any special qualifications for inspecting such a mechanism as the crane, or that he represented himself to have any.

The respondent had owned the crane for about six years. Heinrich was an engineer of forty years' standing who had been with the respondent for thirty-three years. It was not a case of ordinary measures for protecting goods against damage. The work involved some knowledge of the internal workings of a complicated machine. There was nothing external to indicate what adjustments could be or had been made within the apparatus to make it stable and secure. There is no suggestion that any enquiries were made by Newton as to the visible or invisible

means of securing it. The cables were, of course, seen but they might easily be taken as extra-precautionary measures. There was in the crane, and so far as the evidence goes, unknown to Newton, a substantial quantity of ballast which served as a counter-weight to the boom. That was in the knowledge of Heinrich and no doubt was a circumstance taken into account when he decided upon driving a wedge between the moveable superstructure of the crane and its base; but it is not suggested that Newton or the conductor knew anything about the wedge or the considerations which led to its being used, or the fact that there was nothing in the apparatus to enable the revolving superstructure to be firmly locked. The conductor states he assumed there was such a mechanism.

There is said to be a duty to make train conditions safe for operations. Certainly, liability may be bound up with that circumstance: but the duty runs towards those whose goods are being carried or conveyed. It is implicated in the contractual relations with those persons which constitute the carrier's undertaking, including the terms of the preparatory transaction. If, then, the shipper has represented or engaged that his property is fit for conveyance, the railway may, as to that shipper, properly assume the condition to be as represented and act in the manner contemplated by both parties.

A qualification of this may arise in any case in which the insufficiency of the method adopted either is actually known to the carrier or is so manifest or obvious that the carrier must be charged with its knowledge. Then, no doubt, the general obligation of the carrier to exercise care towards goods which he is to take or has taken into his custody, may operate and he may be obliged either to refuse to carry, or to complete or supplement what should have been done by the shipper or thereafter deal with the goods in the light of their actual condition. But that apparency must be to those who are representing the carrier at the time; and, treating the rule as applicable, by analogy, to the case here, it is not seriously suggested that the checker or the conductor actually appreciated the insufficiency here or should have done so.

There were introduced in evidence certain rules of The Association of American Railways, an organization in

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which the appellant held an associate membership, which, among other things, dealt with methods of loading and securing different classes of goods or property, including cranes, which are not moved in closed cars. They are what is termed "recommended practice" originated by and formulated primarily for the benefit of railways. They would apply to the movement of such units as cranes by railways for themselves equally as for others. No doubt shippers may be required to conform to them so far as they are reasonable. They probably have particular relation to the interchange of traffic and equipment between member railways, but they are of value as well to the operations of a single railway.

The consideration of reasonable care by a carrier does not ordinarily arise in common carriage because of his liability as insurer but, where that relation is not present and the question is solely one of that duty, no doubt the standards so set up would weigh strongly in determining whether the carrier had discharged it in the case of damage to property other than that to which a particular rule applied. But that is not the case here. The question which we must determine is the duty of a carrier towards a shipper in respect of the act of preparation. Although the railway might have insisted upon another mode of preparation, was it bound in the circumstances to do so? If the company had sought information as to the proper method, I have little doubt the appellant would have been under a duty to furnish it; and if, through actual knowledge of the "recommended practice" or otherwise, the insufficiency ought to have been apparent to those representing the railway, the same or a similar duty might arise. But the carrier is not, in the circumstances present here, as a matter of law, held to a knowledge of the best or "recommended" practice. In such a case, the shipper in effect says: "I take the risk of what I have done to my own property in the service which I know you are going to give to it", and the mere existence of such a code could not nullify that assumption as a term of the engagement between the parties. If the crane, by some chance, had been the only unit of the train damaged or derailed, the case would have presented little difficulty. Although advanced in the concept of a duty to furnish a "train-

worthy" service, the contention of the respondent reduces itself to the proposition that, in law, the carrier undertakes with the shipper that the act of the shipper will not be a danger to his own property by reason of the effect of that act upon the train operation: but notwithstanding the force with which that view was urged, it is, in my opinion, unfounded in rule or principle.

The representatives of the company who dealt with the railway, neither in fact nor in law, then, placed any reliance whatever in Newton as to the sufficiency of the safeguards: it was their judgment, and theirs alone, on which they acted: and they offered the crane to be transported in the condition to which they had brought it. But it was that act of the company, done in the performance of its own duty or engagement, that caused the derailment. The failure of the means adopted was, therefore, in this respect, chargeable against the respondent and the claim must be rejected: *Canadian Westinghouse Co.* v. *Can. Pac. Rly. Co.* (1): Duff J. (as he then was):—

> If the derailment and consequent injury to the machinery were directly caused, in whole or in part, by negligent loading, the appellant company is not entitled to recover, because, if that be so, the loss is at least a loss caused in part by its negligence, and that circumstance, according to settled and well-known principles, disentitled it to recover any part of the loss.

There remains the counter-claim. As already stated, this is placed on an implied warranty that the crane as delivered to the appellant was reasonably fit for all purposes of being hauled to its destination; there is also a count in negligence in creating a condition of danger, the natural and probable consequences of which, if not adequately controlled, might be the serious disruption that took place.

Now, no doubt the railway did in fact rely upon the work done by the company as sufficient for the safe operation of the train: but was it entitled to do so in the sense that the company should be bound by that reliance and the responsibility which it entailed? The railway knew the general nature of the hazard presented to the transportation. Not all of the safety means taken were disclosed, but in the situation and from the standpoint of the railway's own interest there was sufficient known to place

(1) [1925] S.C.R. 579 at p. 584.

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upon the railway the obligation of enquiry if anything further had been required. In these circumstances, the warranty implied in law against dangerous goods, assuming the principle, by analogy, to apply, does not arise.

Was there an undertaking implied in fact that the crane was sufficiently secured for the safety of train operation? The confusing circumstance is that the security of the crane was intimately bound up with security for the train. There is nothing in the evidence, however, to justify the conclusion that the respondent took the steps it did otherwise than to protect its own property. If that were not so, if in fact the security of the train had been a controlling purpose in the mind of the respondent, I would feel bound to hold it liable for all the consequences. The respondent was prepared to accept the risk involved to its own property in the transportation of the crane as it was, but there is no evidence that it was accepting responsibility for that risk to any other property.

I agree, therefore, with the view of the late Chief Justice of British Columbia that the respondent is not liable for the damage done to the property of the appellant. I agree with him, also, that the appellant is entitled to recover for the freight charges for hauling the crane to Vancouver and back to Squamish: this is the only item of damage claimed on the footing of services rendered at the request of the respondent. The appeal should be allowed and judgment entered dismissing the claim and allowing the counterclaim to the extent mentioned, with costs throughout.

Appeal allowed with costs.

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

Solicitors for the respondent: *Farris, McAlpine, Stultz, Bull & Farris.*

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LE COMITÉ PARITAIRE DE L'INDUSTRIE DE L'IMPRIMERIE DE MONTRÉAL ET DU DISTRICT (PLAINTIFF) ..... APPELLANT;

*Mar. 3, 6, 7, 8, *May 15.

AND

DOMINION BLANK BOOK COMPANY, LIMITED (DEFENDANT) .... RESPONDENT;

AND

DOMINION BLANK BOOK COMPANY, LIMITED, EMPLOYEES' ASSOCIATION (MISE-EN-CAUSE).

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

Employer and employees—Collective labour agreement, under The Professional Syndicate Act, as to wages and hours of labour—Decree by Lieutenant-Governor in Council under The Collective Agreement Act respecting same—Whether relations between employer and employees to be governed by the decree or the agreement—Agreement null and void if in conflict with the decree—The Collective Agreement Act a law of public order and its provisions obligatory—The Professional Syndicates Act not repealed by The Collective Agreement Act—Both Acts co-exist, but first Act must yield to second Act in case of conflict —Whether judgment is susceptible of execution—Terms of injunction —Whether in conformity with Code of Civil Procedure—Printing operations—Whether employers not printers owing to innovations of modern machinery—Printing not principal business of employer—An Act respecting workmen's wages, 1 Geo. VI, c. 49, amended by 2 Geo. VI, c. 52—The Collective Labour Agreements Act, 3 Geo. VI, c. 61—The Collective Agreement Act, R.S.Q., 1941, c. 163.

The appellant brought an action against the respondent, praying *inter alia* that a collective labour agreement, entered into between the respondent and its employees' association, mise-en-cause, under the provisions of *The Professional Syndicates Act,* be declared illegal and set aside, and that the respondent be ordered to abstain from denying to the inspectors of the appellant access to its premises to inspect its books, etc., under the authority of a decree made by the Lieutenant-Governor in Council under the *Collective Agreement Act.* At the same time as the action, the appellant made a demand for an interim injunction, and, later, for an interlocutory injunction which were both granted. The Superior Court maintained the appellant's action, declared illegal, irregular and null that part of the agreement conflicting with the decree, confirmed the interlocutory injunction, ordered the respondent to cease to refuse access to its establishment and further condemned the respondent to pay damages in the amount of $33.80.

*PRESENT:—Rinfret C.J. and Hudson, Taschereau, Rand JJ. and Thorson J. *ad hoc.*

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This judgment was reversed by the appellate court, though its members did not agree on the reasons for their decisions.

Held, reversing the judgment of the appellate court and restoring the judgment of the trial judge, that the collective labour agreement invoked by the respondent is null and void: such agreement cannot have the effect of withdrawing the respondent from the application of the decree previously passed under the *Collective Agreement Act.*

The legislature, by the imperative and unequivocal text of that Act (sections 2, 9, 11, 12 and 13) intended to bind all employees and employers who are engaged in a similar trade or business. It is as a consequence of the legal extension conferred by the decree, that all those performing work of the same nature or kind become subject to its provisions. It is furthermore a law of public order, which stipulates in clear terms that the provisions of the decree respecting hours of labour and wages, in a given undertaking, are obligatory, thus rendering null and void all agreements violating or coming in conflict with its dispositions.

Under *The Professional Syndicates Act,* any agreement respecting the conditions of labour, *not prohibited by law,* can form the object of a collective labour agreement, the aim of that law being to enable the working classes to deal collectively with their employers; but such agreement is the law of the parties only and no greater advantages can be derived from these agreements than from those entered into between ordinary corporations or individuals.—A further step was made later with the enactment of *The Collective Agreement Act,* which recognized labour agreements, and further declared, which was the essential feature of the law, that not only the signators to the agreement would be bound by it but also all those exercising in a given region a similar trade. The scope of the collective agreements was thus considerably extended, and even the dissenting employees and employers were bound by the decree. The agreement, stipulating wages and hours of labour, invoked by the respondent violated the decree passed under *The Collective Agreement Act* and is therefore null and void.

But the judgment of this Court should not be interpreted as meaning that the provisions of *The Professional Syndicates Act* have been in any way repealed by *The Collective Agreement Act.* Both laws coexist, and professional syndicates may enter into labour agreements with their employers under the condition, however, that their terms do not conflict with the existing law. The private agreements made under the first Act between employers and employees must necessarily yield to the imperative provisions of the second Act in the territory covered by the decree.

Held, also, that the judgment of the trial judge is susceptible of execution, that it is not affected by any vagueness and that the terms of the injunction granted by him are in conformity with the Code of Civil Procedure.

Held, also, that, upon the evidence, the respondent is engaged in printing operations and that the contention of the respondent that its employees are not in that trade, but are mere operators requiring very little training because of the perfection of modern machinery, is inadmissible.

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APPEAL, by leave of appeal granted by this Court (1), from a judgment of the Court of King's Bench, appeal side, province of Quebec, reversing the judgment of the Superior Court, Bertrand J., which had maintained the appellant's action, had declared illegal, irregular and null a labour agreement passed between the respondent and the mise-en-cause, had confirmed an interlocutory injunction and granted a permanent injunction, enjoying the respondent to cease to refuse access to its establishments and to obstruct the work of the inspectors of the appellant and had condemned the respondent to pay a sum of $33.80, being damages incurred for expenses of these inspectors.

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

Aimé Geoffrion K.C. and *Laurent Bélanger* for the appellant.

L. E. Beaulieu K.C. and *Ivan Sabourin K.C.* for the respondent.

Alcide Côté for the mise-en-cause.

The judgment of the Court was delivered by

TASCHEREAU J.—In 1937, a collective labour agreement relating to the industry of printing (as defined in the decree) was entered into between several professional syndicates and unions of employees, and over 125 employers.

A few months later, on the 9th of February, 1938, an Order in Council was passed by the Provincial Government of the province of Quebec, and was published in the *Official Gazette* on the 12th of February. This Order in Council, also called the decree, extended without amendment the provisions of this agreement, to all employees and employers, performing work of the same nature and kind in the city of Montreal, and in all the localities situate in a radius of one hundred miles from the boundaries of the island.

In pursuance to the rights and obligations conferred upon them by the law, the parties to the collective agreement formed a joint committee to supervise and ensure the carry-

(1) [1943] S.C.R. 566.

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ing out of the decree, and such committee, which constituted a corporation, had at that time the powers, rights and privileges appertaining to ordinary civil corporations. The committee could further:

(*a*) Compel any professional employer to keep a register indicating the surname, Christian names and residence of each employee in his employ, his competency, the regular and extra hours of daily labour and its nature, as well as the wage paid for such labour, with mention of the method and time of payment;

(*b*) Examine the aforesaid register and the pay-list;

(*c*) Verify, as with any employer and any employee, the rates of wages, the hours of labour, the system of apprenticeship and any other provisions of the decree;

(*d*) Require under oath from any employer or from any employee, and even at the place where the latter does his work, such information as it deems necessary;

(*e*) Require the professional employer to have a copy of the scale of wages which has been made obligatory, or of any decision or by-law, posted up in a suitable place;

(*f*) Levy upon the professional employer alone or upon both the professional employer and the employee, the sums required for the carrying out of the decree; such levying to be made subject to the following conditions * * * etc.

Under the agreement, three zones have been established.

Zone (1): Island of Montreal and a radius of ten miles in a straight line from the boundaries of the Island.

Zone (2): The following municipalities and a radius of two miles from their limits: Three-Rivers, Sherbrooke, Sorel, St. Hyacinthe, Valleyfield, Joliette, Granby, St. John d'Iberville, Laprairie, St. Jérome, Hull; with the exception of establishments which published and printed, as at the 3rd of January, 1938, one or more weekly newspapers.

Zone (3): The whole jurisdiction with the exception of zones (1) and (2) but and comprising all printing establishments possessing and printing a weekly or bi-weekly newspaper and situated within the limits of zones (1) and (2), with the exception that those situate on the Island of Montreal shall continue to be governed by the provisions of zone (1), with the reserve mentioned in zone (2).

The defendant-respondent's establishment is situate at St. John d'Iberville and is therefore included in zone (2).

For a certain period of time after the coming into force of the decree, the respondent paid the levies to the appellant, sent monthly reports, etc., always under reserve of its rights and under protest. But, in July, 1939, the respondent refused to allow the appellant's inspectors to enter its establishment, and a complaint was therefore laid before the Magistrate's Court against the respondent, who had to answer to the charge of hindering the exercising of the

rights conferred on the appellant by the statute. Instead of contesting, the respondent filed a written confession where it pleaded guilty, but without admitting the jurisdiction of the Court and without acknowledging that it was bound by the decree.

Later, in November, 1939, and in January, 1940, the respondent again prevented access to its establishment and to its books to the appellant's inspectors. It was then, as it is now, the contention of the respondent, that it did not fall under the jurisdiction of the decree, because it was not a printing establishment, and because also it had passed with an association of its employees, the mise-en-cause, a special collective labour agreement which prevented the decree from finding any application. The respondent, therefore, ceased to submit to the appellant its monthly reports on wages paid, the hours of labour * * * etc., and ceased also to forward its levies.

In September, 1940, the appellant instituted action in which it claimed (*a*) that the agreement entered into between the respondent and the mise-en-cause on the 26th of September, 1939, be declared illegal, irregular and null, and that it be annulled for all legal purposes; (*b*) that order be given to the defendant, to all its officers, representatives and employees to cease to refuse access to its establishments, books, and to cease also to put any obstacle to the exercise by the inspectors of the appellant, of their powers, rights and privileges; (*c*) that the defendant be condemned to pay to the appellant a sum of $105, being damages incurred for expenses of the inspectors of the plaintiff.

At the same time as this action was taken, there was also a demand for an interim injunction which was granted on the 9th of February, 1940, by Mr. Justice Louis Cousineau, and, on the 18th of November, 1940, an interlocutory injunction was issued by Mr. Justice Trahan.

In the Superior Court, Mr. Justice Charles-Auguste Bertrand maintained the action, declared illegal, irregular and null that part of the agreement conflicting with the decree, confirmed the interlocutory injunction which had been granted by Mr. Justice Trahan, ordered the defendant to cease to refuse access to its establishment, and further condemned the defendant to pay damages in the amount of $33.80, the whole with costs.

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The Court of King's Bench reversed this judgment, but, the learned judges did not agree on their reasons, which we will examine later. The parties are now before this Court, the appellant having obtained special leave to appeal.

Various issues have been raised, and the first ground of defence of the respondent is that it is not affected by the decree, because on the 26th of September, 1939, it entered into an agreement with the mise-en-cause, an association of its employees, and it alleges that this agreement, which is governed by the *Professional Syndicates' Act*, determines amongst other things the wages to be paid, the classification of employees and the hours of labour.

Is this agreement valid, and has it the effect of withdrawing the respondent from the application of the decree under the *Collective Labour Agreement Act?* The Act is found in 1 Geo. VI, c. 49, amended by 2 Geo. VI, c. 52, and by 3 Geo. VI, c. 61, and also in the Revised Statutes of Quebec, 1941, c. 163 (now called *The Collector Agreement Act*). Under this Act, the Lieutenant-Governor in Council:

> may order that a collective labour agreement entered into between employers and employees, respecting any trade, industry, commerce or occupation, shall also bind all the employees and employers in a stated region of the Province.

And section 9 says:

> Whenever a decree is passed under section 2, the provisions of the agreement, whether amended or not, which become obligatory, are those respecting wages, hours of labour, apprenticeship and the proportion between the number of skilled workmen and that of apprentices in a given undertaking.

Section 11 provides that:

> the provisions of the decree entail a matter of public order, and shall govern and rule any hire of work of the same nature or kind as that contemplated by the agreement, in the region of the Province determined by the decree.

Section 12 says that:

> whatever method of remuneration be agreed to between the parties, whether the latter be natural or ideal persons, and whatever be the employer's occupation, it is forbidden to stipulate a remuneration equivalent to a wage below that fixed by the decree.

Section 13 is to the effect that:

> Notwithstanding the provisions of sections 9, 10, 11 and 12 of this Act, the clauses of an individual hire of work contract, when they are to the advantage of the employee, shall be effective, unless expressly forbidden by the provisions of the decree.

It is obvious that by these imperative and unequivocal texts, the legislature intended to bind not only the signators to the agreement, but also all employees and employers who are engaged in a similar trade or business. It is as a consequence of the legal extension conferred by the decree, that all those performing work of the same nature or kind become subject to its provisions. It is furthermore a law of public order, which stipulates in clear terms that the provisions of the decree respecting hours of labour and wages, in a given undertaking, are obligatory, thus rendering null and void all agreements violating or coming in conflict with its dispositions.

The law invoked by the respondent, and under which a contract was passed on the 26th of September, 1939, with an association of its employees, is found in the Revised Statutes of the province of Quebec, 1941, c. 162, under the heading: *An Act Respecting Professional Syndicates.* It authorizes twenty persons or more, engaged in the same profession or in similar trades, to form an association or professional syndicate, the incorporation of which may be authorized by the Provincial Secretary, and if so, notice is given in the Official Gazette. These professional syndicates may appear before the courts, and among other powers conferred upon them by law, they may enter into contracts or agreements with all other syndicates, societies, undertakings, respecting the attainment of their objects, and particularly such as relate to the collective conditions of labour.

This law defines a collective labour agreement as being a contract respecting labour conditions, made between the representatives of a professional syndicate, or of a union, or of a federation of syndicates, on the one hand, and one or more employers, or representatives of a syndicate, union or federation of syndicates or employers, on the other hand. Any agreement respecting the conditions of labour *not prohibited by law,* may form the object of a collective labour agreement.

Are bound by the agreement, the employers and employees who sign it, as well as those who at the time it is signed are members of a syndicate party to the agreement, unless they resign from such syndicate within eight days after the agreement has been deposited with the Minister

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of Labour. Are also bound, those who are members of a group which later joins in the agreement, and those who, after the deposit of the agreement, join a group which was a party to it.

The clear object of this law was undoubtedly to enable the working classes to deal collectively with their employers. Before its enactment, all labour agreements were individual, and the economic inequality existing between the contracting parties did not permit the employees to discuss the conditions of their employment, nor the salary to which they were entitled, on an equal footing. The law now gives the employees an undisputable improved standing, in allowing them to thus deal collectively, and in giving them the right to appear as a legal body before the courts in order to enforce their rights. In addition to these advantages flowing from the right to organize as a syndicate, the law grants no further rights.

The agreement becomes the law of the parties only, and no further advantages are derived from these agreements, than from those entered into between ordinary corporations or individuals. The underlying principle of the law is to allow the labour classes to organize so that they may act collectively.

A further step was made later with the enactment of the *Collective Labour Agreement Act,* which recognized the labour agreements, and further declared, which was the essential feature of the law, that not only the signators to the agreement would be bound to it, but also all those exercising in a given region a similar trade. The scope of the collective agreements was thus considerably extended, and even the dissenting employees and employers were bound by the decree. Any person violating such decree or any of its regulations made obligatory, or any provisions of the Act, declared to be of public order, committed an unlawful act, and was made liable to fine and imprisonment.

I do not think that the respondent can escape the application of this law, by invoking its alleged contract with the mise-en-cause. The *Collective Labour Agreement Act* applies to every one engaged in a similar trade and, specifically forbids to stipulate a wage below that fixed by the decree. Any stipulation to that effect is null and void.

At the time this decree became obligatory, only the clauses of an individual hire of work, when to the advantage of the employee, were effective, unless expressly forbidden by the decree, and this case does not arise here. The law was amended in 1940, and now, section 13 of the statutes of 1941 reads:

> Unless expressly forbidden by the provisions of the decree, the clauses of a lease and hire of work shall be valid and lawful, notwithstanding the provisions of the above sections 9, 10, 11 and 12, in so far as they provide in favour of the employee a higher monetary remuneration in currency or more extended compensation or benefits than those fixed by the decree.

Even if this section applied to the present case, it could not be invoked by the defendant, for an examination of the contract with the mise-en-cause reveals clearly that the conditions of the decree are more advantageous to the employees than those found in the private agreement.

The power conferred upon the contracting parties in the *Professional Syndicates' Act* is to enter into an agreement which is not *prohibited by law.* I cannot but come to the conclusion, that the parties in stipulating the wages and hours of labour, that appear in the impugned contract, violated the *Collective Labour Agreement Act,* and such agreement is therefore null and void.

It would be to my mind most extraordinary, that the dispositions of the *Collective Labour Agreement Act* could be eluded under the pretext raised in the present case. If so, the law would be defeated, and this far-reaching social legislation would indeed be a dead letter in the statutes. If an employer, obviously bound by the decree, may withdraw, and by a unilateral act cease to be affected by its dispositions, all the other parties would clearly have the same rights, thus rendering the law inoperative. By enacting this law, the legislature clearly intended that all the employees of a same category would receive a similar monetary remuneration, and be submitted to like labour conditions. It also intended that the employers, respecting the agreement and paying fair wages, be not put in a constant state of financial instability, by being subject to the disloyal competition of other dissenting employers, who refuse to be parties to the agreement, or who withdraw after having been bound by it.

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Of course, this conclusion must not be interpreted as meaning that the provisions of the *Professional Syndicates' Act* are in any way repealed. Both laws coexist, and professional syndicates may enter into labour agreements with their employers under the condition, however, that their terms do not conflict with the existing law. The private agreements made under *Professional Syndicates' Act* between employers and employees, must necessarily yield to the imperative provisions of the *Collective Labour Agreement Act*, in the territory covered by the decree.

The authorization granted to a group of men to act collectively and to deal in a more efficient way with their employers, surely does not include the privilege of violating the dispositions of an existing law. The contracts they are authorized to pass must necessarily comply with the labour laws of the province, and particularly with section 21 of the *Professional Syndicates' Act*, which says that the conditions of the labour agreement must *not be prohibited by law.*

As to the regions where no decree applies, or where no contract has been entered into under the *Professional Syndicates' Act*, then, the conditions of labour are determined by a Commission appointed under what was formerly *The Fair Wage Act*, now known as *The Minimum Wage Act*. The order of the Commission cannot affect the decree, if one should exist in the locality, but, it does affect the dispositions of a professional syndicate contract, if, the Commission, by a resolution approved by the Minister of Labour, declares that said agreement is less advantageous to the employees than the order itself.

As we have seen, in the Court of King's Bench, the appeal of the present respondent was allowed, but for different reasons.

Mr. Justice Galipeault and Mr. Justice St-Germain, held that the special collective labour agreement, between the respondent and the mise-en-cause, was valid and that, therefore, the defendant was not subject to the decree. I have dealt with this point, and I will now examine the reasons given by the other judges of the Court.

Mr. Justice St-Jacques was of the opinion that, if the dispositions of the agreement are null *ab initio* as contrary to a law of public order, an action does not lie to have

a declaration to that effect, and that a judgment would then merely amount to a theorical declaration. He further held that an injunction, being an accessory to a principal action, cannot stand alone, when the action fails.

With deference, I have come to the conclusion that, in this case, the plaintiff was entitled to ask and obtain such declaration of nullity. In order to avoid the effect of the decree, the respondent alleged its contract with the mise-en-cause, and claimed that it superseded the general law. This obstacle had obviously to be removed, and nothing but a declaration of the Court, to the effect that this contract was null and void, could serve the purposes of the appellant. All its other claims, injunction and damages were subordinated to the legality or illegality of this contract, and the pronouncement that it is illegal, paved the way for the other remedies that it claimed. How could the injunction be declared permanent, and damages awarded, without this declaration of nullity?

It is of frequent occurrence that our courts make such pronouncements, as for instance in cases of nullity of marriage, or nullity of by-laws or resolutions passed by municipal corporations, and which are declared to be *ultra vires*. And if any authority is needed for this proposition, one may refer to *Donohue Bros.* v. *Corporation de la Malbaie* (1), where an action was brought by the appellants to have a valuation roll declared null and void, and to the more recent case of *Rodier et al* v. *Les Curé et Marguilliers de l'Oeuvre et Fabrique de la Paroisse de Ste-Hélène* (2), where the Court of King's Bench declared null an assessment made by trustees.

Mr. Justice Marchand thought that the judgment of the trial judge is not susceptible of execution, and further that the injunction granted is a mandatory injunction, which is unknown to the Code of Civil Procedure. The trial judge said:

> La Cour déclare illégal, irrégulier et nul, et elle annule à toutes fins que de droit, l'accord de travail intervenu entre la défenderesse et la mise-en-cause le 25 septembre 1939; quant à toutes celles de ses stipulations qui sont incompatibles avec les dispositions du décret relatif aux métiers de l'imprimerie.

The respondent is not engaged only in the trade of printing, but is interested also in other trades, which are

(1) [1924] S.C.R. 511. (2) Q.R. [1944] K.B. 1.

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in no way affected by the decree, which covers only printers and other allied industries mentioned in the decree. The judgment of the trial judge amounts merely to a declaration, that the contract entered into between the respondent and the mise-en-cause is severable, and must be considered as inexistent only its dispositions relating to printers. I do not think that it can be said that this judgment lacks the sufficient precision necessary to make it susceptible of execution.

As to the objection that the injunction is mandatory, it is I think useful to refer, first of all, to the injunction itself, which says:

> A la requête de ladite requérante, le Comité Paritaire de l'Industrie de l'Imprimerie de Montréal et du district, nous, soussigné, juge de la Cour Supérieure, siégeant pour ledit district d'Iberville, commandons et enjoignons sous les peines que de droit à vous, dite Dominion Blank Note Book Company Limited, et à vos officiers, représentants et employés, de ne pas commettre, cesser, sous toutes peines que de droit, jusqu'à l'expiration du décret relatif aux métiers de l'imprimerie, de refuser l'accès de l'établissement, des livres et des employés de l'intimée aux inspecteurs de la requérante, et de mettre obstacle, de quelque façon que ce soit, à l'exécution par les inspecteurs de la requérante des pouvoirs, droits, devoirs et privilèges de la requérante, jusqu'à ordonnance contraire.

The order given to the respondent is "to cease" to refuse to the inspectors, access to the establishment, books, etc., and to cease also to prevent in any way whatever the inspectors from fulfilling their duties, and exercising their rights and privileges. Before this injunction was issued, the respondent, through its officers and employees, had clearly refused access to the inspectors in its manufacture. That was the act complained of. The injunction enjoins the respondent to refrain from this *specified act*, and to suspend all operations which may hinder the fulfilment of the inspectors' duties. This is in accordance with section 964 of the Code of Civil Procedure which reads:

> The injunction consists of an order enjoining the opposite party, his servants, agents and employees, to *refrain from a specified act* or to suspend all acts and operations respecting the matters in controversy under pain of all legal penalties.

And any person, against whom such an injunction is directed, who contravenes its commands, is liable to a fine not exceeding $2,000, without prejudice to the right of the party aggrieved, to recover damages.

I think, therefore, that this judgment of the learned trial judge is susceptible of execution, that it is not affected by the alleged vagueness, reproached by Mr. Justice Marchand, and that the terms of the injunction are in conformity with the Code of Civil Procedure.

Mr. Justice Barclay came to the conclusion that the agreement was null, and on that point he shared the opinion of the trial judge. He, however, thought that the record should be sent back to the Superior Court for re-adjudication, because one cannot find in the judgment sufficient precision to permit of its execution. What I have said in dealing with Mr. Justice Marchand's reasons need not be repeated here, and are sufficient to show that I cannot share the opinion of the learned judge on this point.

The last argument submitted by the respondent is that it is not subject to the decree, because it exercises none of the trades contemplated by it. In the alternative, the respondent claims also that even if it exercised the trades covered by the decree, the latter still would not be applicable for the printing operations of the respondent do not constitute its principal business.

I unhesitatingly come to the conclusion that the respondent is engaged in printing operations, and that the contention of the respondent that its employees are not in the trade, but are mere operators requiring very little training, because of the perfection of its modern machinery, is inadmissible. I fully agree with Mr. Justice Barclay who expressed his views as follows:

> The appellant company maintains and attempted to prove that no "métier d'imprimerie" is exercised in its plant because its employees work on machinery so modern and so perfect that the operators do not need to be "hommes de métier" to do their work, that in fact any person can in practically no time learn to do the work and if they did this work and nothing else for years they would never become "hommes de métier". The answer to that contention is that the decree applies to the industry of printing; that is the trade contemplated or *visé*. It is not the manner in which the printing is done nor the qualification of the operator which is contemplated at all; it is the industry as such which is contemplated. In its ordinary sense, the word "métier" means "toute profession manuelle ou mécanique", or "ce que l'on fait habituellement". When, therefore, the decree refers to "all persons engaged in the production of printing", the fact that a person so engaged has not all the qualifications he might have is of no consequence in this particular issue. As a matter of fact, the appellant had in its employ one or more employees who were "hommes de métier", within the restricted meaning which it seeks to give to this term. The only question of importance is whether in fact the appellant company is "engaged in the production of printing", and

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the answer to that question is clearly in the affirmative. The learned trial judge so finds, and in his elaborate judgment he gives his reason for so finding and the evidence on which he bases that reason, and I can find no error in his conclusion.

As to the other submission that the decree does not apply because printing is not the principal business of the defendant, I find the short answer in paragraph 1 (*a*) of section 1 of the decree itself which reads as follows:

> All persons engaged in the production of printing * * * whether in religious institutions, trade plants, private, industrial, commercial or any other establishment, and whether such operations *constitute its principal business or are accessory to some other business or enterprise.*

On the whole, I have reached the conclusion that the appeal should be allowed, and the judgment of the trial judge restored with costs to the appellant against the respondent in the Superior Court and in the Court of King's Bench. The appellant will have its cost of the appeal to this Court against both the respondent and the mise-en-cause.

Appeal allowed with costs.

Solicitors for the appellant: *Slattery, Bélanger & Paré.*

Solicitor for the respondent: *Ivan Sabourin.*

Solicitor for the mise-en-cause: *Alcide Côté.*

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*March 15.
*May 15.

HIS MAJESTY THE KING, ON THE INFORMATION OF THE ATTORNEY-GENERAL OF CANADA (PLAINTIFF)..... } APPELLANT;

AND

LLOYD CAMERON WILLIAMS (DEFENDANT) ..... } RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Statutes—Construction—Attempt to export gold without licence—Gold Export Act (Dom. 1932, c. 33) and regulations thereunder—Foreign Exchange Control Order (P.C. 7378, made under War Measures Act, R.S.C. 1927, c. 206)—Conviction of attempt to export gold, and fine paid—Proceedings for declaration of forfeiture of the gold—Forfeiture provided for in Foreign Exchange Control Order but not in Gold Export Act—Right to forfeiture—Applicability of provisions of Foreign Exchange Control Order—Applicability of maxim Generalia Specialibus non Derogant.

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

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Respondent was convicted, on a charge laid under the *Foreign Exchange Control Order*, P.C. 7378, made on December 13, 1940, under and by virtue of the *War Measures Act* (R.S.C. 1927, c. 206), of having, on December 10, 1942, attempted to export fine gold from Canada without a licence from the Foreign Exchange Control Board, and was fined and paid the fine. An information was then laid against him claiming a declaration that the gold be forfeited to the Crown. Thorson J., [1943] Ex. C.R. 193, dismissed the information, holding that, since the prohibition of the export of gold of the kind in question is dealt with by *The Gold Export Act*, Dom., 1932, c. 33, and regulations made under it, the principle underlying the maxim *generalia specialibus non derogant* should be applied; that the general term "property" as defined in the *Foreign Exchange Control Order* should be construed as "silently excluding" gold of the kind in question; and therefore the provisions of that Order had no application in the case; and, there being no provision for forfeiture of gold in the governing special Act (*The Gold Export Act*) and the regulations made under it, there was no legal authority for ordering the forfeiture. The Crown appealed.

The *Foreign Exchange Control Order* provides (*inter alia*) that "in the event of any conflict between this Order and any law in force in any part of Canada the provisions of this Order shall prevail"; that no person shall, without a licence from the Board, export any property from Canada; that "property" means and includes "every kind of property, real and personal, movable and immovable * * *"; that every person shall be guilty of an offence who attempts to commit an offence under the Order; and for prosecution; and for forfeiture (in addition to any other penalty imposed) of any property which any person attempts to export contrary to the Order.

The Gold Export Act gives power to the Governor in Council to prohibit export of gold, whether in the form of coin or bullion, "except in such cases as may be deemed desirable by the Minister of Finance and under licences to be issued by him: Provided that no such licence shall be issued to other than a Canadian chartered bank or the Bank of Canada"; and to make regulations; and the Act provides for prosecution and for penalty (which does not include forfeiture of the gold) against any person who, whenever a regulation made under the Act is in force, without a licence from the Minister exports or attempts to export gold. A prohibitory regulation was made in 1932, worded like and in conformity with the power given, which regulation was continued in force by orders in council, the last of which, so far as concerned the present appeal, was P.C. 9131, dated November 26, 1941, whereby the regulations of 1932 were continued until December 31, 1942.

Held (Rand J. dissenting): The Crown's appeal should be allowed and it should be declared that the fine gold in question be forfeited.

Per The Chief Justice, and Kerwin and Taschereau JJ.: Even assuming there is a conflict of legislation, the reason of the maxim *generalia specialibus non derogant* does not apply: the powers conferred respectively by *The Gold Export Act* and by the *War Measures Act* (under which the *Foreign Exchange Control Order* was made) were for different purposes; also *The Gold Export Act* and the regulations

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under it affect every one (including respondent, even though he could not have secured a licence thereunder, since a licence was to be issued only to a bank); further, the *Foreign Exchange Control Order* states explicitly that, in the event of conflict, its provisions are to prevail. In truth there is no conflict; the provisions can stand together; there is no reason why a licence should not be required under the *Foreign Exchange Control Order* as well as under *The Gold Export Act* and its regulations where that Act and its regulations are applicable; nor is the conclusion warranted that it was not the intention to embrace within the prohibition and the subjection to forfeiture of the Order an individual such as respondent who, *ex hypothesi*, would not be able to secure a licence.

Per Hudson J.: There is no repugnancy between the enactments in question. Two measures were passed for different purposes and were to be enforced through different organs of the Government. There could not properly be implied, from the existence of *The Gold Export Act*, an intention to exclude fine gold from the comprehensive terms of the *Foreign Exchange Control Order*.

Per Rand J. (dissenting): The argument for appellant proceeds on the assumption that the export of gold is on the basis of leave from both the Minister of Finance (under *The Gold Export Act*) and the Foreign Exchange Control Board (under the *Foreign Exchange Control Order*), as distinguished from leave only from the Board for other property; but, in relation to respondent, that assumption is false. What *The Gold Export Act* does is to enable the Governor-in-Council to prohibit absolutely the exportation of gold, subject only to exportation by a bank acting under a licence from the Minister; but to no one else is that licence available. It is not, then, a situation of export subject to two licences that can stand together. The *Foreign Exchange Control Order* necessarily contemplates an exportation which, under existing law, is possible; and there cannot be attributed to that Order the issue of a licence to respondent by the Board for an exportation which rests under an absolute prohibition by the terms of another existing law; such a licence would be wholly futile and abortive, and there should not be ascribed to the scope of the Order a subject-matter that would bring about such a result in its application. S. 24 (1) of the Order (prohibiting export without licence) should be held not applicable to a case in which a licence from the Board could never, in any proper sense, have effect, in which, in fact, the issue of such a licence would be *ultra vires* of the Board. The absence of a licence from the Board is an essential ingredient of an offence under the Order and that presupposes a power to issue it. The Order's entire prohibition is conditioned in licence. The penalty under *The Gold Export Act* cannot be considered as supplemented, or the offence thereunder duplicated, by an Order, made under other powers and with a different object, when its language is inappropriate and its assumption inapplicable.

APPEAL by the Crown from the judgment of Thorson J., President of the Exchequer Court of Canada (1) dismissing the appellant's action for an order declaring that

(1) [1943] Ex. C.R. 193; [1943] 4 D.L.R. 659.

certain fine gold which the respondent attempted to export from Canada on or about December 10, 1942, without a licence from the Foreign Exchange Control Board, contrary (so the appellant contended) to ss. 24 (1) and 40 (1) (*h*) of the *Foreign Exchange Control Order,* enacted by Order in Council P.C. 7378, dated December 13, 1940, as amended, be forfeited to the Crown. The proceedings were brought under s. 42 (2) of the said Order. The respondent contended that, as the export of gold is the subject-matter of an Act of Parliament dealing specifically with the export of gold, namely, *The Gold Export Act,* Statutes of Canada, 1932, c. 33, and the regulations made under it, which were in effect on the date of the alleged offence, the export of gold is governed exclusively by the special Act and that the word "property" as used in the *Foreign Exchange Control Order* does not include gold—that commodity having been specially dealt with by *The Gold Export Act* (which contains no provision for forfeiture). Thorson J. held that, since the prohibition of the export of gold of the kind in question is dealt with by *The Gold Export Act* and regulations made under it, the principle underlying the maxim *generalia specialibus non derogant* should be applied; that the general term "property" as defined in the *Foreign Exchange Control Order* should be construed as "silently excluding" gold of the kind in question; and therefore the provisions of that Order had no application in the case; and, therefore, there being no provision for forfeiture of gold in the governing special Act (*The Gold Export Act*) and the regulations made under it, there was no legal authority for ordering the forfeiture.

R. Forsyth K.C. and *W. R. Jackett* for the appellant.

R. B. Law K.C. and *S. S. MacInnes* for the respondent.

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

KERWIN J.—This is an appeal from a judgment of the Exchequer Court dismissing an information by the Minister of Justice of Canada against Lloyd Cameron Williams claiming a declaration that a certain quantity of fine gold be forfeited to His Majesty the King.

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The facts are not in dispute. Williams resided in Fort Erie, Ontario, and was an employee of The Williams Gold Refining Company of Canada, Limited, which carried on business there. On or about December 10th, 1942, Williams presented himself at the customs port of Fort Erie and attempted to export from Canada 46 oz., 19 dwt., 10 gr., of fine gold, valued at approximately $1,808, without a licence from the Foreign Exchange Control Board. The gold was seized and detained by an inspector of the Board. Williams was charged under the *Foreign Exchange Control Order* of December 13th, 1940, with the offence of attempting to export the gold from Canada without a licence from the Board. He was convicted and fined $1,250 and costs, which he paid, and the information followed.

The Board was established by the *Foreign Exchange Control Order,* made and promulgated by an Order in Council P.C. 2716 of September 15th, 1939, under and by virtue of the provisions of the *War Measures Act,* R.S.C. 1927, chapter 206. That Act was first enacted in 1914. A proclamation was duly issued thereunder as to the existence of the present state of war, and the provisions of sections 3, 4 and 5 thereof came into force in 1939. The *Foreign Exchange Control Order* of 1939 and amendments were consolidated by Order in Council P.C. 7378 on December 13th, 1940. No question is raised as to this Order or as to the *War Measures Act* and a mere recital of the applicable provisions of the statute and Order is sufficient to show that, *primâ facie,* the declaration asked by the Minister of Justice should be granted.

Section 3 of the Act authorizes the Governor in Council to make the Order, paragraph 1 whereof states:

> 1. (1) These provisions may be cited as the Foreign Exchange Control Order and shall have effect on and after December 16, 1940. In the event of any conflict between this Order and any law in force in any part of Canada the provisions of this Order shall prevail.

Paragraph (1) of clause 24 provides:

> 24. (1) No person shall, without a licence from the Board, export any property from Canada or import any property into Canada.

"Property" is defined by clause 2 (1) (*t*) as follows:

> (*t*) "Property" means and includes every kind of property, real and personal, movable and immovable, and in the case of any property which, under these regulations, is subject to any restriction as to its use or as to dealing therewith or is subject to forfeiture, the same shall be

deemed to include any property into which the property subject to restriction or forfeiture aforesaid has been converted or exchanged and any property acquired by such conversion or exchange whether immediately or otherwise.

By clause 40:

40 (1) Every person shall be guilty of an offence who

* * *

(*h*) attempts to commit, or does any act preparatory to the commission of, an offence under this Order.

Clause 42 provides for the prosecution of a person charged with an offence under the Order, and also for the forfeiture, *inter alia,* of any property which any person attempts to export from Canada contrary to the Order.

Section 4 of the *War Measures Act* provides that the Governor in Council may prescribe the penalties to be imposed for violations of orders made under the Act, with a limitation as to the maximum fine and imprisonment. It might also be noted in passing that, while section 8 provides for the forfeiture of any goods, wares or merchandise dealt with contrary to any order under the Act, the claim for the declaration of forfeiture in this case is made under the *Foreign Exchange Control Order.* However, it was not contended on behalf of the respondent that if that Order applied, judgment should not go as asked by the appellant. What was urged, both before the Exchequer Court and this Court, was that a Dominion statute of 1932, known as *The Gold Export Act,* as amended, and the regulations made under it, were in force at the date of the offence and that, in view of their provisions, the maxim *generalia specialibus non derogant* applied so as to render inapplicable the provisions of the *Foreign Exchange Control Order.* The President of the Exchequer Court agreed with that submission and on that ground dismissed the information.

In construing statutes and orders in council, the courts have, from time to time, adopted particularized rules and maxims but these must not be used in such a manner as to lose sight of the fundamental object, which is to ascertain and give effect to the intention of Parliament and the Governor in Council. The particular maxim relied upon has been discussed in many judgments, two of which are referred to by the learned President, *City of Vancouver* v.

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Bailey (1), and *Barker* v. *Edger* (2). In addition to these, counsel for the respondent referred to the judgment of the House of Lords in *Seward* v. *The Owner of the "Vera Cruz"* (3)—also cited in the appellant's factum.

Before discussing these, an earlier decision of the House of Lords in *Garnett* v. *Bradley* (4) should be noted,—not only because of the result arrived at but also because of the reasons of Lord Blackburn, who sat in that case as well as in the subsequent one of the *Vera Cruz* (3). What was decided in *Garnett* v. *Bradley* (4) was that an Order made under the authority of the *Judicature Act* of 1875, and which Order was made part of the Act by virtue of a section thereof, repealed the Statute of 21 Jac. I, chapter 16, so far as the action for slander was concerned. By the *Judicature Act* it was declared that all statutes inconsistent therewith were to be repealed but, as Lord Blackburn pointed out at page 965:

> An Act saying that all statutes inconsistent with itself shall be repealed, really goes no farther than the general law, but it becomes a question, upon which there is a vast quantity of authority in different ways, as to what shall be the inconsistency which shall cause the repeal of an earlier statute or an existing general rule.

He was there dealing with a prior general statute and on that basis concluded that the two provisions, so far as concerned the costs in an action for slander, were absolutely inconsistent. He proceeded to state that he should not entertain any doubt on the point but that there was another rule which he thought was a good rule, if properly applied, and then gave the substance of the maxim at present under consideration. At page 970 he continued:

> That it should be taken that the object of the Legislature is not, by mere general words, to repeal special laws, is a perfectly true, good, and sound canon of construction, and if this was a case of special laws giving a privilege, or a property, or a right, to a particular class, the canon would be applicable, but it is not applicable when that special law affected every one of Her Majesty's subjects, just in the same way as the general Statute of *Gloucester*, giving costs to all persons who were Plaintiffs who recovered damages in a real action, applied to all His Majesty's subjects, and not to any particular class. I think, therefore, that the reason of the rule does not apply in this case.

In the *Seward* case (5), the actual decision was that the *Admiralty Court Act*, 1861, which by section 7 gave the

(1) (1895) 25 Can. S.C.R. 62.
(2) [1898] A.C. 748.
(3) (1884) 10 App. Cas. 59.
(4) (1878) 3 App. Cas. 944.
(5) (1884) 10 App. Cas. 59.

Court of Admiralty "jurisdiction over any claim for damage done by any ship", did not give jurisdiction over claims for damage for loss of life under Lord Campbell's Act. It was in the course of coming to such a conclusion that Lord Chancellor Selborne stated at page 68:

> Now if anything be certain it is this, that where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered, or derogated from merely by force of such general words, without any indication of a particular intention to do so.

and that Lord Blackburn observed, at page 72:

> The legislature in using such general words as those [damage done by any ship] cannot have had in contemplation all the numerous and important subjects which, had they been considering Lord Campbell's Act, they would have had.

In *Barker* v. *Edger* (1), the Privy Council found the case

> a peculiarly strong one for the application of the general maxim. The Legislature found an area of land comparatively small in extent to be the subject of intricate disputes in which both Europeans and natives took part. Some of those questions fell within the scope of the Native Land Court and others did not. It was for the benefit of all parties that a single tribunal should adjudicate on the whole group of questions. Therefore, as Williams J. has stated, a new authority was given to the Native Land Court as regards both land and matters of account. It would require a very clear expression of the mind of the Legislature before we should impute to it the intention of destroying the foundation of the work which it had initiated some four years before, and to which the Court has ever since been assiduously addressing itself.

I think it will be found upon examination that the *Vancouver* case (2) also was "a peculiarly strong one for the application of the general maxim".

A word might be added as to the quotation from the 8th edition of Maxwell on The Interpretation of Statutes at page 156, the conclusion of which is: "In the absence of these conditions, the general statute is read as silently excluding from its operation the cases which have been provided for by the special one." It should be noted that one of these conditions appears in the last leg of the previous sentence,—"or (unless) there be something in the nature of the general one making it unlikely that an exception was intended as regards the special Act".

(1) [1898] A.C. 748.
(2) (1895) 25 Can. S.C.R. 62.

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Bearing in mind the considerations to be applied, we might now turn to *The Gold Export Act* and the regulations thereunder. The Act, as amended in 1935, reads as follows:

His Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

1. This Act may be cited as *The Gold Export Act.*

2. The Governor in Council may prohibit, from time to time and for any period or periods, the export of gold, whether in the form of coin or bullion, from the Dominion of Canada, except in such cases as may be deemed desirable by the Minister of Finance and under licences to be issued by him: Provided that no such licence shall be issued to other than a Canadian chartered bank or the Bank of Canada.

3. (1) The Governor in Council may make such regulations as he deems necessary or expedient to ensure the carrying out of the provisions and the intent of this Act, and to define from time to time as occasion may require what shall be deemed to be included within the expression "bullion" for the purposes of this Act.

(2) Every regulation made by the Governor in Council in virtue of this Act shall have force and effect only after it has been published in the *Canada Gazette.*

4. Whenever a regulation made under the provisions of section three of this Act is in force any person who, without a licence issued by or on behalf of the Minister of Finance, as aforesaid, exports or attempts to export, carries or attempts to carry out of Canada any gold, whether in the form of coin or bullion, shall be liable upon summary conviction to a penalty not exceeding one thousand dollars or to imprisonment for a term not exceeding two years, or to both fine and imprisonment.

The first regulations were adopted by Order in Council P.C. 1150, dated May 17th, 1932, whereby:

1. The export of gold, whether in the form of coin or bullion, from the Dominion of Canada, is hereby prohibited, except in such cases as may be deemed desirable by the Minister of Finance, and under licences to be issued by him. No such licence shall be issued to other than a Canadian chartered bank.

Provision was also made for the form of the licences and for instructions to be given to various officers. The regulations were continued in force from year to year by orders in council, the last one of which, so far as concerns this appeal, was P.C. 9131, dated November 26th, 1941, whereby it was provided that the regulations of May 17th, 1932, should be continued in force and effect until December 31st, 1942.

I think it can make no difference that this last order in council under *The Gold Export Act* was passed subsequent to the *Foreign Exchange Control Order* of 1940. What the

Order in Council of 1941 was doing was continuing in force the provisions of the 1932 regulations. If there were any conflict between the 1932 regulations and the *Foreign Exchange Control Order*, I would treat it as one between a general enactment and a prior special enactment. *The Gold Export Act* and the earlier regulations passed under it were peacetime measures, although it was thought advisable to continue the regulations in time of war. The authority under the *War Measures Act* may be exercised in time of war only. The powers conferred are for different purposes and that a more serious view is taken of an infraction of the *Foreign Exchange Control Order* than of the Gold Export Regulations is shown by the fact that the maximum fine and imprisonment imposable under the former are greater than under the latter, and that it is only under the former that a declaration of forfeiture may be made. The Gold Export Act Regulations affect every one, including the respondent, even though he could not have secured a licence thereunder since the latter was by the Act and regulations to be issued only to a bank. If one assumes a conflict, I would say that the reason of the maxim does not apply.

In truth there is no conflict. The proper approach to the determination of conflict or no conflict is set forth by Lord Halsbury in *Tabernacle Permanent Building Society* v. *Knight* (1), and by Duff and Anglin JJ., as they then were, in *Toronto Railway Company* v. *Paget* (2).

In the former case Lord Halsbury stated that the two Acts there under review might "stand together and both operate without either interfering with the other" and that, therefore, there was no inconsistency or conflict. In the latter case, by section 5 of the *Ontario Railway Act* of 1906, the provisions of the statute were to apply to every railway company incorporated under a special Act "but, where the provisions of the special Act and the provisions of this Act are inconsistent, the special Act shall be taken to override the provisions of this Act, so far as is necessary to give effect to such special Act". By another section of the Railway Act a passenger on a railway train or car who refused to pay his fare might be ejected by the

(1) [1892] A.C. 298, at 302. (2) (1909) 42 Can. S.C.R. 488.

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conductor, but by a section of the Toronto Railway Company's Special Act, a passenger, in such circumstances, was liable to a fine only.

At page 491 of the report, Duff J. stated:

> There seem to be two possible views of the effect of section 5 of the "Railway Act of Ontario" where you have a provision in that Act and a provision in a prior special Act dealing with the same subject-matter in diverse ways. One possible view is that in such cases the provision in the general Act is to be wholly discarded from consideration; the other is that both provisions are to be read as applicable to the undertaking governed by the special Act so far as they can stand together, and only where there is repugnancy between the two provisions and then only to the extent of such repugnancy the general Act is to be inoperative.

At page 499, Anglin J. said:

> It is not enough to exclude the application of the general Act that it deals somewhat differently with the same subject-matter. It is not "inconsistent" unless the two provisions cannot stand together.

These two cases are referred to by the present Chief Justice of this Court in *City of Ottawa* v. *Town of Eastview* (1).

I am unable to convince myself that there is any reason why a licence should not be required under the *Foreign Exchange Control Order* as well as under *The Gold Export Act* and its regulations where the latter Act and regulations are applicable. Nor can I conclude that it was not the intention of the Governor in Council to embrace within the prohibition and the subjection to forfeiture of the *Foreign Exchange Control Order* an individual such as the respondent who, *ex hypothesi,* would not be able to secure a licence under the Order. Paragraph (1) of the *Foreign Exchange Control Order* has already been quoted but the last sentence might be repeated: "In the event of any conflict between this Order and any law in force in any part of Canada the provisions of this Order shall prevail." I have already expressed the view that no conflict arises but, even if it does, *The Gold Export Act* and its regulations comprise a law in force in Canada, and the Order states explicitly that its provisions are to prevail.

There remains only to be added that it can make no difference even if the Order in Council of November 26th, 1941, under *The Gold Export Act,* continuing in force and effect until December 31st, 1942, the regulations of May 17th, 1932, be considered as a law enacted subsequent to

(1) [1941] S.C.R. 448, at 462.

the *Foreign Exchange Control Order* of 1940. This is quite different from a provision such as the one to which Lord Blackburn referred, that all statutes inconsistent with an Act shall be repealed, and I can find no reason why the words in the *Foreign Exchange Control Order*, "any law in force in any part of Canada", should be restricted to something anterior.

I would allow the appeal and grant an order declaring that the 46 oz., 19 dwt., 10 gr., of fine gold which the respondent attempted to export from Canada on or about December 10th, 1942, be forfeited to His Majesty the King, with costs throughout.

HUDSON J.—Williams, the respondent, attempted to take a quantity of fine gold out of Canada without having first obtained a licence so to do from the Foreign Exchange Control Board. He was stopped at the border, the gold was seized and he was prosecuted for breach of the order of the Board prohibiting such export. He pleaded guilty, was fined and paid his fine. Thereupon, the Attorney-General for Canada laid an Information in the Exchequer Court, claiming a declaration that the gold above referred to should be forfeited to the Crown. The learned President of the Exchequer Court dismissed this application with costs, and from his decision this appeal is brought.

The Foreign Exchange Control Board was created under the *War Measures Act* and no question arises as to its powers. All that is here involved is the interpretation of the Board's order, that is, whether it extends to gold or not. The material provisions of the order are as follows:

24. (1) No person shall, without a licence from the Board, export any property from Canada or import any property into Canada.

40. (1) Every person shall be guilty of an offence who * * *

(*h*) attempts to commit, or does any act preparatory to the commission of, an offence under this Order.

42. (2) Any currency, securities, foreign exchange, goods or property of any kind which any person exports or attempts to export from Canada or imports or attempts to import into Canada contrary to this Order, or which any person buys or sells or in any way deals with or attempts to buy or sell or in any way deal with contrary to this Order, or which any person fails to declare as required by this Order, may (in addition to any other penalty which may have been imposed on any person, or to which any person may be subject, with relation to such unlawful act or omission, and whether any prosecution in relation thereto has been commenced or not) be seized and detained and shall be liable to forfeiture

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at the instance of the Minister of Justice upon proceedings in the Exchequer Court of Canada or in any Superior Court subject, however, to a right of compensation on the part of any innocent person interested in such property at the time it became liable to forfeiture or who acquired an interest therein subsequent to such time as a bona fide transferee for value without notice, which right may be enforced in the same manner as any other right against His Majesty.

Clause 2, paragraph (*t*), defines the word "property" as follows:

(*t*) "Property" means and includes every kind of property, real and personal, movable and immovable, and in the case of any property which, under these regulations, is subject to any restriction as to its use or as to dealing therewith or is subject to forfeiture, the same shall be deemed to include any property into which the property subject to restriction or forfeiture aforesaid has been converted or exchanged and any property acquired by such conversion or exchange whether immediately or otherwise.

Clearly gold would fall within the definition of the word "property".

The respondent contends, however, that by reason of the provisions of *The Gold Export Act* and the Order in Council made thereunder dealing with the export of gold coin and bullion, the word "property" in the *Foreign Exchange Control Order* should be read as excluding gold. This contention was upheld by the learned President.

The Gold Export Act is chapter 33 of the Statutes of Canada, 1932. It provides:

2. The Governor in Council may prohibit, from time to time and for any period or periods, the export of gold, whether in the form of coin or bullion, from the Dominion of Canada, except in such cases as may be deemed desirable by the Minister of Finance and under licences to be issued by him: Provided that no such licence shall be issued to other than a Canadian chartered bank [An amendment in 1935 (c. 21) added "or the Bank of Canada"].

3. (1) The Governor in Council may make such regulations as he deems necessary or expedient to ensure the carrying out of the provisions and the intent of this Act, and to define from time to time as occasion may require what shall be deemed to be included within the expression "bullion" for the purposes of this Act.

(2) Every regulation made by the Governor in Council in virtue of this Act shall have force and effect only after it has been published in the *Canada Gazette*.

4. Whenever a regulation made under the provisions of section three of this Act is in force any person who, without a licence issued by or on behalf of the Minister of Finance, as aforesaid, exports or attempts to export, carries or attempts to carry out of Canada any gold, whether in the form of coin or bullion, shall be liable upon summary conviction to a penalty not exceeding one thousand dollars or to imprisonment for a term not exceeding two years, or to both fine and imprisonment.

Under the authority of this Act an Order in Council was enacted on the 17th May, 1932, providing that the export of gold in the form of coin or bullion from the Dominion of Canada

is hereby prohibited, except in such cases as may be deemed desirable by the Minister of Finance and under licences to be issued by him. No such licence shall be issued to other than a Canadian chartered bank.

By Order in Council dated 26th November, 1941, the provisions were continued until December 31st, 1942.

This Act was passed in peace time with the object of maintaining the status of Canadian currency during the then world-wide financial depression.

It appears from the language of the last-mentioned Act and the orders made thereunder that the respondent might have been convicted and punished for an offence thereunder. This does not in itself mean that he might not be convicted on the same facts under some other law. Such a situation arises not infrequently and has been recognized by Parliament and the possibility of the imposition of both penalties guarded against by the *Criminal Code,* section 15, which follows earlier English legislation to the same effect.

What must be decided here is whether it should be implied from the existence of the provisions of *The Gold Export Act* that the Governor in Council in passing the *Foreign Exchange Control Order* intended to exclude fine gold from its provisions. The maxim *generalia specialibus non derogant* is relied on as a rule which should dispose of the question, but the maxim is not a rule of law but a rule of construction and bows to the intention of the legislature, if such intention can reasonably be gathered from all of the relevant legislation.

In 31 Halsbury, at page 526, para. 687, it is stated:

Where in the same or a subsequent statute a particular enactment is followed by a general enactment, and the latter, taken in its most comprehensive sense, would overrule the former, the particular enactment is operative, and the general enactment is taken to affect only those other parts of the particular enactment to which it may properly apply; * * * The earlier and the later, whether custom or statute, must be reconciled if possible, though an intention to the contrary, if manifest, is operative.

688. A statute giving a new remedy does not of itself, and necessarily, destroy previously existing rights and remedies to which it does not refer. It may, however, appear from the statute that Parliament did not intend the two rights to exist together.

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There is a full discussion of the maxim in the judgments delivered by this Court in the case of *Toronto Railway Company* v. *Paget* (1). It was there held that in the case of two such enactments, only where there is repugnancy between them, and then only to the extent of such repugnancy, is the general Act inoperative.

In the present case there is no repugnancy. Two measures were passed for different purposes and are to be enforced through different organs of the Government. The *Foreign Exchange Control Order* is very comprehensive, covering the whole field of currency, securities and commodities. I do not think that the Court could properly imply an intention to exclude from "currency" gold coins and from "commodities" fine gold, which nominally determines the value of all currency and monetary obligations.

It is difficult to imagine the Foreign Exchange Control Board issuing a licence to export gold but, if by some mischance, such licence were issued, it would not in itself supply a defence to a prosecution under *The Gold Export Act*.

I conclude that the Crown is entitled to the relief asked for in the Information and would allow the appeal with costs.

RAND J. (dissenting).—In this case an information was filed in the Exchequer Court by the Attorney-General of Canada against the respondent for a declaration of forfeiture of certain fine gold which the respondent was charged with having attempted to export from Canada without a licence from The Foreign Exchange Control Board. The proceedings were based upon the provisions of an order in council dated December 13th, 1940, section 24 (1) of which provided that:

> No person shall, without a licence from the Board, export any property from Canada or import any property into Canada.

By section 40 (1) an attempt to export likewise became an offence; and under section 42 (2) the property was liable to forfeiture.

If this order had stood alone, there would be no question of the validity of the proceedings now before us. There was in effect at the same time, however, an order in council under *The Gold Export Act* enacted in 1932 by

(1) (1909) 42 Can. S.C.R. 488.

which the export of gold, except by a chartered bank or by The Bank of Canada acting under a licence issued by the Minister of Finance, was prohibited. The original order under this Act was passed on May 17th, 1932, and by subsequent orders, the last of which was published in the *Canada Gazette* on December 6th, 1941, the prohibition was continued to the end of 1942. The act with which the respondent is charged took place on December 10th, 1942, and was, therefore, within the period of that prohibition.

The President of the Exchequer Court held that the rule *generalia specialibus non derogant* applied, that the Exchange Control order was general legislation and that there was nothing in it to indicate that it was to override or supersede the order under *The Gold Export Act*. He, therefore, dismissed the information and the Attorney-General now appeals.

There is no doubt that the two orders have different objects in view. *The Gold Export Act* is peace-time legislation which has as its purpose the management of gold in relation to the country's currency and international settlements. The Exchange Control order is a temporary war measure to ensure the receipt in Canada of the value of Canadian products and services and to control, in the interest of Canadian requirements, the export and import of capital in any form. It is, therefore, urged by the Attorney-General that there is no conflict, that in substance the subject-matters are different and that licences under the two orders operate on parallel lines with equal and cumulative validity.

This argument in fact proceeds on the assumption that the export of gold is on the basis of leave from both the Minister of Finance under *The Gold Export Act* and the Exchange Control Board under the Exchange Control order as distinguished from leave only from the Board for other property; but, in relation to the respondent, that assumption is false. What *The Gold Export Act* does is to enable the Governor-in-Council to prohibit absolutely the exportation of gold, subject only to exportation by a bank acting under a licence from the Minister: but to no one else is that licence available. The question could arise upon an export by a bank under the Minister's licence whether a further licence from the Foreign Exchange Board

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was necessary; but in no other case would that be so. It is not, then, a situation of export subject to two licences that can stand together.

For that reason, I do not think it necessary to resort to the maxim to determine the question presented to us. The order of the Exchange Control Board necessarily contemplates an exportation which, under existing law, is at least possible, or, viewed from another angle, a licence which either absolutely or conditionally is to be effective. It is not suggested that the Exchange Control order has overridden the Gold Export Act order so as to permit, with leave of the Exchange Control Board, the export of gold regardless of the Gold Export Act order, nor would such a position be tenable. But how can we attribute to the Exchange Control order the issue of a licence to the respondent by the Board for an exportation which rests under an absolute prohibition by the terms of another existing law? Such a licence would be wholly futile and abortive and I am unable to ascribe to the scope of the order a subject-matter that would bring about such a result in its application. In my opinion, section 24 (1) of the Exchange Control order does not apply to a case in which a licence from the Board could never, in any proper sense, have effect, in which, in fact, the issue of such a licence would be *ultra vires* of the Board.

The Gold Export Act provides for fine and imprisonment in case of violation but not for forfeiture. The substantial effect of the Exchange Control order would be to add forfeiture to the penalty of that statute. Whether, under the *War Measures Act,* it might be competent to make that addition, it is unnecessary to determine; for that is neither the purpose nor the purport of the order. If, again, the order by general words prohibited, *simpliciter,* the export or attempted export of gold under penalty of forfeiture, thus creating a duplication of offence, the question of the applicability of the maxim would arise; but the absence of a licence from the Board is an essential ingredient of an offence under the order and that presupposes a power to issue it. It is not suggested that this information could be supported by an allegation, merely, that the respondent attempted to export gold. The order in no case prohibits export absolutely; its entire prohibition is con-

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ditioned in licence. Its general language, therefore, cannot be held to include cases of both absolute and conditional prohibition which might permit us here to treat the reference to the licence as surplusage. We must assume that the penalty provided by the Gold Export Act order was considered ample for the purpose of enforcement but, whether that is so or not, we are not at liberty to treat an order made under other powers and with a different object as either supplementing the penalty or duplicating the offence, when its language is inappropriate and its assumption inapplicable. The appeal, therefore, should be dismissed with costs.

Appeal allowed with costs.

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

Solicitors for the respondent: *Raymond, Spencer & Law.*

1944

*April 25.
*May 15.

IN THE MATTER OF THE ESTATE OF ARTHUR GILL WITHYCOMBE, DECEASED

THE ATTORNEY-GENERAL OF ALBERTA ..... APPELLANT;

AND

THE ROYAL TRUST COMPANY, THE ADMINISTRATOR WITH WILL ANNEXED OF THE ESTATE OF ARTHUR GILL WITHYCOMBE, DECEASED ..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Appeal—Jurisdiction—Supreme Court Act, R.S.C. 1927, c. 35—"Judicial proceeding" (ss. 36, 2 (e))—Security on appeal (s. 70)—Not required from Crown in right of a province.

The judgment of the Supreme Court of Alberta, Appellate Division, [1944] 1 W.W.R. 385, fixing the value of certain property for succession duty purposes at a less sum than the value determined by a commissioner appointed under s. 28 of *The Succession Duty Act*, R.S.A. 1942, c. 57, was *held* to be a judgment in a "judicial proceeding" (within ss. 36 and 2 (e) of the *Supreme Court Act*, R.S.C. 1927, c. 35); and a motion to quash an appeal therefrom was dismissed.

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

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In re WITHYCOMBE ESTATE — ATTORNEY-GENERAL OF ALBERTA *v.* ROYAL TRUST CO.

Sec. 70 of the *Supreme Court Act*, requiring security on appeal, does not apply to an appeal by or on behalf of the Crown in right of a province; there is no reason to restrict the meaning of the word "Crown" (as used in the excepting provision of s. 70 (2)) to the Crown in right of the Dominion.

MOTION to quash an appeal for want of jurisdiction. The appeal was from the judgment of the Supreme Court of Alberta, Appellate Division (1), rendered upon an appeal to it from the report of a commissioner appointed under s. 28 of *The Succession Duty Act*, R.S.A. 1942, c. 57, to determine the value of certain property for succession duty purposes. Under said s. 28 (subss. 8 and 9, and amendment in 1944, c. 29) the Commissioner's report, on being filed in the Supreme Court of Alberta, became a judgment of that Court, and subject to appeal. The commissioner determined the value of the property at $108,300. On appeal, taken by the administrator with will annexed of the estate in question in Alberta, the Appellate Division fixed the value at $65,000 (Harvey C.J.A. and Lunney J.A., dissenting, would have dismissed the appeal). Following this judgment, the Attorney-General of Alberta applied to the Appellate Division for an order for special leave to appeal to the Supreme Court of Canada and also applied to dispense with security for costs on the ground "that this is an appeal by or on behalf of the Crown". The Appellate Division made an order reading as follows:

> Upon the application of counsel for the Attorney-General of the Province of Alberta, and upon hearing read the notice of motion herein, the affidavit of Frederick Claude Blower filed, and upon counsel for the Respondent admitting that the amount involved in this appeal exceeds the sum of Two thousand dollars, and upon hearing counsel for the Respondent,
>
> It is ordered that, in so far as special leave to appeal is necessary and this Court has jurisdiction to grant the Order the Attorney-General of the Province of Alberta do have special leave to appeal to the Supreme Court of Canada from the judgment of the Appellate Division of the Supreme Court of Alberta delivered on the 9th day of February, A.D. 1944, and entered on the 18th day of February, A.D. 1944;
>
> And it is further ordered that the appeal herein of the Attorney-General of the Province of Alberta to the Supreme Court of Canada be allowed without security pursuant to section 70, subsection 2 of the Supreme Court Act, being chapter 35 of the Revised Statutes of Canada, 1927.

The respondent now moved to quash the appeal on the grounds that the judgment of the Appellate Division appealed from was not a judgment in a judicial proceeding

(1) [1944] 1 W.W.R. 385; [1944] 2 D.L.R. 189.

(within ss. 36 and 2 (*e*) of the *Supreme Court Act*, R.S.C. 1927, c. 35), and that the appeal was not properly instituted or allowed without the giving of proper security under s. 70 of the *Supreme Court Act*.

C. Robinson for the motion.

E. G. Gowling contra.

The judgment of the Court was delivered by

THE CHIEF JUSTICE.—The motion to quash for want of jurisdiction should be dismissed with costs. The respondent moved to quash on the following grounds:

(1) That the judgment of the Appellate Division is not a judgment in a judicial proceeding; and

(2) That the appeal was not properly allowed without the giving of proper security under section 70 of the *Supreme Court Act*.

As to the first ground. We think the definition of "judicial proceeding" in the *Supreme Court Act* is a sufficient answer. The Appellate Division of the Supreme Court of Alberta did not, in disposing of the appeal, exercise merely a regulative, administrative, or executive jurisdiction, but it determined substantive rights in controversy in the proceeding. (*Quebec Railway, Light & Power Co.* v. *Montcalm Land Co. and the City of Quebec* (1).)

On the second ground it should be said that there are no words of limitation following the word "Crown" in section 70 of the *Supreme Court Act*. There is no reason to restrict the meaning of that word in section 70 to the Crown in right of the Dominion. We think the appellant is covered and protected by section 70 of the Act. (*Attorney-General for Quebec* v. *Attorney-General for Canada* (2); *Attorney-General for Quebec* v. *Nipissing Central Railway Company and Attorney-General for Canada* (3).

The motion ought, therefore, to be dismissed with costs.

Motion dismissed with costs.

Solicitor for the appellant: *H. J. Wilson.*

Solicitors for the respondent: *Newell, Lindsay, Emery & Ford.*

(1) [1927] S.C.R. 545, at 560. (2) [1932] A.C. 514.
(3) [1926] A.C. 715.

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*Mar. 16, 17
*April 25.

THOMAS PETRIE (DEFENDANT)..... APPELLANT;

AND

MARY ISABELLE PETRIE, ADMINISTRATRIX OF THE ESTATE OF JAMES COBEN PETRIE, DECEASED (PLAINTIFF). } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Contract—Mortgage—Liability of mortgagors as between themselves—Mortgagors each owning a parcel of land included in the mortgage—Dispute as to who was primarily liable—Facts and circumstances in evidence—Onus of proof.

APPEAL by the defendant Thomas Petrie from the judgment of the Court of Appeal for Ontario (1) dismissing (without written reasons) his appeal from the judgment of Urquhart J. (2) holding that the moneys secured by a certain mortgage made by the defendant Thomas Petrie and two of his sons, namely, the defendant William Kenneth Raymond Petrie, and James Coben Petrie (now deceased, of whose estate the plaintiff is the administratrix), on certain land which consisted of the farm of the said Thomas Petrie, the farm of the said William Kenneth Raymond Petrie and the farm of the said James Coben Petrie, deceased, should, as among the said parties, be paid, one-half thereof by the defendant Thomas Petrie (appellant) and one-half thereof by the plaintiff (respondent), administratrix of the estate of the said James Coben Petrie, deceased; that the said William Kenneth Raymond Petrie was liable for the moneys secured by the said mortgage only as surety and not as a principal debtor (from this latter holding there was no appeal). The appellant claimed that, as between him and the respondent, all of the moneys secured by the said mortgage should be paid by the latter, as administratrix of the estate of the said James Coben Petrie, deceased.

W. J. Arthur Fair for the appellant.

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

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

(1) Noted in [1943] O.W.N. 317; [1943] 3 D.L.R. 812.

(2) [1943] O.W.N. 25; [1943] 1 D.L.R. 501.

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On conclusion of the argument the Court reserved judgment and on a subsequent day delivered judgment dismissing the appeal with costs, Taschereau and Rand JJ. dissenting.

Kerwin J., with whom the Chief Justice concurred, after referring to matters and proceedings in the course of litigation between the parties, including proceedings prior to the judgments now in appeal (1), and after remarking that there was nothing in the mortgage document to indicate the manner in which, as among the mortgagors themselves, the payment was to be made, or whether any one, or more, of them, under any circumstances, would have a right of contribution or indemnity as against any of the others, pointed out as follows:

> The onus was on the appellant to rebut the presumption that the respondent was entitled to contribution from him. In *Boulter* v. *Peplow* (2) Maule J., with whom Williams J. and Talfourd J. agreed, stated that "prima facie, where one of three joint-contractors who are jointly sued, pays the whole debt, he is entitled to receive contribution from the other two"; and later: "There is nothing that I can discover here, to show that these parties did not intend that the ordinary implication should arise in this case". In the present case, if nothing appeared beyond the fact that Thomas, James and Kenneth executed a mortgage on their respective farms, in which mortgage they jointly and severally covenanted to pay the mortgage moneys, each of the mortgagors should pay one-third. It is true that it is difficult to conceive such a simple case being presented and we find evidence adduced on behalf of the parties to show the relations that existed between them and the circumstances surrounding the giving of the mortgage.

After reviewing and discussing the evidence, he concluded that it had been shown "that it was never contemplated that James should alone satisfy the mortgage debt but, on the contrary, that as between Thomas and James, the two of them were to pay" and the appeal should be dismissed.

Hudson J. stated that no question of law was involved; the controversy was upon the facts and the proper inference to be drawn therefrom; the evidence was in some respects inconclusive; the judgments in the two courts below, from which this appeal was taken, had done substantial justice between the parties and the appeal should be dismissed.

(1) See [1942] 1 D.L.R. 70 (Makins J.); [1942] O.W.N. 170 and 298, [1942] 2 D.L.R. 573 and [1942] 3 D.L.R. 528 (Court of Appeal).
(2) (1850) 9 C.B. 493; 137 E.R. 984.

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Rand J., dissenting, with whom Taschereau J. concurred, was of opinion that, on the evidence, a finding that appellant and James, between themselves, actually had in mind that each should bear one-half of the obligation, was quite incompatible with the governing features of the transaction; that an equal distribution of the burden between the two was warranted only on the basis that on the narrow issue of fact there was no preponderance of proof one way or the other; that the trial judge was unduly influenced in his findings by considerations of onus and presumption, and it should not be gathered from his reasons that, if he had taken the question as one purely of fact to be decided as between the deceased James and appellant, he would not have concluded that it was understood that the indebtedness created was, as between them, to be the debt of James only; that, under the circumstances "that presumption of joint and equal liability, which arises when the weight of fact inclines toward neither of two joint obligors, does not arise, and there was no right in the plaintiff as representing the estate of James to be exonerated from any part of the mortgage"; and therefore the appeal should be allowed and judgment entered declaring the lands of the defendants to be secondarily liable for the debt secured by the mortgage.

Appeal dismissed with costs.

Solicitor for the appellant: *W. J. Arthur Fair.*

Solicitors for the respondent: *Fasken, Robertson, Aitchison, Pickup & Calvin.*

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CANADIAN BREWERIES TRANSPORT LIMITED AND JACK LACEY (DEFENDANTS) ..... APELLANTS; *May 9. *May 15.

AND

TORONTO TRANSPORTATION COMMISSION (DEFENDANT)..... RESPONDENT;

AND

GEORGE JOHNSON (PLAINTIFF).

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Negligence—Damages—Collision between street car and truck—Action by injured passenger in street car for damages against owner and driver of truck and operators of street railway—Question as to whose negligence caused or contributed to the accident—Judgment at trial on findings of jury—Variation by Court of Appeal—Restoration of judgment at trial.

APPEAL by the defendants Canadian Breweries Transport Ltd. and Lacey from the judgment of the Court of Appeal for Ontario (1) allowing (Kellock J.A. dissenting) the appeal of the defendant Toronto Transportation Commission from the judgment of Barlow J. on the findings of a jury.

The action was brought by the plaintiff, Johnson, against all the said defendants for damages for injuries received by reason of a collision between a truck of the defendant Canadian Breweries Transport Ltd., which was driven by the defendant Lacey, and a street car of the defendant Toronto Transportation Commission. The plaintiff was a passenger in the said street car. At the trial, the jury found against all the defendants, apportioned the blame, 50 per cent. to the defendants Canadian Breweries Transport Ltd. and Lacey and 50 per cent. to the defendant Toronto Transportation Commission, and assessed the plaintiff's damages at $2,750; and judgment was given in accordance with those findings, the formal judgment providing for indemnification as between defendants in case of payment by the Company and Lacey, or by the Commission, of more than one-half of the amount awarded for damages or of the plaintiff's costs.

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

(1) [1943] O.W.N. 626; [1943] 4 D.L.R. 727.

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CANADIAN BREWERIES TRANSPORT LTD. v. TORONTO TRANSPORTATION COMMISSION.

The defendant Toronto Transportation Commission appealed to the Court of Appeal for Ontario. That Court allowed the appeal (Kellock J.A. dissenting) and ordered that the action as against the Commission be dismissed and that the plaintiff recover against the other defendants the sum of $2,750 and costs. (The jury's findings and the judgments below are more fully stated in the reasons for judgment *infra*.) The defendants Canadian Breweries Transport Ltd. and Lacey appealed to this Court, asking that the judgment at trial be restored. Leave to appeal was granted by the Court of Appeal for Ontario. The plaintiff, who was paid his judgment, was not a party to the present appeal.

F. J. Hughes K.C. and *J. W. Thompson K.C.* for the appellants.

I. S. Fairty K.C. for the respondent.

The judgment of the Court was delivered by

KERWIN J.—This is an appeal by special leave of the Court of Appeal for Ontario from a judgment of that Court reversing the judgment of Barlow J., after the trial of the action with a jury. The plaintiff in the action, George Johnson, is not a party to the appeal, as he has been paid the amount of judgment for damages for injuries sustained by him. His action was brought against the Transportation Commission, in one of whose street cars he was a passenger at the time it came into collision with a truck owned by one of the other defendants, Canadian Breweries Transport Limited, and driven by the third defendant, Jack Lacey. No objection is raised to the charge to the jury of the learned trial judge. In answer to questions submitted to them, the jury found that the defendants, the Transport Company and Lacey, had not satisfied them that the plaintiff's injuries were not caused by any negligence on the part of those defendants. This was on the basis of the onus imposed upon these defendants by the *Highway Traffic Act*. The jury found that the operator of the Commission's street car was guilty of negligence, causing or contributing to the plaintiff's injuries, in the following respects:—

Being aware of the icy condition of the road and knowing the difficulty of a truck driver to stop owing thereto, the operator was negligent in failing to bring street car to stop before continuing to drive said street car in path of oncoming truck.

They also found that the degree of negligence on the part of the defendants was fifty per centum as to the Transport Company and Lacey and fifty per centum as to the Commission. On these findings judgment was rendered in favour of the plaintiff against all defendants for the amount of the damages found by the jury, $2,750, with costs. The judgment also provided that if the Transport Company and Lacey paid more than one-half of this sum, or more than one-half of the plaintiff's costs, they should be entitled to be indemnified as to such excess by the Commission, with an additional clause in case the excess was paid by the Commission. The only party to appeal from that judgment was the Commission and, as a result, the Court of Appeal varied the judgment by dismissing the action against the Commission, with costs, and giving judgment for the plaintiff against the Transport Company and Lacey for $2,750 with a proviso that the two last named defendants should pay to the plaintiff his costs of the action, including the amount of costs required to be paid by the plaintiff to the Commission. The Court of Appeal further ordered that all the respondents pay to the Commission the latter's costs of its appeal.

In granting leave to the Transport Company and Lacey to appeal to this Court, the Chief Justice of Ontario, speaking for the Court of Appeal, stated that he did not know that the opinion of the majority of the judges who heard the appeal from the judgment of Barlow J., that there was no evidence to establish any cause of action against the Commission, was arrived at on a consideration of the evidence for the plaintiff alone, and that it might be that the whole of the evidence was considered, including that of the driver of the truck. This refers to the fact that at the close of the plaintiff's case a motion for nonsuit was made by counsel for the Commission, consideration of which was adjourned until the end of the trial. Evidence was thereafter led on behalf of the Commission. Undoubtedly all of the judges that took part in the hearing of the appeal from Barlow J. were aware of the well-settled rule that in such circumstances the plaintiff is

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CANADIAN BREWERIES TRANSPORT LTD. v. TORONTO TRANSPORTATION COMMISSION.

Kerwin J.

entitled to rely upon any evidence adduced on behalf of the defendant. However, the judgment of Mr. Justice Laidlaw, with whom Mr. Justice Riddell concurred, directs:—

> The judgment should recite in appropriate form the motion for nonsuit made on behalf of the Toronto Transportation Commission, and that no evidence was adduced in support of a finding of negligence on the part of the operator of the street car.

It was to these directions that the Chief Justice of Ontario referred when he said that they "seem * * * to approve the adoption of a practice of doubtful propriety in such a case as this".

However, the question as to "whether the Transportation Commission could be dismissed from the action until the evidence of the defendant Company had been heard and had been taken into consideration" does not arise in this appeal because the action was not so dismissed. Under these circumstances, this Court is confined to the determination of the question whether there was any evidence in the whole of the case upon which the jury could find as they did with respect to the defendant Commission. Mr. Fairty argued the appeal on that footing and sought to secure a negative answer to the question upon a correlation of distances and speeds. The result arrived at by such means cannot necessarily prevail against other evidence placed before the jury which they were entitled to consider. I agree with the following passage in the dissenting judgment of Mr. Justice Kellock:—

> I take the answer of the jury to mean that at or before the motorman passed the point in the intersection, beyond which the street car, if it continued would be in the path of the approaching truck, he should have realized that the truck was not intending to, or could not, stop or slow down sufficiently, in the icy condition then prevailing, to allow the street car to clear in front of it. I am unable to say that it was not open to the jury to take that view.

The appeal should be allowed with costs and the judgment at the trial restored. The appellants are entitled to their costs of the appeal to the Court of Appeal.

Appeal allowed with costs.

Solicitors for the appellants: *Hughes, Agar, Thompson & Amys.*

Solicitor for the respondent: *Irving S. Fairty.*

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GORDON HAYMAN, ADMINISTRATOR OF THE ESTATE OF INA F. SUTHERLAND, DECEASED (DEFENDANT) ..... APPELLANT; *April 27, 28 *June 22.

AND

FOSTER NICOLL, ON BEHALF OF THE RESIDUARY LEGATEES OF LYDIA A. NICOLL, DECEASED (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA IN BANCO

Will—Construction—Trust—Bequest of money "in full confidence" that legatee "will dispose of the same in accordance with the wishes which I have expressed to her"—Whether trust established.

The testatrix died in January, 1937, having made her will and four codicils thereto. By the fourth codicil she bequeathed the amount of money which she might have on deposit in a named bank at her death to her daughter S. "in full confidence that she will dispose of the same in accordance with the wishes which I have expressed to her". S. received said amount from the executor of the testatrix and treated it as her own, and died intestate in June, 1940, without having disclosed any "wishes" of the testatrix mentioned in the codicil. An action was brought on behalf of the residuary legatees of the testatrix against the administrator of the estate of S., claiming that the bequest to S. was a trust which S. failed to carry out and, in the absence of evidence showing the nature of the trust, the money should go to the residuary legatees.

Held: The action failed. The words of the fourth codicil, taken by themselves or read with other provisions of the will and codicils, did not establish a trust; nor did the evidence establish that a trust was created. (Rules as to precatory trusts and secret trusts discussed.) (Judgment of the Supreme Court of Nova Scotia *in banco*, [1944] 2 D.L.R. 4, reversed.)

APPEAL by the defendant from the judgment of the Supreme Court of Nova Scotia *in banco* (1) reversing (Doull J. dissenting) the judgment of Archibald J.

Lydia A. Nicoll, late of Clyde River, Nova Scotia, died on or about January 18, 1937. She had made a will and four codicils thereto, all of which were admitted to probate. Her fourth codicil, made in 1936, contained the bequest which gave rise to the present controversy. It read as follows:

I give and bequeath the amount of money which I may have on deposit with the Canadian Bank of Commerce at Barrington, Nova

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

(1) [1944] 2 D.L.R. 4.

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Scotia, at the time of my death to my daughter, Ina F. Sutherland, in full confidence that she will dispose of the same in accordance with the wishes which I have expressed to her.

At the time of the death of the testatrix there was in the said bank the sum of $2,572.05, which sum was, on the closing of the estate (after the passing of the final accounts) paid by the executor to Mrs. Sutherland. Mrs. Sutherland died intestate on or about June 25, 1940, and administration of her estate was granted to Mr. Hayman, who is the defendant in this action and the present appellant.

The action was brought (by the present respondent and another plaintiff who since died) on behalf of the residuary legatees under the will of Lydia A. Nicoll against the administrator of the estate of Mrs. Sutherland, for payment of the said sum to the said residuary legatees, claiming that a trust was imposed upon Mrs. Sutherland in respect of the said sum, that Mrs. Sutherland had refused or neglected to exercise the provisions of the trust and refused to disclose such provisions to the residuary legatees, that Mrs. Sutherland could not take the money for herself, and, in the absence of evidence showing the nature of the trust (it was admitted on behalf of the respondent that the plaintiffs had not succeeded in establishing what were the "wishes" mentioned in the codicil), the money fell into the residue of the estate of the testatrix. The defendant (appellant) denied that there was any trust imposed upon Mrs. Sutherland.

Archibald J. dismissed the action. His judgment was reversed by the Court *in banco* which held (Doull J. dissenting) that the said sum should go to the residuary legatees. The defendant appealed.

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

C. B. Smith K.C. for the respondent.

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

KERWIN J.—This is an appeal by Gordon Hayman, the administrator of the estate of Ina S. Sutherland, from a decision of the Supreme Court of Nova Scotia *in banco*, reversing a judgment of Archibald J. The appellant is

the defendant in an action brought by Foster Nicoll and Hallet Nicoll on behalf of the residuary legatees of Mrs. Lydia A. Nicoll. Hallet Nicoll died after judgment was given by the trial judge but proceedings were continued by Foster Nicoll in the same representative capacity, and he is now the respondent. The claim is to recover a sum of money on deposit at the Barrington branch of the Canadian Bank of Commerce to the credit of Lydia A. Nicoll at the date of her death.

Mrs. Nicoll died on or about January 18th, 1937, having previously made her last will and testament and four codicils thereto, probate of which will and codicils was duly granted to the Royal Trust Company, the executor named in the will. The fourth codicil is in these terms:

> I give and bequeath the amount of money which I may have on deposit with the Canadian Bank of Commerce at Barrington, Nova Scotia, at the time of my death to my daughter, Ina F. Sutherland, in full confidence that she will dispose of the same in accordance with the wishes which I have expressed to her.

The amount in the bank to the credit of Mrs. Nicoll at the time of her death was $2,572.05. The Royal Trust Company passed its accounts as executor on October 14th, 1937, and on that date handed to Mrs. Sutherland a cheque for the amount of the deposit. Mrs. Sutherland treated the money as her own, using a part thereof to purchase an automobile and investing the balance in securities. She died intestate June 25th, 1940, and letters of administration of her estate were granted to the appellant.

On behalf of the respondent, Mr. Smith first contended that there was a resulting trust established with reference to the bank account. His argument was that the wording of the fourth codicil shows, at the very least, that Mrs. Nicoll considered that she had disclosed to Mrs. Sutherland the "wishes" which she desired Mrs. Sutherland to follow in disposing of the money; that, Mrs. Sutherland having refused or neglected to disclose the terms of the communication to her, it should be assumed against her that she acquiesced in the terms of the wishes so expressed to her; and that, it being impossible now to ascertain the wishes of Mrs. Nicoll, there was a resulting trust in favour of the latter's residuary legatees. The second point made is that, on the construction of the codicil itself,

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Mrs. Sutherland became a trustee of the money and that, the terms of the trust not being available, the same result follows.

As to the second contention, I am of opinion that the terms of the codicil, taken by themselves, do not establish a trust. It is now recognized that the old rule as to precatory trusts no longer prevails and that a gift to A "in full confidence" that he will do certain things will not, as a general rule, establish a trust. It does not appear useful to list the many cases that have been cited on this branch of the case since, considering the tendency of the courts in modern times, I have concluded that in this particular case no trust was imposed upon Mrs. Sutherland by the fourth codicil of Mrs. Nicoll's will. This is made clearer when one looks at the second codicil wherein the testatrix, when intending to establish a trust, does so in unmistakable language:

> I give and bequeath to my son Frank Foster Nicoll the sum of three hundred dollars ($300) in trust for the benefit of St. Matthew's Church, Clyde River.

As to the first contention, it is undoubted that in certain circumstances a testator may bequeath a sum of money to an individual upon trust for purposes not appearing in the testamentary document but disclosed by him to the trustee and acquiesced in by the latter either expressedly or tacitly, and that parol evidence is admissible to establish the trust. *Blackwell* v. *Blackwell* (1). This statement, however, begs the question, as it must first be established that there was such a trust and that it was agreed to. It is admitted on behalf of the respondent that the evidence led by him does not show the terms of the alleged trust but it is contended that it shows that Mrs. Sutherland considered she was not herself entitled to the money. Upon that point I agree with the trial judge, as I am not impressed by the evidence in that regard,—given by interested parties and as to which the Trust Company's representative, who was present upon one occasion referred to, was not asked any questions. I also agree that in any event the provisions of section 37 of the Nova Scotia *Evidence Act,* R.S.N.S. 1923, chapter 225, apply and that there is no corroboration of the evidence.

(1) [1929] A.C. 318.

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Assuming that as against the construction to be placed upon the words of the fourth codicil, the terms of Mrs. Nicoll's wishes, if known, might create a trust, those terms might, on the other hand, as in *McCormick* v. *Grogan* (1), disclose that no trust was created. A sufficient time elapsed between the death of Mrs. Nicoll, January 18th, 1937, and the death of Mrs. Sutherland, June 25th, 1940, to bring matters to a head and, even if those on whose behalf this action is brought were, as they suggest, lulled for a time into a sense of false security by expressions used by Mrs. Sutherland, they were quickly disabused. The cheque for the money on deposit was handed to Mrs. Sutherland on October 14th, 1937, and this action was not commenced until after her death. The onus is upon the respondent, and, in the absence of evidence that a trust was imposed upon Mrs. Sutherland, the basis of the first contention fails.

The appeal should be allowed and the judgment at the trial restored, with costs throughout.

HUDSON J.—By a codicil to the will of the late Lydia A. Nicoll it was provided:

> I give and bequeath the amount of money which I may have on deposit with the Canadian Bank of Commerce at Barrington, Nova Scotia, at the time of my death to my daughter, Ina F. Sutherland, in full confidence that she will dispose of the same in accordance with the wishes which I have expressed to her.

Under the authority of this provision the executors of the will paid to the late Mrs. Sutherland the sum of $2,572.05 which she used in part for her own purposes during her life time. The remainder is held by the appellant as part of her estate.

The plaintiffs in this action claim on behalf of the residuary legatees under the will of Mrs. Nicoll that the bequest to Mrs. Sutherland was a trust, that she during her life time failed to carry out such trust or to disclose its nature and that, consequently, they are entitled to the money.

At the trial an attempt was made to establish by evidence that the money bequeathed to Mrs. Sutherland was in a trust to pay the debts of the testatrix and, after pay-

(1) (1869) L.R. 4 H.L. 92.

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ment of some money to a man who had at one time lived at the Nicoll home, to divide what remained among the residuary legatees.

The evidence failed to establish any such purpose and counsel for the plaintiffs at the trial very properly abandoned this ground. It was then contended that there was at least sufficient evidence to establish that the bequest was a trust, the nature of which could not now be ascertained, and that, in the absence of objects, the residuary legatees were entitled to the fund.

In support of this argument it was alleged, firstly, that the words of the codicil, read in conjunction with the will and prior codicils, imposed a trust, and secondly, that Mrs. Sutherland had in her life time admitted that the money was given to her in trust and not for her own benefit.

In respect of the first ground, the learned trial Judge was of the opinion that neither the language of the codicil read by itself, nor read with the other provisions of the will and codicils, gave support to the plaintiffs' position. On the second question, he found that the evidence offered on behalf of plaintiffs was not trustworthy and that it was vague, uncertain and conflicting and did not establish any statement by Mrs. Sutherland that there was any definite obligation imposed upon her.

On appeal, this decision was reversed by a majority, Chief Justice Chisholm and Mr. Justice Smiley forming the majority and Mr. Justice Doull dissenting.

I agree with the views expressed by Mr. Justice Archibald at the trial and Mr. Justice Doull at the Court of Appeal. The word "confidence", as stated by Lord Davey in *Comiskey* v. *Bowring-Hanbury* (1), is a neutral word. If the will as a whole indicates an intention to create a trust, the court will so construe the will; otherwise it will not.

The other testamentary dispositions of the testatrix do not lend support to the contention of the respondent. By the will itself, made in 1930, certain real property was devised to one Jack F. Nicoll. By the first codicil, in 1933, the above devise was revoked and all real property of the testatrix devised to the plaintiff F. Foster Nicoll, one of the respondents.

(1) [1905] A.C. 84, at 89.

By the will $300 was bequeathed to a church and by a second codicil in 1935 this bequest was altered so that it conveyed to F. Foster Nicoll the sum in question in trust for the church, a trust being definitely defined.

By the original will there was no particular disposition of personal property other than a bequest of $2,200 to Jack F. Nicoll, a small sum for a cemetery, and the bequest to the church already mentioned. In 1933 a third codicil was made by which all the deceased's furniture, household effects, etc., were bequeathed to Mrs. Sutherland, upon trust that she should divide the same among the deceased's surviving children in such way as Mrs. Sutherland might wish or decide expressly. In 1936 the fourth codicil containing the provision in question was made.

It will be observed through the progress of these dispositions that the testatrix did not have in mind any absolute equality in benefits for her children. On the contrary, she made a specific devise of all of her real property to the respondent F. Foster Nicoll, and it is shown by the preceding codicils that when a trust was intended it was so stated in definite language.

The argument most pressed and relied on on behalf of the respondent is that, notwithstanding the language of the codicil, Mrs. Sutherland during her life time neglected and refused to disclose what her mother had said to her. Under some circumstances, such reticence might give rise to an inference that a trust was intended, but the evidence put forward here by the plaintiffs in their abortive attempt to prove a trust for specific purposes suggests to me that Mrs. Sutherland may have had quite good and honest reasons for not disclosing her mother's wishes. In any event, the respondents had ample time to take action during the life time of Mrs. Sutherland to compel disclosure, if they so desired. If the oral evidence of the plaintiff is to be given any credence whatever, it leads me to think that whatever was said by the testatrix to Mrs. Sutherland was vague and indefinite as to objects, and this in itself supplies a reason why the words of the will should not be construed as obligatory.

Two old cases are of interest on this point. In the case of *Harland* v. *Trigg* (1), the Lord Chancellor said:

(1) (1782) 1 Br. Ch. Cas. 142.

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I have no doubt but a requisition made with a clear object will amount to a trust. In the case of the Duchess of *Buckingham's* will, the words were very gentle, but had a distinct object. But where the words are not clear, as to their object, they cannot raise a trust. Where this testator had a leasehold estate, which he meant should go to the family, he has used apt words; therefore, where he has not used such words, he had a different intent.

And again in the case of *Wynne* v. *Hawkins* (1) in the same volume, the Lord Chancellor said at page 180:

If a bill had been filed in the lifetime of the wife, could I have ordered this money to be laid out, and that she should receive the interest for her life, and then it should go over? These are equivocal words, the intent of which is to be gathered from the context. If the intention is clear, what was to be given, and to whom, I should think the words not doubting would be strong enough. But where, in point of context, it is uncertain what property was to be given, and to whom, the words are not sufficient, because it is doubtful what is the confidence which the testator has reposed; and, where that does not appear, the scale leans to the presumption that he meant to give the whole to the first taker.

In the case of *Briggs* v. *Penny* (2), it was said by Lord Truro at p. 556:

It is most important to observe that vagueness in the object will unquestionably furnish reason for holding that no trust was intended, yet this may be countervailed by other considerations which shew that a trust was intended.

The words of Lord Bowen in *In re Diggles; Gregory* v. *Edmondson* (3), might be appropriately quoted:

But just as uncertainty of the property and object are reasons for not construing the will as creating a trust, so also the fact that a trust would cause embarrassment and difficulty is a reason for coming to the same conclusion.

With reference to the numerous authorities discussed in the court below, I am content to accept the views of Mr. Justice Archibald and Mr. Justice Doull. I would allow the appeal and restore the judgment at the trial.

The judgment of Taschereau and Rand JJ. was delivered by

RAND J.—This appeal raises the question of the interpretation of a codicil to the will of Lydia A. Nicoll, which reads as follows:

I give and bequeath the amount of money which I may have on deposit with the Canadian Bank of Commerce at Barrington, Nova

(1) (1782) 1 Br. Ch. Cas. 179. (2) (1851) 3 MacN. & G. 546.
(3) (1888) 39 Ch. D. 253, at 257.

Scotia, at the time of my death to my daughter, Ina F. Sutherland, in full confidence that she will dispose of the same in accordance with the wishes which I have expressed to her.

The will, subject to three specific dispositions, had left the residue to the children of the deceased. By earlier codicils the testatrix had converted a direct legacy to a church into one in trust for the same church, and had given certain personal effects then in the residue to the daughter Ina in trust for distribution among the residuary legatees and another, in her absolute discretion; and by the last codicil withdrew likewise from the residue the sum of approximateley $2,500, the amount standing to the credit of the testatrix at her death. The entire estate was in the neighbourhood of $17,000.

The testatrix died in January, 1937. Her will was proved shortly thereafter and the order passing accounts and ordering distribution made in October of that year. The daughter Ina died on June 25th, 1940, and the appellant is the administrator of her estate.

On behalf of the respondents it is claimed there is, on the face of the will, an absolute trust, the objects of which have failed, and consequently the benefits result to the residuary legatees: but that, on the other hand, if the words of the codicil are precatory merely, a secret trust has resulted from the communication by the testatrix to the daughter of her wishes and the undertaking by the latter to carry them out, a failure or refusal on her part to do so, and a resulting trust to the residue.

What the wishes of the testatrix, mentioned in the codicil, were is unknown. Archibald J., who tried the issue, came to the conclusion that there was no evidence on which he could make a finding on them or on the fact of any communication of them to the daughter Ina, whether before or after the making of the codicil. In September, 1938, the respondents, by letter, requested the daughter to disclose them but, so far as appears, without result. It is evident that feelings had been aroused and with at least one of her brothers Ina was not on speaking terms.

Mr. Smith for the respondents argued that the first enquiry should be whether the daughter Ina had in fact so undertaken with the testatrix, and that it was only when

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that question was decided that the construction of the codicil might become necessary. But so far as it may be considered material, I am unable to agree with him. What is first presented to the court is the testamentary document and any enquiry regarding transactions *dehors* that instrument must, I should say, follow the conclusions relating to it.

Do the words of the codicil, then, create a trust or are they merely precatory, expressive of the wish of the testatrix but not intended to impose upon the legatee an imperative direction? During the past fifty years a marked change has taken place in the attitude of the courts toward dispositions of this character. The earlier tendency was to treat such expressions as placing a bond upon the person taking, the performance of which courts of equity would enforce. But this has given way to an opposite leaning and the present rule is that confirmed in the case of *In re Atkinson* (1): to give effect to the real intention of the testator, as that is to be gathered from the testamentary instrument as a whole, regardless of any particular words used or of any rule related to them. So construed, I agree with Archibald and Doull JJ., that the words in question were not intended to do more than to indicate the desire rather than to impose the will of the testatrix.

There remains the contention that by a communication to the daughter a secret trust arose. The rules of law dealing with this class of transactions are clearly settled. If, on the face of the will, the legal interest is, *simpliciter*, in the legatee, it can be shown that an agreement outside of the will was made by which the legatee undertook as an absolute obligation the carrying out of wishes of the testator. If, on the other hand, the will expressly creates the fiduciary obligation, then the oral communication must be made either before or at the time of the making of the will. If it is not, the beneficial interest is deemed not to be distributed and a resulting trust at once arises. The present case is intermediate. Although the words are precatory, they look to an oral or a written communication to the legatee for their completion. Where a trust arises outside the will, the transaction may take place at any time during the life of the testator for the reason that the

(1) (1911) 80 L.J. Ch. 370.

continuance of the legacy is on the footing of the legatee's undertaking. But the rule does not oblige us to say that the mere communication, in such a case as this, of the wishes of the testatrix, would *ipso facto* create an obligatory trust. If the language of the will, following which the communication is made, is precatory, why should a communication be considered as going beyond its mere fulfilment, and as not being intended to have the same effect as if it had been set out in full in the testamentary document? It would be necessary to show clearly not only the communication but that it was made in circumstances in which such an obligation was imposed upon and accepted by the legatee: *In re Falkiner: Mead* v. *Smith* (1); *Sullivan* v. *Sullivan* (2); *Reid* v. *Atkinson* (3). That proof here, having as its object the establishment of a claim against an estate, would in addition require corroboration.

A further difficulty would arise in respect of the question of performance. It is alleged as part of the claim that the daughter Ina had died "without exercising the provisions of the said trust". The respondents are suing not as *cestuis que trust* but as resulting beneficiaries upon a failure of performance and that essential fact is part of their case. The daughter could, if alive, answer it by proving performance and the question is whether we are to presume that the trust must have been incompatible with the conduct of the daughter evidenced to the court.

These difficulties are obviated by the findings below that there is no sufficient evidence either of the fact of the communication of the wishes or of what they were; *a fortiori* there is no evidence of the acceptance by the daughter of an obligation to carry them out; and no ground has been suggested on which a presumption of any of these matters could now be raised against the estate.

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

Appeal allowed with costs.

Solicitor for the appellant: *Donald McInnes.*

Solicitor for the respondent: *R. Clifford Levy.*

(1) [1924] 1 Ch. 88. (2) Ir. R. [1903] 1 Ch. 193.
(3) (1871) Ir. R. 5 Eq. 373.

1944

*April 1.
*June 1.

ABBOTT *v.* THE KING

ON PROPOSED APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Appeal—Application for leave to appeal to Supreme Court of Canada under s. 1025, Criminal Code—Whether Judgment sought to be appealed from conflicted with judgment "of any other court of appeal" "in a like case".

On an application, pursuant to s. 1025, *Criminal Code*, for leave to appeal from the judgment of the Court of Appeal for Ontario, [1944] O.R. 230, dismissing the applicant's appeal from his conviction on a charge of unlawfully obtaining a sum of money by false pretences and with intent to defraud, contrary to s. 405 (1), *Criminal Code*, the applicant's contention being that the court which tried him had no jurisdiction:

Held (dismissing the application), that the judgment in *The King* v. *O'Gorman*, 15 Can. Crim. Cas. 173, was not "in a like case" within said s. 1025; also that said judgment in *The King* v. *O'Gorman*, which was rendered by the Court of Appeal for Ontario, as was also the judgment now sought to be appealed from, was not a judgment "of any other court of appeal" within said s. 1025.

APPLICATION, pursuant to the provisions of s. 1025 of the *Criminal Code* (R.S.C. 1927, c. 36), for leave to appeal to this Court from the judgment of the Court of Appeal for Ontario (1) dismissing the applicant's appeal from his conviction before the Court of General Sessions of the Peace for the County of Simcoe on a charge that he did, on or about the 31st day of August, 1942, at the Township of Nottawasaga, in the County of Simcoe, and elsewhere in the Province of Ontario, by false pretences and with intent to defraud, unlawfully obtain the sum of $500 from Thomas Jones, contrary to s. 405 (1) of the *Criminal Code*. A contention on behalf of the applicant, that the Court of General Sessions of the Peace for the County of Simcoe had no jurisdiction to try him as the evidence established that the offence of which he was convicted was committed in the County of York and he was neither apprehended nor in custody in the County of Simcoe within the meaning of s. 577 of the *Criminal Code*, was rejected by the Court of Appeal. It was contended on behalf of the applicant in the present application that the

*PRESENT:—Rinfret C.J. in Chambers.

(1) [1944] O.R. 230; [1944] 2 D.L.R. 378.

decision of the Court of Appeal conflicted with other judgments, including the judgment in *The King* v. *O'Gorman* (1), "in a like case" within said s. 1025.

G. A. Martin for the application.

W. B. Common K.C. contra.

THE CHIEF JUSTICE.—The only judgment with which it could be seriously said there might be a conflict with the judgment of the Court of Appeal in the present case, is that of *The King* v. *O'Gorman* (1). The other cases referred to obviously presented no conflict at all and that was practically admitted during the argument by counsel for the appellant.

After having carefully considered the judgment in the *O'Gorman* case (1) and having given the fullest consideration to the very able argument of Mr. Martin, I have come to the conclusion that the *O'Gorman* case (1) was "not a like case", within the meaning of section 1025 of the *Criminal Code*. In the present case, the distinction is made in the reasons for judgment of the Chief Justice of Ontario and I fully agree that the two cases are distinguishable and, therefore, there exists no basis for granting leave to appeal in the present case.

There is, to my mind, a further reason why the application for leave should not be entertained. Judgment in the case of *The King* v. *O'Gorman* (1) was rendered by the Court of Appeal for Ontario and the judgment from which it is intended to appeal to this Court was also rendered by the Court of Appeal for Ontario. In the circumstances, it seems to me that it cannot be said this would meet the requirements of section 1025: that leave may be granted "if the judgment appealed from conflicts with the judgment of any other court of appeal". I do not think that the section applies.

The application should be dismissed.

Application dismissed.

(1) (1909) 15 Can. Cr. Cas. 173; 18 Ont. L.R. 427.

LE COMITE PARITAIRE DE L'INDUSTRIE DE L'IMPRIMERIE DE MONTREAL ET DU DISTRICT (PLAINTIFF). } APPELLANT;

AND

DOMINION BLANK BOOK COMPANY LIMITED (DEFENDANT) ..... } RESPONDENT;

AND

DOMINION BLANK BOOK COMPANY LIMITED EMPLOYEES' ASSOCIATION (MISE-EN-CAUSE).

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

Appeal—Jurisdiction—Intended appeal to Privy Council—Judgment of this Court certified by registrar to proper officer of court of original jurisdiction—Motion for stay of proceedings.

When, as provided by section 53 of the *Supreme Court Act*, a judgment of this Court has been finally "certified by the registrar to the proper officer of the court of original jurisdiction" and "all proper and necessary entries thereof" have been made, the practice of this Court, following the decision in *Peters* v. *Perras* ((1909) 42 Can. S.C.R. 361), has been to refuse to entertain an application for a stay of proceedings for the purpose of an appeal from said judgment to the Judicial Committee of the Privy Council.

MOTION, on behalf of the respondent, for stay of execution pending proceedings on an intended application for leave to appeal from the judgment of the Supreme Court of Canada (1) to the Judicial Committee of His Majesty's Privy Council.

The judgment of the Supreme Court of Canada, allowing the appeal to that Court, was rendered on the 15th of May, 1944; the minutes were settled and certified by the registrar of the Supreme Court of Canada on the 25th of May, 1944; and the above judgment with the record was sent to the court of original jurisdiction on the 30th of May, 1944.

Ivan Sabourin K.C. for the motion.

Aimé Geoffrion K.C. contra.

(1) [1944] S.C.R. 213.

THE COURT.—The appellant applies for a stay of proceedings pending an appeal which it intends to lodge from the judgment of this court to the Judicial Committee of the Privy Council.

It appears that the judgment of this court has been finally certified by the Registrar to the proper officer of the court of original jurisdiction and that all proper and necessary entries thereof have been made.

Under the circumstances, following the decision in *Peters* v. *Perras* (1), the practice of this court has been to refuse to entertain an application for a stay of proceedings on the ground that all subsequent proceedings with regard to the execution are to be taken as if the judgment had been pronounced in the court below and that we were, therefore, without jurisdiction to grant the application.

We see no reason why the practice should not be followed in the present case and the application for stay of execution should, therefore, be dismissed with costs.

Motion dismissed with costs.

ALUMINUM COMPANY OF CANADA LIMITED ..... APPELLANT;

AND

THE CORPORATION OF THE CITY OF TORONTO ..... RESPONDENT.

1944

*May 9, 10, 11.

*June 12.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Assessment and taxation—Assessment Act, R.S.O. 1937, c. 272—Company assessed under s. 8 (1) (e) for business assessment, and also, under s. 9 (1) (b), in respect of income received by way of dividends or interest from other companies—Nature and operations of the latter companies in relation to company assessed—Income assessable as not being derived from business in respect of which the company was assessable under s. 8 (1) (e).

Appellant was a company incorporated by letters patent under the Dominion *Companies Act* and had its head office in Toronto, Ontario. It manufactured aluminum products at its plant in Toronto and was assessed in Toronto as a manufacturer for business assessment under

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

(1) (1909) 42 Can. S.C.R. 361.

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ALUMINUM COMPANY OF CANADA LTD. v. CITY OF TORONTO.

s. 8 (1) (*e*) of *The Assessment Act*, R.S.O. 1937, c. 272. It was also assessed by the City of Toronto, under s. 9 (1) (*b*) of said Act, in respect of certain income and it disputed its liability to such income assessment. It received said income by way of dividends on shares in, or interest on moneys advanced to, certain other companies, hereinafter called "subsidiaries", whose operations, all necessary for appellant's purposes, included, by one or other of the subsidiaries, the mining of bauxite (in British Guiana), water and rail transportation, wharf and dock operation, and production and sale of power. Appellant owned all the issued shares of all the subsidiaries except one and in that it owned over half of the issued shares. There was a degree of connection between appellant and each subsidiary in directorate personnel. The subsidiaries did service for or business with others besides appellant. Appellant contended that the businesses of the subsidiaries were integral parts of appellant's business in respect of which appellant was assessed under s. 8; that the subsidiaries acted as agents, or under such arrangement as constituted them agents, of appellant in its said business; and were operated in such a way in relation to appellant as made that operation the carrying on of appellant's said business; and that the income in question was not assessable, having been derived from the business in respect of which appellant was assessed for business assesment.

Held, affirming the judgment of the Court of Appeal for Ontario, [1944] O.R. 66, that appellant was assessable, under s. 9 (1) (*b*), in respect of the income in question, as not being derived from the business in respect of which it was assessed under s. 8. The businesses respectively carried on by the subsidiaries were in each case the subsidiary's own business and not the business or part of the business of appellant in respect of which it was assessable for business assessment. (*City of Toronto* v. *Famous Players' Canadian Corp. Ltd.*, [1936] S.C.R. 141, distinguished.)

APPEAL by the Aluminum Company of Canada, Limited, from the order of the Court of Appeal for Ontario (1) dismissing its appeal from the order of the Ontario Municipal Board (2), which held that the said company should be assessed in the city of Toronto, under s. 9 (1) (*b*) of *The Assessment Act*, R.S.O. 1937, c. 272, for the sum of $1,802,678.82 (in addition to the sum of $9,127, admittedly so assessable), as being income received by it in the year 1939 (assessable in 1940) not derived from the business in respect of which the company was assessable in the city of Toronto for business assessment under s. 8 of said Act. The appellant was assessed in the city of Toronto for business assessment under s. 8 in respect of its plant premises in Toronto as a manufacturer. It received the income in question by way of dividends on shares in, or

(1) [1944] O.R. 66; [1944] 1 D.L.R. 435; [1944] C.T.C. 1.

(2) [1943] O.W.N. 107; [1943] C.T.C. 114.

interest on moneys advanced to, certain other companies, all the issued shares of which the appellant owned except in the case of one company and in that the appellant owned 53½ per cent. of the issued shares. The facts are more fully stated in the reasons for judgment *infra,* and are also discussed at length in the judgments (cited *supra*) of the Court of Appeal and the Ontario Municipal Board. The appellant contended that the businesses of the said other companies were integral parts of the appellant's business in respect of which the appellant was assessed under s. 8; that the said other companies acted as agents, or under such arrangement as constituted them agents, of the appellant in its said business; and were operated in such a way in relation to the appellant as made that operation the carrying on of the appellant's said business; and that the income in question was not assessable, having been derived from the business in respect of which the appellant was assessed for business assessment under s. 8.

S. A. Hayden K.C. and *R. M. Fowler* for the appellant.

J. P. Kent K.C. for the respondent.

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

RAND J.—The appellant is the parent company of an aluminum enterprise which in scope extends from the mining of the raw material through all stages and agencies to the finished products. Its interest in bauxite, the base mineral of aluminum, in British Guiana is through a company organized under the English *Companies Act* of which it is the owner of all the shares except those qualifying directors. The rail and water transportation facilities from the mine to and down the Demarara River, on the Atlantic and up the river St. Lawrence to Port Alfred, Ha Ha Bay, on the Saguenay River, Quebec, and from that port to the manufacturing plant at Arvida, are likewise controlled by wholly owned subsidiaries. The power furnished at Arvida is produced by a company of which it owns 53 per cent. of the capital stock. The product of the plant at Arvida consists of pig or ingot aluminum. To convert this material into articles of trade, subsidiary plants have been established at Toronto and Kingston, Ontario. The head office

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is at Toronto. Under that corporate control there has been organized a chain of connecting industrial operations co-ordinated into a productive unity.

The activities of these various units, however, are not confined to the requirements of the main enterprise. Not all of the bauxite produced is sold to the company. The transportation on the Demarara River is not confined to the goods of the company. The rail service to Arvida is by a subsidiary operating under a Quebec charter as a common carrier. The power company sells a substantial part of its product to other persons and for other purposes.

The controversy in appeal concerns the assessment of the company by the City of Toronto. The scheme of taxation provided by the Ontario *Assessment Act*, so far as it is pertinent to this dispute, provides primarily for the assessment of persons occupying or using land for the purposes of specified businesses; and, in addition to that, for an assessment of income other than that arising from the business so assessed.

It will be convenient at this point to set forth the relevant sections of the Act:

8. (1) Irrespective of any assessment of land under this Act, every person occupying or using land for the purpose of any business mentioned or described in this section shall be assessed for a sum to be called "business assessment" to be computed by reference to the assessed value of the land so occupied or used by him, as follows:

* * *

(*e*) Subject to the provisions of clause *j* every person carrying on the business of a manufacturer for a sum equal to sixty per centum of the assessed value, and a manufacturer shall not be liable to business assessment as a wholesale merchant by reason of his carrying on the business of selling by wholesale the goods of his own manufacture on such land.

* * *

(11) Every person assessed for business assessment shall be liable for the payment of the tax thereon and the same shall not constitute a charge upon the land occupied or used.

* * *

9. (1) Subject to the exemptions provided for in sections 4 and 8,—

(*a*) every corporation not liable to business assessment under section 8 shall be assessed in respect of income;

(*b*) every corporation although liable to business assessment under section 8 shall also be assessed in respect of any income not derived from the business in respect of which it is assessable under that section.

(2) The income to be assessed shall be the income received during the year ending on the 31st day of December then last past.

10. Subject to subsection 6 of section 39 the income of a partnership, or of an incorporated company, if assessable, shall be assessed against the partners at their chief place of business, and against the company at its head office, or if the company has no head office in Ontario, at its chief place of business in the municipality.

The issue raised is, therefore, this: does the business of the appellant on Sterling Road, Toronto, within the meaning of *The Assessment Act*, extend to that of the bauxite company or any of the other subsidiaries mentioned?

By the decision of this Court in the case of *City of Toronto* v. *Famous Players' Canadian Corporation Ltd.* (1), it is now settled that the business of one company can embrace the apparent or nominal business of another company where the conditions are such that it can be said that the second company is in fact the puppet of the first; when the directing mind and will of the former reaches into and through the corporate façade of the latter and becomes, itself, the manifesting agency. In such a case it is not accurate to describe the business as being carried on by the puppet for the benefit of the dominant company. The business is in fact that of the latter. This does not mean, however, that for other purposes the subsidiary may not be the legal entity to be dealt with.

The question, then, in each case, apart from formal agency which is not present here, is whether or not the parent company is in fact in such an intimate and immediate domination of the motions of the subordinate company that it can be said that the latter has, in the true sense of the expression, no independent functioning of its own. The facts here are not in dispute. There is no doubt of the control of policy generally by the parent company. There is also a degree of connection in directorate personnel, but it is quite impossible to say, for instance, that the bauxite company does not function in its own right as a corporate body exercising discretion, directing its local affairs and generally serving the purpose for which its incorporation was intended. It is not a puppet company and the business which it actually carries on is its own. We have here, then, a condition which in each case effectively delimits and differentiates the corporate activity of the

(1) [1936] S.C.R. 141.

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parent company from that of the subsidiary. The appellant has confused the scope of the business properly and legally attributable to the premises on Sterling Road with a totality of co-ordinated operations between self-functioning members of an industrial family. It was only one unit of those operations that was assessed on Sterling Road, and the income received by the appellant and now in question accrued from other units disjunctive in the sense of the statute.

The appeal, therefore, should be dismissed with costs.

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

KERWIN J.—This is an appeal by Aluminum Company of Canada, Limited, from the Court of Appeal for Ontario in an assessment dispute between the Company and the City of Toronto. The appellant is incorporated by letters patent issued under the Dominion *Companies Act*. Its head office is in certain offices in the Canada Life Building on University Avenue in Toronto. It occupied land for the purpose of carrying on the business of a manufacturer at 158 Sterling Road, Toronto, and was assessed for business assessment at that location as a manufacturer under paragraph (*e*) of subsection 1 of section 8 of the Ontario *Assessment Act*, R.S.O. (1937), c. 272. It did not occupy land at its head office in the Canada Life Building for the purpose of its business and was not assessed for any business assessment there. It was, however, there assessed in respect of certain income which the City alleged was not derived from the business in respect of which it was assessed for business assessment, and the question before us is whether the Ontario Municipal Board and the Court of Appeal were right in deciding on their construction of paragraph (*b*) of subsection 1 of section 9 of *The Assessment Act* that a certain part of that income was not derived from the business in respect of which it was assessed at 158 Sterling Road.

Subsection 1 of section 9 is as follows:

9. (1) Subject to the exemptions provided for in sections 4 and 8,—

(*a*) every corporation not liable to business assessment under section 8 shall be assessed in respect of income;

(*b*) every corporation although liable to business assessment under section 8 shall also be assessed in respect of any income not derived from the business in respect of which it is assessable under that section.

The part of the income now in question arises entirely from dividends or interest received by the appellant from five other incorporated companies which, speaking generally, it controls. It was urged that the present case resembled *City of Toronto* v. *Famous Players' Canadian Corporation, Limited* (1). There, however, the Municipal Board was of the opinion that the only business of Famous Players' Canadian Corporation, Limited, could best be described as that of "theatre controller and operator", that the assessment roll should be amended to so read, and that all its income was derived from that business. This Court agreed with that conclusion. What that company did, however, is not in any way analogous to the operations of the present appellant. In my view, the principle of our decision in *Rogers-Majestic Corporation, Limited* v. *City of Toronto* (2) applies.

A concise summary of the appellant's argument before us is found in the statement by the Municipal Board as to the Company's argument before it. That argument is based on the fact that the appellant had been incorporated with very wide powers and on the contention that its business was the production of aluminum goods from the mining of bauxite to the manufacture of aluminum products, including all the intermediary steps, and, that being its business, all income derived from that business is exempt under section 9, subsection 1 (*b*), of the Act.

The powers of the appellant, conferred by its charter, which are particularly relied upon by it are summarized in its factum as follows:

(*a*) To construct or acquire by purchase or otherwise all buildings, water and electrical works necessary for the business of the Company.

(*b*) To manufacture and deal in aluminum and all other metals from the ores to the finished products thereof.

(*c*) To construct, acquire, maintain, operate, use and manage works, machinery and appliances for the production of electricity, etc.

(*d*) To mine, quarry or otherwise extract or remove ores.

Undoubtedly the appellant is interested in controlling in one way or another every step from the mining of the

(1) [1936] S.C.R. 141.
(2) [1943] S.C.R. 440.

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Kerwin J.

bauxite to the manufacturing of aluminum products. The bauxite is mined in British Guiana by a company incorporated under the laws of that country, the shares of which are wholly owned by the appellant, which company carries the bauxite to a river's mouth where it is loaded into larger boats. Not all of that company's business comes from the appellant, although undoubtedly most of it does. It should be further noted that that company operates a short line of railway and, while the appellant may carry on business not only in Canada but in all parts of the world, its charter specifically prohibits it from constructing or working railways.

The bauxite is brought by a third company (all of whose shares are owned by the appellant) from British Guiana to Port Alfred, Quebec, where it owns certain water lots and a wharf. This company carries other freight as well as the appellant's bauxite. A fourth company operates a railway from Port Alfred to Arvida. The appellant owns all the shares of that company which, however, transports not only the appellant's goods but is obliged to carry other freight as well. The prohibition in the appellant's charter against operating railways applies, of course, to this undertaking. The fifth company concerned is a power company which produces and sells power as well to the appellant as to others. The respondent owns the majority of the issued shares thereof.

Even if the appellant were correct in its objections to some of the details as stated by the Chief Justice of Ontario with reference to the mining company, I think the latter's conclusion is inevitable that the mining business in British Guiana, under the agreements and leases referred to by him, is the business of the company incorporated for that purpose and is not the business of the appellant Company. As to the other four companies, in view of the fact that they do business with and for other people or corporations, the argument that they are the agents of the appellant, so as to make their business part of the appellant's manufacturing business, cannot be substantiated.

This disposes of the only income in question before us. The City originally advanced a claim for the income

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derived by the appellant from its manufacturing operations at Arvida. There the bauxite is turned into aluminum ingots, ninety-five per cent. of which are sold in that form by the appellant. The remainder is shipped to the appellant's factories at Kingston, Ontario, and at 158 Sterling Road, Toronto. There the ingots are manufactured into aluminum sheet, foil, pistons, etc. This part of the City's claim was disallowed by the Municipal Board and no appeal as to it was taken and we are not concerned with that problem. On the only issues which are before us, the appellant fails and the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *McCarthy & McCarthy.*

Solicitor for the respondent: *W. G. Angus.*

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Mar. 20, 21.
June, 22.

CASIMIR DESSAULLES (PLAINTIFF)... APPELLANT;

AND

THE REPUBLIC OF POLAND (DEFENDANT) ..... RESPONDENT.

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

International law—Foreign state—Suit brought against it by a lawyer for professional services—Jurisdiction of Canadian courts—Proceedings of a disciplinary nature instigated by foreign state before council of Bar—Whether acceptance of jurisdiction by foreign state—Waiver of the exemption—Declinatory exception.

A sovereign state cannot be impleaded before the courts of a foreign country.

Such indisputable principle is based on the independence and dignity of the state, and international courtesy has always honoured it.

Proceedings of a disciplinary nature instigated against a lawyer before the council of the Bar by a foreign state cannot be considered as tantamount to a renunciation by that state of its privilege of immunity.

An action for fees for professional services and an accounting, directed against the Republic of Poland and impleading the Bar of Montreal as mis-en-cause, should be dismissed for want of jurisdiction.

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

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DESSAULLES v. REPUBLIC OF POLAND.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), reversing the judgment of the Superior Court, Surveyer J., and dismissing the appellant's declinatory exception.

The appellant, by his action, claimed from the respondent the sum of $9,956.27 for professional services and disbursements, including a demand for an accounting of the various business transactions which passed during the time the appellant acted as legal adviser to the Polish Consulate and represented the various nationals of Poland who had been referred to him. He seeks also to have declared valid and binding an agreement entered into by correspondence between himself and the then Consul General of the appellant state. An account already tendered by the appellant was submitted for approval and a declaration asked that the balance therein shown is exact and due to him. Subsidiarily, the appellant asked that the sums received by him from successions or claims in his hands be declared to have been compensated by the advances, disbursements and fees due to him. As against the *mis-en-cause,* the appellant sought the annulment of proceedings taken before its Council and prayed for the suspension of further action upon said complaint until judgment upon the action. The appellant described the respondent in the pleadings as follows: "La République de Pologne, état souverain ayant ci-devant sa capitale dans la ville de Varsovie dans ladite République, maintenant en un endroit inconnu". The respondent pleaded to said action in law, by way of declinatory exception, setting forth that the respondent, being a sovereign state, is not subject, as such, to the jurisdiction of the Superior Court, and prayed by the conclusions of the exception that the action be dismissed, there being no other court competent to hear the issue. In answer to such declinatory exception, the appellant contended that the proceedings instituted against him before the *mis-en-cause,* the council of the Bar, upon the instigation of the Polish Consul, constituted an acceptance of, and submission to, the jurisdiction of the Superior Court and justified him in urging by way of compensation or otherwise such claims as he may possess against the respondent.

(1) Q.R. 1943, K.B. 224.

The declinatory exception was dismissed by the Superior Court; but that judgment was reversed by the appellate court.

Casimir Dessaulles in person for the appellant.

Gregory Charlap for the respondent.

The judgment of the Court was delivered by

TASCHEREAU J.—Il ne fait pas de doute qu'un état souverain ne peut être poursuivi devant les tribunaux étrangers. Ce principe est fondé sur l'indépendance et la dignité des états, et la courtoisie internationale l'a toujours respecté. La jurisprudence l'a aussi adopté comme étant la loi domestique de tous les pays civilisés.

L'exception déclinatoire de la défenderesse, dans laquelle il était allégué que la Cour Supérieure du district de Montréal n'avait pas juridiction pour entendre une action dirigée contre elle, est donc bien fondée, et c'est avec raison que la Cour du Banc du Roi l'a maintenue, et a rejeté l'action.

L'appelant soumet cependant que, dans la présente cause, le principe d'immunité dont bénéficient les états souverains ne s'applique pas, parce que l'intimée y a renoncé en acceptant la juridiction des tribunaux canadiens. Il semble bien inutile d'examiner les divers aspects de cet argument, ni d'en déterminer la portée, car les faits révélés par la preuve ne nous justifient pas de le prendre en considération.

En effet, les procédures instituées par l'intimée contre l'appelant, devant le conseil du Barreau du District de Montréal, ne peuvent pas être considérées comme une renonciation par l'intimée au privilège d'immunité que lui confère son état d'indépendance. Des auteurs nombreux, ainsi que la jurisprudence, font sur ce point les distinctions nécessaires, et précisent les cas où cette renonciation peut être invoquée. Je suis bien convaincu que nous ne sommes en présence d'aucun d'eux. (Vide: Dicey's Conflict of Laws, 5th ed., page 200.)

L'action était dirigée à la fois contre la République de Pologne, et aussi contre le Barreau de Montréal qui était mis-en-cause. Contre la première on demandait une condamnation pécuniaire pour services professionnels, et contre le second, une injonction lui enjoignant de ne pas procéder

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davantage à entendre les plaintes portées contre l'appelant pour dérogation à l'honneur professionnel. La Cour du Banc du Roi a rejeté l'action *in toto*, malgré que le Barreau de Montréal n'eût pas produit, comme la République de Pologne, d'exception déclinatoire. L'appelant prétend que la Cour du Banc du Roi a outrepassé ses pouvoirs.

Si tel était le cas, l'appelant aurait dû signifier son inscription en appel devant cette Cour au Barreau de Montréal. Mais il n'a pas jugé à propos de le faire, et ce n'est que lorsque les délais étaient expirés qu'il a fait motion pour le mettre en cause. Cette motion a été rejetée parce qu'il ne s'agissait pas d'un cas où cette Cour pouvait accorder une pareille demande, comme elle l'a fait déjà, et en particulier dans la cause de *Christin* vs. *Piette et Pelletier* (1).

Il s'ensuit que cette Cour ne peut pas intervenir, et que l'appel doit être rejeté avec dépens.

Appeal dismissed with costs.

Casimir Dessaulles, Solicitor for the appellant.

Gregory Charlap, Solicitor for the respondent.

1944

*May 22.
*June 22.

HARTIN ET AL. (APPELLANTS) *v.* MAY ET AL. (RESPONDENTS).

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Appeal—Jurisdiction—"Final judgment" (Supreme Court Act, R.S.C. 1927, c. 35, s. 2 (b)).

An action was dismissed by the trial Judge on the sole ground of *res judicata*, other matters sought to be litigated not being considered. On appeal it was held that the plea of *res judicata* failed, the judgment of the trial Judge should be set aside, and the case should proceed to be tried on its merits. The defendant appealed to this Court; and a motion was made to quash the appeal for want of jurisdiction because, so it was contended, the judgment appealed from was not a final judgment.

Held: This Court had jurisdiction to hear the appeal; the judgment appealed from was a "final judgment" as defined in the *Supreme Court Act* (R.S.C. 1927, c. 35, s. 2 (*b*)).

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

(1) To be reported.

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HARTIN v. MAY.

MOTION to quash appeal for want of jurisdiction.

Mrs. M. M. May in person for the motion.

P. D. Murphy contra.

THE COURT.—In this case the respondents issued a writ against the appellant both personally and in his quality as trustee of the Daybreak Mining Company Limited in bankruptcy.

Several defences were raised against the action but the learned trial judge, without considering the other matters sought to be litigated, dismissed the action upon the ground that the matter in issue between the parties had already been decided by the courts, that there was *res judicata* and that hence the plaintiffs were without remedy.

The plaintiffs appealed from this decision and as a result the judgment was set aside by the Court of Appeal where, by a majority of two judges against one, it was decided that the plea of *res judicata* failed and that the action should proceed to trial and the case should be tried on its merits.

From that judgment the defendants have now appealed to this Court as of right and they are met by the respondents' motion to the effect that the appeal is not competent because the judgment appealed from is not final but only interlocutory.

It should be stated that upon settlement of the minutes the learned judges of the Court of Appeal who rendered the majority judgment, delivered additional notes stating that when giving judgment the question of a new trial was not in their minds at all and that all the Court dealt with and intended to deal with was whether or not the trial judge was right in giving effect to one particular defence as a ground for dismissing the action.

Under the circumstances we are of the opinion that this Court holds jurisdiction to hear the appeal.

"Final judgment" is defined in the interpretation section of the Act respecting this Court. It means "any judgment, rule, order or decision which determines in whole or in part any substantive right of any of the parties in controversy in any judicial proceeding."

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HARTIN v. MAY.

We think the judgment appealed from comes within that definition. So far as the issue of *res judicata* is concerned, the right of the parties is finally determined and will remain so unless the appellant succeeds in his present appeal.

The Court

The motion to quash should be dismissed with costs.

Motion dismissed with costs.

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*May 5.
*June 22.

AARON G. CLOUGH (PLAINTIFF)..... APPELLANT;

AND

CORPORATION OF THE COUNTY OF SHEFFORD AND OTHERS (DEFENDANTS) ..... } RESPONDENTS;

AND

ANTONIO GRANDPRE, MIS-EN-CAUSE.

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

Municipal law—Tax sale—Immoveable owned by company—Purchaser—Redemption exercised by creditor of company—Company having ceased to exist at time of redemption—Company appearing as owner on valuation roll—Whether right of redemption exists—Municipal Code, sections 726, 727, 754, 755—C.C. acts 368, 371, 372.

When an immoveable belonging to a company is sold at a tax sale, the purchaser, in an action "en passation de titre" against the municipal corporation, cannot ask that the redemption exercised by a creditor for and on behalf of that company be declared null and void and set aside, on the ground that, at the time of the redemption, the company had ceased to exist, its charter then alleged to be extinct and to have been forfeited *de jure* by non-user during three consecutive years.

When the right of redemption is exercised under sections 754 and 755 of the Municipal Code, the original purchaser, to whom the immoveable has been adjudicated, has no more rights than to receive back the money paid plus interest. In this case, the creditor was entitled to exercise that right on behalf of the company, even assuming the forfeiture of its charter.

It is not the duty of the secretary-treasurer of a municipal corporation to investigate as to who may be the real owner of an immoveable offered for sale. He is concerned only with what appears on the valuation roll, and, in this case, the company appeared in the roll as owner of the immoveable sold.

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

APPEAL, by special leave to appeal granted by this court, from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), affirming the judgment of the Superior Court, Surveyer J., and dismissing the appellant's action "en passation de titre".

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

John T. Hackett K.C. for the appellant.

Benoit Marchessault for the respondent.

The judgment of the Court was delivered by

TASCHEREAU J.—In March, 1940, the secretary-treasurer for the corporation of the county of Shefford sold at a tax sale to appellant Clough, an immoveable standing in the name of S.S. Copper Mines Ltd. The purchase price was paid, but notary Bachand, the secretary-treasurer of the county corporation and one of the respondents in the present case, did not deliver to appellant a certificate of adjudication, setting forth the particulars of the sale.

In December, 1941, Bachand filed in the Registry Office of Shefford a notice to the registrar that the immoveable had been redeemed by Elton W. Martin, also one of the defendants, for and in the name of S.S. Copper Mines Ltd.

It is submitted by the appellant that this redemption was null and void, because at the time of this redemption, S.S. Copper Mines Ltd. had ceased to exist, its charter being extinct, having been forfeited *de jure* by non-user during three consecutive years. At the expiration of two years, appellant requested the secretary-treasurer to execute in his favour, in the name of the county corporation, a definite deed of sale of the immoveable, and, upon his refusal, he instituted the present action. In his conclusions he prayed that the redemption by defendant Martin be declared null and void and set aside, and the registration thereof be cancelled and that plaintiff be declared the owner of the said property and entitled to a deed. He also claimed that defendant Bachand in his quality of secretary-treasurer be condemned to produce in court a

(1) Q.R. [1944] K.B. 39.

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Taschereau J.

duplicate of the certificate of adjudication required by law to be issued to plaintiff, and that a deed of sale of the said property be ordered executed in favour of plaintiff by the defendant secretary-treasurer, and that, upon default, the judgment to be rendered avail to all legal purposes, and have the same effect, as a deed executed by the defendant county corporation.

This action was dismissed by Mr. Justice Surveyer sitting in the Superior Court and that judgment was unanimously confirmed by the Court of King's Bench (1).

In view of the conclusions which I have reached, it is unnecessary to examine if at the time the redemption was made, the charter of the company was still in force or not. The fate of this case must be determined solely in the light of the provisions of the Municipal Code of the province of Quebec.

When Clough purchased the immoveable at the tax sale, he obtained only a precarious title, subject to its redemption during a period of two years. The owner, or any person on behalf of the owner, had, during that period of two years, the right to redeem this immoveable by reimbursing to the secretary-treasurer of the Corporation, the price of adjudication with costs and interests. This procedure is authorized by sections 754 and 755 of the Municipal Code which read as follows:

754. The owner of any immoveable sold under the provisions of the first chapter of this title (art. 726-753), may, within two years after the date of the adjudication, redeem the same, by reimbursing to the secretary-treasurer of the corporation of the county in which such immoveable is situated the amount laid out for the purchase of such immoveable, including the cost of the certificate of purchase and the notice to the registrar, with interest at ten per cent per annum, every fraction of a year being reckoned as a year.

755. Any person, whether authorized or not, may, unless a deed of sale has been granted under the second paragraph of article 741, redeem such immoveable in the same manner, but only in the name and for the benefit of the person who was the owner thereof at the time of the adjudication.

When this right of redemption is exercised, the original purchaser to whom the immoveable has been adjudicated has no more rights, except to receive back the money paid plus interest. In the present case, did E. W. Martin have the right to exercise this right on behalf of S.S. Copper

(1) Q.R. [1944] K.B. 39.

Mines Ltd., even assuming the forfeiture of the charter? I have no doubt that this question must be answered in the affirmative.

The recourse of a municipality when taxes are not paid is to have the immoveables sold. The secretary-treasurer has no option but to follow the imperative rules of the Code, and the sales must be effected in the way provided for by the law. It is not the duty of the secretary-treasurer of the local corporation to investigate as to who may be the real owner of the immoveable offered for sale. He is concerned only with what appears on the valuation roll, and in the course of the month of November of each year, he must prepare a statement showing (Municipal Code, section 726):

> the name and style of every person indebted to the corporation for municipal taxes, as set forth in the *valuation roll* * * *

Before the 20th day of December in each year, he must transmit to the office of the county corporation an extract of such statement (Municipal Code, section 727), and it is also the duty of the secretary-treasurer of the county corporation to sell these immoveables on the second Thursday of the month of March following, after having, before the 8th of January, given public notice, that the immoveables (with the names of the owners as mentioned in the *valuation roll*) will be sold at public auction if the taxes are not paid.

In the present case, the name of the S.S. Copper Mines Ltd. appeared on the valuation roll as owner of the immoveable in question, and the secretary-treasurer of the county corporation had no alternative but to proceed the way he did.

Assuming, as I did before, the forfeiture of the charter of the S.S. Copper Mines Ltd., for the benefit of which the redemption has been made, the legal situation cannot be altered.

Under our system of law, property can never be "res nullius". A company is dissolved by the forfeiture of its charter legally incurred (C.C., art. 368), but the law provides for the liquidation of its affairs. It is in the same position as a vacant succession (C.C., art. 371), and the creditors and others interested have the same recourse

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Taschereau J.

against the property which belong to it, as may be exercised against vacant successions and the property belonging to them.

Section 372 of the Civil Code says:

372. In order to facilitate such recourse, a curator, who represents such corporation and is seized of the property which belonged to it, is appointed by the proper court, with the formalities observed in the case of vacant estates.

These sections are applicable in the present case, and are the answer to the objection raised by the appellant, that no redemption can be made on behalf of a company when its charter is forfeited. The legislator has provided for the necessary means to make such a redemption possible.

It follows that the action "en passation de titre" was rightly dismissed by the trial judge, and the present appeal, therefore, should also be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Hackett, Mulvena & Hackett.*

Solicitor for the respondents: *Benoit Marchessault.*

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*May 4, 5.
*June 22.

ALBERT POULIOT AND OTHERS (DEFENDANTS) ..... } APPELLANTS;

AND

DAME ALINA CLOUTIER (PLAINTIFF).. RESPONDENT.

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

International law—Will—Husband and wife—Spouses domiciled and married in the United States of America—Spouses returning to province of Quebec where domicile reacquired—Subsequent death of husband—Statute of State of New Hampshire as to "The rights of surviving husband or wife"—Action by widow under that statute—Whether Quebec testamentary law should be applied.

The respondent's husband, born in the province of Quebec, removed in 1926 to the state of New Hampshire, in the United States of America, where he established his domicile. In 1937, he there married the

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

respondent without a marriage contract and, therefore, by the law of that state, the spouses were separate as to property. In 1939, they returned to the province of Quebec, where they reacquired domicile. The respondent's husband, on June 26th of that year, made his last will, and he died on April 18th, 1940. He bequeathed $1,000 to the respondent, out of an estate of about $15,000. The only immoveable was situated in Quebec; and the balance of his estate were moveables situate some in Quebec and some in New Hampshire. The respondent, in order to claim a greater share of her husband's estate under a statute of New Hampshire, executed a renunciation of the benefits conferred upon her by the will; and she brought an action against the appellants, the residuary legatees under the will, in order to recover the benefits which she alleged were conferred upon her under the New Hampshire statute which contained provisions for a certain share of the property of a deceased husband or wife to go to the survivor whether the deceased dies testate or intestate.

Held, reversing the judgment appealed from, that under Quebec law the terms of the New Hampshire statute are not applicable to the circumstances of this case; and, therefore, the respondent's action ought to be dismissed.

Per The Chief Justice and Kerwin and Taschereau JJ.—In the absence of a contract, either actual or implied, by which proprietary rights are acquired, the law of the domicile at the time of death should determine whether any limitation was imposed upon the disposing power of a testator as to moveables. The same result follows as to immoveables, as those in this case are situate in Quebec.

Per Hudson and Rand.—The New Hampshire statute is one that has to do not with the fact of marriage but with married people; and it is, at most, a law of distribution or succession of property in New Hampshire which is owned at the time of his or her death by a married person. The provisions of that statute are in no sense predicated on marriage within the state nor are they referable only to such a marriage. It is not, therefore, a law creating "a conjugal association" as to property to which the law of Quebec will give effect upon the death of one of the consorts.

De Nicols v. *Curlier* ([1900] A.C. 21), *Stephens* v. *Falchi* ([1938] S.C.R. 354), and *Berthiaume* v. *Dastous* ([1938] A.C. 79) disc.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec, affirming the judgment of the Superior Court, Gibsone J. and maintaining the respondent's action, brought against the appellants, residuary legatees under the will of her deceased husband, for the recovery of certain benefits alleged to have accrued to her under the terms of a statute of New Hampshire, in the United States of America, where the spouses had their domicile and were married.

L. E. Beaulieu K.C. and *Arthur Bélanger K.C.* for the appellants.

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POULIOT v. CLOUTIER.

Kerwin J.

Guy Hudon K.C., Ross Drouin and *Paul Lebel* for the respondent.

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

KERWIN J.—This litigation gave rise to several questions with which the Court of King's Bench and the Superior Court of the province of Quebec found it necessary to deal but which now are not in issue. This narrows the compass of the present appeal and permits the relevant facts to be shortly stated.

Alphonse Pouliot was born in the province of Quebec but, in 1926, removed to the State of New Hampshire in the United States of America where he established his domicile. In 1937 he there married Alma Cloutier of Quebec, so that New Hampshire was the matrimonial domicile. No marriage contract was entered into and, therefore, by the law of the State the spouses were separate as to property. In 1939 the spouses returned to Quebec where, on June 26th of that year, the husband made his last will and testament in notarial form and died on April 18th, 1940. At the time of the making of his will, and therefore at the time of his death, he had reacquired a Quebec domicile. By his will he bequeathed one thousand dollars to his wife, various sums of money to relatives, and devised and bequeathed the residue of his estate to his four brothers. The value of the estate left by him was about fifteen thousand dollars. The only immoveable is situate in Quebec and is valued at $2,500. The balance of his estate consisted of moveables, some of which were in Quebec and some in New Hampshire.

In this situation there would ordinarily be no question that the law of Quebec would regulate the succession. However, relying upon a statute of New Hampshire and in order to become entitled to the share of her husband's estate according to the terms thereof, the widow executed a renunciation on February 20th, 1941, by which she waived the provisions of her husband's will in her favour and released her right of dower and homestead in his real estate. This renunciation was filed in one of the Probate

Courts of New Hampshire. On March 18th, 1941, she executed before a notary public in Quebec another renunciation of the benefits conferred upon her by the will.

The statute law referred to is chapter 118 of the 1933 laws of New Hampshire by which sections 10 and 11 of chapter 306, "The Rights of Surviving Husband or Wife", of the Public Laws of New Hampshire were enacted as follows:

10. Widow, Personalty. The widow of a person deceased, testate or intestate, by waiving the provisions of his will in her favour, if any, shall be entitled, in addition to her dower and homestead right, as her distributive share, to the following portion of his personal estate, remaining after the payment of debts and expenses of administration:

I. One-third part thereof, if he leaves issue surviving him.

II. If testate, and he leaves no issue surviving him, five thousand dollars of the value thereof, and also one-half in value of the remainder above said five thousand dollars.

III. If intestate, and he leaves no issue surviving him, seven thousand five hundred dollars of the value thereof, and also one-half in value of the remainder above said seven thousand five hundred dollars.

11. Real Estate. The widow of a person deceased, testate or intestate, by waiving the provisions of his will in her favour, if any, and by releasing her dower and homestead right, shall be entitled instead thereof, in fee, to the following portion of all the real estate of which he died seized, after the payment of debts and expenses of administration:

I. One-third part thereof, if he leaves issue surviving him.

II. If testate and he leaves no issue surviving him five thousand dollars of the value thereof, and also one-half in value of the remainder above said five thousand dollars; and the same shall be assigned to her in the same manner as dower is assigned. But where the inventory value of all his real estate does not exceed five thousand dollars, she shall be entitled to the whole of said remainder and no assignment of the same to her shall be required unless some party in interest shall petition the probate court therefor.

III. If intestate and he leaves no issue surviving him seven thousand five hundred dollars of the value thereof, and also one-half in value of the remainder above said seven thousand five hundred dollars; and the same shall be assigned to her in the same manner as dower is assigned. But where the inventory value of all his real estate does not exceed seven thousand five hundred dollars, she shall be entitled to the whole of said remainder, and no assignment of the same to her shall be required unless some party in interest shall petition the probate court therefor.

The law of 1933 was thus in force in New Hampshire from a date prior to the marriage down to the trial of the action. It was to recover the benefits mentioned therein that this action was brought by the widow against her husband's four brothers, the residuary legatees under his will.

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Kerwin J.

The terms of the statute are plain. The question is whether by Quebec law they are applicable to the circumstances of the present case. It seems clear that according to Quebec law the domicile of the spouses at the time of marriage fixes their matrimonial status, and they are deemed, in the absence of a marriage contract, to have adopted the law of that domicile for the determination of their property rights. In this respect I think it does not differ materially from the common law. In each system the question is as to what is covered by property rights. The decision of the House of Lords in *De Nicols* v. *Curlier* (1), greatly relied on by the respondent, is quite distinguishable and is no authority for the respondent's contention that she acquired property rights at the time of her marriage in New Hampshire. What happened in the House of Lords' case was that two French people were married in France without any matrimonial contract so that according to French law their rights as to property were subject to the law of community of goods. They came to England and were permanently domiciled there. The husband died in England, leaving his wife surviving and having made an English will by which he disposed of all his property. It was held by the House of Lords that as to moveable goods, the wife, under French law, acquired a real proprietary right to one-half, just the same as if a contract had been entered into accomplishing the same result. In the present case the wife acquired no proprietary rights whatever but only the hope of a certain distribution upon the husband's death in case he was then domiciled in New Hampshire.

In my opinion the true view of the New Hampshire statute, as well by Quebec law as by the common law, is expressed by J. D. Falconbridge in 12 Canadian Bar Review, 133. Referring to the Dependents' Relief Acts or Family Protection Acts in force in some of the common law provinces, by which a court may give to a testator's dependents a larger share of his estate than he has given them by his will, the author states:

> The prevailing view would seem to be that a statute of this kind, in the absence of any clear indication of the legislature's intention, is to be characterized as being in effect a limitation on the testator's disposing

(1) [1900] A.C. 21.

power, and therefore as being testamentary law, applicable to immoveable property situated within the territory of the enacting legislature and to moveable property wherever situated of a testator domiciled in that territory.

This, I think, not only correctly expresses the law but is a practicable rule that in the absence of a contract, either actual or implied, by which proprietary rights are acquired, the law of the domicile at the time of death should determine whether any limitation was imposed upon the disposing power of a testator as to moveables. In the present case the immoveables are situate in Quebec and the same result follows.

The decision of this Court in *Stephens* v. *Falchi* (1) was also relied upon by the respondent. In that case there had been a putative marriage in Italy, which, it was found, had been entered into in good faith. The putative husband was domiciled in Italy and the putative wife acquired an Italian domicile in fact. The marriage being bigamous, the wife returned to her domicile of origin in Quebec and, as it was found, reacquired a domicile there in fact. Both by Italian law and Quebec law, a putative marriage produces "civil effects" if contracted in good faith. Following the decision of the Privy Council in *Berthiaume* v. *Dastous* (2), it was held that the civil effects quoad property would be those rights which were consistent with the real marriage not existing. That is, although the woman had in fact acquired a Quebec domicile at the time of her death, if the putative marriage had been a real one, she would not have been able to do this and it would therefore result that her domicile would be in Italy under the laws of which country the putative husband was entitled to a certain share in her estate. This case has no bearing on the matters under discussion.

The appeal should be allowed and the action dismissed, with costs throughout.

The judgment of Hudson and Rand JJ. was delivered by

RAND J.—This appeal raises a question of the right to real and personal property in the province of Quebec arising upon the death of the husband of the respondent. The parties were married in 1937 in the State of New Hamp-

(1) [1938] S.C.R. 354. (2) [1930] A.C. 79.

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shire, United States of America, while domiciled there: but later they took up their home and domicile in Levis, Quebec, where the husband died in 1940.

The will of the deceased is challenged on the ground that, under their matrimonial law, such rights were acquired by the respondent widow as call for a distribution of the property in Quebec according to the terms of a statute of New Hampshire passed in 1933. That act provides for a certain share of the property of a deceased husband or wife to go to the survivor whether the deceased dies testate or intestate and it is admitted that, if the law so invoked is, within the contemplation of the law of Quebec, a law forming part of the matrimonial regime, the contention of the respondent is sound. In other words, the law of Quebec, in the distribution of its own property, moveable or immoveable, has regard to property rights between husband and wife annexed to the marriage by the law of the matrimonial domicile.

It becomes necessary, therefore, to examine the statute to see if it possesses those characteristics which attach its provisions to marriage within New Hampshire, or whether it provides merely rules of succession which would be irrelevant to the law of Quebec.

The evidence makes it clear to me that the Act is one that has to do not with the fact of marriage but with married persons. The condition of its application seems to be that the deceased person should have been domiciled in New Hampshire at the time of his death, but even if that is not so, it is clearly of no significance where or when he was married. It does not affect or restrict any mode of alienation *inter vivos*. It is, therefore, at most, a law of distribution or succession of property in New Hampshire which is owned at the time of his or her death by a married person.

The decision of the House of Lords in the case of *De Nichols* v. *Curlier* (1) indicates the essential nature of the matrimonial law to which recognition is to be given

(1) [1900] A.C. 21.

in such a case as the present. It must be a law defining and declaring property rights conceived as terms of the marriage itself, following it through all changes of domicile and susceptible of dissolution or modification only in the events or by the means stipulated; in short, it must be a statutory equivalent to a marriage contract.

But the statute of New Hampshire bears no such characteristic. Its provisions are in no sense predicated on marriage within the state nor are they referable only to such a marriage. It is not, therefore, a law creating "a conjugal association" as to property to which the law of Quebec will give effect upon the death of one of the consorts.

It is contended that the controversy is concluded by the decision of this court in the case of *Stephens* v. *Falchi* (1), but the facts there were wholly different. The putative marriage had taken place in Italy where the husband was domiciled. A marriage contract specifically submitted the matrimonial affairs to the law of that country and the civil rights enforced were those given by that law. Here there is neither contract nor statutory equivalent to annex to the marriage vinculum rights of property in the terms of the New Hampshire statute.

I would, therefore, allow the appeal and dismiss the action with costs throughout.

Appeal allowed with costs.

Solicitor for the appellants: *Arthur Bélanger.*

Solicitor for the respondent: *Drouin, Drouin & Lebel.*

(1) [1938] S.C.R. 354.

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*Apr. 1, 2.
*June 22.

HARRY BOXENBAUM (PLAINTIFF)..... APPELLANT;

AND

ALEXANDER WISE AND ANOTHER (DEFENDANTS) ..... RESPONDENTS.

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

Automobile—Negligence—Collision—Injury to pedestrian—Accident at intersection of street—Traffic governed by light signals—Accident following collision between two motor cars—One car having right of way and the other going against red light—Action against owner and driver of both cars—Presumption of fault—Burden of proof—Motor Vehicles Act, R.S.Q., 1925, c. 35, s. 53, ss. 2.

The appellant's minor son, when crossing St. Lawrence boulevard, at the intersection of Sherbrooke street, on the north side of that street, in the city of Montreal, was struck and severely injured, after two automobiles had collided at that point. One of the automobiles belonging to one Gignac and driven by his employee Pelchat was going in a northerly direction, and the other automobile owned by the respondent Alexander Wise, and in charge of his brother, the other respondent, was proceeding towards the west on Sherbrooke street. At that intersection, the traffic is governed by light signals; and, at the moment of the impact, the respondent's automobile, as well as the appellant's son, had the right of way, the green light being in their favour. It was also proven that Gignac's automobile was hit on the right side, a few inches behind the rear axle. After the collision, the appellant's son was found under a tramway facing a southerly direction, but which had stopped in obedience to the red signal. On behalf of his son, the appellant brought an action for damages against the owners and drivers of both automobiles. The trial judge condemned the respondents and Pelchat jointly and severally to $17,447.20, but dismissed the action against Gignac on the ground that, at the moment of the accident, Pelchat was not in the performance of his employment. The appellate court, allowing the respondents' appeal, dismissed the action as to them. The appeal against Gignac before that court is still pending, Pelchat having filed no appeal.

Held, affirming the judgment appealed from, that, upon the evidence, the respondents have committed no fault; and, also, that any presumption of fault, if such presumption did exist, has been rebutted by them.

Subsection 2 of section 53 of the *Motor Vehicles Act* (R.S.Q., 1925, c. 35) provides that "Whenever loss or damage is sustained by any person by reason of a motor vehicle on a public highway, the burden of proof that such loss or damage did not arise through the negligence or improper conduct of the owner or driver of such motor vehicle shall be upon such owner or driver".

Per the Chief Justice and Taschereau J.: The presumption which the law thus creates is not a presumption that the driver of an automo-

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

bile has caused *damage*. It is a presumption that he is *liable* when it is proven that he has caused damage, and he has therefore the onus of showing that he committed no fault which contributed to the accident. But, before such presumption of liability may arise, it is incumbent upon the plaintiff to establish that it is the person, from whom the damage is claimed, that is the author of such damage. There must necessarily exist a relation between the driver of the automobile, and the damage suffered by the victim. And in order to establish such a connection between the driver and the damage suffered, it is not of course necessary in all cases, for the plaintiff, to show that he was struck by defendant's automobile. It may very well happen, as it does often, that the damage may be attributed to a driver who does not actually hit the victim, but acts in such a way that he causes another one to run over a pedestrian. But it is only when such or similar facts are shown to exist that the presumption created by section 53 of the *Motor Vehicles Act* starts to operate, because then only the driver is linked in some way to the mishap. In the present case, nothing of the kind is revealed by the evidence. But, even if such a presumption would exist, it has been rebutted by the respondents.

Per Kerwin J.: There is no question, as to the person at fault, involved in the construction of section 53 (*Maitland* v. *McKenzie*, 28 O.L.R. 506): that is, while the appellant must prove that loss or damage was sustained by reason of respondent's automobile, the tribunal of fact need not determine, so far as the onus is concerned, whether the driver operated the car in a negligent manner or not. There is no evidence that the appellant's son would have been struck by Pelchat's car, even if respondent's car had not been on the highway, and no such inference may properly be drawn. The victim was struck after the collision between the two cars occurred; and the respondents, in view of the evidence on that point, were bound to displace the onus that rested upon them under section 53. But, upon the evidence, the respondents have satisfied such onus.

Per Hudson J.: The plain meaning of section 53 is that a plaintiff must first satisfy the court that the loss or damage was sustained by reason of the motor vehicle; and, once the court is so satisfied, then the onus is on the defendant (owner or driver) to prove if he can that the loss or damage did not arise through his improper conduct.

Per Rand J.: Assuming there was such evidence of a nexus in fact between the collision and the injury as to give rise to the statutory presumption against the respondents, and also that their automobile was proceeding through the intersection at a speed greater than that permitted by the civic by-laws or the motor law of the province, there was no evidence of a dangerous speed nor that the driver was negligent after he became aware of the other car. Upon the evidence, the respondents have exculpated themselves from the presumed responsibility enacted by section 53.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec, reversing the judgment of the Superior Court, Bertrand J. and dismissing the appellant's action against the respondents for

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damages resulting from injuries sustained by appellant's minor son as a result of a collision between two automobiles, one of them owned by one of the respondents and driven by the other.

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

Marcus M. Sperber K.C., Louis Fitch K.C., R. Pinard and *C. R. Gross* for the appellant.

Aimé Geoffrion K.C., P. Meyerovitch K.C. and *N. Charbonneau K.C.* for the respondents.

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

TASCHEREAU J.—The present case arises out of an automobile accident which occurred on the 5th of December, 1938, at the intersection of Sherbrooke street and St. Lawrence boulevard, in the city of Montreal.

Appellant's minor son was crossing St. Lawrence boulevard, on the north pedestrian lane, when he was struck and severely injured, after two automobiles had collided at the intersection. One of the automobiles belonging to one Gignac, and driven by his employee Emile Pelchat, was going in a northerly direction, and the other automobile owned by Alexander Wise, and in charge of his brother I. Wise, was proceeding towards the west on Sherbrooke street.

At this intersection, the traffic is governed by light signals, and it cannot be disputed that at the moment of the impact, Wise's automobile on Sherbrooke street had the right of way, the green light being in its favour. It is also abundantly proven that Gignac's automobile was hit on the right side, a few inches behind the rear axle. After the collision, appellant's son was found under a tramway facing a southerly direction, but which had stopped in obedience to the red signal.

In the Superior Court, Mr. Justice Bertrand condemned Issie Wise, Alex. Wise and Emile Pelchat jointly and severally to $17,447.20, but dismissed the action against

Phydime Gignac, on the ground that at the moment of the accident Pelchat, his employee, was not in the performance of his duties.

The Court of King's Bench allowed the appeal of Issie Wise and Alex. Wise, and dismissed the action as to them. Pelchat filed no appeal, and the appeal against Gignac is still pending before the Court of King's Bench. We have, therefore, before this Court, to deal only with the liability of Issie and Alexander Wise.

A very important question raised in this case is whether the legal presumption of article 53 of the *Motor Vehicle Act* applies against both drivers. This article is as follows:

> (53) (2): Whenever loss or damage is sustained by any person by reason of a motor vehicle on a public highway, the burden of proof that such loss or damage did not arise through the negligence or improper conduct of the owner or driver of such motor vehicle, shall be upon such owner or driver.

This presumption which the law creates is not a presumption that the driver of an automobile has caused *damage*. It is a presumption that he is *liable* when it is proven that he has caused damage, and he has therefore the onus of showing that he committed no fault which contributed to the accident. But before such presumption of liability may arise, it is incumbent upon the plaintiff to establish that it is the person, from whom the damage is claimed, that is the author of such damage.

There must necessarily exist a relation between the driver of the automobile, and the damage suffered by the victim. And in order to establish such a connection between the driver and the damage suffered, it is not of course necessary in all cases, for the plaintiff, to show that he was struck by defendant's automobile. It may very well happen, as it does often, that the damage may be attributed to a driver who does not actually hit the victim, but acts in such a way that he causes another one to run over a pedestrian.

But it is only when such or similar facts are shown to exist, that the presumption created by article 53 of the *Motor Vehicles Act* starts to operate, because then only the driver is linked in some way to the mishap.

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In the present case, nothing of the kind is revealed by the evidence. Before reaching the intersection Wise was invited to cross St. Lawrence boulevard, having the green light in his favour. He was proceeding on the right side of Sherbrooke street, and oncoming traffic prevented him from seeing any car coming on his left. He was also entitled to assume that he had the right of way, and that no one would be imprudent enough to proceed in defiance of the red light. He was acting within his rights, and his assumption was one which would occur to the mind of a reasonable person. It was in complete disregard of the traffic laws, that Gignac's automobile crossed Sherbrooke street. The red signal was against it, and its speed was excessive. I have no doubt, and I agree fully with Mr. Justice Barclay, that it was Gignac's automobile that struck the boy, as a result of this double imprudence. Any other suggestion is untenable.

Gignac's automobile was proceeding north astride the railway tracks, and the boy was right in its path, while Wise's automobile never reached the point where he was walking. It is quite true, that both vehicles came in contact, the front of Wise's automobile hitting the rear end of Gignac's, but this fact did not contribute in any way to the damage done, which has not been suffered by reason of the operation of Wise's automobile. It follows that no presumption of liability lies against the respondents.

But even if such a presumption did exist, without hesitation, I come to the conclusion that it has been rebutted by the respondents.

Wise reached the intersection at a very reasonable rate of speed. Seeing the green light, which in certain judgments has been termed "a command to go ahead" in heavy traffic, he committed no fault by slightly accelerating his speed. As it has been held in *Joseph Eva, Limited* v. *Reeves* (1):

> When therefore a driver entered the cross-roads with the green light in his favour and accelerated to pass, * * * until it was too late to avoid a collision with a vehicle which had entered the cross-roads from the left against the red light, he was not guilty of contributory negligence.

(1) [1938] 2 K.B. 393.

The respondents have clearly shown that they have committed no fault, and that the sole determining cause of the accident was the imprudent and, I dare say, reckless way in which Gignac's automobile was driven.

The appeal should be dismissed with costs.

KERWIN J.—About half-past four in the afternoon of December 5th, 1938, Jack Boxenbaum was returning home from school, walking on the north side of Sherbrooke street, in the city of Montreal, proceeding easterly. In due course he reached the northwest corner of Sherbrooke street and St. Lawrence boulevard. At the intersection of the street and boulevard, traffic lights had been installed. The one facing Jack was green and he proceeded to cross St. Lawrence boulevard on the north pedestrian lane. There are double street car tracks on Sherbrooke street and St. Lawrence boulevard and on the south-bound, that is westerly, tracks on the boulevard a street car was standing at the northwest corner. Jack walked in front of this street car. It is uncertain how far he had travelled beyond it but one thing is certain and that is that he was struck and flung in front of the standing street car, sustaining severe injuries. On his behalf his father brought an action for damages against the owners and drivers of two automobiles, claiming that under subsection 2 of section 53 of the Quebec *Motor Vehicles Act,* R.S.Q. 1925, chapter 35, such damages had been sustained by reason of the two motor vehicles on a public highway. One motor vehicle, owned by the respondent Alexander Wise and driven by the respondent Izzy Wise, was proceeding westerly on the north part of Sherbrooke street. While it was crossing the intersection of St. Lawrence boulevard a collision occurred between that car and the other automobile, owned by the defendant Gignac and driven by the defendant Pelchat, which was proceeding northerly in the easterly half of St. Lawrence boulevard.

It is convenient at this stage to quote the words of subsection 2 of section 53 of the *Motor Vehicles Act* as well in the French as in the English version:

2. Whenever loss or damage is sustained by any person by reason of a motor vehicle on a public highway, the burden of proof that such

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loss or damage did not arise through the negligence or improper conduct of the owner or driver of such motor vehicle shall be upon such owner or driver.

2. Quand un véhicle 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.

In addition to relying on this enactment, the plaintiff claimed that Jack Boxenbaum was struck by the Pelchat car and alleged specific acts of negligence against the driver of that car as well as the driver of the Wise car.

The trial took place before Mr. Justice Bertrand who determined that the onus section applied; that it was quite clear that Pelchat was negligent and that Izzy Wise had failed to satisfy the onus placed upon him. He also found the latter to be negligent in several respects, which will be adverted to later. Judgment was given for $17,447.20 against Pelchat and Alexander and Izzy Wise but the action was dismissed against Gignac. The plaintiff appealed as to this dismissal and that appeal is still pending before the Court of King's Bench. Pelchat did not appeal but Alexander and Izzy Wise did, and the Court of King's Bench dismissed the action as against them on the ground that the onus section did not apply and that the plaintiff had failed to prove any negligence on their part. Mr. Justice St. Jacques was the only one who stated that even if it did apply the onus had been satisfied.

From that judgment the plaintiff now appeals. While the trial judge made no finding on the point, it must be found on the evidence that the Gignac car, driven by Pelchat, was the one that actually struck the boy. That, however, does not dispose of the point as to whether the loss or damage was also sustained by reason of the Wise motor vehicle on a public highway. Sir William Meredith, speaking on behalf of the Ontario Court of Appeal, in *Maitland* v. *McKenzie* (1), with reference to a similar Ontario enactment, stated as to this point at page 510:

I do not understand that any question as to the person at fault is involved in the determination of it.

(1) (1913) 28 O.L.R. 506.

No different construction should be placed on the Quebec statute because the wording of the French version is "cause une perte" while in the English version it is "by reason of a motor vehicle". That is, while the plaintiff in this case must prove that loss or damage was sustained by reason of the Wise automobile, the tribunal of fact need not determine, so far as the onus is concerned, whether Izzy Wise operated the car in a negligent manner or not. I never understood that there was ever any question about this proposition. In *Juraitis* v. *Arsenault* (2), Mr. Justice MacKinnon referred to the *Maitland* case (1) and also to a decision of Mr. Justice Mercier in *Lalumière* v. *Durocher* (3). In *Carter* v. *Van Camp* (4), Chief Justice Anglin referring to the driver of an automobile which had been in a collision but which had not actually struck a pedestrian on a sidewalk, stated that

> a like onus would have rested on Carter as to his responsibility for the collision had it been in issue.

Not only can I not find any evidence in the record that Jack Boxenbaum would have been struck by the Pelchat car, even if the Wise car had not been on the highway, but in my view no such inference may properly be drawn. The boy was struck after the collision between the two cars occurred, and in my view of the evidence on this point, the respondents were charged with the duty of displacing the onus.

The evidence discloses that while Jack Boxenbaum was crossing St. Lawrence boulevard from west to east with the green light, Izzy Wise was crossing the boulevard from east to west. That is, Wise had the right to cross, and with respect to the trial judge who found otherwise, there was no negligence on Wise's part in not anticipating that Pelchat would attempt to cross from south to north with the red light showing against him, or in not seeing Pelchat's car sooner than he did. The only other negligence on the part of Izzy Wise, found by the trial judge, was that he was crossing the intersection at a speed greater than that allowed by subsection 1 of section 41 of the Quebec *Motor Vehicles Act* as it stood at the time. This provided that

> on a curve or steep descent, or at the intersection of roads, or when crossing a bridge, the speed of the motor vehicle shall not exceed eight miles an hour.

(2) (1940) Q.R. 78 S.C. 53. (3) (1931) 37 R.L. N.S. 388.
(4) [1930] S.C.R. 156 at 162.

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As judges we are not permitted to consider as unreasonable a limitation of eight miles per hour on a certain street where traffic is heavy and where a motorist is crossing with the green light in his favour, when such limitation has been enacted by competent legislative authority, any more than we could, at some time in the future, consider unreasonable the present limitation of twenty miles per hour as provided by an amendment to the statute enacted since the date of this accident. All that we can do is to apply the law as we find it. The question is, however, whether the speed of the Wise car, in excess of the existing statutory limit, caused or contributed to Jack Boxenbaum's injuries. This is not the same inquiry as to whether they were sustained by reason of the presence of the Wise car on the street. A careful examination of the record has satisfied me that the question should be answered in the negative.

In my opinion the respondents have satisfied the onus that rested upon them and the appeal should be dismissed with costs.

HUDSON J.—I have had an opportunity of reading the judgments prepared by my brothers Kerwin and Taschereau and agree with them that this appeal should be dismissed with costs.

Some question has arisen about the interpretation to be placed upon subsection 2 of section 53 of the *Motor Vehicles Act* which reads as follows:

> Whenever loss or damage is sustained by any person by reason of a motor vehicle on a public highway, the burden of proof that such loss or damage did not arise through the negligence or improper conduct of the owner or driver of such motor vehicle, shall be upon such owner or driver.

It seems to me that the plain meaning of this provision is that the plaintiff must first satisfy the court that the loss or damage was sustained by reason of the motor vehicle. Once the court is so satisfied, then the onus is on the defendant (owner or driver) to prove if he can that the loss or damage did not arise through his improper conduct.

The first question is a clear question of fact and, in the present case, I am not satisfied that the plaintiff established that the loss or damage was sustained by reason of the defendant's motor vehicle but, even if I am wrong in this,

I am of the opinion that on the evidence it has been established that the injuries to the plaintiff's son did not arise through any improper conduct of the defendant Wise.

RAND J.—For the purposes of this appeal I assume there is such evidence of a nexus in fact between the collision and the injury as gives rise to the statutory presumption against the respondents; and also that their automobile was proceeding through the intersection at a speed greater than that permitted by the by-law of the city or the motor law of the province. There is no evidence of a dangerous speed nor that the driver was negligent after he became aware of the other car. The question then is whether the respondents have exculpated themselves from that presumed responsibility.

The westbound car was running on a green light and the driver was under no duty to anticipate one coming from a cross direction. The sudden and illegal incursion of the northbound car proceeding in the face of a red signal can be taken only as a new and intervening agency. The consequences chargeable to it are those naturally and directly resulting from its impact on the conditions present on Sherbrooke street. In other words, the Pelchat car undertook to cut across a stream of traffic; the only part played by the westbound car was to deflect its course; and the mere fact that the speed of the westbound car exceeded eight miles per hour was quite insufficient to convert it from a circumstance to be expected by Pelchat to a new force of culpability. Treating the speed restriction as a measure of safety toward the son of the appellant, its contravention carried no casual connection with the son's injury. The sole legal cause of the accident remained the intrusion of the Pelchat car upon ordinary street conditions, producing the injury and bringing upon itself liability. The appeal, therefore, should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Sperber & Godine.*

Solicitors for the respondents: *P. Meyerovitch, N. Charbonneau.*

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*Mar. 21, 22.
*June 22.

LOUIS EDGAR CARON (DEFENDANT IN SUB-WARRANTY AND INTERVENING PARTY IN THE PRINCIPAL ACTION)..... APPELLANT;

AND

ALICE FORGUES (PLAINTIFF)..... RESPONDENT;

AND

ALEXANDRE NADEAU (DEFENDANT AND PLAINTIFF IN WARRANTY)

AND

J. B. SAVARD (DEFENDANT IN WARRANTY AND PLAINTIFF IN SUB-WARRANTY).

Negligence—Injury to pedestrian—Icy sidewalk—Action against owner of building fronting it—Intervention by contractor who undertook to keep sidewalk in good condition—Liability of owner and contractor either under article 1053 C.C. or under city charter and by-laws—Admission by intervenant that care and maintenance of sidewalk under responsibility of defendant—Effect to be given to such admission.

The respondent, having suffered injuries through falling on an icy sidewalk in the city of Quebec, brought action against the owner of the premises in front of which she had fallen. The owner called in warranty his tenant who by the terms of the lease engaged himself to the maintenance of, and the removal of snow from, the sidewalk. The tenant in turn called in sub-warranty the appellant who had contracted with him to keep the sidewalk in proper condition and to protect him from claims for damages arising from sidewalk conditions. The owner, defendant, did not put any plea; but the appellant in his place intervened and contested the claim on its merits. The principal grounds urged by the appellant was that neither under the provisions of the city charter nor the by-laws passed under it was there a duty on the owner, defendant, to keep the sidewalk free from the danger of ice and snow, and, in its absence, there was no liability either under the charter or under articles 1053 or 1054 of the Civil Code. But the appellant admitted a paragraph of the statement of claim, where it was alleged that the sidewalk was the property of the defendant and that both the defendant and his lessee engaged themselves to provide for its care and maintenance. The respondent's action was dismissed by the trial judge; and the appellate court reversed that judgment, assessing the damages suffered by the respondent at the sum of $1,882.

Held, affirming the judgment appealed from, that the injury to the respondent was caused by the dangerous state of the sidewalk for which the defendant, the proprietor of the abutting land, must be held

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

responsible. Under the circumstances of the case, the respondent's action was rightly brought against the owner of the building fronting the sidewalk, under the provisions of the city charter and of the by-laws passed under it.

Held, further, that this Court must give effect to the explicit admission made by the appellant; and from the admitted fact that the care and the maintenance of the sidewalk were under the responsibility of the defendant results necessarily the appellant's liability in case of negligence or fault on his part in the execution of his obligation, so admitted, under his contract with defendant, thus giving rise to the application of article 1052 C.C.—Rand J. expressing no opinion.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec, reversing the judgment of the Superior Court, Gibsone J., and maintaining the respondent's action for damages resulting from injuries suffered through falling on an icy sidewalk in the city of Quebec.

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

André Taschereau K.C. and *Wilfrid Desjardins K.C.* for the appellant.

Alphonse Pouliot K.C. for the respondent.

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

THE CHIEF JUSTICE.—L'appelant dans son intenvention a admis

que le trottoir sur lequel l'accident a eu lieu était la propriété du défendeur sous la garde et l'entretien non seulement du défendeur, mais aussi sous la garde et l'entretien du préposé et locataire du défendeur.

C'était là une des allégations de la déclaration et l'appelant, en intervenant à la suite de l'action en arrière garantie, a formellement admis cette allégation.

Il y a peut-être dans cette admission certains éléments de droit, mais elle comporte au moins trois faits: que le trottoir était la propriété du défendeur, qu'il était sous sa garde et qu'il en avait l'entretien.

Si l'admission a été faite par erreur, l'intervenant aurait pu demander d'être autorisé à la rétracter. Il ne l'a pas fait. Cette admission est restée intacte jusqu'à maintenant.

La demanderesse-intimée avait indiscutablement le droit de l'invoquer et de conduire son enquête en consé-

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quence. Cela lui permettait d'omettre la preuve de circonstances et d'autres faits qu'elle aurait pu autrement établir, ou de faire valoir des arguments qui auraient autrement été à sa disposition. La Cour ne saurait maintenant éviter de tenir compte de cette admission. Or, du fait de la garde et de l'obligation d'entretenir le trottoir résulte nécessairement la responsabilité de l'appelant au cas de négligence ou de faute de sa part dans l'exécution de l'obligation ainsi admise. Cela donne ouverture à l'application de l'article 1053 du Code civil.

Mais en plus, l'on ne saurait dire que l'admission de l'intervenant va à l'encontre de la loi ou des règlements qui régissent la cité de Québec.

Déjà l'article 417 de la charte de la cité de Québec, 1929 (Statuts de Québec, 19 Geo. V, chap. 95), décrétait que

dans toutes les rues de la cité, les trottoirs doivent être faits, entretenus et réparés par le propriétaire de chaque immeuble ou terrain vis-à-vis duquel ils doivent être.

Et si le propriétaire néglige de faire, refaire, entretenir ou réparer les trottoirs, alors, à la suite de l'accomplissement de certaines formalités, la cité peut faire les travaux et en recouvrer le coût du propriétaire.

Puis, l'article 437 de la charte, tel qu'il a été remplacé par le statut 1 Geo. VI, chap. 102, édicte ce qui suit:

437. A compter du moment où les chemins et rues dans la cité sont couverts de neige, les propriétaires, locataires ou occupants de maisons, emplacements ou terrains vacants dans la cité, sont tenus de réparer et entretenir leurs chemins et rues bornant, de quelque côté que ce soit, leur terrain, maison, bâtisse, conformément aux règlements alors en vigueur, et ce, tant et aussi longtemps que lesdits chemins, rues et ruelles publiques seront ainsi recouverts de neige en tout ou en partie.

L'intimée a de plus attiré notre attention sur le règlement n° 227 concernant l'entretien des rues pendant l'hiver. Ce règlement n'a été abrogé que le 23 décembre 1942 et était donc en vigueur au moment de l'accident. Il se lit comme suit:

Tout propriétaire, locataire, occupant, ou toute personne ayant la garde, le soin, ou l'administration, d'aucune maison, d'aucun bâtiment, terrain, ou de partie d'iceux, dans les limites de la cité de Québec, borné par ou joignant de quelque côté que ce soit une rue, ruelle, place publique, ou par un passage, sera tenu:

D'enlever toute neige ou glace excédant quatre pouces de hauteur sur la moitié de la largeur de la rue, ruelle, ou du passage, bornant ou joignant telle maison ou tel bâtiment, ou terrain, ou partie d'iceux, dans les quarante-huit heures qui suivront chaque chute de neige.

De niveler la neige ou la glace au cas où elle n'excédera pas quatre pouces de hauteur sur la moitié de la largeur de telle rue, ruelle, ou de tel passage.

De faire couper ou piocher, abattre ou disparaître tout trou, cavité, cahot, ou toute pente sur telle moitié de rue comme susdit, dans les vingt-quatre heures après la formation de tel trou, cavité, cahot ou pente.

A notre avis, ce règlement a pour effet de mettre les trottoirs à la charge et à l'entretien du propriétaire riverain. Sans doute le règlement spécifie certains détails auxquels le propriétaire sera astreint, mais d'une façon générale il stipule que pendant l'hiver le propriétaire aura l'entretien du trottoir. Il est du même ordre que l'article 437 que nous venons de citer.

La cité de Québec, en vertu de sa charte, a, en plus, le pouvoir d'obliger le propriétaire ou occupant de tout immeuble à tenir les trottoirs en front de cet immeuble libre d'obstruction et à imposer une contribution foncière afin de défrayer le coût de l'entretien des trottoirs durant l'hiver "sur toutes les ou certaines sections de la cité". Pour prévenir les accidents en hiver, résultant de l'accumulation de la neige ou de la glace, elle peut déterminer la manière dont les trottoirs seront entretenus.

Et la cité peut décréter qu'elle se chargera de l'enlèvement de la neige ou de la glace dans les rues ou dans quelques-unes, ou dans certaines parties de ses rues, ainsi que sur les trottoirs de ses rues ou parties de rues. C'est le paragraphe 154 de l'article 336 de la charte.

La cité s'est prévalue de l'autorisation qui lui était ainsi donnée et elle a adopté les règlements n^{os} 285 et 388. En vertu du premier, elle a pris à sa charge l'enlèvement de la neige et de la glace dans certaines rues qui y sont énumérées; la rue où l'accident est arrivé n'est pas comprise dans cette énumération.

Au surplus, le règlement n^{o} 388 décrète:

(4) Le grattage des trottoirs sera fait par les propriétaires et non par la cité, conformément aux prescriptions de la charte et des règlements de la cité;

(5) Le service du soufflage de la neige, lorsqu'il a été ordonné par un règlement de ce conseil, comporte le grattage de la neige tel que ci-dessus, et son enlèvement en la soufflant sur des terrains vacants;

(6) En pareil cas, les propriétaires ne sont plus soumis à l'obligation de charroyer la neige, mais ils n'en sont pas moins tenus à l'entretien de leurs trottoirs, ainsi qu'au coupage de la neige ou de la glace lorsqu'elle excède le niveau de quatre pouces prévu par les règlements de la cité.

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Malgré que ce règlement ne s'applique qu'aux rues dont la cité a pris charge, le paragraphe 6 vient confirmer que les propriétaires riverains "sont tenus à l'entretien de leurs trottoirs" et que ce régime est bien celui qui a force et vigueur dans la cité de Québec. Cela, d'ailleurs, nous paraît conforme à la jurisprudence constante.

Sans doute, les textes pourraient être plus précis. Ils gagneraient à être éclaircis, mais il résulte quand même que, sur la question qui nous occupe, tout ce que l'on peut trouver dans les règlements sur lesquels on a attiré notre attention et qui ont été produits favorise la prétention de l'intimée et que rien ne vient à l'appui de la version de l'appelant.

Sur les faits de négligence ou sur le quantum des dommages, il n'y a pas lieu d'intervenir en l'espèce.

Dans les circonstances, tant en vertu de l'admission de l'appelant qu'en vertu de la charte et des règlements qui ont été versés au dossier, nous croyons que le jugement de la Cour du Banc du Roi doit être confirmé et que l'appel doit être rejeté avec dépens.

RAND J.—The respondent suffered injuries through falling on an icy sidewalk in the city of Quebec. She brought action against the owner of the premises in front of which she had fallen. The owner called in warranty his tenant who by the terms of the lease engaged himself to the maintenance of and the removal of snow from the sidewalk. The tenant in turn called in sub-warranty the appellant Caron who had contracted with him to keep the sidewalk in proper condition and to protect him from claims for damages arising from sidewalk conditions. The owner did not defend but the appellant in his place intervened and contested the claim on its merits. The Superior Court dismissed the action but on appeal this was reversed.

The principal ground urged before us was that neither under the provisions of the city charter nor the by-laws was there a duty on the defendant to keep the sidewalk free from the danger of ice and snow, and in its absence there was no liability either under the charter or under sections 1053 or 1054 of the Civil Code.

I entertain no doubt that any duty of the defendant must be found in the charter. No provision of the Code

has been suggested which raises it. By a statute passed by the legislature of the province of Lower Canada in 1799 certain responsibilities were imposed on the inhabitants of what were then the towns of Montreal and Quebec, at that time not incorporated, in relation to the repair and upkeep of highways in winter: but this enactment was snperseded in 1850 by Vic. 13-14, province of Canada, chapter 15, which, for the purpose of removing all doubt with regard to roads and highways within the limits of the cities and towns of the province, provided that the right to the use of the public highways should be vested in the municipal corporations, that the highways should be maintained and kept in proper repair by them, and that they should be under a civil liability for all damages arising from default in that duty.

The sections of the city charter, which deal with the making and upkeep of streets and sidewalks, exhibit a patchwork of provisions but, taken together, they do not appear to leave much doubt as to their meaning or effect. Section 417 is as follows:

> The sidewalks in all the streets of the city shall be made, kept up and repaired by the proprietor of each immoveable or property fronting on such sidewalk. If such proprietor neglects to make, keep up, repair or renew such sidewalks, as the case may be, the chief of police shall give him notice in writing to do what is necessary to such sidewalks. This notice shall be addressed to or left at the domicile of such proprietor, if he is a resident of the city, or at the house of the occupant of the said immoveable, if the proprietor does not reside in the city; if the immoveable has no occupant, then the notice is not necessary.
>
> If, within eight days following the notice, the works required to be done to the said sidewalks have not been done, then such works shall be done by the corporation, which may compel the proprietor to reimburse the cost thereof. This sum is recoverable as a tax, and in the same manner, and with the same privileges as all other taxes imposed upon real estate in the city; but the proprietor, except in cases of express agreement to the contrary, has no right to oblige his tenant to reimburse him any portion whatever of the same.

That language is undoubtedly broad enough to apply to maintenance in respect of snow or ice on the sidewalk: *The City of Sydney* v. *Slaney* (1), where Duff J. (as he then was), used the following language:

> It has repeatedly been decided that natural accumulations of snow and ice on a highway may amount to disrepair within the meaning of statutes requiring municipalities to keep highways in repair.

(1) (1919) 59 Can. S.C.R. 232, at 235.

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There, as here, the injured person had fallen on a sidewalk in a slippery condition and the language of the statute imposing the duty of repair on the city was in substance the same as section 417. Under that section, therefore, the responsibility of the abutting proprietors for the maintenance and repair of the sidewalks in front of their lands extends to conditions of danger brought about by snow and ice, and it is unconditional.

Its scope, however, is simply that steps and measures reasonable under the circumstances be taken to keep the sidewalks, in a practical sense, safe for use. Matters of time, weather, and of feasibility may properly be taken into account in determining whether the duty has been met, and evidence of that nature was adduced here. From a consideration of it, however, I am not prepared to differ with the court below in the finding that the injury to the plaintiff was caused by the dangerous state of the sidewalk for which the proprietor of the abutting land must be held responsible.

The appeal should, therefore, be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *Wilfrid Desjardins.*

Solicitor for the respondent: *Pouliot & Bourget.*

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*Feb. 14, 15.
*Apr. 25

J. CHRISTIN & CIE LIMITEE (PLAINTIFF) ..... APPELLANT;

AND

ANTONIO PIETTE (DEFENDANT)..... RESPONDENT;

AND

PHILIPPE PELLETIER (DEFENDANT).. MIS-EN-CAUSE.

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

Contract—Debtor and creditor—Debtors unable to meet liabilities—Agreement between creditor and debtors—Transfer of debtors' assets to creditor—Creditor assuming payment of their debts—Failure by debtors to fulfill conditions of agreement—Action by creditor, to annul

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

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agreement, brought against both debtors A and B.—No plea filed by B. —Action dismissed by trial judge—Appeal by A. alone, to appellate court, allowed—Appeal by creditor to Supreme Court of Canada— No notice of such appeal served on B.—Motion by creditor to put B. as mis-en-cause granted by this Court—Whether B. regularly before the Court—Power of this Court to annul agreement as to both defendants.

The appellant company, manufacturer of soft drinks, had a claim of $2,966.52 against the defendant and the mis-en-cause, both distributing as jobbers its products in a certain territory. The debtors being unable to meet their obligations, the appellant company made with them a settlement called "assignment and transfer of assets". The debtors, by that agreement, transferred to the appellant all their assets, including a bottling machine as described in a contract of conditional sale passed between the debtors and the vendor. In consideration of the transfer, the appellant company undertook to pay their debts; and the debtors bound themselves to pay off a lien still existing on the machinery amounting to $1,917.70, at the rate of $60 per month and to reimburse the appellant company the monies paid by it to clear off their debts. Later on, the appellant company took proceedings against the defendant and the mis-en-cause and asked for the cancellation of the agreement on the ground that they had failed to fulfill their obligations under it. The defendant alone contested the appellant's action, alleging mainly that it was the latter that had not fulfilled its obligations by not paying the respondent's debts. The trial judge maintained the appellant company's action, which judgment was reversed by the appellate court. The mis-en-cause filed an appearance but did not plead to the action, so that judgment was rendered against him *ex-parte;* and he did not appeal, although made a mis-en-cause by the defendant before the appellate court. The notice of appeal before this Court was served only upon the defendant's attorneys. The defendant urged, as a ground of appeal before this Court, that the judgment of the appellate court refusing to annul the contract constituted *res judicata* as to the mis-en-cause and that, as to the defendant, the contract could no be annulled because his co-signer has not been served with a notice of appeal before this Court. But, before the hearing of the appeal, this Court granted a motion by the appellant company that Pelletier be put into the case as third party.

Held, reversing the judgment appealed from and restoring the judgment of the trial judge, that, upon the facts of the case, an action for annulment of the agreement was the proper remedy to be exercised by the appellant, that the defendant and the mis-en-cause were the first who failed to fulfill their obligations and that consequently the appellant company was justified in discontinuing to pay their debts: the appellant company was not bound to fulfill its own obligations when the defendant and the mis-en-cause were refusing or neglecting to fulfill theirs.

Held, also, that the mis-en-cause Pelletier was regularly before this Court and that a judgment annulling the contract between the appellant company and the two defendants before the trial court could validly be rendered by this Court. The appellant company, by being granted its demand to put Pelletier as mis-en-cause in the appeal before this Court, has been relieved of any forfeiture which it may have incurred

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by not serving to Pelletier a notice of appeal to this Court. Moreover, a statement signed by Pelletier that he did not intend to appear nor to plead was produced by him before this Court, and, nevertheless, he filed a factum and was represented by counsel at the hearing. The decision of this Court in *La Corporation de la Paroisse de St-Gervais* v. *Goulet* ([1931] S.C.R. 437) does not apply, as the facts in that appeal were totally different from those in the present appeal.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec, reversing the judgment of the Superior Court, Cousineau Louis J. and dismissing the appellant's action in annulment of an agreement passed between the appellant and the defendants.

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

Eugène Simard for the appellant.

Ubald Boisvert for the respondent.

Lucien Béliveau K.C. for the mis-en-cause.

The judgment of the Court was delivered by

TASCHEREAU J.—L'appelante, manufacturière d'eaux gazeuses, était créancière du défendeur et du mis en cause, les distributeurs de ses produits dans la région de Sherbrooke, en une somme de $2,966.52. Vu l'incapacité des débiteurs de rencontrer cette obligation, les parties en sont venues à un compromis et ont signé une entente dont les termes ne sont pas très clairs.

Le premier paragraphe de ce contrat que les parties ont appelé une "cession et transport de valeurs" stipule qu'

en considération d'une dette globale de $2,966.52, due à J. Christin et Cie Ltée, MM. Piette et Pelletier cèdent et transportent à ladite J. Christin et Cie Ltée tout leur actif et leur avoir consistant en:

(*a*) un équipement d'embouteillage et de distribution tel que décrit dans un contrat de vente passé le 6 décembre 1939 entre MM. Piette et Pelletier et Brown's Bottle Exchange Inc.

(*b*) tous les accessoires qui s'y rapportent selon Annexe "a",

(*c*) un camion White 1936 deux tonnes, série 191, moteur 8 x 611, lequel était auparavant la propriété de M. Antonio Piette.

En considération de ce transport qui lui était fait, l'appelante s'est obligée de payer les dettes de l'intimé et du mis en cause, au montant de $744.54. Cependant, il existait un lien sur les machineries en faveur du vendeur Brown's

Bottle Exchange Inc. au montant de $1,917.70, mais Piette et Pelletier ont convenu à l'écrit de payer cette dette à raison de $60 par mois, et ils ont en outre contracté l'obligation de rembourser à l'appelante tous les paiements que celle-ci ferait pour acquitter les dettes dues à leurs créanciers. Enfin, en vertu de l'écrit, un territoire dans la région de Montréal a été assigné aux intimés afin de leur permettre de continuer la vente et la distribution des eaux gazeuses de l'appelante.

Le 20 mars 1941, l'appelante a institué action contre Piette et Pelletier, et a demandé l'annulation du contrat ci-dessus parce que les défendeurs n'auraient pas rempli les obligations qu'ils avaient contractées. Seul, le défendeur Piette a contesté. L'honorable juge Cousineau de la Cour Supérieure a maintenu cette action, a en conséquence résilié le contrat et a donné acte à la demanderesse de son offre de remettre le truck et la marchandise qu'elle avait reçus. Devant la Cour du Banc du Roi, l'appel a été maintenu et l'action rejetée. C'est de ce jugement qu'il y a appel devant cette Cour.

Il ne peut y avoir de doute qu'immédiatement après la signature du contrat intervenu, chacune des parties a commencé à remplir ses obligations. Les intimés ont remis la marchandise ainsi que le truck à l'appelante, tel que convenu, et ont également remis la clef de l'endroit où se trouvait la machinerie nécessaire à l'embouteillage. L'appelante, suivant les obligations qu'elle avait contractées, a payé une partie des dettes des intimés.

Elle a ainsi payé une somme de $316.96, mais, depuis le 23 juillet 1940 à octobre de la même année, les intimés n'ont payé à Brown's Bottle Exchange Inc., pour libérer le lien qui affectait la machinerie, qu'une somme de $14.45, au lieu de $60 par mois, tel que convenu à la convention intervenue. Et comme conséquence, ils ont été forcés de remettre à Brown's Bottle Exchange Inc. les machineries en question, en dation en paiement. L'appelante a alors discontinué de payer les dettes des intimés et c'est alors qu'elle a institué l'action en résiliation de contrat.

Cette convention intervenue entre les parties a un caractère particulier, et il semble impossible de la ranger au nombre des contrats nommés. Certains ont cru voir dans le transport de la marchandise, du truck et de la machinerie,

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Taschereau, J.

par les intimés à l'appelante, les éléments de la vente, et ont invoqué l'article 1512 C.C. pour conclure que le recours de l'appelante n'est pas une demande en rescision du contrat, mais se limite à exiger le remboursement du prix de la machinerie, dont l'appelante aurait été évincée.

Je ne puis accepter cette prétention. Pour obtenir ce transport qui lui a été fait, l'appelante a assumé certaines obligations, et a peut-être même renoncé à sa créance, ce qui cependant n'est pas du tout certain.

En admettant la prétention des intimés, c'est le prix que l'appelant aurait payé. Pour obtenir le remboursement de ce prix, il faut de toute nécessité qu'elle se fasse libérer par le tribunal de l'obligation de remplir ses engagements, et aussi qu'elle obtienne que sa créance contre les intimés revive. Ce résultat ne peut être atteint que par une action en annulation du contrat.

Les obligations diverses, toutes liées les unes aux autres, que fait naître cette entente, portent à croire qu'il s'agit plutôt d'un contrat innommé, *sui generis*, qui doit être régi par les principes généraux des obligations. Les parties ont assumé des obligations réciproques, comprises dans un tout qui ne peut être divisé, et qui doit être maintenu ou annulé dans son ensemble. Un semblable contrat contient un pacte commissoire, une clause tacite de résolution. L'article 1184 du Code Napoléon a sur ce sujet une disposition expresse que notre Code ne contient pas, mais il est bien admis chez nous, que si l'une des parties n'exécute point son obligation, l'autre n'est pas tenu d'exécuter la sienne, et la résolution peut être demandée et prononcée par le tribunal.

Dans la cause qui nous est soumise, la preuve révèle que l'appelante, et c'est d'ailleurs la conclusion à laquelle le juge de première instance en est arrivé, a rempli toutes ses obligations. Elle a commencé à payer les dettes des intimés s'élevant à $744.54, jusqu'à concurrence de $316.96. Ce n'est que lorsqu'elle a réalisé que les intimés ne remplissaient pas leurs propres obligations qu'elle a discontinué de faire les paiements, comme elle avait convenu, et avec déférence, je suis d'opinion qu'elle avait raison d'agir ainsi. En effet, les intimés, comme nous l'avons vu, avaient transporté à l'appelante la machinerie nécessaire à l'embouteillage, laquelle machinerie avait une valeur de $3,000,

mais sur laquelle il existait en faveur de Brown's Bottle Exchange Inc. un lien au montant de $1,917.70, qui permettait au vendeur de la reprendre à défaut de paiement. L'appelante croyait sans doute que lorsque les intimés auraient rempli leur obligation de payer $60 par mois, cette machinerie, libre de tout lien, lui servirait à se payer de sa créance. Au lieu d'agir ainsi, les intimés, du 23 juillet 1940 à octobre 1940, n'ont payé que la somme de $14.45, avec le résultat que la Brown's Bottle Exchange Inc. a repris la machinerie.

Piette et Pelletier prétendent que cette dation en paiement a été faite à la connaissance de l'appelante. Il est certain que celle-ci le savait, mais ceci ne peut pas affecter le résultat du litige. Comment en effet pouvait-elle empêcher le créancier de reprendre son bien, s'il n'était pas payé? La seule façon eût été pour l'appelante de payer elle-même la dette due à Brown's Bottle Exchange Inc., mais l'appelante n'avait pas contracté cette obligation qui, au contraire, avait été assumée par le défendeur et le mis-en-cause.

Les intimés ont aussi soutenu qu'en consentant en faveur de Brown's Bottle Exchange Inc. cette dation en paiement, leur obligation vis-à-vis de l'appelante était remplie, vu que Brown's Bottle Exchange Inc. n'avait plus de réclamation contre eux.

Je ne puis partager cette manière de voir. L'obligation des intimés était de payer $60 par mois, afin de faire disparaître le lien sur cette machinerie. En faisant cette dation en paiement, ou cette remise à Brown's Bottle Exchange Inc., les intimés ont sans doute exécuté l'obligation assumée vis-à-vis de leur créancière, mais, certes, pas celle à laquelle ils étaient tenus envers l'appelante.

Il me semble clair que les intimés ont failli à leur obligation les premiers, et qu'en conséquence l'appelante était justifiable de discontinuer de payer leurs dettes. Elle n'était pas tenue d'exécuter ses propres obligations quand les intimés refusaient ou négligeaient de remplir les leurs.

C'est avec raison que le juge de première instance a résilié le contrat et a donné acte à l'appelante de son offre de remettre la marchandise, ainsi que le truck.

Les intimés invoquent un second moyen pour faire rejeter le présent appel.

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L'action de l'appelante-demanderesse a été dirigée à la fois contre Piette et Pelletier. Piette a comparu par ses procureurs, et Pelletier a aussi comparu par l'intermédiaire des siens, mais seul le premier a produit un plaidoyer à l'action, et le jugement contre le dernier a été rendu *ex parte*. Piette a appelé en Cour du Banc du Roi du jugement qui a ainsi annulé le contrat, et son inscription a été signifiée à MM. Trudel, Simard et Beaudet, avocats de J. Christin & Cie Ltée, ainsi qu'à Mtres Leblanc et Filion qui, en Cour Supérieure, avaient comparu pour Philippe Pelletier. Ce dernier n'a pas produit d'inscription en appel, mais était mis-en-cause en Cour du Banc du Roi.

Comme résultat du jugement rendu par la Cour du Banc du Roi, l'appel de Piette fut maintenu, et ce jugement a bénéficié non seulement à Piette mais aussi à Pelletier. Devant cette Cour, l'avis d'appel de Christin n'a été signifié qu'aux procureurs de Piette.

On prétend que le jugement de la Cour du Banc de Roi, refusant de résilier le contrat, constitue chose jugée quant à Pelletier, et que quant à Piette le contrat ne peut pas être annulé, vu que son cosignataire n'a pas reçu signification de l'avis d'appel.

A l'appui de cette prétention, on a cité la cause de *La Corporation de la Paroisse de St-Gervais* vs *Goulet* (1). Je ne crois pas que cette cause puisse avoir d'application, car les faits en cette affaire étaient différents. Le demandeur Goulet avait pris une action contre la corporation de la paroisse de St-Gervais et contre certains entrepreneurs, pour faire mettre de côté un règlement adopté par la corporation municipale de St-Gervais, ainsi qu'un contrat intervenu entre ladite corporation et les entrepreneurs. En Cour Supérieure, l'action du demandeur avait été rejetée. Le demandeur Goulet interjeta appel de ce jugement, mais contre la corporation de la paroisse de St-Gervais seulement, de sorte que, devant la Cour du Banc du Roi, les entrepreneurs n'étaient pas parties au litige. La Cour du Banc du Roi a renversé le jugement de première instance et a annulé le contrat. Cette Cour a alors décidé que la Cour du Banc du Roi ne pouvait pas annuler ce contrat entre la corporation de la paroisse de St-Gervais

(1) (1931) S.C.R. 437.

et les entrepreneurs, parce que ces derniers n'étaient pas parties devant la cour d'appel. Et M. le juge Rinfret, parlant pour cette Cour, a dit:

> Or, dans l'espèce, les entrepreneurs n'étaient pas devant la Cour du Banc du Roi, et il n'est plus possible de les mettre en cause parce que, en ce qui les concerne, nonobstant l'appel contre la corporation municipale, la première décision conserve toute sa force et a acquis l'autorité de la chose jugée. Ils ne peuvent plus être appelés à venir défendre des contrats qui, à leur profit, ont été définitivement jugés valides.

Dans la présente cause, la situation est entièrement différente. Les défendeurs n'ont pas entre eux un contrat qu'un tiers veut faire déclarer illégal et nul, mais ils sont tous deux signataires, conjoints et solidaires, à un contrat avec J. Christin & Cie Ltée. Il y a de leur part, unité d'obligation, et des moyens de défense communs.

Il est vrai que Pelletier n'a pas reçu signification de l'avis d'appel en Cour Suprême du Canada, mais ceci n'empêche pas, je crois, cette Cour d'annuler le contrat intervenu.

La règle générale est à l'effet que lorsqu'une décision est frappée d'appel par quelques parties seulement qui figuraient au procès, la décision d'une cour d'appel n'a d'effet qu'à leur égard. Le jugement concernant les parties qui n'ont pas appelé, se trouve à acquérir l'autorité de la chose jugée. L'inverse est également vrai, et l'appel interjeté contre l'une des parties, comme dans le cas qui nous occupe, n'empêche pas la décision d'avoir l'autorité de la chose jugée au profit des parties qui n'ont pas été intimées.

Telle est l'opinion émise par plusieurs auteurs, entre autres par Glasson & Tissier (Traité de procédure civile, vol. 3, page 298), mais ils disent aussi que la jurisprudence en France admet une première exception à ce principe, lorsque le litige est indivisible, c'est-à-dire lorsque l'indivisibilité absolue de l'objet litigieux rendrait impossible l'exécution simultanée des deux décisions. En ce cas, l'appel interjeté par le créancier à l'égard d'une des parties vaut à l'égard de toutes.

C'est aussi l'opinion de Japiot (Procédure civile et commerciale, page 638). Voici ce que dit cet auteur:

> Le principe est toujours constitué par la relativité de l'effet de l'appel: l'appel n'a d'effet, ne permettra de conclure devant la Cour et de faire réformer par celle-ci le jugement au profit de l'appelant, que contre celles des parties adverses contre lesquelles l'appel aura été formé.

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Pour le cas d'invisibilité, la jurisprudence apporte la même exception au principe de la relativité et décide que l'appel formé contre un des copropriétaire, par exemple, permettra la réformation du jugement même au détriment de l'autre.

Dans une cause de *Montreal Agencies Ltd. vs. Kimpton* (1), M. le juge Rinfret, parlant pour la Cour, a référé à cette théorie de Japiot qu'il semble accepter implicitement.

Glasson & Tissier ajoutent, à la page 301, que l'on doit considérer comme indivisible (et ils citent à l'appui une jurisprudence constante), entre autres, la demande *en nullité d'une vente* ou d'un testament, de même que l'action possessoire dirigée contre plusieurs copropriétaires indivis.

Mais, il ne faudrait pas croire, parce que la matière est indivisible, que le créancier, dont l'action dirigée contre plusieurs débiteurs a été rejetée, puisse se dispenser de mettre en cause tous les intéressés. Les mêmes auteurs expliquent en effet, à la page 300:

> La jurisprudence doit donc être interprétée en ce sens qu'en cas d'indivisibilité, l'appel régulièrement interjeté contre l'une des parties relève l'appelant de la déchéance qu'il aurait encourue vis-à-vis des autres, en n'interjetant pas régulièrement appel contre ces dernières dans les délais, mais il n'en est pas moins nécessaire que toutes les parties soient mises-en-cause avant l'arrêt, à peine d'irrecevabilité de l'appel.

C'est précisément ce qui a été fait dans la présente cause, et avant l'audition, l'appelante a fait motion pour que Pelletier fût mis-en-cause, et cette Cour, s'autorisant de la Règle 50, a accordé la demande. Cette Règle dit en effet:

> Dans chaque cas non déjà prévu par la loi où il devient nécessaire d'ajouter, comme appelante ou intimée, une partie additionnelle à l'appel, que cette procédure s'impose par suite du décès ou de l'insolvabilité d'une partie déjà inscrite, ou *pour toute autre cause*, cette partie additionnelle peut être ajoutée à l'appel par la production d'une déclaration qui peut être selon la Formule C de l'Annexe des présentes Règles.
>
> 2. Dans tout appel, la cour peut, sur ou sans la requête de l'une des parties, ordonner qu'il soit ajouté une partie ou des parties intimées, lorsque, de l'avis de la cour, une telle ordonnance est juste, opportune et nécessaire pour lui permettre de juger et régler efficacement et complètement la question en jeu dans l'appel, et lorsque, d'après les faits produits devant elle, la cour est d'avis que ladite partie ou lesdites parties intimées auraient dû être ajoutées par le tribunal dont la décision fait l'objet de l'appel.

(1) (1927) S.C.R. 598, at 602.

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En obtenant ainsi que Pelletier fût mis-en-cause, l'appelante a été ainsi relevée de toute déchéance qu'elle aurait pu encourir, en ne signifiant pas à toutes les parties intéressées son avis d'appel.

De plus, lors de l'audition de cette demande, la Cour a pris connaissance d'un document signé par Pelletier, à l'effet qu'il n'avait pas l'intention de comparaître ni de plaider devant la Cour Suprême du Canada dans le présent appel, et qu'il s'en rapportait à la justice; et cependant, malgré cette déclaration, il a tout de même produit un factum, et a été représenté par procureurs.

Je ne puis faire autrement que de conclure que Pelletier, le mis-en-cause, était régulièrement devant cette Cour, et qu'un jugement annulant le contrat intervenu entre l'appelante et les deux défendeurs originaires en Cour Supérieure, peut être validement prononcé.

Le présent appel doit donc être maintenu, et le jugement du juge de première instance doit être rétabli avec dépens de toutes les cours.

Appeal allowed with costs.

Solicitors for the appellant: *Trudel & Simard.*

Solicitor for the respondent: *Ubald Boisvert.*

Solicitor for the mis-en-cause: *Lucien Béliveau.*

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*Mar. 2, 3.
*June 22.

JOHN ROBERT LISTER (PLAINTIFF).. APPELLANT;

AND

R. N. McANULTY (DEFENDANT)..... RESPONDENT.

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

International law—Husband and wife—Negligence—Automobile accident—Injury to wife—Action for damages by husband—Husband suing as head of community—Consorts married in Quebec without contract, but domiciled in the state of Massachusetts, U.S.A.—Separation as to property being the rule under law of that state—Right of husband to recover damages—Hospital and out-of-pocket expenses made by him

*PRESENT:—Rinfret C.J. and Hudson, Taschereau and Rand JJ. and Thorson J. *ad hoc.*

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recoverable under both laws—Damages for loss of companionship (consortium) or for loss of wife's services (servitium) not recoverable under Quebec law—Damages for probable future expenses recoverable under Quebec law, such as payment of help necessitated through wife's disability.

Where a husband, purporting to act as head of the community of property, brings an action for damages resulting from bodily injuries suffered by his wife following an automobile accident in the province of Quebec, and it appears that the consorts, though married in Quebec, without a marriage contract, had their domicile in the state of Massachusetts, in the United States of America, where separation as to property is the rule in such a case,

Held that the husband is governed, being domiciled in Massachusetts, by the laws of that state as to *his status and capacity* and all his other rights are to be determined by the laws of Quebec. The laws of Massachusetts and Quebec are both applicable, one in respect of some of the damages claimed by the husband and the other in connection with other kind of damages.

Held, also, that the husband was entitled under both laws to recover hospital and other out-of-pocket expenses made by him as a result of the accident.

Held, by a majority of the Court, that the husband was not entitled to the item of damages covering the loss of his wife's companionship (*consortium*). Hudson and Rand JJ. would have allowed an additional sum of $1,000 in compensation of such loss.

Held, further, reversing the judgment appealed from on that point, that damages for probable future expenses were recoverable by the husband under Quebec law. These expenses were alleged by the husband to have to be incurred by him for the payment of a maid, housekeeper or other kind of help that will be necessitated to help or replace appellant's wife owing to her permanent disability resulting from the accident.

Per The Chief Justice, Taschereau J. and Thorson J. *ad hoc:* These future expenses are distinguishable from damages resulting from loss of wife's services (*servitium*), which services are not recoverable under Quebec law.

Judgment appealed from (Q.R. (1943) K.B. 184) reversed.

APPEAL from a judgment of the Court of King's Bench, appeal side, province of Quebec (1), affirming a judgment of the Superior Court, Errol M. McDougall (2). The appellant brought an action for damages resulting from injuries suffered by his wife following an automobile accident. The Superior Court held that the appellant had made good his demand to an amount not exceeding a tender and deposit made by the respondent and that the respondent has made good his defence as to the remainder of the appellant's claim, and consequently dismissed the appellant's action for the surplus.

(1) Q.R. (1943) K.B. 184. (2) (1940) Q.R. 78 S.C. 577

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

L. E. Beaulieu K.C. and *J. Barcelo* for the appellant.

Wm. F. MacKlaier K.C. and *Gordon Henderson* for the respondent.

The judgment of The Chief Justice and of Taschereau J. and of Thorson J. *ad hoc* was delivered by

TASCHEREAU J.—During the summer of 1938, while a passenger in an automobile owned and driven by the defendant, appellant's wife was seriously injured. She was made a complete cripple for many months, and a partial invalid for the rest of her life. The accident happened near Coaticook in the province of Quebec, and the liability of the respondent is not an issue before this Court. The question raised is purely a matter of private international law; and if decided in favour of appellant, he will be entitled to a substantially increased amount.

The appellant-plaintiff took action in the city of Montreal, and claimed the sum of $18,250.34 and, in the writ of summons he describes himself as

> John Robert Lister, manager, husband common as to property of Isabella Teresa McAnulty, both of Leominster, in the State of Massachusetts, one of the United States of America, in his capacity of head of the community existing between himself and his wife, as well as personally.

In his declaration as amended he claimed:

> (*a*) Bills for all expenses incurred for transport and treatment and also for help in the house up to the 22nd day of July, $750.34.
>
> (*b*) For sufferings endured and to be endured in the future by his wife, $2,500.
>
> (*c*) Permanent disability of the wife, covering the payment of a maid, housekeeper or any kind of help that will be necessary to help or replace plaintiff's wife, $15,000.
>
> Total, $18,250.34.

Plaintiff was ordered by judgment to furnish details as to the amount of $15,000 and the particulars furnished were as follows:

> (1) Damages suffered by plaintiff to secure a maid, housekeeper or any kind of help that will be necessary to help or replace his said wife, $10,181.
>
> (2) Companionship and assistance, $2,000.
>
> (3) For wife's permanent disability, $2,819.
>
> Total, $15,000.

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After having denied his liability, the defendant alleged in his plea, that plaintiff and his wife were married without a marriage contract, that the husband's domicile, at the time of his marriage in Montreal, was not in the province of Quebec, but in the State of Massachusetts, and that, according to the laws of that state which determined the matrimonial status of appellant and his wife, they were not common, but separate as to property, and that plaintiff has no right or title to assert or recover any damages which are personal to his wife.

It is further alleged, that plaintiff and his wife at the time of the accident were, and are still domiciled in the State of Massachusetts, and that, therefore, he and his wife are governed as to their status and capacity by the laws and statutes of the State of Massachusetts.

It would follow, if the defendant is right, that the husband could not claim on behalf of his wife the sum of $2,819 for permanent disability nor the sum of $2,500 for sufferings endured and to be endured in the future by his wife. It would also follow that plaintiff has no right to claim or recover other than the damages, if any, actually and directly suffered by him from the said accident.

Defendant also strongly denied plaintiff any right to claim or recover $2,000 for loss of companionship and assistance, and $10,181 for damages personally suffered

to secure a maid or housekeeper or any kind of help, that would be necessary to help or replace his said wife

because such items are not recoverable, under the laws of Massachusetts, which, it is alleged, must govern this case.

Without prejudice, but in order to purchase his peace, defendant tendered to plaintiff and deposited in court an amount of $1,250 and costs, in full of all claims of the plaintiff. This amount of $1,250, it is said, substantially exceeds the damages actually and directly suffered by plaintiff, and the amount which would be legally recoverable if defendant were under any legal liability to him, which liability, however, despite the tender was clearly denied.

In the Superior Court, Mr. Justice Errol M. McDougall declared the tender and deposit made by defendant good and sufficient, and dismissed plaintiff's action for the surplus, with costs. He reached the conclusion that

plaintiff was entitled only to his out-of-pocket expenses, $750.34, but that must be excluded from the amount of damages to be paid, the sum of $2,500 for pains and sufferings, and the item of $15,000 which could be claimed only by the wife.

Without accepting all the reasons given by Mr. Justice McDougall, the court of appeal came to the conclusion that there was no error in the "dispositif" of the judgment appealed from, and dismissed the appeal with costs against the appellant.

There can be no doubt in my mind that appellant's domicile was in the State of Massachusetts. He was born in Scotland, and then came to Montreal where he lived during seven years. He afterwards left that city saying that he was "tired of living there", and went to Leominster, Massachusetts, but, four years later, he came back to Montreal for the sole purpose of getting married, and immediately after returned with his wife to Massachusetts, where he has lived since for over forty years. It seems clear that the appellant had an actual residence in the State of Massachusetts, and that this fact was coupled with his intention of making that place the seat of his principal establishment. These are the legal requirements under article 80 of the Civil Code to operate a change of domicile, and I fully agree with the courts below, which have come to the conclusion that the domicile of the appellant was in the State of Massachusetts.

It is true, that in Montreal, when he married, the appellant did not go through the formalities of a marriage contract, and that under the laws of the province of Quebec, he would be common as to property with his wife and thus entitled, if domiciled in Montreal, to institute the present action, the way he did. But, under the laws of his domicile, this system of community is unknown, and separation of property exists, when there is no marriage contract. The wife is on an equal footing with her husband as to the exercise of her civil rights, and any action for personal injury must therefore be instituted by her. As a result of this, the sum of $2,500 for sufferings endured and to be endured in the future by the wife, and the sum of $2,819 for her permanent disability cannot be claimed by the

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husband, and were rightly abandoned in the court of appeal by appellant. These items are personal to the wife, and cannot belong to a community which does not exist.

The plaintiff, however, claims that he is entitled to the sum of $2,000 for loss of companionship (*consortium*) and of his wife's services (*servitium*), and that he is also entitled to claim $10,181 being the damages suffered by him to secure for the future, a maid, housekeeper or any kind of help that will be necessary to help or replace his wife. These, he says, are personal items, which were wrongly denied by the courts below, and which, even if refused by the laws of Massachusetts which have no application, are recoverable under the laws of Quebec.

The last paragraph of article 6 of the Civil Code reads as follows:

> An inhabitant of Lower Canada, so long as he retains his domicile therein, is governed, even when absent, by its laws respecting the status and capacity of persons; but these laws do not apply to persons domiciled out of Lower Canada, who, as to their status and capacity, remain subject to the laws of their country.

The plaintiff, therefore, is governed, being domiciled in Massachusetts, by the laws of that State but only as to his *status and capacity*. All his other rights are to be determined by the laws of the province of Quebec. If the latter laws apply, appellant is clearly entitled to more than what the courts have allowed him, but if the laws of Massachusetts are to govern this case, the amount awarded seems sufficient.

The laws of Massachusetts have been explained and discussed at the trial. Mr. John E. Hannigan, of Boston, Massachusetts, a lawyer of some fifty years of practice at the Massachusetts Bar, and lecturer on damages, contracts and torts at the Law School of Boston University, has been heard as an expert on foreign law, on behalf of the respondent. The reading of his evidence leaves no doubt in one's mind, that the conception of marriage, and the reciprocal obligations arising therefrom are entirely different in Massachusetts from what they are here. He explained in a very elaborate testimony the *status* of married persons in the State of Massachusetts, and concluded, that if the present action had been instituted in the state where he lives, only the out-of-pocket expenses, made prior to the trial ($750.34), would be allowed. In view of the legal rights and obligations of hus-

band and wife, towards each other, he says that plaintiff could not claim for loss of *consortium* or *servitium*, nor for future expenses to be incurred by him for the care of his invalid wife.

The wife, since she has been emancipated, has no obligations towards her husband; she has the right to live with him, to be his companion, to enjoy his society, to share his home, but is not bound to do so. The same rule applies as to *servitium*. She is free to be a housewife or not, and to fulfill these ordinary duties, which are fulfilled in some other countries, and which flow necessarily from the status of married persons. The husband is not as of right entitled to this companionship, and to the services and assistance of his wife.

The logical legal consequence is that, whenever she suffers personal injuries, as a result of a delict or quasi-delict, of which a third party is the author, and made crippled, the husband cannot claim for loss of *servitium* and *consortium*. He has lost nothing to which he was entitled. There has been no invasion of his rights.

As to the husband's right to claim damages for future expenses, it is, according to the learned expert's views, denied in the State of Massachusetts. Although the husband, as a result of his status, is bound to care for his wife, even if he is poor and she is rich, he may claim personally only for out-of-pocket expenses, up to the time of the trial. It is practical justice, says Mr. Hannigan, that this claim should belong to the wife personally. If the husband did obtain damages on that ground, he would not hold the money in trust for his wife, but it would be his personally. The fact cannot be ignored that there are frequent divorces and terminations of marriages, which leave the wife alone, and unprotected. In support of these propositions, Mr. Hannigan has cited many authorities. It is of course within the powers of this Court to examine these authorities and to construe them, because, having been cited by the expert, they become part of his evidence. As it has been said by Sir Lyman Duff, in *Allen* v. *Hay* (1), 64 S.C.R. at page 81:

> These experts may, however, refer to codes and precedents in support of their evidence and the passages and references cited by them will be

(1) (1922) 64 S.C.R. 76, at 81.

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treated as part of their testimony; and it is settled law that if the evidence of such witnesses is conflicting or obscure the Court may go a step further and examine and construe the passages cited for itself in order to arrive at a satisfactory conclusion.

Vide also: Halsbury Laws of England, 2nd Ed., Vol. 13, at page 615:

> If, however, the witness produces any text book, decision, code, or other legal document, as stating or representing the foreign law, the court, on looking at or dealing with these books and documents, is entitled to construe them and form its own conclusion thereon. The court, in deciding on foreign law as a fact, is not bound to accept the construction put upon it by the expert, even if uncontradicted, nor is it bound to accept the decision of foreign courts as correctly setting out the law of the foreign state.

I have read with interest and care all the authorities cited, and I have reached the conclusion that a fundamental difference exists between the claim of the appellant for loss of *consortium* and *servitium,* and his claim for future expenses to be incurred by him for the care of his wife.

I have cited previously article 6 of the Civil Code. It must not be forgotten that persons domiciled outside the province of Quebec, when in the province, are governed by its laws. They remain subject to the laws of their country only as to their status and capacity.

The status of an individual is the whole of his juridical qualities, which the law takes into consideration to attach thereto legal effects. Capacity, very often the consequence of a person's status, is merely the aptitude to have and exercise rights, and accomplish juridical acts. Thus, the quality of Canadian, of major or infant, of husband or wife, of legitimate or illegitimate son, is a question of juridical status, reserved by law to the person. This is what has to be taken into account for the determination of this case. All evidence adduced beyond what is necessary to determine the status of the plaintiff, as a husband, is quite irrelevant.

As it has been said by Earl of Halsbury speaking for the Judicial Committee of the Privy Council in *De Nicols* v. *Curlier* (1).

> There is no real conflict between the learned persons who have given evidence on this question. One of them indeed, besides giving evidence as to what the French law is, upon which he is an authority

(1) [1900] A.C. 21, at 24.

entitled to respect, has also gone on to express an opinion upon how that law should be treated in this country, upon which subject he is no authority at all; and indeed such a question is not the subject of evidence at all, but pure matter of English law for English courts to decide.

Mr. Hannigan, in answer to questions put to him by respondent's solicitor, dealt not only with the status of the plaintiff as a consequence of his marriage, and his reciprocal rights and obligations as such towards his wife, but went further, and gave a very interesting but irrelevant lecture on the law of torts and damages.

The law in the province of Quebec is as stated by the Judicial Committee in *De Nicols* v. *Curlier* (1). A foreigner who is a plaintiff before our courts and prays for a relief as a result of a quasi-delict committed in Quebec, and causing injury to his wife, has to prove his status; and then, the question is not: what would he get in Massachusetts with this proven status? But rather what amount is he entitled to under the Quebec laws relating to torts and damages? Obviously, the same situation would arise in the case of a minor, domiciled in the United States, suing in damages before our courts, to claim compensation for a breach of contract executed in the province of Quebec. He would have to show that in the country of his domicile, he has the capacity to enter into a contract and to institute legal proceedings. But his right of action, and the extent of his damages would undoubtedly be determined by the laws of Quebec, and not under the laws of his domicile, which have no application whatever.

The present case must be governed by the same rules.

We know the status of the plaintiff, and what are his rights and obligations towards his wife. Underlying his status of husband there is no right to the *consortium* of his wife, nor to *servitium*. This is the principle, I think, that may be found flowing from the evidence of Mr. Hannigan, and from the authorities cited by him, and which he has fully explained. What the appellant claims he has lost, is not due him under the laws of his domicile as naturally attaching to his status. He has suffered no invasion of his rights, which is a fundamental condition to give rise to an action in damages.

The question of the right of the appellant to damages for future expenses is quite different. The evidence is clear

(1) [1900] A.C. 21.

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that a husband is obliged to provide for his wife, and pay all expenses that are necessary to satisfy this obligation. And this obligation exists whatever the means of the husband are, and is inherent to the quality of husband. It is truly an incident of the status of the plaintiff.

Through the injury sustained by his wife, plaintiff's rights have been affected, and an obligation has arisen for him to provide for the necessaries that are required by the condition in which his wife is now. On this point, appellant is entitled to succeed.

I do not forget that such damages are not recoverable under the laws of Massachusetts, but this Court ought not to be concerned with the views that may take other courts on the subject. The plaintiff has shown what his status is, and what are the obligations towards his wife, as a result of his quality of husband. He has satisfied the provisions of section 6 of the Civil Code, and it is now for the Quebec courts to determine what rights he has with this imported status, under the laws of Quebec. To hold otherwise would be a violation of article 6 C.C. for it would mean that a foreigner suing in Quebec, for damages that occurred in Quebec, is governed by the laws of his domicile, not only as to his status and capacity, but also as to the law of torts and damages.

This being the case, the appellant is personally entitled to damages for future expenses. The evidence is sufficient to allow this Court to assess them as the trial judge would have done, if he had come to the conclusion that plaintiff was entitled to any.

I think, taking into consideration the severity of the injury suffered by appellant's wife, the permanent incacity that will make her an invalid for life, her age, and the probable future expenses that will be incurred by appellant, that a sum of $3,000 would be fair and equitable.

The appeal should, therefore, be allowed with costs throughout, and the tender of $1,250 made by defendant should be declared insufficient. There should be judgment for $3,750.34 with interest since the date of the judgment of the Superior Court, less interest on the amount of $1,250 already paid.

HUDSON J.—The facts giving rise to the questions still in controversy between these parties are few and simple.

A husband and wife married in Quebec were domiciled in Massachusetts. The wife came to Quebec on a visit and while there was injured in an automobile accident arising through the defendant's negligence. This action for consequent damages was brought by the husband alone in a Quebec court.

At the trial the husband was awarded damages for expenses incurred for doctors' fees, nursing and so forth, but was denied his claim in respect of two other matters: (1) the loss of his wife's services; (2) the loss of *consortium*. This judgment was upheld on appeal.

We have here to consider only the quantum of damages and the two items last above mentioned.

The plaintiff's claim to damages is based on article 1053 of the Civil Code which reads as follows:

> Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect or want of skill.

The plaintiff himself suffered no physical injury in the accident. His loss was indirect. At one time the application of article 1053 C.C. to such a person was open to question. However, by a majority decision of this Court in the case of *Regent Taxi and Transport Co.* v. *La Congrégation des Petits Frères de Marie* (1), this was settled in the plaintiff's favour.

Where, as here, the wrong is committed in Quebec and the action is taken in a Quebec court, article 1053 C.C. applies irrespective of the domicile of the parties (except as provided in article 6 of the Code). It is said in Lafleur's Conflict of Laws, p. 198:

> When an offence or quasi-offence is committed within the Province of Quebec and the action for damages is brought before our Courts, there is no conflict, the *lex fori* and the *lex loci delicti commissi* being the same. Such a case appears to come within the meaning of art. 6 of the Civil Code, which enacts that the laws of Lower Canada relative to persons apply to all persons being therein, even to those not domiciled there (saving the exception as to laws governing status and capacity). Accordingly, if a delict is committed in this province by natives or foreigners, the law to be applied by our courts is undoubtedly our own law, and whether the law of the offending or injured party does not create civil liability in such case is immaterial.

(1) [1929] S.C.R. 650.

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and in Johnson's Conflict of Laws, vol. III, p. 340:

> The purpose of the law of delictual responsibility is to protect individuals against wrongful acts by which they suffer loss or prejudice; to indemnify them in money damages. Article 1053 C.C. makes every person who is capable of discerning right from wrong, responsible for damage caused by his fault to another, whether by positive act, imprudence, neglect or want of skill. This is a general rule, applicable by first intention to delicts committed within the province whatever their nationality or domicile. In that sense, it is a rule designed for public safety, and is a rule of public policy.

These statements accord with the generally recognized rule of private international law.

It must be kept clearly in mind that what we must consider now is the damage to the husband, and only such damage as arises by reason of his relationship with his wife who was the immediate victim of the accident.

I have had an opportunity of reading the judgment prepared by my brother Taschereau in this case and agree with what he says as to the expenses incurred and to be incurred by the plaintiff.

It is in evidence that the plaintiff and his wife were married in Quebec and thereafter lived together in amity and mutual helpfulness for many years and with a reasonable expectation of a continuance of this happy state, until disturbed by the accident due to the fault of the defendant. As stated by Mr. Justice Prévost in the court below:

> Devant cette Cour, l'appelant reconnaît que son régime matrimonial est la séparation de biens, en vertu des lois de l'Etat du Massachusetts, où il a son domicile depuis plus de quarante ans; et il renonce à deux chefs de dommages-intérêts allégués dans son action, savoir: ceux qui se rapportent aux souffrances physiques de sa femme, et à l'incapacité permanente de celle-ci. Mais il insiste sur les deux derniers. Il dit et il a prouvé que sa femme jusqu'à la date de l'accident tenait seule sa maison, où elle excellait à tous les travaux du ménage. Désormais il lui faudra une ménagère qui lui coûtera $18.00 à $20.00 par semaine; ce qui justifie une indemnité de $10,000.00.
>
> Il dit et il a prouvé que sa femme était une charmante compagne et une épouse modèle; mais que depuis l'accident, elle est sourde, ne voit que d'un œil, souffre constamment, doit coucher sur des planches; et que pour cela elle est devenue nerveuse, irritable, taciturne, intolérante; ce qui gâte irrémédiablement sa vie conjugale, et justifie une indemnité de $2,000.00.
>
> Si l'on applique la loi du Québec, où le quasi-délit a été commis, l'appelant a droit à une indemnité; si on applique la loi du domicile de l'appelant, il n'a droit à rien.

It is hardly open to dispute that the facts here would justify an award of damages under the law of Quebec. The mutual obligations of husband and wife are set forth in articles 173, 174 and 175 C.C. as follows:

173. Husband and wife mutually owe each other fidelity, succor and assistance.

174. A husband owes protection to his wife; a wife obedience to her husband.

175. A wife is obliged to live with her husband, and to follow him wherever he thinks fit to reside. The husband is obliged to receive her and to supply her with all the necessities of life, according to his means and conditions.

Any wrongful interference by a third person with the enjoyment of the rights and privileges of either husband or wife would in my opinion be a proper subject for relief under article 1053 C.C. Recognition by law of such a right by the husband and a remedy for its breach is common throughout most of the civilized world. Under the common law in England from medieval times onwards a writ of trespass might be issued for injury done to a servant *per quod servitium amisit,* and by analogy an action lay in trespass or case for injury done to a wife or child *per quod consortium* or *servitium amisit.* At the present time such a right of action is recognized. See Salmond on Torts at p. 391:

It is a tort actionable at the suit of a husband to take away, imprison, or do physical harm to his wife, if (*a*) the act is wrongful as against the wife, and (*b*) the husband is thereby deprived of her society or services. A husband has a right as against third persons to the *consortium et servitium* of his wife, just as a master has a similar right to the *servitium* of his servant. Any tortious act, therefore, committed against the wife is actionable at the suit of her husband, if he can prove that he was thereby deprived for any period of her society or services.

It should be observed here that this remains the law, notwithstanding the so-called emancipation of women where under legislation they have been given, in both England and elsewhere, approximately equal rights with men as to property and otherwise before the law.

The common law on this subject was introduced in the United States and is still generally recognized in principle. As stated in 30 Corpus Juris at p. 961:

A personal injury to a married woman caused by the tort of a third person gives rise to two causes of action; one for her personal pain and suffering, and the other for the husband's consequential loss of her society and services and for expense incurred for medical attention and nursing.

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This statement is supported by reference to decisions of the courts of many states. In the case of *Fink* v. *Campbell* (1), a United States Circuit Court consisting of Taft (afterwards Chief Justice Taft), Lurton and Hammond JJ. stated the law to be as follows:

> Two entirely separate causes of action may arise from an injury to the person of a wife during the disability of coverture, one for injury to her, and the other for the damages resulting to the husband from the loss of her services and society as a consequence of the injury. Though these rights of action have their origin in the same injuries, the damages are distinct and cannot be recovered in one action.

Similar decisions were given in a number of the Canadian provinces.

It is inconceivable that the rights of a husband in Quebec are more restricted than those in common law jurisdiction.

It is claimed, however, on behalf of defendant, and it has been held by the courts below, that the plaintiff is not entitled to recover because the matrimonial domicile was in the State of Massachusetts, that the law of that state governs and no such right of action for a husband is there recognized.

In support of this view, reliance is placed upon the final paragraphs of article 6 of the Civil Code:

> An inhabitant of Lower Canada, so long as he retains his domicile therein, is governed, even when absent, by its laws respecting the status and capacity of persons; but these laws do not apply to persons domiciled out of Lower Canada, who, as to their status and capacity, remain subject to the laws of their country.

It will be noted, however, that the preceding paragraph in article 6 C.C. provides:

> The laws of Lower Canada relative to persons, apply to all persons being therein, even to those not domiciled there; subject, as to the latter, to the exception mentioned at the end of the present article.

With respect, I am of opinion that the question here involved is not one of status within the meaning of this article. The marriage has not been dissolved or annulled. The parties are still husband and wife. The husband is still the head of the matrimonial regime and with obligations incidental thereto; for example, the maintenance of the wife and family. There is no suggestion that either husband or wife has repudiated or intends to repudiate the mutual obligations entered into by them when they were married in Quebec. What the plaintiff claims is

(1) (1895) 70 Fed. Rep. 664.

damages for the loss he has sustained through the defendant's negligence which deprives him of the services and companionsnip of his wife.

The defendant called as witness on his behalf an attorney with very wide experience in the practice of law in Massachusetts. This witness stated in effect that up until the year 1909 the husband had a right of action to recover damages for loss of *servitium* and *consortium* in that State, but after that date the courts there have constantly refused to make any such allowance. In support of his opinion he referred to a number of cases decided by the Massachusetts courts. We are justified in examining the precedents cited in support of his evidence. This was expressly stated in the case of *Allen* v. *Hay* (1). For the present law, he largely relied upon a decision of the Supreme Court of that State reported as *Feneff* v. *New York Central & Hudson River Railroad Co.* (2), which was decided in 1909. The head-note of the report is as follows:

> The right of *consortium* is a right growing out of the marital relation which the husband and wife respectively have to enjoy the society, companionship and affection of each other in their life together.
>
> A married woman cannot maintain an action for a loss of *consortium* occasioned by physical and mental injuries of her husband, which were caused by the negligence of a person from whom her husband has recovered compensation in damages. It seems that the same rule would apply in an action by a husband for a loss of *consortium* from an injury to his wife through the negligence of one from whom she has recovered damages, and that anything to the contrary is overruled.

In the course of delivering the opinion of the Court the Chief Justice stated that (p. 279):

> At the common law, the husband had a right to the labour and services of his wife, and in suing for the damages which are personal to the husband for an injury to his wife, he was permitted to recover, not only for the expenses of her care and cure, but for his loss of her labour and services and the loss of *consortium*.

And at p. 280:

> The right to the *consortium* of the other spouse seems to belong to husband and wife alike, and to rest upon the same reasons in favour of each. Since the removal of the wife's disability to sue, this is now settled in most courts by a great weight of authority.

Again on the same page:

> The wrong which may be redressed through such suits (i.e. those for alienation of affection, etc., of husband and wife) is one which has a direct tendency to deprive the husband or wife of the *consortium*

(1) (1922) 64 S.C.R. 76, at 81. (2) (1909) 203 Mass. 278.

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of the other spouse. No case has been brought to our attention, and after an extended examination we have found none, in which an action for a loss of *consortium* alone has been maintained merely because of an injury to the person of the other spouse, for which the other has recovered, or is entitled to recover, full compensation in his own name, when the only effect upon the plaintiff's right of *consortium* is that, through the physical or mental disability of the other, the companionship is less satisfactory and valuable than before the injury.

Again at page 281:

It is enough for the present case that persons whose relations to the injured party are purely domestic should not be permitted to share the compensation to which he is entitled for the impairment of his powers by the tort of another person, nor to receive an additional sum beyond the full compensation to which the injured person is entitled. Their damages are too remote to be made the subject of an action.

And in conclusion at page 282 he says:

We are of opinion that in this class of cases there should be no recovery for loss of *consortium*, when the impairment of the powers and faculties of the plaintiff's spouse has been fully paid for in money. Indirectly, the plaintiff in such a case reasonably may be expected, through the same marital relation which gives a right of *consortium*, to be somewhat benefited by such a payment.

In passing, it should be noted that the view that the enactment of laws empowering the wife to take action in her own name altered the common law right to a separate action by the husband is in direct conflict with the accepted law in England and in Canada. In Winfield on Torts at p. 248 it is stated:

The same wrongful act may deprive her husband of her *consortium* and do bodily harm to her. And there are two separate remedies for these two separate torts. In cases like *Brockbank* v. *Whitehaven Ry* (1), the wife can nowadays maintain an action on her own behalf. Before 1883 the law was the same except that her husband must sue for her benefit, and this action which he brought merely as her representative was entirely independent of the action which he had, *and still has*, for the loss of *consortium*.

See *Brawley* v. *Toronto Ry. Co.* (2) and the remarks of Chief Justice Meredith at the conclusion of his judgment at p. 36. Also *Swan* v. *Canadian Northern Railway Co.* (3), the remarks of Mr. Justice Stuart at p. 431.

However, the witness said that since the decision in the *Feneff* case (4) it had been universally accepted as law in Massachusetts that a husband could not get damages there in such an action. It should be noted, however, that,

(1) (1862) 7 H. & N. 834.
(2) (1919) 460 L.R. 31.
(3) (1908) 1 Alta. L.R. 427.
(4) (1909) 203 Mass. 278.

in any reports of decisions brought to the attention of this Court, there already had been another action in which the injured spouse had in the first instance secured damages. There is throughout all of these judgments a recognition of a right in the husband to the services of his wife in keeping the house and in giving companionship to her husband. What is denied is damages for a breach of this right, which are considered too remote. Now, with all respect to what has been said by others in this case, it seems to me that the remoteness of damages is not a question of status within the meaning of article 6 of the Civil Code.

In the case of *Machado* v. *Fontes* (1), it was decided by the Court of Appeal of England that

> An action will lie in this country in respect of an act committed outside the jurisdiction if the act is wrongful both in this country and in the country where it was committed, but it is not necessary that the act should be the subject of civil proceedings in the foreign country.

This case is relied upon by Dicey in his book on Conflict of Laws at pages 722 and 723 to support one of the rules he has there enunciated. It is further stated by Dicey at pages 797, 800 and 801 that the *lex fori* governs in respect of remedies.

When the husband proved a valid subsisting marriage and a right to *consortium* by the laws of Massachusetts he established his status. It then remains for the Court to decide what remedy should be awarded for a wrongful interference with this right by a third party. This should in my opinion, be decided by a Quebec Court in accordance with Quebec Laws.

I would allow the appeal and award the plaintiff for past and probable future expenses a sum of $3,000 and a further sum of $1,000 in respect of the loss of *consortium*, the amount of $1,250 already received by the plaintiff to be credited on the amount awarded and the plaintiff also to receive interest.

RAND J.—The appellant is a domiciled resident of the State of Massachusetts, U.S.A. His wife while on a visit to Quebec was, on September 9th, 1938, injured in an automobile accident through the negligence of the respondent. On September 2nd, 1939, the husband brought

(1) (1897) 2 Q.B. 231.

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action in the courts of that province in which he claimed damages for: (*a*) medical, nursing, hospital and housekeeping disbursements up to July 22nd, 1939, the commencement of the action, (*b*) loss of *consortium*, (*c*) subsequent expenses including maid or housekeeper services necessary to help or replace his wife, (*d*) his wife's permanent injury and disability. Liability for the first item was admitted and no question of the right of the plaintiff under article 1053 of the Civil Code to bring the action is raised. Admittedly also, the last item, which is personal to the wife, is not recoverable. The items brought in the appeal are (*b*) and (*c*), and as can be seen, they include claims founded on both *consortium* and the duty of the husband to care for and support the wife.

The challenge to these claims is put on the ground that by the law of Massachusetts the husband has no right to recover damages for loss of *consortium* resulting from personal injury to the wife through negligence nor for expenses for medical or like services, or aid necessary to her care and comfort subsequent to the trial; he is limited to such out-of-pocket expenses incurred up to the trial: and not being recoverable under the law of the domicile, they are not by the law of Quebec proper items of damages there. Evidence of these provisions of the law of Massachusetts was given by a member of the bar of that state. The courts below upheld this contention, allowed recovery for the disbursements to July 22nd, 1939, but denied all other relief. The remedial right of the husband arising in Quebec and claimed in the courts of Quebec was treated as depending upon the law of his domicile and the question in the appeal is whether that view of the law is sound.

It is beyond controversy that, in the courts of the same jurisdiction, rights of action arising from personal wrongs are the creation of the law of the place where the tortious acts are committed. This is expressly declared by article 6 of the Civil Code. Whatever consequences are to be attached to those acts must arise by force of that territorial law. It may be, in the determination of those consequences, that resort becomes necessary to some other law for the purpose of ascertaining status or primary rights arising from it, but such a resort is only for the purpose of furnishing the basis upon which rights of action in the jurisdiction of the act may depend.

By article 1053 of the Civil Code,

> Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another whether by positive act, imprudence, neglect or want of skill.

Under that language, not only the immediate victim of a wrongful act, but third persons upon whose legal rights that act, through the direct injury, has trespassed, are entitled to redress. The claim here is by a third party and in order to bring himself within the article he must show that some right of his has been invaded and that damage has resulted. He is the husband and whatever primary rights he has in relation to his wife are those which arise from the marriage status; and to ascertain them we must go to the law of the domicile. Once they are ascertained there has been presented the jural material on which the law of the place must operate to create or withhold a right of action against the person whose act has brought about the damaging consequences.

We look, then, to the law of Massachusetts to discover those incidents of the marriage status which are relevant to article 1053 of the Civil Code. It is clear from the evidence that the common law right of the husband to the earnings of his wife has been abrogated. It is also clear that in an action similar to this in Massachusetts the husband would be limited in his recovery to his actual disbursements in medical care and other attention to his wife up to the time of the trial. This involves the absence of any right on the husband's part to claim damages for loss of *consortium* and all involved in that fundamental incident of marriage. But it does not mean that the husband has lost his right to *consortium*. One of the authorities upon which the evidence is supported, *Nolin* v. *Pearson* (1), distinctly holds that the wife is entitled to damages for the loss of *consortium* brought about by the wrongful enticement from home and affection of the husband and it assumes the converse right in the husband; and the existence of that right is not affected by the fact that injury to it is not always attended by compensating sanctions. In the language of the judgment:

> But he retains the unmodified right to her conjugal society, even if her refusal to recognize this right affords him no ground for an absolute divorce.

(1) (1906) 191 Mass. 283.

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The limitation of recovery established by the decisions cited shows beyond doubt that it results from the conflict between rights of action given to the wife under the various married women's property acts and the common law rights of the husband; but it is in fact a limiting rule of damages. As the wife under those statutes has the right to recover in one sum for the total effect upon her of the injury, there is in the view adopted nothing left for any claim of the husband. One complete recovery is permitted and on grounds of policy that recovery has been attributed to the wife. Otherwise the equivalent of her physical and mental impairment would become the property of her husband in contradiction to the provisions that she shall be entitled as if she were femme sole; and it is conceived that any damage beyond the perimeter of her own loss or injury, even an injury to the husband's interest, is too remote to be taken into account: *Feneff* v. *New York Central & Hudson River Railroad Co.* (1).

> When there is no intentional wrong the ordinary rule of damages goes no further in this respect than to allow pecuniary compensation for the impairment or injury directly done. When the injury is to the person of another, the impairment of ability to work and be helpful and render services of any kind is paid for in full to the person injured. Ordinarily the relation between him and others whereby they will be detrimentally affected by the impairment of his physical or mental ability makes the damage to them only remote and consequential and not a ground of recovery against the wrongdoer.
>
> * * *
>
> It is enough for the present case that persons whose relations to the injured party are purely domestic should not be permitted to share the compensation of which he (the husband) is entitled for the impairment of his powers by the tort of another person, nor to receive an additional sum beyond the full compensation to which the injured person is entitled. Their damages are too remote to be the subject of an action.

The recovery of the wife, therefore, exhausts the total liability of the wrongdoer. The only exception to this is in respect of disbursements up to the trial. In the absence of evidence to the contrary it is presumed that such outlays have been made by the husband and he is allowed to recover them; but even that is a question of fact and, if it is shown that the obligation for them was taken on by the wife, then she alone becomes entitled to recover them.

Although under Massachusetts law the common law right of the husband to the services of his wife has been

(1) (1909) 203 Mass. 278.

seriously encroached on to the extent that he cannot claim her earnings, nevertheless, as he remains under a duty to care for and support her and as that duty is complementary to his rights under the *consortium,* the incidental services arising from that home association cannot be separated from the other elements of *consortium.* That concept embodies all of the characteristics of the conjugal cohabitation which is the *fundus* of marriage: and a disturbance of the *consortium* must include an interruption of those ordinary acts by which the necessary supports to the home life are given, which, whether companionship, comfort or services, are inseparable from the body of relations of which they form a part. It may be that, for the purpose of defining the scope of a wife's recovery of damages, her capacity to work in its entirety may be segregated to her own exclusive right: but that fact is irrelevant to the content of *consortium.*

For the purposes of the law of Quebec, then, we have a claim on the part of a husband who possesses the right of *consortium* and who is under a legal duty to care for and support his wife while the marriage continues. These are the rights which in Quebec the husband complains have been violated by the wrongful act of the respondent. It is the law of Quebec and that only to which we must look for the legal consequence from those facts. It will arise from the law of personal wrongs in that province, and part of that law is the delimitation of the damages attributed to the impairment of right suffered. It was, therefore, in my opinion, a misconception of the law to be applied to import from Massachusetts the law of tort including the rule of damages to determine the rights of the appellant in Quebec.

The latter has suffered an *injuria* from the wrongful act by which his wife was injured. His right to the *consortium* and to be protected against an aggravation of his duty towards her have been violated. Under section 1053 of the Civil Code, those violations give rise to a right to damages that will reasonably compensate him for the loss he has sustained.

It is suggested by McDougall (E. M.) J., at the trial, that to hold the husband entitled to such damages in Quebec would expose the respondent to a like claim on

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the part of the wife in Massachusetts but that, with the greatest respect, involves, I think, a confusion of the law of *status* and rights flowing from it with the law of private wrongs. It is to the law of Quebec in the latter respects to which Massachusetts would refer to ascertain the rights of action given to both husband and wife as a result of the tortious act there and as those rights limit the wife, separate as to property, to her personal injuries and suffering and do not include expenses of medical or other care, or encroach upon any loss of enjoyment of the *consortium*, which are exclusively matters of injury to the husband, a like limitation on the scope of the wife's recovery would be made by the law of Massachusetts. But whether or not Massachusetts would follow such a rule in allowing recovery for a wrong committed in another jurisdiction, we must apply in Quebec the rule which her law dictates.

The only question that might arise is whether or not the claim for future expenses, of aid and assistance for the proper care of the wife, is sufficiently alleged. Item (1) of the particulars specifies the necessity of securing

> a maid, housekeeper or any kind of help that will be necessary to help or replace his said wife.

That, I think, is a sufficient allegation of that part of the claim. All of the evidence offered on the rejected items was admitted and is now before this court, which is in as good a position as a trial judge to assess the quantum. I would allow, on the claim for care and aid, including expenses from July 22nd, 1939, the sum of $3,000 and for loss of *consortium* the sum of $1,000, together with interest from the date of the judgment at trial with proper allowance for the tender made with the defence. The appeal should, therefore, be allowed with costs throughout.

Appeal allowed with costs.

Solicitors for the appellant: *Cartier, Barcelo, Rivard & Pelletier.*

Solicitors for the respondent: *MacDougall, McFarlane, Scott & Hugessen.*

MARY BRAUN, ADMINISTRATRIX OF THE ESTATE OF JACOB G. BRAUN (CLAIMANT) } APPELLANT;

AND

THE CUSTODIAN (RESPONDENT)..... RESPONDENT.

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*June 12, 13,14.
*Oct. 3.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

International law—Companies—Contracts—Certificates of shares in Canadian company issued from an office of the company in the United States to a German corporation as registered holder—Subsequent state of war against Germany—Certificates, endorsed with transfer in blank signed by such registered holder, bought in 1919 in Germany by a United States citizen—Transfers registrable only at said United States office—Right to the shares as between the purchaser and the Canadian Custodian of enemy property—Consolidated Orders Respecting Trading with the Enemy, 1916 (and order of court thereunder)—Treaty of Versailles (signed 28th June, 1919)—Treaties of Peace Act, 1919 (Dom., 1919, 2nd Sess., c. 30)—Treaty of Peace (Germany) Order,1920—Situs of the shares—Jurisdiction of Canada.

The claimant, as administratrix of B.'s estate, claimed, as against the Canadian Custodian of enemy property, right of ownership of 470 shares of common stock of the C.P. Ry. Co., a company incorporated by special Act of the Parliament of Canada. B. was a citizen of and resident in the United States. The Government of the United States, at war with Germany from April 6, 1917, granted on July 14, 1919, a general licence (subject to exceptions) to trade with the enemy. B. went to Germany in September, 1919, and in October, 1919, purchased there the shares in question, receiving 48 certificates of shares, all in the same form and dated between 1894 and 1913, and being in the name of one or the other of two German banking houses as registered holders, which were at all relevant times enemy alien corporations. Each certificate was countersigned by the company's transfer agent and registrar of transfers in New York (U.S.A.) and on each was endorsed a transfer in blank signed by the registered holder. These certificates formed part of a group of certificates issued by the company to the said two banking houses covering a total of about 140,000 shares. They were so issued in order that the shares might be traded in on the stock exchanges in Germany and certain other European countries as bearer securities without being presented for transfer at a transfer office maintained by the company upon each transfer of ownership. The certificates covering the said 140,000 shares were registered in the company's transfer office which it had been authorized to establish and had established in New York and transfers were registrable on the books of that office and nowhere else. Dividends on shares so transferable were payable at New York in United States funds.

On April 23, 1919, the shares standing in the name of the said two banking houses (as well as other shares) had been the subject of an order of the Superior Court of Quebec made under the *Consolidated Orders Respecting Trading with the Enemy,* 1916 (enacted under

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

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the authority of the *War Measures Act*, R.S.C. 1927, c. 206); which court order in its terms vested the shares in the Custodian; and when B., in November, 1919, presented his certificates for transfer and registration in his own name at the company's New York office, that office (having received a copy of the order, with instructions) refused acceptance of the transfers. The certificattes have since remained in the possession of B. or the claimant.

Held: The shares in question were vested in the Custodian, and did not at any time belong to B. or the claimant. (Judgment of Thorson J., President of the Exchequer Court of Canada, [1944] Ex. C.R. 30, affirmed).

The *Consolidated Orders Respecting Trading with the Enemy*, 1916 (particularly ss. 6 (1) (2), 1 (1) (*d*)), *The Treaty of Versailles* (signed on June 28, 1919) (particularly paragraphs (*b*) and (*d*) of Article 297, and paragraphs 1, 3, of the Annex to Article 297), *The Treaties of Peace Act, 1919* (Dom., 1919, 2nd Sess., c. 30), *The Treaty of Peace (Germany) Order, 1920* (particularly ss. 33, 34), referred to. The court order of April 23, 1919, vested the shares in the Custodian, and that order was confirmed, and all subsequent dealings with the shares by the Custodian were authorized, by the *Treaty of Versailles* and by *The Treaty of Peace (Germany) Order, 1920.*

While the Governor in Council (enacting the said *Consolidated Orders Respecting Trading with the Enemy*, 1916, and *The Treaty of Peace (Germany) Order, 1920*) could not prevent the share certificates from being physically endorsed by the holder and handed over to a purchaser, he could provide that no transfer should confer on the transferee any rights or remedies in respect of such securities. The situs of the shares, as distinguished from that of the certificates, was in Canada; and the conditions under which title to the company's shares might be acquired was exclusively matter for the law-making authority of Canada. The fact that the company was authorized to, and did in fact, establish a transfer office in the State of New York where, only, transfers of the shares in question were registrable, could not make any difference; this was a mere matter of convenience and did not detract from the power of Canada to deal with the title to the shares of the Canadian company. (*Spitz* v. *Secretary of State of Canada*, [1939] Ex. C.R. 162, approved. *The King* v. *Cutting* (dealing with a different problem), [1932] S.C.R. 410, at 414, 418, referred to. The considerations which applied in *Rex.* v. *Williams*, [1942] A.C. 541, cannot affect the matter for consideration in the present case). Even assuming that a transfer of the certificates to B. (in Germany) was valid by German law, yet such transfer did not, in the language of s. 6 (1) of said Consolidated Orders of 1916, "confer on the transferee any rights or remedies in respect thereof".

APPEAL by the claimant from the judgment of Thorson J., President of the Exchequer Court of Canada (1), dismissing her action, in which action (brought by

(1) [1944] Ex. C.R. 30; [1944] 3 D.L.R. 412.

consent of the Custodian under s. 41 (2) of *The Treaty of Peace (Germany) Order, 1920*) she claimed a declaration that she, as the administratrix of the estate of Jacob G. Braun, deceased, was (as against the Custodian, respondent) the owner of certain shares of the common stock of the Canadian Pacific Railway Company, and for further relief.

The material facts, and relevant enactments, are stated in the reasons for judgment in this Court now reported and in the reasons for judgment in the Exchequer Court (above cited).

Thorson J. dismissed the action, holding that the shares in dispute never at any time belonged to the late Jacob G. Braun or the claimant but as at January 10, 1920, and since that date belonged to Canada and were vested in the Custodian.

D. L. McCarthy K.C. and *W. R. Wadsworth K.C.* for the appellant.

Aimé Geoffrion K.C. and *C. Robinson* for the respondent.

The judgment of the Court was delivered by

KERWIN J.—The circumstances giving rise to the present dispute are set forth in a statement of facts agreed to by the parties. The appellant is the administratrix of the estate of Jacob G. Braun, and the respondent is charged with the administration of enemy property under the Canadian *Treaty of Peace (Germany) Order* (P.C. 755 of 1920) and amendments thereto. Braun, born a German subject, was naturalized in the United States of America in 1886 and was thereafter until his death a citizen thereof. The United States was at war with Germany from April 6th, 1917, and until July 14th, 1919, United States citizens were forbidden by statute to enter into any business relations with residents in Germany. On that date the government of the United States granted to its citizens general licences to trade with the enemy, subject to certain immaterial exceptions.

On September 5th, 1919, Braun went to Germany where he purchased, between the sixth and seventeenth days of October, 1919, 470 shares of common stock of the Canadian Pacific Railway Company, a company incorporated by

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special Act of the Parliament of Canada. In consideration of this payment Braun received 48 certificates of shares of the common stock of the Company, all in the same form and dated between 1894 and 1913. Four of them were in the name of C. Schlessinger-Trier & Co. as registered holders and the remainder in the name of the National-bank fur Deutschland. Both registered holders were German banking houses and at all relevant times enemy alien corporations. Each of the certificates was countersigned by the Bank of Montreal as the Canadian Pacific Railway Company's transfer agent in New York and by the Central Trust Company of New York as its Registrar of Transfers, and on each there was endorsed a transfer in blank signed by the registered holder.

These certificates formed part of a group of certificates issued by the Railway Company to the two banking houses mentioned covering a total of about 140,000 shares. They were so issued in order that the shares might be traded in on the stock exchanges in Germany and certain other European countries as bearer securities without being presented for transfer at a transfer office maintained by the company under each transfer of ownership. The certificates covering the 140,000 shares issued to the two banking houses were registered in the company's transfer office which it had been authorized to establish and had in fact established in New York City and transfers were registrable on the books of that office and nowhere else. Dividends on shares so transferable were payable at New York in United States funds.

Braun brought the 48 certificates with him from Germany to the United States and in November, 1919, presented them for transfer and registration in his own name at the office of the Central Trust Company of New York. The acceptance of the transfers was refused on the ground that they could not be accepted having regard to the Canadian *Consolidated Orders Respecting Trading with the Enemy,* 1916, and an order of the Superior Court of Quebec made thereunder. The certificates have since remained in the possession of Braun or the claimant.

On April 23rd, 1919, the shares standing in the name of C. Schlessinger-Trier & Company and the Nationalbank fur Deutschland as well as other shares had been the sub-

ject of the order of the Superior Court of Quebec referred to. A copy of this order had been furnished to the Central Trust Company of New York on October 9th, 1919, with instructions from the Minister of Finance, who was then Custodian of Enemy Property, to make appropriate notations on the records, and between October 9th and October 24th the transfer agents placed against the accounts in the share register of each of the shareholders named in the order a note in the following terms:

> Vested in the custodian appointed under Consolidated Orders respecting Trading with the Enemy by virtue of the judgment of the Superior Court of the Province of Quebec, Canada, made in the matter of Consolidated Orders respecting Trading with the Enemy, and the Secretary of State of Canada, Petitioner, and the Canadian Pacific Railway Company, Respondent, and dated April 23rd, 1919.

In view of the result of this appeal, we are not concerned with various agreements made between the respondent and the Railway Company or with what was done by the Custodian with the shares standing in the name of the two banking houses. The claim advanced by Braun, and by the appellant after his death, was always disputed by the Custodian and after certain litigation in the United States had been allowed to lapse, this action, by the consent of the respondent under section 41 (2) of *The Treaty of Peace (Germany) Order, 1920,* was brought by the appellant in the Exchequer Court of Canada. The relief sought is a declaration that the claimant is the owner of the certificates of shares obtained by Braun and of the shares themselves; judgment against the respondent for the amount of the quarterly dividends declared upon the said shares in United States funds with interest from the respective due dates of the dividends; and for a certain sum in United States funds stated to have been received by the respondent in respect of the sale by him of "rights" declared to attach to the shares with interest.

The question submitted by the parties for the decision of the Court by the agreed statement of facts was as to what remedy or relief, if any, the claimant was entitled. The President of the Exchequer Court decided that the shares in question never at any time belonged to Braun or the claimant but as at January 10th, 1920, and since that date belonged to Canada and were vested in the

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respondent, and that the claimant was not entitled to the declaration of ownership asked by her statement of claim. The action was accordingly dismissed.

The crux of the matter is the proper interpretation of subsections 1 and 2 of section 6 of the *Consolidated Orders Respecting Trading with the Enemy*, 1916, enacted by the Governor General in Council under the authority of the *War Measures Act*, R.S.C. 1927, c. 206. These subsections read as follows:—

> 6. (1) No transfer made after the publication of these orders and regulations in the *Canada Gazette* (unless upon licence duly granted exempting the particular transaction from the provisions of this subsection), by or on behalf of an enemy of any securities shall confer on the transferee any rights or remedies in respect thereof and no company or municipal authority or other body by whom the securities were issued or are managed shall, except as hereinafter appears, take any cognizance of or otherwise act upon any notice of such a transfer.
>
> (2) No entry shall hereafter, during the continuance of the present war, be made in any register or branch register or other book kept within Canada of any transfer of any securities therein registered, inscribed or standing in the name of an enemy, except by leave of a court of competent jurisdiction or of the Secretary of State.

With these should be read clause (*d*) of subsection 1 of section 1 whereby:—

> (1) For the purposes of these orders and regulations, the following expressions shall be construed so that—
>
> * * *
>
> (*d*) "Securities" shall extend to and include stock, shares, annuities, bonds, debentures or debenture stock or other obligations issued by or on behalf of any government, municipal or other authority, or any corporation or company whether within or without Canada.

The appellant contends that these provisions apply only to persons, property and transactions within the territorial boundaries of Canada and have neither authority nor effect to restrain persons, property or transactions of foreigners in foreign countries. So far as the Exchequer Court is concerned that argument was disposed of by the decision of the late President in *Spitz* v. *Secretary of State of Canada* (1). I may say at once that I approve that judgment and the reasons therefor but add the following to emphasize some of the matters dealt with therein and to cover any new arguments that have been adduced.

(1) [1939] Ex. C.R. 162.

While undoubtedly the Governor in Council could not prevent the share certificates from being physically endorsed by the holder and handed over to a purchaser, he could provide that no transfer should confer on the transferee any rights or remedies in respect of such securities. Such a power was necessary to attain the desired object of preventing any material aid being secured by the enemy. While ordinarily (in the present instance) the law of Germany would determine the effect of the contract to transfer the certificates, "the distinction", as Professor Beale points out in volume 1 of his Conflict of Laws, page 446, "between the certificate of stock and the stock itself is an important one. The latter has its situs at the domicile of the corporation and there only".

We are not concerned with disputes between the Custodians of Enemy Property of allied countries as was this Court in *Secretary of State of Canada* v. *Alien Property Custodian (U.S.)* (1), and the Supreme Court of the United States in *Disconto-Gesellschaft* v. *U.S. Steel Co.* (2). Nor is the problem the same as that considered in *The King* v. *Cutting* (3), but in the opinions delivered in that case are two statements that are not without significance and bearing upon the present appeal. The first appears at page 414 in the judgments of Duff and Smith JJ., delivered by the former:—

> But there is nothing in the *Bank Act* to prevent a purchaser or creditor acquiring by contract a right legal and equitable to require the vendor or debtor to do whatever is necessary in order to effect a legal transfer of such share; and the question whether such is the effect of the contract will depend upon the law of the place where the contract is made—*Colonial Bank* v. *Cady* (4), nor I apprehend—is there any doubt that the conditions under which title to its shares may be acquired is exclusively matter for the law making authority of the jurisdiction where the Corporation has its proper domicile.

The present Chief Justice of this Court agreed with that judgment and also with the judgments of Lamont and Cannon JJ., delivered by the former. At page 418, Lamont J. said something to the same effect:—

> The effect of a contract to transfer shares made in another country must depend upon the laws of that country. But, subject to that law, it is within the competence of the Parliament of Canada in legislating on the subject of banks and banking—a matter over which it is given

(1) [1931] S.C.R. 169.
(2) (1925) 267 U.S. 22.
(3) [1932] S.C.R. 410.
(4) (1890) 15 App. Cas. 267.

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exclusive jurisdiction by section 91 of the *British North America Act*, 1867,—to compel a bank, its own creature, to recognize as valid a lawful transfer made outside of Canada, when made in the manner prescribed by the Act. *Secretary of State of Canada* v. *Alien Property Custodian (U.S.)* (1).

Here the situs of the shares, as distinguished from that of the certificates, was in Canada and the New York Uniform Stock Transfer Law, relied upon by the appellant, has no bearing upon the question. The fact that the Railway Company was authorized to, and did in fact, establish a transfer office in the State of New York where, only, transfers of the shares in question were registrable, cannot make any difference. This was a mere matter of convenience and did not detract from the power of Canada to deal with the title to the shares of the Canadian company.

The appellant also relied on the decision of the Privy Council in *Rex* v. *Williams* (2). There the Province of Ontario attempted to collect succession duty upon shares of a mining company incorporated by letters patent under the Ontario *Companies Act* and which had two transfer offices, one in Toronto and the other in Buffalo, New York, at either of which shareholders might have their shares registered and transferred in the books of the company. The shares in question were those of a testator who died domiciled in New York and the share certificates themselves were physically located there. Viscount Maughan pointed out that "One or other of the two possible places where the shares can be effectively transferred must therefore be selected on a rational ground" (p. 559); and further: "In a business sense the shares at the date of the death could effectively be dealt with in Buffalo and not in Ontario" (p. 560). The considerations which apply to a discussion as to the situs of shares for provincial succession duty purposes where a provincial legislature is restricted to direct taxation within the province cannot affect the matter at present under review.

The respondent contended that at the relevant time the law of Germany, so far as it could be ascertained, prohibited in that country the transfer of the certificates and of any interest in the shares. It is unnecessary to deal with this contention because, assuming a transfer to

(1) [1931] S.C.R. 169. (2) [1942] A.C. 541.

Braun of the certificates valid by German law, such transfer did not, in the language of subsection 1 of section 6 of the *Consolidated Orders Respecting Trading with the Enemy* "confer on the transferee any rights or remedies in respect thereof"; and furthermore "no company * * * shall * * * take any cognizance of or otherwise act upon any notice of such a transfer". Subsection 1 by itself is sufficient to justify the conclusion that when Braun bought the certificates, he actually secured nothing that would enable him to claim title to the shares. Clause (*d*) of subsection 1 of section 1 and subsection 2 of section 6 may be considered as having been included for extra precaution or to cover cases with which we are not concerned.

The *Treaty of Versailles* was signed on June 28th, 1919, and by para. (*d*) of Article 297 (contained in Section IV), as between the Allied and Associated Powers or their nationals, on the one hand, and Germany or her nationals, on the other hand, all the exceptional war measures or measures of transfer, or acts done or to be done in execution of such measures shall be considered as final and binding upon all persons. The definition of these measures in paragraphs 1 and 3 of the Annex to Article 297 is wide enough to include *Consolidated Orders Respecting Trading with the Enemy,* 1916, and the order of the Superior Court of Quebec of April 23rd, 1919. Furthermore, by paragraph (*b*) of Article 297 of the Treaty, the Allied and Associated Powers reserve the right to retain and liquidate all the property, rights and interests belonging at the date of the coming into force of the Treaty to German nationals. By *The Treaties of Peace Act, 1919,* being chapter 30 of the Dominion statutes of that year (2nd Sess.), the Governor in Council was authorized to make such appointments, establish such offices, make such Orders in Council and do such things as would appear to him to be necessary for carrying out the *Treaty of Versailles* and for giving effect to any of the provisions thereof.

The Treaty of Peace (Germany) Order, 1920, was accordingly enacted by the Governor in Council and subsequently amended. By this Order—"During the war" means "at any time between six o'clock (eastern standard

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time) in the afternoon of the fourth day of August, 1914, and midnight (eastern standard time) of the tenth-eleventh day of January, 1920". Section 33 provides that all property, rights and interests in Canada belonging on the tenth day of January, 1920, to enemies or heretofore belonging to enemies and in the possession or control of the Custodian at the date of the Order are vested in and subject to the control of the Custodian, and notwithstanding anything in any order heretofore made vesting in the Custodian any property, right or interest formerly belonging to an enemy, such property, right or interest shall be vested in and subject to the control of the Custodian who shall hold the same on the same terms and with the same powers and duties in respect thereof as the property, rights and interests vested in him by this Order. By section 34, all vesting orders made or given or purporting to be made or given in pursuance of the *Consolidated Orders Respecting Trading with the Enemy*, 1916, and all actions taken with regard to any property, business or company, whether as regards its investigation, sequestration, compulsory administration, use, requisition, supervision or winding up, the sale or management of property, rights or interests, the collection or discharge of debts, the payment of costs, charges or expenses, or any other matter whatsoever in pursuance of any such order, direction, decision or instruction, and in general all exceptional war measures or measures of transfer or acts done or to be done in the execution of any such measures, are hereby validated and confirmed and shall be considered as final and binding upon all persons.

The order of the Superior Court of Quebec of April 23rd, 1919, was such an order and it is not necessary to refer further to it except to state that it vested the shares in question in the Minister of Finance and Receiver-General of Canada as the Custodian appointed by the *Consolidated Orders Respecting Trading with the Enemy*. The shares were subsequently dealt with by the Minister of Finance or his successor as Custodian. The order of the Superior Court was confirmed, and all such dealings were authorized, by the *Treaty of Versailles* and by *The Treaty of Peace (Germany) Order, 1920*.

The appeal should be dismissed. In accordance with the terms of the consent of the Custodian to the bringing of this action, such dismissal is without costs.

Appeal dismissed.

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Solicitor for the appellant: *W. R. Wadsworth.*

Solicitors for the respondent: *Smart & Biggar.*

ONTARIO BOYS' WEAR LIMITED AND OTHERS (PLAINTIFFS) ..... } APPELLANTS;

AND

THE ADVISORY COMMITTEE, APPOINTED PURSUANT TO THE PROVISIONS OF THE INDUSTRIAL STANDARDS ACT AND THE SCHEDULE FOR THE MEN'S AND BOYS' CLOTHING INDUSTRY FOR THE PROVINCE OF ONTARIO, AND

THE ATTORNEY-GENERAL FOR THE PROVINCE OF ONTARIO (DEFENDANTS) ..... } RESPONDENTS;

AND

THE TOLTON MANUFACTURING CO., LTD. (PLAINTIFF).

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*May 29, 30, 31.
*June 1.
*Oct. 3.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Industry and Labour—Constitutional Law—The Industrial Standards Act, R.S.O. 1937, c. 191—Constitutional validity of the Act and of regulations made thereunder—Sufficiency, for compliance with the Act and regulations, of proceedings taken for creation of a schedule under the Act—Validity of the schedule.

Appellants called in question the constitutional validity of *The Industrial Standards Act,* R.S.O. 1937, c. 191, and regulations made pursuant thereto, and claimed that, in any event, a certain schedule, purporting to have been established pursuant to the Act, and which was approved by the Minister of Labour and on his recommendation declared to be in force by the Lieutenant-Governor in Council, of wages and hours and days of labour for the Men's and Boys' Clothing Industry for the Province of Ontario, and which purported to confer upon the Advisory Committee appointed pursuant to the provisions of said Act and

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

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schedule, *inter alia*, the power to collect certain assessments of money from appellants and other manufacturers engaged in the industry and to administer and enforce the schedule, was illegal, void and *ultra vires*, because (so it was alleged) certain proceedings and conditions required for the creation of the schedule were not properly taken or observed.

Held: The said Act and regulations were not *ultra vires;* and they were sufficiently complied with in the creation of the schedule in question. Judgment of the Court of Appeal for Ontario, [1943] O.R. 526, affirming judgment of Mackay J., [1942] O.R. 518, dismissing appellants' action, affirmed.

Dealing specifically with questions raised, this Court held as follows:

The giving to the Industry and Labour Board of its powers under s. 5 (*c*) and (*e*) of the Act is not *ultra vires* the provincial legislature.

The said Board in exercising its powers under the Act is not a court of justice analogous to a superior, district or county court; it would seem to be merely an administrative body, but, in any event, it does not come within the intendment of s. 96 of the *B.N.A. Act.*

Clause (*l*) of s. 7 of the Act (as to assessment of and collection from employers and employees) and clauses 16 and 17 of the regulations (as to collection of assessments from employees by, and remittance by, employers) cannot be said to authorize the imposition of an indirect tax. If the assessment be a tax, it is a direct tax. Assessment may be justified as a fee for services rendered by the Province or by its authorized instrumentalities under the powers given to provincial legislatures by s. 92 (13) and (16) of the *B.N.A. Act* (*Shannon* v. *Lower Mainland Dairy Products Board,* [1938] A.C. 708).

The Act, regulations and schedule are not *ultra vires* as encroaching upon a field occupied by the Dominion in the *Combines Investigation Act* (R.S.C. 1927, c. 26, as amended); the legislature would have authority to enact anything which is found in the schedule; and such legislation (and therefore the combined effect of the Act, regulations and schedule) cannot be said to be a "combine" within the meaning of the Dominion Act.

The notice in the present case (described in the judgment) convening the conference of the employers and employees in the industry for the purpose mentioned in s. 6 of the Act, was sufficient in point of form; and the extent and manner of notification (publication of the notice in three Toronto newspapers and notification, giving date of the conference and calling attention to the newspaper advertisements, to employers named in a list on file in the Department of Labour, and to various union representatives) was, in the circumstances (set out in the judgment), sufficient. As long as the Minister of Labour and his officers act in good faith, all such matters must be left to their discretion. They were justified in proceeding upon notice to those employers whose names appeared on the departmental list and to the officials of various unions who, in the industrial standards officer's opinion, represented the great majority of the employees engaged in the industry.

The Minister and his officers were also justified in omitting custom tailors from the conference. It was quite apparent that in the view of the industrial standards officer (and in the view of the trade) custom tailors did not come within the industry as designated and defined. Even if that were not so, under clause *f* of s. 7 of the Act the schedule could and did classify employers by omitting custom tailors from the industry.

As to objection to the procedure taken in the carrying on of the conference: By the first branch of s. 8 of the Act, it was the prerogative of the Minister, and his alone, to determine whether a schedule was agreed to by a proper and sufficient representation of employers and employees; and such a determination is not reviewable by the courts.

The fixing by the schedule of different minimum rates of wages in two areas or sections of the province (the schedule providing that minimum rates fixed to apply in certain counties might be 12½% less in the rest of the province) was not unauthorized. By s. 4 (2) of the Act, the zone designated by the Minister (in this case the whole of the province) could be divided into separate zones by the conference. This was done and, within the meaning of said s. 4 (2), the Minister, by his approval of the schedule submitted to him, approved such division, whereupon the area as divided was "deemed to be the designated * * * zones for the industry affected".

APPEAL from the judgment of the Court of Appeal for Ontario (1) dismissing the present appellants' appeal from the judgment of Mackay J. (2) dismissing their action, in which action they claimed: that *The Industrial Standards Act,* R.S.O. 1937, c. 191 (as amended in 1939, c. 21) and regulations made pursuant thereto, were *ultra vires,* and that, in any event, a certain schedule, purporting to have been established pursuant to the Act, and which was approved by the Minister of Labour and on his recommendation declared to be in force by the Lieutenant-Governor in Council on or about April 1, 1939, of wages and hours and days of labour for the Men's and Boys' Clothing Industry for the Province of Ontario, and which purported to confer upon the defendant (the respondent the Advisory Committee appointed pursuant to the provisions of the said Act and schedule), *inter alia,* the power to collect certain assessments of money from appellants and other manufacturers engaged in the industry and to administer and enforce the schedule, was illegal, void and *ultra vires,* because (so it was alleged) certain proceedings and conditions required for the creation of the schedule

(1) [1943] O.R. 526; [1943] 3 D.L.R. 474; 80 C.C.C. 99.
(2) [1942] O.R. 518; [1942] 3 D.L.R. 705; 78 C.C.C. 191.

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were not properly taken or observed; an injunction to restrain the defendant (the said Advisory Committee), its servants, etc., from proceeding with certain prosecutions brought under the Act and from attempting to collect from appellants any sums of money whatever alleged to be owing under the said schedule and from enforcing or attempting to enforce the said Act, regulations and schedule against appellants; and damages for legal expenses incurred in defending the prosecutions and for loss of time and travelling expenses incurred.

The questions involved and the facts from which they arise are stated in the reasons for judgment in this Court now reported and in the judgments at trial and on appeal above cited.

Leave to appeal to this Court was granted by the Court of Appeal for Ontario.

By an order of Mackay J. in the Supreme Court of Ontario, the Attorney-General for Ontario was added as a party defendant (reserving to him "all just exceptions and rights").

A. G. Slaght K.C. and *C. H. Howard* for the appellants.

J. L. Cohen K.C. for the respondent The Advisory Committee.

C. R. Magone K.C. for the respondent The Attorney-General for Ontario.

The judgment of the Court was delivered by

KERWIN J.—Originally this was an action against the Advisory Committee appointed pursuant to the provisions of *The Industrial Standards Act*, R.S.O. 1937, c. 191, and of what is known as the Schedule for the Men's and Boys' Clothing Industry for the Province of Ontario. The action, as framed, was an attack on the Act as being *ultra vires* the provincial legislature. It was tried before Mr. Justice Roach and dismissed (1). The Tolton Manufacturing Co. Limited, one of the plaintiffs, then withdrew from the action by filing a notice of discontinuance. The remaining plaintiffs appealed to the Court of Appeal for Ontario who gave them leave to amend their statement of

(1) [1940] O.R. 301; [1940] 3 D.L.R. 383; 74 C.C.C. 252.

claim as they might be advised in order to raise specifically the claim that the regulations and schedule were invalid as not being in conformity with the Act (1). Amendments were duly made and at the second trial the Attorney-General for Ontario, by his consent and at his instance, was added as a party defendant. After a lengthy hearing, the action was dismissed by Mr. Justice Mackay (2) and an appeal from that judgment was dismissed (3). It is from such dismissal that the present appeal is taken.

At the conclusion of Mr. Slaght's argument, the Court intimated that it would be unnecessary to hear counsel for the respondents upon any of the questions raised as to *The Industrial Standards Act* being beyond the competence of the Ontario Legislature. These and the other questions raised will appear as the Act and regulations are examined and a statement made as to what was done thereunder.

By subsection 1 of section 4 of the Act, the Minister of Labour may from time to time designate the whole of the province, or any part or parts thereof, as a zone or zones for any business, calling, trade, undertaking and work of any nature whatsoever and any branch thereof and any combination of the same which he may designate or define as an industry for the purposes of the Act.

Subsection 2 provides:—

> (2) Any area so designated as a zone may be enlarged or reduced or divided into separate zones by the representatives of employers and employees in any conferences to be held as hereinafter provided and upon the approval of the Minister, the area as enlarged, reduced or divided, shall be deemed to be the designated zone or zones for the industry affected.

The effect of section 6 is that if, under section 4, the Minister shall have designated a zone, he may, upon the petition of representatives of employers or employees in any industry within that zone, authorize an industrial standards officer (for the appointment of whom provision is earlier made) to convene a conference of the employers and employees in such industry for the purpose of investi-

(1) [1941] O.R. 79; [1941] 2 D.L.R. 541.
(2) [1942] O.R. 518; [1942] 3 D.L.R. 705; 78 C.C.C. 191.
(3) [1943] O.R. 526; [1943] 3 D.L.R. 474; 80 C.C.C. 99.

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gating and considering the conditions of labour and the practices prevailing in such industry and for negotiating in respect to any of the matters enumerated in section 7.

By section 7, this conference may submit to the Minister in writing a schedule of wages and hours and days of labour for the industry affected. This schedule may deal with a number of matters listed in the section. All of these matters need not be detailed, but, because of the argument addressed to the Court on behalf of the appellants, it is important to notice that by clause (*f*) the schedule may "classify the employees and employers and separately provide for each classification with respect to any of the matters which may be dealt with in such schedule", and that by clause (*l*) the schedule may, subject to the approval of The Industry and Labour Board (hereafter called the Board) "and with respect only to an interprovincially competitive industry" assess employers only or employers and employees in any such industry to provide revenue for the enforcement of the schedule. Provision is made for the appointment of the Board by another statute known as *The Department of Labour Act,* R.S.O. 1937, c. 69, as amended.

By section 8 of *The Industrial Standards Act,* if, in the opinion of the Minister, the schedule of wages and hours and days of labour submitted by the conference is agreed to by a proper and sufficient representation of employers and employees, he may approve thereof; and upon his recommendation the Lieutenant-Governor in Council may declare such schedule to be in force. By section 13, the Lieutenant-Governor in Council may make such regulations not inconsistent with the Act as he may deem necessary for carrying out the provisions of the Act and for the efficient administration thereof. Certain powers are given throughout the Act to Advisory Committees whose appointment by the Minister for every zone or group of zones to which any schedule applies is provided for by section 14. A right of appeal to the Board is given any employer or employee aggrieved by the decision of an Advisory Committee. Penalties are provided for violation by any employer or any employee of the provisions of any relevant schedule.

The Lieutenant-Governor in Council duly promulgated regulations. Under clause 9 thereof the Board may require any employer to pay it the arrears of wages owing to any employee or employees according to the provisions of any schedule, and the Board may, at its discretion, direct that the whole, or any part, of such wages be either forfeited to the Crown or paid out to the employees entitled thereto. By clause 16, whenever any schedule requires the employees in any industry to pay an assessment on their wages to the Advisory Committee appointed to administer such schedule, every employer of any such employees, as the agent of such Advisory Committee, shall collect by deduction or retention of wages the amount of such assessment. Clause 17 provides that every such employer shall remit the amount so collected to the Advisory Committee.

Pursuant to subsection 1 of section 4 of the Act, the Minister, on November 7th, 1938, designated and defined as the Men's and Boys' Clothing Industry, for the purposes of the Act, all work performed in connection with the entire or partial manufacture or production anywhere in the Province of Ontario of all men's, boys' and youths' pants, coats, vests or suits of every type and description, manufactured from cross-bred serges, flannels of all kinds, worsted and cotton and wool mixtures,—with certain exceptions. The only exception relevant to the argument presented to us is "the manufacture of clothing by merchant tailors employing or giving employment to no more than four workmen (including any working employer, his partner or partners) manufacturing clothing to order for individual customers according to individual sizes, measurements or specifications". At the same time the Minister designated the whole of the Province of Ontario as a zone for the said industry.

All objections to the sufficiency of the petition to the Minister, referred to in section 6 of the Act, to authorize an industrial standards officer to convene a conference of the employers and employees in the industry, were abandoned and we therefore need not examine the steps leading to the presentation of the petition to the Minister. In pursuance of such petition, the Minister, on November 17th, 1938, authorized Mr. Louis Fine, an industrial standards officer,

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to convene such a conference. Sometime in December, 1938, or early in January, 1939, the Board designated the industry an interprovincially competitive industry. Mr. Fine, in the name of the Minister, caused to be published on January 6th, 1939, in three Toronto newspapers, a notice that a conference of the employers and employees engaged in the industry (describing it fully) within a zone described as the whole of the province, was summoned to meet at 10 a.m. on Monday, January 16th, 1939, in Committee Room No. 1, Parliament Buildings, Toronto, for the purpose of investigating and considering the conditions of labour and the practices prevailing in the industry and for negotiating and submitting to the Minister a schedule of wages and hours and days of labour. Notice was further given that such schedule might contain provisions for the levying of an assessment upon the employers and employees for the purpose of administering the schedule and that, subject to the approval of the Board and Minister, the Lieutenant-Governor in Council might declare that such schedule should be binding upon all employers and employees. This is a very complete and very comprehensive notice and I can find no substance in the somewhat general complaint that it was not sufficient in point of form.

It should here be explained that the Act and its forerunner had been in force for some time and that the industrial standards officer had throughout the intervening years been in touch with employers in the men's and boys' clothing industry and with representatives of union employees engaged therein. There was on file in the Department a list of a great number of such employers. Notices of the date of the conference and calling attention to the advertisements were sent to these employers and to various union representatives. It was strenuously argued that these notices were not sufficient because not every employer was notified and only some representatives of employees. While, as pointed out above, counsel withdrew his objection to the sufficiency of the petition to the Minister, which by the first part of section 6 of the Act may be made by representatives of employers or employees, he pointed out that when, by the next part of section 6 the Minister may authorize an industrial standards officer to convene a con-

ference, it is to be a conference "of the employers and employees in such industry". From this, he argued, employers and employees must be notified, if not individually, at least in a more comprehensive manner than was done.

Such, however, is not the proper construction of the section. As long as the Minister and his officers act in good faith (and that is not questioned), all such matters must be left to their discretion. The Minister and his officers were justified in proceeding upon notice to those employers whose names appeared on the departmental list and to the officials of various unions who, in Mr. Fine's opinion, represented the great majority of the employees engaged in the industry. Furthermore, as to the employees, it appears that the matter of a proposed schedule had been the subject of keen interest and discussion at the meetings of the union locals and that those in attendance thereat authorized the union officials to appear at the conference on their behalf.

The Minister and his officers were also justified in omitting custom tailors from the conference. It is quite apparent that in the view of the officer (and, it may be said, in the view of the trade), custom tailors in whose establishments a garment is made by one person do not fall within the description of merchant tailors who "manufacture" clothing by their employees doing only one or more particular operations on a garment. Even if that were not so, under clause (*f*) of section 7, the schedule could and did classify employers by omitting custom tailors from the industry.

On January 16th a number of persons attended at the designated committee room and the meeting was adjourned to January 19th. On that day a committee was selected with full power to consider the matters mentioned in the notice. The general meeting adjourned without any definite date being fixed. The committee met on various dates until on February 7th its members decided that a plenary session of the conference would be held on February 8th and informed the parties they represented to that effect. On February 8th the conference reconvened and agreed to a schedule. Strenuous objection was raised to this method of procedure, but by the first branch of

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section 8 of the Act it was the prerogative of the Minister, and his alone, to determine whether a schedule was agreed to by a proper and sufficient representation of employers and employees. Such a determination is not reviewable by the courts, as has been held in many cases, a recent example of which is *The King* v. *Noxzema Chemical Company of Canada Ltd.* (1). The Minister exercised that prerogative, approved the agreed schedule (which was also approved by the Board), and, upon his recommendation, the Lieutenant-Governor in Council declared it to be in force.

The schedule fixes the number of hours for a regular working week. It also fixes minimum rates of wages which are to apply in the Counties of Ontario, York, Peel, Halton and Wentworth, and provides that in the rest of the province the minimum rates might be 12½ per centum less. The fixing of different rates in these two areas or sections of the province was objected to as unauthorized. The Chief Justice of Ontario states that this matter was not made the subject of special argument before the Court of Appeal, but before this Court the point was pressed and we have had the benefit of a complete argument. The Minister designated the whole of the province as a zone, but by subsection 2 of section 4 of the Act that zone could be divided into separate zones by the conference. This was done and, within the meaning of the same subsection, the Minister, by his approval of the schedule submitted to him, approved such division, whereupon the area as divided was "deemed to be the designated * * * zones for the industry affected". The objection fails.

Having reached the conclusion that the Act and regulations were complied with, there remains but to deal with the arguments as to constitutionality. Under section 5 (*c*) of the Act, the Board may, with the concurrence of the proper Advisory Committee, make an order amending the provisions of any schedule and, under section 5 (*e*), the Board may, with reference to any industry declared by it to be interprovincially competitive, approve or withhold approval of the provisions in a schedule with reference to

(1) [1942] S.C.R. 178.

the collection of revenue from employers and employees in the industry. The authorities are clear that there is nothing in the *British North America Act* to prohibit what is described by the appellants to be a delegation by the legislature of jurisdiction and authority to the Board to override and nullify many of the things previously done by the conference, the Minister and Order in Council.

As to the objection that, to quote appellants' factum:—

> The Board (constituted by Provincial authority) is given the same powers as a Court, being power to exercise judicial functions. This is *ultra vires*. (*City of Toronto* v. *Township of York*, [1937] O.R. 177, at 180, and in the Privy Council at [1938] A.C. 415.),

it is sufficient to point out that the Board, whatever it may be, is certainly not a court of justice analogous to a superior, district or county court. In my view it is merely an administrative body, but, in any event, it does not "come within the intendment of section 96 of the *British North America Act*". *Reference re Adoption Act, etc.* (1).

Nor can the contention prevail that section 7 (*l*) of the Act and clauses 16 and 17 of the regulations authorize the imposition of an indirect tax. If the assessment be a tax, it is a direct tax within the meaning of the decisions of the Judicial Committee and of this Court; and, in any event, it may be justified as a fee for services rendered by the Province or by its authorized instrumentalities under the powers given provincial legislatures by section 92 (13) and 92 (16) of the *British North America Act*. *Shannon* v. *Lower Mainland Dairy Products Board* (2).

The last argument of the appellants on this branch of the case is that "The Statute, regulations and schedule are also *ultra vires* because they encroach upon a field occupied by the Dominion in the *Combines Investigation Act*, R.S.C. 1927, c. 26, as amended". As Kellock, J.A., points out, the legislature would undoubtedly have authority to enact anything which is found in the schedule and I agree with him that such legislation (and therefore the combined effect of the Act, regulations and schedule) cannot be said to be a "combine" within the meaning of the Dominion Act.

(1) [1938] S.C.R. 398, at 415. (2) [1938] A.C. 708.

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These conclusions render it unnecessary to consider the question as to whether or not the Advisory Committee was a proper party defendant. The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *German, Howard & Rapoport.*

Solicitor for the respondent The Advisory Committee: *J. L. Cohen.*

Solicitor for the respondent The Attorney-General for Ontario: *C. R. Magone.*

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*May 11, 12.
*Oct. 3.

ANDREW J. FLEMING AND WILLIAM E. ADAMS (PLAINTIFFS) ..... } APPELLANTS;

AND

WALTER WATTS AND OTHERS, EXECUTORS OF THE LAST WILL AND TESTAMENT OF ROBERT MILNER (DEFENDANTS).... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Sale of Land—Mortgage—Agreement, in form one for sale of land, held to be in reality a mortgage—Time declared "to be the very essence" of the agreement—Right to redeem after default.

In an action claiming a right to redeem and for relief against forfeiture for default, in respect of an agreement which was in form an agreement of sale of land and which, *inter alia,* provided that on any breach of covenant by the purchaser he was to give up possession and the agreement was to be (at the vendor's option) void, and declared that time was "to be the very essence of this agreement"; it was *held,* on the facts and circumstances (discussed in the judgment), that at the time of the agreement the purchaser had an equitable interest in the land which was not extinguished or surrendered, that the agreement was in its true nature and effect a mortgage from the purchaser to the vendor, and there was a right to redeem. (Judgment of the Court of Appeal for Ontario, [1943] O.W.N. 463, affirming judgment of McFarland J., [1943] O.W.N. 116, dismissing the action, reversed.)

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

APPEAL by the plaintiffs from the judgment of the Court of Appeal for Ontario (1) dismissing their appeal from the judgment of McFarland J. (2) dismissing their action and allowing the defendants' counterclaim.

On June 16, 1941, Robert Milner (now deceased, of whose will the defendants are executors) and the plaintiff Fleming entered into an agreement by the terms of which Milner agreed to sell to Fleming certain land in Chatham, Ontario. The agreement, *inter alia,* provided that on any breach of covenant by the purchaser he was to give up possession and the agreement was to be (at the vendor's option) void, and declared that time was "to be the very essence of this agreement".

At various times prior to the said agreement there had been transactions between one and another or among all, of Milner, Fleming and Adams (co-plaintiff of Fleming), which, as well as the circumstances of the agreement in question, are set out in the reasons for judgment in this Court *infra.*

The plaintiffs alleged that the said agreement was entered into by way of securing Milner for a loan to Fleming, that by inadvertence Fleming failed to make a certain payment when it was due under the agreement but later tendered it with interest and had always been and was still ready, able and willing to make it.

The plaintiff Fleming claimed an order directing the defendants to receive payment, an order relieving against forfeiture and allowing redemption. The plaintiff Adams, to whom Fleming had assigned the said agreement (which assignment the defendants claimed was in breach of the agreement), claimed an order allowing him to redeem the property and for relief against forfeiture.

The defendants counterclaimed for judgment declaring the agreement void and declaring the defendants entitled to possession, freed and discharged from every claim whatsoever of the plaintiffs or either of them in and to the land.

(1) [1943] O.W.N. 463. (2) [1943] O.W.N. 116.

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McFarland J. dismissed the action and gave judgment for the defendants on their counterclaim (1). An appeal by the plaintiffs to the Court of Appeal for Ontario was dismissed (2). The plaintiffs appealed to this Court.

J. R. Cartwright K.C. and *J. A. McNevin K.C.* for the appellants.

C. F. H. Carson K.C. for the respondents.

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

HUDSON J.—The late Robert Milner became the legal owner in fee simple of a parcel of land in the City of Chatham on the 3rd day of March, 1936. On the following day, he entered into an agreement to sell this land to the appellant Fleming, who was then in occupation thereof.

On the 4th of August, 1938, there was a readjustment of the subsisting arrangement between Milner and Fleming and a new agreement was entered into by which Milner agreed to sell the land to Fleming for $11,000, payable, $1,000 on the 15th of December, 1938, and the balance in instalments, the last of which was $5,000 to be paid on the 15th of June, 1941. There was also a provision for the payment of interest on the amount of principal remaining due from time to time at the rate of 6 per cent. per annum, not payable, however, until the 15th of June, 1941.

Within a few months after the last agreement was entered into, Fleming fell into financial difficulties and sought the assistance of his co-plaintiff, Adams, who made him some advances. On the 8th of December, 1938, Fleming, with the consent of Milner, assigned all his interest under the last-mentioned agreement to Adams. Shortly thereafter, Fleming ceased to occupy the premises and they were let by Adams to a man named Todgham who continued in occupation at least until the commencement of this suit.

In the month of June, 1941, there was owing to Milner under the agreement of the 4th of August, 1938, a principal sum of $5,000 and interest amounting to $1,440. Milner advanced $5,000 for the purpose of paying off Adams and

(1) [1943] O.W.N. 116. (2) [1943] O.W.N. 463.

received from the latter a quit claim deed. Further sums were advanced to pay taxes, etc. At this point the agreement now in question was entered into. It is dated the 16th of June, 1941, between Milner and Fleming. It recites that Milner is the owner and provides that he, as vendor, agrees to sell to Fleming, as purchaser, the land in question for the sum of $12,000, to be paid as follows: $1,000 on the principal on the 16th of June, 1942; $1,000 on the principal on the 16th of June, 1943, and the balance of the principal in the amount of $10,000 and interest on the 16th of June, 1944. The money advanced in the sum of $12,000 was to bear interest at the rate of 5 per cent. per annum.

There are covenants by Fleming, (1) to pay taxes; (2) not to assign without leave; (3) that in case of the breach of any covenant the whole purchase money should become due; (4) that in case of any such breach the agreement should at the option of the vendor be void. Time was made of the essence of the agreement.

On the 16th of August, 1941, Mr. Milner died at the advanced age of 92 years.

On the 16th of June, 1942, the payment of $1,000 fell due and was not paid. On the 6th of July, 1942, the solicitor for the respondents wrote to the appellant Fleming notifying him that by reason of breaches of covenants the executors were treating the agreement as void under the terms of the default clause.

The breaches assigned were that the instalment of $1,000 had not been paid, that taxes were not paid as they became due and that there was a violation of the covenant not to assign without leave.

The plaintiffs thereupon commenced this action, which was dismissed at the trial and the decision of the trial Judge affirmed by the Court of Appeal.

Briefly stated, the appellants' contentions are, firstly, that the agreement in question was in the nature of a mortgage and that they were entitled to redeem, and secondly, that if not a mortgage, yet the circumstances were such as to entitle them to relief from any forfeiture.

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In form the transaction is a sale by Milner of the land which he owned to Fleming for $12,000 to be paid in the future, but it is necessary for the court to determine its true nature and effect.

Unfortunately, Mr. Milner was dead long before the trial and we are without knowledge of what his attitude would have been. It appears that when the agreement was under negotiation Mr. Milner insisted on the form which was adopted. There is no suggestion of fraud or deceit on his part.

At the time the agreement was entered into, Milner held the legal title but Fleming had an equitable interest which had not been extinguished or surrendered. Adams' position was analogous to that of a second mortgagee and his quit claim deed to Milner to a discharge of that mortgage. Fleming had been in possession of the land directly or through a tenant for many years. Substantial improvements had been added by him and the value of the property at this time was placed at from $20,000 to $25,000, as against $12,000 named as the purchase price in the agreement.

There is in the agreement no direct surrender by Fleming of his existing interest. Upon these facts, I find it difficult to believe that there was any intention on Milner's part to purchase Fleming's existing interest, or on the latter's part to sell. The facts are more consistent with a further advance to enable Fleming to clear off his debts and make a new start in life. It was in essence a borrowing transaction.

Having come to this conclusion on the facts, the right to redeem is clear. The law is succinctly stated in Falconbridge on Mortgages (3rd Ed.) at page 36:—

> When the right of redemption after default became established, the Court of Chancery, in order to prevent its evasion, was obliged to hold that a mortgagor could not, by any agreement entered into at the time of the mortgage and as part of the mortgage transaction, contract away his right of redemption or fetter it in any way by confining it to a particular time or to a particular class of persons * * *. The equity judges looked not at what was technically the form, but at what was really the substance of transactions, and confined the application of their rules to cases in which they thought that in its substance the transaction was oppressive.

and again at page 54 as follows:—

> Furthermore a mortgagor may, by a separate and independent transaction subsequent to the making of the mortgage, sell or release his equity of redemption to the mortgagee, or give the mortgagee the option of purchasing the mortgaged property and thus in effect deprive himself of his right to redeem * * *. The relation of the parties is that of vendor and purchaser and the onus of justifying the transaction is not upon the mortgagee.

Milner had a right to buy Fleming's equity, but the fact that here all was done in what was essentially one transaction leads to an inference of a further loan rather than of a purchase.

The appeal should be allowed and the judgment at the trial reversed. The appellants having declared their readiness and ability to pay the total amount due, the judgment should run to the following effect: It should declare that the agreement of sale between Robert Milner and Andrew J. Fleming, dated June 16th, 1941, is in reality a mortgage from Fleming to Milner, and that all necessary inquiries be made, accounts taken, costs taxed and proceedings had for the redemption of the premises in question, and that for this purpose the cause be referred to the Local Master of the Supreme Court of Ontario at Chatham. The judgment should contain the usual clauses in a judgment for redemption. Since the respondents failed on the main issue requiring a trial, they should only be entitled to their costs of the action down to the close of the pleadings but must pay the costs thereafter. The costs of the reference will be dealt with by the Local Master in the usual way. The counterclaim is dismissed with costs and the appellants are entitled to their costs in the Court of Appeal and this Court.

RAND J.—The facts in this controversy will be better appreciated by setting them forth chronologically. In the year 1934 the appellant Fleming entered into a contract to buy, for the sum of $7,000, a lot on the east side of William Street in Chatham, Ontario. It was contiguous on the south to a lot on the corner of William and Wellington Streets, then owned by the deceased, Robert Milner, represented by the respondents. It will be convenient to call the former the Watts lot and the latter the Milner lot. By

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1936 Fleming had paid something in the neighbourhood of $3,500 on the purchase price. There was on the land at this time a mortgage to a loan company apparently for $3,500 or thereabouts. This contract, if in writing, was not placed in evidence.

In 1936 Milner, an elderly man who had been a friend of Fleming's father, agreed to sell to Fleming the Milner lot for $6,000. At least $1,500 was paid at the time on account of this price. At the same time or shortly afterwards, he agreed to assist Fleming in financing by paying off the balance of the purchase price owing on the Watts lot, taking a conveyance from the owner to himself and consolidating the two transactions. Under date of March 4th, 1936, there was executed what purports to be a contract of sale to Fleming of the Watts lot for the sum of $8,000, payable in four annual instalments of $1,000 each and the balance of $4,000 on June 10th, 1940. The agreement contains a statement to the effect that

> part of the consideration for this agreement is the balance of the purchase price owing by the Purchaser herein to the Vendor herein on the purchase of the property adjoining immediately to the south of the property herein described, and that payments on this agreement shall be also payments on the sale agreement between the above parties covering the lands immediately to the south of the above described property.

Fleming was now in possession of both lots. The building on the Milner lot was torn down and a new one erected which, with the remodelled structure on the Watts lot, made a garage running across the back portions of both lots and fronting on Wellington Street. On December 16th, 1938, the premises were leased by the appellant Adams to one Todgham at a rent of $2,580 per annum.

In 1938 Milner made a further advance of $4,050 to assist Fleming in financing the garage business he was then carrying on. The arrangement is evidenced by an agreement dated July 30th, 1938, and its recital is to this effect:—

> Whereas the Vendor has agreed to sell and the Purchaser has agreed to purchase, upon the terms and conditions hereinafter mentioned all and singular that certain parcel or tract of land and premises [etc., describing the Watts lot].

That land was, of course, already the subject-matter of the written document of the 4th of March, 1936, by which the

purchase price was expressed to be $8,000. In the later agreement also it is stated that Fleming was in default in his payments under the agreement of March 4th, 1936, and that the principal sum at that time outstanding was $6,500. Provision was then made to pay this latter sum in four instalments as set forth. It was declared also that part of the consideration for the agreement was

> the balance of the purchase price owing by the Purchaser herein to the Vendor herein on the purchase of the property adjoining immediately to the south of the property herein described, and that payments on this agreement shall also be payments on the sale agreement between the above parties covering the lands immediately to the south of the above described property.

A like provision, it will be recalled, was contained in the document of March 4th, 1936.

On the 4th of August, 1938, a further document was executed by Milner and Fleming. It purported to provide for the sale by Milner as vendor to Fleming as purchaser of the Watts lot for the sum of $11,000, payable by instalments, the last of which for the sum of $5,000 was to become due on June 15th, 1941. It was agreed

> that this agreement is in lieu of and substituted for the hereinbefore agreements dated the 4th day of March, 1936, and the 30th day of July, 1938, and that this agreement dated the 4th day of August, 1938, shall be the only agreement affecting the hereinafter described property.

There is no reference in this document, as there was in those it superseded, to the purchase of the corner or Milner lot.

When the final instalment under this arrangement became due in June, 1941, Adams, the assignee of the interest of Fleming, was ready to pay the $5,000 with interest to Milner but the latter "said he would like to put more money into the garage"; the reply to Milner was: "If you want to put money in it at 5 per cent. it is all right with me. You can do whatever you wish. Otherwise your money is there for you." At this time the only sum outstanding between Milner and Fleming was the $5,000 instalment and the interest. By a document dated June 16th, 1941, Milner purported to sell anew to Fleming the same land, the Watts lot, for the sum of $12,000. The preamble recited:—

> Whereas the party of the first part, Robert Milner, is the owner of the hereinafter described premises in the City of Chatham in the County of Kent.

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> And whereas the party of the first part, Robert Milner, is desirous of selling the said hereinafter described premises to Andrew J. Fleming, upon the terms and conditions hereinafter set out in this agreement.

A clause provided that "the money advanced in the sum of $12,000 is to bear interest at the rate of 5 per cent. per annum". There were terms covering adjustments of taxes, insurance premiums and rentals to the 16th day of June, 1941; exempting the vendor from furnishing an abstract of title; providing that on any breach the purchaser was to give up possession, the agreement to be void and the purchaser to have no recourse to recover any monies paid thereunder. As in the previous instruments it stipulated that time was "to be the very essence of this agreement". On August 16th, 1941, Milner died.

It is on the last agreement that this action has been brought by Fleming and Adams for relief from forfeiture and to redeem. They are ready to pay the balance of the monies owing with all interest and other charges, and on those terms the relief is asked.

The grounds upon which the claim is contested are the breach by Fleming of a covenant against assignment without leave and the failure to pay the first instalment of $1,000 when it became due on June 16th, 1942. The questions raised for decision are whether the real arrangement between the parties was a mortgage or a sale, and whether, in either case, the appellants have lost their rights by reason of default in the respects mentioned.

The point of assignment, as a matter of fact, can be dealt with shortly. In December, 1938, with Milner's consent, Fleming had assigned his interest in the agreement of August 4th, 1938, to Adams as security for money owed. Before the agreement of June 16th, 1941, was executed Milner required a quit claim from Adams but his purpose is clear: he was entering into a new arrangement with Fleming to cover a new advance of approximately $5,600 for which he wanted an unencumbered title to the security. On June 17th, following the agreement, a new assignment was executed by Fleming, but this was not registered until after the death of Milner. In the month of September, 1941, the respondents became aware of it and through their solicitor notified Adams they would not recognize him in

the transaction. By a letter on May 27th, 1942, likewise through the solicitor, they requested the city Tax Collector to collect the taxes from the tenant of the property, basing their action on the term of the agreement by which the taxes were to be paid by Fleming. This communication unequivocally recognized the agreement as then subsisting. On July 6th, 1942, a formal repudiation by letter was sent to Fleming based on the breaches of the covenants against assignment, to pay taxes, and to pay the instalment of $1,000 on June 16th, 1942. This letter confirms the inference from the conduct of the respondents from the autumn of 1941 until after June 16th, 1942, that they did not intend to act upon the breach to which the assignment is said to have given rise. The fact that the formal notification asserts the failure of payment of the instalment of June 16th, 1942, as a default, is conclusive of that waiver.

What, then, was the real nature of the agreement between the parties and what the effect of the default in payment on June 16th, 1942? When the 1936 agreement between Milner and Fleming was entered into, the latter was already the equitable owner of the land; there was nothing in the agreement which destroyed that interest; nor has that interest, in any of the succeeding transactions, been released or surrendered. The contract failed in the essential function of executing in the purchaser the equitable estate: on the contrary, the purchaser agreed to encumber his existing estate with a consolidated charge, which involved a discharge of the contractual obligation to pay the balance of price for the Milner lot. I find no difficulty in the circumstance that Mrs. Watts conveyed the land direct to Milner. Milner was advancing to Fleming the balance of the purchase price. The usual step would have been a conveyance from Mrs. Watts to Fleming and a mortgage from Fleming to Milner. But Milner evidently desired to combine his dealings with Fleming under a single arrangement, and the mode adopted was one, though a somewhat clumsy, way of doing that.

When we come to the transaction of July 30th, 1938, the real nature of these documents is put beyond doubt. There was made at this time an advance by Milner to Fleming of $4,050. It was pure loan, and yet, for the purpose of

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securing it, what purports to be a formal contract for the sale of land already covered by the 1936 agreement and in terms expressly maintaining both is drawn up. This form, according to the solicitor, was the "idea" of Milner; and that circumstance confirms Fleming's statement that the various transactions took the same form because "he (Milner) wanted it that way".

The instrument of 1941 carried similar stigmata. By that transaction he agreed to advance as a loan to Fleming about $5,600 which, with the interest and the balance owing, brought the total to $12,000; and it is that amount which purports and is claimed to be the price of the lot originally sold for $7,000, all of which had long since been paid to the real vendor.

It is significant, too, that that instrument should carry the language, "the money advanced in the sum of $12,000 is to bear interest". A vendor does not stipulate for interest on money advanced. That language unconsciously reveals the mind of Milner and it confirms the inference from the documents and the underlying facts that the money had not the character of sale price.

The transaction being, then, a mortgage, the case is the ordinary one of relief from forfeiture through default in payment of the money secured, and the right to redeem claimed should, in my opinion, have been granted to the appellants.

In this view it is unnecessary to consider the ground upon which the judgments below proceeded, that is, that the clause as of an agreement for the sale of land declaring time to be of the essence was conclusive and excluded relief from the resulting forfeiture. In the light of the decision in the case of *In re Dagenham (Thames) Dock Co.* (1), followed in *Kilmer* v. *British Columbia Orchard Lands Limited* (2), the point would appear to present more aspects for consideration than were apparently dealt with either on the trial or the appeal: and I do not express any opinion upon it.

(1) (1873) L.R. 8 Ch. App. 1022. (2) [1913] A.C. 319.

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I would, therefore, allow the appeal on the terms proposed by my brother Hudson.

Appeal allowed with costs.

Solicitors for the appellants: *Kerr, McNevin, Gee & O'Connor.*

Solicitor for the respondents: *A. L. Hanna.*

HIS MAJESTY THE KING (PLAINTIFF). APPELLANT;

AND

DOMINION ENGINEERING COMPANY LIMITED (DEFENDANT)..... RESPONDENT.

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*May 22.
*Oct. 3.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Revenue—Sales tax—Contract of sale of machinery—Purchase price to be paid by monthly progress instalments during period of construction—Purchaser becoming insolvent before completion and delivery of machine—Claim by the Crown for sales tax on remaining instalments then not collected—The Special War Revenue Act, R.S.C., 1927, c. 179, s. 86

The respondent company entered into a contract, on June 5th, 1937, for the sale of a pulp-drying machine to the Lake Sulphite Pulp Company for the price of $488,335 payable in nine monthly progress instalments of $48,800 each commencing July 5th, 1937, and the balance of $49,135 when the machine would be in operation, title to pass on payment in full of the price. Six instalments were paid to the respondent and the sales tax on them was paid by the latter to the appellant. On February 5th, 1938, a petition in bankruptcy was filed against the Pulp Company; and on the 11th of February, all work on the machine was stopped. On February 22nd, an order was made for winding up under the Dominion *Winding Up Act* and a liquidator was appointed. The Crown brought an action for the recovery from the respondent of the sum of $10,844.46 for sales tax and penalties on the instalments payable on the 5th days of January, February and March, 1938, the tax being claimed under section 86 of the *Special War Revenue Act,* R.S.C., 1927, c. 179. The first proviso of that section enacts *inter alia* that "the tax shall be payable *pro tanto* at the time each of such instalments falls due and becomes payable in accordance with the terms of the contract, and all such transactions shall, for the purpose of the section, be regarded as sales and deliveries"; and the second proviso further enacts that "in any case where there is no physical delivery of the goods by the manufacturer or producer, the said tax shall be payable when the property in the said goods

*PRESENTS—Rinfret C.J. and Kerwin, Hudson, Taschereau and Rand JJ.

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passes to the purchaser thereof". The contention of the Crown is that the case is within the first proviso and that, as the agreement formally provided for instalments on specified dates, when these dates arrived the tax *eo instanti* became an absolute obligation to the Crown divorced wholly from the contract.

Held, affirming the judgment of the Exchequer Court of Canada, [1943] Ex. C.R. 49), that there was no liability on the respondent for sales tax as claimed by the Crown.

Per The Chief Justice and Kerwin, Taschereau and Rand JJ.—The language of the first proviso, appropriate to a contract performed according to its original terms, presents difficulties in its application to one which has been modified or disrupted; and, therefore, such language is subject to interpretation. If, for instance, after some instalments and the related taxes had been paid, the parties had altered the agreement by either increasing or reducing the price, the incidence of the tax must thereafter vary accordingly. And, in case of disruption of the contract, to sustain the right to the tax, the instalment become payable must remain an obligation of an executory contract. In the present case, the fact of bankruptcy intervening is a circumstance fatal to the right of the Crown to maintain the information. When, on February 22nd, 1938, the liquidation order was made, the instalments for the balance of purchase price ceased to be "due" and "payable" within the meaning of the statute; the respondent could not have enforced payment of the remaining instalments and the essential condition of the tax that they should continue as effective obligations of a contract of sale was not existing when the information was issued.

Per Hudson J.—The sales price, under the contract, was to be paid in instalments in the nature of progress payments although there was no provision that these instalments should be made in accordance with any particular rate of progress, but it must be assumed that it was the intention of the parties that the payments should not become payable until the respondent was making fair progress in its work. Therefore, it is doubtful, upon evidence of delays by the respondent, whether or not the instalments in respect of which the Crown claims ever fell "due" and "payable" in order to bring them within the terms of the first proviso. But, even if it were so, the second proviso must prevail, as the property in the goods never passed to the purchaser: the machinery was never completed, and thus was never capable of physical delivery in fulfilment of the contract. *Forbes* v. *Git* ([1922] A.C. 256) applied.

APPEAL from the judgment of the Exchequer Court of Canada, Angers J. (1), dismissing an information exhibited by the Attorney-General of Canada to recover from the respondent sales tax and penalties alleged due the Crown under the provisions of the *Special War Revenue Act,* R.S.C., 1927, c. 179.

(1) [1943] Ex. C.R. 49.

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

F. P. Varcoe K.C., Roger Ouimet and *W. R. Jackett* for the appellant.

Hazen Hansard for the respondent.

The judgment of the Chief Justice and of Kerwin, Taschereau and Rand JJ. was delivered by

RAND J.—This is an information brought to recover sales taxes claimed in respect of a contract of sale between the respondent as seller and the Lake Sulphite Pulp Company Limited as purchaser of an apparatus known as a pulp-drying machine. The machine was to be built according to plans and specifications, and delivery was to be made on or about March 5th, 1938, f.o.b. cars at Lachine, Quebec, with freight prepaid to the plant of the purchaser at Nipigon, Ontario. The erection of the machine was to be done by the purchaser. The proposal was under date of June 5th, 1937, and the acceptance by the purchaser made on August 3rd, 1937.

The price was $488,335 payable in nine monthly progress instalments of $48,800 each commencing July 5th, 1937, and the balance of $49,135 when the machine was in operation but in no event later than six months from the date of final shipment or offer of shipment from the respondent's works at Lachine. Title was to pass on payment in full of the price.

Although the acceptance was not made until August 3rd, work was actually commenced on June 15th and at the outset consisted of the preparation of plans, ordering of materials and parts, making of moulds, castings, machinery, etc. The instalments due on July 5th and August 5th were paid on August 27th, that for September 5th on the 30th of that month, for October on the 7th and for November on the 13th. Some time in December it was made known that the purchasers were under the necessity of raising funds to carry on the completion of their plant by an issue of treasury notes. A subscription of $50,000 by the respondent was made on terms that the instalment due on

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December 5th should be paid out of the funds realized, and that instalment was paid on January 11th, 1938. On February 5th, 1938, a petition in bankruptcy was filed against the Lake Sulphite Pulp Company and on the 11th of February all work on the machine was stopped. On February 22nd an order was made for winding up under the Dominion *Winding Up Act* and a liquidator was appointed.

On the 11th of February the purchaser had paid on account the sum of $292,800. There remained of the price a balance of $195,335. On the 6th day of April, 1938, the respondent by letter communicated to the liquidator the details of the contract, adding certain extras, sales tax and freight amounting to $1,662.80 and stating that the "work under the contract" was approximately 75 per cent completed. With that was submitted a statutory proof of claim for the sum of $202,820.76. The difference of $5,622.96 was for three small additional contracts. There is no evidence of what, if anything, took place thereafter between the liquidator and the respondent. The information was filed on the 25th day of April, 1940.

The tax is claimed under section 86 of *The Special War Revenue Act*, c. 179 R.S.C., 1927, as amended. Subsection (1) is as follows:

> 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, payable by the producer or manufacturer at the time of the delivery of such goods to the purchaser thereof.
>
> Provided that in the case of any contract for the sale of goods wherein it is provided that the sale price shall be paid to the manufacturer or producer by instalments as the work progresses, or under any form of conditional sales agreement, contract of hire-purchase or any form of contract whereby the property in the goods sold does not pass to the purchaser thereof until a future date, notwithstanding partial payment by instalments, the said tax shall be payable *pro tanto* at the time each of such instalments falls due and becomes payable in accordance with the terms of the contract, and all such transactions shall for the purposes of this section, be regarded as sales and deliveries.
>
> Provided further that in any case where there is no physical delivery of the goods by the manufacturer or producer, the said tax shall be payable when the property in the said goods passes to the purchaser thereof.

It is contended by the Crown that the case is within the first proviso and that, as the agreement formally pro-

vided for instalments on the 5th days of January, February and March, 1938, when these times arrived the tax *eo instanti* became an absolute obligation to the Crown divorced wholly from the contract. It was conceded that, as the remaining balance was payable only after delivery or its equivalent, it could not be said to be due and payable and the tax had not arisen.

The transaction is undoubtedly within the first part of the proviso. It is a contract for the sale of goods

> wherein it is provided that the sale price shall be paid to the manufacturer or producer by instalments as the work progresses.

It contemplates the machine to be built or assembled by the respondent and the monthly payments are distributed evenly over the time allowed for construction. But there is nothing in the contract to indicate that the course of the work, whether as to plans or material or the production or assembly of parts, should follow any particular order or schedule or observe any uniformity of progress. That lay quite within the main obligation of the seller to furnish the apparatus at the time fixed.

By the proviso,

> the tax shall be payable *pro tanto* at the time each of such instalments falls due and becomes payable in accordance with the terms of the contract, and all such transactions shall, for the purposes of this section, be regarded as sales and deliveries.

The words "such transactions" refer either to the contracts themselves or to the successive liabilities for instalments. But in either sense the expression "becomes payable" is not to be limited solely to the event of the day named for the payment of the instalment. What is contemplated is an obligation to pay arising from the legal effectiveness of the contract.

The language of the proviso, appropriate to a contract performed according to its original terms, presents difficulties in its application to one which has been modified or disrupted. If, for instance, after the first two instalments and the related taxes had been paid, the parties had altered the agreement by either increasing or reducing the price, there can be no doubt that the incidence of the tax would thereafter have varied accordingly. But what

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is the effect on unpaid taxes of a subsequent disturbance of the contract which affects the instalment obligations from which the taxes arose?

Although the section declares the "transaction" to be a constructive sale and delivery, the fundamental support of the tax is an executory contract leading to the transfer of title and possession. That contract is conceived as a potential sale to which in turn is related a potential total tax: "the tax shall be payable". *Pro tanto* portions of the tax are related to instalments of price and, when the latter become payable as parts of a whole, the right to the tax takes on the same character: but throughout, the tax depends for its efficacy upon the maturing contract. For the total tax there is only an inchoate liability created by the making of the agreement: and to sustain the right to the tax, the instalment become payable must remain an obligation of an executory contract.

The legal liability at any time for any portion of the tax in no degree restricts the parties in good faith from modifying the contract as they see fit, and *a fortiori* it does not prevent a modification by operation of law. If, in the legal result, the actual transaction ceases to be one of sale, then the necessary support for the tax disappears. That result, at least where the termination of the contract does not effect a total rescission, will not affect the right to taxes on any portion of the price paid to the seller nor does it touch those that have been collected or reduced to judgment by the Crown.

It is contended that, on the dates mentioned, the work was so far behind any schedule as to constitute a breach sufficient to give rise to a suspensive defence by the purchaser. To prove that state of things a graph was introduced showing lines of normal progress and actual progress in the shop work, and indicating that completion by March 5th was impossible. It may be that on December 31st, 1937, the work was at such a stage that, even with the capacity available to the respondent, the machine could not have been finished on time. The evidence does not clearly indicate that. It is admitted that there was a quick as well as an average schedule for the work at the Lachine plant, the former of six months and the latter of

nine. But assuming such a defence to be available under the Civil Code and on the footing that the contract was six weeks behind in its progress at the end of 1937, on January 11th, 1938, the instalment due on December 5th, 1937, was paid and the delay up to that time waived. It is not suggested that from then on until the insolvency appeared, a satisfactorily high rate of performance was not maintained.

But whether under the Act such a defence could have been interposed against the claim for the taxes, it is not necessary to decide. The fact of bankruptcy intervening is, in my opinion, a circumstance fatal to the right of the Crown to maintain this information. When, on February 22nd, the liquidation order was made, the instalments for the balance of purchase price ceased to be "due" and "payable" within the meaning of the statute. What remained to the respondent was to prove for unliquidated damages subject to the right of the liquidator to elect to complete the contract. It is not suggested there was any such election prior to the commencement of this proceeding. But the respondent could not have enforced payment of the remaining instalments and the essential condition of the tax that they should continue as effective obligations of a contract of sale was not existing when the information was issued. A right of election by the liquidator even then continuing could not affect the present proceeding.

This interpretation of the Act does not mean that either price or instalment of price in such a contract must be received before the tax is exigible but it does mean that where the obligation of such an executory contract is by operation of law destroyed, then unpaid taxes related to its terms, themselves suffer a corresponding effect. If that were no so, sellers with unsold property on their hands would be liable for taxes in respect of purchase price not only unpaid but the legal right to which had been annulled: and on the other hand a resale of the same property would attach to itself a new tax unrelated in any sense to that attributed to the first sale. What is created is a tax liability running parallel to executory commercial transactions

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which, before their completion, is exposed to the effect of contractual changes or fundamental legal infirmities to which they may become subjected.

For these reasons I would dismiss the appeal with costs.

HUDSON J.—This appeal concerns a claim on behalf of the Crown against the respondent in the sum of $10,844.46 as sales tax, and for a penalty for non-payment thereof.

The claim arises out of a contract in writing concluded on 3rd August, 1937, whereby the respondent company agreed to manufacture and deliver to the Lake Sulphite Pulp Company Limited a pulp-drying machine with accessories and spare parts for a price of $488,335, this amount to be paid in nine monthly progress payments of $48,800 each, commencing on the 5th of July, 1937, and continuing until a total of $439,800 should have been paid, and the balance of $49,135 when the machine was placed in operation, but in no event later than six months from the date of final shipment or offer of shipment. It was further stipulated that the property in the goods should remain the personal property of the respondents until the price had been fully paid for in cash.

The machine to be constructed was very large and complicated. It required much planning and a great variety of materials and skilled workmanship in construction over a considerable period of time.

The work of construction had actually been commenced prior to the conclusion of the written contract, and thereafter was carried on but not at the rate expected by the parties, owing to various causes which need not be considered. However, five progress payments totalling $244,000 had been paid by the Lake Sulphite Pulp Company by November 13th, 1937. Thereafter another instalment of $48,800 was made in January, 1938, in respect of the sum falling due in December, 1937, but no instalments were paid in the months of January, February and March of 1938, and it is for the amount of these three payments that the present proceedings are taken.

It appears that the Lake Sulphite Pulp Company found difficulty in paying its obligations about the end of 1937 and eventually a winding-up order was made against it on the 22nd of February, 1938. The respondent's manager

learning of the Lake Sulphite Pulp Company's financial difficulties ceased work on the machinery entirely on February 11th, before the formal assignment.

The respondents paid sales tax to the Crown in respect of the payments actually made and the claim of the Crown is in brief that under section 86 (1) (*a*) of the *Special War Revenue Act* the respondents are liable for the tax in respect of the three payments above mentioned because these payments

> fell due and became payable in accordance with the terms of the contract during the months of January, February and March.

There is no dispute as to any material facts and the whole question is as to the interpretation of the section in relation to the facts. It must be kept in mind that the machinery was being sold as a unit, that it was never completely manufactured, and that physical delivery had not been made of any, except a small part of the value of $1,200 and that the property in such part of the machine as had been manufactured did not pass to the purchaser.

Section 86 is as follows:

> 86. 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, payable by the producer or manufacturer at the time of the delivery of such goods to the purchaser thereof.
>
> Provided that in the case of any contract for the sale of goods wherein it is provided that the sale price shall be paid to the manufacturer or producer by instalments as the work progresses, or under any form of conditional sales agreement, contract of hire-purchase or any form of contract whereby the property in the goods sold does not pass to the purchaser thereof until a future date, notwithstanding partial paymyent by instalments, the said tax shall be payable *pro tanto* at the time each of such instalments falls due and becomes payable in accordance with the terms of the contract, and all such transactions shall for the purposes of this section be regarded as sales and deliveries.
>
> Provided further that in any case where there is no physical delivery of the goods by the manufacturer or producer, the said tax shall be payable when the property in the said goods passes to the purchaser thereof.

This section requires careful analysis.

Under (*a*) the tax is payable on delivery of the goods.

In the first proviso, provision is made for earlier payments in cases where the contract calls for payment by instalments. In most of the cases falling within this proviso there would be an actual physical delivery of the goods agreed to be sold. For example, in cases of con-

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ditional sales and hire-purchase, this is almost invariably the case. In some, however, there would not be physical delivery and for such it is provided that a constructive or notional delivery should be assumed.

The second proviso does not apply to cases where there is an actual physical delivery, but in any other cases makes the tax payable when the property in the goods passes to the purchaser.

The facts in the present case may bring it within the language of the first proviso. By the contract the sales price was to be paid in instalments in the nature of progress payments although there was no provision that these instalments should be made in accordance with any particular rate of progress. I think, however, that it must be assumed that it was the intention of the parties that the payments should not become payable until the respondent was making fair progress in its work. This was the interpretation of the Lake Sulphite Pulp Company officials because it appears from the evidence that that Company's manager protested against the delays of the respondent, and in fact held up the December payment for some time on that account.

It is a question whether or not the instalments in respect of which the Crown claims ever fell due and became payable but, even if this were so, I am of the opinion that the second proviso must prevail. The language is unqualified and it is clear that the property in the goods never passed to the purchaser. The second proviso does not destroy altogether the first but applies only to cases where there is no physical delivery. I think for that reason that the rule of construction approved of in *Forbes* v. *Git* (1) is applicable. The machinery was never completed and thus was never capable of physical delivery in fulfilment of the contract.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *Roger Ouimet.*

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

(1) [1923] A.C. 256.

[1922] 1

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CONSUMERS' CORDAGE COMPANY, LIMITED (DEFENDANT) ..... APPELLANT; *Oct. 3. *Oct. 10.

AND

ST. GABRIEL LAND & HYDRAULIC COMPANY, LIMITED (PLAINTIFF) . RESPONDENT.

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

Appeal—Jurisdiction—Motion to quash—Claim of $2,000 under contract of lease—Trial judge holding lease void, but granting $1,066.66 as reasonable value for use and occupation of premises—Appellate court holding lease valid and awarding amount claimed, i.e., $2,000, with interest from date of service of action—Appeal to Supreme Court of Canada—Amount or value of matter in controversy—Whether same is the difference between sums granted by the appellate and trial courts or whether it is the sum of $2,000, plus interest, granted by the appellate court—Section 39, Supreme Court Act.

The respondent claimed from the appellant a sum of $2,000 for five unpaid rental instalments under the terms of a lease of water rights and property rights. The trial judge held that such instrument, being a lease in perpetuity, was void and of no effect; but he gave judgment in favour of the respondent for $1,066.66, amount representing a reasonable value for the use and occupation of the leased property for a certain period of time. On appeal by the respondent, the appellate court held that a valid subsisting lease terminating in 1956 was in effect and binding upon the parties and maintained the action as brought, condemning the present appellant to pay the sum of $2,000, with interest from the date of the service of the action. The appellant having appealed to this Court, the respondent moved to quash the appeal for want of jurisdiction, on the ground that the amount of the matter in controversy was merely the difference between the sum of $2,000, claimed in the action and awarded by the appellate court and the sum of $1,066.66 awarded by the trial judge, i.e., a sum of $933.34, which would be insufficient to clothe this Court with jurisdiction. (*Supreme Court Act*, s. 39).

Held that an appeal lies to this Court from the judgment appealed from. The decision of the trial court, having been set aside, is no longer in controversy in the appeal before this Court. The matter upon which this Court will have to pronounce is whether at the time of the action the lease in question was still subsisting, and the true controversy in the appeal before this Court is the full amount of the condemnation pronounced by the appellate court. Therefore, the amount of the matter in controversy is more than $2,000, since the appellant is entitled to add to the amount of $2,000 granted by the appellate court the interest from the date of the service of the action up to the date of the judgment of the appellate court.

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

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CONSUMERS' CORDAGE CO., LTD. v. ST. GABRIEL LAND & HYDRAULIC CO., LTD.

This case is not similar to the one where the plaintiff only recovers part of the amount claimed for in the trial court and succeeds in having the amount increased in the appellate court. *Berthiaume* v. *Laurier* [1934] 2 D.L.R. 797 dist.

MOTION on behalf of the respondent for an order quashing the appeal to this Court, which was brought from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), reversing the judgment of the trial judge, Greenshields CJ. and granting to the respondent the sum of $2,000 with interest as claimed by the action.

R. C. Holden K.C. for the motion.

A. H. Elder K.C. contra.

The judgment of the Court was delivered by

THE CHIEF JUSTICE.—The respondent, who was the plaintiff in the Superior Court of the province of Quebec, moved to quash the appeal to this Court from the Court of King's Bench on the ground that the amount, or value, of the matter in controversy in the appeal does not exceed the sum of $2,000, as provided in section 39 of the *Supreme Court Act.*

By its action the respondent claimed from the appellant the sum of $2,000 for five unpaid rental instalments under the terms of a lease of water rights and property rights.

The trial judge held that the instrument in question was a lease in perpetuity and, as such, a violation of the law, and that in consequence the instrument was void and of no effect. However, he held that the appellant was in peaceable possession of the leased property up to the 1st of March, 1940, and that it must pay reasonable value for that use and occupation and he, therefore, gave judgment in favour of the respondent for $1,066.66, with interest from the date of the institution of the action and costs.

The present appellant did not appeal from this judgment, but the respondent appealed from it to the Court of King's Bench and the latter Court reversed the judgment of the Superior Court, holding that

at the time of the institution of the action a valid subsisting lease terminating in February, 1956, was in effect and binding upon the parties.

(1) Q.R. [1944] K.B. 305.

As a consequence, the court of appeal maintained the action as brought and condemned the present appellant to pay to the respondent the sum of $2,000, with interest from the date of the service of the action.

The appellant then appealed to this Court and the respondent now moves to quash the appeal for want of jurisdiction. He argues that the amount of the matter in controversy is merely the difference between the sum of $2,000, claimed in the action and awarded by the judgment of the Court of King's Bench (Appeal Side), and the sum of $1,066.66 awarded by the judgment of the Superior Court, or altogether $933.34, which would be insufficient to clothe this Court with jurisdiction.

We cannot agree with such a view of the appeal. The judgment appealed from, and which will have to be considered by this Court, is the judgment of the Court of King's Bench, which held that the lease subsisted until 1956 and, on account of that holding, condemned the appellant to pay the sum of $2,000, with interest from the date of the service of the action. By that judgment the decision of the Superior Court was set aside and is no longer in controversy in the appeal before this Court. The matter upon which we will have to pronounce is whether at the time of the action the lease in question was still subsisting and the amount claimed for in the declaration was due by the appellant to the respondent. The amount of that matter is more than $2,000, since the appellant is entitled to add the interest from the date of the service of the action up to the date of the judgment in the Court of King's Bench.

This is not similar to a case where the plaintiff only recovers part of the amount claimed for in the Superior Court and succeeds in having the amount increased in the Court of King's Bench (Appeal Side). In those cases the amount in controversy is only the amount of the increase, but in the present instance the respondent succeeded on an entirely different ground from that on which the Superior Court judgment was rendered, and we think that the true controversy in the appeal before this Court is the full amount of the condemnation pronounced by the Court of King's Bench.

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Rinfret C.J.

This case must be distinguished from that of *Berthiaume* v. *Laurier* (1), where, as a result of the judgment of the court of appeal, the only amount of the matter in controversy on the appeal to this Court was the sum of $1,000 awarded by way of credit, or set-off, by the court of appeal.

For these reasons, the motion to quash should be dismissed with costs.

Motion dismissed with costs.

Solicitors for the appellant: *Wainwright, Elder & Laidley.*

Solicitors for the respondent: *Heward, Holden, Hutchison, Cliff, Meredith & Collins.*

(1) [1934] 2 D.L.R. 797.

COCA-COLA COMPANY OF CANADA LIMITED (DEFENDANT) ..... } APPELLANT; 1944 *Nov. 15.

AND

FLORENCE MATHEWS (PLAINTIFF)... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Appeal—Leave to appeal to Supreme Court of Canada granted by provincial Court of Appeal on terms which left no issue to be decided between the parties—Court declining to hear appeal.

Appellant, against whom judgment had been given in the Court of Appeal for Ontario directing that respondent recover $350 damages, with costs of the action and of the appeal, was granted by said Court leave to appeal to this Court (the Supreme Court of Canada) on appellant undertaking to pay to respondent in any event of the cause the amount of the judgment ($350) and costs of the trial, of the appeal to the Court of Appeal and of the appeal to this Court.

Held: This Court should decline to hear the appeal, on the ground that there was no issue before it to be decided between the parties.

It may now be regarded as well settled that this Court will not decide abstract propositions of law (even if to determine the liability as to costs, which was not the case in the present instance); and this situation may not be affected by the fact that the provincial Court of Appeal has granted leave to appeal to this Court.

Semble, a provincial Court of Appeal, in giving leave to appeal, and in suitable cases, may impose terms upon the appellant as a condition of his being permitted to appeal to this Court; he may be asked to undertake to pray for no costs in this Court, or even to meet the costs of both sides in any event, or to be put on terms of a similar character, provided the terms for leave to appeal are not so framed as to take away from the respondent any interest in the result of the appeal whatever.

APPEAL by the defendant from the judgment of the Court of Appeal for Ontario (1) which (Henderson J.A. dissenting) (reversing the judgment at trial dismissing the action) directed that the plaintiff recover from the defendant the sum of $350 (damages), with costs of the action and of the appeal. Leave to appeal to the Supreme Court of Canada was granted by the Court of Appeal for Ontario on an undertaking by the defendant, the terms of which undertaking are set out in the reasons for judgment in this Court now reported, the effect of which terms is

*PRESENT:—Rinfret C.J. and Kerwin, Hudson, Rand and Estey JJ.

(1) [1944] O.R. 207; [1944] 2 D.L.R. 355.

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expressed in said reasons in this Court as being "that no further *lis* exists between the parties and that they leave nothing for the respondent to fight over"; and it is to that situation that the judgment now reported is directed.

C. W. R. Bowlby K.C. for the appellant.

A. M. Lewis K.C. for the respondent.

The judgment of the Court was delivered by

THE CHIEF JUSTICE.—In this case the respondent claimed damages from the appellant for injuries and sickness suffered as a result of circumstances for which it held the appellant responsible.

The case came before the Judge of the County Court of the County of Wentworth, who dismissed the action with costs.

Upon appeal, the Court of Appeal for Ontario set aside the judgment of the County Court and directed that the respondent do recover from the appellant the sum of $350, with costs of the action and of the appeal.

Then, upon motion by the present appellant, the Court of Appeal granted leave to appeal to the Supreme Court of Canada upon the following terms:—

> The [appellant] through its counsel undertaking to pay to the [respondent] in any event of the cause the amount of the judgment which she now has in the sum of $350, together with her party and party costs of the trial, the appeal to this Court [the Court of Appeal for Ontario] and the appeal to the Supreme Court of Canada, all to be taxed.

The result is that the terms put on the appellant are such that no further *lis* exists between the parties and that they leave nothing for the respondent to fight over.

As was said by Lord Loreburn, L.C., in *Glasgow Navigation Co.* v. *Iron Ore Co.* (1):—

> It is not the function of a Court of law to advise parties as to what would be their rights under a hypothetical state of facts.

The appellate jurisdiction of the Supreme Court of Canada is from a judgment pronounced in a "judicial proceeding" (*Supreme Court Act,* section 36); and the words "judicial proceeding" mean and include any action, suit, cause, matter or other proceeding in disposing of

(1) [1910] A.C. 293, at 294.

which the court appealed from has not exercised merely a regulative, administrative, or executive jurisdiction (section 2 (*e*)). It will be apparent that if this Court were to entertain the appeal, under the conditions stated in the order granting leave, it would not be called upon to decide, as between the parties, the issue presented in the judicial proceeding which was before the Court of Appeal. It would not have to decide whether the respondent is entitled to recover the damages for which she has brought action. It would have to merely express its view upon a legal question on which the appellant would hope to get a favourable opinion from the Court without in any way affecting the position between the parties.

The Courts have been instituted to decide cases or litigious matters, but not to entertain applications for advice upon legal questions, except, of course, in certain special procedures which are provided for under special statutes.

This is not the first time that this question comes before this Court. In *Moir v. Huntingdon* (1), the head-note is as follows:—

> Since the rendering of the judgment by the Court of Queen's Bench refusing to quash a by-law passed by the corporation of the village of Huntingdon, the by-law in question was repealed. On appeal to the Supreme Court of Canada:—
>
> *Held,* that the only matter in dispute between the parties being a mere question of costs, the court would not entertain the appeal.

In *McKay v. Hinchinbrooke* (2), it was disclosed that the only matter in dispute between the parties was a mere question of costs and the Court decided that it would not entertain the appeal.

A fortiori in this case, where, as a result of the order granting leave, there is not even a question of costs left between the parties.

In *Commissioner of Provincial Police* v. *The King on the prosecution of Pascal Dumont* (3), Dumont had launched *mandamus* proceedings directed against the Commissioner of Police to compel him to return certain motor licences. The *mandamus* was granted by the Court of Appeal. After the judgment of the Appellate Court, the

(1) (1891) 19 Can. S.C.R. 363. (2) (1894) 24 Can. S.C.R. 55.
(3) [1941] Can. S.C.R. 317.

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Commissioner of Police complied with the order and delivered up the licences and number plates to Dumont. The Commissioner of Police then appealed to this Court. Chief Justice Duff, delivering the judgment of the Court, said (at p. 320):—

From that point of view the appeal had no practical object. Even if the appellant's technical objection to the proceeding by way of *mandamus* had been well founded, the licences and number plates would still remain in the hands of the respondent; the purported suspension would still remain a void act and the only question for discussion on the appeal would be the academic technical question with regard to the propriety of proceeding by *mandamus* and the question of costs.

Again in the recent judgment of this Court in *The King ex rel. Tolfree v. Clark et al.* (1), an application was made to this Court for special leave to appeal from the judgment of the Court of Appeal for Ontario affirming the striking out by Hope J. of notice of motion in the nature of *quo warranto* for an order that the respondents show cause why they, as was alleged, did each unlawfully exercise or usurp the office, functions and liberties of a member of the Legislative Assembly of Ontario during and since the month of February, 1943, contrary to the provisions of the *B.N.A. Act* (s. 85), whether or not the same were lawfully amended by *The Legislative Assembly Act* (R.S.O. 1937, c. 12, s. 3), notwithstanding *The Legislative Assembly Extension Act, 1942* (Ont., 6 Geo. VI, c. 24), which, it was alleged, was *ultra vires*. Since the date of the judgment of the Court of Appeal, the "then present" Legislative Assembly was dissolved. The application for leave came before the full Court and was refused. In the course of the judgment delivered for the Court by the Chief Justice, it was said (p. 72):—

Admittedly the application by way of *quo warranto* was for the purpose of obtaining a judicial pronouncement upon the validity of the statute of 1942 extending the life of the Legislative Assembly, as well as section 3 of *The Legislative Assembly Act*. Nevertheless, the direct and immediate object of the proceeding was to obtain a judgment fore-judging and excluding the respondents from sitting and exercising the functions of members of the "then present" Legislative Assembly; and obviously, the Legislative Assembly having been dissolved since the delivery of the judgment of the Court of Appeal, such a judgment could not now be executed and could have no direct and immediate practical effect as between the parties, except as to costs. It is one of those cases where, the state of facts to which the proceedings in the lower

(1) [1944] S.C.R. 69.

Courts related and upon which they were founded having ceased to exist, the sub-stratum of the litigation has disappeared. In accordance with well-settled principle, therefore, the appeal could not properly be entertained. The fact that some important question of law of public interest was or might be pertinent to the consideration of the issue directly and immediately raised by the proceedings does not affect the application of the principle. *Archibald* v. *Delisle* (1); *Delta* v. *Vancouver Rly. Co.* (2).

It may now, therefore, be regarded as well-settled that this Court will not decide abstract propositions of law, even if to determine the liability as to costs, which is not the case in the present instance. Moreover, this situation may not be affected by the fact that the provincial Court of Appeal has granted leave to appeal to this Court.

In *Harris* v. *Harris* (3), notwithstanding that the Court of Appeal for Ontario had granted leave, this Court, having come to the conclusion that it had no jurisdiction, refused to entertain the appeal. See also the decision of this Court in *The Corporation of the City of Toronto* v. *Thompson et al.* (4).

We do not wish to mean that a provincial Court of Appeal in giving leave to appeal, and in suitable cases, may not impose terms upon the appellant as a condition of his being permitted to appeal to this Court. The appellants may be asked to undertake to pray for no costs in this Court, or even to meet the costs of both sides in any event, or to be put on terms of a similar character, provided the terms for leave to appeal are not "so framed as to take away from the respondent any interest in the result of the appeal whatever". These are the words of the Lord Chancellor in the decision of the House of Lords in *Sun Life Assurance Company of Canada v. Jervis* (5). In that case the Court of Appeal had given leave to the appellants to appeal to the House of Lords on the following terms:—

On the defendants undertaking to pay the costs, as between solicitor and client, in the House of Lords in any event, and not to ask for the return of any money directed to be paid by this order, it is ordered that the defendants be at liberty to lodge a petition of appeal to the House of Lords.

(1) (1895) 25 Can. S.C.R. 1, at 14, 15.
(2) (1909) Cameron's Supreme Court Practice, 3rd edit. (1924), p. 93.
(3) [1932] S.C.R. 541.
(4) [1930] S.C.R. 120.
(5) (1944) 113 L.J.K.B. 174.

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It was held that, as the terms placed on the appellants by the Court of Appeal in giving leave were such as to have made it a matter of complete indifference to the respondent whether the appellants won or lost, the respondent in either event remaining in exactly the same position, the House would not hear such an appeal, as it would only be deciding an academic question and not an existing *lis* between the parties.

Likewise, in the Privy Council in *Attorney-General for Ontario v. The Hamilton Street Railway Co.* (1), certain questions had been referred to the Court of Appeal by the Lieutenant-Governor of Ontario and the Court of Appeal's answers were brought before the Privy Council. Their Lordships' opinion on the first question rendered it unnecessary to answer the second; but with regard to the remaining questions they stated that it was not the practice of the Board to give speculative opinions on hypothetical questions and that the questions must arise in concrete cases and involve private rights.

Again, in *Attorney-General for Alberta* v. *Attorney-General for Canada* (2), their Lordships held that:—

> Inasmuch as the Social Credit Board and the Provincial Credit Commission, as constituted under the Alberta Social Credit Act, 1937, no longer existed, that Act having been repealed since the order of the Supreme Court on the reference in this case, those bodies could not perform the powers proposed to be conferred upon them in respect of the Press Bill and the Credit Regulation Bill, which Bills, therefore, could not now be brought into operation, and their Lordships, in accordance with the established practice of the Board in such circumstances, declined to hear arguments on this appeal so far as it related to those two Bills.

In view of these reasons, we are unanimously of the opinion that this Court should decline to hear this appeal on the ground that there is no issue before the Court to be decided between the parties.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *C. W. R. Bowlby.*

Solicitor for the respondent: *A. M. Lewis.*

(1) [1903] A.C. 524.

(2) [1939] A.C. 117 at 118.

LES COMMISSAIRES D'ECOLES POUR LA MUNICIPALITE DE LA PAROISSE DE ST-ADELPHE (DEFENDANTS) ..... APPELLANTS;

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*Feb. 17, 18, 21.
*Oct. 31.

AND

JOSEPH CHAREST AND OTHERS (PLAINTIFFS) ..... RESPONDENTS;

AND

PATRICK DOUVILLE AND LES CURE ET MARGUILLIERS DE L'ŒUVRE ET FABRIQUE DE LA PAROISSE DE ST-ADELPHE.

(MIS-EN-CAUSE).

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

School law—Resolution of school commissioners for building of school house—Awarding of contract—Action by ratepayers, under article 50 C.C.P., to quash resolution and annul contract—Superior Court not acting as appellate court—Appeal by ratepayers to Magistrate's Court—Cost of work paid by loan raised by means of promissory notes—Resolution merely stipulating that a tax "will be" imposed and levied—Wording insufficient to create a tax—Tax must be actually imposed by the resolution—Contract void, but not resolution, which is amendable—Power of school commissioners to acquire immoveable property by emphyteutic lease—Art. 50 C.C.P.—School Code, articles 236, 237, 244, 248, 508—Quebec Municipal Commission Act, R.S.Q., 1941, c. 207, ss. 2, 34.

An action was brought by some ratepayers against the school commissioners of a municipality, under the provisions of article 50 of the Code of Civil Procedure, asking that a certain resolution passed by the commissioners, ordering the building of a school house, be declared illegal, irregular and null and that a contract entered into between the commissioners and a contractor to do that work be set aside.

Held that the superintending and reforming power, order and control given to the Superior Court by article 50 of the Code of Civil Procedure are different from the power attributed to an appellate court; and the Superior Court cannot substitute its own opinion to the opinion of the persons or bodies mentioned in that article as to the decisions taken by the latter. In order to enable the Superior Court to exercise its power under that article, it is not sufficient that these persons or bodies have failed to perform some duties imposed upon them by law, but it is necessary that their conduct will give rise to

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

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an illegality or a denial of justice which would be equivalent to fraud. Otherwise, as in the present case, the proper remedy of a ratepayer, if the school commissioners refuse or neglect to perform any of the duties imposed upon them by the School Code, is by way of an appeal to the Circuit Court or the Magistrate's Court under section 508 of the code.

Held, also, that school commissioners, when passing a resolution authorizing a contract of work for construction or improvement, have the right, with the approval of the Quebec Municipal Commission, to provide for the appropriation of the moneys required for paying the whole costs of the work by way of a loan secured by promissory notes, notwithstanding the provisions of article 248 of the School Code, such section merely limiting the borrowing power of the commissioners to "temporary loans" by means of notes pending the collection of school taxes.

The resolution of the school commissioners stipulated that, in order to provide for the payment of the notes and interest as they become due, a special annual tax *will be* imposed and levied on all taxable properties of the municipality. The respondents contended that no tax had been imposed by the resolution as the future sense had been employed in the wording of the resolution and that, consequently, when the contract had been awarded, and the loan effected, no tax was then in existence.

Held that the contract of work was illegally awarded by the school commissioners, as the terms of the resolution were not sufficient to create a tax. The exigencies of the law go further: it is necessary that a tax, which will be levied in the future, should actually be imposed by the resolution, there being a radical difference between the imposition of a tax and its levy. The awarding of the contract was in contravention of the non-ambiguous provisions of articles 237 and 244 of the School Code and the formalities therein prescribed must be strictly followed. But the contract alone is void, and the resolution itself is not illegal, as an incomplete resolution can always be amended. *Goulet* v. *La Corporation de la Paroisse de St-Gervais* (Q.R. 50 K.B. 513) approved.

Held, further, that school commissioners have the right, under article 236 of the School Code, to acquire immoveable property by means of an emphyteutic lease.

Judgment of the Court of King's Bench (Q.R. [1943] K.B. 504) varied.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), affirming the judgment of the Superior Court, Marchand J., and maintaining the respondents' action, by which they asked that certain resolutions passed by the School Commissioners be declared illegal, irregular and void and that certain contracts entered into between the latter and the mis-en-cause be set aside.

(1) Q.R. [1943] K.B. 504.

Fortunat Lord K.C. and *Elie Beauregard K.C.* for the appellants.

Aldéric Laurendeau K.C. and *J. M. Bureau K.C.* for the respondents.

The judgment of the Court was delivered by

TASCHEREAU J.—Il s'agit dans la présente cause d'une action instituée par les intimés contre les appelants pour faire déclarer illégales, irrégulières et nulles certaines résolutions adoptées par la commission scolaire, et pour faire mettre de côté certains contrats intervenus entre les appelants et les mis-en-cause.

A une réunion de la commission scolaire tenue le 30 juillet 1941, une résolution a été adoptée unanimement décrétant (*a*) la construction à un prix maximum de $7,000 d'une école pour garçons suivant les plans et spécifications approuvés par le Surintendant de l'Instruction Publique, (*b*) l'acquisition par bail emphytéotique d'un morceau de terre offert par la Fabrique, (*c*) un emprunt d'une somme de $7,000 par billet, avec intérêt au taux de 5 pour 100 par année pour payer le coût de la construction, (*d*) imposition d'une taxe spéciale affectant la propriété immobilière de la municipalité.

Subséquemment, la commission scolaire a adopté, le 27 septembre 1941, une autre résolution accordant à Patrick Douville, mis-en-cause, le contrat pour la construction de cette école, et le même jour un contrat a été signé entre la commission scolaire et ledit Patrick Douville. A cette même date, la commission scolaire a autorisé son Président et son Secrétaire à signer un bail emphytéotique avec l'Œuvre et Fabrique de la paroisse de St-Adelphe, pourvoyant à l'acquisition du terrain sur lequel devait être construite la maison d'école en question, et le 29 septembre, le Président et le Secrétaire ont signé ce bail emphytéotique.

Patrick Douville a immédiatement commencé la construction de cette maison d'école sur le terrain acquis de l'Œuvre et Fabrique de la paroisse de St-Adelphe.

Les intimés ont institué leur action le 13 septembre 1941, et ils ont demandé la nullité de la résolution du 30 juillet 1941, et dans le cours du mois d'octobre, ils ont

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produit une demande incidente pour demander la nullité de la résolution du 27 septembre accordant le contrat à Patrick Douville, ainsi que la nullité de ce contrat. Ils demandaient également dans leur demande incidente la nullité du bail emphytéotique intervenu avec les curé et marguilliers de l'Œuvre et Fabrique de la paroisse de St-Adelphe. Le tout était accompagné d'une demande d'injonction.

Le 14 août 1942, la Cour Supérieure a donné raison aux intimés tant sur l'action que sur la demande incidente, mais l'injonction n'a été maintenue que quant aux frais. La Cour du Banc du Roi a confirmé ce jugement et cette Cour a donc à se prononcer sur trois points, soit la demande principale, la demande incidente et l'injonction.

Les intimés soutiennent que toutes les procédures faites par les commissaires d'écoles sont nulles, et ils allèguent diverses raisons à l'appui de leurs prétentions. En premier lieu, ils soutiennent que les ordonnances visées leur causent une injustice grave équivalente à fraude et qu'elles sont en conséquence *ultra vires*. Ils soumettent également que les ordonnances outrepassent les pouvoirs des appelants relatifs aux emprunts scolaires, et à l'octroi du contrat d'entreprise.

A l'appui de leurs premières prétentions, les intimés disent que la municipalité scolaire de St-Adelphe est endettée, que les revenus ordinaires de la municipalité ne sont pas suffisants pour rencontrer les dépenses ordinaires, que les maisons d'écoles dans la municipalité sont vieilles et offrent un danger constant pour la santé des enfants, que d'autres écoles auraient dû être construites dans d'autres districts scolaires avant de construire celle autorisée par la résolution du 30 juillet 1941, que depuis quinze ans des enfants d'autres districts n'ont pas joui des facilités scolaires auxquelles ils avaient droit, que toutes les résolutions et contrats passés font partie d'une conspiration, au détriment d'une partie de la population, qui fait que leurs actes sont entachés de mauvaise foi, et même de fraude suffisante pour autoriser la Cour à intervenir et à renverser la décision des commissaires d'écoles.

Il est bon de rappeler que dans cette paroisse de St-Adelphe il existait en 1941 un couvent dirigé par les Sœurs de Jésus, et situé près de l'église sur une terre

appartenant à la Fabrique. Comme il n'y avait pas d'école pour les enfants du sexe masculin dans ce district, les commissaires d'écoles, appelants dans la présente cause, ont réservé pour ces enfants deux classes dans le couvent. Ces classes ont été confiées au Frère St-Gabriel, mais des plaintes se sont fait entendre à ce sujet, et l'inspecteur régional a recommandé, en conséquence, la construction d'une école pour les garçons.

Le 26 mai 1941, le Département de l'Instruction Publique a promis un octroi de $4,500 pour la construction de cette école si elle était bâtie suivant les recommandations de l'inspecteur. De plus, la Fabrique, avec l'approbation de l'Ordinaire, a offert presque gratuitement un morceau de terrain près de l'église pour servir de site à cette nouvelle école.

A la réunion de la commission scolaire du 30 juillet 1941, les intimés ont présenté aux appelants une requête demandant la tenue d'un referendum sur l'opportunité d'adopter la résolution inscrite à l'ordre du jour, dont avis avait été donné le 21 juillet précédent, et décrétant la construction de cette école pour garçons, l'acquisition de la pièce de terre de la Fabrique, et un emprunt de $7,000 pour rencontrer les dépenses à être encourues. A cette assemblée, chacun a eu la liberté d'émettre ses opinions, mais la requête a été définitivement rejetée. La résolution a été adoptée sur-le-champ Elle a été approuvée par la Commission Municipale le 19 août 1941, et le 26 septembre de la même année, le Secrétaire Provincial et le Ministre des Affaires Municipales ont aussi donné l'approbation requise par la loi.

La présente action est instituée sous l'empire de l'article 50 du Code de Procédure Civile qui accorde à la Cour Supérieure un droit de surveillance et de réforme sur les corps politiques et les corporations dans la province, et cette Cour a déjà décidé que la Cour Supérieure n'est pas un tribunal d'appel des décisions des commissaires d'écoles. Le pouvoir conféré à la Cour Supérieure par l'article 50 C.P.C. est un pouvoir de contrôle et de surveillance qui diffère des pouvoirs que possède une cour d'appel.

Comme le dit M. le juge Brodeur dans la cause de *Hébert* vs *Les Commissaires d'Ecoles de St-Félicien* (1):

(1) (1921) 62 Can. S.C.R. 174, at 180

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Une cour d'appel substitue son opinion sur les mérites de la cause et l'opinion de la cour qui a rendu le jugement originaire, tandis que la Cour Supérieure, sous l'autorité de l'article 50 C.P.C. n'a pas le droit d'empiéter sur les attributions qui appartiennent exclusivement aux autorités scolaires et de substituer son opinion à celle des autorités sur le mérite de leurs ordonnances passées régulièrement et dans les limites de leurs attributions.

Ainsi, dans le cas actuel, la Cour de Circuit aurait eu pleine et entière juridiction pour s'enquérir de l'injustice de la résolution attaquée, mais la Cour Supérieure peut tout au plus rechercher si la corporation scolaire a agi au delà de ses pouvoirs, si elle a commis une illégalité, ou bien si la résolution attaquée constitue un déni absolu de justice.

C'est à la lumière de ce principe qu'il s'agit de déterminer si les tribunaux dans le cas qui nous est soumis peuvent et doivent intervenir et se substituer à l'opinion des commissaires d'écoles qui, en vertu du Code Scolaire, voient à l'administration des affaires scolaires des paroisses.

Les tribunaux, évidemment, n'interviendront pas lorsque, dans l'exercice des pouvoirs que la loi leur confère, les commissaires d'écoles prennent des décisions qu'ils croient être dans l'intérêt de la population et que, cependant, d'autres personnes peuvent ne pas approuver. Ce serait, comme le dit M. le juge Brodeur, dans la cause citée précédemment (1) substituer leur opinion à celle des commissaires, empiéter sur leurs attributions, et faire jouer à la Cour un rôle que la loi attribue aux membres de la commission scolaire.

D'ailleurs, si les commissaires refusent ou négligent d'exercer quelques-uns des devoirs ou des attributions mentionnées au Code Scolaire, tout contribuable de la municipalité peut appeler à la Cour de Magistrat dans les trente jours qui suivent l'expiration d'un délai de trente jours à compter de la mise en demeure donnée par un contribuable aux commissaires et aux syndics d'écoles de les exercer. L'article 508 se lit comme suit:

Il y a appel ou recours à la Cour de Circuit ou à la Cour de Magistrat lorsque les commissaires ou les syndicts d'écoles ont

(1) choisi l'emplacement ou décidé la construction ou la reconstruction d'une école;
(2) établi un nouvel arrondissement;
(3) changé les limites d'un arrondissement déjà existant;
(4) réuni ou séparé deux ou plusieurs arrondissements;
(5) imposé une cotisation spéciale en vertu des dispositions de l'article 265;

(1) (1921) 62 Can. S.C.R. 174

(6) refusé ou négligé d'exercer quelques-unes des attributions qu'ils peuvent ou doivent exercer en vertu des articles 88, 93, 236, 264, 265 ou 266.

Les articles mentionnés au paragraphe (6) indiquent quelles sont les obligations des commissaires d'écoles. Ainsi, ils doivent partager les municipalités en arrondissements d'écoles qu'ils désignent par des numéros. Ils doivent en outre, en vertu de l'article 93, autant que possible, maintenir une école dans chaque arrondissement, mais ils peuvent néanmoins, s'ils le jugent nécessaire, réunir deux ou plusieurs arrondissements pour une école et les séparer de nouveau. Il est de leur devoir, en vertu de l'article 236, d'administrer les biens meubles et immeubles appartenant à la commission scolaire, de choisir et d'acquérir les terrains nécessaires pour les emplacements de leurs écoles. L'article 264 impose aux commissaires l'obligation de construire les écoles conformément aux plans et devis approuvés par le Surintendant, et, enfin, l'article 265 dit que s'il devient nécessaire d'acquérir ou d'agrandir l'emplacement d'une maison d'école, de construire, de reconstruire, d'agrandir ou de réparer une ou plusieurs maisons d'écoles ou leurs dépendances, ils peuvent imposer pour cette fin soit l'arrondissement en particulier, soit la municipalité entière. Et c'est lorsque les commissaires d'écoles ne remplissent pas les devoirs qui leur sont imposés en vertu de ces articles que l'appel est donné à tout contribuable à la Cour de Magistrat qui agit véritablement comme une cour d'appel et qui a le pouvoir de renverser les décisions prises par les commissaires d'écoles.

Les intimés semblent avoir bien compris la portée de ces articles du Code Scolaire, car ils ont institué des procédures devant la Cour de Magistrat qu'ils ont cependant presque immédiatement abandonnées. Pour que la Cour Supérieure puisse intervenir, et pour qu'il lui soit permis d'exercer ce droit de contrôle et de réforme dont l'investit l'article 50 du Code de Procédure Civile, il ne faut pas seulement que les commissaires aient négligé de remplir quelqu'un des devoirs qui leur sont imposés dans les articles que nous venons de citer, mais il faut, comme l'ont dit les tribunaux déjà, que leur conduite soit telle qu'elle cause une injustice qui soit équivalente à la fraude.

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De quoi se plaignent les intimés, et quels actes auraient été posés par les commissaires d'écoles qui seraient de nature à permettre à la Cour Supérieure d'intervenir? On dit que les écoles des autres arrondissements sont en mauvais ordre et qu'elles ne sont pas entretenues, et que même dans certains arrondissements il n'y a pas de facilités scolaires pour la jeunesse étudiante. On prétend également qu'il y a déjà une école dans l'arrondissement n° 1, et que le fait d'en construire une nouvelle constitue une injustice pour les habitants des autres arrondissements qui n'en ont pas. Mais ces questions sont évidemment du ressort du magistrat que le législateur a investi du pouvoir de reviser les décisions des commissaires d'écoles, en vertu des dispositions de l'article 508 du Code Scolaire. Ce magistrat aurait pu prendre la décision que la commission aurait dû rendre si véritablement il y avait eu injustice.

On prétend également que la situation financière de St-Adelphe est précaire et que la construction de cette école créera un fardeau trop lourd pour les contribuables. Je doute fort que la décision de cette question relève de la Cour Supérieure. La Commission Municipale exerce un contrôle sur les dépenses des commissions scolaires, et d'ailleurs, le gouvernement provincial s'est engagé à payer une somme de $4,500, de sorte que durant une période de cinq ans la commission scolaire n'aura qu'à payer une somme de $2,475.

On accuse clairement les membres de la commission scolaire d'avoir conspiré pour priver une partie de la population de son droit à une école. Tout semble au contraire avoir été fait très ouvertement. Avis de la résolution a été donné le 21 juillet, et la résolution elle-même a été adoptée le 30 du même mois après une réunion de la commission où le public était admis et où on a discuté de l'opportunité de tenir un referendum. Les inspecteurs du gouvernement ont visité les lieux, et après que la résolution eut été adoptée, elle a été approuvée par la Commission Municipale, par l'honorable Secrétaire de la province, de même que par le Ministre des Affaires Municipales, de l'Industrie et du Commerce.

Je ne puis trouver aucun des éléments de fraude que l'on reproche aux appelants. Peut-être ont-ils commis

une erreur de jugement; peut-être eût-il été préférable que l'école fût construite dans l'arrondissement n° 5 (*a*) au lieu de l'arrondissement n° 1. Mais les commissaires ont exercé leur discrétion. La Cour de Magistrat, siégeant comme cour d'appel de cette décision, aurait certes pu intervenir en vertu des pouvoirs qui lui sont conférés par le Code Scolaire, mais je suis fermement convaincu, dans un cas comme celui qui nous occupe, qu'il n'appartient pas à la Cour Supérieure de s'ériger en tribunal d'appel et de remplir le rôle qui est réservé aux commissaires eux-mêmes.

On prétend aussi que la résolution décrétant un emprunt au moyen de billet promissoire est illégale, car le Code Scolaire n'autorise ce mode d'emprunt que dans un seul cas, c'est-à-dire en attendant la perception des taxes scolaires. En effet, l'article 248 du Code Scolaire prescrit que la période de tel emprunt ne doit pas excéder six mois, et que la somme empruntée ne doit en aucun temps excéder le huitième du revenu de la municipalité, alors dû et exigible.

Lorsqu'une commission scolaire donne à l'entreprise des travaux de construction ou d'amélioration, la résolution qui autorise le contrat ou ordonne les travaux doit pourvoir à l'appropriation des deniers nécessaires pour en payer le coût. C'est l'article 237 du Code Scolaire qui impose cette obligation à la commission, et si elle n'a pas dans ses fonds généraux les sommes nécessaires à cette fin, la résolution doit pourvoir à l'imposition d'une taxe spéciale, ou décréter un emprunt. Mais lorsque tel emprunt est décrété, la résolution doit remplir les conditions et formalités requises par la loi relative aux emprunts.

L'on voit donc qu'une corporation scolaire peut, lorsqu'elle donne un contrat d'entreprise, payer de plusieurs façons. Il est possible qu'elle ait dans ses fonds généraux non autrement appropriés les sommes nécessaires, alors aucune taxe n'est imposée et aucun emprunt n'est nécessaire. Il est également possible qu'elle impose une taxe immédiate suffisante pour payer le coût total des travaux, ou, enfin, il est loisible à la commission scolaire de faire un emprunt.

Les emprunts que la commission scolaire peut contracter sont par émissions d'obligations ou par d'autres formes

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d'emprunts qui, en certains cas, sont appelés emprunts temporaires. Dans le cas qui nous occupe, il n'y a pas eu d'émissions d'obligations, mais la résolution décrète bien un emprunt au moyen de billets, et c'est ce qui doit être fait afin de rencontrer les prescriptions impératives de l'article 237. La question qui se pose est donc de savoir si, lorsque les appelants ont décrété cet emprunt au moyen de billets, ils ont suivi toutes les conditions et formalités requises par la loi relative aux emprunts scolaires. Les intimés invoquent l'article 248 pour prétendre que les appelants ont excédé leur juridiction dans le choix du mode d'emprunt, vu que l'article 248 dit que la période de l'emprunt temporaire ne doit pas excéder six mois, et que la somme empruntée ne doit en aucun temps excéder le huitième du revenu de la municipalité, alors dû et exigible.

On semble prendre pour acquis qu'une corporation scolaire ne peut pas contracter d'emprunts par billets autrement que par emprunts temporaires suivant les dispositions de cet article 248. Mais l'article 244 du Code Scolaire permet à une corporation scolaire de faire des emprunts autrement que par émissions d'obligations ou par billets à court terme, qu'on appelle emprunts temporaires. "Aucune émission d'obligations ne peut être faite, et *aucun emprunt* ne peut être contracté", dit cet article, "à moins qu'il ne soit imposé", etc., etc. Cette rédaction démontre bien qu'une corporation scolaire peut emprunter pour payer le coût d'un contrat d'entreprise non seulement par obligations, mais aussi par billets, indépendamment de l'autorisation qui lui est donnée de contracter des emprunts temporaires en vertu de l'article 248.

Il est bien possible que ce ne soit pas un emprunt temporaire qui ait été contracté par les appelants dans la présente cause, mais ceci, je crois, ne peut pas affecter l'issue du procès.

En effet, si l'emprunt peut être appelé "un emprunt temporaire", l'argument des intimés à l'effet que l'emprunt temporaire ne doit pas excéder six mois, et que la somme empruntée ne doit en aucun temps excéder le huitième du revenu de la municipalité, alors dû et exigible, aurait une certaine valeur, mais la législature a fait davantage, et l'on trouve dans la Loi de la Commission Municipale l'article 34 qui se lit de la façon suivante:

La Commission peut autoriser une municipalité, sur demande qui lui est faite par simple résolution du conseil, à contracter un ou des emprunts temporaires aux conditions et pour la période de temps qu'elle détermine.

Les conditions ainsi déterminées par la Commission régissent ces emprunts nonobstant toute disposition contraire ou incompatible d'une loi générale ou spéciale, limitant le montant des emprunts temporaires et déterminant l'époque de leur remboursement.

Et si l'on réfère à l'article 2 de la même loi qui est le chapitre 207 des Statuts Refondus de 1941, l'on voit que le mot "municipalité" signifie toute "corporation de commissaires d'écoles". Cet article permet donc aux appelants, avec l'approbation de la Commission Municipale qui, d'ailleurs, leur a été donnée, d'étendre les délais limités par l'article 248, et d'emprunter pour des montants plus élevés que ne le permet le même article.

Qu'il s'agisse donc d'un emprunt temporaire dont le terme a été étendu en vertu de la Loi de la Commission Municipale, ou d'un emprunt ordinaire par billets, autorisé par l'article 244, je suis d'opinion que les formalités légales ont été remplies, et que sur ce point, l'argument des intimés ne peut pas prévaloir.

Mais c'est aussi la prétention des intimés que les appelants n'ont pas suivi les prescriptions de la loi, en particulier les prescriptions des articles 237 et 244 du Code Scolaire, qui se lisent comme suit:

Art. 237: Nulle corporation scolaire, sauf les corporations scolaires comprises en tout ou en partie dans la cité de Québec ou dans celle de Montréal, ne peut donner à l'entreprise des travaux de construction ou d'amélioration et passer un contrat à cette fin, à moins que la résolution qui autorise le contrat ou ordonne les travaux n'ait pourvu à l'appropriation des deniers nécessaires pour en payer le coût.

Si la corporation n'a pas dans ses fonds généraux non autrement appropriés, les sommes nécessaires à cette fin, la résolution doit pourvoir *à l'imposition d'une taxe spéciale* sur toute la municipalité ou sur les propriétaires obligés au coût des travaux, selon le cas, ou décréter un emprunt, et, dans ce cas la résolution doit remplir toutes les conditions et formalités requises par la loi relative aux emprunts scolaires.

Les contrats passés contrairement aux dispositions qui précèdent *sont nuls* et ne lient pas la corporation, et tout contribuable peut obtenir un *bref d'injonction* contre la corporation et l'entrepreneur pour empêcher l'exécution des travaux.

L'article 244 dit ce qui suit:

Art. 244: Aucune émission d'obligations ne peut être faite, et *aucun emprunt ne peut être contracté* à moins qu'*il ne soit imposé* par la résolution qui les autorise, sur les biens imposables affectés au paiement de telles obligations ou de tel emprunt, une taxe annuelle suffisante pour payer l'intérêt de chaque année, etc., etc.

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Or, la résolution dit:

De façon à pourvoir au paiement des intérêts et afin de couvrir les échéances de chaque année ci-dessus mentionnées, il sera imposé et prélevé par la commission scolaire une taxe spéciale annuelle suffisante sur toutes les propriétés taxables de la municipalité.

L'argument invoqué par les demandeurs-intimés est qu'aucune taxe n'a été imposée, vu qu'on a employé le futur dans la rédaction de la résolution, et en conséquence, à la date où le contrat a été donné et l'emprunt contracté, cette taxe n'existait pas, et n'affectait pas les propriétés imposables de la municipalité.

A l'argument on a cité le jugement de la Cour du Banc du Roi (1) et de cette Cour (2) dans *Goulet* vs *La Corporation de la paroisse de St-Gervais*. Dans cette cause, des faits à peu près identiques se présentaient. La corporation de la paroisse de St-Gervais avait consenti trois contrats différents pour la construction de certains ponts situés dans les limites de la municipalité. Les contrats avaient été donnés après que la résolution suivante eut été adoptée par le conseil:

Il est aussi statué et ordonné qu'une taxe spéciale *sera prélevée* sur tous les bien imposables des contribuables obligés auxdits ponts afin d'en faire le paiement dans un seul versement au comptant.

La Cour du Banc du Roi en est venue à la conclusion que le règlement n'était pas nul, cas ce n'est pas le règlement, lorsque la taxe n'est pas imposée, que la loi frappe de nullité; et, comme le disait le juge en chef, sir Mathias Tellier:

Tout règlement peut être amendé par un autre règlement. Rien n'empêchait la défenderesse, après qu'elle eût reçu des soumissions, d'accepter conditionnellement celle des mis-en-cause et d'adopter un second règlement pour compléter le premier.

Mais il s'ensuit du jugement de la Cour du Banc du Roi qu'un règlement semblable, malgré qu'il pût être complété, était tout de même insuffisant. Et, quant au contrat consenti, comme conséquence d'un semblable règlement, il devrait être annulé, parce qu'en réalité, il se trouvait à avoir été donné avant que la taxe ne fût imposée.

Sir Mathias Tellier dit, à la page 520:

Le demandeur a raison, lorsqu'il dit que par la disposition ci-dessus du règlement la taxe ne se trouve pas actuellement imposée, mais je crois

(1) [1930] Q.R. 50 K.B. 513. (2) [1931] S.C.R. 437.

qu'il a tort de prétendre que cela rend la règlement nul. L'article 627a sur lequel il se base ne va pas si loin que cela. Il frappe de nullité tout contrat d'entreprise donné par une corporation municipale qui n'a pas pourvu à ses voies et moyens; mais il ne déclare pas invalide le règlement lui-même en exécution duquel elle a agi.

Et à la page 521, le juge en chef s'exprime enfin de la façon suivante, après avoir cité le règlement imposant la taxe:

> Cette clause est claire: La défenderesse se procurera les fonds requis pour son entreprise, en imposant une taxe spéciale sur les contribuables obligés aux ponts. Voilà sa décision. Cette taxe a-t-elle été imposée? Elle ne l'avait pas encore été, à la date des trois contrats attaqués, ni même à la date de la présente poursuite. Dans ces conditions, il me paraît clair que lesdits contrats étaient invalides, et que, partant, le demandeur, qui est un des contribuables, avait droit à l'action en nullité qu'il a intentée.

Devant cette Cour, cette question n'a pas été discutée. Mais l'appel de la corporation de la paroisse de St-Gervais a été maintenu parce que l'intimé Goulet, en inscrivant sa cause en appel, n'avait pas signifié son avis d'appel aux contracteurs, et cette Cour en est venue à la conclusion qu'il était impossible d'annuler les contrats, à moins que lesdits contracteurs ne soient en cause.

Dans la présente cause, les faits sont pratiquement identiques. La taxe n'est sûrement pas imposée. On dit que dans l'avenir ou imposera une taxe, mais ceci n'est pas suffisant pour la créer. Il me semble clair que l'article 237 du Code Scolaire a été violé, car le contrat a été signé avant que la taxe ne fût imposée sur les biens de la municipalité affectés au paiement de l'obligation contractée. Ce que le législateur a voulu, et il l'a dit en termes non équivoques, c'est qu'aucun contrat d'entreprise ne soit donné, à moins que la corporation scolaire n'ait préalablement pourvu à s'assurer la disponibilité des fonds nécessaires pour payer le coût des travaux. Et on conçoit facilement la sagesse d'une semblable législation dont le but évident est de mettre un frein aux dépenses exagérées, et de protéger le contribuable contre les extravagances des administrateurs. C'est une erreur de prétendre qu'en employant les expressions "sera imposée et prélevée", on a pourvu à ses voies et moyens, et qu'on s'est assuré une source de revenus pour payer le coût de l'entreprise. La loi exige davantage. Il faut que la taxe qui sera prélevée plus tard soit imposée par la résolution. Il y a une différence essentielle entre

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l'imposition de la taxe et son prélèvement. L'imposition est l'acte des commissaires, et le prélèvement, l'acte du secrétaire-trésorier. Comme le dit M. le juge Rinfret (*Canadian Allis Chalmers Limited* vs *City of Lachine* (1) le rôle de perception est surtout un mécanisme de recouvrement nécessairement basé sur le règlement. Il est avant tout une opération mathématique.

Telle est l'opinion émise par la Cour du Banc du Roi dans la cause de *Goulet* vs *La Corporation de la paroisse de St-Gervais* (2), et je partage cette manière de voir.

Les formalités imposées par cet article sont de rigueur, et si la taxe n'est pas imposée, le contrat est nul et ne lie pas la corporation, et tout contribuable peut obtenir un bref d'injonction contre la corporation et l'entrepreneur pour empêcher l'exécution des travaux. Malgré les inconvénients que cela puisse présenter, je ne puis mettre de côté le texte impératif de cet article du Code Scolaire, et je suis d'avis, en conséquence, que sur ce point, les intimés ont raison, et que le contrat d'entreprise a été illégalement consenti.

Les principes émis par la Cour du Banc du Roi réfèrent, il est vrai, aux dispositions du Code Municipal, mais ils sont également applicables dans la présente cause parce que le Code Municipal de Québec contient des dispositions identiques au Code Scolaire de la province. Ainsi, l'article 237 du Code Scolaire correspond à l'article 627a du Code Municipal. En vertu de ces articles du Code Scolaire et du Code Municipal, le contrat n'est pas valide, à moins que la résolution ou le règlement, suivant le cas, n'ait imposé la taxe. Cependant, seul le contrat peut être frappé de nullité si la taxe n'est pas imposée. Il n'est pas illégal en effet pour une municipalité de déclarer par résolution qu'elle a l'intention de construire une école au coût de $7,000. Ce qui est illégal, dit le Code Scolaire, c'est de consentir un contrat d'entreprise avant que la taxe ne soit imposée. Or, comme la résolution incomplète peut être amendée, il s'ensuit que seul le contrat est nul, mais la résolution du 30 juillet 1941, décrétant la construction d'une école pour garçons au prix de $7,000, n'est pas nulle. Il en est autrement, cependant, de cette autre résolution en date du 27

(1) [1934] S.C.R. 445, at 453. (2) [1930] Q.R. 50 K.B. 513.

septembre 1941, accordant le contrat d'entreprise à M. J. Patrick Douville, parce que cette résolution est intimement liée au contrat d'entreprise qui, pour les raisons que nous venons de mentionner, doit être déclaré illégal.

Les intimés invoquent un autre grief. C'est que la résolution qui autorise l'emprunt est illégale, en premier lieu parce qu'elle ne serait pas conforme aux dispositions de l'article 244 du Code Scolaire ,et aussi parce qu'elle confère des pouvoirs discrétionnaires au président et au secrétaire de la commission.

Nous avons cité déjà l'article 244. L'on sait que cet article dit qu'aucun *emprunt* ne peut être contracté, à moins qu'il ne *soit imposé* par la résolution qui l'autorise une taxe annuelle suffisante pour payer l'intérêt, etc., etc.

Or, le même argument se répète ici: c'est le futur, dit-on, qui est employé, et il s'ensuit qu'aucune taxe n'est imposée sur les biens de la municipalité. Mais c'est aussi la même réponse qui doit être faite que celle faite précédemment lorsque nous avons examiné la question de savoir si la résolution accordant le contrat d'entreprise était nulle. La conclusion négative à laquelle nous sommes arrivés nous amène nécessairement à conclure de la même façon. La résolution n'est pas nulle. Elle est sûrement incomplète, et tant qu'elle n'aura pas été complétée, l'emprunt ne peut pas être légalement contracté.

Il n'y a pas lieu de déclarer cette résolution nulle. Peut-être l'emprunt lui-même est-il illégal. Mais il n'appartient pas à cette Cour de se prononcer sur ce point parce qu'il semble qu'il n'a pas été contracté encore. De plus, on n'en demande pas l'annulation, et le prêteur, s'il existe, partie à ce contrat de prêt, n'est pas mis en cause. (*Goulet* vs *La Corporation de la paroisse de St-Gervais* (1).

Quant au second moyen invoqué pour faire mettre de côté cette résolution, je crois qu'il doit être également rejeté.

Le 31 juillet 1941, la commission scolaire a adopté une résolution qui se lit ainsi:

> Que ladite commission scolaire emprunte, vu que la commission scolaire ne peut entreprendre cette construction sans recourir à un emprunt, un montant n'excédant pas $7,000 à un intérêt n'excédant pas

(1) [1934] S.C.R. 445, at 453.

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5 pour 100 l'an, lequel emprunt sera fait au moyen de billets promissoires remboursables comme suit:

1er avril 1942, $1,700.
1er avril 1943, $1,800.
1er avril 1944, $1,900.
1er avril 1945, $ 800.
1er avril 1946, $ 800.

A une autre séance de la commission scolaire, tenue le vingt-septième jour du mois de septembre 1941, une autre résolution a été adoptée qui se lit de la façon suivante:

Que le président et le secrétaire de cette commission scolaire soient autorisés de signer un ou des billets promissoires à l'ordre d'une banque ou d'une caisse populaire ou des particuliers pour un montant n'excédant pas $7,000 en totalité, au taux d'intérêt n'excédant pas 4 pour 100 avec échéances conformes à l'échelle prévue à la résolution de cette commission scolaire en date du 30 juillet 1941, et ce pour servir à acquitter le coût de la construction de la maison d'école pour garçons dans l'arrondissement scolaire nº 1, le tout autorisé par le Surintendant de l'Instruction Publique, le Secrétaire de la province et de l'honorable Ministre des Affaires Municipales.

On prétend que les commissaires ne pouvaient autoriser ainsi leur président et leur secrétaire-trésorier à signer un ou des billets promissoires à l'ordre d'une banque ou d'une caisse populaire ou des particuliers, et que ce mode de procéder a été condamné par la Cour du Banc du Roi comme illégal et *ultra vires,* dans la cause des *Commissaires d'Ecoles de St-Augustin* vs *Quézel* (1).

Dans cette cause, voici ce que disait le juge en chef, sir Mathias Tellier, à la page 211:

Avant donc de conclure un emprunt en vertu de l'article 248, les commissaires doivent d'abord se trouver ou se faire trouver un prêteur, et après cela adopter une résolution déterminant ce prêteur, et indiquant en outre, avec précision, le montant de l'emprunt et tous les détails ou particularités les concernant, de façon à ne rien laisser à la discrétion ou volonté du mandataire choisi pour signer l'acte.

Dans le cas qui nous occupe, il est clair que le montant de l'emprunt est déterminé, que l'échéance de chaque billet l'est également, et que le taux de l'intérêt maximum fixé à 5 pour cent par la résolution du 31 juillet 1941, subséquemment réduit à 4 p. 100 lors de l'adoption de la résolution du 27 septembre 1941, est suffisamment précis pour satisfaire les exigences de la loi. Il reste que seul le nom du prêteur n'est pas déterminé. Mais je ne puis me convaincre que cette omission soit suffisante pour invalider

(1) [1937] Q.R. 64 K.B. 193.

la résolution. Il est certain que le montant de l'emprunt, le taux de l'intérêt, la date de l'échéance doivent être mentionnés dans la résolution, parce qu'on ne pourrait pas laisser ces éléments essentiels à la discrétion des officiers de la corporation. Mais il n'en est pas ainsi du nom du prêteur. Il est totalement indifférent que la corporation emprunteuse reçoive le produit du prêt d'une personne plutôt que d'une autre. Aucune question de solvabilité, ou autre, ne se présente, et la responsabilité de la commission ne peut en aucune façon être affectée, diminuée ou augmentée par le choix du prêteur que les officiers peuvent faire.

Enfin, on prétend que les commissaires d'écoles n'avaient pas le droit d'acquérir par bail emphytéotique le terrain sur lequel l'école a été construite. La résolution du 31 juillet 1941 se lit ainsi:

Désignation:

Un terrain situé en la paroisse de St-Adelphe, connu et désigné comme faisant partie du lot numéro sept cent vingt-quatre (p. 724) du cadastre de St-Stanislas, contenant un arpent de largeur sur trois arpents de profondeur, et sis comme suit: à deux cent cinquante pieds à l'arrière du couvent, et cinquante pieds à l'arrière de l'église, lequel terrain est borné au nord par Florien Baillargeon (p. 725) à l'est, à l'ouest et au sud par l'Œuvre et Fabrique de la paroisse de St-Adelphe;

(*c*) Que la commission scolaire de St-Adelphe acquière de la Fabrique St-Adelphe le susdit terrain suivant bail emphytéotique, et conformément à la résolution de ladite Fabrique adoptée le vingt juillet mil neuf cent quarante et un, et plus particulièrement pour la considération d'un dollar par année ($1) ainsi qu'en considération de l'engagement devant être pris par ladite commission scolaire pour le droit de passage et l'entretien du chemin.

Et, à l'assemblée subséquente du 25 septembre de la même année, une nouvelle résolution a été adoptée dont les termes sont les suivants:

(*a*) Un contrat notarié pour acquérir, par bail à rente foncière ou bail emphytéotique, de l'Œuvre et Fabrique de la paroisse de St-Adelphe l'emplacement tel que prévu par la commission scolaire en date du trente juillet mil neuf cent quarante et un, et aux conditions y posées pour y asseoir la maison d'école pour garçons.

Comme on le voit, lors de cette première résolution, on mentionne

que la commission scolaire de St-Adelphe acquière de la Fabrique de St-Adelphe le susdit terrain suivant bail emphytéotique, et conformément à la résolution de ladite Fabrique adoptée le 20 juillet.

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Et, lors de la seconde résolution, on mentionne que le président et le secrétaire-trésorier sont autorisés à signer pour et au nom de la commission scolaire

un contrat notarié pour acquérir par bail à rente foncière, etc., etc., aux conditions y posées.

Le 20 juillet 1941, la Fabrique de St-Adelphe avait adopté une résolution à l'effet que le terrain en question

soit mis à l'usage par constitut à la commission scolaire de St-Adelphe aux conditions énumérées pour 99 ans.

Je suis d'opinion que le contrat doit être annulé, car il contient des clauses qui vont bien au delà de la résolution de la commission scolaire, qui autorise ses officiers à le signer. Le président et le secrétaire ont consenti, en effet, à des clauses onéreuses, résolutoires et forfaitaires que la résolution n'autorise pas. Ils ont même hypothéqué le terrain acquis, et le contrat, tel que signé, n'a donc jamais été approuvé par la commission scolaire.

Quant à la résolution qui a précédé ce contrat, je la crois légale. Je suis d'opinion en effet qu'une corporation scolaire peut, comme la chose d'ailleurs se fait depuis un temps immémorial, acquérir par bail emphytéotique. L'emphytéose est en effet un mode d'acquisition de la propriété, et en vertu de l'article 236 du Code Scolaire, le législateur a autorisé les commissaires d'écoles à "acquérir et à posséder pour le compte de leur corporation des biens meubles ou immeubles". Il serait à mon avis bien étrange, qu'une corporation scolaire ait le droit, comme lui confère également l'article 236, de louer une maison d'école pour un temps limité, et n'ait pas le pouvoir d'acquérir par bail emphytéotique pour 99 ans, le terrain sur lequel elle veut construire cette école.

Il résulte de tout ceci que l'appel doit être maintenu en partie. Le jugement de première instance doit être modifié en ce sens que seulement le contrat d'entreprise consenti par les appelants à Patrick Douville, mis en cause, ainsi que la résolution qui le lui accorde, doivent être déclarés nuls et annulés à toutes fins que de droit, de même que le contrat par bail emphytéotique intervenu entre les appelants et la Fabrique de St-Adelphe.

Quant aux autres résolutions attaquées, elles doivent être tenues pour légales.

En Cour Supérieure, les intimés auront droit à leurs frais de l'action, de demande incidente, ainsi qu'aux frais de l'injonction. Quant aux frais de sténographie, ils seront payables un quart par les appelants et les trois quarts par les intimés. Ces derniers paieront les frais en appel et devant cette Cour.

Appeal allowed with costs:

Solicitor for the appelants: *Fortunat Lord.*

Solicitor for the respondents: *Jean-Marie Bureau.*

DOMINION GLASS COMPANY LIMITED (PLAINTIFF) ..... } APPELLANT;

AND

THE SHIP *ANGLO INDIAN* AND HER OWNERS (DEFENDANTS) ..... } RESPONDENTS.

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*Feb. 24, 25, 28, 29.
*Oct. 3.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA, QUEBEC ADMIRALTY DISTRICT

Shipping—Fire on board ship—Damage to cargo—Metal concentrates—Whether dangerous cargo—Bill of lading—Construction—Whether Water Carriage of Goods Act, 1936, incorporated in the contract of carriage—Warranty as to seaworthiness—Exemption from liability—Due diligence to make ship seaworthy—Actual fault or privity—The Water Carriage of Goods Act, 1936, (Dom.) 1 Edw. VII, c. 49—Imperial Shipping Act, 1894, 57-58 Vict., c. 60, s. 502.

The owners of the *Anglo Indian* having agreed by a time charter to let the ship to a transport company, the latter entered into a charter party, on May 11th, 1938, with the owners of about 1,700 tons of mineral concentrates for their transport in bags under deck from the city of Quebec to Tacoma, in the state of Washington. On the 18th of the same month, at Montreal, the transport company accepted a consignment from the appellant company of 2,402 packages of glassware, owned by it, for carriage and delivery to itself at Vancouver, via the Panama canal. After the ship had passed through the canal, certain concentrates commenced to heat, the ship caught fire and she put in to a harbour on the coast of California where the fire was extinguished. It is admitted that the appellant's goods became a total loss, amounting to $4,235.13. The appellant company then brought an action against the ship and her owners to recover these damages. The bill of lading contained a number of conditions,

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

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all of which were agreed to by the appellant. Clause 24 of those conditions stated that the bill when issued from a port in Canada was subject to all the terms and conditions of, and all the exemptions from liability contained in, *The Water Carriage of Goods Act of Canada,* clause 25 referred to bills of lading from a port in the United States of America and clause 26 stipulated that, subject to clauses 24 and 25, the bill of lading, no matter where issued, shall be construed and governed by English law. Also, at the foot of the face of the bill, appeared in heavy black type the following: "This bill of lading is subject to provisions of *The Canadian Water Carriage of Goods Act, 1936.* The trial judge held that this Act was not in force in May, 1938, but that, in view of the foot clause, the provisions of the Act and of the Rules scheduled thereto were incorporated into and formed part of the bill of lading; he also held that the concentrates were a dangerous cargo which rendered the ship unseaworthy and that the loss was directly attributable to such unseaworthiness. But the trial judge, holding that the owners of the ship and the charterer, the transport company, had exercised due diligence to make her seaworthy, dismissed the appellant's action. The appellant company contended that, the loss being attributable to the unseaworthiness of the ship, the respondents were responsible in damages to it, and it also challenged the finding of due diligence; while the respondents contended that, even if this Court should find that due diligence had not been exercised, the appellant company must fail.

Held that the finding of the trial judge, that the concentrates were a dangerous cargo which rendered the ship unseaworthy and that the loss of the appellant's goods was directly attributable to such unseaworthiness, should be upheld; but

Held, affirming the judgment of the Exchequer Court of Canada, Quebec Admiralty District, Taschereau and Rand JJ. dissenting, that the respondents have shown that before and at the beginning of the voyage they exercised due diligence to make the ship seaworthy; and that, therefore, notwithstanding the unseaworthiness of the ship, the respondents were not liable for loss of the cargo.

Held that the Canadian *Water Carriage of Goods Act,* 1936 was in force at the time of shipment, i.e., in May, 1938.

Per the Chief Justice and Hudson and Kerwin JJ.:—Therefore, it is unnecessary to express any opinion as to whether, in view of the foot clause of the bill of lading, the provisions of that Act should be considered as having been incorporated into and forming part of the bill.

Per Taschereau and Rand JJ:—Whether the foot clause is looked upon as a conformity with the requirement of section 4 or a contractual reference, the effect of it is to incorporate the rules as part of the Act and to carry the intention of overriding any contrary provision of the bill of lading.

As to the contention of the respondents that, even if the finding that due diligence has been used by them to make the ship seaworthy was wrong, they were still entitled to succeed, such contention being based on clause 2 (*b*) of article IV of the Rules which provides that

"neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from * * * (*b*) fire, unless caused by the actual fault or privity of the carrier", and the respondents relying on the decision of the House of Lords in *Louis Dreyfus and Company* v. *Tempus Shipping Company* ([1931] A.C. 726), where effect was given to the provisions of section 502 of this Imperial *Merchant Shipping Act, 1894.*

Held, per The Chief Justice and Kerwin and Hudson JJ., that the respondents' contention is not well founded.—The law of Canada must be applied in this case, notwithstanding clause 26 of the bill of lading. Considering the purpose of the *Water Carriage of Goods Act,* if the direct cause of a loss is the unseaworthiness of the ship, even though fire was the proximate cause, the loss is not one arising or resulting from fire within the meaning of clause 2 (*b*) of article IV, even though it is proven that the unseaworthiness was caused without the actual fault or privity of the carrier; that still leaves the clause free to operate where a loss is the direct result of fire only.—*Dreyfus* case (*supra*) not applicable.

Per Taschereau and Rand JJ.:—Section 502 of the Imperial *Merchant Shipping Act, 1894,* does not apply, as such provision, so far as it was in force in Canada, was repealed by the 13th schedule of the *Canada Shipping Act, 1934.*—Notwithstanding the express stipulation in the bill of lading that the contract was to be governed by English law, whatever effect might be given to it in a court outside of Canada, the Canadian courts are bound by the provisions of the *Water Carriage of Goods Act,* 1936, and section 502, if relied on as having been incorporated in the contract under that stipulation, clashes with section 8 of article III of the Rules and must in this court be deemed to be excluded from the bill of lading.—Moreover, the respondents have not brought themselves within the exception of section 2 (*b*) of article IV of the Rules.

APPEAL from the judgment of the Exchequer Court of Canada, Quebec Admiralty District, Cannon J., dismissing the appellant's action with costs.

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

C. Russell McKenzie K.C. for the appellant.

R. C. Holden K.C. and *Lucien Beauregard K.C.* for the respondents.

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

KERWIN J.—This is an appeal by Dominion Glass Company Limited from a decision of Cannon J., District Judge in Admiralty for Quebec, whereby the appellant's action

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was dismissed. That action was brought in the Exchequer Court of Canada against the ship *Anglo Indian* and her owners, The Nitrate Producers Steamship Company, Limited, a corporation duly incorporated under the law of England and having its head office and chief place of business in the city of London in England.

The appellant is a manufacturer of glass-ware, carrying on business at Montreal and throughout Canada. Its claim is to recover damages for the destruction of a consignment of 2,402 packages of glass-ware, owned by it and shipped on the *Anglo Indian* for carriage and delivery to itself at Vancouver, British Columbia, via the Panama canal. The goods were shipped from Montreal and, after the *Anglo Indian* had passed through the Panama canal and was off the coast of California, certain concentrates, which were also in the ship, commenced to heat, the ship caught fire, and on June 14th, 1938, she put into San Pedro (Los Angeles) where the fire was extinguished. It is admitted that the appellant's goods were destroyed and became a total loss by reason of the fire and that such loss amounted to $4,235.13.

The *Anglo Indian* was a new ship, built to the order of The Nitrate Producers Steamship Company, Limited, and delivered to them in January, 1938. Previously, by a time charter, the owners had agreed to let the ship from the time of delivery for about twelve to fourteen months to Canadian Transport Company Limited. Under this charter, the owners were to provide and pay for all the provisions and wages of the captain, officers and crew and no question has been raised as to the authority of the master of the *Anglo Indian* to sign bills of lading on behalf of the owners or to permit others to sign for him. The appellant's goods were shipped under two bills of lading dated May 18th, 1938. Except for the number of packages, the two bills are the same and it will be convenient hereafter to proceed as if only one had been issued covering the total shipment. The bill of lading was signed by A. Rees for and on behalf of the master and Rees had authority from the master so to sign.

Canadian Transport Company Limited entered into a charter party with Derby and Company, Limited, for the

transport by the *Anglo Indian* from the city of Quebec to Tacoma, in the state of Washington, of about seventeen hundred tons

of lead and/or zinc and/or copper concentrates and/or other ore concentrates of similar physical characteristics and stowage, in bags, under deck.

Because of what will be stated later, it should be noted that the clause of the charter party describing the cargo continued:

it is understood that concentrates shipped are safe, non-injurious and lawful merchandise.

On or about May 11th, 1938, 23,072 bags of concentrates were received at Quebec on board the ship, which then proceeded to Montreal where she loaded general cargo, including the appellant's glass-ware.

By the written admission of the parties, it was agreed that the glass-ware was "destroyed and became a total loss by reason of fire on board the said ship *Anglo Indian*." The trial judge gave effect to this admission but found that the fire was caused by the spontaneous combustion of the concentrates; that these concentrates were a dangerous cargo which rendered the ship unseaworthy; and that the loss was naturally and directly attributable to such unseaworthiness. That finding was attacked by the respondents but I am satisfied that on that point the trial judge came to the right conclusion. However, he also held that the respondents and their agents, servants and employees, and the charterers, Canadian Transport Company Limited, exercised due diligence to make the ship seaworthy and to secure that she was properly manned, equipped and supplied and to make the holds fit and safe for the reception, carriage and preservation of the appellant's goods. It was on this ground that he dismissed the action although he held further that there was no actual fault or privity on the part of the charterers, agents or master of the ship and no fault or neglect of the owners or of their agents, servants or employees.

The appellant contends that, the loss being attributable to the unseaworthiness of the ship, the respondents are responsible in damages to it. The appellant also challenges the finding of due diligence; while the respondents

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contend that, even if the Court should find that due diligence was not exercised, the appellant must fail. It therefore becomes necessary to determine the rights and obligations of the parties.

The bill of lading contained a number of conditions, all of which were agreed to by the appellant. Clause 24 of those conditions states:

> This bill of lading when issued covering goods from a port in Canada is subject to all the terms and conditions of and all the exemptions from liability contained in The Water Carriage of Goods Act of Canada, section 4 of which is as follows:

and then follows what, except for a minor error, was section 4 of chapter 207 of the Revised Statutes of Canada, 1927,—since repealed. Clause 25 refers to bills of lading from a port in the United States, and then comes clause 26:

> Subject to clauses 24 and 25 this bill of lading no matter where issued shall be construed and governed by English law.

These clauses commence on the face of the bill of lading and are continued on the back. At the foot of the face appears in heavy black type the following:

> This bill of lading is subject to provisions of The Canadian Water Carriage of Goods Act, 1936.

The trial judge decided that *The Water Carriage of Goods Act, 1936,* which is chapter 49 of the Dominion statutes of that year, was not in force in May, 1938, but he held, in view of the clause at the foot of the face of the bill of lading, that the provisions of the Act and of the Rules scheduled thereto were incorporated into and formed part of the bill. It is unnecessary to express any opinion as to the last point because, with deference, I have concluded that the 1936 Act was in force.

That Act was assented to on June 23rd, 1936, and it consists of nine sections and a schedule containing the nine articles of the Hague Rules relating to bills of lading. Section 1 of the Act contains the short title. Section 2 provides that subject to the provisions of the Act, the Rules in the schedule shall have effect in relation to and in connection with the carriage of goods by water in ships carrying goods from any port in Canada to any other port, whether in or outside Canada.

By section 3, there is not to be implied in any contract for the carriage of goods by water, to which the Rules apply, any absolute undertaking by the carrier of the goods to provide a seaworthy ship. Section 4 provides:

> Every bill of lading, or similar document of title issued in Canada which contains or is evidence of any contract to which the Rules apply shall contain an express statement that it is to have effect subject to the provisions of the Rules as applied by this Act.

Section 5 states:

> Article VI of the Rules shall, in relation to the carriage of goods by water in ships carrying goods from any port or place in Canada to any other port or place in Canada, have effect as though the said article referred to goods of any class instead of to particular goods and as though the proviso to the second paragraph of the said article were omitted.

Section 6 contains certain provisions dealing with the weight of bulk cargo. Subsection 1 of section 7 provides that nothing in the Act shall affect the operation of certain sections of the *Canada Shipping Act,* 1934, as amended, or the operation of any other enactment for the time being in force limiting the liability of owners of vessels. Subsection 2 of section 7 is the one that causes the difficulty on the point under consideration and is as follows:

> The Rules shall not by virtue of this Act apply to any contract for the carriage of goods by water made before such day, not being earlier than the first day of August, nineteen hundred and thirty-six, as the Governor General may by Order in Council direct, nor to any bill of lading or similar document of title issued, whether before or after such day as aforesaid, in pursuance of any such contract as aforesaid.

By section 8, *The Water Carriage of Goods Act,* chapter 207, R.S.C. 1927, is repealed, and by section 9,

> This Act shall come into force on a date to be fixed by proclamation of the Governor in Council published in the *Canada Gazette.*

On July 2nd, 1936, an Order in Council was passed in the following terms:

> The Committee of the Privy Council, on the recommendation of the Minister of Marine, advise that the Water Carriage of Goods Act, Chapter 49 of the Statutes of 1936, be proclaimed effective the 1st August, 1936, and that a proclamation do forthwith issue accordingly.

A proclamation was issued on the same day, proclaiming and directing that the Act should come into force and have effect upon, from and after August 1st, 1936. This proclamation was published in the *Canada Gazette* on July 18th,

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1936. Apparently this was not considered sufficient in view of the terms of subsection 2 of section 7, and on February 14th, 1939, an Order in Council was passed in the following terms:

> Whereas, under the provisions of Order in Council P.C. 1623 of July 2nd, 1936, authority was given for the proclamation of *The Water Carriage of Goods Act, 1936,* effective as of August 1st, 1936;
>
> And whereas section 7, subsection (2), of the said Act, reads as follows:
>
> "7. (2) The Rules shall not by virtue of this Act apply to any contract for the carriage of goods by water made before such day, not being earlier than the first day of August, nineteen hundred and thirty-six, as the Governor General may by Order in Council direct, nor to any bill of lading or similar document of title issued, whether before or after such day as aforesaid, in pursuance of any such contract as aforesaid."
>
> And whereas it is deemed expedient to determine pursuant to section 7, subsection (2) of the said Act, that the Rules contained in the Schedule to the said Act shall apply to any contract for the carriage of goods by water made after February 15th, 1939, and to any bill of lading or similar document of title issued in pursuance of any such contract;
>
> Now, therefore, His Excellency the Governor General in Council, on the recommendation of the Minister of Transport, is pleased to direct and doth hereby order and direct that the Rules contained in the Schedule to *The Water Carriage of Goods Act, 1936,* shall apply to any contract for the carriage of goods by water made after February 15th, 1939, and to any bill of lading or similar document of title issued, whether before or after February 15th, 1939, in pursuance of any such contract.

Nor can it be said that it was the intention of Parliament to have two different dates fixed by Order in Council. I do not think so. The schedule which contains the Rules is part of the Act and in my view it was never intended that sections 1 to 9 should be brought into force at one time and the Rules at a different time. Furthermore, section 8 repealed the previous *Water Carriage of Goods Act* and it could not have been intended that there should be an *inter regnum* during which resort might have to be had to the common law. While no doubt it would have been better had the first Order in Council referred in terms to subsection 2 of section 7, it would defeat the object of Parliament to hold that that was necessary.

The Act (including therein the Rules) being in force in May, 1938, those Rules relating to bills of lading in accordance with section 2, had effect in relation to and in connection with the carriage of glassware in the *Anglo Indian* from the port of Montreal in Canada. It was held by the

Judicial Committee of the Privy Council in *Vita Food Products* v. *Unus Shipping Co. Ltd.* (1), that a similar section of the Newfoundland Act was the dominant section, and that the words therein "Subject to the provisions of this Act" mean merely that the Rules were to apply but subject to the modifications contained in the other sections in the Act. It was also held that section 4 was merely directory. The objection, therefore, that the wording at the foot of the face of the bill of lading in this action,

> This bill of lading is subject to the provisions of the Canadian Water Carriage of Goods Act, 1936.

did not comply with section 4, even if it were valid, cannot affect the matter, as the Act, by virtue of section 2, applies.

This being an action in Canada with reference to a bill of lading issued in Canada, the law of Canada must be applied notwithstanding the inclusion in the bill of lading of clause 26. The question dealt with by Lord Wright in the *Vita Food* case (1) as to the effect of a somewhat similar clause in a bill of lading issued in Newfoundland but action upon which was brought in Nova Scotia, does not arise. For the same reason the respondents can find no comfort in subsection 1 of section 7 of the Act:

> Nothing in this Act shall affect * * * the operation of any other enactment for the time being in force limiting the liability of the owners of vessels.

There is no such enactment in force in Canada.

Under the Canadian Act there was no absolute undertaking in this case to provide a seaworthy ship but by clause 1 of Article III of the Rules, the respondents were bound to exercise due diligence to make the ship seaworthy. It has already been stated that the appellant contends that the trial judge was in error in finding that such due diligence had been exercised but that the respondents argue, even if that finding is wrong, they are still entitled to succeed. It seems advisable, therefore, to examine that argument immediately.

It is based on clause 2, paragraph (*b*) of Article IV of the Rules, which provides:

(1) [1939] A.C. 277.

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Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from,

* * *

(*b*) fire, unless caused by the actual fault or privity of the carrier;

The respondents rely on the decision in the House of Lords in *Louis Dreyfus and Company* v. *Tempus Shipping Company* (1), that under section 502 of the British *Merchant Shipping Act, 1894*, the owner of a British sea-going ship is freed from liability for any damage caused by fire on board his ship even though that fire resulted from actual unseaworthiness, if he could prove that the fire occurred without his actual fault or privity. That section provides:

502. The owner of a British sea-going ship, or any share therein, shall not be liable to make good to any extent whatever any loss or damage happening without his actual fault or privity in the following cases; namely,—

(i) Where any goods, merchandise, or other things whatsoever taken in or put on board his ship are lost or damaged by reason of fire on board the ship; or

In the *Dreyfus* case (1), the House of Lords approved of two decisions of the Court of Appeal, *Virginia Carolina Chemical Co.* v. *Norfolk and North American Steam Shipping Co.* (2), and *Ingram & Royle Ltd.* v. *Services Maritimes du Tréport* (3). At page 732, Viscount Dunedin stated that where there was an exception in the bill of lading of fire on board, it had been held that that did not protect the ship when the fire was due to unseaworthiness but what the Court of Appeal decided was that the statutory exception against fire was not elided by proving that the fire was due to unseaworthiness. The point, he continues, was arguable but what had turned the scale in the earlier Court of Appeal case was that to come to the result opposite to that of the decision would be, as Vaughan Williams L.J., put it

to change the words of a section from "a British sea-going ship" into "a British sea-going seaworthy ship".

That is, what the courts in those cases were construing were the words of an enactment creating an exception against fire.

Here we have to deal with a statute wherein appears not only the obligation on the part of the ship and carrier

(1) [1931] A.C. 726. (2) [1912] 1 K.B. 229.
(3) [1914] 1 K.B. 541.

to exercise due diligence to make the ship seaworthy but also the immunity from loss or damage arising or resulting from fire unless caused by the actual fault or privity of the carrier. How is that accomplished? Under Article II of the Rules the carrier is subject to the responsibilities and liabilities and entitled to the rights and immunities thereinafter set forth in the Rules, subject only to the provisions of Article VI, with which we are not concerned. Clause 1 of Article III then imposes the duty of exercising due diligence before and at the beginning of the voyage to make the ship seaworthy, and it is to be noted that this obligation is not stated to be subject to any of the rights or immunities granted by Article IV. Compare with this the provisions of clause 2 of Article III:

> 2. Subject to the provisions of Article IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried.

There, Parliament, while imposing upon the carrier the obligation to load, handle, stow, etc., provides that it is subject to the provisions of Article IV, but no such proviso appears in clause 1 of Article III.

What is the effect of these Rules and how are they to be construed? In the House of Lords in *Stag Line, Limited* v. *Foscolo, Mango and Company, Limited* (1), appear two statements on the matter. Lord Atkin at page 342 says:

> In approaching the construction of these rules it appears to me important to bear in mind that one has to give the words as used their plain meaning, and not to colour one's interpretation by considering whether a meaning otherwise plain should be avoided if it alters the previous law. If the Act merely purported to codify the law, this caution would be well founded.

He then refers to the well-known words of Lord Herschell in the *Bank of England* v. *Vagliano Brothers* (2), and continues:

> But if this is the canon of construction in regard to a codifying Act, still more does it apply to an Act like the present which is not intended to codify the English law, but is the result (as expressed in the Act) of an international conference intended to unify certain rules relating to bills of lading. It will be remembered that the Act only applies to contracts of carriage of goods outwards from parts of the United Kingdom: and the rules will often have to be interpreted in the courts of the foreign consignees. For the purpose of uniformity it is, therefore, impor-

(1) [1932] A.C. 328. (2) [1891] A.C. 107.

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tant that the Courts should apply themselves to the consideration only of the words used without any predilection for the former law, always preserving the right to say that words used in the English language which have already in the particular context received judicial interpretation may be presumed to be used in the sense already judicially imputed to them.

At page 350, Lord Macmillan states:

> It is important to remember that the Act of 1924 was the outcome of an International Conference and that the rules in the Schedule have an international currency. As these rules must come under the consideration of foreign Courts it is desirable in the interests of uniformity that their interpretation should not be rigidly controlled by domestic precedents of antecedent date, but rather that the language of the rules should be construed on broad principles of general acceptation.

I adopt, if I may, these statements as my own as expressing the proper method to be followed in construing the Rules.

The actual decision and the remarks of Lord Wright in *Patterson Steamships, Limited* v. *Canadian Co-operative Wheat Producers, Limited* (1), are not in conflict therewith. First of all, what was there in question was *The Water Carriage of Goods Act,* R.S.C. 1927, chapter 207, which is entirely different from the Act with which we are concerned. At page 549 Lord Wright refers to the meaning of the words "actual fault or privity" in section 7 of that Act and states that they seemed to have been taken from section 502 of the *Merchant Shipping Act, 1894.* He points out that the meaning of the words had been explained by Hamilton L.J., as he then was, in *Asiatic Petroleum Co. Ltd.* v. *Lennard's Carrying Co. Ltd.* (2), as follows: "Actual fault negatives that liability which arises solely under the rule of 'respondeat superior'." That is, at that point Lord Wright was referring to the meaning of the words "actual fault or privity" and was stating in different language what Lord Atkin had expressed in his reservation,

> always preserving the right to say that words used in the English language which have already in the particular context received judicial interpretation may be presumed to be used in the sense already judicially imputed to them.

Lord Wright was not dealing with the question whether something that would fall within the meaning of the words

(1) [1934] A.C. 538. (2) [1914] 1 K.B. 419, at 436.

"actual fault or privity" would relieve a carrier from liability for loss caused by unseaworthiness. In my opinion the *Dreyfus* case (1) is not applicable.

In the view of the editors of the 14th edition of Scrutton on Charter Parties and Bills of Lading, at page 497, and of the editors of the 7th edition of MacLachlan on Merchant Shipping, page 378, the exception as to fire in clause 2, paragraph (*b*) of Article IV of the Rules, does not operate if the fire has been caused by failure to use due diligence to make the ship seaworthy. The view of the authors of Williamson and Payne's Carriage of Goods by Sea Act, page 42, is to the contrary but it seems to be based upon the *Dreyfus* case (1). For the reasons already given, I am of opinion that that decision does not apply. My conclusion is that considering the purpose of the Act, if the direct cause of a loss is the unseaworthiness of the ship, even though fire was the proximate cause, the loss is not one arising or resulting from fire within the meaning of Article IV, clause 2 (*b*) even though it is proven that the unseaworthiness was caused without the actual fault or privity of the carrier. That still leaves the clause free to operate where a loss is the direct result of fire only.

It has been proved that an English Company, Lawther Latta and Co. Limited, were the managers of the ship's owners, The Nitrate Producers Steamship Co., Limited, and of their ships, and that Sir John Latta, the managing director and chairman of the board of both companies, was registered owner of the *Anglo Indian*. There was no actual fault or privity on the part of the "directing mind and will of the corporation", *Lennard's Carrying Co. Limited* v. *Asiatic Petroleum Co. Limited* (2). This, of course, is not sufficient so far as the obligation on the carrier to use due diligence to make the ship seaworthy is concerned as that diligence must be not only by the ship owner itself but by all its servants and agents. For the purposes of the Act, the owners were the carriers under the bill of lading but Canadian Transport Company Limited and their officers and servants were the owner's agents. Is the finding of the trial judge that due diligence was exercised by them sustainable?

(1) [1931] A.C. 726. (2) [1915] A.C. 705, at 713.

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All arrangements were made for the shipment of the concentrates by the shippers, Derby and Company, with Canadian Transport Company Limited through the latter's eastern manager, A. L. Palmer. This latter company, with its head office at Vancouver, British Columbia, carried on a large shipping business, having on charter from forty to eighty ships at one time, carrying about three-quarters of a million tons of cargo a year. Mr. Palmer, who had had twelve years' previous experience, joined the company in 1932 and from that time down to and including the year 1937, the company shipped, from Quebec to Tacoma, Washington, about 100,000 tons of concentrates. With one exception, these came from the Beatty Gold Mine and an analysis had been made of them before any were shipped. They were shipped, below deck, in about thirty-three different ships similar to the *Anglo Indian* and no heating occurred. The exception was a small shipment of about 150 tons, stowed on deck because there was a suspicion that the concentrates were warm and they were stowed where they were accessible. It was in that shipment that the only difficulty occurred when the concentrates smoldered.

When Derby and Company, through its agent, J. B. Saxe, first approached Mr. Palmer, in 1937, to arrange for the shipment of concentrates, the latter, upon being told that they were coming from a different gold mine, Thomson-Cadillac, asked for and received a sample. According to Mr. Saxe, concentrates from that mine had previously been shipped on various occasions through his company from Quebec to Antwerp and no trouble had occurred. The sample was sent for testing to a well-known and reputable firm of industrial chemists and engineers, G. S. Eldridge & Co., of Vancouver, and there was received from them by Canadian Transport Company the following report, dated May 20th, 1937:

We have tested the sample of concentrates submitted by you and report as follows:

Marks	None;
Iron (Fe)	31·20%;
Sulphur (S)	23·32%;
Insoluble Matter (SiO_2, etc)	23·30%;
Alumina (A1203)	5·31%;
Calcium Oxide (CaO)	3·62%;
Copper (Cu)	None.

As this concentrate consists mainly of iron pyrites and insoluble matter and does not show any appreciable amount of pyrrhotite, we are of the opinion that if this material is shipped wet as it comes from the filters there will be no danger of the concentrate taking fire within at least six months as long as these damp conditions are maintained.

The only reason for securing this report, according to Mr. Palmer, was because the concentrates were coming from a different gold mine.

It has already been noted that the charter party between Canadian Transport Company Limited and Derby and Company was dated April 7th, 1938, and that the clause in the charter party, describing the cargo, contained the statement: "It is understood that concentrates shipped are safe, non-injurious and lawful merchandise." The concentrates actually shipped on the *Anglo Indian* were sent from the mine to Quebec in bags and accumulated in an unheated shed and lay there during the winter of 1937-1938. S. Barrow was the Quebec agent for Robert Reford Company, who in turn were the Quebec agents for Canadian Transport Company. Again, only because the concentrates were from a different gold mine, Mr. Palmer instructed Mr. Barrow to secure a sample from the pile of bags in the shed, and in April, 1938, Mr. Barrow had his wharfinger take a sample of eight to ten pounds from the centre of one of the piles. Still on Mr. Palmer's instructions, this sample was sent to well-known chemists and analysts in Montreal, Milton Hersey Company Limited, and on May 5th, 1938, that company made the following report to Canadian Transport Company Limited:

On examination of the sample of concentrates received from you, we find that the material consists of finely divided and compact mineral matter, 99 per cent passing a No. 100 standard sieve. About 11 per cent moisture is present.

We understand that the concentrates are packed in 100-lb. burlap bags, lined with paper.

In our opinion this material should be safe for shipment and not liable to heat if kept in compact form and at ordinary temperature.

When the bags are transferred from the warehouse, careful attention should be given to be certain that no heating has developed in storage, and if the temperature of any bags should be found above normal, such bags should not be shipped but should be held for further investigation.

In May, 1938, both Mr. Palmer and Mr. Barrow examined the piles of bags and were satisfied that in accordance with the last paragraph of the above report there was

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no heating. The bags on top of the piles were wet and the ones in and towards the centre of the piles were frozen. Mr. Barrow oversaw the stowing of the bags and he and the captain and the mate of the *Anglo Indian* were satisfied that the bags were stowed in compact form in the ship. At Montreal, Furness Withy were the agents for Canadian Transport Company and J. D. McCloskey was superintendent of Furness Withy. He also testified that the bags were stowed in compact form. Two port wardens at Montreal were satisfied with the stowage and approved the placing of general cargo on dunnage boards erected over the concentrates.

As against this, the appellant relies upon the evidence of Mr. Freeman, who has made a special study of concentrates and who, before 1938, had perfected a system of sealing shipments of them by spraying them with a preparation. Mr. Freeman stated that the term "concentrates" by itself means nothing but that the important thing was to discover the amount of iron and sulphur therein. He described the concentrates shipped on the *Anglo Indian* as iron sulphide concentrates and stated that where the iron exceeds the copper content by weight, as shown in the Eldridge report,

> there is certainty of the material being able to absorb oxygen and therefore heat up spontaneously. That is to say that the material should be regarded as definitely dangerous.

He also spoke of a fire that had occurred in a shipment of concentrates from Quebec to Three Rivers in 1937 as a result of which some publicity occurred, including a report in a newspaper published in the latter city and having a circulation "in the St. Maurice Valley and waterfront companies". Another witness on behalf of the appellant, Dr. Snell, objected to the smallness of the sample out of such a large shipment and also expressed the opinion that heating and fire were bound to occur. None of this was known to the Canadian Transport Company Limited or anybody connected therewith, nor do I think that it can be held that they should have known. They were bound only to act with reasonable care and exercise due diligence in view of the circumstances existing in May, 1938. I agree with the trial judge that the two reports obtained

by Canadian Transport Company Limited were inaccurate and misleading but that the company was entitled to rely on them as coming from experts who were rightly considered as reliable and competent.

It was objected that the statement in the Eldridge report:

> We are of the opinion that if this material is shipped wet as it comes from the filters there will be no danger of the concentrate taking fire within at least six months as long as these damp conditions are maintained.

could not be taken to refer to concentrates that were left for some months in a shed in Quebec after leaving the mine. However, the Transport Company was justified in thinking that when, in May, 1938, an examination disclosed that the bags of concentrates were wet or frozen, there would be no danger as the voyage of the *Anglo Indian* was to be considerably less than six months. As to the concentrates being packed in bags, it appears from the second paragraph in the report of Milton Hersey Company Limited that they knew the concentrates were packed in 100-lb. burlap bags lined with paper.

The appellant suggested that the result of some of the evidence was that the system of ventilation on the *Anglo Indian* should have been operated in a different manner and that the concentrates could have been dampened while on board the ship but this evidence is not material to the question of due diligence. I agree with the trial judge that the respondents have shown that before and at the beginning of the voyage they exercised due diligence to make the ship seaworthy.

The appeal should be dismissed with costs.

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

RAND J.—This action arises out of fire damage in the course of a water shipment of glass bottles from Montreal to Vancouver. The cause of the fire was the heating of gold concentrates taken on board the vessel at Quebec on the 10th and 11th of May, 1938, and destined to Tacoma, Washington. The goods of the appellant were loaded on May 18th at Montreal, the day on which the vessel sailed.

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About June 3rd, after the ship had passed through the Panama canal, fumes and heat were noticed arising from the concentrates. This condition steadily deteriorated until on June 9th their temperature had risen to 110 degrees Fahrenheit and on the 13th the vessel made the port of San Pedro, California, where the fire was extinguished.

Several points are raised. At the outset there is the question whether the rules under the *Water Carriage of Goods Act, 1936,* were in force at the time of the shipment and, if not, were they sufficiently incorporated in the contract of carriage by the language of the bill of lading; then there is the question whether the ship, at the time of sailing, was unseaworthy and, if so, had due diligence been used to make her seaworthy. If the rules did not apply, we are remitted to a consideration of the clauses of the bill of lading. In either case, does section 502 of the Imperial *Merchant Shipping Act, 1894,* or item (*b*) of article IV, section 2, of the Rules furnish an answer to the claim.

The doubt as to the applicability of the rules under the *Water Carriage of Goods Act* of 1936 arises from the peculiar language of section 7 (2) which is as follows:

> The Rules shall not by virtue of this Act apply to any contract for the carriage of goods by water made before such day, not being earlier than the first day of August, nineteen hundred and thirty-six, as the Governor General may by Order in Council direct, nor to any bill of lading or similar document of title issued, whether before or after such day as aforesaid, in pursuance of any such contract as aforesaid.

Section 9 provides for the coming into force of the Act on a date to be fixed by proclamation of the Governor-in-Council, published in the *Canada Gazette.* On July 2nd, 1936, the proclamation was made. In the preamble it is recited:

> And whereas it is expedient and our Privy Council has advised that a proclamation be issued bringing the said Act into force on the day hereinafter mentioned.

And then follows the declaration:

> Now know ye that by and with the advice of our Privy Council for Canada we do hereby proclaim and direct that the said Act shall come into force and have effect upon, from and after the first day of August in the year of our Lord one thousand nine hundred and thirty-six.

By section 23 of the *Interpretation Act,* such a proclamation is to be taken as having been issued under an order of the Governor-in-Council. Later, on February 14th, 1939, order in council P.C. 343 was made, the declaratory language of which is as follows:

> Now therefore His Excellency the Governor General-in-Council on the recommendation of the Minister of Transport is pleased to direct and doth hereby order and direct that the rules contained in the schedule to the Water Carriage of Goods Act 1936 shall apply to any contract for the carriage of goods by water made after February 15th, 1939, and to any bill of lading or similar document of title issued whether before or after February 15th, 1939, in pursuance of any such contract.

The Act clearly includes the schedule containing the rules. The enacting part is in fact confined in its operation to the rules except as to the repeal by section 8 of the *Water Carriage of Goods Act,* 1910. It is argued that the statute contemplates both a proclamation of the Act and a separate order in council dealing with the rules. The inconvenience, not to say absurdity, of that procedure is obvious. With any lapse of time between the proclamation and the order in council, the effect would be to repeal the Act of 1910 and leave no statutory rules in force during that period. When section 7 (2) is carefully examined, it is seen to have only this intent, that the rules as part of the Act and so the Act itself, should not come into force before August 1st, 1936; and with an order in council supporting the proclamation, the section is, in my opinion, amply satisfied. In that view, order P.C. no. 343, made, no doubt, *ex majore cautela,* was simply inoperative.

The bill of lading contained the following reference to the Act of 1936:

> This bill of lading is subject to provisions of the Canadian *Water Carriage of Goods Act,* 1936.

Whether this is looked upon as a conformity with the requirement of section 4 or a contractual reference, I take it to incorporate the rules as part of the Act and to carry the intention of overriding any contrary provision of the bill of lading.

I come, then, to the question whether the vessel was, at the time of sailing from Montreal, in an unseaworthy condition. The facts are not in dispute. The concentrates were of such a composition that sooner or later they must

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have developed the combustion that took place. They consisted mainly of iron sulphides. Now, iron sulphides can be either safe or dangerous. If they consist strictly of the proportions of weight represented by the formula FeS_2, which makes approximately 48½ per cent iron and 51½ per cent sulphur, they are known as pyrites and can be carried with safety. If, however, there is a predominance of iron which brings to the mixture any appreciable quantity of what is known as pyrrhotite, in which the percentage of iron is 7 per cent. or more greater than that of the sulphur, then we have an unstable condition in which the iron, being unsatisfied by the sulphur present, reaches out for oxygen and, depending on the conditions in which the oxidation takes place, can bring about a combustion of any degree of danger.

Now, the ship was under a time charter, not amounting to a demise, to the Canadian Transport Company Limited. The representative of that company, A. L. Palmer of Montreal, had had an experience in 1933 with heating concentrates and when he was approached by the shippers he raised the question of the characteristics of the goods to be shipped. Concentrates, it may be explained, are simply the ore from which, as in this case, gold was to be obtained, ground to a very fine degree with the foreign matter or gang removed by what is known as a flotation process. What remains is the concentrated mineral substance. In April or May, 1937, Palmer asked for and apparently obtained a small sample of concentrate from the mine from which the shipment was to come and had it sent to responsible chemists in Vancouver. Under date of May 20th, 1937, they reported back the analysis which showed iron 31·02 per cent. by weight and sulphur 23·32 per cent. and the following advice:

> As this concentrate consists mainly of iron pyrites and insoluble matter and does not show any appreciable amount of pyrrhotite, we are of the opinion that if this material is shipped wet as it comes from the filters there will be no danger of the concentrate taking fire within at least six months as long as these damp conditions are maintained.

Acting on this opinion Palmer intimated that he was prepared to carry the goods as proposed. The operations of the mining company were not on such a scale as to produce sufficient material for an early shipment and from, evi-

dently, the summer of 1937 until late in the fall the necessary quantity amounting to 1,668 tons was accumulated in the storage sheds on the dock at Quebec. It is not clear what the monthly output was though there is some intimation that it might have run between two and three hundred tons, but the evidence is that the entire quantity lay in storage during the whole of the winter and up until the time of shipment on May 10th.

It is conceded that the interpretation given to the analysis by the Vancouver chemists was not strictly accurate. The marked excess of weight of iron over sulphur made the category of pyrites questionable and indicated to one thoroughly familiar with sulphides that there was a dangerous quantity of pyrrhotite and that shipment without special precautions would be hazardous.

Palmer evidently took it that the danger indicated by the report could be controlled by the use of water and he so informed the captain; and the latter accepted the goods as safe cargo for the reason that "it made no difference because I could pour water upon the concentrates if necessary". Palmer also informed him that a report of a chemist had been received and that he was acting on the strength of it.

A week or so before the vessel sailed from Quebec another sample of between eight and ten pounds, taken apparently from one or more of the bags in the shed at Quebec, was sent to reputable chemical engineers in Montreal and a report on May 5th was given as follows:

> On examination of the sample of concentrates received from you, we find that the material consists of finely divided and compact mineral matter, 99 per cent passing a No. 100 standard sieve. About 11 per cent moisture is present.
>
> We understand that the concentrates are packed in 100-lb. burlap bags, lined with paper.
>
> In our opinion this material should be safe for shipment and not liable to heat if kept in compact form and at ordinary temperature.
>
> When the bags are transferred from the warehouse, careful attention should be given to be certain that no heating has developed in storage, and if the temperature of any bags should be found above normal, such bags should not be shipped but should be held for further investigation.

The bags, 28,000 odd in number, were stowed in the bottoms of three adjoining holds. They were leveled off and on the top was laid a rough flooring of 6-inch by 1-inch

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dunnage. On this was placed general cargo, including the shipment of the appellant. Direct access to the concentrates was thus made inconvenient, if not impossible, and any application of water could have been made, if at all without the removal of cargo, only under difficulties and at the cost of damage to other cargo.

During the voyage and up until June 9th, the three holds were given full ventilation. When the fumes appeared about June 3rd, extra ventilation was provided by means of wind-sails. The temperature in approaching and leaving the canal was between 80 and 85 degrees and through the ventilation the warm air played around the concentrates. The effect of this was to dry them out, raise their temperature and promote oxidation; but in the conditions of the stowage the heat so generated could not be adequately dissipated and the process became steadily intensified. What was vital was to prevent oxidation but it seems to be a fair conclusion that the method adopted could scarcely have been more calculated to bring about the opposite result. Between June 9th and June 13th a number of communications passed between the captain and the Transport Company at Vancouver as well as the owners in London. The purport of the captain's messages was for instructions, among other things, as to the use of water. This, in the light of his conversation with Palmer before the shipment, is difficult to understand but it seems to make clear that no method of treating the concentrates with water had been planned or foreseen. The fact is, however, that the fire, after the removal of other cargo, was put out by water in about four hours, that the concentrates "which had been effectually flooded" did not have to be removed from the holds and that the ship continued the voyage to discharge them at Tacoma.

On the facts I agree with Cannon J., that when the vessel left Montreal she was not in a seaworthy condition. There were within her the conditions of a process that must, before the termination of the voyage, result in fire injurious to other cargo as well as to the ship herself and she was properly equipped in neither stowage arrangement, means, measures nor methods by which that process could be adequately controlled.

Did the master exercise due diligence in relation to this condition? It is on the basis of compliance with the two reports of May, 1937, from Vancouver, and May, 1938, from Montreal that the respondents claim to have done so. Although these reports were obtained by Palmer for the charterer, the master in effect adopted the action taken and accepted Palmer's assurance that the shipment was not dangerous; and the argument assumed that on what he did, in the light of the advice given, he must be judged. The salient point of that advice is a warning that fire from the concentrates is to be anticipated and it stresses maintenance of temperature and moisture, restriction of exposure to the air, and a time limit of safety. But the material was not shipped "wet as it comes from the filters"; nor so as to maintain "those damp conditions"; nor (at least doubtfully) so as to be "kept at ordinary temperature"; neither was the safety period of six months given consideration. In fact, although most of it had been in storage for more than six months, no more precaution seems to have been taken—with the possible exception of ventilation—than if the bags had contained sand. Either there was a failure to sense the danger against which the letter of May, 1937, so precisely warned and to appreciate the necessity of the safety conditions which it defined, or Palmer was willing to rely on his own judgment that the state of the concentrates, even though different from, was sufficiently close to those conditions to justify taking the risk.

Up to this point it has been assumed that in the circumstances mere reliance on the advice received was sufficient, but in my opinion it was not. There is nothing in the evidence to indicate that the Vancouver consultants were informed of the destination of the goods or were asked to consider ventilation, and the circumstances of the material at the time of shipment were essentially different from those on which the advice was based. It is a reasonable inference from the letter of May, 1937, that if those engineers had been aware that the material would be accumulated over a period of eight or nine months in ordinary storage, would then be shipped in bags and stowed as mentioned, carried through the canal to Tacoma

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and be subjected to a continuous ventilation, the accentuated danger would have taken on a much more serious aspect and the advice might very probably have been either that the concentrates be brought to the equivalent of the conditions mentioned in the letter of May, 1937—"wet as it comes from the filters"—or that measures be taken for the application of water during the voyage, or that the shipment be refused. The evidence, too, makes it clear that the sample taken in May, 1938, was not a fair one; the letter from the Montreal engineers is dated the 5th of that month and the sample of eight pounds was intended to represent a lot of 28,000 bags of over 100 lbs. each and as the loading started on May 10th it must have been taken while the original pile stood. It seems a bit strange that the later sample should have been sent to Montreal and without any intimation of the analysis or the opinion already received from Vancouver: and again nothing was asked as to ventilation. Neither of the engineers who reported was called as a witness; but the onus lay with the respondents to show that these undisclosed facts would not have changed the advice and would not reasonably have called for any material change of conduct on their part in precaution or lack of it. In either case, therefore, the respondents have fallen short of the duty required under the statute.

In this I disregard the fact that there was in the field and literature of chemistry not only the common knowledge that iron sulphides were liable to spontaneous combustion, but also the limited knowledge of the means for controlling them. Before 1935 Swedish chemists had discovered that spraying the concentrates with a sulphite liquor coated the particles and effectively prevented oxidation; and the practical question became one of low-cost liquids with the required properties. An article setting forth the results of the research was in 1935 published in a chemical trade journal which circulated in Canada.

It is argued that section 502 of the Imperial *Merchant Shipping Act, 1894,* applies; but this provision, so far as it was in force in Canada, was repealed by the 13th schedule of the Canada *Shipping Act,* 1934, c. 44. It is

then urged that by an express stipulation in the bill of lading the contract is to be governed by English law which must be taken to be what is called the "proper law" of the contract. Whatever effect might be given to such a stipulation in a court outside of Canada, within this country we are bound by the provisions of the *Water Carriage of Goods Act* of 1936. By section 8 of article III of the Rules any clause in a contract of carriage purporting to relieve a carrier for loss or damage arising from negligence in respect of the duties provided in that article (except as allowed by the Rules), is void. As the English law would have effect only by way of factual incorporation in the contract, and as the immunity of section 502 extends to all negligence imputable to the carrier by the rule of respondeat superior, on the assumption that item (*b*) next dealt with does not give exemption, it clashes with section 8 and must in this court be deemed to be excluded from the bill of lading.

There remains the defence that the respondents have brought themselves within the exception of item (*b*) of article IV, section 2, of the Rules:

> 2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from:
>
> * * *
>
> (*b*) fire unless caused by the actual fault or privity of the carrier.

It will be convenient to set against this language that of section 502:

> The owner of a British sea-going ship or any share therein shall not be liable to make good to any extent whatever any loss or damage happening without his actual fault or privity in the following cases, namely:
>
> (i) Where any goods, merchandise or other things whatsoever taken in or put on board his ship are lost or damaged by reason of fire on board the ship.

This latter provision is in a general shipping Act which does not deal specifically with stipulations of bills of lading, and is contained in a part which provides a number of limitations on the liability of owners of vessels. It is now settled that the exemption so given extends to a loss by fire resulting from unseaworthiness and we must consider whether the same interpretation is to be given to item (*b*).

The *Water Carriage of Goods Act* of 1936 and its rules were intended to make uniform over a wide range of inter-

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national commerce the rules under which goods are carried by sea and to limit the extent to which water carriers might restrict their liability for loss or damage. At the same time it qualified the important obligation of seaworthiness to which they were subject.

At common law the obligation of a water carrier was the same as that of a common carrier: he must deliver what he received unless excused by an act of God, the King's enemies or inherent defect. Implicit in this obligation was the duty at all times to exercise reasonable care and skill in the undertaking, and an absolute warranty that the vessel was reasonably fit for the purpose to which it was to be put or, in other words, was seaworthy. But these two inherent obligations of care and skill and seaworthiness were significant only in relation to exceptions from the absolute liability of the carrier and in the development of shipping law they became the background against which all exceptions, including the act of God or the King's enemies, came to be interpreted.

The Rules assume, and are intended to be terms and conditions of, a common law undertaking to carry and deliver. That is made clear by article II. In article III the responsibilities and liabilities of the carrier are set forth. Section 1 prescribes the obligation in respect of seaworthiness, i.e., the duty of due diligence in the furnishing of a complete vessel: section 2 deals likewise with the care and skill to be exercised in the receipt, carriage and delivery of the goods.

Section 2, however, by its introductory language, "subject to the provisions of article IV", declares in effect that the responsibility so created, in relation to liability, is not absolute; that, for example, the exceptions may, on their proper construction, trench upon the duty so prescribed. On the other hand, there is no such subjection of section 1 of article III to article IV; and, in a manner complementary to section 1 of article III, section 1 of article IV expressly and exclusively deals with liability for loss or damage arising from unseaworthiness. The effect of that special treatment is, I think, to render the exercise of diligence absolute and to place it quite outside the scope of any of the itemized exemptions.

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It may be that the language of item (*b*), virtually identical with that of section 502, would, in the absence of the particular provisions of the Rules to which I have referred, call for a similar construction as to seaworthiness; but as item (*b*) clearly gives exemption in the case of fire caused by negligence, other than that of the carrier himself, arising in the course of the duties of section 2, article III, the exception is fully satisfied consistently with what appears to be perfectly plain and straightforward language, and I feel bound to assume that the legislature did not intend to ascribe to the item a more extended scope.

It may be suggested that item (*p*), "latent defects not discoverable by due diligence", embraces a defect rendering the vessel unseaworthy and no doubt it does; but the obligation within which these exceptions are to be construed is that of the undertaking to carry and deliver. So considered, it is seen that they are intended to exclude the liability of the carrier as insurer and to confine it to negligence not excepted.

I would, therefore, allow this appeal and direct judgment to be entered for the plaintiff for the sum of $4,235.12, with costs throughout.

Appeal dismissed with costs.

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

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

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*May 15.
*June 22.
*Oct. 30.
*Nov. 20.

HIS MAJESTY THE KING..... APPELLANT;

AND

CAMILLE DEUR AND OTHERS..... RESPONDENTS.

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

Criminal law—Accused charged on three counts of conspiracy—Speedy trial before Court of Sessions—Only one trial on the three charges—Only one complaint or information charging accused with the three charges, one preliminary inquiry and one option—Not the same as if several counts arise from separate informations and commitments, each charging distinct offences—This case distinguished from decision of this Court in The King v. Balciunas ([1943] S.C.R. 317).

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

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The accused, respondents, were charged on five counts, one for conspiracy to commit fraud, two for conspiracy to commit indictable offences and two for having committed the substantive offences themselves. The trial having been limited to the three conspiracy counts, the accused, having elected to be tried speedily under part 18 of the Criminal Code, were found guilty, but on appeal the conviction was set aside and a new trial was ordered. The decision of the appellate court was based on the ground that the trial judge upon speedy trial had no jurisdiction to try the three different counts in the indictment at the same time, that Court being of the opinion that it was contrary to the rule laid down by this Court in *The King v. Balciunas* ([1943] S.C.R. 317). The Crown appealed to this Court, leave having been granted under section 1025 of the Criminal Code.

Held that the appeal should be allowed. The judgment of this Court in the *Balciunas* case (*supra*) should not be considered as governing the present case, the true effect of that decision being that it is limited in its restriction of trial to cases where the several counts arise from separate informations and commitments.

The procedure was different in the two cases. In the present case, there was only one complaint which charged the respondents with the three conspiracy offences, there was only one preliminary inquiry referring to the three counts and there was only one charge sheet and one option. In the *Balciunas* case (*supra*), three separate informations were laid, each charging a distinct offence; there was a commitment for trial in each of the cases, although the three charges were set forth on a single charge sheet, there was one speedy trial on all three charges and the accused was convicted on each charge. Therefore, in the *Balciunas* decision, it was a case of a joinder for trial purposes of charges originating in different complaints, or in different and distinct commitments, or, in short, a joinder of different cases; and it was held that it was improper to try the three separate charges together.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec, which allowed the respondents' appeal on questions of law and ordered a new trial, without giving any decision on questions of facts.

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

Gérald Fauteux K.C. and *Gustave Adam K.C.* for the appellant.

Philippe Monette K.C. and *M. Gameroff K.C.* for the respondents.

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

THE CHIEF JUSTICE.—The respondents were, by the Court of Sessions sitting in and for the district of Montreal, found guilty on three counts of conspiracy on which they had been tried. These counts of conspiracy formed part of a single charge sheet. The accused were charged with having conspired to commit a number of offences and also, on two other counts, with having committed the substantive offences themselves. Upon objection of the respondents, by way of motion to quash, against the joinder of the conspiracy charges and of the two other charges for having committed the substantive offences, the hearing of the two latter counts was adjourned and the case proceeded only upon the conspiracy charges, to the joinder of which, at that particular time, no objection was forthcoming from the respondents.

Against the conviction on the three counts of conspiracy, the respondents appealed on questions of law and on questions of facts.

By judgment rendered on the 30th of December, 1943, the Court of King's Bench (appeal side) unanimously allowed the appeal on the questions of law and ordered a new trial; but, although the Court had heard counsel for the parties both on the law and on the facts, no reference either in the formal judgment or in the reasons for judgment was made to the appeal on questions of facts.

The decision of the Court was that the presiding judge, upon speedy trial under part 18 of the Criminal Code, had no jurisdiction to try the three different counts in the indictment at the same time, as he had done; that this was contrary to the rule laid down by the Supreme Court of Canada in *The King* v. *Balciunas* (1). For that reason the conviction was quashed and the Court ordered a new trial.

Although the formal judgment of the Court of King's Bench states that the respondents took exception to the mode of trial, it now appears that this was a mistaken impression and that the trial proceeded and the accused were found guilty without raising the objection which they alleged in their notice of appeal.

The Crown moved for leave to appeal to this Court, under section 1025 of the Criminal Code, alleging conflict

(1) [1943] S.C.R. 317.

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in a like case between the judgment now appealed from and the judgment of the Court of Appeal of Nova Scotia in the case of *The King* v. *Cross* (1). Leave to appeal was granted.

There is no doubt about the jurisdiction of the learned judge who gave leave, because the conflict is evident. In the *Cross* case (1) the Court decided that a judge holding a speedy trial may deal with each charge as the counts in one indictment might be dealt with and is not bound to proceed with a speedy trial upon each formal charge. There was, as here, only one information. The Court of Appeal of Nova Scotia held that the magistrate had jurisdiction to try together the three charges there referred to and that the several charges were not to be treated as separate indictments and to be tried separately. The conviction was affirmed.

The judgment rendered by the Court of King's Bench in the present case is, therefore, clearly in conflict with the *Cross* case (1), and the case comes under section 1025 of the Criminal Code, unless it may be said that the judgment of this Court in the *Balciunas* case (2) overruled the judgment in the *Cross* case (1) and that the Court of King's Bench of Quebec only followed the decision rendered in this Court in the *Balciunas* case (2).

Leave having been granted, the Court first heard the appeal during the May sittings and judgment was then reserved; but, in the course of its deliberations, the Court felt there were points on which it would like to have a reargument. Accordingly counsel were advised that they were called upon to argue the following points:—

Whether, under the judgment of this Court in the *Balciunas* case, (2) in no case can more than one count be the subject of trial under Part 18 of the Code at the same time, or whether the judgment is limited in its restriction of trial to cases where the several counts arise from separate informations and commitments.

Counsel on both sides had full opportunity to be heard on the points thus submitted.

The reargument took place at the present sittings of the Court. Counsel for the Attorney-General for the province of Quebec took the position that the second alternative in

(1) (1909) 14 Can. Cr. Cas. 171. (2) [1943] S.C.R. 317.

the question submitted by the Court was the correct one and that to which one should adhere. I have come to the conclusion that the latter view is the true effect of the *Balciunas* judgment (1). As appears in the judgment of the Court, the facts in that case were as follows:—

Three separate informations were laid against Balciunas. He was committed for trial on all three. A single charge sheet setting forth the three charges was prepared by the Crown Prosecutor and on this the accused was arraigned and elected to be tried speedily under part 18 of the Criminal Code. There was one trial on all three charges before the County Court judge and Balciunas was convicted on each charge. On appeal to the Court of Appeal this conviction was set aside and a new trial directed on the ground that it was improper to try the three separate charges together, the point being that, although there was authority in the Criminal Code to include in an indictment a number of separate charges, this was not the case as to a charge under the provisions of part 18. In this Court the judgment of the Court of Appeal was affirmed.

In the present case the procedure was different. There was only one complaint which charged the respondents with the three conspiracy offences. There was only one preliminary inquiry referring to the three counts, and there was only one charge sheet and one option.

A motion to quash was made, but it objected to the joinder of the conspiracy charges with the other charges of having committed the offences themselves; it did not object to the joinder of the three conspiracy charges.

As appears, there was a single complaint, a single inquiry, a single charge comprising the three counts, a single option in relation to that charge, and a single trial on the three counts. No objection was made to having the conspiracy counts tried simultaneously, and objection was made only to the joinder with the substantive offences counts.

The procedure, therefore, was different in the two cases and I do not think the *Balciunas* judgment (2) should be considered as governing the present case. What the Court had before it in the *Balciunas* case (2) was the fact of three separate informations, a commitment for trial on all three

(1) [1943] S.C.R. 317, at 319. (2) [1943] S.C.R. 317.

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and a single charge sheet on which the trial proceeded to conviction on all three charges. The Court did not pretend to decide anything else than what was then before it. The effect of the judgment is that, in the premises, it was improper to try the three charges together; and the decision should not be extended to a different case. Speaking broadly, however general the terms may be in which a judgment is expressed, unless a contrary intention clearly appears, they extend only to the facts and to the questions with which the Court is at the moment concerned.

In the *Balciunas* case (1) what was condemned was the joinder for trial purposes of charges originating in different complaints, or different informations, the joinder of separate records, or, in short, of different cases. It should not, therefore, be considered as concluding this particular case.

Now, as can be seen by the notice of appeal, there was substantially only one ground of appeal on the law before the Court of King's Bench in Quebec. The respondents contended that the trial judge had exceeded his jurisdiction in hearing simultaneously three counts in the indictment. Likewise, the Court of King's Bench decided that contention favourably to the respondents by resting its decision on the *Balciunas* judgment (1); but, in my opinion, the two cases are different and, as this was the real ground of the decision in the Court of King's Bench, it follows that the appeal ought to be allowed.

However, this does not dispose of the case. There was an appeal to the Court of King's Bench not only on the question of law just discussed, but also on questions of fact. The respondents were entitled to a pronouncement by the Court of King's Bench on their appeal on facts. In view of the result on the question of law, the Court of King's Bench gave no decision on the appeal on facts. The case ought, therefore, to be remitted to the Court of King's Bench (appeal side) of the province of Quebec in order that that Court may pass upon the grounds of appeal based on facts. In so ordering, I am adopting the course followed by this Court in *The King* v. *Boak* (2).

The appeal should be allowed to the extent indicated.

(1) [1943] S.C.R. 317.

(2) [1925] S.C.R. 525, at 532.

The judgment of Taschereau and Rand JJ. was delivered by

RAND J.—The respondents were charged before the Court of Sessions, district of Montreal, under the speedy trials provisions of the Criminal Code on five counts, one for conspiracy to commit fraud, two for conspiracy to commit indictable offences against sections 164 and 169 of the *Excise Act*, and two for those offences themselves. The charges had been laid in one information and the commitment was on all of them. On the objection of the respondents and with the consent of the Crown, the trial was limited to the conspiracy counts. The accused were found guilty but on appeal the conviction was set aside and new trials ordered. From that judgment the Attorney-General of Quebec appeals.

The ground on which the Court of King's Bench proceeded was that under part 18 of the Code, as interpreted by this court in the case of *The King* v. *Balciunas* (1), no more than one count or charge can be the subject of such a trial. But that was not, in my opinion, the effect of the *Balciunas* judgment (1) nor do I think it governs this case. An examination of its facts shows that three informations had been laid, each charging a distinct offence. There was a commitment in each case. The three charges, however, were set forth on one charge sheet; on them the accused elected for a speedy trial and they were tried together. It was, therefore, a case of joining charges contained in separate and distinct commitments. The Court of Appeal for Ontario had held that there was no power under part 18 to do that and that section 834 had no application because all three were contained in the commitments; and it had directed

> that the appellant be tried regularly upon the charges upon which he was committed for trial.

That judgment was affirmed in this court (1). In both, reference was made to section 856 of part 19 of the Criminal Code and assuming that section would have cured what was otherwise a misjoinder, it was held not to apply to proceedings under part 18.

(1) [1943] S.C.R. 317.

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These judgments imply that, if the three charges had been properly on the charge sheet, they could have been tried together, and this is clearly the assumption underlying section 856 in relation to an indictment. If the question had been simply whether there was jurisdiction under part 18 to try two charges together, it would have been quite unnecessary to emphasize the precise procedure followed or to make any reference to section 834.

Then does part 18 exclude all joinder of counts in a charge sheet? The commitment on the five charges was unobjectionable. Section 827 requires, for the purposes of election, that the prisoner be informed that he is charged with "the offence", which ordinarily means that upon which he has been committed, but the singular number is not to be taken as a limitation. By subsection 3,

> the prosecuting officer shall prefer the charge against the accused for which he has been committed for trial or any charge founded on the facts or evidence disclosed on the depositions.

Section 834 has already been considered. Section 839, giving all powers of amendment, authorizes the division of a count under section 891.

By the common law rule, an indictment could in general contain any number of counts. In felonies, when it appeared that they did not all arise out of the same body of facts, the court, not as a matter of jurisdiction but of judicial discretion, followed this practice: if the discreteness was detected before the prisoner pleaded, the court would quash the indictment; if it did not appear until after plea, the prosecutor was called upon to elect upon which count he would proceed; but after verdict the joinder was not available on a writ of error. So long, however, as the counts were statements of different offences arising out of what was in substance a single transaction, there was no misjoinder and all could be tried together: *The King* v. *Lockett et al.* (1), and in this background both the purpose of section 856 and the interpretation of part 18 are clarified. If a joinder of two or more counts, arising as in this case, were not allowed, then either speedy trials would be limited to commitments on a single charge or a separate trial would be necessary for each of any number of charges

(1) [1914] 2 K.B. 720.

although they all arose out of the same transaction, and the real object of part 18 would, in large measure, be defeated. Section 710 in part 15 shows with what specific language such a limitation of trial has been prescribed.

The ground, then, upon which the court below proceeded lay in a misconception of what the *Balciunas* judgment (1) decided and the appeal must be allowed but, as the accused had appealed as well on the facts and this ground has not been considered below, I would return the case to the Court of King's Bench to be dealt with accordingly.

Appeal allowed.

ANGUS C. WILKINSON (DEFENDANT). APPELLANT;

AND

MARY SHAPIRO AND JOSEPH SHAPIRO (PLAINTIFFS) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Negligence—Motor vehicles—Evidence—Trial—Action for damages for injuries to person struck by motor car—Onus of proof under s. 48 (1) of Highway Traffic Act, R.S.O. 1937, c. 288—Nature and extent of the onus—Trial Judge's charge to jury.

Plaintiff claimed damages for personal injuries caused by her being struck, while crossing a street in Toronto, Ontario, by a motor car driven by defendant. At trial, the jury, asked if defendant had satisfied them that plaintiff's loss or damage did not arise through negligence or improper conduct on defendant's part (the question being framed with regard to the onus created by s. 48 (1) of *The Highway Traffic Act*, R.S.O. 1937, c. 288), answered in the affirmative; and the action was dismissed. The Court of Appeal for Ontario ([1943] O.R. 806) ordered a new trial, on the ground of error in the trial Judge's charge to the jury. Defendant appealed to this Court.

Held: The appeal should be dismissed. The trial Judge, in charging the jury, erred in the following respects:

(1) In stating that "when a defendant is called upon to prove that the damage was not caused by his negligence or improper conduct, he might prove it by showing that it was caused, in whole or in part, by the negligence of the plaintiff". Defendant could not satisfy the burden placed upon him by said s. 48 (1) by showing that the damages were caused in part by plaintiff's negligence; his obligation was

PRESENT:—Kerwin, Hudson, Taschereau, Kellock and Estey JJ.

(1) [1943] S.C.R. 317.

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to satisfy the jury that the loss or damage did not arise through any negligence or improper conduct on his part; if they were so satisfied, that was an end to the matter; if they were not, it would then be open to them to find that plaintiff's negligence caused or contributed in part to the accident in accordance with the provisions of *The Negligence Act*, R.S.O. 1937, c. 115.

(2) In putting the case to the jury as though their task under said s. 48 (1) were to examine defendant's conduct in certain particulars only so as (in the language of the charge) "to come to a decision as to whose negligence caused the accident, or whether both were negligent". (No doubt plaintiff's counsel, in addressing the jury, had referred to certain conduct of defendant as constituting negligence; but the statement of claim had not alleged negligence, nor was it required that it should do so.) That manner of dealing with the onus fell far short of what is required in explaining its nature and was misleading. A jury may properly find that a defendant has failed to meet the statutory onus (each juror possibly having a different ground for so thinking) without being able to specify exactly in what the defendant's negligence consisted.

Winnipeg Electric Co. v. *Geel*, [1932] A.C. 690, at 695, 696; [1931] S.C.R. 443, at 446, cited. Statement of the law in *Newell* v. *Acme Farmers Dairy Ltd.*, [1939] O.R. 36, at 43, approved.

APPEAL by the defendant from the judgment of the Court of Appeal for Ontario (1) which (Riddell J.A. dissenting) vacated and set aside the judgment of McFarland J. (dismissing the action on a finding by the jury) and ordered a new trial. The action was for damages by reason of personal injuries to one of the plaintiffs (wife of the other plaintiff) caused by her being struck, while crossing a street in Toronto, Ontario, by a motor car driven by the defendant. The ground of the judgment in the Court of Appeal was that, with regard to the onus created by s. 48 (1) of *The Highway Traffic Act*, R.S.O. 1937, c. 288, there was error in the trial Judge's charge to the jury.

E. L. Haines and *D. Haines* for the appellant.

I. Levinter K.C. for the respondents.

The judgment of the Court was delivered by

KELLOCK J.—We are all of opinion that this appeal should be dismissed. The appeal is from an order of the Court of Appeal for Ontario, dated November 18th, 1943,

(1) [1943] O.R. 806; [1944] 1 D.L.R. 139.

allowing an appeal from a judgment at trial, of McFarland J., with a jury, dated June 9th, 1943, by which the action was dismissed.

The respondents brought the action to recover damages for personal injuries sustained by the respondent Mary Shapiro and for expenses incurred by her husband, the respondent Joseph Shapiro, as the result of an accident happening on or about the 27th September, 1942, while the first named respondent was crossing from north to south on Bloor Street West, in the City of Toronto, in the neighbourhood of Manning Avenue. Whilst so doing, she was struck by an automobile, owned and driven by the appellant.

The jury in answer to the question, "Has the defendant Angus Wilkinson satisfied you that the loss or damage of the plaintiffs did not arise through negligence or improper conduct on his part", answered in the affirmative. The appeal to the Court of Appeal was on the ground of misdirection and non-direction in the charge of the learned trial judge.

In his charge, the learned trial judge, after explaining to the jury the meaning of the term "negligence", pointed out to them that the accident was not one requiring the respondents to prove negligence on the part of the appellant but was governed by the provisions of section 48, subsection 1, of *The Highway Traffic Act,* which he read. He then proceeded:—

> In this case, to put it frankly, the onus is upon the defendant Wilkinson to satisfy you that the injuries to the plaintiff were not caused by his negligence.
>
> I should also go on to say that when a defendant is called upon to prove that the damage was not caused by his negligence or improper conduct, he might prove it by showing that it was caused, in whole or *in part,* by the negligence of the plaintiff. And that is the allegation set up here.

(The italics are mine.) The learned judge then turned to the questions to be submitted to the jury and proceeded:—

> The first question goes directly to the heart of the matter of which I have just been speaking; namely, onus; because the first question reads:

(His Lordship then read the first question.) The jury were then charged that that question had to be answered "Yes, or No" and that, if the answer were in the affirmative,

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the jury need not answer any of the later questions except the question as to damages. The later questions were the usual ones in actions of this character, as to negligence on the part of the plaintiff and the respective degrees of the negligence of plaintiff and defendant.

The learned judge then proceeded to deal with the evidence and said: "as I see it, the negligence of the defendant, alleged by the plaintiff, was," in certain particulars which the learned judge set out seriatim.

No doubt counsel for the respondents, in his address to the jury, had referred to certain conduct on the part of the appellant as constituting negligence, but the statement of claim did not allege negligence on the part of the appellant at all, and it was not required that it should do so. The learned judge then proceeded to comment on the evidence dealing with the conduct of the respondent Mary Shapiro and the appellant's account of the accident. He then stated: "I think you have heard enough to enable you to come to a decision as to whose negligence caused the accident, or whether both were negligent." After dealing with the question of damages, his Lordship later returned to the first question and repeated his instruction that if the jury found that the appellant had satisfied them that he was not negligent, and answered the first question in the affirmative, they should then proceed to the question of damages but, if they answered question 1 in the negative, they should deal with the other questions. He then said: "Remember that the onus is upon the defendant. Any ten of you may agree on the answer to any question, it is not necessary for you to be unanimous."

Objection was taken by counsel for the respondents on the ground that the learned trial judge had not adequately explained to the jury the meaning of section 48, subsection 1, and the learned judge was referred to *Winnipeg Electric Company* v. *Geel* (1), and *Newell* v. *Acme Farmers Dairy Limited* (2). The learned judge recalled the jury and on the question of onus said:—

> The contention is made that certain expressions I used might probably have been misleading. I have been asked to make it quite clear to you again, that the onus rests squarely on the defendant to prove to your satisfaction that there was no negligence on his part. That onus

(1) [1932] A.C. 690. (2) [1939] O.R. 36.

rests upon him. Any verdict brought in by you must be based upon whether or not the defendant has sustained that onus. Now, I think that is putting it as clearly as I can.

His Lordship then referred to the sections of *The Highway Traffic Act* dealing with the requirements as to lights and horns, and the jury were instructed that the onus was upon the defendant to satisfy the jury that the section as to lights was observed and that the non-operation of the horn was justified under the circumstances.

Essentially two points arise on this charge: First, the instruction with regard to the first question submitted to them that the appellant could satisfy the burden of proof cast upon him by section 48, subsection 1, by showing that the damage suffered by the female respondent was caused "in part" by her negligence. The second point arises in connection with the manner in which the learned trial judge further dealt with the onus cast upon a defendant by the subsection and his putting of the case to the jury as though their task, under the section, were to examine the conduct of the appellant in certain particulars only so as "to come to a decision as to whose negligence caused the accident, or whether both were negligent", to employ the language of the learned trial judge.

The appeal to the Court of Appeal was allowed, Riddell J.A., dissenting. Laidlaw, J.A., who wrote the majority judgment and with whom Gillanders, J.A., agreed, held that the trial judge was in error in his charge with regard to the first point and that the jury, so charged, could not properly deal with the question as to whether or not the appellant had satisfied the onus of proof resting upon him. We find ourselves in agreement with Laidlaw, J.A., on this point. The appellant could not satisfy the burden placed upon him by showing that the damages were caused in part by the female plaintiff's negligence. His obligation was to satisfy the jury that the loss or damage did not arise through any negligence or improper conduct on his part. If they are so satisfied, that is an end to the matter; if they are not, it would then be open to them to find that the female plaintiff's negligence caused or contributed in part to the accident in accordance with the provisions of *The Negligence Act*, R.S.O. 1937, c. 115.

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With regard to the second point arising on the charge as above referred to, this was criticized by Laidlaw, J.A., but he thought it unnecessary to determine whether this would form a good ground of appeal in view of his opinion on the other point.

With regard to this aspect of the learned trial judge's charge, we think it falls far short of what is required in explaining the nature of the onus cast upon a defendant by subsection 1 of section 48 of *The Highway Traffic Act* and is quite misleading. If the jury were to be put in a position to discharge their duty, it was essential that the learned trial judge should direct them properly as to the law and as to how that law was to be applied to the facts before them, as they might find them. As to the relevant law, it is only necessary to refer to the judgment delivered by Lord Wright in the Privy Council in *Winnipeg Electric Company* v. *Geel* (1), and to the judgment of Duff J., as he then was, in the same case (2). We find ourselves in agreement with the statement of the law of Middleton, J.A., in *Newell* v. *Acme Farmers Dairy Limited* (3), as follows:—

> The jury may find itself quite satisfied that the defendant has failed to meet the statutory onus cast upon him. But each of the jurors may have a different ground for so thinking, and it may be impossible for a jury who rightly believe that the accident was caused by negligence to specify exactly in what the negligence consisted.

It is not necessary to repeat or amplify these authorities. They indicate the requirements of a satisfactory explanation of the effect of the legislation under consideration. The charge in the case at bar does not comply with these requirements and we think that a verdict based on it cannot stand. What the learned judge said to the jury after they were recalled was quite inadequate to rectify the error existing in his previous instructions to them.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Haines & Haines.*

Solicitor for the respondents: *J. M. Friedman.*

(1) [1932] A.C. 690, at 695 and 696.
(2) [1931] S.C.R. 443, at 446.
(3) [1939] O.R. 36, at 43.

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DAMAGES—*Continued*

the amount awarded for special damages, but no general damages should be allowed. Davis J., dissenting, would order a new trial as to damages.—*Per* the Chief Justice and Rand J.: (1) The damages from the deceit in this case were the same as the consequences of a breach of the obligations from which plaintiff's rights and interests arose, and were to be determined on the rules applicable to contractual defaults. The person who has suffered from such a wrong is entitled, so far as money can do it, to be placed in as good a position as if the contract had been performed. With this there is the parallel duty on his part to take all reasonable measures to mitigate the loss consequent upon the breach. Any steps required by such duty must arise out of the consequences of the default and be within the scope of what would be considered reasonable and prudent action. The duty is limited by considerations of class of venture and risks; but where there has been an actual performance within those consequences, whether or not within the duty, the benefit derived may be taken into account. But the performance in mitigation and that provided or contemplated under the original contract must be mutually exclusive, and the mitigation, in that sense, a substitute for the other; or, stated from another point of view, by the default or wrong there is released a capacity to work or to earn; that capacity becomes an asset in the hands of the injured party, and he is held to a reasonable employment of it in the course of events flowing from the breach. In the present case the question was whether or not the "White Cross" business could be looked upon as incompatible with that closed by the fraud; or, in the other sense, whether the capacity to be released to plaintiff by the result of the fraud was necessary to the continuance of the "White Cross" business. The facts did not admit of any such conclusion; and there was no evidence on the basis of which a jury should have been instructed to take account of the "White Cross earnings. Also there was no evidence that the trading situation in Halifax was such as to offer to plaintiff the conditions and inducement of still another successful business venture; and this was sufficiently decisive, as once a *prima facie* case for damages is presented, the onus at least for proceeding with the evidence is then cast upon the party asserting a claim for mitigation. It may be that, as in the ordinary case of dismissal from employment, the facts raising a *prima facie* case for damages to themselves contain evidence of potential earning power and raise a presumption that

DAMAGES—*Continued*

the capacity to work has a calculable value; but in the present case there was no evidence from which a necessary or reasonable transfer of earning capacity from the one store to another could be inferred, and that was decisive on the point. (2) It was not a case where the damages should be limited to the value of the leasehold interest of which plaintiff was deprived (*Re Schulte-United Ltd.*, [1934] O.R. 453, distinguished). (3) It could not be said that the jury, acting as reasonable men, could not have found special damages in the amount awarded. (4) As to the general damages: Where actual damages themselves are the gist of the remedy, the causing of those damages being itself the wrong done, the rule of general damages has no application. As to allowance of "general damages" in the sense in which that expression is, for instance, applied to allowance for pain and suffering in the case of personal injury through negligence: It is not clear in the present case how any such matters (referred to in the trial Judge's charge as "general worry, upset of business, being subjected to what he regards as illegal action") could be treated as natural and direct consequences of the fraudulent representations, but, in any event there was no attempt made to prove them. *Per* Kerwin J.: The jury were entitled to award as damages such amount of profits as they considered plaintiff would have secured under a renewal lease for five years (taking into consideration profits previously made and all the vicissitudes of business enterprises) subject always to sooner determination in the event of a *bona fide* sale; such profits were neither too remote nor too uncertain to serve as the basis of estimate of the amount of damages. There was no basis for a deduction from such amount of an annual sum, such as a yearly salary at one time earned, as the value of plaintiff's yearly earning ability. Nor should there be any deduction of the amount of profits made or likely to be made at plaintiff's other stores; the starting or acquiring of them could not, under the circumstances, be said to have arisen "out of the consequences of the breach" (applying the rule in breach of contract cases). The amount awarded for special damages was such as a jury, doing their duty, could award. On plaintiff's cause of action, he was not entitled to anything beyond what he proved in the way of special damages. *Per* Taschereau J.: Though the amount awarded as special damages seemed high, this Court would not be justified in interfering. The case was not one where general damages might be awarded. *Per*

EXPROPRIATION—*Continued*

building lots—Amount of compensation—Method of valuation—Evidence as to value of land—Damage to adjoining land caused by operation of airport—Damages due to noise, dust or danger to persons or property—Servitude of "non aedificandi" created by Federal orders in council—Whether claimant entitled to such damages as owner of adjoining land.]—On the 10th of July, 1940, the Federal Government, as a war measure, leased a municipal airport, already existing since 1936, at Cap de la Madeleine, Quebec, where an aviation school had also been established. In order to enlarge the runways, the Crown expropriated some land, surrounding the airport, belonging to the respondent, the latter remaining owner of property adjoining the airport and the expropriated land. The property of the respondent had been subdivided into lots some years previously. On the 28th of February, 1942, as the Crown had made no move to compensate him, the respondent obtained a fiat authorizing him to claim by petition of right due compensation. The respondent claimed $162,911.51, being the value at 9½ cents a square foot of 514,648 square feet of the expropriated land and damages at the same rate to 1,200,210 square feet of adjoining land belonging to him. These damages, it was alleged, resulted from the general operation of the airport, and more especially from the noise, from the dust raised by the starting and the landing of the air machines and from the danger to persons and property; and damages were also alleged to have been created by a servitude or easement "non aedificandi" or "altius non tolendi" established by certain orders in council and zoning regulations passed by the Federal authorities. The Crown offered an indemnity of $3,000. The Exchequer Court of Canada granted to the respondent a sum of $36,278.16, being $23,159.16 as the value of the expropriated land, i.e. 514,648 square feet at 4½ cents per foot, and $13,122 for damages to respondent's property adjoining such land and the air-port, this latter amount being arrived at by allowing 30 per cent depreciation on the value of the land estimated at the same price as the expropriated land. The Crown appealed to this Court, first on the ground that the value of 4½ cents per square foot fixed by the trial judge was too high, and secondly that the respondent had no right to claim damages caused to his adjoining property, even if any existed. *Held,* reversing the judgment appealed from, that the amount which the respondent was entitled to recover from the Crown, for the land expropriated, should be reduced to $10,292.96.

EXPROPRIATION—*Continued*

Upon the evidence, the amount of 4½ cents per square foot fixed by the trial judge is clearly excessive, and the price per square foot should be reduced to two cents. *Held,* further that the respondent was not entitled to any damage which may have been caused to the residue of his property adjoining the expropriated land and the airport. *Per* Rinfret, Taschereau and Rand JJ.—The respondent's claim was brought under the *Expropriation Act,* which provides that the party expropriating must pay, besides the value of the land actually expropriated, a compensation for land "injuriously affected" as a result of the expropriation. But, in this case, it is not the expropriation itself which had "injuriously" affected the respondent's adjoining land. As to the depreciation, if any, resulting from orders in council and regulations, passed under the *War Measures Act,* creating a servitude of "non aedificandi" or "altius non tolendi", these orders in council were antecedent to the expropriation and would have created the same servitude, if there had been no expropriation. The respondent, therefore, must suffer such prejudice, the same as citizens generally suffer from different kinds of restriction imposed under the present state of war. The depreciation alleged to have resulted from the operation of the aeroplanes, especially from noise, dust raised by them and danger to person and property, may present a different aspect, as these inconveniences would have existed even in the absence of the orders in council; but the respondent is also precluded from claiming any relief on that account. The respondent having subdivided his land into lots, each of them possessed a different entity with no relation to the neighbouring lot; and, although the respondent remained the owner of all the lots, each of them was independent from the other. The principle laid down by the decision of the Judicial Committee in *Holditch* v. *Canadian Northern Ontario Ry.* ([1916] 1 A.C. 536, at 540) should be applied to the present case. Each lot taken apart does not confer any advantage to the neighbouring lot; and, therefore, the respondent is not entitled to compensation from the fact that, upon the compulsory taking of some of the lots, he is prejudiced in his ability to use or dispose of the remaining lots: the respondent is in no better position than he would be, if the expropriated lots would have been the property of another person. The mere unity of ownership does not add any value to the lots: there is a lack of such a connection between all the lots from which it would follow that, through the loss of

MOTOR VEHICLES—*Continued*

between two motor cars—One car having right of way and the other going against red light—Action against owner and driver of both cars—Presumption of fault—Burden of proof—Motor Vehicles Act, R.S.Q., 1925, c. 35, s. 53, ss. 2.]—The appellant's minor son, when crossing St. Lawrence boulevard, at the intersection of Sherbrooke street, on the north side of that street, in the city of Montreal, was struck and severely injured, after two automobiles had collided at that point. One of the automobiles belonging to one Gignac and driven by his employee Pelchat was going in a northerly direction, and the other automobile owned by the respondent Alexander Wise, and in charge of his brother, the other respondent, was proceeding towards the west on Sherbrooke street. At that intersection, the traffic is governed by light signals; and, at the moment of the impact, the respondent's automobile, as well as the appellant's son, had the right of way, the green light being in their favour. It was also proven that Gignac's automobile was hit on the right side, a few inches behind the rear axle. After the collision, the appellant's son was found under a tramway facing a southerly direction, but which had stopped in obedience to the red signal. On behalf of his son, the appellant brought an action for damages against the owners and drivers of both automobiles. The trial judge condemned the respondents and Pelchat jointly and severally to $17,447.20, but dismissed the action against Gignac on the ground that, at the moment of the accident, Pelchat was not in the performance of his employment. The appellate court, allowing the respondents' appeal, dismissed the action as to them. The appeal against Gignac before that court is still pending, Pelchat having filed no appeal. *Held,* affirming the judgment appeared from, that, upon the evidence the respondents have committed no fault; and, also, that any presumption of fault, if such presumption did exist, has been rebutted by them. Subsection 2 of section 53 of the *Motor Vehicles Act* (R.S.Q., 1925, c. 35) provides that "Whenever loss or damage is sustained by any person by reason of a motor vehicle on a public highway, the burden of proof that such loss or damage did not arise through the negligence or improper conduct of the owner or driver of such motor vehicle shall be upon such owner or driver". *Per* the Chief Justice and Taschereau J.: The presumption which the law thus creates is not a presumption that the driver of an automobile has caused *damage*. It is a presumption that he is *liable* when it is proven that

MOTOR VEHICLES—*Continued*

he has caused damage, and he has therefore the onus of showing that he committed no fault which contributed to the accident. But, before such presumption of liability may arise, it is incumbent upon the plaintiff to establish that it is the person, from whom the damage is claimed, that is the author of such damage. There must necessarily exist a relation between the driver of the automobile, and the damage suffered by the victim. And in order to establish such a connection between the driver and the damage suffered, it is not of course necessary in all cases, for the plaintiff, to show that he was struck by defendant's automobile. It may very well happen, as it does often, that the damage may be attributed to a driver who does not actually hit the victim, but acts in such a way that he causes another one to run over a pedestrian. But it is only when such or similar facts are shown to exist that the presumption created by section 53 of the *Motor Vehicles Act* starts to operate, because then only the driver is linked in some way to the mishap. In the present case, nothing of the kind is revealed by the evidence. But, even if such a presumption would exist, it has been rebutted by the respondents. *Per* Kerwin J.: There is no question, as to the person at fault, involved in the construction of section 53 (*Maitland* v. *McKenzie,* 28 O.L.R. 506): that is, while the appellant must prove that loss or damage was sustained by reason of respondent's automobile, the tribunal of fact need not determine, so far as the onus is concerned, whether the driver operated the car in a negligent manner or not. There is no evidence that the appellant's son would have been struck by Pelchat's car, even if respondent's car had not been on the highway, and no such inference may properly be drawn. The victim was struck after the collision between the two cars occurred; and the respondents, in view of the evidence on that point, were bound to displace the onus that rested upon them under section 53. But, upon the evidence the respondents have satisfied such onus. *Per* Hudson J.: The plain meaning of section 53 is that a plaintiff must first satisfy the court that the loss or damage was sustained by reason of the motor vehicle; and, once the court is so satisfied, then the onus is on the defendant (owner or driver) to prove if he can that the loss or damage did not arise through his improper conduct. *Per* Rand J.: Assuming there was such evidence of a nexus in fact between the collision and the injury as to give rise to the statutory presumption against the respondents, and also

NEGLIGENCE—*Continued*

Plaintiff was driven (about 1.30 p.m.) into defendant's public garage in a motor car driven by B. who left the car there to be parked. The car entered the garage through a large folding door composed of four sections, which door was opened to admit the car and then closed. In one of the sections there was a small exit door, which had a sill, 10½ inches high, to provide stability for the section, since the large door was suspended from the top and did not quite touch the floor. In leaving the garage, B. opened the small door and stood aside for plaintiff to go through. Plaintiff did not see the sill and tripped on it and was injured. She was wearing spectacles equipped with bifocal lenses. She sued defendant for damages. The trial Judge, on motion for non-suit, dismissed the action, holding that plaintiff by the exercise of ordinary care could have seen the sill and avoided injury. His judgment was reversed by the Court of Appeal for Ontario ([1943] O.W.N. 179; [1943] 2 D.L.R. 291), which held that the sill constituted a concealed danger. Defendant appealed. *Held* (the Chief Justice and Kerwin J. dissenting): The appeal should be allowed and the judgment at trial restored. The sill did not constitute a concealed danger to any person exercising ordinary care. BAY-FRONT GARAGE LTD. *v.* EVERS. **20**

2.——*Elevator—Sudden fall from upper floor — Injury to passengers — Damages paid by insurer of owner—Claim by insurer, under subrogation, against contractor who installed elevator—Liability resulting from offence or quasi-offence—Probable failure of safety blocks—Blocks made of cast iron—Expert evidence such material used at time of construction—Whether forged steel should have been employed—Quaere as to liability of owner of building —Certificate of inspection — Statement therein that elevator was in good order—Duties of inspector—Failure to mention kind of material of safety blocks—Whether in certain cases certificate should mention improvements since date of construction.*]—On February 24, 1938, one of the elevators in use in the Hôpital du St-Sacrement, at Quebec, fell from the second floor of the building to the bottom of the elevator pit, causing injuries to a number of passengers. Under the terms of its insurance policy with the hospital, the appellant company made a settlement of the claims filed by the injured persons, and disbursed a total sum of $7,453.48 which included the costs of repairs to the elevator, for which sum the appellant took subrogation from its assured and the injured persons. The appellant company then brought an action to recover that amount against both the general contractor for the building of the hospital and the present company respondent, which under a sub-contract had built and installed in 1926 the elevator; but the appellant company proceeded only against the latter. As there could not be any contractual fault of the respondent, the action had to proceed on the basis of its delictual or quasi-delictual responsibility, and the burden of proof was on the appellant. The precise cause of the failure of the elevator, the cause of its fall, has not been clearly demonstrated; but the injuries to its passengers were probably brought about by the failure of the brake appliance consisting of safety blocks, with which the elevator was equipped, to arrest the descent of the elevator and their rupture in the emergency which arose at the time of its fall. The main ground raised by the appellant was that the respondent furnished safety blocks made of cast iron, alleged to be a defective material and too weak to stand a violent shock, while such appliances should, in accordance with good practice, have been fabricated of cast or forged steel, thus effecting more security. The other ground of appeal was that, for many years, periodical inspections of the equipment were made by the respondent company, and, on the very day of the accident, an inspection had been made by an employee of the respondent and, as in previous occasions, a certificate was given to the appellant company attesting that the elevator was in good order. The trial judge maintained the appellant's action, but the appellate court reversed that judgment, holding that the evidence of the expert witnesses, as to the propriety or impropriety of using cast iron at the time the elevator was constructed from the point of view of safety, was contradictory and conflicting and permitted of no definite conclusion upon the point. Held, affirming the judgment appealed from (Q.R. [1943] K.B. 511), that, under the circumstances of this case, the respondent company was not liable. The result from the evidence of the expert witnesses, although somewhat contradictory, is to the effect that, at the time the elevator was built and installed, safety blocks of either cast iron or forged steel were used by experienced and competent contractors and were both giving entire satisfaction. So, at that time, the respondent company was at liberty to choose between two methods of construction then usually employed by leading men of art, more so for an elevator as the one in this case, and there has

TAXATION—*Continued*

brought by the Dominion and Province for a declaration that these buildings were not subject to taxation and by the railway company for a declaration that it was not liable to be assessed or taxed in respect of these buildings and was entitled to recover back taxes already paid by it thereon. The procedure laid down by the *Vancouver Incorporation Act, 1921,* (B.C.—12 Geo. V, c. 55) for the taxation of land is outlined in the judgments now reported. Briefly, it is enacted that the City Treasurer, or the Collector of Taxes, "shall make out a tax roll" in which there are set down, *inter alia,* "the name * * * of the assessed owner", "the value at which the land and improvements * * * are assessed" and "the total amount of taxes imposed for the current year" (s. 59); it is also enacted that "all rates, taxes or assessments * * * shall be due and payable * * * by the owner of the property upon which they are imposed * * *" (sec. 63); and it is further enacted (s. 46) that "all land, real property, improvements thereon * * * shall be liable for taxation, subject to the following exemptions: (1) All property vested in or held by His Majesty or for the public use of the Province * * * and either unoccupied or occupied by some person in an official capacity". On behalf of the respondents, it was contended that the buildings were the property of the Dominion and Provincial Governments and as such were non-assessable and non-taxable: their contention being that these buildings had been assessed as improvements and that the taxes had been unlawfully levied and wrongfully collected in respect of them. The trial judge maintained the respondent's action, except that the railway company's claim for repayment was restricted to one year's taxes which had been paid under protest, this decision being based on the Crown's ownership of the two buildings and also on the ground that the buildings were "held by" His Majesty within the meaning of section 46 of the Vancouver charter. The Court of Appeal, Sloan J.A. dissenting, affirmed the judgment of the trial judge. *Held,* reversing the judgment appealed from (58 B.C.R. 371), Hudson J. dissenting, that the respondents were not entitled to the relief claimed. The provincial statute does not operate by way of attempting to impose any liability on the Crown in respect of any interest under the leases, and there has been no attempt by the city appellant to impose such liability on the Crown. The respondent railway company, as registered owner of the land,

TAXATION—*Continued*

is liable to taxation in respect of its value as assessed in conformity with the statute. The provisions of the statute do not contemplate the assessment, as a separate subject, of improvements in an assessed parcel of land. There has been a separate valuation of the buildings as improvements; but the value of the buildings has been taken into account only for the purpose of valuing the parcel of land and calculating the tax to be paid in respect of it, and also in order to permit of the operation of other sections of the statute. The Crown's exemption, provided by section 125 B.N.A. Act or by section 46 (1) of the Vancouver charter, remained unimpaired. *Per* The Chief Justice and Rinfret J.—The "assessed owner" is liable for taxation, and he is liable in virtue of his ownership; the "assessed owner", in light of the provisions of the statute, must be construed as meaning the registered owner in fee. The holder of a lease, if registered, and the owner of a structure erected on a land of which he is not the owner, cannot be registered otherwise than as owner of a charge. The property in this case has been valued in precisely the same way as it would have been valued if the lessees had been subjects, and not the Crown. *Per* Davis J.—The parcel of land is wholly owned by the respondent railway company and the only levy of rates has been made against it on an assessment of the land and buildings thereon made under the valid provisions of statute. No attempt has been made by the appellant city to assess or levy rates against the rights or interest of the Crown or to tax the Crown in respect of the buildings. *Per* Kerwin J.—The proper construction of the provisions of the statute is that what is rateable or taxable is "land" as defined in the interpretation section. Such taxation is founded upon the appearance in the assessment roll of such rateable land, together with the name of the registered owner. The rateable land includes buildings erected on it, but the land and improvements are assessable and taxable as a unit. The levy under the Act is not only a tax on "land", but is also a tax against the owner. As to the former, the statute must be read as not applying to the Crown and the operation of the statute imposing the tax is limited to the respondent railway's interest. As to the latter, there is no constitutional objection to taxing the respondent company on the basis of the total value of the land and improvements thereon, even though the improvements are the property of, or are held by, the Crown and are themselves not liable