1961

CANADA
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Supreme Court of Canada

Editors

FRANÇOIS des RIVIÈRES, Q.C.

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OTTAWA, 1962

JUDGES

OF THE

SUPREME COURT OF CANADA

DURING THE PERIOD OF THESE REPORTS

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

The Honourable ROBERT TASCHEREAU.

The Honourable CHARLES HOLLAND LOCKE.

The Honourable JOHN ROBERT CARTWRIGHT.

The Honourable GÉRALD FAUTEUX.

The Honourable DOUGLAS CHARLES ABBOTT, P.C.

The Honourable RONALD MARTLAND.

The Honourable WILFRED JUDSON.

The Honourable ROLAND A. RITCHIE.

ATTORNEY GENERAL OF CANADA

The Honourable EDMUND DAVIE FULTON, Q.C.

SOLICITOR GENERAL OF CANADA

The Honourable WILLIAM J. BROWNE, Q.C.

92001-7—1½

ERRATA

in volume 1961

Page 3, last line. Read "Hoddinott *v.* Hoddinott".

Page 13, line 11 from bottom. Read "Hoddinott *v.* Hoddinott".

Page 70, line 3 of Caption. Read "The Canadian Citizenship Act".

Page 349, line 24. Read "forcible" instead of "forceable".

Page 578, line 3. Read "acquiring" instead of "requiring".

Page 581, line 1 of Caption. Read "vicious" instead of "viscious".

UNREPORTED JUDGMENTS OF THE SUPREME COURT OF CANADA

In addition to the judgments reported in this volume, the Supreme Court of Canada, between November 1960 and November 1961, delivered the following judgments which will not be reported in this publication:

Acme Sawmills Ltd. v. *Mahinder Sing et al.* (B.C.), appeal dismissed with costs, January 26, 1961.

Baker Perkins Inc. and Canadian Petersen Oven Co. v. *Weston Bakeries Ltd.*, 31 W.W.R. 200, appeal dismissed with costs, May 8, 1961.

Beaver Valley Development v. *Township of North York*, 23 D.L.R. (2d) 341, appeal dismissed with costs, April 25, 1961.

Beckow v. *Stein and Stein*, [1961] Que. Q.B. 85, appeal dismissed with costs, May 31, 1961.

Bell Building Ltd. v. *Bird Construction Co.* (Alta.), appeal dismissed with costs, November 30, 1961.

Boland v. *Diguillio*, [1958] O.R. 384, 13 D.L.R. (2d) 510, appeal dismissed with costs, February 23, 1961.

Boland et al v. *U.S. Fidelity and Guaranty Co.* (Ont.), appeal dismissed with costs, June 14, 1961.

Burger-Ellen v. *Rosenstone et al*, [1960] Que. Q.B. 666, appeal dismissed with costs, April 25, 1961.

Charbonneau v. *Gagnon*, [1960] Que. Q.B. 986, appeal dismissed with costs, April 25, 1961.

Cohen v. *Huard*, [1961] Que. Q.B. 258, appeal dismissed with costs, May 22, 1961.

Contract Mining & Development Co. v. *Craigmont Mines Ltd.*, 26 D.L.R. (2d) 35, appeal dismissed with costs, May 2, 1961.

Deery v. *Protestant School Board of Greater Montreal*, [1960] Que. Q.B. 676, appeal dismissed without costs, May 23, 1961.

Gauthier v. *Barrette*, [1960] Que. Q.B. 563, appeal dismissed with costs, February 17, 1961.

Goulet v. *Frechette*, [1960] Que. Q.B. 379, appeal dismissed with costs, November 21, 1960.

Grand Northern Pipe Line Co. v. *Matador Pipe Line Ltd.* (Ont.), appeal dismissed with costs, November 28, 1961.

Gregoire v. *Forget et al*, [1960] Que. Q.B. 549, appeal dismissed with costs, March 27, 1961.

Hayward et al, v. *Thompson* (Ont.), appeal allowed with costs, October 4, 1960, and March 27, 1961.

Kamlee Construction Ltd. v. *Town of Oakville,* 26 D.L.R. (2d) 166, appeal dismissed with costs, Locke and Cartwright JJ. dissenting, November 21, 1960.

Larose and Paquin v. *The Queen,* [1961] Que. Q.B. 174, appeal dismissed for lack of jurisdiction, June 2, 1961.

Levy v. *The Queen,* 34 C.R. 44, 128 C.C.C. 277, appeal dismissed, April 25, 1961.

London and Provincial Marine & General Ins. Co. v. *Calp's Ltd.* (N.B.), leave to appeal refused and appeal quashed with costs of a motion to quash, May 11, 1961.

Mayzel v. *Sturm, Lipton and Trinity Apartments Ltd.* (Ont.), appeal dismissed with costs, February 28, 1961.

Patenaude v. *The Queen,* [1961] Que. Q.B. 359, appeal allowed and acquittal directed, May 29, 1961.

Rosenstone et al, v. *Burger-Ellen,* [1960] Que. Q.B. 666, appeal dismissed with costs, April 25, 1961.

Snow v. *Steamship "Maria Luisa"* (Exch.), appeal dismissed with costs, November 28, 1960.

Soo Line Railroad Co. v. *Matador Pipe Line Ltd.* (Ont.), appeal dismissed with costs, November 28, 1961.

Stinson v. *Craigmont Mines Ltd.,* 26 D.L.R. (2d) 35, appeal dismissed with costs, May 2, 1961.

Stoesz v. *Wilchewski* (Alta.), appeal dismissed with costs, October 24, 1961.

Travelers Indemnity Co. v. *Sumner Co. Ltd. et al,* 27 D.L.R. (2d) 562, appeal dismissed with costs, May 11, 1961.

Wiens and Wiens Construction Co. v. *Municipality of Fort Garry* (Man.), appeal dismissed with costs, June 26, 1961.

MOTIONS

Applications for leave to appeal granted are not included in this list.

Anglo-Canadian Telephone Co. v. *Bendit,* [1961] Que. Q.B. 306, leave to appeal refused with costs, February 28, 1961.

Bebbington and Bebbington v. *Colquhoun,* 24 D.L.R. (2d) 557, leave to appeal refused with costs, February 7, 1961.

Bell Building Co. Ltd. v. *Bird Construction* (Alta.), motion to adduce new evidence dismissed with costs, November 30, 1961.

Bernard v. *The Queen*, 130 C.C.C. 165, leave to appeal refused, April 25, 1961.

C.P.R. v. *B.C. Department of Highways (Bd. of Transport Commissioners)*, leave to appeal refused with costs, August 22, 1961.

Carleton v. *The Queen* (Ont.), leave to appeal refused, October 16, 1961.

Central Ontario Cattle Breeding v. *Weddel* (Ont.), leave to appeal refused with costs, October 3, 1961.

Deslonchamps v. *Peloquin et al.* (Que.), motion to adduce new evidence dismissed with costs, October 3, 1961.

Dominion Insurance v. *Rubin* (Ont.), leave to appeal refused with costs, November 27, 1961.

Electrical Contractors Association of Ontario v. *The Queen*, 27 D.L.R. (2d) 193, leave to appeal refused, March 13, 1961.

Eliason's Ltd. et al. v. *City Construction Co. Ltd.*, 35 W.W.R. 557, leave to appeal refused with costs, July 31, 1961.

Franchuk v. *Kroeger* (Alta.), leave to appeal refused with costs, October 11, 1961.

Gatineau Power Co. et al v. *Lafrance*, [1960] Que. Q.B. 979, leave to appeal refused with costs, February 6, 1961.

Goldsobel v. *Erlanger et al*, [1961] Que. Q.B. 437, leave to appeal refused with costs, February 7, 1961.

Guimond v. *The Queen* (Que.), leave to appeal refused, June 26, 1961.

Gunn v. *The Queen* (Sask.), leave to appeal refused, April 25, 1961.

King v. *Brooks and Minister of Citizenship and Immigration*, 25 D.L.R. (2d) 779, leave to appeal refused with costs, February 7, 1961.

Kruger v. *Booker*, [1961] S.C.R. 231, motion to vary judgment granted; motion to issue process out of this Court refused, February 7, 1961.

Lambert v. *Frier* (Ont.), leave to appeal refused with costs, June 19, 1961.

McKinnon v. *St. Constant Corporation* (Que.), leave to appeal refused with costs, October 3, 1961.

Martel v. *The Queen* (Que.), leave to appeal refused, March 27, 1961.

Montreal v. *Chevigny* (Que.), leave to appeal refused with costs, November 20, 1961.

Morel v. *Savoie et al*, [1960] Que. Q.B. 818, motion to quash granted and leave to appeal refused with costs, February 28, 1961.

Naujoks v. *Legusinschi*, [1961] Que. Q.B. 177, leave to appeal refused with costs, April 25, 1961.

Palchynski v. *Palchynski* (Sask.), leave to appeal refused with costs, January 24, 1961.

Pitre v. *The Queen*, [1961] Que. Q.B. 535, leave to appeal refused, June 26, 1961.

Queen, The v. *Kramer & Grekin*, [1961] Que. Q.B. 534, leave to appeal refused, June 19, 1961.

S. & S. Industries Inc. v. *R. F. Rowell* (Exch.), leave to appeal refused with costs, April 21, 1961.

Sauvé v. *The Guildhall Insurance Co.* (Que.), leave to appeal refused with costs, June 26, 1961.

Selkirk v. *Willoughby et al*, [1961] O. R. 391, leave to appeal refused with costs, May 20, 1961.

Sharpe v. *The Queen*, [1961] O.W.N. 261, leave to appeal refused, October 3, 1961.

Stoller v. *Public Accountants Council for Ontario*, 25 D.L.R. (2d) 410, leave to appeal refused with costs, January 27, 1961.

Sund et al v. *Beachcombers Restaurant Ltd. et al*, 27 D.L.R. (2d) 434, leave to appeal refused with costs, May 29, 1961.

Voghell v. *Voghell and Pratt*, 27 D.L.R. (2d) 216, leave to appeal refused, February 21, 1961.

Weleschuk et al v. *Bednarsky et al* (Alta.), leave to appeal refused, October 3, 1961.

Williams v. *Webb et al*, 27 D.L.R. (2d) 465, motion to quash granted and leave to appeal refused, June 5, 1961.

A TABLE
OF THE
NAMES OF THE CASES REPORTED
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A TABLE
OF THE
NAMES OF THE CASES CITED
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W—Concluded

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NOTICE TO THE PROFESSION

Your attention is called to the requirements of Rule 12, as to the "Form of Case". Strict attention must be given to this rule, for recently subparagraph (6) has been neglected in many instances. This subparagraph relates to grouping exhibits and *printing them in chronological order.*

Attention is directed also to subparagraph (3) of Rule 12. The Case should show that the requisites for jurisdiction are satisfied. Thus, any order granting leave to appeal, extending time for appeal, or approving security, should be printed in Part I of the Case. Also, all judgments appealed from, *followed* by their respective reasons for judgment should appear in Part IV of the Case.

Failure to comply with the detail of Rule 12 would appear to indicate insufficient superintending of printing and may result in disallowance of the fee for such purpose in the Tariff of Fees: Item 19.

KENNETH J. MATHESON,

Registrar.

AVIS AUX MEMBRES DU BARREAU

L'attention des membres du Barreau est attirée sur les exigences de la Règle 12, concernant le "Format du dossier imprimé". Cette règle qui doit être observée rigoureusement a été bien négligée dernièrement et tout spécialement le sous-paragraphe (6). Ce sous-paragraphe a trait au groupement des pièces et à leur *impression dans l'ordre chronologique.*

Votre attention est aussi attirée sur le sous-paragraphe (3) de cette même Règle 12. Le dossier imprimé doit montrer que les formalités nécessaires pour donner juridiction à la Cour ont été remplies. Ainsi, toute ordonnance accordant la permission d'appeler, ou étendant les délais pour appeler ou approuvant le cautionnement, doit être imprimée dans la Partie I du dossier. En plus, tous les jugements rendus par les tribunaux inférieurs, *suivis* respectivement des notes à leur appui, doivent être mis dans la Partie IV du dossier.

Le défaut de se conformer à la lettre de la Règle 12 semble indiquer une surveillance insuffisante de l'impression et peut faire encourir le désaveu de l'honoraire proposé à cette fin dans le tarif d'honoraires: item 19.

KENNETH J. MATHESON,

Registraire.

CASES

DETERMINED BY THE

SUPREME COURT OF CANADA
ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

91991-0—1

KENNETH JOHN CLARKE THOMPSON (*Defendant*) ..... } APPELLANT;

AND

CONSTANCE NICHOLSON THOMPSON (*Plaintiff*) ..... } RESPONDENT.

1960

*June 15, 16
Nov. 21

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Husband and wife—Dispute between spouses as to interest in property—Conveyance taken in name of husband—Matrimonial home—Wife not entitled to proprietary interest in absence of financial contribution.

H bought a parcel of land and took the conveyance in his own name. With the assistance of a loan obtained by him under the *Veterans' Land Act* he had a house built on a lot within the parcel, and later sold all the land with the exception of the house and lot. Subsequently his wife W issued a writ for alimony, support for an infant child and a declaration that she was the sole owner of the property and entitled to all the proceeds of the sale. The trial judge dismissed her claim to the property on the ground that she had made no financial contribution to its purchase. The Court of Appeal held that W was entitled to a one-half interest in the property and the proceeds of the sale. The husband then appealed to this Court.

Held (Kerwin C.J. and Cartwright J. dissenting): The appeal should be allowed.

Per Martland and Ritchie JJ.: No question of a matrimonial home arose until two years after the purchase of the land, which was a business venture by H for speculative purposes, with the added advantage that the land was suitable for the building of a house on part of it. Therefore no principle applicable to a matrimonial home which may be derived from cases such as *Rimmer v. Rimmer,* [1953] 1 Q.B. 63, would properly be applicable to the circumstances of this case.

Per Martland, Judson and Ritchie JJ.: The trial judge concluded that the financial dealings between the spouses indicated no proprietary interest in the property on the part of the wife. This was not a case where the findings of fact of the trial judge should have been reversed.

No case has yet held that, in the absence of some financial contribution, the wife is entitled to a proprietary interest from the mere fact of marriage and cohabitation and the fact the property in question is the matrimonial home. Yet, if the principle is sound when it is based on a financial contribution, no matter how modest, there seems to be no logical objection to its application and the exercise of the same discretion when there is no financial contribution when the other attributes of the matrimonial partnership are present. Here, however, on the finding of the trial judge, the basis for the application of the rule as at present developed by the English decisions is not to be found. *Rimmer v. Rimmer, supra*; *Hodinott v. Hodinott,* [1949] 2 K.B. 406;

*PRESENT: Kerwin C.J., Cartwright, Martland, Judson and Ritchie JJ.

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Cobb v. Cobb, [1955] 2 All E.R. 696; *Silver v. Silver*, [1958] 1 All E.R. 523; *Richards v. Richards*, [1958] 3 All E.R. 513; *Fribance v. Fribance*, [1957] 1 All E.R. 357, referred to.

The judicial use of the discretionary power under s. 12 of *The Married Women's Property Act*, R.S.O. 1950, c. 233, in property disputes between husband and wife has not developed in the same way in the common law provinces of Canada as it has in England. *Minaker v. Minaker*, [1949] S.C.R. 397; *Carnochan v. Carnochan*, [1955] S.C.R. 669; *Jackman v. Jackman*, [1959] S.C.R. 702, referred to.

Per Kerwin C.J. and Cartwright J., *dissenting*: The actions of counsel for the defendant in moving at the commencement of the trial for a mental examination of the wife and the many interventions of the trial judge had a direct influence on the latter's finding in connection with the property and mortgage.

Bearing in mind the principles to be applied by a Court of Appeal in considering the judgment of a trial judge, it is impossible to say that the trial judge made full judicial use of the opportunity given him by hearing the *viva voce* evidence. *Hontestroom (Owners) v. Sagaporack (Owners)*, [1927] A.C. 37, applied; *Powell v. Streatham Manor Nursing Home*, [1935] A.C. 243; *Calderia v. Gray*, [1936] 1 All E.R. 540; *Lawrence v. Tew*, [1939] 3 D.L.R. 273, referred to.

The evidence justified the conclusion that the parties considered that each was entitled to a one-half interest in the land.

Cases where a husband supplies most, if not all of the money required for the purchase of a property, and puts it in his wife's name with the result that there is a presumption of advancement, such as in *Jackman v. Jackman, supra,* have no application in the circumstances of this case.

Per Cartwright J., *dissenting*: When the husband used moneys of which the wife was joint owner with him to purchase the property and took the deed thereof in his own name there arose a rebuttable presumption that he held as trustee for himself and his wife jointly. The evidence taken as a whole far from rebutting that presumption supports it.

APPEAL from a judgment of the Court of Appeal for Ontario[1], reversing in part a judgment of Kelly J. Appeal allowed, Kerwin C.J. and Cartwright J. dissenting.

A. Maloney, Q.C., and *P. Hess*, for the defendant, appellant.

R. N. Starr, Q.C., and *J. M. Weekes*, for the plaintiff, respondent.

THE CHIEF JUSTICE (*dissenting*):—This is an appeal by the husband from a judgment of the Court of Appeal for Ontario[1] in an action brought against him by his wife in which she claimed alimony and custody of an infant child of the marriage together with maintenance for his support.

[1] (1960), 22 D.L.R. (2d) 504.

She also claimed a declaration that certain lands were held by the husband in trust for her; an order requiring him to pay her the monies received by him for the sale of certain parts thereof; a declaration that a mortgage given to the husband was held in trust by him for the plaintiff; an accounting of all monies paid under that mortgage; and an order declaring that part of the lands,—a two-acre lot on which was situate the matrimonial home,—and which was to be conveyed under a certain contract to the defendant, be conveyed to the plaintiff. The claim for alimony was dismissed at the trial and in the Court of Appeal and there is no cross-appeal, and all disputes as to the custody and support of the child have been settled between the parties.

This leaves for determination only the questions of ownership of the land and the mortgage money. As to these there was a difference of opinion in the Court of Appeal. Laidlaw J.A. and McGillivray J.A. decided that the property described in the statement of claim was owned by the parties in equal shares at and subsequent to the date of purchase thereof; that the wife was entitled to an equal share with the husband of the proceeds of the sale of part of the property sold by him including the proceeds of the mortgage given by the purchaser to him; and that the land and premises reserved by the husband from the sale, (the two-acre lot), belong to each of the parties to this litigation in equal shares. MacKay J.A. would have dismissed all the wife's claims in connection with the property and mortgage.

The three members of the Court of Appeal agreed that counsel who had formerly appeared for the husband acted improperly in moving at the commencement of the trial for a mental examination of the wife, which, he stated, was made for two purposes,—to attack the credibility of the wife and also to show that the action had not been commenced "on properly given instructions". The trial judge permitted counsel to call Dr. Crisp although at the conclusion of the doctor's testimony the motion was dismissed. I agree with all that has been said by all the members of the Court of Appeal with reference to those actions of the husband's former counsel.

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Kerwin C.J.

The majority of the Court of Appeal considered that the trial judge, with the best intentions in the world, intervened unduly during the course of the trial. Laidlaw J.A. points out in his reasons that in the memorandum filed in the Court of Appeal counsel for the wife stated that the examination-in-chief of the plaintiff occupied 147 pages and that on 134 of them the trial judge intervened. Without attempting to assess the accuracy of these figures it is clear to me from a reading of the record that the interventions occurred on a great many occasions and I cannot but come to the conclusion that they, as well as the unwarranted proceedings by the husband's counsel, affected the conclusions of the trial judge. At p. 473 of vol. 2 of the Appeal Case in this Court, he is reported as follows:

> As I said during the trial, I have to deal with this case on the premise that the wife was normal mentally. She refused to submit to a further physical examination to have her mental condition ascertained, so that I have to deal with her as being normal. However, there is evidence before me and I cannot say that it did not, to some extent, influence me at least in coming to a conclusion as to why the plaintiff acted as she did. I feel that paranoia has influenced the plaintiff in her dealings and relationship with her husband. She was taking psychiatric treatments for some time before November 12th, 1956. In fact, she went to see her doctor the very next day, on November the 13th, I think it was, according to the evidence, or within a few days anyway, and she saw Dr. Crisp on the 20th of November, which would only be a week later. I am of the opinion that what was in her mind was the root of all the trouble.

The underlining has been added but I cannot read the above extract in conjunction with the rest of the trial judge's remarks as referring only to the claims for alimony and custody and support of the infant.

MacKay J.A. concluded that much of the blame for the trial judge's intervention should be attributed to the plaintiff's evasiveness and failure to make direct answers to questions put to her by counsel. In view of the statements made by the husband's counsel at the commencement of the trial and of the calling by him of Dr. Crisp as a witness on the motion, it is not surprising that the wife was disconcerted. In my view the actions of counsel for the defendant at the trial and the intervention of the trial judge had a direct influence on the latter's finding in connection with the property and mortgage.

Soon after the commencement of the argument on behalf of the appellant in this Court, it was announced that we were of opinion that the evidence of Dr. Crisp was not

admissible and when Mr. Maloney was replying it was made clear that that ruling applied to all of the doctor's evidence, whether given on the motion at the commencement of the trial or whether (and assuming it was not necessary for him to be re-sworn) when he was called as a witness on behalf of the defendant after the evidence on behalf of the plaintiff was completed.

The principles to be applied by a Court of Appeal in considering the judgment of a trial judge are set forth in the decision of the House of Lords in *Hontestroom (Owners) v. Sagaporack (Owners)*[1] and mentioned in *Powell v. Streatham Manor Nursing Home*[2], both of which cases together with the decision of the Privy Council in *Calderia v. Gray*[3] are referred in the decision of this Court in *Lawrence v. Tew*[4]. Bearing in mind these principles I find it impossible to say, in view of what is set out above, that the trial judge made full judicial use of the opportunity given him by hearing the *viva voce* evidence. A careful reading of the record satisfies me that the evidence detailed in the reasons of Laidlaw J.A. and in the additional reasons of McGillivray J.A. justify the following conclusions:

(1) the wife worked and earned a considerable sum throughout the years and her cash in the bank was nearly exhausted in 1954;

(2) while the husband was in the Air Force the wife worked and paid for help in the apartment and for the education of the daughter;

(3) while sums of money were paid by the husband to his wife and, as he alleged, in repayment of what he considered had been loans, she had made substantial contributions to the purchase of the land and paid out of her own monies various sums for household articles and expenses;

(4) each of the parties expended physical labour in building the house and in working the land in conjunction with others;

[1] [1927] A.C. 37 at 40, 95 L.J.P. 153.
[2] [1935] A.C. 243 at 264, 104 L.J.K.B. 304.
[3] [1936] 1 All E.R. 540, 80 Sol. Jo. 243.
[4] [1939] 3 D.L.R. 273.

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Kerwin C.J.

(5) it was recognized by the husband that his wife was entitled to a one-half interest in the land when he gave her a cheque for one-half ($6,403.65) of a payment made to him and that he intended, as a result of certain misinformation given him, that $4,000 of the cheque should be free from what he thought would be subject to a gift tax.

I am not suggesting that there is community of property in Ontario as between husband and wife and I do not rely upon the "palm tree" justice referred to in some of the decisions in England mentioned in the reasons for judgment of the Court of Appeal; I place my conclusion upon the ground that there is evidence in this record that the parties considered that each was entitled to a one-half interest in the land.

Cases where a husband supplies most, if not all of the money required for the purchase of a property, and puts it in his wife's name with the result that there is a presumption of advancement, such as in *Jackman v. Jackman*[1], have no application to the circumstances before us.

The appeal should be dismissed with costs.

CARTWRIGHT J. (*dissenting*):—The differences of judicial opinion to which this case has given rise appear to me to result from the difficulty in ascertaining the facts rather than from any question as to the applicable law.

The primary question is as to the intention of the parties at the time when the conveyance of the twenty-acre parcel of land was taken in the name of the husband. The analysis of the evidence made in the reasons of Laidlaw J.A. brings me to the conclusion that the down payment on the purchase of this property was made from moneys jointly owned by the appellant and the respondent. If the respondent had paid his own money into a joint account standing in the names of himself and his wife there would have been a rebuttable presumption that he was giving her a half interest in the moneys in the account. In fact more than half of the money standing in that account at the time that the down payment was paid out of it had been furnished by the wife.

[1] [1959] S.C.R. 702, 19 D.L.R. (2d) 317.

When the husband used moneys of which the wife was joint owner with him to purchase a property and took the deed thereof in his own name there arose a rebuttable presumption that he held as trustee for himself and his wife jointly. In my opinion the evidence taken as a whole far from rebutting that presumption supports it.

For the reasons given by the Chief Justice and those briefly stated above I would dispose of the appeal as proposed by the Chief Justice.

The judgment of Martland and Ritchie JJ. was delivered by

MARTLAND J:—I agree with the reasons given by my brother Judson and with his proposed disposition of this appeal.

There is also a further point which I consider to be important. The property in question here was a substantial area of suburban land, with possibilities for a considerable appreciation in value, but suitable, at the time of purchase, for operation as a small farm or market garden. At that time there was no house on the property. The appellant rented the land to a tenant for five years and later operated the farm, as such, in his spare time. No question of a matrimonial home arose until two years after the purchase of the land, when the appellant decided to build a house with the assistance available to him under the *Veterans' Land Act*. I regard this, as did the dissenting judgment in the Court of Appeal, as a business venture by the appellant for speculative purposes, with the added advantage that it was suitable for the building of a house on part of it.

On this ground alone it does not appear to me that any principle applicable to a matrimonial home which may be derived from cases such as *Rimmer v. Rimmer*[1], would properly be applicable to the circumstances of this case.

The judgment of Judson and Ritchie JJ. was delivered by

JUDSON J.:—The only remaining issue in this litigation between husband and wife relates to the ownership of a twenty-acre parcel of land in the Township of Scarborough. The husband bought this property as vacant land in 1945, for $1,940 and took the conveyance in his own name. With

[1] [1952] 2 All E.R. 863, [1953] 1 Q.B. 63

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Judson J.

the assistance of a loan obtained by him under the *Veterans' Land Act* he had a house built on a two-acre lot within the parcel. The house was completed in 1951. In 1954 he sold all the land, with the exception of the house and two-acre lot, for $40,000. In 1957 the wife issued a writ for alimony, support for an infant child and a declaration that she was the sole owner of the property and entitled to all the proceeds of the sale. The learned trial judge dismissed her claim to the property on the ground that she had made no financial contribution to its purchase. The Court of Appeal held that she was entitled to a one-half interest in the property and the proceeds of the sale. The husband now appeals. The claim for alimony was dismissed both at trial and on appeal. The matter of custody and support of the child was settled.

There is a full analysis of the evidence in the reasons of the learned trial judge and in the reasons delivered in the Court of Appeal. The evidence satisfies me, as it did the learned trial judge and MacKay J.A. (dissenting in the Court of Appeal) that it was the husband who purchased this property with his own money and that there was no intention between the parties either expressed or to be inferred from their conduct and dealings that this property was to be owned jointly.

The wife's claim to a proprietary interest in this property is based first upon what she says was her contribution to the down payment. The total purchase price of $1,940 was to be paid as follows: $100 as a deposit; $1,440 to be secured by a mortgage given back by the purchaser; and the balance of $400, subject to adjustments, to be paid on closing. The husband paid the $100. The wife put $300 into a joint account, which the evidence indicates to have been the husband's account. This is the only deposit which the wife ever made in this account. The wife says that this $300 was her contribution to the purchase of the farm. The husband says that this money was given to him by his wife to reimburse him for moneys that she had taken from this account while he was overseas. This account had originally been in his name but when he went overseas, he put it in their joint names. The wife had the usual allowance for herself and the children and the husband made her, in addition, an assignment from his pay. He says that

while he was overseas he sent certain sums of money for deposit in this joint account with the intention that he should have an emergency fund when he returned. These sums, he said, amounted to $379.74 and particulars are given in the evidence. When he returned from overseas in January 1944, because of domestic trouble, there was only $1.15 in this account. The trial judge accepted the husband's evidence and found that this $300 was not a contribution to the purchase price but was a reimbursement by the wife of these moneys. During the husband's absence overseas, the wife had been working and had kept her savings in her own account. There was ample evidence on which the learned trial judge could find as he did and I do not think that his finding constitutes reversible error.

The husband alone was liable on the mortgage and he paid it off out of his own monies on August 1, 1947. Until 1950 he received all the rents from the land, which was leased to neighbouring farmers. The wife never made any claim to share these rents.

In 1947 the husband applied under the *Veterans' Land Act* for assistance in the construction of a house. As required by the Act, he conveyed to the Director under the Act a parcel containing over two acres on which the house was to be built. The loan was for $6,000, of which $5,400 was for the house and $600 for equipment and stock. Nine progress payments in all were made during the course of building, the first on August 10, 1949, the last on July 17, 1952. Construction of the house began in 1948. The husband's evidence was that in 1949, the progress payments being slow and since he needed money to continue building, he borrowed sums from his wife on the understanding that they would be repaid as soon as possible out of the progress payments. In July and August 1949 the husband received from his wife two cheques, one for $400 and one for $1,000. She says that these cheques were for the purpose of paying off the National Trust mortgage on the purchase price of the farm. This cannot be so because this mortgage had been paid off by the husband two years before. The husband claims that he repaid these cheques by endorsing his progress payments under the *Veterans' Land Act*. He produced cheques totalling $1,545 endorsed by him to his wife and deposited by the wife in her own

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bank account. So far the only possible financial contribution of the wife to the purchase price appears to be the $300, on which the learned trial judge made a finding adverse to the wife.

After 1950 the wife operated the vacant land as a market garden. She got the profits from this operation and also the cheques representing the proceeds of the grain crop for the years 1951 to 1954.

In June 1954 the husband accepted an offer to purchase the farm lands for $40,000, payable $2,000 as a deposit, $20,000 to be secured by a mortgage and the balance in cash on closing. The sale was completed on August 1, 1954; the mortgage in favour of the Director of the *Veterans' Land Act* was paid off, and the husband received a net amount of $12,807.30 on closing. A week after the closing he gave his wife exactly one-half of this sum, namely, $6,403.65. The husband says that this was a gift to the wife because family troubles were beginning and he was anxious to keep the household together. After this, the husband, as sole mortgagee, received and retained all monies payable under the mortgage for a period of two years and, until the institution of the action, the wife never made any claim.

There is also a great mass of evidence about other financial dealings between husband and wife—who purchased certain articles; who provided the money for these purchases; who provided the money for a vacation in Western Canada; how the market garden was operated, and who got the money from this source. It seems to be impossible to expect any married couple to testify with certainty about these matters and the understandings behind them. During the period 1945 to 1955 the marital life of this couple seems to have been free of discord but on a consideration of the whole evidence, the learned trial judge concluded that the financial dealings between the two indicated no proprietary interest in the property on the part of the wife. There was ample evidence on which he could make this finding. The majority judgment of the Court of Appeal does, however, analyse the evidence and come to different conclusions of fact. MacKay J.A., dissenting, also on a detailed analysis of the evidence, came to

the same conclusion as the learned trial judge. In my opinion, this is not a case where the findings of fact of the learned trial judge should have been reversed.

The learned trial judge based his judgment on the obvious principle that where a husband provides the purchase money and takes the conveyance in his own name, he will be the beneficial owner unless the wife can prove that he holds on an express trust for her, either as to the whole or part. Such proof, of course, involves compliance with the Statute of Frauds. He found as a fact that the husband did provide the purchase money and if this finding is supportable, as I think it is, there was no basis for the imposition of a trust.

The Court of Appeal, on the contrary, founded its judgment on its own independent finding that the wife in this case had made some financial contribution as a purchaser to the acquisition of the property and was, in consequence, entitled to a one-half interest in what, in these cases, is commonly referred to as the matrimonial home. The Court, on the basis of its own finding of fact that there was some financial contribution to the purchase price, is really doing what, according to Romer L.J., should be done when he said in *Rimmer v. Rimmer*[1], that "cases between husband and wife ought not to be governed by the same strict considerations, both at law and in equity, as are commonly applied to strangers." This, it seems to me, is a fundamental departure in dealing with disputes between husband and wife about ownership of property and is traceable to its beginning in the dissenting judgment in *Hodinott v. Hodinott*[2]. The dissent was adopted in *Rimmer v. Rimmer, supra; Cobb v. Cobb*[3]; *Silver v. Silver*[4]; *Richards v. Richards*[5] and *Fribance v. Fribance*[6], with the result that, if it is found that the wife makes any contribution to the purchase of the matrimonial home, she is the owner of a one-half interest and not merely of an interest proportionate to her contribution as in *Re Rogers*[7].

But no case has yet held that, in the absence of some financial contribution, the wife is entitled to a proprietary interest from the mere fact of marriage and cohabitation

[1] [1952] 2 All E.R. 863, [1953] 1 Q.B. 63.
[2] [1949] 2 K.B. 406 at 414.
[3] [1955] 2 All E.R. 696.
[4] [1958] 1 All E.R. 523.
[5] [1958] 3 All E.R. 513.
[6] [1957] 1 All E.R. 357.
[7] [1948] 1 All E.R. 328.

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and the fact the property in question is the matrimonial home. Yet, if the principle is sound when it is based on a financial contribution, no matter how modest, there seems to be no logical objection to its application and the exercise of the same discretion when there is no financial contribution when the other attributes of the matrimonial partnership are present. However, if one accepts the finding of the learned trial judge, the basis for the application of the rule at its present stage of development in England is not to be found in the present case.

The judicial use of the discretionary power under s. 12 of *The Married Women's Property Act,* R.S.O. 1950, c. 233, in property disputes between husband and wife has not developed in the same way in the common law provinces of Canada as it has in England. There is no hint of it in this Court in *Minaker v. Minaker*[1], and there is an implicit rejection of the existence of any such power in *Carnochan v. Carnochan*[2], where Cartwright J. stated that the problem was not one of the exercise of a discretionary power but one of application of the law to ascertained facts. Further, in *Jackman v. Jackman*[3], where the Alberta Court of Appeal, in reversing the judgment at trial, had applied the line of decisions above referred to, this Court declined to support the exercise of the discretionary power in the rebuttal of the presumption of advancement in circumstances where the husband's contribution was very large and where it should not have been difficult to draw an inference of a joint interest in the matrimonial home.

If a presumption of joint assets is to be built up in these matrimonial cases, it seems to me that the better course would be to attain this object by legislation rather than by the exercise of an immeasurable judicial discretion under s. 12 of *The Married Women's Property Act.*

I would allow the appeal with costs and restore the judgment at trial. The order of the learned trial judge as to costs pursuant to Rule 388 should stand. In the Court of Appeal the order that the husband do pay to the wife

[1] [1949] S.C.R. 397, 1 D.L.R. 801. [2] [1955] S.C.R. 669, 4 D.L.R. 81.
[3] [1959] S.C.R. 702, 19 D.L.R. (2d) 317.

her cash disbursements actually and properly made by her solicitor and attributable to her claim for alimony should stand but beyond this there should be no order as to costs.

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Appeal allowed with costs, Kerwin C.J. *and* Cartwright J. *dissenting.*

Solicitors for the defendant, appellant: Whiteacre & Creighton, Toronto.

Solicitor for the plaintiff, respondent: John M. Weekes, Toronto.

CANADIAN EXPLORATION LIMITED (*Defendant*) ..... APPELLANT;

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*May 6
Nov. 21

AND

FRANK R. ROTTER (*Plaintiff*) .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Waters and watercourses—Conveyance of land with registered plan indicating one boundary at top of river bank—Whether title extends to centre line of stream—Application of ad medium filum aquae rule—Land Registry Act, R.S.B.C. 1948, c. 171—Land Act, R.S.B.C. 1948, c. 175.

R took conveyance to a certain sub-lot of land, except that portion thereof which had previously been conveyed to him, and which in turn was transferred by him to the Crown as the result of expropriation proceedings. This latter portion, of which the appellant company later became the registered owner, by transfer from the Crown, lay on the opposite side of a river from R's property.

The description of the appellant's land was that which appears coloured red on the registered plan, the western limit of which was a line drawn along the top of the river bank. The certificate of title which issued to R described the lands held as being sub-lot 36 save and except those parts of the lot shown outlined in red on the plan.

The appellant having entered into the stream bed of the river opposite its lands and having carried out certain works, R commenced an action. The appellant counterclaimed for damages and for a declaration that it was the lawful owner of the bed of the river *ad medium filum aquae.*

The finding of the trial judge that the appellant was the owner of the bed *ad medium filum* was reversed by the Court of Appeal. By special leave of the Court of Appeal the appellant appealed to this Court.

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*PRESENT: Locke, Cartwright, Abbott, Martland and Judson JJ.

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Held (Martland J. *dissenting*): The appeal should be allowed.

Per Locke, Cartwright, Abbott and Judson JJ.: The rights acquired by the Crown, all of which were transferred to the appellant, were the same in their nature as if the western boundary of the property had been defined as being the river. The matter is not affected by the fact that the land conveyed is shown in the description by measurement and colour on the plan. *Micklethwait v. Newlay Bridge Co.*, (1886), 33 Ch. D. 133; *Berridge v. Ward,* (1861), 10 C.B.N.S. 400, referred to.

Whether the basis upon which the title of such an owner *ad medium filum* rests is of common right, as stated by Sir Mathew Hale in his Treatise De Jure Maris and by Lord Blackburn in *Bristow v. Cormican* (1878), 3 App. Cas. 641, or whether it passes as a matter of construction of the grant, as it was treated by the Judicial Committee in *Lord v. City of Sydney* (1859), 12 Moo P.C. 473 and in *Maclaren v. Attorney General of Quebec,* [1914] A.C. 258, the principle is too deeply embedded in the law to be disturbed or doubted. *City of London v. Central London Railway,* [1913] A.C. 364, referred to.

The proper construction of the grant by the respondent to the Crown cannot be affected by the terms of ss. 53, 125, 141(1) and 156 of the *Land Registry Act,* R.S.B.C. 1948, c. 171. The failure of the Crown to ask that the grant be construed as conveying title *ad medium filum* cannot deprive the appellant of the right to insist as against the grantor that it should be so construed.

Esquimalt Waterworks Co. v. City of Victoria (1906), 12 B.C.R. 302; *Chasemore v. Richards* (1859), 7 H.L. Cas. 349; *Gibbs v. Messer,* [1891] A.C. 248; *The Queen v. Robertson* (1882), 6 S.C.R. 52, referred to. *The King v. Fares et al.,* [1932] S.C.R. 78, explained and distinguished.

Per Martland J., *dissenting*: The rebuttable rule of construction at common law as to conveyances of land bounded by a non-tidal river, that the land extends to the middle of the stream, is not applicable to a certificate of indefeasible title under the *Land Registry Act.* The appellant's certificate does not establish title in the appellant to any lands beyond those which are actually described in it.

The contention that if the form of the appellant's certificate of title is not in a form satisfactory to include the whole of his interest he is in a position in equity to apply for rectification of the title fails.

The King v. Fares, supra; Gibbs v. Messer, supra; Micklethwait v. Newlay Bridge Co., supra, referred to.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], allowing in part a judgment of Brown J. Appeal allowed, Martland J. dissenting.

Evans E. Wesson, for the defendant, appellant.

J. F. Meagher, for the plaintiff, respondent.

The judgment of Locke, Cartwright, Abbott and Judson JJ. was delivered by

[1] (1960), 23 D.L.R. (2d) 136, 30 W.W.R. 446.

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LOCKE J.:—This is an appeal from a judgment of the Court of Appeal for British Columbia[1] brought by special leave of that Court. That judgment allowed in part an appeal of the present respondent from the judgment of Brown J. by increasing the damages awarded and declaring that the present appellant is not the lawful owner of that part of the bed of the Salmo River adjoining its property *ad medium filum aquae.*

While oral evidence was given at the trial, the case filed in this Court contains only an agreed statement of the facts, the material parts of which are as follows:

The appellant is the holder of a certificate of indefeasible title to a parcel of land in the Nelson Assessment District, therein described as being those parts of sub-lot 36 of lot 1,236, Kootenay District, Plan X 69, shown outlined in red on Reference Plan 61457-I.

The plan referred to was prepared under the circumstances to be hereinafter described and shows the property in question coloured in red lying immediately to the east of the Salmo River, the westerly boundary of which is indicated by stakes placed in the ground at the top of the river bank and lettered A, B, C, D, E, F, G and H.

The question to be determined in the action is as to the respective rights of the parties to the ground lying between the line thus delineated and the centre line of the stream at the relevant times.

In 1897 the Nelson and Fort Shepard Railway Company obtained a grant of land in the Kootenay District which included a parcel described in the Crown grant to it as lot 1,236. There was no reservation in this grant of the beds of any rivers or streams. In 1938 a portion of these lands described as sub-lot 36 of lot 1,236 was owned by the Erie Timber Co. Ltd. and, through this lot, there runs a river or stream known as the Salmo River. In that year the respondent purchased sub-lot 36 from the Erie Timber Company under an agreement of sale and entered into possession.

In the latter part of 1942 or early in 1943 Wartime Metals Ltd., a Crown corporation, commenced operation of a tungsten mine situated in the mountains to the east of sub-lot 36 and, requiring lands for a mill site and for a

[1] (1960), 23 D.L.R. (2d) 136, 30 W.W.R. 446.

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disposal area for tailings or waste from the mill, took expropriation proceedings to acquire a portion of sub-lot 36. During these proceedings the respondent caused a survey to be made of the property to be expropriated by Boyd C. Affleck, a British Columbia land surveyor. The agreed statement of the facts dealing with this aspect of the matter reads:

> The land to be taken by the Crown was to be that portion of the Sub-lot lying to the East of the River and South of Lot 275. In carrying out the survey on the river boundary the surveyor ran a series of traverses from point to point along the river bank, marking the points with stakes placed in the ground. These points, and the stakes, are represented on the plan of his survey as "A", "B", "C", etc. The boundary line along the river was the top of the riverbank—the line of perennial vegetation.

The plan so prepared was registered with the above mentioned reference number, with the first conveyance and application to register, in accordance with the requirements of the *Land Registry Act,* R.S.B.C. 1948, c. 171.

Rotter had not completed his payments to the Erie Timber Company at the time these lands were required by the Crown. The matter was arranged by that company conveying the lands described in the plan to Rotter and he, in turn, transferred such lands to His Majesty The King.

The conveyance from the Erie Timber Company dated March 29, 1945, described the lands transferred as being "those parts of sub-lot thirty-six (36) of lot 1,236, Kootenay District, shown outlined in red on the attached plan".

The conveyance from Rotter to His Majesty The King dated May 28, 1945, described the lands conveyed as being those parts of sub-lot 36 described in the deed last mentioned and shown outlined in red on the reference plan attached. The plan referred to in both of these conveyances was Reference Plan 61457-I.

While the documents are not mentioned in the agreed statement of the facts or made exhibits at the trial, it may be assumed that certificates of indefeasible title were issued to Rotter and to the Crown respectively for the lands mentioned pursuant to these conveyances, as required by s. 142(1) of the *Land Registry Act.*

By a conveyance dated December 11, 1945, the Erie Timber Company conveyed to Rotter sub-lot 36, save and except that portion theretofore conveyed to him as above mentioned.

By a conveyance dated April 11, 1947, His Majesty The King conveyed to the appellant the lands conveyed to him by Rotter by the above mentioned conveyance and the certificate of title first above mentioned dated October 21, 1947, issued in the appellant's name.

In November 1954 the appellant, purporting to be acting under the authority of a conditional licence granted by the Provincial Water Rights Branch for that purpose under the provisions of the *Water Act,* R.S.B.C. 1948, c. 361, entered into the stream bed of the river opposite its lands and carried out certain works, removing approximately 30,000 cubic yards of sand and gravel which it used to build an impoundment area for the tailings from its mill. These works extended in places to the west of the surveyed line upon the plan and into the westerly half of the bed of the river. In January 1955 the respondent commenced the present action for damages, for trespass, for the value of the materials removed from the bed of the river and for an injunction. The appellant, in turn, counterclaimed for the cost of certain repairs and reinforcements which it claimed to have been necessary to the east bank of the river by reason of a certain wing dam erected by the respondent at a point up stream on lot 275 about the year 1948, and for a declaration that it was the lawful owner in fee simple of the bed of the river *ad medium filum aquae* at the place in question.

Brown J., by whom the action was tried, found that the appellant was the owner of the bed of the stream *ad medium filum* and that it was entitled to remove the material from the eastern half of the bed of the stream but, as the evidence disclosed that material had also been removed from the western half, held that the appellant was liable in damages in a sum of $100 as the value of the material so removed. Upon the counterclaim it was found that the appellant had suffered damages by the variation of the course of the stream caused by the wing dam and damages were awarded in the sum of $3,075.17.

On appeal to the Court of Appeal this judgment was set aside in part, the judgment declaring that the present appellant was not the lawful owner of that part of the bed of the stream *ad medium filum* which is adjacent to the portion of sub-lot 36 owned by it, and increasing the damages awarded

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to the sum of $300. The appeal taken by the present respondent from the damages awarded on the counterclaim was dismissed.

The judgment of the court delivered by Coady J.A. proceeded upon a view of the questions involved which had not been raised at the trial or considered by Brown J. As will be seen from the foregoing recital, the description of the appellant's land was that which appears coloured red on the registered plan, the western limit of which was the line drawn between the stakes placed in the ground at the top of the river bank. The certificate of title which issued to Rotter, following the conveyance to him of the balance of sub-lot 36 by the Erie Timber Company, described the lands held as being sub-lot 36 save and except those parts of the lot shown outlined in red on the plan. Coady J.A. was of the opinion that, by reason of the fact that as he considered this latter certificate evidenced title to the bed of the stream in the respondent, this was conclusive of the matter, there being no grounds in his opinion upon which the conclusive nature of the certificate as declared by s. 38(1) of the *Land Registry Act* might be impeached.

The question is one which is of importance not only in British Columbia but in the three other Western provinces where the Torrens system of land holding is in effect, as well as in certain other of the provinces.

Brown J., considering that the law as to the rights of a riparian owner whose lands border a non-tidal or non-navigable stream were the same in British Columbia at the times in question as in England, found the rights of the appellant to the eastern half of the bed of the stream to be as they are stated in the judgment of Cotton L.J. in *Micklethwait v. Newlay Bridge Co.*[1] That learned judge there said:

> In my opinion, the rule of construction is now well settled that where there is a conveyance of land, even though it is described by reference to a plan and by colour and by quantity, where it is said to be bounded on one side either by a river or by a public thoroughfare, then on the true construction of the instrument half the bed of the river or half of the road passes, unless there is enough in the circumstances or enough in the description of the instrument to show that that is not the intention of the parties.

[1] (1886), 33 Ch. D. 133 at 145, 55 L.T. 336

Coady J.A., accepting without deciding that the learned trial judge was right in finding that the land conveyed extended to the river bank notwithstanding the plan, and also without so deciding that the *ad medium filum* rule was introduced into and became at one time part of the law of British Columbia, considered that the so-called rule had no application in the circumstances of this case where the title of the lands in question and the lands adjoining them immediately to the west was evidenced by certificates of indefeasible title issued under the provisions of the *Land Registry Act*.

By the provisions of the *English Law Act*, R.S.B.C. 1948, c. 111, the civil and criminal laws of England, as the same existed on the 19th day of November 1858 and so far as the same are not from local circumstances inapplicable, are declared to be in force in all parts of the province, save to the extent that such laws are modified and altered by legislation having the force of law in the province.

In the case of *Esquimalt Waterworks Co. v. City of Victoria*[1], Duff J. (as he then was) considered whether the English law relating to riparian rights became part of the law of the Colony of Vancouver Island where the river in question in that litigation was situate and concluded that the English law applied, referring to what was said by Lord Wensleydale in *Chasemore v. Richards*[2]. While unnecessary to decide whether this was so on the mainland, he expressed his agreement with a judgment of Martin J. (as he then was) in the case of *West Kootenay Power and Light Co. v. Nelson*[3], where that learned judge had expressed the view that the rules of English law on this point had since 1870 been the law of the whole Colony of British Columbia, and that of Drake J. in *Columbia River Co. v. Yuill*[4].

The exact ground upon which a riparian owner of lands upon a non-tidal or non-navigable stream is held to own the bed of the stream adjoining his property *ad medium filum* has been variously described. In Sir Matthew Hale's

[1] (1906), 12 B.C.R. 302.
[2] (1859), 7 H.L. Cas. 349 at 382, 11 E.R. 140.
[3] (1906), 12 B.C.R. 34.
[4] (1892), 2 B.C.R. 237.

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Treatise De Jure Maris, written in the 17th century, which is to be found in Moore's Law of the Foreshore, 3rd ed., the following statement appears (p. 370):

> Fresh rivers of what kind soever, do of common right belong to the owners of the soil adjacent; so that the owners of the one side have, of common right, the propriety of the soil, and consequently the right of fishing, *usque filum aquae*; and the owners of the other side the right of soil or ownership and fishing unto the *filum aquae* on their side.

In *Chasemore v. Richards*[1], Lord Wensleydale said at p. 382:

> It has been now settled that the right to the enjoyment of a natural stream of water on the surface, *ex jure naturae,* belongs to the proprietor of the adjoining lands, as a natural incident to the right to the soil itself, and that he is entitled to the benefit of it, as he is to all the other natural advantages belonging to the land of which he is the owner.

In *Bristow v. Cormican*[2] where the question of the right of the Crown to the soil of an inland non-tidal lake was considered, Lord Blackburn said at p. 666:

> It is clearly and uniformly laid down in our books that where the soil is covered by the water forming a river in which the tide does not flow, the soil does of common right belong to the owners of the adjoining land.

In *Lord v. City of Sydney*[3], a grant by the Crown made in 1910 of land in New South Wales described as bounded by a creek was held to pass the soil *ad medium filum aquae.* The judgment of the Judicial Committee delivered by Sir John Coleridge quoted with approval a passage from *Kent's Commentaries,* ed. 1840, stating that:

> it may be considered as the general rule that a grant of land bounded upon a highway or river carried the fee on the highway or the river to the centre of it, provided the grantor at the time owned to the centre and there be no words or specific description to show a contrary intent.

As the description of the boundary in the grant from the Crown did not exclude from it that portion of the creek which by the general presumption of law would go along with the ownership of the land on the bank of it, the Board considered that title passed.

[1] (1859), 7 H.L. Cas. 349, 11 E.R. 140.
[2] (1878), 3 App. Cas. 641.
[3] (1859), 12 Moo. P.C.C. 473, 14 E.R. 991.

The same principle has been held to apply in the case of lands which front upon a highway in England. In *Berridge v. Ward*[1], Erle C.J. at p. 415 said in part:

> I am of opinion that where a close is conveyed with a description by measurement and colour on a plan annexed to and forming part of the conveyance and the close abuts on a highway and there is nothing to exclude it, the presumption of law is that the soil of the highway *usque ad medium filum* passes by the conveyance.

an opinion in which Williams, Willes and Keating JJ. concurred. The reference to this case in the 25th edition of Prideaux's Precedents in Conveyancing at p. 183 reads:

> When in the parcels the land is described as bounded on one side by a road or a non-tidal river the conveyance will, so far as the grantor has power to do so, pass the soil of the road or the bed of the river *ad medium filum*, unless a contrary intention is clearly shown. The fact that the land is described by reference to a coloured plan and no part of the road or river is coloured, and that precise measurements are given which will be satisfied without including any part of the road or river, are not sufficient indications of a contrary intention.

As authority for the last statement the learned authors quote *Micklethwait v. Newlay Bridge Co.*, above mentioned, which supports it.

In *City of London v. Central London Railway*[2] Lord Shaw, after referring with approval to what had been said by Kay J. in *Tilbury v. Silva*[3], and by Cotton L.J. in *Micklethwait v. Newlay Bridge Co.*[4], said in discussing the reasons for the doctrine (p. 380):

> But this doctrine is not a mere inference of dedication; it is not a mere convenience in conveyancing; but it is, and is nothing less than, a presumption of, and applicable to, ownership itself. This is too deeply embedded in the law to be disturbed or doubted.

a statement with which Lord Moulton agreed (p. 384).

In *Maclaren v. Attorney-General of Quebec*[5], the appellants held lands on either side of the Gatineau River under letters patent in which they were described as numbered lots in the Townships of Low and Denholm. These townships on opposite sides of the river had been created by letters patent and a proclamation which described them as being bounded by the river in addition gave detailed boundaries which were stated to start from a post and stone

[1] (1861), 10 C.B.N.S. 400, 142 E.R. 507.
[2] [1913] A.C. 364.
[3] (1890), 45 Ch. D. 98 at 109.
[4] (1886), 33 Ch. D. 133 at 145.
[5] [1914] A.C. 258.

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boundary upon the bank of the river, to describe a certain course inland therefrom, then to return to another post and stone boundary at a higher point on the river bank, and "thence along the bank of the river following its sinuosities as it winds and turns to the place of beginning." The judgment delivered on the appeal from this Court by Lord Moulton said in part (p. 272):

> In the Courts below the learned judges have held that the presumption that the bed of the river *ad medium filum aquae* was included in the grant is negatived by the fact that the metes and bounds of the parcels forming the townships as described in the letters patent make them terminate at the bank of the river. But their Lordships are of opinion that in so holding they are not giving full effect to the presumption or (as it should rather be termed) rule of construction which is so well established in English law. It is precisely in the cases where the description of the parcel (whether in words or by plan) makes it terminate at the highway or stream and does not indicate that it goes further that the rule is needed.

The manner in which plans of the nature of that referred to in the present case are to be prepared is defined in Part VI of the *Land Registry Act*. Section 80 requires that the land intended to be dealt with by the plan is to be shown thereon surrounded by a line in red ink and that each angle of each parcel shall be defined on the ground by the surveyor by a post or monument of a durable character. Reference Plan No. 61457-I shows the western boundary of the part of sub-lot 36 as an irregular line, the posts being placed at what was apparently regarded as the top of the eastern bank of the river.

While, by agreement between the parties, the case filed in this Court did not contain the evidence taken at the trial and which was considered in the Court of Appeal, the evidence as it appeared in the appeal books in that court is on the file and I have examined it. According to Mr. Affleck, the surveyor, the line showing the western boundary of the property in question was the bank of the river as it existed in 1944, which he described as the line of perennial vegetation, trees and shrubs growing there. This line indicates what is the edge or shore of the river at high water. This manner of preparing plans of lands adjoining non-tidal rivers was, he said, the standard practice followed on the instructions of the Surveyor General of British Columbia, an officer appointed under the provisions of the *Land Act*, R.S.B.C. 1948, c. 175, applying to all Crown granted lands except those affected by tidal waters. The Salmo River is

subject to floods in the spring of the year when the water overflows its banks usually. In times of low water, however, as indicated upon a photograph put in evidence at the trial, there is an area in the bed of the river between the eastern boundary of the river so delineated and the stream itself which is dry.

Section 38 of the *Land Registry Act* provides that every certificate of indefeasible title issued under the Act, so long as it remains in force and uncancelled, is conclusive evidence at law and in equity as against Her Majesty and all persons whomsoever that the person named in the certificate is seized of an estate in fee simple in the land therein described, subject to certain exceptions. Of these, if as a matter of law the certificate of title issued to Rotter following the conveyance to him by the Erie Timber Company of December 11, 1945, included the entire bed of the stream, the only exception which could affect the absolute nature of the respondent's title is that lettered (i) which reserves the right of any person to show that the whole or any portion of the land is by wrong description of the boundaries or parcels improperly included in such certificate.

It is, however, to be remembered that the certificate of title referred to describes the land as being sub-lot 36, save and except thereout, *inter alia,* those parts of the sub-lot shown outlined red on Reference Plan 61457-I. In these circumstances, the extent of the lands of which the respondent holds an indefeasible title cannot be determined as between the appellant and the respondent without first determining that of the lands acquired by Rotter, under the transfer of March 29, 1945, from the Erie Timber Company, by His Majesty The King under the transfer from Rotter of May 28, 1945, and those of the appellant under the certificate of indefeasible title, issued to it consequent upon the transfer from His Majesty. It is only sub-lot 36, less the lands to which these parties became respectively entitled under these successive certificates of title, for which the respondent has an indefeasible title.

It must be taken, in my opinion, to be conclusively established that if the area of land described by reference to the plan in the appellant's certificate of title was held by it under a registered Crown grant issued under the provisions of the *Land Act* of British Columbia, the appellant would

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have title to the bed of the stream *ad medium filum,* with all the rights and benefits which accrue to a riparian owner by virtue of that fact. That appears to me to be determined by the judgments of the Judicial Committee in *Lord v. City of Sydney* and *Maclaren v. Attorney General of Quebec* and by the House of Lords in *Bristow v. Cormican,* above referred to. The rights of the grantee would not be held to be limited in any respect by the fact that the lands were described in reference to such a plan showing the boundary as the bank of the river containing the stream and not in midstream.

While evidence was not given as to the nature of the title of the Erie Timber Company to lot 1,236, it was stated in counsel's opening for the plaintiff at the trial that it had been registered in the name of that company since 1935 and it must be presumed that that company held a certificate of indefeasible title. It retained that title to sub-lot 36 at the time the portion shown on the plan was transferred by it to the respondent, to enable him to transfer it in turn to the Crown. According to the witness Mason, a mining engineer who was employed by Wartime Metals Ltd. from 1942 to 1944, after negotiations with the respondent, the land was acquired for the erection of a mill, for a tailings disposal area, and to afford direct access to the river for water for the operation of the mill. A pumping station was thereafter established for that purpose on the east bank by the Crown.

That the property was being acquired by the Crown for these purposes was undoubtedly known to the respondent during the course of the negotiations. No one would seriously suggest that either party contemplated that the land sold would afford to the grantee access to the water from the river, required for the operation of the mill, only during the time when it was in flood. Yet, this is the result if effect is given to the contention of the respondent that he is the legal owner of the entire bed of the stream. As the matter now stands, the appellant can only obtain access to the water for its mill by leave of the respondent, except during the spring floods. The property and the right to the use of the water is in the Crown in right of the province, as declared by s. 3 of the *Water Act,* and the apellant *qua* licensee might under the provisions of s. 21 of that Act

expropriate sufficient of the bed of the stream to afford access to the water. However, in the view that I take of this matter, that is not necessary.

In *The King v. Fares et al.*[1], the rights of owners of lands in Saskatchewan in respect of the bed of a lake upon which it was claimed such lands had originally abutted were considered. So far as I am aware, this is the only Canadian case in which any mention is made of the rights of such an owner where title is held under the Torrens System.

The lands in question had been purchased by Fares and Alexander Smith, partly from the Canadian Agricultural Coal and Colonization Company and partly from the Canadian Pacific Railway Company and included certain fractional sections in the 17th Township in the 11th Range West of the Third Meridian in the Northwest Territories. Patents had been issued in respect of these lands to the vendor companies between the years 1888 and 1890 and, at the time they were issued, the fractional sections in question abutted on Rush Lake, a non-navigable body of water. The Canadian Agricultural Company had acquired these lands by purchase from the Government of Canada in the year 1887. They were part of an area of 50,000 acres purchased from the Crown for a consideration of $1.50 per acre. The lands purchased from the railway company formed part of the land grant to which that company was entitled under the contract dated October 21, 1880, which forms the schedule to chapter 1 of the Statutes of Canada, 1881. By that contract the Government agreed to grant to the company a subsidy of 25,000,000 acres of land and it was a term of that contract that "lakes and water stretches" should not be computed in the acreage of the lands granted but should be made up of other portions in the tract known as the fertile belt.

At the time when the patents were issued the lands were subject to the provisions of the *Territories Real Property Act,* S.C. 1886, c. 26, and, presumably, certificates of title had issued to the patentees under the provisions of s. 46 of that Act. That Act was taken practically *verbatim* from *The Real Property Act* of Manitoba passed in 1885, which introduced for the first time the Torrens System into Canada. While the report does not so state, the record in the case, which is available, shows that certificates of title were issued

[1] [1932] S.C.R. 78, 1 D.L.R. 421.

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to Fares and to Smith for undivided half interests in the lands in the year 1909. Since the lands were subject to the Act, these conveyances must have been made by transfers in the prescribed form.

At the time the lands were purchased by Fares and Smith, the level of Rush Lake had been so lowered by drainage that no part of them abutted upon the lake. Their claim, however, was that, as at the time the patents were granted to their predecessors in title they did so, they were entitled to the lands abutting on and to the centre of the said lake.

The patents issued defined the area of each of the parcels of land in acres. The land had been surveyed up to the border of the lake as it was at the time when the patents were issued, but no reference was made in these instruments to the survey. The lands purchased by the company were sold under the provisions of the *Dominion Lands Act*, R.S.C. 1886, c. 54, which permitted the sale of such lands only as had been surveyed at such prices as might be fixed by the Governor in Council and at a price not less than $1 per acre.

Duff J. (as he then was) considered that the letters patent could not be construed as conveying more than the acreage referred to in them, since to do so would be to convey unsurveyed lands without consideration, contrary to the terms of s. 29 of the Act. He held that what he referred to as the presumptive rule and also the presumptive construction of grants of riparian lands entitling the owners to non-navigable waters *ad medium filum* was rebutted by this fact and by the further fact that, at the time title to the lands was acquired by the claimants, the lands had long since ceased to be riparian lands. Lamont J. was of the same opinion upon the first of these grounds. It is in his judgment, which was concurred in by Cannon J., that the only reference is made to the fact that title to the lands was held under the *Real Property Act*. As to this Lamont J., after pointing out that the claimants obtained title by transfers under the Act, said that it would be noted that no provision was made under that Act for the registration of property or property rights to which a riparian owner would be entitled in the bed of a non-navigable stream or

lake by virtue of the *ad medium filum* rule if the same were applicable to conveyance of lands in the Northwest Territories.

In respect of the lands purchased from the Canadian Pacific Railway Company, in view of the fact that the agreement between that company and the Government above referred to pursuant to which the patents were granted by its terms excluded "lakes and water stretches" in the sections granted, it was held that the letters patent could not be construed as conveying any rights to the bed of Rush Lake.

The Torrens System of landholding originated in Australia and, in New South Wales where the question with which we are concerned appears to have been considered as a matter of doubt, the matter was dealt with by an amendment made in the year 1930 to the *Real Property Act 1900*. Section 45A, added to that statute, reads in part:

> Except as in this section mentioned, the rebuttable rule of construction applicable to a conveyance of land therein indicated as abutting on a non-tidal stream or a road, that the land extends to the middle line of the stream or road, shall apply, and be deemed always to have applied to instruments registered under the provisions of this Act relating to land indicated in the instruments as so abutting.

The cases in New South Wales dealing with the matter before this amendment was made are to be found in Baalman on the Torrens System, p. 180 et seq.

It is to be remembered that this is not a case where lands acquired by a person relying upon the state of the register are in question, as might have been the case had the parties to this litigation been some person who had purchased the remaining part of sub-lot 36 from Rotter after the conveyance to him by the Erie Timber Company and the appellant. What was said by Lord Watson in reference to the *Transfer of Land Statute of Victoria* in *Gibbs v. Messer*[1], has no relevance to the circumstances of this case.

In the evidence given by the respondent at the trial he stated that he had insisted on the preparation of a plan, apparently saying this in support of his contention that the property conveyed was bounded on the west by the line along the top of the bank shown on the plan, and this statement of fact is repeated in the reasons for judgment

[1] [1891] A.C. 248 at 254.

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delivered by Coady J.A. The statement, however, would appear to be inaccurate since the plan was necessary, since the property formed a part only of sub-lot 36, by reason of the provisions of ss. 83 and 84 of the *Land Registry Act* unless it was dispensed with by the Registrar under the powers given by s. 106. Section 80 of that Act requires that every such plan tendered for deposit shall be based on a survey made by a British Columbia land surveyor and shall comply with all regulations in regard to surveys and plans which may from time to time be issued by the Surveyor General, and that the land intended to be dealt with shall be shown thereon surrounded by a line in red ink. As shown by the evidence of the surveyor Affleck, in placing the stakes at the top of the bank of the river at the vegetation line he was complying with the instructions of the Surveyor General relating to surveys of Crown lands. If there were at the time in question any regulations issued by the Surveyor General in regard to lands fronting upon non-tidal waters in respect of which a certificate of indefeasible title had been issued under the *Land Registry Act* following the issue of a Crown grant, no evidence was given as to the fact. Section 6(5) of the *Land Act* provides that where land to be surveyed is in whole or in part bounded by any lake or river, such lake or river may be adopted as the boundary of the land. By s. 7(*d*) it is provided that if a corner of a lot falls in the bed of a stream or in any other locality unfavourable to the planting of a post, or if a post is likely to be disturbed or destroyed the corner shall be witnessed by witness-posts planted at the nearest suitable point on the surveyed line, that is, either north, south, east or west of the true corner. There are, however, no similar provisions in the *Land Registry Act*.

The practical difficulties in surveying such property adjoining a mountainous stream such as the Salmo River, unless the river is stated to be the boundary, are obvious. In the summer time, at low water, it is apparent from the evidence that the body of the stream is comparatively small while, at the time of the spring floods, the banks at the vegetation line indicated on the plan are at times overflowed. To establish the *medium filum* or thread of the stream at a particular time would be feasible for a surveyor, but to mark it with posts which would be visible or continue

in place when the stream was in flood would probably be a matter of extreme difficulty. Since it is obvious upon the evidence that what was intended by the parties was that the area to be conveyed would be such as to afford Wartime Metals Ltd. direct access to the water in the stream at all seasons of the year, the placing of the stakes at the top of the bank, in accordance with the directions of the Surveyor General applying to Crown lands in such cases, should not, in my opinion, be held to restrict the rights of the transferee to something less than would be the case if the western boundary had been defined as being the river.

In my opinion, the rights acquired by His Majesty The King on behalf of Wartime Metals Ltd., all of which were transferred to the appellant, were the same in their nature as if the westerly boundary of the property had been described in the certificate of title and the accompanying plan as the Salmo River. The matter is not affected, in my opinion, by the fact that the land conveyed is shown in the description by measurement and colour on the plan (*Micklethwait v. Newlay Bridge Co., Berridge v. Ward,* above referred to). Whether the basis upon which the title of such an owner *ad medium filum* rests is of common right, as stated by Sir Mathew Hale in his treatise and by Lord Blackburn in *Bristow v. Cormican*[1], or whether it passes as a matter of construction of the grant, as it was treated by the Judicial Committee in *Lord v. City of Sydney*[2] and in *Maclaren v. Attorney General of Quebec*[3], the principle appears to me to be, as Lord Shaw said in *City of London v. Central London Railway*[4] too deeply embedded in the law to be disturbed or doubted.

The argument to the contrary, to which effect has been given in the Court of Appeal, means that a transfer of land described as bounded by a non-tidal or non-navigable stream in a grant from the Crown, registered under an Act repealed by s. 26 of the statutes of 1921 (see s. 126 of the *Land Registry Act*), would vest in the owner title to the bed of the stream *ad medium filum,* while a transfer of immediately adjoining property fronting upon the same water and similarly described in a certificate of indefeasible title would carry no such right, even as between the parties.

[1] (1878), 3 App. Cas. 641.
[2] (1859), 12 Moo. P.C.C. 473, 14 E.R. 991.
[3] [1914] A.C. 258.
[4] [1913] A.C. 364.

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The question to be decided in this action is the proper construction of the grant by the respondent to His Majesty dated May 28, 1945. That question cannot, in my opinion, be affected by the terms of ss. 53, 125, 141(1) and 156 of the *Land Registry Act* which deal with the manner of registration of conveyances and the duty of the registrar to register the title claimed if the statutory conditions are complied with. The failure of the Crown to ask that the grant be construed as conveying title *ad medium filum* cannot deprive the appellant of the right to insist as against the grantor that it should be so construed.

In the *Fares* case it was held that the proper construction of the grants in the letters patent was that they were not intended to convey and did not convey the unsurveyed lands covered by the waters of Rush Lake, for the reasons above mentioned. There was no authority in anyone to give away lands of the Crown or to sell unsurveyed lands, and to do so was expressly prohibited by the *Dominion Lands Act*. No statutory enactment of that nature affects the present matter.

The transfer of the lands in question was made, as I have pointed out, for the purpose of enabling Rotter to convey the same forthwith to His Majesty the King for the purposes above described. There is nothing to rebut what was referred to by Strong J. in *The Queen v. Robertson*[1], as the presumption that it was intended that the soil and bed of the river *ad medium filum* should pass by the conveyance: rather do the circumstances support such presumption and, in my opinion, the transfers should be so construed. As all of the right, title and interest of His Majesty in the property were transferred by the conveyance to the appellant, that title has, in my opinion, been vested in it since the date of the issue to it of the certificate of indefeasible title which has been mentioned.

In *Re White*[2], where an application was made to bring land bounded by a river under the provisions of the *Real Property Act 1900,* it was determined by the Court of Appeal that the certificate of title should show as part of the description of the land whether the presumption of ownership of the soil *ad medium filum* does or does not apply. Street C.J., who gave the judgment of the Court, considered

[1] (1882), 6 S.C.R. 52 at 130. [2] (1927), 27 S.R. (N.S.W.) 129.

that it was the duty of the Registrar General in such cases to investigate the claim and determine whether the presumption applied and, if so, to insert in the description of the land in the certificate of title a statement to that effect. While in the present matter the appellant by its counterclaim asked for a declaration that it was the lawful owner in fee simple of the river bed *ad medium filum*, the prayer for relief did not ask that the certificates of title held by the parties respectively should be amended to evidence that fact.

This litigation has now been pending for more than five years and as the only persons whose rights may be affected are the parties to this action, it is, in my opinion, in the interests of the due administration of justice that such rights be now finally determined and defined upon the record.

I would allow this appeal with costs and direct that the judgment at the trial be amended by directing that the certificate of indefeasible title issued to the appellant by the Nelson Land Registry Office and the duplicate thereof in that office be amended by adding to the description of the land the following words immediately after the figures 61457-I in the description:

and the lands immediately adjoining the same to the west *ad medium filum aquae* of the Salmo River as of May 28, 1945

and that the certificate of indefeasible title of the respondent for the remaining portion of sub-lot 36 referred to in the pleadings and the duplicate thereof in the said Land Registry Office dated January 28, 1946, be amended accordingly.

The appellant should have its costs in this Court and in the Court of Appeal.

MARTLAND J. (*dissenting*):—The material facts in the present appeal are set out in the reasons of my brother Locke and do not require to be repeated at length. In each of the conveyances, from Erie Timber Company Limited to the respondent, from the respondent to the Crown, and from the Crown to the appellant, the description of the land to be conveyed was those parts of Sub-lot 36 of Lot 1236, Kootenay District, shown outlined in red on the reference plan, which plan was registered, as No. 61457, in the Land Registry Office in Nelson, British Columbia. The significant thing to me is that, on the basis of a conveyance in this

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form, a conveyance which resulted from expropriation proceedings by the Crown, application was made to register title to land pursuant to s. 125 of the *Land Registry Act*, R.S.B.C. 1948, c. 171, which provides:

> Every person claiming to be registered as owner in fee-simple of land shall make application to the Registrar for registration in Form A in the First Schedule. R.S. 1936, c. 140, s. 124.

As Coady J.A. said, when delivering the judgment of the Court of Appeal:

> That application is not before the Court but we can assume, I think, that the property described in that application is that described in the conveyance and nothing more. The purpose of requiring application to be made on Form A is to make sure that the applicant and the Registrar are "ad idem" as to what land the applicant requests registration of and what land is to be included in the certificate of title.

The material portion of Form A reads as follows:

> I, , solemnly declare that I am entitled to be registered as the owner in fee-simple of the land hereunder described, and hereby make application under the provisions of the "Land Registry Act" and claim registration accordingly.

We must assume that the applicant for registration applied for registration of the parcel of land described as above and did not, on the strength of the conveyance in that form, seek registration of a title to include, in addition to the lands actually described in the conveyance, the lands to the west thereof *ad medium filum* of the Salmo River. On the basis of the various conveyances the appellant obtained a certificate of indefeasible title to those parts of Sub-lot 36 shown outlined in red on Reference Plan 61457-I.

These facts raise the issue as to whether the rebuttable rule of construction applicable, under the common law, to a conveyance of land therein indicated as abutting on a non-tidal stream, that the land extends to the middle line of the stream, is also applicable in respect of a registered title under a Torrens System of titles, such as the *Land Registry Act*. The appellant, in answer to a claim for trespass, and in support of its counterclaim, relied upon its title to the land to the middle line of the Salmo River and claimed ownership of that land. That claim depends upon what title was conferred upon it by its existing certificate of indefeasible title, for there has been no claim for any correction of the register or of any instrument.

That the rule itself is well established in English law is shown in the cases cited by my brother Locke. But as Anglin C.J.C. said, in this Court, in *The King v. Fares*[1]:

> I have had the advantage of perusing the carefully prepared opinions of my brothers Duff and Lamont. While they may differ in some details, as I read what they have written, they agree in holding that, assuming the *ad medium filum* rule of English law to be ordinarily applicable in Saskatchewan to non-navigable waters, such as the lake in question, it is, at the highest, a rule of interpretation, and the rebuttable presumption thereby created yields readily to proof either of circumstances inconsistent with its application, or of the expressed intention of a competent Legislature so to exclude its application. With that view, I entirely agree (*Keewatin Power Co. v. Kenora,* (1908) 16 Ont. L.R. 184, at 190, 192), and I also agree that the intention of the Dominion Parliament—an authority competent so to provide—to exclude the application of the rule to Dominion lands in the North West Territories, was sufficiently manifested by the provisions of the *Dominion Lands Act* (c. 54, R.S.C. 1886).

There was no provision in the *Dominion Lands Act,* there under consideration, expressly excluding the application of the *"ad medium filum"* rule, but it was held that the Act disclosed an intent inconsistent with its application.

Lamont J., with whom Cannon J. concurred, made some reference to the application of the rule to a Torrens System of titles, at p. 96, as follows:

> In addition, there was in force at the same time the *Territories Real Property Act* (ch. 51 of R.S.C., 1886), in which Parliament had adopted for the Territories the Torrens System of land registration and transfer by which the title of an owner was registered under the Act and a transfer of land could be made by a conveyance in Form G, in which form the land to be conveyed is described by section, township, range and meridian, according to the description given in the survey provided for by the *Dominion Lands Act.* It will be noted, however, that no provision was made for the registration of property or property rights to which a riparian owner would be entitled in the bed of a non-navigable stream or lake by virtue of the *ad medium filum* rule if the same were applicable to conveyances of land in the North West Territories.

Do the provisions of the *Land Registry Act* manifest an intention to exclude the rule in respect of certificates of indefeasible title in British Columbia? The judgment of the Court of Appeal, delivered by Coady J.A., in this case is that they do, and I have reached the same conclusion.

[1] [1932] S.C.R. 78 at 80, 1 D.L.R. 421.

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In the first place, the purpose of a Torrens System of titles, such as is provided for in the *Land Registry Act,* is that which was stated by Lord Watson, in the leading case of *Gibbs v. Messer*[1], when speaking of the *Transfer of Land Statute of Victoria*:

> The main object of the Act, and the legislative scheme for the attainment of that object, appear . . . to be equally plain. The object is to save persons dealing with registered proprietors from the trouble and expense of going behind the register, in order to investigate the history of their author's title, and to satisfy themselves of its validity.

If the "*ad medium filum*" rule were to be applied to certificates of indefeasible title, it would always be necessary to go behind the register. The rule is a rebuttable one. It may be rebutted, as Cotton L.J. said, in *Micklethwait v. Newlay Bridge Company*[2], by "facts, whether appearing on the face of the conveyance or not". Consequently, if the rule were to apply to a registered title under the *Land Registry Act,* a person proposing to deal with respect to a parcel of land bounded by a non-tidal and non-navigable river, could not tell, even by a search of the conveyance which created the title, whether it carried the ownership of the land *ad medium filum* or not. The whole intent of this Act is that a person dealing with land may rely upon the register.

In the second place, in my opinion, specific provisions of the Act show a contrary intent. I have already referred to s. 125 and to Form A, dealing with an application to register land. Section 141(1) deals with the Registrar's power to register, and provides:

> Where an application has been made for the registration of the title to any land, if the Registrar is satisfied that the boundaries of the land are sufficiently defined by the description or plan on record in the office or provided by the applicant, and that a good safeholding and marketable title in fee-simple has been established by the applicant, the Registrar shall register the title claimed by the applicant in the register.

Section 156 deals with the issuance of subsequent certificates of title and reads:

> Where a conveyance or transfer is made of any land the title to which is registered, the grantee or transferee shall be entitled to be registered as the owner of the estate or interest held by or vested in the former owner to the extent to which that estate or interest is conveyed or transferred; and the Registrar, upon being satisfied that the conveyance or transfer produced has transferred to and vested in the applicant a good

[1] [1891] A.C. 248 at 254.

[2] (1886), 33 Ch. D. 133 at 145, 55 L.T. 336.

safe-holding and marketable title, shall, upon production of the former certificate or duplicate certificate of title, register the title claimed by the applicant in the register. R.S. 1936, c. 140, s. 155.

These provisions establish that on the application for the issue of the first certificate of title the applicant must make claim to the title which he seeks to register and thereafter conveyances are made on the basis of the registered title.

Section 53 of the Act contains the following provision:

Instruments in statutory or other form sufficient to pass or create an estate or interest in land shall be registrable, and for all purposes of registration effect shall be given to them according to their tenor. R.S. 1936, c. 140, s. 52.

It seems to me, in view of this section, in the absence of any claim by the Crown that on the basis of the conveyance to it by Rotter it had become entitled to be registered as owner of the lands *ad medium filum* of the River Salmo, the only effect which could be given to that conveyance was the issuance of a certificate of indefeasible title to those lands which were actually described in the conveyance itself. That is what actually occurred and, in turn, a similar title issued in the name of the appellant as a result of the subsequent conveyance to it by the Crown.

The Act does contain a provision regarding title to minerals to the middle line of a highway, in certain circumstances. Section 112 provides:

(1) Where, on the subdivision of land, any subdivision plan or reference plan covering the land subdivided is deposited in any Land Registry Office, and any portion of the land subdivided is shown on the plan as a highway, park, or public square, and is not designated thereon to be of a private nature, the deposit of the plan shall be deemed to be a dedication by the owner of the land to the public of each portion thereof shown on the plan as a highway, park, or public square for the purpose and object indicated on or to be inferred from the words or markings on the plan. No certificate of title shall issue for any highway, park, or public square so dedicated.

(2) The deposit of any plan to which this section applies shall be deemed to vest in the Crown in right of the Province the title to such portion of the land subdivided as is shown thereon as a highway, park, or public square: Provided that the deposit of the plan shall not be deemed to vest in the Crown or otherwise affect the right or title to the minerals, precious or base, including coal, petroleum, fireclay, and natural gas, underlying any portion of the land shown as a highway, park, or public square, anything in the "Highway Act", the "Municipal Act", or any other Act to the contrary notwithstanding; but, upon conveyance of a parcel shown upon the plan adjoining a highway, park, or public square so dedicated, such minerals underlying the portion of the highway, park, or public square

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opposite the parcel conveyed and between that parcel and the middle line of the highway, park, or public square, unless expressly reserved, shall pass to and vest in the owner for the time being of the parcel conveyed. R.S. 1936, c. 140, s. 111.

It is to be noted that in this particular instance the question as to whether or not title to minerals to the middle line of the highway passes is made dependent upon whether or not there is an express reservation of minerals in the conveyance.

My conclusion is that the rebuttable rule of construction at common law as to conveyances of land bounded by a non-tidal river is not applicable to a certificate of indefeasible title under the *Land Registry Act*. In the present case the appellant, in claiming ownership of the river bed *ad medium filum*, relies upon its certificate of indefeasible title. In my opinion that certificate does not establish title in the appellant to any lands beyond those which are actually described in it.

I have dealt up to this point with the question of the applicability of the rule above mentioned to the certificate of indefeasible title itself. However, counsel for the appellant, in his factum, also submits the following proposition.

> If the form of the appellant's certificate of title is not in a form satisfactory to include the whole of the appellant's interest the appellant is in a position in equity to apply for rectification of the certificate.

The appellant's title is derived from a conveyance to it by the Crown. It could not acquire thereby anything beyond what the Crown owned. The Crown derived its title by virtue of the conveyance from the respondent whereby he had granted those parts of Sub-lot 36 "outline in red on reference plan attached thereto".

The portion of Sub-lot 36 outlined in red on the reference plan did not include the river bed of the Salmo River *ad medium filum*.

That conveyance from Rotter to the Crown was submitted by the Crown to the Registrar for registration and he, by virtue of s. 53 of the *Land Registry Act*, was bound to give effect to it "according to its tenor".

In Earl Jowitt's Dictionary of English Law, in defining the word "tenor", it is said:

> The tenor of a document means, in ordinary conversation, its purport and effect, as opposed to the exact words of it. In law, in its correct usage, the reverse is the case, and tenor means the exact words of the document.

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Martland J.

In view of the provisions of s. 53, I do not see how the Registrar, solely on the basis of the conveyance presented to him by the Crown, could have issued to it a certificate of indefeasible title for anything more than the lands actually described in the conveyance. If the Crown contended that it was entitled to more it would seem that proceedings for rectification of the conveyance would have been necessary. No such proceedings have been taken, nor is there any evidence that the Crown made any such contention when it accepted its certificate of indefeasible title.

For these reasons, in my opinion, this contention of the appellant also fails.

In my view the appeal should be dismissed with costs.

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

Solicitors for the defendant, appellant: Wraggle, Hamilton and Arnesen, Nelson, B.C.

Solicitor for the plaintiff, respondent: J. Frank Meagher. Trail, B.C.

CANADIAN PACIFIC RAILWAY COMPANY ..... APPELLANT;

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*Nov. 24, 25 Dec. 19

AND

THE CORPORATION OF THE CITY OF SUDBURY ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Taxation—Assessment of railway right-of-way—Based on average value of land in the locality—Exclusion of streets and public lanes—Appraisal of actual cash value of assets on a notional sale between two railway companies—The Assessment Act, R.S.O. 1950, c. 24, s. 44(2)(a) and (d).

The railway company appealed against the assessments of certain of its property in the City of Sudbury on the ground that the assessor failed to observe the requirements of s. 44(2) of *The Assessment Act.* Both the Municipal Board and the Court of Appeal confirmed the assessments, and the company then appealed to this Court.

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*PRESENT: Kerwin C.J. and Cartwright, Fauteux, Judson and Ritchie JJ.

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CANADIAN PACIFIC RAILWAY CO. v. CITY OF SUDBURY

Held: The appeal should be dismissed.

Per Curiam: The appellant's argument that streets in the matter of area but not in the matter of value must be included in computing the average value of land in the locality was rejected. "Value" in the context of s. 44(2)(*a*) of the Act means "value in exchange", a value which streets do not have.

With respect to the assessment of the company's assets under s. 44(2)(*d*) of the Act, the assessor is not required to value these assets as part and parcel of the whole railway system and base his valuation upon the earnings of the system. The test is an appraisal on notional sale of these particular assets to another railway company and not on a notional sale of all the assets of the appellant company to another railway company.

APPEAL from a judgment of the Court of Appeal for Ontario, affirming a decision of the Ontario Municipal Board. Appeal dismissed.

C. F. H. Carson, Q.C., Allan Findlay, Q.C., and *G. P. Miller,* for the appellant.

J. J. Robinette, Q.C., for the respondent.

The judgment of the Court was delivered by

JUDSON J.:—The Canadian Pacific Railway Company appeals against the 1954 quinquennial assessment of certain of its property in the City of Sudbury on the ground that the assessor failed to observe the requirements of s. 44(2) of *The Assessment Act*. Both the Municipal Board and the Court of Appeal have confirmed the assessments.

The first issue is on the assessment of the roadway or right-of-way, which by s. 44(2)(*a*) the assessor is required to assess in the following way:

> (*a*) the roadway or right-of-way at the actual value thereof according to the average value of land in the locality; but not including the structures, substructures and superstructures, rails, ties, poles and other property thereon.

There is no dispute about the geographical limits within which land in the locality is to be taken to lie for the purpose of the computation required by the subsection. The difficulty arises from the phrase "average value of land in the locality". The assessor ignored in his computation the streets and public lanes within the area. The railway says that he is required to include them. If he does so and assesses them as of no value, as the railway says he must, the consequence will be a lower average value and a lower assessment for these railway lands. The argument is simple. Streets are

land; they are not excluded from land by the interpretation section of *The Assessment Act*; all real property in Ontario is liable to assessment and taxation subject to certain exemptions from taxation; and by s. 4(8) streets are assessable but not taxable. Therefore streets in the matter of area but not in the matter of value must be included in computing the average value of land in the locality. Any other procedure, it is said, would involve the addition of words to the statute, the filling in of supposed gaps and the usurpation by the court of the function of the legislature. (*Magor and St. Mellons Rural District Council v. Newport Corporation*[1]).

This argument for the application of the literal or plain meaning rule to the construction of s. 44(2)(*a*) fails to recognize that the phrase to be construed is "average value of land in the locality" and that the word "value" is not self-explanatory. Streets have value and they are land. But it is not the same kind of value as that attributable to the land which borders on the streets. The ambiguous word in the phrase is "value". Streets have value for public use but they have no monetary worth, marketable price or value in exchange. It was for this reason that the Municipal Board upheld the assessor in excluding them from the computation.

Words are not mathematical symbols. In every context the word "value" cannot have the same meaning or shade of meaning. As a matter of statutory construction I think the Municipal Board was correct in finding that "value" in the context of s. 44(2)(*a*) meant "value in exchange" for this is what the Board did when it supported the assessor in averaging the value of all those lands in the locality which have value of the nature and kind in question.

I prefer the basis of the decision of the Municipal Board to that of the Court of Appeal, which held that land in the locality meant taxable land in the locality. There can be land in the locality which has a value in exchange and which is subject to the same assessment as other land but is exempt from taxation. The sounder interpretation, it seems to me, with respect, is to say that "value" in this context means "value in exchange".

The purpose of this legislation is clear. Its purpose is equality—to require the assessor to treat this kind of railway property as other property in the neighbourhood—and

[1] [1952] A.C. 189, [1951] 2 All E.R. 839.

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Judson J.

the exclusion of public streets and lanes from the calculation of the average value of land in the locality is required if the purpose is to be attained.

The second issue in the appeal is on the assessment of six parcels of land used for a variety of railway purposes, most of which are essential to the continued operation of the railway. These are to be assessed under the provisions of s. 44(2)(*d*) of *The Assessment Act,* which reads as follows:

> (*d*) the real property not designated in clauses *a, b* and *c* of this sub-section in actual use and occupation by the Company, at its actual cash value as the same would be appraised upon a sale to another company possessing similar powers, rights and franchises.

This section confronts the assessor with a very difficult task—an appraisal of the actual cash value of these assets on a notional sale between two railway companies. I agree with Roach J.A. that the reason for the introduction of the notional sale was to avoid any suggestion that these assets could be valued at their scrap or salvage value. Old illustrations of cases where this had to be done because of the wording of the legislation are to be found in *Re London Street Railway Assessment*[1], *Re Queenston Heights Bridge Assessment*[2], *Re Bell Telephone and City of Hamilton*[3].

The railway submits that these assets must be valued as part of a going concern and that this valuation must depend largely on the earnings of the company. Therefore, it is submitted, the assessor must begin with the last quinquennial assessment of these assets in 1949. This assessment had been confirmed on appeal to the Municipal Board. Ten per cent. should be added to this figure, because during the period 1950 to 1954 railway earnings had increased by this amount.

I can see no reason why the assessor must take as his starting point the last quinquennial assessment of these assets. His task is defined by the subsection. The test is an appraisal on notional sale of these particular assets to another railway company and not on a notional sale of all the assets of the Canadian Pacific Railway Company to another railway company. The assessor is not required to value these assets as part and parcel of the whole Canadian

[1] (1900), 27 O.A.R. 83. [2] (1901), 1 O.L.R. 114.
[3] (1898), 25 O A.R. 351.

Pacific Railway system and base his valuation upon the earnings of the system. The subsection does not require this and the sheer impossibility of such a task is sufficient to condemn this interpretation.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: F. H. Britton, Toronto.

Solicitor for the respondent: John Ryan, Sudbury.

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*May 2, 3, 4
Nov. 21

MARWELL EQUIPMENT LIMITED AND BRITISH COLUMBIA BRIDGE & DREDGING COMPANY LIMITED (*Plaintiffs*) ..... APPELLANTS;

AND

VANCOUVER TUG BOAT COMPANY LIMITED, OWNERS OF THE TUG *LA DENE* AND THE BARGE *V.T. 5* (*Defendants*) ..... RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA, BRITISH COLUMBIA ADMIRALTY DISTRICT

Shipping—Collision—Removal of wreck by owner—Liability of defendants —Limitation of liability—Canada Shipping Act, R.S.C. 1952, c. 29, ss. 657, 659—Navigable Waters Protection Act, R.S.C. 1952, c. 193, ss. 13, 14, 15, 16.

The respondent company and a master in its employ were held to be liable in an action for damages arising from a collision in the Fraser River of a scow owned by the company, when in tow by a tug also owned by the company, with a barge owned by the appellant M. The trial judge found that the collision was caused solely by the negligence of the master of the tug, but found that the company was entitled to limit its liability under ss. 657 and 659 of the *Canada Shipping Act*, as well for the damage caused by the sinking as for the cost incurred by the appellants in removing the wreck at the direction of the river authorities. The appellants appealed to this Court.

Held (Locke and Cartwright JJ. *dissenting*): The appeal should be allowed in part.

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*PRESENT: Locke, Cartwright, Martland, Judson and Ritchie JJ.

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Per Curiam: The findings of the trial judge that the sinking was caused by the improper navigation of the tug and scow and that this occurred without the actual fault or privity of the respondent should not be disturbed. Accordingly the respondent is not deprived of its right to limit its liability under s. 657 of the *Canada Shipping Act* in relation to the claim for the loss of the dredge.

Per Martland, Judson and Ritchie JJ.: The words "in respect of loss or damage" in s. 657 of the Act are not used to define the wrongful act of the shipowner whose vessel causes damage, but are used to define that kind of damage in relation to which, the wrongful act having occurred, he may limit his liability. *Burger v. Indemnity Mutual Marine Assurance Company Limited,* [1900] 2 Q.B. 348, applied.

Section 659 only affords protection to a shipowner in respect of a claim for loss or damage caused to property or rights of any kind by reason of improper navigation or management of the ship. This is not to be read as applying to any kind of damage resulting from the infringement of another's rights. The section limits liability for the infringement of rights in respect of a particular kind of loss or damage, i.e., loss or damage caused to property or to rights. The "rights" referred to must be rights which may be subject to loss or damage.

The claim with respect to the expense incurred in removing the wreck is not one for damage to property. Neither is it a claim for loss or damage to the appellant's rights. Nor was there any claim in damages for damage to the property or rights of the Crown, as distinct from those of the appellants, which could make s. 659 applicable.

The Crown's claim, in respect of the obstruction to navigation caused by the sinking of the dredge, was for the enforcement of the statutory duties imposed and of its statutory rights created by the *Navigable Waters Protection Act* and not a claim for damages for damage to its own property or rights.

Therefore s. 659 does not enable the respondent to limit its liability in respect of the claim for the cost of removing the wreck. *The Urka,* [1953] 1 Lloyd's Rep. 478; *The Millie,* [1940] P. 1; *The Stonedale No. 1,* [1955] 2 All E.R. 689, applied.

Per Locke J., *dissenting*: The sinking of the dredge occurred through the negligence of the respondent, and there was imposed upon the owners the statutory obligation to remove the wreck. This was a direct result of the negligent act and was damage "in respect of" the damage to the dredge within the meaning of s. 657 of the Act and to the "rights" of the appellants within the meaning of s. 659. *The Stondale No. 1, supra; The Millie, supra,* distinguished; *The Urka, supra,* not followed.

Per Cartwright J., *dissenting*: If damages flow sufficiently directly from a wrongful act to be recoverable in an action in tort based on that act it is not possible to say that they are not damages "in respect of" that wrongful act. If they were not in respect of such act they would not be recoverable.

The expense incurred in removing the wreck forms part of the damages for which the respondent is liable, and the respondent is entitled to limit its liability accordingly.

APPEAL from a judgment of Sidney Smith D.J.A.[1] Appeal allowed in part, Locke and Cartwright JJ. dissenting.

D. McK. Brown and *R. M. Hayman,* for the plaintiffs, appellants.

J. I. Bird and *F. O. Gerity,* for the defendants, respondents.

LOCKE J. (*dissenting*):—This is an appeal by the plaintiffs in the action from the judgment of the Deputy Judge in Admiralty at Vancouver[1] by which the respondent company and G. M. L. Harwood, the master of the tug *La Dene,* were held to be liable for damages arising from the collision between the scow *V.T. 5,* when in tow by the said tug, and the dredge *Townsend* owned by the appellant, Marwell Equipment Ltd. in the Fraser River on the evening of March 14, 1957. The learned judge found that the collision was caused solely by the negligence of Harwood, the master of the tug, but found that the respondent company was entitled to limit its liability to both of the appellants under the provisions of ss. 657 and 659 of the *Canada Shipping Act,* as well for the damage caused by the sinking as for the cost incurred by the appellants for removing the dredge and other equipment from the bed of the river at the direction of the river authorities.

The defendant Harwood did not appeal and the finding that he was guilty of negligence in the navigation of the *La Dene,* which either caused or contributed to the collision, is not disputed. The issues to be determined are as to the respondent company's right to limit its liability under the sections of the *Shipping Act* referred to.

The Marwell Company was the owner of the dredge which was at the time in question under a charter by demise to the British Columbia Bridge and Dredging Co. Ltd. The dredge was not self-propelled and it was necessary to employ tugs to place her in position. Under a contract with the British Columbia Highway Toll and Bridge authority, the last named company (to be referred to as the Dredging Company) was preparing certain test holes in the bed of the Fraser River in connection with the intended construction of the Deas Island tunnel, which has since been completed, under the south arm of the Fraser River. The dredge

[1] [1960] Ex. C.R. 120, 32 W.W.R. 523.

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had been moved to the Ladner Ferry slip on March 9th and on March 12th was moved into a position located approximately 1,200 feet from the Deas Island shore on the south and something more than 600 feet from the Lulu Island shore on the north. Between the position of the dredge, as thus located, and the shore of the Deas Island there was a pipeline carried on pontoons designed to carry the sand and other material removed from the bed of the river by the dredge to be deposited on the island to the south. The south arm of the Fraser is navigable by deep sea vessels and there is a great deal of traffic both ways in that portion of the river between the sea and the Port of New Westminster and places to the east which passed the site of these operations. The requisite permission had been granted to the appellants for the carrying on of the work and the stationing of the dredge and the pipeline in the river and no question arises as to this.

The respondent company carries on extensive operations upon the west coast and in the Fraser River, operating a fleet of tugs employed, *inter alia,* by logging and lumber companies in towing scows and rafts of logs. Captain Harwood was a qualified master of long experience and had been employed by the respondent company for many years. He was not apparently assigned to any particular vessel, being employed on any of the tugs operated by his employer to which he might be directed. He had been on a holiday for the two weeks preceding the date in question but was recalled on the morning of that day and instructed to assume command of the tug *La Dene* at Marpole on the north arm of the river and to carry out a tow to Bellingham. He took charge of the tug at about 2.00 p.m. At about 4 o'clock that afternoon Captain Edward Y. Taylor, the senior despatcher of the respondent company, learned that the scows which were to be towed to Bellingham would not be ready and, having communicated with another company, arranged with them to tow the scows *V.T. 5* and the *I.T. 41* from a place near New Westminster to Duncan Bay. Taylor spoke to Harwood at some time between 4.30 and 5.00 o'clock communicating to him the changed instructions, and thereafter the latter proceeded with the *La Dene* to the place where these latter scows were loaded, at or near the easterly extremity of Lulu Island, arriving there at about 6 o'clock.

In taking the tugs in tow deep sea gear was used, the *V.T. 5* being about 300 feet behind the tug and the *I.T. 41* to the rear of it. The master estimated the total length of the tug and the tow as being close to 800 feet. The *La Dene* started on its voyage at 8.15 p.m. According to Harwood, the visibility was first rate and objects could have been seen at 8 or 9 miles. It is common ground that at some time during the afternoon of March 13 the respondent company received a written notice from the District Marine agent of the Department of Transport at Victoria dated March 11, 1957, entitled "Notice to Shipping" which stated that the hydraulic dredge *Townsend* would be operating in the main channel of the Fraser for approximately two weeks, anchored on the centre line of the Deas Island tunnel project approximately 1,000 feet from the Canada Rice Mills and approximately 600 feet north of the Deas Island dyke, and that a floating pipeline would extend from the dredge to Deas Island. Mariners were warned to pass to the north of the dredge and to exercise the necessary caution while these operations were in progress. On the evening of March 14 when Harwood left with his tow he was unaware of these facts, Taylor, whose duty it was to inform him having failed to do so.

There was a strong ebb tide at the time and with the river current together ran at the rate of approximately 3 to 4 knots. The speed of the tug with the tow was approximately 4 knots through the water, giving her speed over the ground of some 7½ knots. The dredge *Townsend* 115 feet in length and 36 feet in breadth was anchored headed upstream and carried two red lights suspended at a height between the two forward masts of the scow, two 1,500 watt floodlights at the front of the dredge, two deck lights and two 1,500 watt floodlights at the stern. On the pontoons carrying the pipeline there were 25 watt bulbs every 50 feet, these being some 22 in number, between the dredge and the shore. These lights were carried some 7 to 8 feet above the water.

The position of the dredge was in the Gravesend Reach of the river and the *La Dene,* moving downstream toward the sea, entered the reach at a place about 2 miles from the location of the dredge. While, according to Captain Harwood, he saw these lights, other than the red lights above mentioned, he thought they were the lights of the Ladner

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Ferry landing which was situate roughly 800 feet in a southerly direction from the dredge and which, it was shown, were of a substantially different nature, and he did not realize that the dredge and pipeline were in the position stated until he was about 400 feet distant from them. It was then clearly too late to avoid a collision between one of the scows and the dredge.

Captain Leonard Griffiths was the owner of the tug *Jarl* which was acting as tender for the *Townsend*. He saw the *La Dene* and the tow approaching when the latter was about 1½ mile distant and realized that the course it was following would take it to the south of the dredge, that is, between that vessel and the Deas Island shore. Griffiths, whose evidence was accepted by the learned trial judge, first called the *La Dene* on the radio but got no response and started upstream to warn that vessel, making several attempts on the way to communicate with it on the radio without getting any answer. In addition, Griffiths directed that the front side deck lights of his tug be flashed repeatedly in an endeavour to attract attention, and tried to do so by using the search light but this was of no avail. He passed the *La Dene* as he went upstream to a distance of some 50 to 75 feet and thereafter attempted to assist the extrication of that vessel from its position by pushing the second of the scows to the north. These efforts proved unavailing and the first of the scows hit the dredge on the starboard side causing her to sink. Captain Harwood said that he did not see the *Jarl* or the signals made by her described by Griffiths and the radio on the *La Dene* was not turned on.

Upon these facts the learned trial judge held that Harwood should have recognized that there was an obstruction in the channel on first entering the Gravesend Reach and found that he was negligent in failing to keep a proper lookout and in failing to appreciate the significance of the lights that were exhibited when he saw them, and that his failure was the sole cause of the collision.

Captain Harwood had said in his evidence that had he known of the presence of the dredge and the pipeline in the river he would not have attempted to take the *La Dene* and its tow down the river at all, and there was evidence by other masters to the same effect. There was, however, more

than 625 feet of navigable channel through which the tug and tow could have been safely directed to the north of the position of the dredge, and the finding at the trial that the sole cause of the accident was the negligence of the master shows that the learned trial judge considered that this was the case and that had the master steered a course closer to the north shore the collision would have been averted.

The finding that the negligence of Harwood at least contributed to the occurrence is not questioned by the parties to this appeal: the appellant, however, contends that the respondent has not satisfied the onus resting upon it of proving that the loss of the dredge and the consequent damage occurred without its actual fault or privity and that, accordingly, the limitation of liability permitted by s. 657 of the *Canada Shipping Act* is not available to it. Upon this aspect of the matter the learned trial judge held that if there was fault on the part of the respondent in failing to have communicated to Captain Harwood the fact of the presence of the barge and pipeline in the river, of which it had received notice on March 13, the negligence was that of a paid employee only and was without its "actual fault or privity" within the meaning of that expression in s. 657.

Section 657 of the *Canada Shipping Act,* R.S.C. 1952, c. 29, so far as it is relevant, reads:

> The owners of a ship, whether registered in Canada or not, are not in cases where all or any of the following events occur without their actual fault or privity, that is to say,
>
> * * *
>
> (*d*) where any loss or damages is by reason of the improper navigation of the ship caused to any other vessel . . .
>
> liable to damages . . . in respect of loss or damage to vessels . . . to an aggregate amount exceeding thirty-eight dollars and ninety-two cents for each ton of the ship's tonnage.

The history of the statutory provisions permitting the owners of vessels to limit their liability in this manner is to be found in Mayers' Admiralty Law, commencing at p. 161. In England the matter was dealt with in a statute passed in 1773 and later appeared as s. 503 of the *Merchant Shipping Act 1854* and as s. 502 of the Act of 1894. In an *Act Respecting the Navigation of Canadian Waters,* passed as c. 58 of the Statutes of Canada of 1858, s. 12 provided for the limitation, and this was repeated in a slightly varied form in c. 29 of the Statutes of 1880, R.S.C. 1886, c. 79 and

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R.S.C. 1906, c. 113. Each of these Canadian statutes contained the expression "actual fault or privity" adopted from the earlier English statutes.

I do not find any assistance in determining the meaning to be assigned to the expression where the ship owner is a limited company prior to the decision of the Court of Appeal and of the House of Lords in *Lennard Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd.*[1] When that case came before the Court of Appeal[2] Buckley L.J. said in part (p. 432):

> The words "actual fault or privity" in my judgment infer something personal to the owner, something blameworthy in him, as distinguished from constructive fault or privity such as the fault or privity of his servants or agents.

and Hamilton L.J. said in part (pp. 436-7):

> Actual fault negatives that liability which arises solely under the rule of "respondeat superior." . . .
>
> In the case of a company, the "owners" within the meaning of the section must be the person or persons with whom the chief management of the company's business resides.

The facts in that case were that the appellant company was managed by another limited company and J. M. Lennard who was a director of both companies was registered in the ship's register and designated as the person to whom the management of the vessel was entrusted. It had been found that Lennard knew or had the means of knowing of the defective condition of the ship's boilers which rendered her unseaworthy, but gave no instructions to the captain or the engineer regarding their supervision and took no steps to prevent the ship putting to sea with her boilers in that condition. It had been held at the trial that the owners had failed to discharge the onus which lay upon them of proving that the loss happened without their actual fault or privity. After referring to the language of s. 502 of the *Merchant Shipping Act 1894,* Viscount Haldane L.C. said in part (p. 713):

> Now, my Lords, did what happened take place without the actual fault or privity of the owners of the ship who were the appellants? My Lords, a corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purpose may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation. . . . It has not been contended at the Bar, and it could not

[1] [1915] A.C. 705. [2] [1914] 1 K.B. 419.

have been successfully contended, that s. 502 is so worded as to exempt a corporation altogether which happens to be the owner of a ship, merely because it happens to be a corporation. It must be upon the true construction of that section in such a case as the present one that the fault or privity is the fault or privity of somebody who is not merely a servant or agent for whom the company is liable upon the footing *respondeat superior*, but somebody for whom the company is liable because his action is the very action of the company itself.

The language employed by Buckley L.J., by Hamilton L.J. and by the Lord Chancellor which has been above quoted was approved and adopted in the judgment of the Judicial Committee in *Robin Hood Mills Ltd. v. Paterson Steamships Ltd.*[1]

At the relevant time J. C. F. Stewart, who had been in the employ of the respondent in various capacities for many years including that of general manager, was the vice-president of the company and in charge of its general administration. Rod Lindsay, the general manager of the company, was absent on a holiday in March of 1957 and Stewart was discharging his duties as well as his own. He was a director and, in answer to a question put to him in cross-examination, agreed that he was discharging the functions of a managing director at the time. Stewart said that he saw the notice to shipping referred to on the afternoon of March 13. It was proven that a second copy was given to Taylor, the senior despatcher, and Stewart said that it was the latter's duty to broadcast such notices so that the information would be in the possession of the respondent's vessels, all of which were fitted with telephonic equipment. The practice in the respondent's office was to have four such broadcasts daily, one of which would be made at 4 o'clock in the afternoon. According to Stewart, at about 3.30 in the afternoon of the 14th he went to the despatcher's office and asked Taylor if he had seen the notice. For some reason, objection was made to his giving evidence as to what then took place between him and the senior despatcher, which was clearly admissible on this issue, but he was permitted to say that as a result of what Taylor said to him he was satisfied that the notice was going to be put out over the air. He did not learn that this had not been done until after the accident later that day. Taylor, who was a qualified master who had been employed by the company as a

[1] [1937] 3 D.L.R. 1 at 6, 46 C.R.C. 293.

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despatcher for some nine years, said that he had seen the notice to shipping on the morning of March 14. He confirmed the evidence of Stewart that the latter had come to his office just before the 4 o'clock broadcast and had mentioned this particular notice and that he, Taylor, had told him that he had forgot to broadcast it on the earlier broadcast but would do so at 4 o'clock. It was apparently after the 4 o'clock broadcast that he spoke to Harwood on the telephone, the latter being then at Marpole, and he admittedly did not then communicate to him the contents of the notice. Taylor said that he did not think he had talked to the *La Dene* at the time of the 4 o'clock broadcast. It is not questioned that the information contained in the notice should have been communicated to the masters of the company's vessels operating on the Fraser River and, as Taylor did not know whether Harwood had heard the 4 o'clock broadcast clearly, he should have informed him.

While it was the duty of the despatchers to communicate the contents of such notices to those in charge of the respondent's ships Stewart was unable to explain why he had spoken to Taylor on the afternoon in question regarding this particular notice. The learned trial judge, however, accepted his evidence and that of Taylor that this had occurred. He found as a fact that Taylor and the other despatchers were reliable, competent and certificated men and had performed their duties for several years; that Stewart had spoken to Taylor at about 3.30 p.m. taking the copy of the notice with him, and asked Taylor if he had seen it and had then been told that he had not informed the tugs but would do so on the next broadcast which was to take place in about half an hour and that:

> With the assurance received from Capt. Taylor that he would inform all the tugs, Mr. Stewart left the Despatch Office and had no knowledge that the information had not in fact been conveyed until after the accident.

After referring to the decision in the *Asiatic Petroleum Company* and *Paterson Steamships* cases above mentioned, the judgment reads in part:

> I think it is conceded here that the *alter ego* of this Company consisted of Mr. Arthur Lindsay, the President, or Mr. James Stewart, the Vice President and General Manager. Mr. Lindsay may be dismissed from consideration . . .

It seems to me that just as Mr. Stevenson was the pertinent "heart" in the *City of Alberni* case (1947 Ex. Ct. Rep. 83), so I think is Mr. Stewart in the same position here . . .

The fault lay with Capt. Taylor, the senior Despatcher of the Company, and a man of very considerable experience both ashore and afloat. But he has no interest in the Company. He is not a shareholder; he is an employee, albeit an important one.

In view of the principles I have referred to above, it seems impossible for me to say that the Company must be held in "fault and privity" to his neglect and thereby barred from the indulgence provided by the relevant sections of the Canada Shipping Act.

The evidence appears to me to support the finding that the "directing mind and will" of the respondent company was at the time in question that of Stewart. I have read with care his evidence and the exhaustive cross-examination to which he was subjected. It appears to me to be strange that Stewart should on the afternoon in question have particularly mentioned the notice to shipping in question to the senior despatcher when it was that official's duty to communicate the information to the masters of the various tugs which might be operating on the Fraser River. However this may be, the learned and greatly experienced trial judge who heard Stewart and Taylor give their evidence believed them and I can find nothing in the record to justify us in interfering with his finding as to their credibility. This being so, whether or not the failure to advise Captain Harwood of the fact that the dredge was operating on the river was a contributory cause to the collision, the respondent is not, in my opinion, deprived of its right to limit its liability under s. 657 of the *Canada Shipping Act*.

It is said for the appellants that the respondent's system was defective in that proper logs were not maintained upon the tugs and that, as the evidence shows, Captain Harwood paid scant attention to radio broadcasts which he appeared to regard as something in the nature of a nuisance. The tug was well equipped with means of maintaining close telephonic communication with the headquarters of the company in Vancouver and was equipped with radar which, if used as the tug entered the Gravesend Reach, would have disclosed the presence of the obstruction in the river, and it seems apparent from the evidence that, at least so far as Captain Harwood is concerned, the regulations of the

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company in this regard had not been enforced. However, none of these matters contributed to the event in my opinion in view of the findings of fact that have been made.

I have read the judgment of the House of Lords in *"The Norman"* which is now available[1], where neglect was found on the part of the owners of the trawler in that Hellyer, put forward by the owners as the *alter ego* whose actual fault or privity would for the purpose of the action be deemed to be theirs, had been negligent in failing to communicate by wireless to the trawler information as to a rock, the presence of which was not indicated upon the available charts and the existence of which had been discovered after the vessel had sailed. The decision does not, however, assist the appellant in the present case where it was Taylor's duty, and Stewart did give express instructions, that the masters should be informed of the presence of the obstruction. It is unnecessary to discuss further the facts of "The Norman" case which bear no similarity to those in the present matter, other than the fact that the rock, as the dredge, was a danger to navigation.

A further question to be determined is as to the right of the respondent to limit its liability under the provisions of the *Canada Shipping Act* for the costs incurred by the appellant in removing the wreck of the dredge from the river following the demand made upon it by the New Westminster Harbour Commissioners.

Section 13 of the *Navigable Waters Protection Act,* R.S.C. 1952, c. 193, provides, *inter alia,* that where the navigation of any navigable water over which the Parliament of Canada has jurisdiction is obstructed by the sinking or grounding of any vessel, the owner of such vessel shall forthwith begin the removal thereof and prosecute such work diligently to completion. Under the terms of s. 16 as amended, if an owner has failed to remove such a wreck and the Minister has caused the same to be removed and where the cost thereof has been defrayed out of public money of Canada, the amount of such cost constitutes a debt recoverable by Her Majesty in right of Canada from the owner.

Following the sinking of the "Townsend" the New Westminster Harbour Commissioners, having jurisdiction in the matter, by a notice dated March 21, 1959, addressed to both

[1] [1960] 1 Lloyd's Rep. 1.

appellants, ordered them forthwith to remove the dredge *Townsend* which, it was said, was causing an obstruction to navigation in the Fraser River near Deas Island, on pain that if they did not remove the same, they would be held responsible for the resulting expense.

The appellants removed the wreck from the river and incurred expense in respect of which they claim to recover the amount of $108,039.06. The respondent claimed to be entitled to limit its liability and has been held entitled to do so by the judgment at the trial.

Section 659 of the *Canada Shipping Act* reads:

> The limitation of the liability of the owners of any ship set by s. 657 in respect of loss of or damage to vessels, goods, merchandise or other things shall extend and apply to all cases where without their actual fault or privity any loss or damage is caused to property or rights of any kind whether on land or on water, or whether fixed or moveable, by reason of the improper navigation or management of the ship.

This section is in the same language as that of an amendment made to the *Merchant Shipping Act,* 1894 (Imp.), in the year 1900.

The appellants' contention is expressed in their factum in these terms:

> The appellants submitted in the Court below, and submit in this Court that the claim for removal of the wreck constitutes a claim for damages arising out of a tort committed by respondent. Appellants' obligation arose out of the *Navigable Waters Protection Act,* c. 140, ss. 14 and 16. Appellants submit that the claim is not one for damage to rights in any case because appellants have no right to have their vessel positioned in the bottom of the river. On the contrary they have an obligation both at common law and by statute not to position their dredger in the bottom of the river.

In dealing with the question the learned trial judge distinguished the claim from that asserted in *The Stonedale*[1] upon the ground that in that case the claim was there advanced by the Manchester Ship Canal Company, a harbour authority entitled under the *Manchester Ship Canal Act,* 1936, to recover the cost of removing a wreck from the harbour. Such claim was not for damages for negligence, but was to recover upon the statutory obligation imposed by the Act.

[1] [1955] 2 All E.R. 689, [1956] A.C. 1.

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In the judgment delivered by Viscount Simonds in *The Stonedale* this is most clearly pointed out and he referred with approval to the judgment of Langton J. in *The Millie*[1], where the claim was of the same nature and where it had been held that the limitation permitted under the *Merchant Shipping Act,* 1894 (Imp.), as amended, was inapplicable.

On the argument before us we were referred to the decision in *The Urka*[2], to which the attention of the learned trial judge had not apparently been directed. That case was decided by Lord Sorn in the Court of Session. In a collision in Stornoway Harbour between *The Urka* and a coal hulk known as *The Portugal,* the hulk was sunk, due to faulty navigation on the part of the vessel, which was admitted. The owner's claim for the value of the hulk and the right to limit the liability in respect of that claim was admitted. A further claim was for the cost of removing the wreck of *The Portugal* on the demand of the Stornoway Harbour Commissioners, and it was held that in respect to this claim s. 503 of the *Merchant Shipping Act,* 1894 (Imp.), did not apply. Lord Sorn was of the opinion that the claim was not in respect of "loss of damage to property or rights", saying that when the owners of *The Portugal* incurred this expenditure they were neither rescuing their property nor vindicating their rights. The learned judge said that this was the identical question decided in *The Millie.*

I am unable with respect to agree with this judgment or with the reasoning upon which it proceeds. After saying that the identical question had been decided by Langton J. in *The Millie* it is said that while in that case there was a direct liability of the owner and the liability in the case of *The Portugal* was indirect the learned judge was of the opinion that this made no difference. This would appear to overlook the fact that as pointed out by the learned trial judge in the present matter and by Viscount Simonds in *The Stonedale* the only claim to which the sections of the *Merchants Shipping Act* permitting limitation of liability apply are those for damages for negligence and the claim of the Ship Canal Company was not such a claim.

[1] [1940] P. 1, 109 L.J.P. 17. [2] [1953] 1 Lloyd's Rep. 478.

In my opinion the claim for the cost of removing the wreck falls within the terms of ss. 657 and 659. By reason of the sinking of *The Townsend* through the negligence of the respondent the dredge was lost and there was imposed upon the owners the statutory obligation to remove the wreck. This was a direct result of the negligent act and was in my opinion damage "in respect of" the damage to the dredge within the meaning of s. 657 and to the "rights" of the appellants within the meaning of s. 659. I can see no basis for a contention that to impose a legal liability upon a third person by a negligent act is not an infringement of his rights.

I would dismiss this appeal with costs.

CARTWRIGHT J. (*dissenting*):—For the reasons given by my brother Locke I agree with his conclusion that we cannot disturb the findings of the learned trial judge that the sinking of the dredge *Townsend* was caused by the improper navigation of the tug *La Dene* and its tow the scow *V.T. 5* and that this occurred without the actual fault or privity of the respondent, the owner of the tug and scow.

The claim of the appellant, Marwell Equipment Limited, hereinafter referred to as Marwell, is set out in the statement of claim as follows:

14. The Plaintiff Marwell Equipment Limited has suffered damages in the amount of $682,041.70, particulars of which are:—

(*a*) Loss of dredge "Townsend"	$ 550,000.00
(*b*) Pipeline and pontoon damage	7,767.30
(*c*) Loss of equipment on dredge "Townsend" at time of sinking	28,239.06
(*d*) Loss of spare parts and materials on "Townsend" at time of sinking	7,048.48
(*e*) Loss of sandsucker including cost of removal	10,105.83
(*f*) Loss of rentals from "Townsend" for period March 15th, 1957 to November 1st, 1957	30,000.00
(*g*) Premium overtime expended during construction of Dredge "W. G. Mackenzie" to replace "Townsend" for the purpose of meeting Deas Island committment.	48,881.03

15. The Plaintiff Marwell Equipment Limited has also suffered the loss of $108,039.06, being the expense incurred in removal of the wreck of the dredge "Townsend" from the channel of the Fraser River, including cost of salvaging scrap, less the amount recovered through sale of this scrap.

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On the basis of the findings set out in the first paragraph of these reasons the appellant does not appear to question the right of the respondent to limit its liability in respect of any of the items claimed which may be allowed by the registrar in assessing the damages other than the item of $108,039.06 the expense incurred by the appellant in removing the wrecked dredge from the river.

While the learned trial judge left it to the registrar to assess the damages, it is implicit in his reasons and was not questioned before us that the damages which Marwell is entitled to recover from the respondent include the expenses of removing the wreck. In my opinion this is clearly the right view. In *The Stonedale No. 1*[1], Singleton L.J. says at page 176:

> If those responsible for the management of a ship are guilty of faulty navigation (or negligence) which causes damage to others, the measure of damages is governed by the ordinary rule, i.e., they are recoverable if they are the natural and probable results of the wrongful act.

It appears to me that it is a natural and probable result of sinking a dredge in that part of the Fraser River in which the *Townsend* sank that her owners will be put to the expense of removing the wreck. Indeed the whole argument before us proceeded on the basis that Marwell can recover this item from the respondent; if it were otherwise the question of the respondent's right to limit its liability in regard to the item would, of course, not arise at all.

In my opinion the learned trial judge was right in rejecting the argument that the case at bar is governed by *The Stonedale No. 1*[2] or by *The Millie*[3]. The cardinal difference between those cases and the case at bar is that neither of the former was and the latter is an action for damages.

The expense of removing the dredge with which we are concerned is merely one item among those making up the sum total of damages for which, when the reference is completed, the appellant will have judgment against the respondent. The *ratio decidendi* of *The Stonedale No. 1* and

[1] [1954] 2 All E.R. 170.

[2] [1953] 1 W.L.R. 1241, affirmed [1954] 2 All E.R. 170, affirmed [1955] 2 All E.R. 689.

[3] [1940] P. 1, 109 L.J.P. 17.

The Millie, that the amounts there in question were recoverable not as damages but as a statutory debt, has no application in the circumstances of the case before us.

In *The Stonedale No. 1* Viscount Simonds after referring to the anomalies which exist in this branch of the law said at page 693:

> But, having said so much about anomalies, I think it right to repeat that I found my opinion that the appellants have no right of limitation on the plain words of the statutes.

It appears to me that the solution of the question before us depends on the true meaning of s. 657(1) of the *Canada Shipping Act* which reads as follows:

> 657 (1) The owners of a ship, whether registered in Canada or not, are not, in cases where all or any of the following events occur without their actual fault or privity, that is to say,
>
> (*a*) where any loss of life or personal injury is caused to any person being carried in such ship;
>
> (*b*) where any damage or loss is caused to any goods, merchandise, or other things whatsoever, on board the ship;
>
> (*c*) where any loss of life or personal injury is, by reason of the improper navigation of the ship, caused to any person carried in any other vessel; and
>
> (*d*) where any loss or damage is, by reason of the improper navigation of the ship, caused to any other vessel, or to any goods, merchandise, or other things whatsoever on board any other vessel;
>
> liable to damages in respect of loss of life or personal injury, either alone or together with loss or damage to vessels, goods, merchandise, or other things, to an aggregate amount exceeding seventy-two dollars and ninety-seven cents for each ton of their ship's tonnage; nor in respect of loss or damage to vessels, goods, merchandise, or other things, whether there be in addition loss of life or personal injury or not, to an aggregate amount exceeding thirty-eight dollars and ninety-two cents for each ton of the ship's tonnage.

In some judgments the draftsmanship of the corresponding provision of the English Act has been subjected to criticism but on a careful analysis the purpose and meaning of the sub-section appear to me to be reasonably plain.

The primary purpose is to provide that in certain specified cases the liability of the owners of a ship to damages for which they would be liable under the principle *respondeat superior* is to be limited to amounts ascertained by reference to the tonnage of their ship. All the cases are conditioned upon the wrongful act giving rise to the right of action for damages having occurred without the fault or privity of the owners.

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The specified cases are those in which all or any of the events set out in clauses (*a*), (*b*), (*c*) and (*d*) occur. Once it appears that one or more of these events has occurred without the actual fault or privity of the owners their *right* to limit their liability is established but the *amount* to which it is limited will depend upon the clause or clauses under which the event (or events) giving rise to the liability for damages falls.

The primary purpose of the clauses introduced by the words "in respect of" in the two places in which they occur in the subsection is to assign the appropriate amount of limitation having regard to the event (or events) which has given rise to liability; whatever may be the aggregate amount of damages recoverable at common law it is reduced to the aggregate amount set by the sub-section.

In the case at bar the appropriate clause is (*d*) and the limitation is $38.92 for each ton of the combined tonnage of the tug and scow.

What then is limited in the case at bar is the aggregate amount of the respondent's liability to damages in respect of loss or damage to the dredge. The appellant's cause of action is for damages for the wrong done it by the respondent in damaging and thereby sinking its dredge by reason of improper navigation. The reason that it is entitled to have the cost of removing the wreck added to its other items of damage is that it is a part of the damages caused to it by the respondent's tortious act. The phrase "in respect of" as used in the sub-section appears to me to be at least as comprehensive as the phrases "resulting from", "caused by" or "in consequence of". I observe that the meanings given to the phrase "in respect of" in the Shorter Oxford English Dictionary, 3rd edition (1947) are:—"with reference to", "as relates to" "as regards".

It appears to me that all damages which Marwell is entitled to recover from the respondent for having sunk and damaged its dredge, since to be recoverable at all they must in contemplation of the law have been caused by that single wrongful act, are necessarily damages in respect of that act. I cannot follow the argument that an item of damage awarded as being caused by a wrongful act is not awarded in respect of that wrongful act.

I could understand (although I would not agree with) the argument that, since at common law the owners of a vessel sunk without any fault on their part were not bound to remove the wreck, the expense to which they were put in removing it for which, in the case at bar, they are liable only by virtue of the provisions of the *Navigable Waters Protection Act,* R.S.C. 1952, c. 193, was not a loss caused by the wrongful sinking; but if this argument were accepted the result would be that Marwell could not recover this item of expense from the respondent and no question of limitation of liability would arise in regard to it.

In construing an ordinary English phrase such as "in respect of" in one statute only limited assistance can be derived from cases construing it in other statutes or documents.

In *Tatam v. Reeve*[1], a Divisional Court composed of Bruce and Wright JJ. held that the words "in respect of any contract" were more comprehensive than the words "under any contract".

In *Lord Glanely v. Wightman*[2], Viscount Buckmaster at page 629 and Lord Tomlin at page 632 appear to treat the phrase "in respect of the occupation of lands" as the equivalent of "arising from the occupation of lands"; at page 637 Lord Wright holds that before an operation carried on on the land in question can be taxed as not being "in respect of the land" it must be shewn that the taxpayer "is there conducting some 'separate and distinct operation unconnected with the occupation of the land' ".

On the other hand, in *Burger v. Indemnity Mutual Assurance Company*[3], the Court of Appeal held that the words in a marine insurance policy agreeing to indemnify the assured against liability "in respect of injury to such other ship or vessel itself" were not equivalent to the words "in consequence of injury to such other ship or vessel" and did not cover a sum which the owners of the vessel sunk through the insured's negligence had been obliged to pay for the removal of the wreck and for which they had recovered judgment against the insured; but that decision appears to me to have turned upon the special wording of the policy and

[1] [1893] 1 Q.B. 44, 67 L.T. 683.
[2] [1933] A.C. 618, 102 L.J.K.B. 456.
[3] [1900] 2 Q.B. 348, 69 L.J.Q.B. 838.

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particularly on the view that if the words quoted were construed as "in consequence of injury to such other ship or vessel" it would render otiose some of the terms of the contract which followed. However, I have gained little help from these cases in which the phrase "in respect of" has been used in other contexts and I rest my judgment on what appears to me to be the meaning of s. 657(1).

For the reasons given by my brother Locke, I agree with his conclusion that we ought not to follow the decision in *The Urka*[1].

I have not found it necessary to refer to the terms of s. 659 of the *Canada Shipping Act*, as in my opinion, the respondent's right to limit its liability is found in the words of s. 657(1); certainly there is nothing in s. 659 to cut down this right of the respondent.

In my opinion if damages flow sufficiently directly from a wrongful act to be recoverable in an action in tort based on that act it is not possible to say that they are not damages "in respect of" that wrongful act. If they were not in respect of such act they would not be recoverable. I can see no more reason for denying the right of the respondent to limit its liability in regard to the item of $108,039.06 than in regard, for example, to items (*f*) and (*g*) claimed in paragraph 14 of the statement of claim, set out above.

In my view the item of expense with which we are concerned forms part of the damages for which the respondent is liable to the appellant in respect of the damage negligently done by the respondent's tug and scow to the appellant's dredge and the respondent is entitled to limit its liability accordingly.

I would dispose of the appeal as proposed by my brother Locke.

The judgment of Martland and Judson JJ. was delivered by

MARTLAND J.:—I agree with the conclusions of my brother Locke with regard to the respondent's right to limit its liability in relation to the appellants' claim for the loss of the dredger *Townsend*. With respect, however, I have reached a different conclusion concerning the appellants'

[1] [1953] 1 Lloyd's Rep. 478.

claim to recover the expenses which they incurred in connection with the removal of the wreck. In my opinion the limitation provisions of the *Canada Shipping Act*, R.S.C. 1952, c. 29, are not applicable to that claim.

Section 13 of the *Navigable Waters Protection Act*, R.S.C. 1952, c. 193, imposed upon the owner of the dredger the statutory duty to remove it. That section provides as follows:

13. (1) Where the navigation of any navigable water over which the Parliament of Canada has jurisdiction is obstructed, impeded or rendered more difficult or dangerous by the wreck, sinking, lying ashore or grounding of any vessel or part thereof or other thing, the owner, master or person in charge of such vessel or other thing, by which any such obstruction or obstacle is caused, shall forthwith give notice of the existence thereof to the Minister or to the collector of customs and excise at the nearest or most convenient port, and shall place and, as long as such obstruction or obstacle continues, maintain, by day, a sufficient signal, and, by night, a sufficient light to indicate the position thereof.

(2) The Minister may cause such signal and light to be placed and maintained, if the owner, master or person in charge of such vessel or other thing by which the obstruction or obstacle is caused fails or neglects so to do.

(3) The owner of such vessel or thing shall forthwith begin the removal thereof, and shall prosecute such removal diligently to completion; but nothing herein shall be deemed to limit the powers of the Minister under this Act. R.S., c. 140, s. 14.

Sections 14 and 15 go on to provide:

14. The Minister may, if, in his opinion,

(*a*) the navigation of any such navigable water is obstructed, impeded or rendered more difficult or dangerous by reason of the wreck, sinking, partially sinking, or lying ashore or grounding of any vessel, or of any part thereof, or of any other thing,

(*b*) by reason of the situation of any wreck or any vessel, or any part thereof, or of any other thing so lying, sunk, partially sunk, ashore or grounded, the navigation of any such navigable water is likely to be obstructed, impeded or rendered more difficult or dangerous, or

(*c*) any vessel or part thereof, wreck or other thing cast ashore, stranded or left upon any property belonging to Her Majesty in right of Canada, is an obstacle or obstruction to such use of the said property as may be required for the public purposes of Canada,

cause such wreck, vessel or part thereof or other thing, if the same continues for more than twenty-four hours, to be removed or destroyed in such manner and by such means as he thinks fit. R.S., c. 140, s. 15.

15. (1) The Minister may cause such vessel, or its cargo, or anything causing or forming part of any such obstruction or obstacle, to be conveyed to such place as he thinks proper, and to be there sold by auction

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or otherwise as he deems most advisable; and may apply the proceeds of such sale to make good the expenses incurred by him in placing and maintaining any signal or light to indicate the position of such obstruction or obstacle, or in the removal, destruction or sale of such vessel, cargo or thing.

(2) The Minister shall pay over any surplus of such proceeds or portion thereof to the owner of the vessel, cargo or thing sold, or to such other persons as are entitled to the same respectively. R.S., c. 140, s. 16.

The appellants performed the duty imposed upon them by s. 13. Had they not done so, the Minister of Transport could have caused the removal of the dredger, pursuant to s. 14, and the Crown could have recovered, as a debt, the cost of removal from the owner or from the respondent by virtue of s. 16 of the Act, the material portions of which provide as follows:

16. (1) Whenever, under the provisions of this Part, the Minister has caused

(*b*) to be removed or destroyed any wreck, vessel or part thereof, or any other thing by reason whereof the navigation of any such navigable waters was or was likely to become obstructed, impeded or rendered more difficult or dangerous,

and the cost of maintaining such signal or light or of removing or destroying such vessel or part thereof, wreck or other thing has been defrayed out of the public moneys of Canada, and the net proceeds of the sale under this Part of such vessel or its cargo, or the thing that caused or formed part of such obstruction are not sufficient to make good the cost so defrayed out of the public moneys of Canada, the amount by which such net proceeds falls short of the costs so defrayed as aforesaid, or the whole amount of such cost, if there is nothing that can be sold as aforesaid, is recoverable with costs by the Crown.

(i) from the owner of such vessel or other thing, or from the managing owner or from the master or person in charge thereof at the time such obstruction or obstacle was occasioned, or

(ii) from any person through whose act or fault, or through the act or fault of whose servants such obstruction or obstacle was occasioned or continued.

Had the Minister taken this course and claimed the cost of removal from the respondent, it would seem clear that, applying the reasoning of the House of Lords in *The Stonedale No. 1*[1], the respondent would not have been entitled to limit its liability under s. 659 of the *Canada Shipping Act*. The relevant portions of s. 657 and s. 659 of that Act are as follows:

657. (1) The owners of a ship, whether registered in Canada or not, are not, in cases where all or any of the following events occur without their actual fault or privity, that is to say,

[1] [1955] 2 All E.R. 689.

(*d*) where any loss or damage is, by reason of the improper navigation of the ship, caused to any other vessel, or to any goods, merchandise, or other things whatsoever on board any other vessel;

liable to damages in respect of loss of life or personal injury, either alone or together with loss or damage to vessels, goods, merchandise, or other things, to an aggregate amount exceeding seventy-two dollars and ninety-seven cents for each ton of their ship's tonnage; nor in respect of loss or damage to vessels, goods, merchandise, or other things, whether there be in addition loss of life or personal injury or not, to an aggregate amount exceeding thirty-eight dollars and ninety-two cents for each ton of the ship's tonnage.

659. The limitation of the liability of the owners of any ship set by section 657 in respect of loss of or damage to vessels, goods, merchandise, or other things shall extend and apply to all cases where, without their actual fault or privity, any loss or damage is caused to property or rights of any kind, whether on land or on water, or whether fixed or movable, by reason of the improper navigation or management of the ship.

The question in this issue is as to whether the respondent is in a better position in relation to the claim by the appellants than it would have been had the claim been made by the Crown for expense of the removal of the dredger by the Minister of Transport.

The learned trial judge held that the limitation provisions of the *Canada Shipping Act* did apply. His reasoning on this point is as follows[1]:

It seems clear that the Marwell Company only did what it was bound to do, and undoubtedly it has a claim against the defendants. The question is, however, whether the limitation clause applies to the defendant company. The nature of the claim for reimbursement of cost of recovering a wreck has been considered in several English cases, and it has been held that since the limitation section only limits liability for damages, and the right of the authorities who have incurred expense to collect from the owner, does not sound in damages, but is based on a statutory debt, the limitation section is no defence to the claim. *The "Stondale" No. 1,* (1954) P. 338: (1955) 2 All E.R. 689.

Here, however, the claim is not by the harbour authorities, but by the owner. And there is nothing in the *Navigable Waters Protection Act* that gives the owner a new right to sue the wrong-doer, so that suit cannot be based on statutory debt. Equally there is no contractual relation, so it seems that any claim against the defendants must be based in tort; c.f. the reasoning of Willmer, J. (the trial Judge), (1953) 1. W.L.R. 1241) as opposed to that of the Court of Appeal in *The "Stondale" No. 1* (*supra*). I therefore see no escape from the conclusion that the Marwell Company can claim its outlays from the wrongdoers as part of its damages consequent on the negligence that caused the sinking; and that involves the limitation section in the *Canada Shipping Act* applying for the benefit of the defendant Company.

[1] (1960), 32 W.W.R. 523 at 525.

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MARWELL EQUIPMENT LTD. AND BRITISH COLUMBIA BRIDGE & DREDGING CO. LTD. v. VANCOUVER TUG BOAT CO. LTD.

Martland J.

I agree that if the Minister of Transport had caused the dredger to be removed, the recovery of this expense, pursuant to s. 16 of the *Navigable Waters Protection Act*, either from the owner or from the respondent, would have been the recovery of a statutory debt and there could have been no limitation of liability in respect of such a claim. The appellants' claim against the respondent in this case is for indemnity for the expense of performing the statutory duty imposed upon them in consequence of the fault of the respondent's servants. I do not agree that this leads to the conclusion that the limitation provisions of the *Canada Shipping Act* become applicable. The respondent is only entitled to the protection afforded by them if the appellants' claim is of the kind defined in them. As Viscount Simonds said in his judgment in *The Stonedale No. 1*, at page 691, with reference to *The Merchant Shipping (Liability of Shipowners and Others) Act, 1900*, s. 1 of which is the same as our s. 659 of the *Canada Shipping Act*:

> That Act, by Part 8, dealt with the subject of the liability of shipowners, and I pause to observe that the right of a shipowner to limit his liability forms no part of our common law but is entirely the creature of statute and must be found within its four corners.

The position in this case is that, because of the negligence of the respondent's servant, the appellants, without any negligence on their own part, have been made liable for the performance of a statutory duty imposed upon them by the *Navigable Waters Protection Act*. They have been required to spend money for the removal of the sunken dredge. At common law, there being no negligence on their part, that duty would not have arisen (*Dee Conservancy Board v. McConnell*[1]). Had they failed to fulfil that statutory duty the appellants, as also the respondent, could have been made liable to the Crown under that Act for the expense of the removal of the dredge by the Crown as a statutory debt. That liability could not have been limited either by the appellants or by the respondent under the provisions of the *Canada Shipping Act*.

Section 657 of that Act permits limitation of liability where, by reason of improper navigation of a ship, loss or damage is caused to another vessel, but only "in respect of loss or damage" to that vessel. In my opinion the words just

[1] [1928] 2 K.B. 159, 97 L.J.K.B. 487.

quoted are not used to define the wrongful act of the shipowner whose vessel causes damage. They are used to define that kind of damage in relation to which, the wrongful act having occurred, he may limit his liability. This he can only do in the case of a collision between vessels (apart from claims for loss of life or personal injury) where the damages are for loss of or damage to the other vessel or the goods, merchandise or other things on board it or on board his own vessel. This is not a claim for that kind of damage. The language used in the section to define those kinds of damage in respect of which liability may be limited is not broad enough to describe the statutory obligation to raise the dredger which arose as a result of the respondent's tort.

I find support for my view of the limited meaning of the words "in respect of loss or damage to vessels" in s. 657 in the judgment of the Court of Appeal in *Burger v. Indemnity Mutual Marine Assurance Company, Limited*[1]. In that case, which involved the interpretation of a policy of marine insurance, the issue was as to whether the insurer's covenant, in the event of a collision by the insured ship with another ship, to pay "in respect of injury to such other ship or vessel itself" would include the amount which the assured had to pay for the removal of a tug which had sunk after collision with the insured vessel. The tug owners had had to pay the cost of removal to the river commissioners, who had removed it and then asserted their statutory power to recover the expense. The tug owners, in turn, had obtained a judgment against the assured. The Court unanimously held that the policy did not cover that expense. Dealing with the words of the policy quoted above, Vaughan Williams L.J., at p. 351, said:

> The question in this case depends on the meaning of the words "sums . . . in respect of injury to such other ship or vessel itself, or to the goods and effects on board thereof, or for loss of freight then being earned by such other ship or vessel." It seems to me that those words, which enumerate the subject-matters against which the underwriters undertake by the collision clause to indemnify the assured, taken as they stand, are clear enough, and need no explanation. I think that prima facie it is impossible to say that a sum of money which the assured has been compelled to pay in respect of the expenses of clearing the tideway of the Tees is a sum paid "in respect of injury to such other ship or vessel."

[1] [1900] 2 Q.B. 348, 69 L.J.Q.B. 838.

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MARWELL EQUIPMENT LTD. AND BRITISH COLUMBIA BRIDGE & DREDGING CO. LTD. v. VANCOUVER TUG BOAT CO. LTD.

Martland J.

Section 659 only affords protection to a shipowner in respect of a claim for loss or damage caused to property or rights of any kind by reason of improper navigation or management of the ship. I do not read this as applying to any kind of damage resulting from the infringement of another's rights. The section does not so state. It limits liability for the infringement of rights in respect of a particular kind of loss or damage, i.e., loss or damage caused to property, or to rights. The "rights" referred to in this section must be rights which may be subject to loss or damage.

The claim with which we are concerned here is not one for damage to property. That was the subject-matter of the claim for the loss of the dredger itself to which s. 657 applied. Is it a claim for loss or damage to the appellants' rights? I do not think that it is. As previously stated, the substance of the matter is that as a consequence of the improper navigation of the respondent's tug a statutory liability was imposed upon the appellants by s. 13(3) of the *Navigable Waters Protection Act*. The only rights created under that Act were granted to the Crown and not to the appellants. I agree with the words of Lord Sorn in *The Urka*[1], where he says:

> In order to come within the words of the section, the pursuers' liability for this claim must be held to be a liability in respect of "loss or damage to property or rights," etc. First of all, then, can it be said that the liability is in respect of any loss or damage to property or rights of the defenders, the owners of the *Portugal*, who present the claim? Obviously not. The *Portugal* was their property, but its loss is covered by their other claim, and this claim is not in respect of any loss or damage to property of theirs. Nor can it be said to be in respect of any loss or damage to any right of theirs. When they incurred this expenditure they were neither rescuing their property nor vindicating their rights.

Was there then, as the result of the improper navigation of the tug, any claim in damages for damage to the property or rights of the Crown, as distinct from those of the appellants, which could make s. 659 applicable? Again I do not think that there was. It was on this phase of the issue that Lord Sorn in *The Urka* said that the matter had been determined by Langton J. in *The Millie*[2]. The judgment of Langton J. in that case has been confirmed by the House of Lords in *The Stonedale No. 1, supra.* In both cases it was held that the claim of the Manchester Ship Canal Company

[1] [1953] 1 Lloyd's Rep. 478 at 480.
[2] [1940] P. 1, 109 L.J.P. 17.

in respect of interference with navigation in the canal by reason of the sinking of a vessel was a claim for statutory debt and not covered by the limitation provisions of s. 1 of the *Merchant Shipping (Liability of Shipowners and Others) Act, 1900,* which, as already noted, is the same as s. 659 of the *Canada Shipping Act*. In the present instance, as evidenced by the letter dated March 21, 1957, from The New Westminster Harbour Commissioners to the appellants, the Crown's claim, in respect of the obstruction to navigation caused by the shinking of the dredge, was for the enforcement of the statutory duties imposed and of its statutory rights created by the *Navigable Waters Protection Act* and not a claim for damages for damage to its own property or rights.

In my view, therefore, s. 659 of the *Canada Shipping Act* does not enable the respondent to limit its liability in respect of this part of the appellants' claim.

In my opinion, the appeal on this point should be allowed and the appeal in respect of the question of limitation of liability regarding the damage to the dredger itself should be dismissed. I think that the appellants should be entitled to their costs in this Court and in the Court below.

RITCHIE J.:—I agree with the conclusions of Mr. Justice Locke with respect to the respondent's right to limit its liability in relation to the appellants' claim for loss of the dredge *Townsend,* but I share the view expressed by Mr. Justice Martland that the appellants' claim for the costs and expenses of removing the wreck is not one to which the limitation provisions contained in s. 657 of the *Canada Shipping Act,* R.S.C. 1952, c. 29, are applicable.

I would dispose of this appeal as proposed by my brother Martland.

Appeal allowed in part with costs, LOCKE *and* CARTWRIGHT JJ. *dissenting.*

Solicitors for the plaintiffs, appellants: Russell & Dumoulin, Vancouver.

Solicitors for the defendants, respondents: Campney, Owen & Murphy, Vancouver.

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*Nov. 1
Nov. 28

LOUIE YUET SUN (*Applicant*) .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Aliens—Deportation—Chinese mother—Non-immigrant—Child born in Canada during visit—Right to deport mother—The Immigration Act, R.S.C. 1952, c. 325—The Canadian Citizens Act, R.S.C. 1952, c. 33—The Canadian Bill of Rights, 1960 (Can.), c. 44.

The applicant, a citizen of China, came to Canada on a non-immigrant visa issued to her in Hong Kong. Her husband and two other children remained in Hong Kong. During her stay in Canada, a son, issue of her marriage, was born to her. A deportation order was made against her by a special enquiry officer under the *Immigration Act*. This order was quashed by the trial judge, but restored by the Court of Appeal.

Held: The appeal should be dismissed.

The applicant fell within the terms of s. 5(*t*) of the Act and of ss. 18 and 20 of the Regulations, and has not been deprived of her liberty except by due process of law. The fact that she was the mother of a legitimate child born in Canada had no bearing on the matter.

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

G. A. MacKay, for the applicant, appellant.

D. S. Maxwell and *N. Chalmer,* for the respondent.

The judgment of the Court was delivered by

THE CHIEF JUSTICE:—This is an appeal by Mrs. Louie Yuet Sun from a judgment of the Court of Appeal for Ontario[1] reversing a decision of King J. which had quashed a deportation order made against the appellant under the *Immigration Act,* R.S.C. 1952, c. 325. As set out in the factum of the appellant, it appears that she is a citizen of China who came to Canada as a visitor in December 1957 by way of Hong Kong. She was in possession of a passport in which was entered a Canadian non-immigrant visa issued to her in Hong Kong. She had been allowed entry into Canada for a period of six months and later her permit was extended another six months to December 1958. She had come to Canada to visit her father and brother, who live

*PRESENT: Kerwin C.J. and Taschereau, Locke, Cartwright, Fauteux, Abbott, Martland, Judson and Ritchie JJ.

[1] [1960] O.W.N. 476.

in Ottawa. Her husband, a farmer, and her two children, remained in Hong Kong. She, who is now twenty-nine years of age, and her husband, who is thirty-one years of age, were married in China in 1948. On August 18, 1958, while she was in Ottawa, the appellant gave birth to a son, a child of that marriage.

Since the permission she had received to enter Canada had expired, the appellant reported to an immigration officer as required by the Act. She was examined by the officer who made a report under s. 23 of the Act that it would be contrary to the provisions of the Act to grant admission to or otherwise let the appellant come into Canada by reason of her coming under the prohibited classes of s. 5, para. (*t*) thereof, in that she could not or did not fulfil or comply with the conditions or requirements of ss. 18 and 20 of the Regulations promulgated under the Act. Subsequently an enquiry was held by a special enquiry officer, who decided that the appellant might not come into or remain in Canada as of right and that (1) she was not a Canadian citizen; (2) she was not a person having Canadian domicile; (3) she was a member of a prohibited class described in s. 5(*t*) of the Act in that she could not and did not fulfil or comply with the conditions or requirements of the Act or the Regulations because: (*a*) she did not have an immigrant visa as required under subs. 3 of s. 18 of the Regulations; (*b*) she did not come within the provisions of subs. (*d*) of s. 20 of the Regulations. He accordingly ordered her to be detained and to be deported.

King J. held that the appellant was not a person within the meaning and intent of s. 5(*t*) of the Act because she had recently given birth to a child in Canada; the child being a natural born Canadian citizen had a right to live in Canada and was entitled to the love, care and attention of its mother. The mother desired to remain in Canada because she thought it would be better for the child. No reasons were given by the Court of Appeal but upon consideration I can see no basis for the judgment of the judge of first instance. If the appellant chooses to take the child with her, the material indicates that the Hong Kong authorities are willing to receive her and the child. If, on the other hand, she chooses to leave the child here, he is entitled to remain in Canada. It is not denied that the

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applicant falls within the terms of the relevant sections of the Act and Regulations, and, unless the fact that she is the mother of a legitimate child born in Canada affects the matter, she has not been deprived of her liberty except by due process of law. In my view that fact has no bearing on the matter.

Any other points raised in the Courts below were abandoned before us. The appeal should be dismissed without costs.

Appeal dismissed without costs.

Solicitors for the appellant: McMichael, Wentzell & MacKay, Ottawa.

Solicitor for the respondent: D. S. Maxwell, Ottawa.

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*Oct. 18, 19
Dec. 19

THE LABOUR RELATIONS BOARD OF THE PROVINCE OF NEW BRUNSWICK (*Defendant*) ..... APPELLANT;

AND

EASTERN BAKERIES LIMITED (*Plaintiff*) ..... RESPONDENT.

AND

LOCAL UNION NO. 76, TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN, HELPERS AND MISCELLANEOUS WORKERS AND THE ATTORNEY GENERAL OF NEW BRUNSWICK.

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

Labour—Union application for certification as a bargaining agent for certain employees—Attempt by company to include employees not resident within Province—Jurisdiction of Labour Relations Board—Right of Board to participate in certiorari proceedings—Labour Relations Act, R.S.N.B. 1952, c. 124.

The union made application under the provisions of the *Labour Relations Act* of New Brunswick for certification as bargaining agent for all employees of the respondent company, employed in certain categories, at the latter's Moncton plant. At the hearing of the application before

*PRESENT: Kerwin C.J. and Taschereau, Locke, Cartwright, Fauteux, Abbott, Martland, Judson and Ritchie JJ.

the Labour Relations Board, respondent endeavoured unsuccessfully to have the bargaining unit described to include all employees "on the payroll of the Moncton plant". Pursuant to the terms of an order made on June 26, 1959, the Board's secretary conducted a mail vote, but only respondent's employees resident and employed in New Brunswick were considered by him as eligible to vote. A majority of the said employees being in favour of the union as bargaining agent, the Board issued a certification order.

The respondent company obtained a writ of certiorari removing the matter to the Court of Appeal, which Court granted a rule absolute and quashed the certification order. The Board then appealed to this Court.

Held: The appeal should be allowed and the order of certification restored.

Per Kerwin C.J. and Taschereau and Cartwright JJ.: The final order for certification correctly carried out the Board's previous direction as embodied in its order of June 26, 1959. The Board never intended and never ordered that the bargaining agent should include non-resident employees.

The New Brunswick Labour Relations Board can have no jurisdiction over persons residing and working outside that province so as to declare that they are part of the membership of a unit of the company's employees residing and working in New Brunswick.

In this case the Board not only had a right to be heard in Court but was entitled to make clear exactly what had occurred and as to the position it took on the question of its jurisdiction. *The Labour Relations Board of Saskatchewan v. Dominion Fire Brick and Clay Products, Ltd.*, [1947] S.C.R. 336, referred to.

Per Locke, Cartwright, Fauteux, Abbott, Martland, Judson and Ritchie JJ.: The certification order should be so interpreted that the Board intended to limit its application to employees working at respondent's Moncton plant. Therefore no constitutional question as to the competence of the Board to make the order can arise.

There was nothing in the record to establish that the appellant acted in excess of its jurisdiction or that it declined jurisdiction, and as the order of the Board was not attacked on any other ground it was not subject to review by the Courts in proceedings by way of *certiorari*.

APPEAL from a judgment of the Supreme Court of New Brunswick, Appeal Division[1], granting a rule absolute for a writ of *certiorari*. Appeal allowed.

Eric L. Teed, for the defendant, appellant.

Adrien Gilbert, Q.C., for the plaintiff, respondent.

E. R. Pepper, for the Attorney-General for Ontario.

L. Lalande, Q.C., for the Attorney-General of Quebec.

Lorne Ingle, for the Attorney-General for Saskatchewan.

[1] (1960), 44 M.P.R. 213, 23 D.L.R. (2d) 635.

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LABOUR RELATIONS BOARD OF NEW BRUNSWICK v. EASTERN BAKERIES LTD. et al.

Kerwin C.J.

R. W. Cleary, for the Attorney-General for Alberta.

Ian P. Maikin, for Local Union No. 76, Teamsters, Chauffeurs, Warehousemen, Helpers and Miscellaneous Workers.

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

THE CHIEF JUSTICE:—Upon the application of Eastern Bakeries Limited, a Justice of the Supreme Court of New Brunswick ordered the Registrar to issue a writ of *certiorari* directed to the Labour Relations Board of the Province for the removal into the Court of the Board's order of July 31, 1959, certifying Teamsters, Chauffeurs, Warehousemen, Helpers and Miscellaneous Workers Local Union #76 to be the bargaining agent for certain employees employed by "Eastern Bakeries Limited, Moncton, N.B.", and also the application for certification, and all proceedings upon which the said order for certification was based. Such writ was to be made returnable at the next sitting of the Court of Appeal at which time and place it was ordered that the Board show cause why the said certification should not be quashed or such order made as might seem right. The writ was duly issued the next day.

The application for the writ was supported by the affidavit of John G. Patterson, branch manager of the company's plant at Moncton, to which was attached as Exhibit A a copy of a letter to the company, dated June 9, 1959, from the Board under the signature of its secretary, John C. Tonner, notifying the company that the Board had received an application from the union for certification as bargaining agent affecting teamsters, chauffeurs, warehousemen, helpers and miscellaneous workers Local Union #76 and "Eastern Bakeries Ltd., Moncton, N.B.". The letter also enclosed a copy of the application and drew the company's attention to the Board's rules as to the necessity of the company filing a notice of desire to intervene to contest or not to contest the application and file a reply thereto. Exhibit B to Mr. Patterson's affidavit is a copy of the application which was made by the Local Union for certification as a bargaining agent pursuant to the *Labour*

Relations Act of New Brunswick, R.S.N.B. 1952, c. 124, as amended. In answer to No. 4 on the form of application for certification reading:

> Description and location of the bargaining unit which applicant claims is appropriate for collective bargaining and for which certification is desired,

the applicant gave the description and location of the bargaining unit as:

> All employees of the employer employed as driver salesmen, spare driver-salesmen, special delivery drivers and highway drivers and helpers employed at the Moncton plant of the Employer.

In the application the union stated that the total number of employees in the unit which it desired to represent was fifteen and the approximate total number of employees in the work, undertaking, business, plant or plants involved was seventy-five. The number of employees in the proposed bargaining unit who were members in good standing of the union was stated to be twelve or a percentage of eighty per cent. Exhibit C to Mr. Patterson's affidavit is a copy of the reply of the company to the application. That reply alleges that the description of the bargaining agent was not appropriate but in the event of certification any bargaining unit should include all such employees of the company whether at Moncton or elsewhere and requested that the Board investigate and rule that the proposed bargaining unit is not an appropriate unit for collective bargaining. Exhibit D is a copy of the Board's order, dated June 26, 1959, defining the appropriate bargaining unit as "all driver-salesmen, spare driver-salesmen, special delivery drivers, highway drivers and driver helpers employed by Eastern Bakeries Limited, Moncton, N.B.". Exhibit E is a copy of the Board's order, dated July 31, 1959, certifying Local No. 76 as the bargaining agent "for all driver-salesmen, spare driver-salesmen, special delivery drivers, highway drivers and driver helpers employed by Eastern Bakeries, Limited, Moncton, N.B.".

The above being the material upon which the writ of *certiorari* was issued, the Board submitted, as an answer, "the attached return, being the order for certification; the application for certification, the affidavit of John C. Tonner as to the proceedings taken before the Board, and the reasons for the same". Exhibit A to the affidavit of John C.

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Tonner referred to is a copy of the application to the Board for certification,—already filed on the application for the writ. Mr. Tonner's affidavit stated that at the hearing part of the proceedings were recorded by a recording machine and part of the proceedings were unrecorded. Exhibit B to his affidavit was a copy, certified by him as true, of the minutes of the hearing whereby it appeared that on that occasion the solicitor for Eastern Bakeries Limited stressed that the appropriate unit should be "All Driver-Salesmen, Spare Driver Salesmen, Special Delivery Drivers, Highway Drivers and Driver Helpers on the payroll of the Moncton, N.B. branch of the Eastern Bakeries Limited". The minutes also show that the Board directed that the appropriate unit would be "all employees employed as driver salesmen, spare driver salesmen, highway drivers and driver helpers employed by Eastern Bakeries Limited, Moncton branch". Mr. Tonner's affidavit further stated:

> That during the hearing the Board advised Eastern Bakeries Limited that it considered it had no jurisdiction in other Provinces and for the purposes of Certification, any person employed and resident outside the Province of New Brunswick was not an employee within the meaning of the New Brunswick Labour Relations Act for purposes of the application.

Following the hearing, the Board made an order defining the bargaining unit and directing a vote to be taken. The company furnished a list of employees—twenty-two resident and employed in New Brunswick, three resident and employed in Prince Edward Island, and thirteen resident and employed in Nova Scotia. Pursuant to the Board's decision that employees resident in Prince Edward Island and Nova Scotia were not employees for the purposes of the application, Mr. Tonner, as returning officer, ruled that those persons were not eligible to vote and he conducted a vote by mail. His return certified that the number of eligible workers was twenty-two; that the number of votes cast was eighteen and that the number who voted "Yes" was fourteen and that four voted "No".

The Appeal Division of the Supreme Court of New Brunswick made absolute the rule and quashed the certification order of the Board. In the reasons for judgment it is stated that the secretary, as returning officer on the vote, certified the Local Union as the bargaining agent for "all driver-salesmen, spare driver-salesmen, special delivery drivers,

highway drivers and driver helpers employed by Eastern Bakeries Limited, Moncton, N.B.". The reasons stated that the "special delivery drivers" classification which had been omitted from the direction of the Board of June 26, 1959, was included in its order for certification of July 31, 1959; and later that "the wording used by the board to define the bargaining unit can be interpreted only as including in it the non-resident employees ruled ineligible to vote". While in the minutes of the Board the words "special delivery drivers" are omitted in what is stated to have been the Board's direction, the order of the Board, dated June 26, 1959, signed by the secretary and issued as a result of the meeting of that date, does include them. Subsection (1) of s. 47 of the *Labour Relations Act* reads:

> Any document purporting to contain or to be a copy of any rule, decision, direction, consent or order of the Board, and purporting to be signed by a member of the Board, or the secretary thereof, shall be accepted by any court as evidence of the rule, decision, direction, consent, order or other matter therein contained of which it purports to be a copy.

In view of all the material before the Court, it appears to be clear that the final order for certification of July 31, 1959, correctly carried out the Board's previous direction as embodied in its order of June 26, 1959. The Board never intended and never ordered that the bargaining agent should include non-resident employees.

However, the Appeal Division also decided that in the number of employees hired at the Moncton branch of the company there should be included not only those who resided in New Brunswick, but also those who resided in Nova Scotia and Prince Edward Island. It is stated that the Attorney General of New Brunswick was named as an intervenant in the New Brunswick Court but there is nothing to indicate that he was represented before the Appeal Division. Because of the constitutional problem that might arise he, together with the Attorney General of Canada and the Attorney General of each of the other provinces, were notified of the proceedings in this Court but only the Attorneys General of Ontario, Quebec, Saskatchewan and Alberta appeared by counsel. The union had been allowed to intervene and counsel on its behalf filed a factum and appeared. All of these, except counsel for the Attorney General of

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Quebec, supported the appellant while the latter supported the position of the respondent in so far as the constitutional point might be involved.

There is no evidence as to where the hiring of the resident employees in Nova Scotia or Prince Edward Island occurred, but it does not advance the case for the respondent if it took place at Moncton. The New Brunswick Labour Relations Board can have no jurisdiction over persons residing and working outside that province so as to declare that they are part of the membership of a unit of the company's employees residing and working in New Brunswick. The fact of proximity in the present instance does not distinguish it from the case where employees of a company in Toronto may do work similar to that of other employees of the same company in the same category residing and working in Montreal. Such latter employees could not be included by an order of the Ontario Labour Relations Board under similar legislation in Ontario for the purpose of declaring a bargaining unit. The decision of this Court in *Attorney General for Ontario v. Scott*[1] deals with an entirely different matter.

The Appeal Division considered that counsel for the Board should have refrained from involvement in the controversy. In *The Labour Relations Board of Saskatchewan v. Dominion Fire Brick and Clay Products, Limited*[2], it was held by the majority of the Court that the Labour Relations Board of Saskatchewan had a right to be heard in Court. In this particular case the Board not only had such a right but was entitled to make clear exactly what had occurred and as to the position it took on the question of its jurisdiction.

The appeal should be allowed and the order for certification of the Board restored. No order as to costs was made by the Appeal Division in making absolute the order *nisi* and quashing the certification order; nor was any order as to costs made when that Court gave leave to the Board to appeal to this Court. The parties have agreed that there should be no costs of the appeal to this Court.

[1] [1956] S.C.R. 137, 114 C.C.C. 224.
[2] [1947] S.C.R. 336, 3 D.L.R. 1.

The judgment of Locke, Fauteux, Abbott, Martland, Judson and Ritchie JJ. was delivered by

ABBOTT J.:—This appeal by the Labour Relations Board of New Brunswick is from a decision of the Supreme Court of New Brunswick rendered February 12, 1960, granting a rule absolute for a writ of *certiorari* and quashing an order of the Board given July 31, 1959, certifying Teamsters, Chauffeurs, Warehousemen, Helpers and Miscellaneous Workers, Local Union No. 76 (which I shall hereafter refer to as the union) as bargaining agent for certain employees of Eastern Bakeries Ltd., Moncton, N.B.

The facts are these: On June 5, 1959, the union made application under the provisions of the *Labour Relations Act* of New Brunswick, R.S.N.B. 1952, c. 124, for certification as a bargaining agent for all employees of the respondent company employed as driver salesmen, spare driver salesmen, special delivery drivers, and highway drivers and helpers, at the Moncton plant of the respondent.

Pursuant to the provisions of the *Labour Relations Act,* and rules made thereunder, appellant gave notice of the application for certification to respondent, and hearing of the application was held on June 26, 1959, at which respondent was represented by one of its officers and by counsel. Respondent had filed a reply to the application, objecting that the proposed bargaining unit was not an appropriate unit, and also submitting that it did not have the requisite number of employees.

In its application for certification as bargaining agent, the union asked that the bargaining unit contain only persons "employed at the Moncton plant of the employer". At the hearing before the Board, respondent endeavoured to have the bargaining unit described to include all employees *"on the payroll* of the Moncton plant", but the Board refused to accept that description.

An affidavit of the secretary of the Board filed in the present proceedings states that during the hearing the Board advised the respondent that it considered it had no jurisdiction in other provinces and, for the purposes of certification, any person employed and resident outside the Province of New Brunswick was not an employee within the meaning of the New Brunswick *Labour Relations Act,* for the purposes of the application.

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Abbott J.

The order of the Board, made on the same day as the hearing, defined the bargaining unit in the following terms:

All Driver-Salesmen, Spare Driver-Salesmen, Special Delivery Drivers, Highway Drivers and Driver Helpers employed by Eastern Bakeries Limited, Moncton, N.B.

The order directed that a vote be taken to determine the wishes of the employees concerned.

In a letter dated July 2nd from the secretary of the Board to the respondent, with reference to the vote which the Board had directed to be taken, it was stated:

The N.B. Labour Relations Board has directed that a vote be conducted in connection with the above-mentioned application. A copy of the Board's order is enclosed.

This vote will be conducted by mail and those eligible to vote are all Driver-Salesmen, Spare Driver-Salesmen, Special Delivery Drivers, Highway Drivers and Driver Helpers. Needless to say the vote will be limited to employees in the above classification *employed in the Province of New Brunswick.*

It will be necessary for you to provide the writer with a list of such employees, showing their addresses, at your earliest convenience. Your early attention to this matter will be appreciated.

A copy of the Board's order of June 26 was enclosed with this letter. In a letter to the respondent's solicitor dated July 10 the secretary of the Board stated:

As you are aware the Labour Relations Board of New Brunswick has no authority to certify a bargaining agent for employees in any other province.

The material before us establishes that at the hearing the Board made a decision that it had no jurisdiction in other provinces and that for the purposes of certification a person employed and resident outside New Brunswick was not an employee for the purposes of the application. That ruling was made in the presence of representatives of both the respondent and the union.

Section 55(1)(*a*) and (*f*) of the *Labour Relations Act* provide as follows:

55. (1) If in any proceeding before the Board a question arises under this Act as to whether

(*a*) a person is an employer or employee;

* * *

(*f*) a group of employees is a unit appropriate for collective bargaining;

* * *

the Board shall decide the question and its decision shall be final and conclusive for all the purposes of this Act.

There is no doubt that under s. 8(1) of the Act the Board could determine as a bargaining unit a group of the respondent's employees comprising those employees employed in New Brunswick at the Moncton plant. That is what the application of the union sought. That was the kind of group which, on the basis of its decision at the hearing, the Board had decided to certify.

Respondent furnished appellant with a list of the names and addresses of employees of its Moncton branch, of whom 22 were resident and employed in New Brunswick, and 16 outside that province. Pursuant to the terms of the order, the secretary of the Board acting as returning officer, conducted a mail vote, but only respondent's employees resident and employed in New Brunswick were considered by him as eligible to vote. A majority of the employees to whom ballots were sent, were in favour of the union as bargaining agent, and on July 31, 1959, the Board made the certification order which is the subject of the present appeal.

Upon the view (i) that the Board was entitled to include in a bargaining unit, certified under the Act, persons who reside outside New Brunswick and (ii) that the terms of the order should be interpreted as including in it non-resident employees ruled ineligible to vote, and thereby deprived of an opportunity to express their wishes, the Court below held that "as the condition precedent to the exercise by the Board of its jurisdiction did not exist, the certification order was made without authority and should be quashed".

The respondent operates plants at various points in New Brunswick and also a plant in Nova Scotia. It would no doubt have been preferable to include in the formal order the word "at" immediately before the words "Moncton, N.B.", but it is obvious from the correspondence between appellant and respondent which is in the record, from the proceedings before the Board, and from the vote subsequently taken, that there was no doubt in the mind of the parties but that the Board intended to limit the application of the order to employees working at respondent's Moncton plant and, with the utmost respect for the learned judges in the Court below who reached a different view, in my opinion the order should be so interpreted. It follows, of

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LABOUR RELATIONS BOARD OF NEW BRUNSWICK v. EASTERN BAKERIES LTD. et al.

Abbott J.

course, that no constitutional question as to the competence of the Board to make the order in question can arise here.

Since preparing these reasons, I have had the opportunity of considering those of the Chief Justice. Had the Board attempted to include in its order persons working in another province, I share his view that the Board can have no jurisdiction over such persons.

There was no failure to give an opportunity to be heard, and therefore no question of jurisdiction can arise on this ground. The Act imposes no obligation on the Board to adopt any particular method in order to ascertain the wishes of employees to be included in a proposed bargaining unit. Section 8(1) provides only that the Board "shall take such steps as it deems appropriate to determine the wishes of the employees in the unit as to the selection of a bargaining agent to act on their behalf". In my opinion, there is nothing in the record to establish that the appellant acted in excess of its jurisdiction or that it declined jurisdiction, and as the order of the Board was not attacked on any other ground it was not subject to review by the Courts in proceedings by way of *certiorari*.

I would allow the appeal and restore the order of the Board. It was agreed at the hearing before us that there would be no costs on the appeal to this Court.

CARTWRIGHT J.:—I agree with the reasons of the Chief Justice and with those of my brother Abbott and would dispose of the appeal as they propose.

Appeal allowed.

Solicitor for the defendant, appellant: Eric L. Teed, Saint John.

Solicitors for the plaintiff, respondent: Gilbert, McGlogan & Gillis, Saint John.

Solicitor for Local Union No. 76, Teamsters, Chauffeurs, Warehousemen, Helpers and Miscellaneous Workers: Ian P. Mackin, Saint John.

TRADERS FINANCE CORPORATION LTD. (*Defendant*) ..... APPELLANT;

1960
*Jun. 6
Nov. 21

AND

EMILIEN LEVESQUE (*Plaintiff*) .....RESPONDENT.

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

Bankruptcy—Payment within three months of bankruptcy—Refusal of trustee to institute proceedings—Proceedings taken by creditor—Delay—Whether cause of action prescribed—Civil Code, art. 1040—The Bankruptcy Act. R.S.C. 1952, c. 14, ss. 16, 64.

Alleging that a debtor had, within three months of his assignment in bankruptcy, made to the defendant a payment which constituted an illegal preference, and alleging that the trustee had refused to institute proceedings in annulment, the plaintiff was authorized pursuant to s. 16 of the *Bankruptcy Act* to commence this action in his own name for a declaration that the payment was a fraudulent preference and for recovery of the amount. The plaintiff commenced the action some three years after the payment, but within the year of his obtaining a knowledge thereof. The action was maintained by the trial judge and by a majority judgment in the Court of Appeal. The defendant argued that as the plaintiff was the assignee, under s. 16 of the Act, of the rights of the trustee whose rights had expired by virtue of the second paragraph of art. 1040 of the *Civil Code*, since he had been appointed more than a year prior to the commencement of the action, the trustee had no rights to assign and the claim was prescribed.

Held: The appeal should be dismissed and the action maintained.

Per Kerwin C.J. and Taschereau, Fauteux and Abbott JJ.: A creditor, in the circumstances of this case, is not the assignee of the rights of the trustee. What s. 16 of the *Bankruptcy Act* gives to the creditor is a right to be preferred over the other creditors; and this right, which the creditor exercises by his action, is given to him by the law and not by the trustee. Since the trustee never had this right, he could not assign it to the creditor.

Assuming, without deciding, that art. 1040 of the *Civil Code* could apply, the action would not be prescribed as it was taken within the year of the creditor's obtaining knowledge of the payment.

Per Locke J.: Article 1040 of the *Civil Code* has no application to the cause of action referred to in s. 64 of the *Bankruptcy Act*, when asserted either by the trustee or under s. 16 by a creditor claiming by virtue of an assignment. It was not "by reason of anything contained in" section 6 of the *Code*, being arts. 1032 to 1040 inclusive, that the creditor sought to recover and did recover. But it was as the assignee of the right of action conferred by s. 64 of the *Bankruptcy Act*, which right is given alone to the trustee. The *Bankruptcy Act* being silent as to the delay within which the action under s. 64 must be instituted, the action, in this case, was not prescribed.

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

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TRADERS FINANCE CORPN. LTD. v. LEVESQUE

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], affirming a judgment of Casgrain J. Appeal dismissed.

G. Dorion, Q.C., for the defendant, appellant.

G. Pelletier, for the plaintiff, respondent.

The judgment of Kerwin C.J. and of Taschereau, Fauteux and Abbott JJ. was delivered by

FAUTEUX J.:—En octobre 1953, la compagnie Garage Causapscal Limitée, dont les ventes d'automobiles étaient financées par l'appelante suivant la pratique et le mode usuels, faisait cession de ses biens. A peine dix jours avant celui de la cession, l'appelante obtenait de la compagnie un paiement de $5,702.21. Créancier de la débitrice pour une somme de $12,000, l'intimé, dont la réclamation fut d'abord refusée par le syndic et plus tard admise par jugement de la Cour, n'acquit la connaissance de ce paiement qu'en février 1956. Considérant qu'au regard, particulièrement, des prescriptions de l'art. 64 de la *Loi sur la faillite*, S.R.C. 1952, c. 14, ce paiement était, en l'espèce, un paiement frauduleux, il somma le syndic de prendre des procédures pour en faire déclarer la nullité au bénéfice de l'actif. Celui-ci ayant refusé d'agir, l'intimé se prévalut des dispositions de l'art. 16 de la loi précitée et obtint du tribunal une ordonnance l'autorisant d'intenter, en son propre nom, des procédures contre l'appelante. C'est ainsi qu'après avoir satisfait aux exigences de l'art. 16 et aux conditions fixées par l'ordonnance du tribunal, l'intimé intentait, par voie de requête à la Cour supérieure siégeant en faillite, et ce, dans l'année de la connaissance acquise de ce paiement, l'action en justice conduisant au présent appel.

L'appelante contesta et après enquête et audition, le Juge de première instance fit droit au recours de l'intimé. Porté en appel[1], ce jugement fut confirmé par une décision majoritaire dont l'appelante se pourvoit maintenant devant cette Cour, après y avoir été autorisée.

Au seuil de la considération du mérite de cet appel, il convient de noter les faits suivants. Il est admis aux plaidoiries que la débitrice a bien, dans les dix jours précédant celui de la cession, fait à l'appelante le paiement

[1] [1960] Que. Q.B. 264.

en question. Il ne fait aussi aucun doute que si ce paiement doit être retenu comme validement fait, il aura pour effet de procurer à l'appelante une préférence sur d'autres créanciers, dont l'intimé. Enfin, la preuve au dossier supporte amplement, comme il est expressément ou implicitement reconnu par les Juges de la majorité en Cour d'Appel, la proposition que la présomption de fraude édictée en l'art. 64 de la *Loi sur la faillite* à l'égard de tels paiements, n'a pas été repoussée, ainsi qu'en a jugé le Juge de première instance.

Dans cette situation, il reste à considérer le principal moyen soumis par l'appelante, devant les Cours inférieures et en cette Cour, et voulant que les procédures intentées par l'intimé soient tardives.

Sur ce point, l'appelante argumente comme suit. L'intimé, dit-elle, qui, au défaut d'agir du syndic, a obtenu, en vertu de l'art. 16 de la *Loi sur la faillite,* le droit de prendre des procédures, est cessionnaire des droits du syndic et ne saurait avoir, en cette qualité, plus de droits qu'en avait le cédant. Or, poursuit-elle, lorsqu'à la suite de l'ordonnance du tribunal, le syndic, se soumettant aux dispositions de l'article, déclarait céder ses droits à l'intimé, le syndic était déjà et depuis l'année suivant le jour de sa nomination en octobre 1953, déchu du droit de poursuivre l'appelante si l'on applique, comme on le doit, le deuxième paragraphe de l'art. 1040 du *Code Civil.*

Cet article, visant spécifiquement les recours accordés au créancier par le *Code Civil,* dans le cas des contrats et paiements faits en fraude de ses droits, se lit comme suit:

> 1040. Aucun contrat ou paiement ne peut être déclaré nul, en vertu de quelqu'une des dispositions contenues en cette section, à la poursuite d'un créancier individuellement, à moins que telle poursuite ne soit commencée avant l'expiration d'un an à compter du jour qu'il en a eu connaissance.
>
> Si la poursuite est faite par des syndics ou autres représentants des créanciers collectivement, elle devra être commencée dans l'année à compter du jour de leur nomination.

Mais est-il bien vrai, dans le cas qui nous occupe, que l'intimé soit, d'après l'art. 16 de la *Loi sur la faillite,* le cessionnaire des droits du syndic. C'est là la première question à décider. Car si cette prétention, sur laquelle se fonde tout le raisonnement de l'appelante, est mal fondée, il devient inutile de poursuivre l'examen des autres questions que soulève ce raisonnement.

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TRADERS FINANCE CORPN. LTD. v. LEVESQUE

Fauteux J.

Cette prétention s'appuie uniquement sur la partie ici soulignée du premier paragraphe de l'art. 16 qu'il convient de reproduire au long:

16. (1) Si un créancier exige que le syndic intente des procédures qui, à son avis, seraient à l'avantage de l'actif, et que le syndic refuse ou néglige d'intenter ces procédures, le créancier peut obtenir du tribunal une ordonnance l'autorisant à intenter des procédures en son propre nom et à ses propres frais et risques, en donnant aux autres créanciers avis des procédures projetées, et selon les termes et conditions que peut ordonner le tribunal; *et lorsque cette ordonnance est rendue, le syndic doit céder et transporter au créancier tout son droit, titre et intérêt dans les droits incorporels ou dans l'objet des procédures, y compris tout document à l'appui.*

(2) Tout profit provenant de procédures exercées en vertu du paragraphe premier, jusqu'à concurrence de sa réclamation et des frais, appartient exclusivement au créancier intentant ces procédures, et l'excédent, s'il en est, appartient à l'actif.

(3) Si, avant qu'une ordonnance soit rendue en vertu du paragraphe premier, le syndic, avec la permission des inspecteurs, déclare au tribunal qu'il est prêt à intenter les procédures au profit des créanciers, l'ordonnance doit prescrire le délai qui lui est imparti pour ce faire, et dans ce cas l'avantage résultant des procédures, si elles sont intentées dans le délai ainsi prescrit, appartient à l'actif.

Les biens du débiteur sont le gage commun de ses créanciers, et, dans le cas de concours, le prix s'en distribue par contributions, à moins qu'il n'y ait entre eux des causes légitimes de préférence. Dans une faillite ou cession, l'art. 16, au refus du syndic de prendre des procédures au bénéfice mais aux risques et dépens de l'actif, accorde au créancier diligent qui désire poursuivre en son nom et à ses risques et dépens, une préférence exclusive jusqu'à concurrence de sa réclamation et des frais. C'est ce droit de préférence que l'intimé fait valoir par ses procédures. Ce droit, c'est la loi et non le syndic, qui le lui confère. Il diffère, d'ailleurs, essentiellement de celui que le syndic, agissant pour la collectivité des créanciers, aurait pu faire valoir au bénéfice de l'actif. Le fait qu'au soutien des procédures qu'il pouvait prendre, en l'espèce, le syndic aurait invoqué, comme l'a fait l'intimé dans celles qu'il a prises, le caractère frauduleux du paiement, permet bien de dire qu'ils avaient tous deux un moyen commun mais non un droit et un recours identiques. N'ayant jamais eu le droit et le recours de l'intimé, le syndic ne pouvait le lui céder.

Sous l'ancienne *Loi sur la faillite,* S.R.C. 1927, c. 11, ce même droit de préférence était accordé au créancier par l'art. 69; mais c'est le syndic qui le faisait valoir en son

nom pour le bénéfice du créancier, lequel fournissait un cautionnement pour l'indemniser de ses frais. L'article 16 de la nouvelle loi maintient ce droit de préférence, mais prescrit que l'action pour l'exercer doit être prise par le créancier personnellement et non plus par le syndic. C'est pour cette raison que le Parlement a, par l'art. 16, obligé ce dernier à céder et transporter au créancier tout son droit, titre et intérêt dans les droits incorporels ou dans l'objet des procédures, y compris tout document à l'appui, lorsqu'est rendue l'ordonnance autorisant le créancier à poursuivre. Cette obligation est une conséquence et non une condition du droit de préférence et du droit de poursuivre pour l'exercer.

Aussi bien, et en toute déférence pour ceux qui peuvent avoir l'opinion contraire, la prétention de l'appelante ne peut pas être acceptée.

Dans ces vues, il n'est pas nécessaire de décider si les déchéances spécifiquement établies en l'art. 1040 du *Code Civil* pour des recours qui, s'apparentant à celui qu'autorise l'art. 16, en diffèrent, peuvent recevoir une application en l'espèce. Mais assumant, sans le décider, que tel soit le cas, d'accord avec MM. les Juges Pratte et Choquette, je dirais que le point de départ des déchéances prescrites par cet article varie selon que la poursuite est intentée par le créancier ou par le syndic. Il s'ensuivrait alors que l'intimé ayant poursuivi dans l'année de la connaissance acquise du paiement frauduleux, son action ne saurait être considérée comme tardive aux termes de cet article.

Je renverrais l'appel avec dépens.

LOCKE J.:—In my opinion, the provisions of art. 1040 of the *Civil Code* have no application to the cause of action asserted by the respondent and, on that ground, this appeal should fail.

By the petition addressed to the judge in bankruptcy dated October 9, 1956, the fact of the payment by the bankrupt to the appellant within three months of the date of the bankruptcy was recited. It was alleged that this constitued an illegal preference, that the respondent had asked the trustee to institute proceedings against the appellant which he had refused to do, and asked authority to proceed in the petitioner's own name for the recovery of the amount.

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TRADERS FINANCE CORPN. LTD. v. LEVESQUE

Locke J.

The order made by Dion J., which authorized the commencement of the action, stated that it was made under the provisions of s. 16 of the *Bankruptcy Act*.

The petition filed on January 23, 1957, alleged that the proceedings were taken pursuant to leave granted by the last mentioned order, that within three months preceding the bankruptcy the bankrupt had paid to the appellant the sum of $5,702.01 and that this payment constituted a fraudulent preference, illegal and null as against the trustee, the creditors of the bankrupt in general and the respondent in particular: that at the date of payment the bankrupt was insolvent to the knowledge of the appellant and that the trustee had transferred to the petitioner all his right, title and interest in the claim on January 23, 1957. The claim for relief asked a declaration that the payment was a fraudulent preference and for recovery of the amount so paid, with interest.

The assignment from the trustee, so far as relevant, read:

> Je cède et transporte au créancier Emilien Lévesque de Ste-Florence, tous mes droits, titres et intérêts dans la réclamation que monsieur Emilien Lévesque peut avoir contre Traders Finance Corporation et ce, en vertu d'une ordonnance du Tribunal autorisant ledit Emilien Lévesque à intenter des procédures en son propre nom et à ses propres frais et risques contre Traders Finance Corporation.

The learned trial judge found that the payment had been made within three months preceding the bankruptcy, that the appellant was aware that the garage company was insolvent and declared that the payment was fraudulent and void as against the trustee and the respondent as his assignee.

Article 1040 of the *Civil Code* forms part of s. 6 of the third title of the Code and reads:

> No contract or payment can be avoided by reason of anything contained in this section, at the suit of any individual creditor, unless such suit is brought within one year from the time of his obtaining a knowledge thereof.
>
> If the suit be by assignees or other representatives of the creditors collectively, it must be brought within one year from the time of their appointment.

The learned trial judge considered that the limitation referred to in the first sentence of the article applied and that, as it had been shown that the respondent for the first

time obtained knowledge of the payment within one year of the date upon which the action was commenced, the claim was not barred.

It was the contention of the present appellant that this was error in that it was the second sentence of the article which applied and that, since the trustee had been appointed more than a year prior to the commencement of the action, the claim was prescribed. This argument was rejected by the learned judges of the Court of Appeal[1], other than by Hyde J. who considered that the appeal should succeed on the ground that the cause of action which the trustee purported to assign had been prescribed before the assignment to the respondent was given, that accordingly the trustee had no rights to assign and the action failed.

Section 64 of the *Bankruptcy Act* reads in part:

> Every conveyance or transfer of property or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any insolvent person in favour of any creditor or of any person in trust for any creditor with a view of giving such creditor a preference over the other creditors shall, if the person making, incurring, taking, paying or suffering the same becomes bankrupt within three months after the date of making, incurring, taking, paying or suffering the same, be deemed fraudulent and void as against the trustee in bankruptcy.
>
> (2) If any such conveyance, transfer, payment, obligation or judicial proceeding has the effect of giving any creditor a preference over other creditors, or over any one or more of them, it shall be presumed *prima facie* to have been made, incurred, taken, paid or suffered with such view as aforesaid whether or not it was made voluntarily or under pressure and evidence of pressure shall not be receivable or avail to support such transaction.

The section in terms provides that a transfer of property of the nature and under the circumstances described is fraudulent and void as against the trustee in bankruptcy. The appellant misconceived the effect of the section in alleging in his petition that the transfer was illegal and null as well against the creditors of the bankrupt in general as against himself as a creditor. The right of action conferred by the section is to obtain a declaration that the conveyance is null and void and to recover the property conveyed, and that right is given alone to the trustee. It was as the assignee of that right that the respondent sued and was found at the trial to be entitled to recover.

[1] [1960] Que. Q.B. 264.

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TRADERS FINANCE CORPN. LTD. v. LEVESQUE

Locke J.

The limitation in art. 1040 is that no payment can be avoided *"by reason of anything contained in this section"* and it is not by reason of anything contained in section 6, being art. 1032 to 1036 and 1038 to 1040 both inclusive, that the respondent sought to recover and did recover. The article, therefore, in my opinion does not affect the matter.

It may be said that provisions similar to those contained in the articles of the *Civil Code* to which I have referred are to be found in statutes of most of the provinces of Canada. They are to be found in British Columbia in the *Fraudulent Preferences Act,* R.S.B.C. 1948, c. 132, in Alberta in the *Fraudulent Preferences Act,* R.S.A. 1955, c. 120, in Saskatchewan in the *Fraudulent Preferences Act,* R.S.S. 1953, c. 362, in Manitoba in the *Assignments Act,* R.S.M. 1954, c. 11, and in Ontario in the *Assignment and Preferences Act,* R.S.O. 1950, c. 26. All of these statutes deal with the rights of creditors to set aside conveyances made by persons in insolvent circumstances, which have the effect of giving a creditor a preference over the others and all of them provide that, in the event of action being brought within a certain period of the date of the conveyance, it is to be held null and void. The remedies thus given are quite distinct from those given to the trustee in bankruptcy under c. 64 of the *Bankruptcy Act.* The right to enforce such claims by creditors does not depend upon the fact that the person making the transfer has been declared bankrupt and these rights may be enforced under the provincial statutes unless bankruptcy has intervened. This has been held in a number of cases in various provinces, which are to be found collected in the 3rd ed. of Bradford and Greenberg on the Bankruptcy Act, at p. 158 et seq. In Quebec the limitation provided by art. 1040 only refers to proceedings under the articles mentioned.

If it were otherwise and art. 1040 on its face applied to the cause of action referred to in s. 64 of the *Bankruptcy Act,* when asserted either by the trustee or under s. 16 by a creditor claiming by virtue of an assignment, it would be necessary to consider whether the article was *intra vires* the Legislature of Quebec. The right of action is one given by a Dominion statute and the right of the trustee and his assignee to resort to the courts is a substantive right. Article 1040, if it applied, would deprive those entitled to assert

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TRADERS FINANCE CORPN. LTD. v. LEVESQUE

Locke J.

that right after a defined period. It would be necessary to consider then the effect of the decision of this Court in *Attorney General of Alberta and Winstanley v. Atlas Lumber Co. Ltd.*[1]. There, a statute of the Province of Alberta which deprived the holder of a promissory note of his right of access to the court without permission of the Debt Adjustment Board, constituted under the *Debt Adjustment Act, 1937, of Alberta,* was held to be *ultra vires.* This aspect of the matter was not raised before the courts of Quebec nor argued before us and I accordingly do no more than draw attention to the fact that, in my opinion, that question would arise if art. 1040 applied to the facts of this case.

I would dismiss this appeal with costs.

Appeal dismissed with costs.

Attorneys for the defendant, appellant: Dorion, Bernier & La Haye, Quebec.

Attorney for the plaintiff, respondent: Georges Pelletier, Quebec.

1960

*Oct. 25
Nov. 28

EVELYN DINI MOLINARI (*Defendant*) ..APPELLANT;

AND

ADELAIDE WINFREY (*Plaintiff*) .....RESPONDENT;

AND

ALBERT FRASER AND OTHERS .....MIS-EN-CAUSE.

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

Wills—Holograph—Letter admitted for probate as a will by prothonotary—Whether letter constitutes a will—Whether only instructions for the preparation of—Whether intention to make will—Whether actual disposition of property.

A month or so before his death, the deceased went to the office of the Royal Trust Co. and told one of its officers that he wished to make a new will with the trust company as his executor. It was arranged that on his return home, the deceased would write to the officer to give him the names of the legatees and that a will would be prepared by a

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

[1] [1941] S.C.R. 87, 1 D.L.R. 625.

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notary. The deceased wrote and signed a letter to the trust company in which he said ". . . here are the names and addresses, with amounts for my will: . . . Please let me hear from you shortly". This letter was never mailed and was found after the deceased's death in his home. The letter was admitted for probate as a will by a judgment of the prothonotary. The plaintiff took this action to have it set aside. The action was maintained by the trial judge and his decision was affirmed by the Court of Appeal.

Held: The letter did not constitute a will.

Per Taschereau, Abbott and Judson JJ.: To be a valid holograph will, a document must be written wholly in the handwriting of the testator and signed by him, must contain an actual disposition of property rather than a mere recommendation, and must reveal an intention to make a will then and there and not in the future. *Dansereau v. Berget,* [1951] S.C.R. 822.

In the present case, the letter contained no actual disposition of property. There was no *animus testandi.* It merely contained instructions for the preparation of a will to be made and signed at a later date.

Per Cartwright, Fauteux, Abbott and Judson JJ.: The defendant, who was seeking to uphold the letter as a will, had the burden of establishing the *animus testandi.* This burden was not transferred to the appellant by the judgment of probate rendered by the prothonotary. *Dugas v. Amiot,* [1929] S.C.R. 600; *Latour v. Grenier,* [1945] S.C.R. 749.

In the present case, the defendant has failed to establish that the letter had the characteristics of a will.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], affirming a judgment of Challies J. Appeal dismissed.

G. Pager, for the defendant, appellant.

J. de M. Marler, Q.C., and *T. O'Connor,* for the plaintiff, respondent.

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

TASCHEREAU J.:—La demanderesse-intimée Adelaide Winfrey a institué une action contre la défenderesse-appelante, dans laquelle elle soutient que la vérification d'un prétendu testament fait le 29 juillet 1956, n'est pas l'expression des dernières volontés de son frère William Constantine Winfrey, que ce document est illégal et nul,

[1] [1959] Que. Q.B. *806.*

et qu'elle est en conséquence la légataire universelle de la succession du *de cujus* en vertu d'un testament antérieur, reçu devant Me Papineau Couture, N.P., le 22 août 1955.

Le testateur William C. Winfrey était domicilié à Dundee, dans le district de Beauharnois, et vivait sur une île dont il était propriétaire, et l'appelante était sa ménagère depuis environ une année.

En 1955, William C. Winfrey fit son testament devant Me Papineau Couture, dans lequel il nommait le Montreal Trust Company son exécuteur testamentaire, et après avoir fait quelques legs particuliers, il institua sa sœur Audie Winfrey Paquin sa légataire universelle. La validité de ce testament n'est pas contestée, mais l'appelante prétend que par une lettre adressée au Royal Trust à Montréal, portant la date du 29 juillet 1956, mais jamais mise à la poste, il aurait révoqué ce testament et institué l'appelante sa légataire universelle.

Avant d'écrire cette lettre, William C. Winfrey s'était rendu à Montréal où, cette fois, il avait rencontré M. Edgar Ramsay, l'un des officiers du Royal Trust Company, et discuta avec lui les clauses d'un nouveau testament. Il lui dit qu'il voulait que cette compagnie de fiducie fût son exécutrice testamentaire, mais il ne mentionna aucun nom de bénéficiaire, sauf "The Montreal Chess Club" qui devait être un légataire particulier.

Il fut convenu qu'à son retour chez-lui, Winfrey écrirait à Ramsay pour lui donner les noms de ceux qu'il désirait gratifier, et qu'un testament serait préparé par Me Campbell, N.P. de Montréal, lorsqu'il aurait reçu les instructions nécessaires. Me Campbell avait l'habitude de se rendre souvent à Huntingdon, non loin de la résidence de Winfrey, où il pourrait lui soumettre le testament et le lui faire signer.

Mais, il est arrivé que le 6 août 1956, Ramsay n'avait pas encore de nouvelles de Winfrey, et à cette date il lui écrivit pour lui demander de lui faire parvenir ses instructions. Ce dernier lui aurait cependant écrit une lettre le 29 juillet 1956, qu'il n'avait pas mise à la poste, et qui fut

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retrouvée par l'appelante après la mort du testateur une semaine plus tard, soit le 7 août, à l'âge de 84 ans. Cette lettre était ainsi rédigée:

July 29th 1956

THE ROYAL TRUST
105 St James St
Montreal.
Dear Sirs,

Following my visit of the 24th, here are the names and addresses, with amounts for my will:

Friends Rose and Fred Martin, St Martin, Prov. Quebec	500.00
Mrs. Ruth Paquin, niece, of San Bernadino, Calif.	1,500.00

The Balance of moveables and immoveables, assets, etc., to Mrs. Evelyn Dini Molinary, of Winfrey's Island and Montreal, with recommendation to give my dogs good care and have masses and also prayers said and to make donations to Jesuit College and Father Gagnon of St. Agnes Dundee, Prov. Quebec.

Please let me hear from you shortly,

Sincerely.
(signed) Dr. Willie Winfrey

L'appelante prétend que cette lettre constitue véritablement une disposition testamentaire, et c'est ce document qui a été vérifié et dont la demanderesse-intimée demande la nullité.

J'ai eu l'occasion déjà d'exprimer mes vues sur la valeur testamentaire d'une lettre-missive, et dans la cause de *Dansereau v. Berget*[1], je disais qu'il ne fait plus de doute qu'une lettre-missive peut constituer un testament olographe valide qui n'a pas besoin d'être entouré de formules sacramentelles. En effet, du moment qu'un document est écrit en entier de la main du testateur, qu'il est signé par lui, qu'il contient une disposition de biens à l'exclusion de simples recommandations, qu'il révèle chez son auteur une volonté de tester, et qu'il n'est pas seulement un projet, alors il est véritablement un testament . . .

Je ne puis trouver dans la lettre qui fait l'objet du présent litige, rien qui puisse me justifier de dire qu'il y a eu transmission de propriété et que, comme conséquence de cet écrit, le patrimoine de la prétendue légataire universelle, appelante dans cette cause, ait été confondu avec celui du *de cujus*. Comme le dit le vieil adage romain, pour

[1] [1951] S.C.R. 822.

qu'il y ait transmission, il faut que le «mort saisisse le vif», et je ne crois pas qu'une semblable opération légale se soit produite ici.

Cette lettre, à mon sens, ne constitue qu'un projet de faire plus tard un testament; elle ne contient que de simples instructions à celui qui est appelé à préparer le testament qui doit possiblement être éventuellement signé. Le signataire de cette missive n'a pas entendu disposer de ses biens par la lettre même, et il y avait encore dans sa pensée beaucoup à faire pour accomplir la transmission complète de ses biens. Il manque sûrement l'«animus testandi». Il ne s'agit que d'un projet de volontés que Winfrey comptait ultérieurement faire figurer dans un testament dont il remettait à plus tard la réalisation. (Vide Baudry-Lacantinerie et Colin, 1905, 3è éd., vol. 11, p. 46). Nous sommes en présence d'une disposition *en puissance,* en élaboration, où l'acte définitif et nécessaire n'a jamais été posé.

La lettre elle-même révèle une absence totale de finalité dans les desseins du testateur. «Voici» dit-il «les noms et adresses *pour mon testament*». Il s'agit évidemment d'un testament qui est à venir. «Donnez-moi bientôt de vos nouvelles» écrit-il au Royal Trust, sans doute pour que son projet devienne une réalité et que ce qu'il se propose soit un fait accompli. Il ne mentionne pas les montants des dons qu'il a l'intention de faire ni des sommes qu'il désire affecter à la célébration des messes qu'il demande qu'on fasse chanter pour lui. Autant d'intentions vagues qu'il fallait préciser avant que ne se réalise finalement la dispositions de ses biens.

Annoncer simplement à son exécuteur que l'on désire faire certaines dispositions dans un testament qui doit être signé plus tard, ce n'est sûrement pas le faire véritablement.

Dans l'occurrence, il ne s'agit bien que du prélude d'un testament, de ce qui précède nécessairement l'acte par lequel on veut instituer des héritiers. Il n'y a rien de définitif, de finalement concrétisé. (vide Laurent, vol. 13, nos 180-189) (Fuzier-Herman, Répertoire du Droit Français, sup. vol. 14, p. 14, n° 358).

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C'est donc avec raison, je crois, que la Cour supérieure et la Cour du banc de la reine ont maintenu l'action de l'intimée.

L'appel doit être rejeté avec dépens.

The judgment of Cartwright, Fauteux, Abbott and Judson JJ. was delivered by

FAUTEUX J.:—Le 7 août 1956, W. C. Winfrey décédait, à sa résidence, dans le district de Beauharnois, province de Québec. Aux termes d'un testament authentique par lui exécuté le 22 août 1955, il avait institué sa sœur, l'intimée en la présente cause, comme héritière universelle résiduaire. Après sa mort, on trouva, chez lui, l'original d'une lettre datée du 29 juillet 1956 et destinée au Royal Trust. Cette lettre, entièrement écrite et signée de sa main, se lit comme suit:

July 29th 1956

The Royal Trust
105 James St
Montreal
Dear Sirs,

Following my visit of the 24th, here are the names and addresses, with amounts for my will:

Friends Rose and Fred Martin, St Martin, Prov. Quebec	500.00
Friend Albert Fraser, Fraser's Point, Dundee, Prov. Quebec	500.00
Mrs. Ruth Paquin, niece, of San Bernardino, Calif.	500.00
My sister Addie Paquin, San Bernardino, Calif.	1,500.00

The balance of moveables and immoveables, assets, etc, to Mrs. Evelyn Dini Molinari, of Winfrey's Island and Montreal, with recommendation to give my dogs good care and have masses and also prayers said and to make donations to Jesuit College and Father Gagnon of St. Agnes Dundee, Prov. Quebec.

Please let me hear from you shortly,

Sincerely,
(signed) DR. WILLIE WINFREY

Prétendant que cette lettre constitue un testament olographe sous forme d'une lettre missive, l'appelante, dont le nom y apparaît comme bénéficiaire, obtint, par requête présentée le 22 août 1956, un jugement du protonotaire, pour le district de Beauharnois, vérifiant cette lettre comme testament.

Quelques mois plus tard, dans une action dirigée contre l'appelante, et en laquelle Fraser et autres furent mis en cause, l'intimée demanda à ce que, par jugement à intervenir sur cette action, il soit déclaré que cette lettre n'équivaut pas à un testament, que le jugement de vérification rendu par le protonotaire est nul et sans effet, et qu'elle est elle-même, en vertu du testament authentique exécuté le 22 août 1955 par Winfrey, légataire universelle résiduaire de ce dernier.

L'appelante contesta cette demande et, après enquête et audition, la Cour supérieure fit droit à l'action de l'intimée. Porté en appel, ce jugement fut confirmé par une décision unanime de cette Cour[1]. L'appelante en appelle de ce dernier jugement.

Les circonstances en lesquelles cette lettre fut écrite apparaissent aux raisons de jugement de mon collègue M. le Juge Taschereau et il n'y a pas lieu d'y revenir.

En droit. La validité d'un testament olographe présenté sous forme d'une lettre missive est subordonnée à la preuve qu'en rédigeant et signant cette lettre, son auteur avait l'*animus testandi,* c'est-à-dire une intention réfléchie, arrêtée et définitive de faire une disposition de ses biens à sa mort. Cette preuve incombe à celui qui invoque la lettre missive. Le jugement de vérification, rendu par le protonotaire, n'a pas eu pour effet, en l'espèce, de transférer cette obligation, quant à la preuve, à l'intimée qui répudie la lettre litigieuse comme testament. *Dugas v. Amiot*[2], *Latour v. Grenier*[3].

En fait. Tous les Juges des Cours inférieures qui ont eu à considérer la question en sont venus à la conclusion que l'appelante n'avait pas établi que la lettre ci-dessus avait le caractère requis pour valoir comme testament.

D'accord avec ces vues, et comme mon collègue M. le Juge Taschereau, je renverrais cet appel avec dépens.

Appeal dismissed with costs.

Attorney for the defendant, appellant: G. Pager, Montreal.

Attorneys for the plaintiff, respondent: Common, Howard, Cate, Ogilvy, Bishop, Cope, Porteous & Hansard, Montreal.

[1] [1959] Que. Q.B. *806.* [2] [1929] S.C.R. 600.
[3] [1945] S.C.R. 749.

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*Oct. 5, 6, 7
Dec. 19

FELIX LETAIN (*Plaintiff*) .....APPELLANT;

AND

CONWEST EXPLORATION COMPANY LIMITED (*Defendant*) .... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Companies—Constitutional law—Date of incorporation as set out in letters patent—Badge of status—Whether evidence letters patent actually issued at later date precluded—Companies Act, R.S.C. 1952, c. 53, ss. 11, 132, 133.

An option agreement, whereby the appellant L granted an option to the respondent C to purchase certain mineral claims, provided for the transfer of the mineral claims to a mining company to be incorporated by C on or before October 1, 1958. It also provided for the transfer forthwith of the claims to C and that in the event that C should not duly exercise the option thereby granted, C would, at the request of L, retransfer the claims to L.

In an action for the return of the claims, L alleged that the letters patent of the mining company were actually signed, sealed and issued after October 1, 1958. C contended that under s. 133 of the *Companies Act* of Canada the letters patent, dated September 25, 1958, were conclusive proof that the company was incorporated on or before October 1, 1958. The dismissal of the action at trial was affirmed by the Court of Appeal. The appellant appealed to this Court.

Held: The appeal should be allowed, the order of the Court of Appeal set aside, and also all of the order of the trial judge except that part permitting the appellant to amend his statement of claim.

Per Kerwin C.J. and Taschereau, Fauteux and Judson JJ.: Sections 11, 132 and 133 of the *Companies Act* when read together are concerned with the status and capacity of a company incorporated under the Act. Therefore the Court was not concerned here with any question as to the right of Parliament to provide for what shall be evidence in a civil case in a provincial court.

The rights of the appellant and respondent must be determined by the meaning to be ascribed to clause 7 of the original agreement between them, and the appellant was not precluded by the mere production of the letters patent from showing at the trial that the respondent did not exercise the option in accordance with its terms.

Per Locke, Cartwright, Abbott, Martland and Ritchie JJ.: The fact that the letters patent were dated the 25th of September and the company had status as from that date for the purposes of the *Companies Act,* in no way precluded the appellant from adducing evidence to prove whether or not the option was exercised by the respondent in accordance with the terms of the contract.

*PRESENT: Kerwin C.J. and Taschereau, Locke, Cartwright, Fauteux, Abbott, Martland, Judson and Ritchie JJ.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], affirming a judgment of Collins J. Appeal allowed.

J. W. de B. Farris, Q.C., for the plaintiff, appellant.

C. W. Tysoe, Q.C. and *F. U. Collier*, for the defendant, respondent.

D. S. Maxwell and *G. W. Ainslie*, for the Attorney General of Canada, intervenant.

L. Tremblay, Q.C., for Attorney-General of Quebec, intervenant.

The judgment of the Chief Justice and of Taschereau, Fauteux and Judson JJ. was delivered by

THE CHIEF JUSTICE:—This is an appeal by the plaintiff Felix Letain against a judgment of the Court of Appeal for British Columbia[1] dismissing an appeal from the judgment of Collins J. dismissing the action. After the pleadings had been delivered the defendant Conwest Exploration Company Limited applied under Order XXV, Rule 2, of the Supreme Court Rules 1943 of British Columbia to dispose of a point of law arising under the pleadings. Collins J. decided the point in favour of the respondent and being of the opinion that such decision substantially disposed of the whole action, he thereupon dismissed the action under Rule 3 of Order XXV.

The action arises out of an option agreement, dated July 26, 1955, between the appellant and the respondent therein called Conwest, whereby the appellant for valuable consideration granted an option to the respondent to purchase certain mineral claims. Clause 7 of the agreement reads as follows:

> In the event of Conwest electing to exercise fully the option hereby granted, it may do so by causing to be incorporated on or before the 1st day of October, 1958, under the Companies Act of Canada, or under the laws of such other jurisdiction in Canada as Conwest shall choose, a mining company to which reference is herein made as the proposed company, with an authorized capital comprising three million shares, either without nominal or par value, or of the par value of $1.00 each, as Conwest shall decide. The proposed company, if incorporated, shall, in due course, be organized by Conwest, whereupon the said claims and such other mineral claims, if any, as Conwest shall elect, shall be transferred to the proposed company free of encumbrance.

[1] (1960), 31 W.W.R. 638, 23 D.L.R. (2d) 444.

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The agreement provided for the transfer of the mineral claims to the company to be incorporated as provided in clause 7 in return for fifty thousand shares of the proposed company. It also provided for the transfer forthwith of the claims to the respondent and that in the event that Conwest should not duly exercise the option thereby granted, Conwest would, at the request of the appellant, retransfer the said claims to the appellant. Other agreements were made later between the parties but their provisions do not materially affect clause 7 of the original.

On September 15, 1958, the respondent caused an application to be made under the *Companies Act* of Canada, R.S.C. 1952, c. 53, for the incorporation under the name of "Stikine Asbestos Company Limited" of a mining company such as was contemplated by the option agreement. The director of the Companies Division of the Department of the Secretary of State of Canada raised a question as to the use of the word "Stikine" in view of the incorporation of a company with a similar name under the laws of British Columbia in 1952. It was therefore arranged that the name "Kutcho Creek Asbestos Company Limited" should be adopted and that name was accepted by the director on September 25, 1958. In a letter bearing that date he advised the solicitors for the applicants for letters patent that the application for incorporation, with an amendment already agreed upon, "has been recommended for approval under the name of Kutcho Creek Asbestos Company Limited and letters patent are being prepared upon the basis of their bearing date of September 25, 1958". In a telephone conversation of September 26, 1958, between solicitors on behalf of the applicants and the assistant director of the Companies Division, the former asked that the name read "Letain Asbestos Company Limited", instead of "Kutcho Creek Asbestos Company Limited", and on September 29, 1958, that was confirmed in a letter from the solicitors to the director enclosing the consent of Felix Letain. That consent was subsequently withdrawn.

On October 1, 1958, the Director wrote the solicitors the following letter:

> In connection with the application for incorporation originally received under the name of STIKINE ASBESTOS COMPANY LIMITED, which corporate name was amended to read KUTCHO CREEK ASBESTOS COMPANY LIMITED. As intimated in my letter of September 25, 1958,

the application so revised was recommended for approval under the name of KUTCHO CREEK ASBESTOS COMPANY LIMITED and letters patent were being prepared on the basis of their bearing date of September 25, 1958.

In the interval, Mr. Lesage received a further telephone call in which you requested that the name should be further amended to read LETAIN ASBESTOS COMPANY LIMITED, which request was confirmed by your letter of September 29, 1958. A search of the records maintained by the department does not disclose the incorporation of any Canadian company under the precise name of LETAIN ASBESTOS COMPANY LIMITED.

There has been submitted in support of the application a consent to the use of the personal name "Letain: as part of the corporate name executed by Felix Letain. However, I should be obliged if the consent of Mr. Letain were supplemented by evidence to the effect that he is to be predominant in the company, a circumstance of which Mr. Hill has verbally advised Mr. Lesage.

Accordingly, the draft Letters Patent which have been prepared and approved have been amended so that the corporate name will read LETAIN ASBESTOS COMPANY LIMITED.

On October 15, 1958, the solicitors wrote the Director this letter:

re: *Letain Asbestos Company Limited*

In view of the misunderstanding which has apparently arisen over rights to use the above identified corporate name, this letter is to request you to amend the application for Letters Patent so that the corporate name reads

KUTCHO CREEK ASBESTOS COMPANY LIMITED

approval of which was indicated in your letter of September 25, 1958. As indicated during our telephone conversations it is most important to our client that the Letters Patent document bear a date prior to October 1, 1958 and we would most appreciate your arranging for this to be the case.

On October 20, 1958, the Director wrote the solicitors:

The application for incorporation of KUTCHO CREEK ASBESTOS COMPANY LIMITED has been approved and letters patent will be prepared upon the basis of their bearing date of September 25, 1958.

In the Canada Gazette of November 8, 1958, appears a notice dated October 31, 1958, by the Under-Secretary of State that under the *Companies Act* letters patent had been issued under the seal of the Secretary of State of Canada to Kutcho Creek Asbestos Company Limited, giving the name of the incorporators, the head office, the authorized capital and under the heading "Date" appears "September 25th, 1958". It is stated in an affidavit filed in the proceedings that in the meantime a meeting of the first directors of "Kutcho Creek Asbestos Company Limited" was held on or about September 29, 1958, and a

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meeting of the shareholders immediately thereafter on the same day. The minutes are not before us. According to the material filed this is the usual practice when the applicants for incorporation of a company under the *Companies Act* of Canada have been advised that letters patent will issue bearing a certain date, but it is difficult in the present case, in view of the letter to the director of October 15, 1958, to understand how the meetings of a company "Kutcho Creek Asbestos Company Limited" could be held on September 29, 1958. However, in view of the conclusion arrived at, it is unnecessary to pursue the matter further.

The writ in this action was issued December 16, 1958, and the basis of the action as developed in the pleadings is that the letters patent were actually signed, sealed and issued after October 1, 1958, the relevant date mentioned in the agreement between the parties to this litigation. The provisions of the *Companies Act* referred to before this Court are s. 11:

> 11. The company shall be deemed to be existing from the date of its letters patent.

s. 132 and s. 133:

> 132. In any action or other legal proceeding, the notice in the *Canada Gazette* of the issue of letters patent or supplementary letters patent under this Part shall be *prima facie* proof of all things therein contained, and on production of such letters patent or supplementary letters patent or of any exemplification or copy thereof certified by the Registrar General of Canada, the fact of such notice and publication shall be presumed.
>
> 133. Except in any proceeding by *scire facias* or otherwise for the purpose of rescinding or annulling letters patent or supplementary letters patent issued under this Part, such letters patent or supplementary letters patent, or any exemplification or copy thereof certified by the Registrar General of Canada, shall be conclusive proof of every matter and thing therein set forth.

Counsel for the appellant stated that s. 132 had not been referred to in the Courts below.

The above provisions when read together are concerned with the status and capacity of a company incorporated under the Act and while in response to a notice that a constitutional point might be involved the Attorney General of Canada and the Attorney-General of Quebec intervened and were represented by counsel, my conclusion is that we are not concerned with any question as to the right of Parliament to provide for what shall be evidence

in a civil case in a provincial court. Kutcho Creek Asbestos Company Limited is not a party to this action; it continues to exist and not one of its powers is affected. The rights of the appellant and respondent are to be determined by the meaning to be ascribed to clause 7 of the original agreement between them and the appellant is not precluded by the mere production of the letters patent from showing at the trial that Conwest did not exercise the option in accordance with its terms.

The appeal should be allowed, the order of the Court of Appeal set aside and also all of the order of Collins J. except that part permitting the appellant to amend his statement of claim. The precise point of law raised by the application before Collins J. is that the letters patent referred to in paragraph 14 of the amended statement of defence are conclusive proof of the fact that Kutcho Creek Asbestos Company Limited was incorporated on or before the 1st day of October, A.D. 1958, under the *"Companies Act"* of Canada and the defendant having caused such a mining company to be so incorporated is a complete defence to the claims advanced by the plaintiff in this action. That point of law is decided in the negative. The appellant is entitled to his costs here and in the Courts below.

The judgment of Locke, Cartwright, Abbott, Martland and Ritchie JJ. was delivered by

RITCHIE J.:—The circumstances giving rise to this appeal are very fully set forth in the reasons for judgment of the Chief Justice, which I have had the benefit of reading.

As I understand the matter, the sole question before this Court is the determination of the point of law raised by para. 14 of the amended defence. By this paragraph the respondent, having recited that Kutcho Creek Asbestos Company Limited, a mining company which complied with the requirements of the option agreement referred to by the Chief Justice, was incorporated by letters patent dated September 25, 1958, went on to plead:

> 14. (*b*) That, under Sec. 133 of the said "Companies Act", except in a proceeding for the purpose of rescinding or annulling said letters patent, said letters patent are conclusive proof of the fact that such a mining company was incorporated prior to the said 1st day of October, 1958.

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The point of law so raised was set down for hearing before Collins J. who adopted the view that as the terms of the option contemplated the incorporation of a company by the respondent in which the appellant was to become a substantial shareholder, the question before him must be determined on the basis that at the time when the option was granted both parties should be taken to have been aware of the provisions of s. 133 of the *Companies Act* which section "should be applied in determining the rights and obligations of the parties arising out of the option in question." He accordingly granted an order dismissing the action with costs.

Section 133 of the Dominion *Companies Act* upon which the respondent relies reads as follows:

> Except in any proceeding by *scire facias* or otherwise for the purpose of rescinding or annulling letters patent or supplementary letters patent issued under this Part, such letters patent or supplementary letters patent, or any exemplification or copy thereof certified by the Registrar General of Canada, shall be conclusive proof of every matter and thing therein set forth.

In appealing from the judgment of Mr. Justice Collins, it was contended that s. 133 cannot be interpreted as meaning that the date specified in the letters patent is conclusive proof of the fact that the company came into existence on that date because this very fact is made the subject of a rebuttable presumption by s. 11 of the Dominion *Companies Act* which provides that: "The company shall be deemed to be existing from the date of its letters patent."

In rendering the decision of the Court of Appeal of British Columbia, Mr. Justice Sheppard held that:

> The result is that the express words of Sec. 133 exclude any ambiguity from the phrase in Sec. 11 and that intention so expressed can be given effect to by construing the phrase "shall be deemed" in Sec. 11 to be conclusive, save for those exceptions provided for in Sec. 133.

It was also contended before the Court of Appeal of British Columbia and before this Court that because s. 133 is grouped with other sections in the *Companies Act* under the heading "Evidence" it must be regarded as legislation in relation to evidence and that to the extent that it precludes the hearing of evidence in a provincial Court concerning a provincial contract it is *ultra vires*.

As the requisite notice to the Attorney-General had not been furnished prior to the hearing in the Court of Appeal, Mr. Justice Sheppard held that the appellant could not contend before that Court that the section was *ultra vires*, but he went on to say:

> The substance of Sec. 133 would appear to be primarily not evidence but those rights which are to flow from the charter and which are sometimes called the status of the company; such status in this company is a matter exclusively for the Parliament of Canada:
>
> * * *

In the result it was held that:

> . . . Sec. 133 precludes the plaintiff in this action controverting the date of incorporation appearing in the Letters Patent, and the appeal should be dismissed.

Notice of a constitutional issue raised in this appeal was duly served pursuant to order of this Court upon the agent for the Attorney-General of each province and upon the Attorney General for Canada wherein the issue was stated as follows:

> (1) In a civil action on a contract in any Province is a party precluded by virtue of Section 133 of the Companies Act of Canada from controverting the date of incorporation appearing on the Letters Patent of the Company incorporated under the said Companies Act of Canada?
>
> (2) If the answer to (1) is "yes", is the said Section 133 *ultra vires* of the Parliament of Canada or is the section merely inapplicable?

The Attorney General for Quebec and the Attorney General for Canada intervened and were represented at the hearing before this Court.

I agree with Mr. Justice Sheppard that s. 133 in its substance and true character is primarily concerned not with evidence but with the status of companies incorporated under the Dominion *Companies Act* and that the status of such companies is a matter within the exclusive jurisdiction of the Parliament of Canada, but in my view this does not, by any means, conclude the issue in the respondent's favour.

It is true that by conclusively fixing the status and powers of a Dominion company as being those set forth in the letters patent, except in a proceeding brought for the purpose of rescinding or annulling such letters patent, s.

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133 may have an effect on the rules of evidence in provincial Courts in cases where the status of a Dominion company is in issue but this is not legislation "in relation to" civil rights, it is rather legislation having an incidental and consequential effect upon civil rights and as such it is within the power and authority of the Parliament of Canada (see *Gold Seal Limited v. Attorney-General for the Province of Alberta*[1]). By its very nature, however, such effect is limited to matters which are incidental to the true character and subject-matter of the Dominion *Companies Act* and in a civil action in which the status and powers of a Dominion company are not involved it cannot be extended beyond the scope and purpose of that statute so as to preclude a party in a provincial Court from adducing evidence to establish that in fact the letters patent bear an earlier date than that upon which they were actually signed and sealed.

Kutcho Creek Asbestos Company Limited is a company incorporated under the authority of the Dominion *Companies Act,* endowed with the characteristics enumerated in that statute and in its letters patent granted pursuant thereto, one of which is that its date of incorporation is to be conclusively taken for all purposes of its corporate dealings and activities as being the 25th of September, 1958. The date of incorporation is one of the badges of a company's status and identity, it is an integral part of its corporate personality which flows from its charter as do the other ingredients of its status, the determination of which is, as has been said, a matter within the exclusive jurisdiction of Parliament. With the greatest respect, however, it seems to me that it is not the status of Kutcho Creek Asbestos Company Limited but the actions of the respondent Conwest Exploration Company Limited which are at issue in this case, and I am unable to see how conclusive proof of the fact that the former company has acquired status with effect from September 25th for the purposes of the Dominion *Companies Act* can preclude the appellant from proving whether or not the latter company exercised its option on or before the 1st of October.

[1] (1921), 62 S.C.R. 424 at 460.

The only method of creating a body corporate under Part I of the Dominion *Companies Act* is for the Secretary of State to grant a charter by letters patent under his seal of Office (see s. 5(1)). If the charter so granted bears a date earlier than that upon which the Seal was affixed, then, by virtue of s. 133, the company acquires status with effect from the earlier date. The question here, however, is not whether or not Kutcho Creek Asbestos Company Limited is to be conclusively taken as having the status of a company incorporated on the 25th of September, but rather whether or not the respondent caused it to be "incorporated on or before the 1st day of October, 1958" within the meaning of those words as they are used in para. 7 of the agreement pursuant to which this action is brought.

I am of opinion that the fact that the letters patent of Kutcho Creek Asbestos Company Limited bear date the 25th of September and that company has status as from that date for the purposes of the Dominion *Companies Act* in no way precludes the appellant from adducing evidence to prove whether or not this option was exercised by the respondent in accordance with the terms of the contract now sued upon, and I would accordingly dispose of this appeal as proposed by the Chief Justice.

Appeal allowed with costs.

Solicitors for the plaintiff, appellant: Hogan, Webber, & Woodliffe, Vancouver.

Solicitors for the defendant, respondent: Guild, Yule, Schmidt, Lane, Collier & Hinkson, Vancouver.

Solicitor for the Attorney General of Canada: Wilbur J. Jackett, Ottawa.

1960
*Nov. 16
Dec. 19

BOGUE ELECTRIC OF CANADA LIMITED (*Plaintiff*) ..... APPELLANT;

AND

CROTHERS MANUFACTURING LIMITED (*Defendant*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Contract—Time of essence—Non-delivery—Extension of time—Further delay—Cancellation—Notice of termination.

The respondent C entered into a contract with a Crown corporation to supply motor-driven generator sets, and sub-let to the appellant B the contract for the supply of the generators. Very little effort was made to commence production of the generators, and as a result of the appellant's inability to begin deliveries at the time promised, the three interested parties agreed to a revised delivery schedule. B failed to adhere to the new schedule and C cancelled the sub-contract, having previously notified B of its intention so to do, if delivery was not made as promised. B sued for damages arising from cancellation of the contract. The action was dismissed by the trial judge, and this judgment was affirmed by a majority in the Court of Appeal. B then appealed to this Court.

Held: The appeal should be dismissed.

Time was of the essence of both the head contract and the sub-contract. The importance of delivery according to schedule had been emphasized, and punctual performance by B went to the whole consideration of the sale.

Time remained of the essence notwithstanding the substitution of new delivery dates. The appellant's two-fold submission that when notice was given time was not of the essence, and that the notice was not a reasonable one was rejected.

The provision for cancellation on 15 days' notice in the general conditions was in conflict with the condition in the agreement between C and B authorizing an immediate right of cancellation without further liability "if delivery is not made within the time promised or specified". Consequently the general conditions, even if assumed to be applicable to the sub-contract, must give way in accordance with clause 1(2) of the interpretation section of the said conditions.

APPEAL from a judgment of the Court of Appeal for Ontario, affirming a judgment of Gale J. Appeal dismissed.

A. S. Pattillo, Q.C., and *D. J. Wright,* for the plaintiff, appellant.

P. B. C. Pepper, Q.C., Miss Janet Scott and *W. Herridge,* for the defendant, respondent.

*PRESENT: Kerwin C.J. and Locke, Cartwright, Martland and Judson JJ.

The judgment of the Court was delivered by

JUDSON J.:—Bogue Electric of Canada Limited, the appellant, sued the respondent, Crothers Manufacturing Limited, for damages arising from the cancellation of a contract for the supply of 249 electrical generators which Bogue was to manufacture for Crothers. The judgment at trial was that Crothers was justified in cancelling the contract for non-delivery at the stated time. This judgment was affirmed on appeal and Bogue now appeals to this Court.

On October 18, 1956, Crothers entered into a contract with Canadian Commercial Corporation, a Crown corporation, for the supply of a large number of motor-driven generator sets for rural electrification in India. Crothers were suppliers of diesel motors and they sub-let to Bogue the contract for the supply of the generators. On October 19, Crothers wired to Bogue to book the order for the generators. There had been previous discussions between the two companies. Bogue knew that Crothers was tendering for the contract with Canadian Commercial Corporation and that if the tender was successful, it would be asked to supply these generators. Bogue had stated that shipment could begin 16 to 18 weeks from the date of receipt of a firm order. On October 30, 1957, Bogue and Crothers entered into their formal contract, which provided for end of the month deliveries of 40 generators from February to June 1957 and the balance in July and August. The need for regular deliveries was known to both parties. Crothers had first to connect the generators to the diesel units before it could meet its own schedule of deliveries under the head contract commencing in March 1957, and its ability to do this depended upon prompt performance by Bogue.

It became apparent on February 13, 1957, as a result of a visit by an official of Crothers to the Bogue plant in Ottawa, that Bogue had made very little effort to begin to produce the generators and that delivery could not begin by the end of February as promised. This was nearly four months after the placing of the order. The evidence coming from the internal memorandum of the Bogue Company, dated February 22, 1957, makes it clear that the delay was entirely the fault of the Bogue Company, which appears

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to have been making little or no effort to complete its contract. The reason was that while the contracting party was Bogue Electric of Canada Limited, the decisions necessary to carry out the contract had to be made at the head office of the parent company in the United States and these decisions were not being made. As a result of the obvious inability of Bogue to begin its deliveries on February 28, 1957, the three interested parties, the Government, Crothers and Bogue, agreed, on March 12, 1957, to accept a new delivery schedule to begin on May 15, 1957. On March 13, 1957, the Canadian company emphasized to its parent company the urgency of preparing to meet this new delivery schedule.

After this had been arranged, Crothers, with the approval of the Government, revised its own delivery schedule of the completed units to begin on June 30, 1957, instead of March, as previously agreed. On March 29, 1957, Bogue assured Crothers that "delivery was progressing satisfactorily according to the revised schedule." This assurance was given notwithstanding the fact that on March 22, 1957, a Government inspector who had visited the Bogue plant in Ottawa had made a report which showed that little was being done to fill the order and that there was little likelihood of the delivery of 40 generators by May 15, 1957. Crothers complained to the Government about this but was informed on April 18 that it would be held to its own revised delivery schedule under the head contract. After receiving this information, Crothers made another visit to the Bogue plant and found that conditions were as bad as had been reported by the Government inspector one month before. In spite of the assurances of Bogue that the delivery schedule would be met, Crothers was satisfied that this was impossible because of the inactivity in the plant. Crothers then began to make plans for an alternative source of supply of generators.

On May 6, 1957, Crothers notified Bogue that if deliveries were not made on May 15 as promised, it would cancel the sub-contract. Bogue, on May 7, 1957, stated that it was exerting its best efforts to meet its commitments under the contract. Crothers made tentative arrangements to obtain generators from an alternative supplier if Bogue

generators should not be delivered on May 15. Bogue did not deliver on May 15 and Crothers cancelled the sub-contract on May 16.

At the trial no attempt was made to explain Bogue's lack of preparedness and dilatory conduct. The learned trial judge said that there was no evidence to lead to any conclusion about the date when Bogue might have delivered its first 40 units had it been allowed to do so. The generators called for under the contract were uncomplicated, run-of-the-mill units. At no time did Bogue have a first-production unit available for inspection as required by the contract. It failed to take on labour. It was late in ordering supplies. By May 15, 1957, it had been supposedly working on this sub-contract from October 19, 1956, a period of 7 months. Both the trial judge and the majority opinion in the Court of Appeal held that Crothers was justified in terminating the contract in these circumstances. The only point of the dissent in the Court of Appeal was that certain general conditions, which Laidlaw J.A. said formed part of the sub-contract, required the giving of 15 days' notice of termination on default by Bogue.

The sub-contract between Crothers and Bogue contained the following condition:

> The purchaser reserves the right to cancel all or any part of this order if delivery is not made within the time promised or specified, without any liability whatsoever.

This was the condition under which Crothers exercised its right of cancellation. The learned trial judge's finding was that time was of the essence of the head contract between the Government and Crothers. He was also of the same opinion concerning the sub-contract between Crothers and Bogue. In the circumstances of this case no other conclusion is possible. This was a mercantile contract. The importance of delivery according to schedule is emphasized by the whole of this record. Crothers was depending upon Bogue to make and deliver a component part of a complete unit. After delivery of the generator, Crothers had to connect it with its motive power and meet a delivery schedule of its own. The supply of these complete units was part of a wider Government plan which was recognized to be

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an urgent one. It was part of a chain of transactions, and punctual performance by Bogue went to the whole consideration of the sale. (22 Hals., 2nd ed., 57)

The next question is whether time ceased to be of the essence because of the alteration of the delivery dates by mutual consent. The dates of all the deliveries were precisely stated in both the original and the amended schedule. No other change was made in the sub-contract. All that happened was that one schedule of deliveries was substituted for another. Bogue's new delivery schedule was acted upon by Crothers in re-scheduling its own deliveries despite the problem of storage space, and at no time between March 1957 and May 15, 1957, did Crothers do anything to indicate to Bogue that May 15 was not the deadline. As late as April 25 Bogue was insisting that it could make delivery on May 15 although it is quite apparent from the evidence that there was no basis of fact for this insistence.

Both the learned trial judge and the Court of Appeal, without any dissent on this point, have held that time remained of the essence of the contract notwithstanding the substitution of new delivery dates, and in my opinion this is clearly correct. The principle is stated in 8 Hals., 3rd ed., 165:

> Where time is of the essence of the contract, and is extended by agreement between the parties, the extension does not operate as an entire waiver of the condition, but merely has the effect of substituting the extended time for that originally fixed.

Even if this were not so, there is also a unanimous finding of the learned trial judge and the whole Court of Appeal that the notice given by Crothers to Bogue on May 6th requiring Bogue to deliver on the date promised was reasonable. These are concurrent findings on a question of fact, fully supported by the evidence and obviously correct. I have therefore no difficulty in rejecting the appellant's twofold submission that on May 6, the date of the notice, time was not of the essence and that the notice given was not a reasonable one.

This leaves only the appellant's submission that there was no right of cancellation until 15 days following May 15, 1957. This proposition is the sole foundation for the dissenting opinion of Laidlaw J.A. in the Court of Appeal.

In order to succeed the appellant must show that General Conditions CCC 50 form part of the contract and that the provision for 15 days' notice of cancellation contained in clause 22 of these Conditions overrides the specific provision for cancellation contained in the contract itself which I have already quoted.

The learned trial judge dealt with this aspect of the case on the assumption that these general conditions did form part of the sub-contract. They expressly form part of the head contract and they were drawn to be of general application to contracts between the Crown and a contractor. There are many clauses which can have no possible application to a contract to which the Government is not a party. The sub-contract between Crothers and Bogue states that it is understood that General Conditions, Form CCC 50, will apply for the duration of the contract, which could be interpreted to mean that Bogue was contracting on the understanding that Crothers was subject to these conditions. It is not, however, necessary to decide this point. I will proceed on the same assumption as the trial judge. Clause 22 of these general conditions provides:

> If the Contractor is in default for a period of fifteen days in carrying out the terms of the contract as a result of events or occurrences for which it is responsible or which are within its control . . . the Corporation may at his option, upon giving notice in writing to the Contractor, (i) terminate the contract as to work not theretofore completed or (ii) take the work out of the Contractor's hands and employ such means as the Corporation may see fit to complete the work in whole or in part.

But along with this, one must read Clause 1(2) of the interpretation section of these general conditions. It reads:

> In the event of any inconsistencies, the provisions of the agreement and/or of these general conditions shall prevail over the specifications (if any) and the provisions of the agreement and of the supplemental conditions (if any) shall prevail over these general conditions.

I agree entirely with the finding of the learned trial judge that the provision for cancellation on 15 days' notice in the general conditions is in conflict with the condition in the agreement between Crothers and Bogue authorizing an immediate right of cancellation without further liability "if delivery is not made within the time promised or specified", and that consequently, the general conditions, even if assumed to be applicable, must give way.

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I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the plaintiff, appellant: McIlraith and McIlraith, Ottawa.

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

1960

*Jun. 3
Dec. 5

DAME LUCIENNE THERIAULT (*Plaintiff*) ..... APPELLANT;

AND

SIMON GRAVEL (*Defendant*) .....RESPONDENT.

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

Negligence—Building works—Standard of care—Caretaker falling through opening in floor—Knowledge of existence of opening—Reasonable precautions—Civil Code, arts. 1053, 1054.

During the construction of an additional floor to a school building, the plaintiff's husband, caretaker of the school, fell through an opening in the floor made by the contractor for a stairway. The caretaker was present when the opening was made the previous day. A panel to contain the heat on the floor below had been placed across the opening. The caretaker was leaning over the opening and fell after losing his balance. The action was maintained by the trial judge, but this judgment was reversed by the Court of Appeal.

Held: The accident was not caused by any fault on the part of the contractor.

It is normal that building operations involve certain inherent dangers, and any person who enters such a site cannot expect complete security. The law does not require that the standard of care be placed at an exaggerated level. Hence the law does not require a contractor to protect against an inherent danger a person who, having knowledge of it, does not try to guard against it.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], reversing a judgment of Marquis J. Appeal dismissed.

R. Legendre, Q.C., and *R. Angers*, for the plaintiff, appellant.

*PRESENT: Taschereau, Fauteux, Abbott, Judson and Ritchie JJ.

[1] [1959] Que. Q.B. 61.

J. de Grandpré, for the defendant, respondent.

The judgment of the Court was delivered by

TASCHEREAU J.:—La demanderesse-appelante réclame de l'intimé, tant personnellement qu'en sa qualité de tutrice à ses enfants mineurs, la somme de $47,198.68. Elle allègue qu'au cours du mois de janvier 1953, le défendeur Gravel effectuait pour le compte de la Commission Scolaire de Chicoutimi, des travxaux de réparations à l'école St-Joachim, et il avait entrepris de construire un étage supplémentaire à l'école déjà existante.

Le 22 janvier 1953, Saucier, l'époux de la demanderesse-appelante, qui était à l'emploi de la Commission Scolaire depuis quelques années, a fait une chute du second étage au premier, soit environ dix-sept pieds, et mourut sur les lieux, d'une fracture du crâne. La prétention de la demanderesse est que le défendeur et ses employés avaient percé une ouverture au plafond du rez-de-chaussée, entre les deux étages, et que c'est à travers cet orifice insuffisamment recouvert que Saucier est tombé et a perdu la vie.

M. le Juge Marquis, de la Cour supérieure, siégeant à Chicoutimi, a maintenu l'action, a condamné le défendeur à payer à la demanderesse personnellement la somme de $12,804.50, et à la demanderesse en sa qualité de tutrice à ses enfants mineurs la somme de $4,150, formant un total de $16,954.50. La Cour du banc de la reine a fait droit à l'appel de l'intimé, a cassé le jugement attaqué, et a débouté la demanderesse de son action.

La victime était le surveillant à la Commission Scolaire, et quelques jours avant cet accident, il fut considéré nécessaire de faire une ouverture dans le plancher en forme de L, afin de permettre la construction d'un escalier pour relier les deux étages. Le 21 janvier, cette ouverture fut pratiquée par l'intimé et ses employés en présence de Saucier qui, le 17 janvier, avait aussi participé à la préparation du plan.

Le jour de l'accident, alors que le plancher du second étage était en construction, la victime se rendit au second étage pour donner certaines instructions aux électriciens. L'ouverture, autour de laquelle on avait fait un cadre en bois qui excédait le plancher de six pouces, avait été

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Taschereau J.

recouverte partiellement de planches et de ten-test à la suggestion même de la victime, afin que l'on puisse conserver la chaleur à l'étage inférieur où se tenaient les classes. Alors que Saucier et l'électricien Desforges discutaient de l'endroit où l'on devait placer un appareil électrique, il fallut enlever le morceau de ten-test qui recouvrait une partie de l'ouverture, afin de permettre d'avoir une vision exacte de l'intérieur du plafond du premier étage. Desforges recouvrit alors partiellement l'ouverture avec la pièce de ten-test, mais ne la referma pas complètement afin qu'il y eût possibilité pour les deux hommes de communiquer de haut en bas. Il descendit au premier étage, et c'est à ce moment que Saucier fit sa chute par l'ouverture, et se fracassa le crâne.

Le témoin St-Gelais, qui était sur les lieux, précise exactement comment est arrivé l'accident. Il nous dit qu'au moment de l'accident, il était à trois ou quatre pieds de la victime. Saucier a voulu lui montrer par où les fils électriques devaient passer, et le témoin affirme que c'est en se penchant, après avoir reculé sur le bord de l'ouverture, qu'il est tombé.

Comme la Cour du banc de la reine, je suis d'opinion que ce malheureux accident n'est pas le résultat d'une négligence qui puisse entraîner la responsabilité civile de l'intimé. La victime connaissait l'existence de cette ouverture et de quelle façon elle était recouverte. Elle savait que c'est par là qu'elle devait communiquer avec Desforges pour déterminer l'endroit de l'installation des fils et appareils électriques. C'est évidement comme conséquence d'un faux-pas que Saucier est tombé, ou parce qu'il a perdu l'équilibre ou n'a pas pris les précautions voulues en s'approchant de l'ouverture.

Je ne vois pas sur quels principes légaux il serait possible d'appuyer un jugement qui reconnaîtrait la responsabilité de l'intimé. Comme le dit M. le Juge Pratte de la Cour du banc de la reine, il est normal qu'un chantier en construction présente certains dangers inhérents aux opérations qui y sont poursuivies, et celui qui y pénètre ne peut s'attendre à se trouver en parfaite sécurité. Ce serait exiger du contracteur plus que ne réclame la prudence normale en

des circonstances identiques, que de prétendre qu'un garde-fou aurait dû être placé autour de cette ouverture. C'eût été pratiquement rendre impossibles les opérations de construction.

Je suis donc d'opinion que Saucier, qui était familier avec les lieux, a été la victime de sa propre imprudence ou inhabileté. La loi ne réclame pas que l'on porte le standard de prudence à un niveau exagéré, et par conséquent elle ne demande pas à un contracteur de protéger contre les risques inhérents à un métier ou à une occupation celui qui connaissant un danger ne cherche pas à s'en prémunir.

L'appel doit être rejeté avec dépens.

Appeal dismissed with costs.

Attorney for the plaintiff, appellant: R. Angers, Chicoutimi.

Attorneys for the defendant, respondent: Tansey, de Grandpré & de Grandpré, Montreal.

METALLIFLEX LIMITED (*Defendant*) ...APPELLANT;

AND

RODI & WIENENBERGER AKTIEN-GESELLSCHAFT (*Plaintiff*) ..... RESPONDENT.

1960
*Apr. 27, 28, 29
Dec. 19

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

Patents—Alleged infringement—Patent claims—Whether specifications should also be considered—Injunction—Claims for damages.

The plaintiff brought action for an injunction and damages for an alleged infringement by the defendant of a patent relating to "extensible chain bands" for use as wrist-watch straps or bracelets, consisting of three parts: sleeves, U-shaped connecting bows and leaf springs. The embodiments of the invention were defined in 3 claims. The defendant pleaded that as the claims omitted the holding connection, the bracelet was an inoperative device, and alternatively, that there had been no infringement. The trial judge found that claims 1 and 2 were invalid

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

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for lack of utility and that claim 3 was valid but had not been infringed. The Court of Appeal reversed this judgment as to claims 1 and 2, the plaintiff having abandoned its demand based on claim 3. The defendant appealed to this Court.

Held: Claims 1 and 2 of the patent were valid and were infringed by the defendant.

Claims must be construed with reference to the entire specifications, but the patentee is not allowed to expand his monopoly specifically expressed in the claims by borrowing from other parts of the specifications. However, in the present case, the plaintiff was not seeking to enlarge or expand its monopoly by reference to the specifications, but referred to them to explain the obvious. The monopoly consisted of three elements, and the particular means by which the parts were to be held together was immaterial. The specifications proposed the use of a means, but it was not essential that it should be that particular one.

As was held by the Court of Appeal, the device was operative and useful and the claims were, therefore, valid. There was in the invention, sufficient creative or inventive character and sufficient novelty to constitute the subject-matter of the patent, and it was infringed by the defendant.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], reversing a judgment of Ralston J. Appeal dismissed.

G. F. Henderson, Q.C., J. R. Hoffman and *D. Watson,* for the defendant, appellant.

Christopher Robinson, Q.C., and *S. Godinsky,* for the plaintiff, respondent.

The judgment of the Court was delivered by

TASCHEREAU J.:—This is an appeal from the judgment of the Court of Queen's Bench of the Province of Quebec[1], reversing a judgment of the Superior Court rendered by Mr. Justice Ralston.

In its statement of claim the plaintiff-respondent alleges that it is the owner of a Canadian patent bearing no. 505,676, dated September 7, 1954, and that as such, had the exclusive rights, privilege and liberty of making, constructing, using, and selling to others to be used in Canada, an invention entitled "EXTENSIBLE CHAIN BANDS", and that the appellant-defendant has infringed its patent, by manufacturing and selling to others "Extensible Chain Bands" similar to those protected by its patent.

[1] [1960] Que. Q.B. *391,* 32 C.P.R. 102.

The appellant-defendant pleaded that the patent of the respondent is invalid, and in the alternative, alleged that if the patent were valid, which is denied, the extensible chain bands which it manufactured and sold to the public are distinctive in all relevant elements both as to structure and function, from those designated in the limitative provisions of the three claims set forth in respondent's patent, hereafter recited at length, and do not constitute in any way an infringement of the distinctive features of the latter.

The learned trial judge dismissed the plaintiff's action with costs, cancelled and annulled the interlocutory injunction previously granted by Associate Chief Justice W.B. Scott. Mr. Justice Ralston held that claims nos. 1 and 2, although not invalid for lack of invention and of novelty, were invalid for lack of utility, that consequently there could be no infringement thereof, and that claim no. 3, although valid, had not been infringed.

The Court of Queen's Bench allowed the appeal, declared that as between the parties claims nos. 1 and 2 of the Canadian patent no. 505,676 granted to the respondent were valid, and that they had been infringed by the appellant. The Court of Queen's Bench did not deal with respondent's demands based on claim no. 3, because they had been abandoned. The Court of Queen's Bench further ordered that the interlocutory injunction granted by the Superior Court of Montreal on December 13, 1956, be declared permanent, and that the defendant-appellant cease to manufacture, produce, import, buy or sell extensible chain bands similar to and in violation of plaintiff's patent and in particular, the "Bandmaster" or "Metalliflex" type of bracelets. The Court also condemned the present appellant to pay to the plaintiff the sum of $551.05 as damages with costs.

The present action leading to this appeal, was instituted by the respondent in December 1956, and deals with patent no. 505,676 issued to the respondent on September 7, 1954.

After the issues were joined, the appellant filed a supplementary plea on September 30, 1957, alleging that in August 1957, the Commissioner of Patents issued in favour of the present appellant a patent bearing no. 545,184 which

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Taschereau J.

granted to the appellant the exclusive right, privilege and liberty of making, constructing, using and selling to others in Canada, its invention referred to in the patent.

When the present action was instituted, the plaintiff-respondent also sued Watchstraps Inc. for infringement of its patent (no. 505,676) and claimed $27,795 in damages. It was then agreed that the evidence in one case would be evidence in the other. The trial judge dismissed the action against Metalliflex Ltd., but maintained it in part against Watchstraps Inc. There was an appeal to the Court of Queen's Bench in both cases, but the Watchstraps case did not proceed, and judgment was delivered only in the present case. As I have stated, the Court allowed the appeal, ordered that the interlocutory injunction granted by the Superior Court be declared permanent, and that the defendant Metalliflex cease to manufacture, produce, import, buy or sell "extensible chain bands" similar to and in violation of Rodi's patent and, in particular, the "Bandmaster" or "Metalliflex" type of bracelets. This Court is therefore not concerned with the case against Watchstraps Inc.

To summarize the course of this litigation: the Court of Queen's Bench reached the conclusion that claims 1 and 2 of respondent's patent were valid, not only as regards invention and novelty, but also as regards utility, and that Rodi's patent had been infringed. As to claim no. 3, it was held valid by the trial judge, who also came to the conclusion that it had not been infringed. In the Court of Queen's Bench, the appellant Rodi (now the respondent) abandoned the demand based on claim no. 3, and restricted its argument to claims 1 and 2, which it contended to be valid, and infringed by the appellant Metalliflex.

It might be useful to state the embodiments of the invention in which an exclusive property or privilege was *claimed*. They are defined as follows:

Claim No. 1. An extensible self-retracting chain band, comprising hollow links constituted by tubular sleeves arranged transversely to the longitudinal direction of the chain band in two series, pairs of connecting links constituted by U-shaped connecting bows arranged with one limb of each pair of bows in engagement with a hollow link of one series and the other limbs of said pair of bows in engagement with two links of the other series so as to connect the hollow links together in an articulated manner in two rows with the hollow links of one row of the retracted chain band staggered in the longitudinal direction of the chain band with respect to those of

the other row, the limbs of said connecting bows having a greater width than their thickness and co-operating with spring means arranged to hold the hollow links in the said relationship while permitting said links to be pulled apart to extend the chain band, said spring means comprising a leaf spring within each hollow link interposed between one wall thereof and the limbs of the connecting bows in engagement with the link so as to force the said limbs against the opposite wall of the link.

Claim No. 2. An extensible self-retracting chain band, comprising hollow links constituted by tubular sleeves arranged transversely to the longitudinal direction of the chain band in two series, pairs of connecting links constituted by U-shaped connecting bows the limbs of which are flat on the inside, said connecting bows being arranged with one limb of each pair of bows in engagement with a hollow link of one series and the other limbs of said pair of bows in engagement with two links of the other series so as to connect the hollow links together in an articulated manner in two rows with the hollow links of one row of the retracted chain band staggered in the longitudinal direction of the chain band with respect to those of the other row, and spring means arranged to hold the hollow links in the said relationship while permitting said links to be pulled apart to extend the chain band, said spring means comprising a leaf spring within each hollow link interposed between one wall thereof and the inside of the limbs of the connecting bows in engagement with the link so as to force the said limbs against the opposite wall of the link.

Claim No. 3. An extensible self-retracting chain band, comprising hollow links constituted by tubular sleeves arranged transversely to the longitudinal direction of the chain band in two series, pairs of connecting links constituted by U-shaped connecting bows on both sides of the chain band and arranged with one limb of each pair of bows in engagement with a hollow link of one series and the other limbs of each pair of bows in engagement with two links of the other series so as to connect the hollow links together in an articulated manner in two rows with the hollow links of one row of the retracted chain band staggered in the longitudinal direction of the chain band with respect to those of the other row, the limbs of said connecting bows having a greater width than their thickness and having transverse grooves on the inside, and spring means arranged to hold the hollow links in the said relationship while permitting said links to be pulled apart to extend the chain band, said spring means comprising a bent spring plate inserted in each hollow link and extending lengthwise thereof, said spring plate having bent up ends which engage in the transverse grooves in the limbs of the connecting bows on the respective sides of the chain band.

The construction of this bracelet is simple. It consists of three parts which are sleeves, U-shaped connecting bows and leaf springs, the arrangement of which provides a relatively cheap and simple bracelet. It can be more easily adjusted in length for different wrists than the other bracelets. It is said on behalf of the appellant that although claims 1 and 2 cover a combination, the elements of which are links, bows and springs, they omit the holding connection, with the consequence that the bracelet is an inoperative device, which must necessarily fall apart, and

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that the claims should therefore be held invalid as lacking utility. The respondent's contention is that claims 1 and 2 should be construed so that something to hold the parts in their specified relationship be included as part of the normal routine of a person setting out to construct the bracelet. It has been also argued, and the Court of Queen's Bench has adopted this view, that it is not sufficient to consider only the wording of the claims, but also the whole specifications, which have been described as the "Dictionary" of the Claims.

The claims, of course, must be construed with reference to the entire specifications, and the latter may therefore be considered in order to assist in apprehending and construing a claim, but the patentee may not be allowed to expand his monopoly specifically expressed in the claims "by borrowing this or that gloss from other parts of the specifications". Vide: *Ingersoll Sergeant Drill Co. v. Consolidated Pneumatic Tool Co.*[1]

But here, the respondent does not seek to enlarge or expand its monopoly by reference to the specifications, but refers to them to explain the obvious. The monopoly applied for is the combination of three elements, and the particular means by which the parts are to be held together is immaterial. The appellant does not claim a holding means. This, of course, may be effected in any practical way. In the specifications, a means proposed to be used by the respondent was disclosed, but it is not essential that it should be that particular one. It is beyond question that the parts have to be held together, but the means to attain that purpose and hold together the combination, which is the invention claimed in 1 and 2, is not material.

Thus, in *The King v. Uhlemann*[2], it was held that the claims to a spectacle construction were valid, although it was not specified how these straps "embracing" the edges of the lenses would maintain the embrace. Vide also: *Canadian Tire v. Samson*[3]. In this latter case, the claims spoke of blades carried by a hub without specifying any means to retain them in position during operation. In both cases the claims were held to be valid.

[1] (1907), 25 R.P.C. 61.
[2] [1952] 1 S.C.R. 143, 12 Fox Pat. C. 65, 15 C.P.R. 99.
[3] [1940] S.C.R. 386, 3 D.L.R. 64.

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I have, therefore, come to the conclusion, as did Mr. Justice Rinfret of the Court of Queen's Bench with whom Pratte and Owen JJ. concurred, that the device, which is the subject-matter of this case, is operative and useful and that, therefore, the claims are valid.

I also agree with the Court of Queen's Bench that there is in the invention, sufficient creative or inventive character and sufficient novelty to constitute the subject-matter of the patent, and that it has been infringed by the appellant.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Attorney for the defendant, appellant: Kaufman, Hoffman & Respitz, Montreal.

Attorneys for the plaintiff, respondent: Greenblatt, Godinsky & Kingstone, Montreal.

ALAN THOMAS MARSHALL .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

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*Oct. 19
Dec. 19

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Evidence—Motor vehicles accident—Statements made to police—Whether admissible in criminal proceedings—The Highway Traffic Act, R.S.O. 1950, c. 167, s. 110, as amended—Canada Evidence Act, R.S.C. 1952, c. 307, s. 36—Criminal Code, 1953-54 (Can.), c. 51, s. 7(1).

The appellant was convicted on a charge of causing death by criminal negligence in the operation of a motor vehicle contrary to the *Criminal Code*. The Court of Appeal having dismissed his appeal, the appellant appealed to this Court on a question of law whether oral statements as to the quantity of beer he had consumed prior to the accident made to the police by him were inadmissible at the trial because of s. 110 of *The Highway Traffic Act* of Ontario.

Held: The appeal should be dismissed.

Per Kerwin C.J. and Taschereau and Judson JJ.: By common law a confession was admissible when it was proved to have been voluntarily made in the sense that it was not induced by threats or promises. Here

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

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the trial judge was right in holding that the statements made by the appellant were voluntary. If s. 110(5) of *The Highway Traffic Act* purported to alter the rule, its application in a trial under the *Criminal Code* was excluded by s. 36 of the *Canada Evidence Act* because s. 7(1) of the Code retained the old common law. But in view of the amendment contained in s. 20 of c. 17 of the Statutes of 1938, wherein the words "civil or criminal" were stricken from the section corresponding to the present s. 110(5) of the Act, it was never the intention of the Legislature to so alter the rule.

Per Locke and Cartwright JJ.: Statements made under compulsion of a statute were not by reason of that fact alone rendered inadmissible in criminal proceedings against the person making them. *Walker v. R.*, [1939] S.C.R. 214; *R. v. Scott*, (1856), Dears & B. 47; *R. v. Coote*, (1873), L.R. 4 P.C. 599, referred to. This rule was continued as part of the criminal law of Ontario by virtue of s. 7 of the Criminal Code.

Section 36 of the *Canada Evidence Act* could not be interpreted as providing that where a law in the province in which criminal proceedings are taken renders a statement made under specified circumstances inadmissible in civil proceedings it shall be inadmissible in criminal proceedings also. *R. v. Gordon*, [1946] O.R. 845; *R. v. Pedersen*, 23 C.R. 198; *R. v. Arnew*, 30 C.R. 318, disapproved.

In addition the words in s. 36, "subject to this and other acts of the Parliament of Canada" prevented the section having the effect that a statement made pursuant to the obligation imposed by s. 110 of *The Highway Traffic Act* should be inadmissible in criminal proceedings.

APPEAL from a judgment of the Court of Appeal for Ontario, affirming the conviction of the appellant. Appeal dismissed.

H. S. Honsberger, for the appellant.

W. C. Bowman, Q.C., for the respondent.

The judgment of Kerwin C.J. and of Taschereau and Judson JJ. was delivered by

THE CHIEF JUSTICE:—By leave of this Court Alan Thomas Marshall appeals upon a question of law against a judgment of the Court of Appeal for Ontario dismissing his appeal from his conviction upon a charge that he caused the death of James Brown by criminal negligence in the operation of a motor vehicle contrary to the *Criminal Code*. The point of law is whether oral statements as to the quantity of beer he had consumed prior to the accident made to the police by the appellant were inadmissible at his trial upon that charge because of s. 110 of *The Highway Traffic Act*, R.S.O. 1950, c. 167.

The appellant was tried at the Toronto Assizes before Wilson J. and a jury. The evidence for the Crown was that about 5.45 p.m., on August 4, 1959, the appellant was driving a Volkswagen automobile in an easterly direction along the Lakeshore Road, a wide street with two sets of streetcar tracks, at about forty-five miles per hour in a thirty-mile per hour zone and barely avoided colliding with the rear of a streetcar proceeding in the same direction and which streetcar was coming to a stop at a stop light. Later the Volkswagen made a wide sweep in passing a truck, went into a spin and struck another automobile, as a result of which Brown was fatally injured. When Constable Wackett arrived at the scene of the accident about 5.54 p.m., Brown was unconscious. The appellant was conscious but there was a cut on his face and the constable "noticed there was a smell of an alcoholic beverage on his breath". The appellant was taken in an ambulance to the Queensway General Hospital and later to St. Joseph's Hospital.

Evidence was then given in the absence of the jury to determine the admissibility of statements alleged to have been made by the accused. In answer to the question to Constable Wackett: "Did you have any conversation, Officer, with the accused man at the scene of the accident?", the reply was: "Just general questions as to his well-being and in connection with the accident". No evidence as to that occurrence was given by the appellant. About 6.15 p.m. the same day, the constable saw the appellant at the Queensway General Hospital, told the appellant he had observed that he had been drinking, and asked him: "How much have you had to drink?", to which the reply was: "Six pints of beer". Later in the evening of the same day Wackett saw the appellant at St. Joseph's Hospital and testified that he said to the appellant that he "was of the opinion that he had had too much to drink to be driving", to which the appellant answered: "Well, if that is your opinion, you are entitled to your opinion". Sergeant Morrisson testified that the appellant told him that he had had some beer to drink at a bar in downtown Toronto, from where he had gone to another downtown bar and had more beer. He had then gone to New Toronto, where he had met Brown in the beverage room of the Almont Hotel where the two of them had beer and were proceeding from

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that place to the Woodbine race track when the accident occurred. Sergeant Morrisson testified that the appellant had admitted to having four pints of beer and two glasses of draft beer in all. The accused testified on the voir dire that he had not had anything to drink downtown but only at the Almont Hotel where he met Brown and where he, himself, had three pints of beer. All this time the accused was not under arrest and no charge had been laid against him.

The trial judge held that the evidence did not show that there was any intention on the part of the appellant to report the accident since, on the voir dire, he had no memory of doing anything except vaguely having some conversation with a police officer. Assuming that s. 110 of *The Ontario Highway Traffi Act* applied to the appellant, the trial judge held that an investigation by the police to determine whether or not a crime had been committed was not to be hampered by a ruling that there was a privilege extended by the section. He had no doubt that the statement was voluntary. He therefore admitted the statements which were repeated in evidence in the presence of the jury.

Section 110 of the Ontario *Highway Traffic Act*, as amended by s. 14 of c. 35 of the Statutes of 1954, reads as follows:

> 110. (1) Every person in charge of a motor vehicle who is directly or indirectly involved in an accident shall, if the accident results in personal injuries, or in damage to property apparently exceeding $100, report the accident forthwith to the nearest provincial or municipal police officer, and furnish him with such information or written statement concerning the accident as may be required by the officer or by the Registrar.
>
> (2) Where such person is physically incapable of making a report and there is another occupant of the motor vehicle, such occupant shall make the report.
>
> (3) A police officer receiving a report of an accident, as required by this section, shall secure from the person making the report, or by other inquiries where necessary, such particulars of the accident, the persons involved, the extent of the personal injuries or property damage, if any, and such other information as may be necessary to complete a written report concerning the accident to the Registrar.
>
> (4) The Registrar may require any person involved in an accident, or having knowledge of an accident, the parties thereto, or any personal injuries or property damage resulting therefrom, to furnish, and any police officer to secure, such additional information and make such supplementary reports of the accident as he may deem necessary to complete his records, and to establish, as far as possible, the causes of the accident, the persons responsible, and the extent of the personal injuries and property damage, if any, resulting therefrom.

(5) Any written reports or statements made or furnished under this section shall be without prejudice, shall be for the information of the Registrar, and shall not be open to public inspection, and the fact that such reports and statements have been so made or furnished shall be admissible in evidence solely to prove compliance with this section, and no such reports or statements, or any parts thereof or statements contained therein, shall be admissible in evidence for any other purpose in any trial arising out of a motor vehicle accident.

(6) Any person who fails to report or furnish any information or written statement required by this section shall be liable to a penalty of not less than $10 and not more than $50, and in addition the Minister may suspend the operator's or chauffeur's licence and owner's permit or permits of any such persons.

Section 7(1) of the *Criminal Code*, 1953-54 Statutes of Canada, c. 51, enacts:

7. (1) The criminal law of England that was in force in a province immediately before the coming into force of this Act continues in force in the province except as altered, varied, modified or affected by this Act or any other Act of the Parliament of Canada.

Section 36 of the *Canada Evidence Act*, R.S.C. 1952, c. 307, provides:

36. In all proceedings over which the Parliament of Canada has legislative authority, the laws of evidence in force in the province in which such proceedings are taken, including the laws of proof of service of any warrant, summons, subpoena or other document, subject to this and other Acts of the Parliament of Canada, apply to such proceedings.

The question whether the provisions of subs. 5 of s. 88 of the Ontario *Highway Traffic Act*, R.S.O. 1927, c. 251, as enacted by 20 Geo. V, c. 47, s. 6, applied to verbal statements was left open in *Walker v. The King*[1]. That subsection, with an important amendment noted below, corresponds to subs. 5 of s. 110 of the present Act but it is unnecessary to express any view on the question in the present appeal. As was pointed out in the Walker case, by common law a confession is admissible when it is proved to have been made voluntarily in the sense that it was not induced by threats or promises. I agree with the trial judge that the statements here in question were made voluntarily. If subs. 5 of s. 110 of the present Act purported to alter this rule, its application in a trial under the *Criminal Code* is excluded by that part of s. 36 of the *Canada Evidence Act* which is underlined because s. 7(1) of the *Criminal Code* retains the old common law; but in view of

[1] [1939] S.C.R. 214, 71 C.C.C. 305.

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the amendment referred to above, I am satisfied that the Legislature never so intended. The Walker case was decided in 1939 with reference to an accident which had occurred in July 1937 before the Revised Statutes of Ontario 1937 came into force. Subsection 5 of s. 88 of R.S.O. 1927, c. 251, as enacted by Geo. V., c. 47, s. 6, was carried forward into the Revised Statutes of 1937 as subs. 5 of s. 94, but by s. 20 of c. 17 of the Statutes of 1938 the words "civil or criminal" in the ninth line of subs. 5 of s. 94 of the 1937 Revised Statutes were striken out.

The appeal should be dismissed.

The judgment of Locke, Cartwright and Judson JJ. was delivered by

CARTWRIGHT J.:—The relevant facts, the provisions of the applicable statutes and the question raised on this appeal are set out in the reasons of the Chief Justice.

The finding of the learned trial judge that the statements made by the appellant, the admissibility of which is questioned, were voluntary in the sense that they were not induced by threats or promises is supported by the evidence and could not be successfully challenged; and he was right in admitting them unless they were rendered inadmissible by the combined effect of s. 110(5) of *The Highway Traffic Act* of Ontario and s. 36 of the *Canada Evidence Act*.

As a matter of construction it is my opinion that the words in s. 110(5) "any trial" mean "any trial respecting the proceedings in which the Legislature has jurisdiction". This follows not only from the history of the subsection and particularly the amendment made by s. 20 of c. 17 of the Statutes of Ontario 1938 set out in the reasons of the Chief Justice but also from the well settled rule of construction that if the words of an enactment so permit they shall be construed in accordance with the presumption which imputes to the legislature the intention of limiting the operation of its enactments to matters within its allotted sphere.

The judgment of this Court in *Klein v. Bell*[1] makes it plain that it would be *ultra vires* of the Legislature to provide that the reports and statements made under the

[1] [1955] S.C.R. 309.

compulsion of s. 110 of *The Highway Traffic Act* should be inadmissible in criminal proceedings. At page 315 the Chief Justice said:

> Canada, of course, could only provide with reference to all proceedings over which it had legislative authority and the provincial legislature with reference to proceedings over which it had such authority.

At page 319, Rand J. said:

> I entertain no doubt that a province cannot exclude from testimony in a criminal prosecution admissions made in the course of discovery or of trial in a civil proceeding; to do so would be to legislate in relation to procedure in criminal matters which is within the exclusive jurisdiction of Parliament.

It has long been settled that statements made under compulsion of a statute are not by reason of that fact alone rendered inadmissible in criminal proceedings against the person making them; it is sufficient on this point to refer to *Walker v. The King*[1]; *Regina v. Scott*[2]; and *Regina v. Coote*[3].

It remains to consider the effect of s. 36 of the *Canada Evidence Act*. No doubt s. 110(5) of *The Highway Traffic Act* forms part of the laws of evidence in force in the Province of Ontario but, construed as I think it must be, it does not purport to render the statements made under it inadmissible in criminal proceedings. It cannot assist the appellant unless s. 36 of the *Canada Evidence Act* can be interpreted as providing that where a law in the province in which criminal proceedings are taken renders a statement made under specified circumstances inadmissible in civil proceedings it shall be inadmissible in criminal proceedings also. Parliament has power to so enact, but it does not appear to me that the words of s. 36 are susceptible of the suggested interpretation, and I am forced to conclude that even on the assumption that the statement made by the appellant would have been rendered inadmissible in a civil trial arising out of the motor vehicle accident out of which the criminal charge against the appellant arose (a question which I find unnecessary to decide) they were not rendered inadmissible on the trial of that charge.

[1] [1939] S.C.R. 214 at 217.
[2] (1856), Dears & B. 47, 25 L.J.M.C. 128.
[3] (1873), L.R. 4 P.C. 599 at 607.

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I realize that the view which I have expressed restricts the operation of s. 36 within narrow limits in so far as criminal proceedings are concerned, but the contrary view would involve the possibility of the law as to the admissibility in evidence in criminal proceedings of statements made by an accused person varying from province to province and from year to year in accordance with provincial enactments dealing with the rules of evidence in civil cases. It would, in my opinion, require plainer words than have been used to enable us to construe s. 36 as having such an effect.

I have reached the above conclusion with hesitation as it appears to be at variance with the view implicit in the reasons of Lebel J. in *Rex v. Gordon*[1], those of Gale J. in *Regina v. Pedersen*[2], and those of the Court of Appeal in *Regina v. Arnew*[3].

If, however, contrary to the opinion I have expressed, the words of s. 36 would otherwise have been apt to provide that a statement made pursuant to the obligation imposed by s. 110 should be inadmissible in criminal proceedings arising out of the same motor vehicle accident, I would agree with Mr. Bowman's submission that the words in s. 36, "subject to this and other acts of the Parliament of Canada" prevent the section having that effect.

The predecessor of what is now s. 110 of *The Highway Traffic Act* was first enacted in 1930. At that time the rule embodied in many decisions, that a statement made under compulsion of a statute is not by reason of such compulsion rendered inadmissible in criminal proceedings against the person making it, was by virtue of an Act of the Parliament of Canada, i.e., s. 10 of the *Criminal Code*, R.S.C. 1927, c. 36, part of the criminal law of the Province of Ontario, and that state of affairs is preserved by s. 7 of the *Criminal Code*, 2-3 Elizabeth II, c. 51. It follows that the protection accorded by s. 110(5) to a person making a statement pursuant to s. 110, is effective in civil but not in criminal proceedings arising out of the accident in regard to which the statement was made.

[1] [1946] O.R. 845.
[2] [1956] O.W.N. 212, 23 C.R. 198.
[3] [1959] O.R. 446, 30 C.R. 318.

That such a conclusion has anomalous results cannot be denied. If a person in charge of a motor vehicle is involved in an accident causing personal injuries under such circumstances that he may well be guilty of criminal negligence and is confronted immediately thereafter by a police officer he is entitled, under the maxim *nemo tenetur seipsum accusare,* to remain silent and indeed it is desirable that the officer before questioning him should give him the usual warning that he is not obliged to say anything (other than to give his name and address, as required by s.221(2) of the *Criminal Code*); on the other hand it is his duty under s. 110, to furnish the officer with such information concerning the accident as the officer may require, and the information which he gives in fulfilment of this duty can be used against him if he is tried for criminal negligence. If it is thought undesirable that such anomalies should exist, they can be removed only by legislative action.

The opinion which I have formed as to the combined effect of s. 110(5) of *The Highway Traffic Act* and s. 36 of the *Canada Evidence Act* renders it unnecessary for me to examine the arguments addressed to us on the question whether the statements with which we are concerned would, in the particular circumstances of this case, have been admissible at the trial of a civil action; I wish to reserve my opinion on the questions, (i) whether under s. 110 it is the duty of a person to inform the police officer, if such information is required by the latter, as to the amount of intoxicating liquor he had consumed prior to the accident, and (ii) whether the view of the majority of the Court of Appeal or that of Mackay J.A. in *Smith Transport et al. v. Vanderyagt*[1] is to be preferred.

I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors for the appellant: Raymond & Honsberger, Toronto.

Solicitor for the respondent: F. L. Wilson, Toronto.

[1] [1957] O.R. 599, 11 D.L.R. (2d) 166.

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*Nov. 3
Dec. 19

LLOYD LAFONTAINE (*Plaintiff*) .....APPELLANT;

AND

HARTFORD ACCIDENT AND INDEMNITY COMPANY (*Defendant*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Insurance—Public liability policy placed by employer for employee—Termination of employment—Right of employer to cancel policy.

Courts—Inference of fact drawn by appeal court—Not to be interfered with unless clearly erroneous.

A term of the appellant's employment as a salesman for Hearst Corporation was that he should use his own car. The employer procured an individual insurance policy covering the employee against public liability for a period of one year from March 22, 1954. All that the employee did was to sign an application for the policy. Within a few days after the termination of his employment in May 1954, the appellant received an insurance identification card from the insurer. Shortly afterwards the policy was cancelled at the instance of Hearst, although there was no express term in the agreement of employment that the employer should have the right to cancel the policy before its expiration. The cancellation was made without the appellant's knowledge, and he learned of it only in November 1954 when he made enquiries of the insurer. Upon being so informed he made no protest. He was involved in an accident in February 1955, and then claimed indemnification after judgment went against him. The trial judge held in his favour, but this decision was reversed by a majority in the Court of Appeal. The appellant appealed to this Court.

Held (Cartwright J. dissenting): The appeal should be dismissed.

Per Kerwin C.J. and Abbott, Martland and Judson JJ.: The inference of fact drawn by the Court of Appeal that the employer, as a necessary incident of the right and authority to place the insurance as a term of the contract of employment, had the right to cancel it when the employment came to an end was correct. In any event the inference is one that can only be interfered with if this Court is satisfied that it is clearly erroneous. *Pelletier v. Shykofsky,* [1957] S.C.R. 635, referred to.

Per Cartwright J., *dissenting*: The Court may supply a term which the parties have failed to express in a contract only if satisfied that it is doing merely what the parties would clearly have done themselves had they thought about the matter. Here it was far from clear what the parties would have done under the circumstances. *Reigate v. Union Manufacturing Co. (Ramsbottom),* [1918] 1 K.B. 592, applied.

*PRESENT: Kerwin C.J. and Cartwright, Abbott, Martland and Judson JJ.

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

R. N. Meakes, for the plaintiff, appellant.

T. N. Phelan, Q.C., for the defendant, respondent.

The judgment of Kerwin C.J. and of Abbott, Martland and Judson JJ. was delivered by

JUDSON J.:—The appellant, Lloyd LaFontaine, sued the respondent insurance company for indemnification against two judgments given against him as a result of a motor car accident. He succeeded at the trial but failed on appeal and he now seeks to have the judgment at trial restored.

From March 22, 1954, to May 25, 1954, the appellant was employed by Hearst Corporation of New York as a sales agent in its Magazine Division in Toronto. It was a term of his employment that he should use his own car. Since he had no insurance, the Hearst Corporation immediately applied for public liability insurance for him through its own brokers in New York. To comply with s. 194(1) of the Ontario *Insurance Act,* R.S.O. 1950, c. 183, it was necessary to have a signed application from the employee. At the request of the employer, the employee signed the application and an individual policy was eventually issued covering the employee against public liability from March 22, 1954, the date when the employment began, until March 22, 1955, while driving either for business or pleasure. The Hearst Corporation chose the insurance company through its own broker; it decided that there should be insurance as a condition of employment; it decided the extent of the coverage and the monetary limits; it paid the premium and took delivery of the policy. All that the employee did was to sign an application for the policy. The appellant's employment ended on May 25, 1954. On July 15, 1954, the Hearst Corporation surrendered the policy for cancellation and return of the unearned premium. The insurance company acted on this application on July 23, 1954.

Because there had been delays in correspondence between Toronto and New York the policy was not actually issued until May 21, 1954, but the employee had been covered from

[1] [1960] O.W.N. 25, 21 D.L.R. (2d) 403.

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Judson J.

March 22, 1954. This explains why the insurance company, within a few days after May 25, when the appellant's employment had already ended, sent to him an identification card, for use in case of an accident, which gave some particulars of the policy which had been issued. This might have led the appellant to conclude at the time that notwithstanding the termination of his employment, his automobile policy was still in force and would remain in force. It was in fact in force at the time of the receipt of the identification card but was cancelled shortly afterwards without his knowledge. He learned of the cancellation only in November 1954 when he made enquiries at the Toronto office of the insurance company and was told that the insurance had been cancelled in June and the unearned premium paid to the Hearst Corporation. He made no protest either to Hearst Corporation or the insurance company against what had been done. He was involved in an accident in February 1955 and then claimed indemnification after judgment went against him. He succeeded at the trial on his claim for indemnity because the learned trial judge held that the Hearst Corporation, while it had authority to take out the policy, had none to surrender it.

The Court of Appeal, Schroeder J.A. dissenting, held that the Hearst Corporation, as employer, in all the circumstances of this case, had authority to do both. The finding of the Court of Appeal was that the clearly understood purpose of this insurance was to cover the appellant while he was an employee and not for the period of one year stated in the policy; that the appellant knew that the employer had no interest in covering him after the termination of the employment, and that his failure to protest after his discovery of the cancellation was significant, not, it is true, in creating an estoppel, but as a tacit acknowledgment that he knew that the company had the right to surrender the policy.

What the Court of Appeal has found was that the scope of the agency was the insurance of the appellant against public liability during the term of the employment and not after its termination. There was express authority to place this insurance in the form of the signed application. The fact that the policy was for a term of one year did not entitle the appellant to this protection if his employment ceased

within the year. The employer, therefore, as a necessary incident of the right and authority to place this insurance as a term of the contract of employment, had the right to cancel it when the employment came to an end. This, of course, is an inference of fact drawn by the Court of Appeal and differing from that of the learned trial judge. It is, in my respectful opinion, the correct inference from the undisputed facts but in any event it is one that can only be interfered with if this Court is satisfied that it is clearly erroneous. (*Pelletier v. Shykofsky*[1])

I would dismiss the appeal with costs.

CARTWRIGHT J. (*dissenting*):—The facts out of which this appeal arises are not in dispute. They are stated in the reasons of my brother Judson. I shall endeavour to refrain from repetition but wish to emphasize certain matters.

By the policy which was admittedly issued by the respondent to the appellant the former agreed to indemnify the latter, and every other person who with the appellant's consent should personally drive the automobile belonging to the appellant and described in the policy, against the liability imposed by law upon the appellant or upon any such person for loss or damage arising from the ownership or operation of the automobile. The purposes for which the automobile was to be chiefly used were stated in the policy to be "business and pleasure".

It will be observed that the policy afforded protection to the appellant with which his employer the Hearst Corporation, hereinafter referred to as "Hearst", was not concerned. Hearst would be exposed to the risk of vicarious liability for injuries inflicted or damage done by the negligent operation of the automobile only if the appellant were at the time of such operation using the automobile on the business of Hearst.

There was no express term in the agreement of employment between the appellant and Hearst that the latter should have the right to cancel the policy before its expiration. The difference of opinion, between the majority in the Court of Appeal on the one hand and the learned trial judge and Schroeder J.A. on the other, is as to whether or not the Court should imply such a term.

[1] [1957] S.C.R. 635.

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Cartwright J.

On this question I agree with the conclusion reached by Schroeder J.A. and by the learned trial judge and also with their reasons, which make it unnecessary to refer at length to the authorities with which they deal so fully.

The test to be applied in determining whether or not the Court should imply a term which the parties have not expressed has been stated by several judges in varying language but without difference in substance.

In *Reigate v. Union Manufacturing Co. (Ramsbottom)*[1], Scrutton L.J. said:

> A term can only be implied if it is necessary in the business sense to give efficacy to the contract; that is, if it is such a term that it can confidently be said that if at the time the contract was being negotiated some one had said to the parties, 'What will happen in such a case,' they would both have replied, 'Of course, so and so will happen; we did not trouble to say that; it is too clear.' Unless the Court comes to some such conclusion as that, it ought not to imply a term which the parties themselves have not expressed.

Applying the test suggested in this passage to the circumstances of the case at bar, it appears to me that if some one had said to the appellant and the officer of Hearst while they were negotiating the contract of employment, "What will happen in regard to the insurance policy if the employment terminates during its currency?" there is no answer which it can be said would have been given by both of them as a matter of course. There are, I think, a number of answers any one of which might have been made by reasonable business men. I suggest the following examples and doubtless others could be given.

(i) Hearst may surrender the policy for cancellation at any time after the employment terminates, without giving any notice to the appellant and may accept and retain the portion of the premium that is refunded. (This is the term implied by the judgment of the majority in the Court of Appeal.)

(ii) If Hearst terminates the employment for any reason other than the misconduct of the employee, the policy will be handed over to the appellant without obligation on his part.

[1] [1918] 1 K.B. 592 at 605, 87 L.J.K.B. 724.

(iii) Hearst will give the appellant the option of taking delivery of the policy and paying to Hearst the proportionate part of the premium for the unexpired term, or of having it cancelled and allowing Hearst to retain the portion of the premium refunded.

(iv) Hearst may surrender the policy for cancellation at any time after the employment terminates upon giving the appellant two weeks notice of its intention so to do, in order that he may have an opportunity of obtaining other insurance if he so desires.

I find myself quite unable to say that if the suggested question had been raised both parties would have said "Of course the agreement will be that set out in example (i)". Personally, I think it more likely that some discussion would have been necessary and that the parties would have agreed on the term set out in example (iii) which would adequately protect the rights of both Hearst and the appellant and appears to me to be the most reasonable of those I have suggested.

The Court may supply a term which the parties have failed to express in a contract only if satisfied that it is doing merely what the parties would clearly have done themselves had they thought about the matter. In the circumstances of this case I think it far from clear what the parties would have done.

I would allow the appeal, set aside the judgment of the Court of Appeal and restore the judgment of the learned trial judge with costs throughout.

Appeal dismissed with costs, CARTWRIGHT J. *dissenting.*

Solicitors for the plaintiff, appellant: Palamar & Hebert, Toronto.

Solicitors for the defendant, respondent: Phelan, O'Brien, Phelan & Rutherford, Toronto.

1960
*Oct. 13
Dec. 19

HER MAJESTY THE QUEEN (on the information of Alexander F. Price) .. } APPELLANT;

AND

LOBLAW GROCETERIA CO. (MANITOBA) LTD. ..... } RESPONDENT.

HER MAJESTY THE QUEEN (on the information of Alexander F. Price) .. } APPELLANT;

AND

DAVID THOMSON, trading under the firm name and style of Niagara I.G.A. Grocery ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Criminal law—Trading stamps—Criminal liability—Whether Criminal Code definition of "trading stamps" exhaustive—Criminal Code, 1953-54 (Can.), c. 51, ss. 322(b), 369(2).

The respondents in both appeals, the circumstances of which were the same or similar, were charged with unlawfully giving trading stamps to a customer, contrary to s. 369(2) of the *Criminal Code*. In each case the magistrate dismissed the charge, and an appeal by way of a stated case was dismissed by a majority in the Court of Appeal. The appellant appealed to this Court.

Held: The appeals should be dismissed.

Per Curiam: The only object in deleting the words "besides trading stamps commonly so called" from the definition of trading stamps section in the 1953 revision of the Code (s. 322(b)) was to make the present definition exhaustive. The word "include" had an exhaustive definition in the present case.

There was no general accepted definition of "trading stamps". Here the stamp was not token currency, nor was it used in the obtaining of goods; it was not usable instead of money in procuring articles from the issuer of the stamps. The stamp could be redeemed only from the respondent from whom the article had been purchased and at the premises where it was sold; and the stamp showed upon its face the place where it was delivered and where it was redeemable upon demand, and in fact where it was so redeemed.

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*PRESENT: Kerwin C.J. and Locke, Fauteux, Abbott and Martland JJ.

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Per Fauteux J.: The word "includes" in s. 322(b) of the Code was, in the context, exclusively related to the words "any form"; it was not referable to what the documents or other devices must be as to substance in order to come within the prohibition. While all-embracing or all-inclusive as to the forms which may possibly be adopted for such documents or devices, the definition was exhaustive as to the particular features required as constituent elements of the prohibited trading stamps. The precise specifications as to substance, contained in (b)(i), (ii) and (iii) of the section as well as in the saving clause did not justify the inference that Parliament intended, from the use of the word "includes", to extend the definition in order to cover any other documents or devices as to which it said nothing with respect to features attending issuance, nature of benefit and redemption.

APPEALS from judgments of the Court of Appeal for Manitoba[1], affirming orders of acquittal of a Police Magistrate.

J. A. Scollin, for the appellant in both appeals.

Edward A. Pitblado, Q.C., and *David Procter,* for the respondent, Loblaw Groceterias Co. (Manitoba) Ltd.

J. J. Robinette, Q.C., H. Solway, Q.C., and *J. F. R. Taylor,* for the respondent, David Thomson (Niagara I.G.A. Grocery).

The judgment of Kerwin C.J. and of Locke, Abbott and Martland JJ. was delivered by

THE CHIEF JUSTICE:—These two appeals were argued together. I deal first with that in connection with Loblaw Groceterias Co. (Man.) Limited, which is an appeal against a judgment of the Court of Appeal for Manitoba[1] on an appeal to it by way of stated case against an order or judgment of acquittal of a Police Magistrate. By answering the three questions submitted to it in the affirmative the Court of Appeal held that on the facts found by the Magistrate, as to which there is no dispute, he had correctly dismissed the charge against that respondent company that it did on November 17, 1959, at Winnipeg, unlawfully, being a merchant or dealer in goods, by its employee or agent, directly, or indirectly, give trading stamps to William Hrycyk, a person who purchased goods from it.

[1] *R. v. Loblaw Groceterias Co. (Manitoba) Ltd.* (1960), 31 W.W.R. 433, 24 D.L.R. (2d) 324.

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Kerwin C.J.

The charge was laid under subs. 2 of s. 369 of the *Criminal Code*, 1953-54, c. 51:

(2) Every one who, being a merchant or dealer in goods, by himself or his employee or agent, directly or indirectly gives or in any way disposes of, or offers to give or in any way dispose of, trading stamps to a person who purchases goods from him is guilty of an offence punishable on summary conviction.

Section 369 appears in Part VIII and the first section in that Part reads as follows:

322. In this Part,

(*a*) "goods" means anything that is the subject of trade or commerce; and

(*b*) "trading stamps" includes any form of cash receipt, receipt, coupon, premium ticket or other device, designed or intended to be given to the purchaser of goods by the vendor thereof or on his behalf, and to represent a discount on the price of the goods or a premium to the purchaser thereof

(i) that may be redeemed

(A) by any person other than the vendor, the person from whom the vendor purchased the goods, or the manufacturer of the goods,

(B) by the vendor, the person from whom the vendor purchased the goods, or the manufacturer of the goods in cash or in goods that are not his property in whole or in part, or

(C) by the vendor elsewhere than in the premises where the goods are purchased; or

(ii) that does not show upon its face the place where it is delivered and the merchantable value thereof; or

(iii) that may not be redeemed upon demand at any time,

but an offer, endorsed by the manufacturer upon a wrapper or container in which goods are sold, of a premium or reward for the return of that wrapper or container to the manufacturer is not a trading stamp.

The respondent is a merchant or dealer in goods doing business at 1445 Main St. North, Winnipeg. On November 17, 1959, a member of the Winnipeg City police force, William Hrycyk, purchased from the respondent at that address, one tin of sardines for which he paid ten cents; at the time of the purchase Hrycyk was given by an employee of the respondent, one "Lucky Green stamp" and a book, called a stamp saver book, in which could be pasted that stamp and any others secured by the purchaser from time to time. On the face of the stamp appear the words:

Redeemable at any time
Merchantable Value 2 Mills
1445-Main St. N.
Winnipeg
B.C. Premium Company

and the stamp saver book states that the stamps are redeemable at any time and only at the store from which original purchases were made, and, further that the gifts illustrated in the premium catalogue are the property of the retailer. There were filed before the Magistrate as one exhibit a premium catalogue and supplements thereto and it was agreed that the lucky green stamp scheme was as detailed in that exhibit. Hrycyk presented the stamp and book to the manager of the respondent's store at the above address for redemption and he was handed by the manager two cake cups.

The answer given by the majority of the Court of Appeal to each of the following questions submitted by the Magistrate was: "Yes".

1. Was I right in law in holding that the word "includes" in Section 322(b) of the Criminal Code is to be construed as "means and includes"?
2. Was I right in law in holding that the stamp given to the said William Hrycyk by the said Loblaw Groceterias Co. Manitoba Limited is not a trading stamp within the meaning of the term "Trading stamps" in Section 322(b) of the Criminal Code?
3. Was I right in law in holding that the stamp given to the said William Hrycyk by the said Loblaw Groceterias Co. Manitoba Limited is not a trading stamp within the meaning of the term "trading stamps" in Section 369(2) of the Criminal Code?

Tritschler J.A. and Miller J.A. would have answered "No" to the questions.

The problem to be decided is whether the lucky green stamp is a "trading stamp" within the meaning of the Code and more particularly whether the definition of "trading stamps" in s. 322(*b*) is exhaustive. The history of the *Criminal Code* dealing with trading stamps shows that the first legislation by Parliament was enacted by c. 9 of the Statutes of 1905, amending the 1892 Code by the introduction of ss. 526(*a*) and 526(*b*). Until the amendments made to the Code, when it was revised in 1953 (Statutes of Canada 1953-54, c. 51), the definition section read in part:

"trading stamps" includes, besides trading stamps commonly so called, any form of cash receipt, receipt, coupon, premium ticket or other device, designed or intended to be given to the purchaser of the goods by the vendor . . .

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The definition section 322 inserted in the revision of 1953 deleted the underlined words. I can conceive of no object in deleting these words except to make the present definition of trading stamps exhaustive. Counsel for the appellant relies upon the statement of Lord Watson delivering the judgment of the Judicial Committee in *Dilworth v. New Zealand Commissioner of Stamps*[1]. He was there referring to ss. 2 and 3 of the *Charitable Gifts Duties Exemption Act*, 1883, as to which he said:

> Sect. 2 is, beyond all question, an interpretation clause, and must have been intended by the Legislature to be taken into account in construing the expression "charitable devise or bequest", as it occurs in s. 3. It is not said in terms that "charitable bequest" shall mean one or other of the things which are enumerated, but that it shall "include" them. The word "include" is very generally used in interpretation clauses in order to enlarge the meaning of words or phrases occurring in the body of the statute; and when it is so used these words or phrases must be construed as comprehending, not only such things as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include.

However, Lord Watson continues:

> But the word "include" is susceptible of another construction, which may become imperative, if the context of the Act is sufficient to show that it was not merely employed for the purpose of adding to the natural significance of the words or expressions defined. It may be equivalent to "mean and include", and in that case it may afford an exhaustive explanation of the meaning which, for the purposes of the Act, must invariably be attached to these words or expressions.

If authority were needed, the last part of Lord Watson's statement shows that "include" may be an exhaustive definition and for the reasons above stated that is the case in the present appeal.

Furthermore, a reference to the dictionaries mentioned by counsel for the respondent and for the appellant shows that there is no general accepted definition of "trading stamps". Certainly the stamp here in question is not token currency; it is not used in the obtaining of goods; it is not usable instead of money in procuring articles from the issuer of the stamps, B.C. Premium Company. The stamp delivered to Hrycyk could be redeemed only from the respondent from whom the tin of sardines had been purchased and at the premises where it was sold; and the stamp shows upon its

[1] [1899] A.C. 99 at 105.

face the place where it was delivered and where it was redeemable upon demand, and, in fact, where it was so redeemed.

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In the Thomson case, the purchaser, Hrycyk, purchased a tin of sardines from David Thomson, trading under the name and style of Niagara IGA Grocery, and upon demand received one safety pin. Hrycyk had received a stamp and a stamp saver book similar to the articles described in considering the Loblaw appeal and the same or similar circumstances existed.

The appeals should be dismissed.

FAUTEUX J.:—Respondents were charged under subsection (2) of s. 369 Cr. C., 1953-1954, c. 51:

(2) Every one who, being a merchant or dealer in goods, by himself or his employee or agent, directly or indirectly gives or in any way disposes of, or offers to give or in any way dispose of, trading stamps to a person who purchases goods from him is guilty of an offence punishable on summary conviction.

The expression "trading stamps" is defined as follows in s. 322(*b*):

322 (b) "trading stamps" includes any form of cash receipt, receipt, coupon, premium ticket or other device, designed or intended to be given to the purchaser of goods by the vendor thereof or on his behalf, and to represent a discount on the price of the goods or a premium to the purchaser thereof

(i) that may be redeemed

(A) by any person other than the vendor, the person from whom the vendor purchased the goods, or the manufacturer of the goods,

(B) by the vendor, the person from whom the vendor purchased the goods, or the manufacturer of the goods in cash or in goods that are not his property in whole or in part, or

(C) by the vendor elsewhere than in the premises where the goods are purchased; or

(ii) that does not show upon its face the place where it is delivered and the merchantable value thereof; or

(iii) that may not be redeemed upon demand at any time,

but an offer, endorsed by the manufacturer upon a wrapper or container in which goods are sold, of a premium or reward for the return of that wrapper or container to the manufacturer is not a trading stamp.

In essence, the question is whether this definition of trading stamps is exhaustive, or whether, as contended for by both appellants, it contemplates a class of trading stamps other than the one as to which specifications are given.

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Fauteux J.

The word "includes", appearing in the first line of the definition is, in the context, exclusively related to the words "any form"; it is not referable to what the documents mentioned or other devices must be as to substance in order to come within the prohibition. While all-embracing or all-inclusive as to the forms which may possibly be adopted for such documents or devices, the definition is exhaustive as to the particular features required as constituent elements of the prohibited trading stamps. The precise specifications as to substance, contained in (*b*)(i), (ii) and (iii) of the section as well as in the saving clause appearing at the very end of it, do not justify the inference that Parliament intended, from the use of the word "includes", to extend the definition in order to cover any other documents or devices as to which it said nothing with respect to features attending issuance, nature of benefit and redemption.

For the reasons given by the Chief Justice and the reasons above, I would dismiss the appeals.

Appeals dismissed.

Solicitor for the appellant in both appeals: The Attorney-General of Manitoba, Winnipeg.

Solicitors for the respondent, Loblaw Groceterias Co. (Manitoba) Ltd.: Pitblado, Hoskin & Company, Winnipeg.

Solicitors for the respondent, David Thomson (Niagara I.G.A. Grocery): Johnston, Garson, Forrester, Davison and Taylor, Winnipeg.

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*Oct. 4
Dec. 19

HER MAJESTY THE QUEEN .....APPELLANT;

AND

CECIL RAYMOND WARNER .....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Criminal law—Murder—Conviction quashed by Court of Appeal on ground inter alia it could not be supported by the evidence—Whether question of law raised—Jurisdiction of Supreme Court to hear appeal —Criminal Code, 1953-54 (Can.), c. 51, ss. 201, 202, 592 (1)(a)(i).

*PRESENT: Kerwin C.J. and Taschereau, Locke, Cartwright, Fauteux, Abbott, Martland, Judson and Ritchie JJ.

The respondent was found guilty of murder. He appealed and, by a unanimous decision, the Appellate Division of the Supreme Court quashed the conviction of murder, and substituted therefor one of manslaughter.

It was not disputed that the victim was killed by the respondent. According to the latter's evidence, the deceased while sitting in his car with the respondent, made an indecent proposal to the respondent who was drunk. The respondent seized the deceased by the neck and choked him. When the respondent came to his senses he found the victim limp and he attempted unsuccessfully to revive him. Thinking that the man was dead, he drove the car a short distance and then dragged the body to a ditch. He placed the man's belt around his neck, took his wallet and the car and left the place.

The pathologist who performed the autopsy concluded that death was caused by strangulation due to the tightening of the belt.

Held (Locke, Fauteux, Martland and Judson JJ. dissenting): The appeal should be dismissed.

Per Kerwin C.J. and Taschereau and Abbott JJ.: There was no jurisdiction in this Court to hear the appeal. The Chief Justice of Alberta, speaking on behalf of the Appellate Division, considered that the evidence was not sufficient to support a conviction, which was a question of fact. This first reason was not *obiter dictum* merely because he also gave another reason. *Gravestock v. Parkin,* [1944] S.C.R. 150; *Jacobs v. London County Council,* [1950] A.C. 361, referred to.

Per Taschereau, Cartwright and Abbott JJ.: The Appellate Division quashed the conviction on the ground *inter alia* that it could not be supported by the evidence. This was a distinct ground on which its judgment was based, and was a ground raising no question of law in the strict sense. It was *nihil ad rem* that the judgment was based also on other grounds raising such points of law.

Per Ritchie J.: In finding that a reasonable doubt existed as to whether or not the respondent believed his victim to be already dead at the time when he in fact caused his death, the Appellate Division made a finding of fact which excluded the application of s. 201 of the Code from the circumstances of this case, and which was not subject to review in this Court.

If the Appellate Division erred in finding that such a doubt existed, then this was an error of fact from which other errors necessarily flowed, including that s. 202 was the only one under which the jury could have found the accused guilty of murder. The error, if error it was, raised a mixed question of fact and law, and as such was not a competent ground of appeal to this Court. *R. v. Décary,* [1942] S.C.R. 80, referred to.

As the Appellate Division quashed the conviction on the ground *inter alia* that it could not be supported by the evidence, no question of law in the strict sense was raised by this appeal.

Per Locke J., *dissenting*: The language of the Chief Justice of the Appellate Division did not indicate that the decision of that Court rested upon the insufficiency of the evidence. If, however, it should be so construed, what was said as to the insufficiency of the evidence referred only to a charge of murder under s. 202 of the Code and not to such a charge under s. 201. This was misdirection. It

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was further made manifest that one of the grounds for this conclusion was the opinion that, as it could not be said with assurance that the accused did not believe the victim to have been dead when he tightened the belt around his neck, there could be no conviction for murder under s. 202. These were errors in law, which this Court was vested with jurisdiction to correct. *Thabo Meli v. R.*, [1954] 1 W.L.R. 228; *Bradley v. The Queen*, [1956] S.C.R. 723, referred to.

Per Fauteux, Martland and Judson JJ., *dissenting*: Although the Chief Justice of the Appellate Division was strongly of the opinion that the verdict of murder could not be supported by the evidence, he was not satisfied that this opinion had that degree of finality required to assert it as a distinct ground for the decision of the appeal.

If, however, it could be said that the decision of the Appellate Division was that the verdict could not be supported on the evidence, it appeared that this conclusion rested on the proposition stated when the Chief Justice, after dealing with s. 202, said: "this is the only section under which the jury could have found the accused guilty of murder." This was tantamount to saying that there was no evidence on which the jury could have convicted under s. 201, which was a question of law.

Where it appears that a decision of a court of appeal that a verdict cannot be supported by the evidence has been founded on a wrong conclusion of law, this Court is not without jurisdiction to hear an appeal from it. It was an error in law to say that there was no evidence upon which the jury could have found the accused guilty of murder under s. 201, which was the conclusion, in a relation to that section, which was ultimately reached by the Chief Justice of the Appellate Division.

The jury having rejected the defence of drunkenness, the suggestion of the Appellate Division that the trial judge should have put to the jury "a suggestion" that the accused put the belt around the victim's neck to assist in dragging him from the car to the ditch, was untenable. In directing a jury, the trial judge has not the duty to speculate and instruct them as to all the views which one might possibly take of the evidence.

As to the errors found in the Court below, and as to the grievances alleged for respondent in the notices of appeal to that Court, there was nothing of real substance.

APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division[1], quashing a conviction of murder and substituting one of manslaughter. Appeal dismissed, Locke, Fauteux, Martland and Judson JJ. dissenting.

W. Shortreed, Q.C., for the appellant.

Bruce D. Patterson, for the respondent.

The judgment of Kerwin C.J. and of Taschereau and Abbott JJ. was delivered by

[1] 127 C.C.C. 394.

THE CHIEF JUSTICE:—In my opinion there is no jurisdiction in the Court to hear this appeal. The first two sentences of the reasons for judgment of the Chief Justice of Alberta, speaking on behalf of the Appellate Division, are as follows:

> I am strongly of opinion that the verdict of murder cannot be supported by the evidence. But I feel I must go further, and set out other reasons for setting aside the conviction.

I read the first sentence as meaning that the Chief Justice considered that the evidence was not sufficient to support a conviction,—which is a question of fact. As to the second sentence and the remainder of the reasons, the decisions, referred to on the argument, of *Gravestock v. Parkin*[1] and *Jacobs v. London County Council*[2] show authoritatively that the first reason given by the Chief Justice of Alberta was not *obiter dictum* merely because he also gave another reason.

While it was announced that we had jurisdiction, further consideration has persuaded the majority of the Court that such is not the case.

The appeal should be dismissed.

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

CARTWRIGHT J.:—This is an appeal from a unanimous judgment of the Appellate Division of the Supreme Court of Alberta[3] pronounced on March 31, 1960, allowing an appeal from the conviction of the appellant on January 22, 1960, before Greschuk J. and a jury on the charge that at Edmonton on or about August 23, 1959, he did murder Stanley Valpeters. The Appellate Division quashed the conviction of murder, substituted a conviction of manslaughter and subsequently sentenced the appellant to ten years imprisonment.

The appeal is brought pursuant to an order made by this Court on May 12, 1960, granting the appellant leave to appeal on the following questions:

> (*a*) Did the Appellate Division err in law in holding that there was nondirection amounting to misdirection, if not misdirection, in respect to the offence of murder under section 202 of the Criminal Code, and that

[1] [1944] S.C.R. 150, 2 D.L.R. 337.
[2] [1950] A.C. 361, 1 All E.R. 737.
[3] 127 C.C.C. 394.

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Cartwright J.

the grounds on which the jury could find the accused guilty of murder while committing robbery were not placed before the jury as facts to be found by them;

(*b*) Did the Appellate Division err in law in finding that the trial judge should have put to the jury "a suggestion" that the accused put the belt around Valpeters' neck to assist in dragging him from the car to the ditch, in the absence of evidence to support any such suggestion;

(*c*) Did the Appellate Division err in law in holding that the judge's charge was inadequate in failing to explain the theory advanced by the Crown that strangulation was used to facilitate the commission of robbery, and, hence, whether it was intended to cause death or not the act constituted murder;

(*d*) Did the Appellate Division err in law in holding that only under section 202 of the Criminal Code could the jury have found the accused guilty of murder.

The order granting leave was made by a court consisting of five members, two of whom, dissenting, would have dismissed the application.

It is not disputed that Valpeters was killed by the appellant. There were no eye-witnesses of the killing other than the appellant himself who made a voluntary statement to the police after his arrest on the charge of murder and also gave evidence at the trial. The effect of the evidence is sufficiently summarized in the following passage in the reasons of Ford C.J.A. who delivered the reasons of the Appellate Division:

The facts of what happened when the deceased, Valpeters, met his death must be ascertained from the story told by the accused himself with the reasonable inferences to be drawn therefrom, the location and condition of the body when found, and the opinion evidence of the two doctors called by the Crown.

The story of the accused is that he is a drink addict and had been drinking throughout part of the afternoon of Saturday, August 22nd, 1959 and all of the evening, during which time he visited at least two hotels, the Hotel Regis, and the King Edward. He said that he met a constable on the street and asked to be taken into custody for being drunk as he wanted to go to Belmont for treatment because of his drink habits. Being unsuccessful in this, he went to police headquarters and suggested that there was a charge of false pretences that could or should be laid against him on which he could be taken into custody. In this, too, he was unsuccessful. There is no doubt that he tried to have this done as it is confirmed by the evidence of the police constables.

After this he roamed the streets of Edmonton until about two o'clock Sunday morning. During this period he was put out two or three times from the Rose cafe. This is also confirmed by independent evidence. About the hour just mentioned, when still in search of liquor, he met a stranger somewhere near the same restaurant. This stranger, who has turned out to be Valpeters, invited him to go in his car out of the City of Edmonton into the country to consume a bottle of whiskey. Valpeters

drove out past the oil refineries until the car was brought to a stop somewhere in the entrance to a farmhouse in the country. Valpeters invited the accused into the back seat in order to drink the whiskey. After both got into this seat he invited the accused to perform an act of gross indecency, whereupon a struggle began in which some blows, apparently ineffective, were struck, and Valpeters got the accused down and the accused seized Valpeters by the neck and choked him. The accused said that when he came to his senses Valpeters was all limp and that he attempted to revive him. The accused said that he had had some training with the St. Johns Ambulance. The attempt to revive was unsuccessful and, after feeling his heart and pulses, he thought the man was dead.

He said that he was in fear because of what he had done and backed the car out of the entrance way to the farmhouse and drove it a short distance along the road to a ditch where he got out and pulled the body from the back seat and dragged it by the armpits to the ditch. He said that he tried again to revive the man but could not do so. He said also what is the most serious evidence against himself that he put the man's belt around his neck when he was in the ditch and took his wallet and the car and left the place. That is where the body was found the following Monday afternoon.

The accused, on taking the car, drove to where he was living in Edmonton and took with him the woman with whom he was living and their son, that same morning, and drove back to the home of her parents in Ontario where he was later arrested.

I do not find it necessary to consider the several errors of law alleged by the appellant to have been made by the Appellate Division as I think it is clear that the Appellate Division allowed the appeal on two main grounds:

(1) that, in the opinion of the Appellate Division, the verdict of guilty of murder should be set aside on the ground that it could not be supported by the evidence, and

(2) that there had been errors in law in the charge of the learned trial judge.

So far as the judgment of the Appellate Division is based on the first ground mentioned, this Court is powerless to interfere with it. The question whether the Appellate Division was right in proceeding on this ground is not a question of law in the strict sense. It is a question of fact or, at the best from the point of view of the appellant, a mixed question of fact and law.

The reasons of the learned Chief Justice of Alberta open with the following paragraph:

I am strongly of opinion that the verdict of murder cannot be supported by the evidence. But I feel I must go further, and set out other reasons for setting aside the conviction.

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Later in his reasons, the learned Chief Justice says:

> No one can say with assurance that the accused did not believe Valpeters was dead on his becoming unconscious during the course of the struggle and after the efforts to revive him had failed.

This is a finding of fact made by the Appellate Division as a result of its examination of the evidence. It is irrelevant to inquire whether we would make the same finding if we had the power, which the Appellate Division has but which we have not, to proceed upon grounds of fact.

The jurisdiction of the Appellate Division to allow the appeal is found in s. 592(1)(*a*) of the *Criminal Code* which reads:

> 592(1) On the hearing of an appeal against a conviction, the court of appeal
>
> (*a*) may allow the appeal where it is of the opinion that
>
> (i) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence,
>
> (ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or
>
> (iii) on any ground there was a miscarriage of justice;

On reading the reasons as a whole, I am satisfied that the Appellate Division was exercising its jurisdiction under s. 592(1)(*a*)(i) and was setting the verdict aside on the ground that, in its opinion, it could not be supported by the evidence.

It was suggested during the argument that what the Appellate Division really did was to rule that there was no evidence on which the jury could have convicted the respondent of murder and that the question whether there is any evidence, as distinguished from the question whether there is enough evidence, is a question of law.

I cannot agree with this suggestion for several reasons. First, it appears that there was, as indeed both counsel concede, some evidence on which it would have been open to a properly instructed jury to find a verdict of murder and I am not prepared to assume that the Appellate Division overlooked or misunderstood this evidence. Secondly, if the Appellate Division had intended to hold that there was no evidence they would have said so; it is significant that they followed the very words of s. 592(1)(*a*)(i). This clause gives jurisdiction to the Court of Appeal to proceed on grounds of fact, while clause (ii) which follows immediately gives it jurisdiction to proceed on the ground that there has been

a wrong decision on a question of law. Thirdly, while a large number of grounds of appeal were put forward in the notice of appeal to the Appellate Division these did not include the ground that there was no evidence to support the conviction, while the following grounds were all appropriate to found the submission that the verdict should be set aside under s. 592(1)(*a*)(i) as being one that could not be supported by the evidence:

> (1) That the said conviction is against the law, evidence and weight of the evidence.
>
> * * *
>
> (3) That the jury failed to give proper, fair, reasonable and adequate consideration to the evidence and came to a hasty conclusion.
>
> (4) That the verdict of the jury was perverse and contrary to the evidence at the trial.
>
> * * *
>
> (19) The verdict of the jury was perverse and contrary to the evidence in that it generally failed to give the appellant the benefit of reasonable doubt and more particularly with respect to the following:
>
> (*a*) That the medical evidence indicated that a person rendered unconscious by pressure on the carotid nerve would become dead in a matter of minutes if certain steps such as lowering of the head between the knees and relieving of the pressure did not take place and there being no evidence that the deceased was so relieved prior to the placing of the belt.
>
> (*b*) That the medical evidence indicated death by strangulation and the evidence of the appellant indicated the deceased was limp and appeared to be dead in the car, which evidence was consistent with appellant's theory and defence as to cause and time of death or at least raised reasonable doubt that death occurred from the placing of the belt on the deceased's neck in the ditch and not by reason of the appellant's actions as stated in the car.

However, I may have dealt with this suggestion at undue length for the grounds on which leave to appeal to this Court was granted do not include a ground that the Appellate Division erred in holding that there was no evidence on which the jury could have convicted the respondent of murder.

If I am right in my view that the judgment of the Appellate Division is based on distinct grounds, with one of which we cannot interfere because it raises no question of law in the strict sense, it is of no consequence that the other grounds on which they proceeded did raise such questions of law. If authority be needed for this proposition it is to be

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found in the cases referred to by the Chief Justice during the argument of the appeal, *Gravestock v. Parkin*[1] and *Jacobs v. London County Council*[2]: in the last mentioned case Lord Simonds, with whom the other Law Lords agreed, said at page 369:

> But, however this may be, there is in my opinion no justification for regarding as obiter dictum a reason given by a judge for his decision, because he has given another reason also. If it were a proper test to ask whether the decision would have been the same apart from the proposition alleged to be obiter, then a case which ex facie decided two things would decide nothing.

At the risk of appearing repetitious, I venture to suggest that if the learned Chief Justice of Alberta, as he might have done, had simply said:

> I am strongly of opinion that the verdict of murder cannot be supported by the evidence . . . I would allow the appeal and quash the conviction of murder . . . we order that the conviction for murder be quashed, and a conviction of manslaughter be substituted.

no one would have suggested that this Court had power to review the judgment of the Appellate Division. I am unable to see how we acquire such power because the learned Chief Justice felt that he "must go further, and set out other reasons for setting aside the conviction"; his use of the word "other" makes it plain that he had already given one reason. The meaning of the word "other" as here used is that given first in the Concise Oxford Dictionary "not the same as one or more or some already mentioned or implied, separate in identity, distinct in kind, alternative or further or additional". Once a distinct reason has been given its character is not altered by the giving of additional reasons.

I conclude that the Appellate Division quashed the conviction on the ground *inter alia* that it cannot be supported by the evidence, that this was a distinct ground on which its judgment was based, that it is a ground raising no question of law in the strict sense and that it is *nihil ad rem* that the judgment was based also on other grounds raising such points of law.

I would dismiss the appeal.

LOCKE J. (*dissenting*):—The passage from the judgment of the learned Chief Justice of Alberta which is relied upon to support the argument that this Court is without jurisdiction to entertain this appeal must be read together with

[1] [1944] S.C.R. 150, 2 D.L.R. 337. [2] [1950] A.C. 361, 1 All E.R. 737.

other passages of the reasons which discuss the grounds upon which that portion of the opinion is based. After saying:

> I am strongly of opinion that the verdict of murder cannot be supported by the evidence. But I feel I must go further, and set out other reasons for setting aside the conviction.

the learned Chief Justice said in part:

> I would hold that there was non-direction amounting to misdirection, if not misdirection, in respect of the offence of murder under Section 202 of the Code. This is the only section under which the jury could have found the accused guilty of murder.

and again, after referring to the fact that the belt of the deceased was drawn tightly about his neck, this admittedly having been done by the respondent, and that the medical evidence was to the effect that the man had died of strangulation, it was said:

> No one can say with assurance that the accused did not believe Valpeters was dead on his becoming unconscious during the course of the struggle and after the efforts to revive him had failed.

With great respect, I am of the opinion that upon the evidence the accused might properly have been found guilty of murder under s. 201 of the *Criminal Code* and I consider the learned trial judge properly charged the jury upon that section.

I am further of the opinion that the fact that the accused may have believed that Valpeters was dead when he put the belt around his neck and drew it tight does not affect the question as to whether the offence was murder under either sections 201 or 202.

Upon the respondent's own statement, in the struggle with Valpeters in the car he struck him several times with his fists and attempted to throttle him and, after moving the car to another location, dragged the man to the ditch and there placed and tightened the belt around his neck. These were all facts which formed part of the offence of either murder or manslaughter and were properly all considered together. The argument that the various unlawful acts causing the death of a person may be split up and the intention of the accused considered in respect of each of them separately was made and rejected by the Judicial Committee in *Thabo Meli v. R*[1]. In that case the accused

[1] [1954] 1 W.L.R. 228, 1 All E.R. 373.

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persons had planned to kill the victim and had beaten him so severely that they thought he was dead. They then threw his body over a cliff for the purpose of indicating that the man had accidentally fallen over and been killed. It was shown at the trial that the injured man died not from the beating to which he had been subjected but from the exposure when lying out at the foot of the cliff. The contention that as the accused persons thought the man was dead when they threw him over the cliff and did this accordingly without the intent of killing him was rejected, for reasons which are applicable in the present case. I would add that a similar contention was advanced in this Court and rejected in *Bradley v. The Queen*[1].

I agree with my brother Fauteux, whose reasons I have had the advantage of reading, that the language of the learned Chief Justice above quoted does not indicate that the decision was rested upon the insufficiency of the evidence. If, however, it should be so construed, it is my opinion that there is jurisdiction in this Court to hear the appeal. Clearly, what is said as to the insufficiency of the evidence refers only to a charge of murder under s. 202 and not to such a charge under s. 201 and this, with respect, was misdirection. It is further made manifest that one of the grounds for this conclusion was the opinion that, as it could not be said with assurance that the accused did not believe Valpeters to have been dead when he tightened the belt around his neck, there could be no conviction for murder under s. 202. These were errors in law, in my opinion, which this Court is vested with jurisdiction to correct.

I would allow the appeal and restore the judgment at the trial.

The judgment of Fauteux, Martland and Judson JJ. was delivered by

FAUTEUX J. (*dissenting*):—In the early afternoon of August 24, 1959, two hunters discovered a body, in a ditch beside a municipal road, outside the city limits of Edmonton, in the Province of Alberta. The body, later identified

[1] [1956] S.C.R. 723 at 742, 6 D.L.R. (2d) 385.

as that of one Stanley Valpeters, was partly hidden by growing grass and was lying face down with a belt around the neck.

The pathologist who subsequently performed the autopsy observed, amongst other marks of violence, that there were, all around the neck, a straplike constriction and a furrow to which blades of grass were stuck. When the belt was exhibited to him and when told of its finding around the neck of the body, he expressed the opinion that the furrow could have resulted from a tension sustained for some time on the free end of the belt. He estimated it would take a minimum of about five minutes for constriction to stop the breath so as to cause death. His findings indicated to him that Valpeters was alive prior to the exertion of the pressure that caused the furrow. He concluded that death was caused by strangulation.

Investigation by the police led to the arrest of respondent a few days later, in the city of Toronto. Warner was then found in possession of Valpeters' wallet and automobile, the wallet containing identification papers of the latter and the license plates, issued for his automobile, having been substituted.

Respondent made an admittedly voluntary statement to the police. In the first part thereof, he relates at length and with details various occasions during which, the week before the date of the fatal occurrence and on the very day itself, he consumed alcoholic liquors. Then follows a narration of events contemporaneous and immediately subsequent to the killing of Valpeters, including his hurried departure from Edmonton, with all the members of his family, in the automobile of the latter. Respondent says that, in the early hours of the 23rd of August, 1959, the day before the discovery of the body, he and the deceased, who were strangers to one another, met casually on a street within the city limits of Edmonton. He accepted an invitation of Valpeters to drive to a suitable place to consume a bottle of liquor which the latter said he had in his automobile. They eventually stopped on a gravel road "or a kind of track or cattle-path in some bushes", where, on respondent's story, the following events took place:

> He (Valpeters) says "Let's get in the back seat because the whiskey is there". Both of us got in the back seat with him behind the driver's seat and I was on his right. Instead of producing a bottle of whiskey

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he put his hand over and started to undo my pants. The next thing I knew I got mad and proceeded to struggle with him. I started to choke him. I don't remember too much how long I was choking him or what but when I came to my sense again he was all limp.

I tried to feel a heart beat but couldn't and I got scared. This was in the back seat with my door open and I tried artificial respiration with him laying on the back seat. Nothing happened so I closed the back door and climbed into the driver's seat. I backed the car out of there on to the road and I drove a short distance from there. It wasn't very far. I got out and pulled him out of the car into the ditch.

I don't know whether I was still mad or crazy but I took his belt from his pants and wrapped it around his neck. I left him there.

I took his wallet from him but I don't know just what pocket it was in. I put it in my own pocket. Then I drove out of there and went home. It was just breaking daylight when I got home. I went into the house and got my wife out of bed and told her we were leaving right away as we were going to Drayton Valley and to pack everything that she could get in the car and we would send for the rest of the stuff later.

Respondent was then charged with the murder of Valpeters. At trial, he testified in his own defence repeating, with some additions, what he had already stated to the police. Thus, he suggested that while wrestling in the car, he was overpowered by his victim and then started to choke him. He said he had some knowledge of first aid and that, to practise artificial respiration, he thought it better, being in fear that attention of people in the neighbourhood might have been attracted by the scuffle, to drive some distance away. Having done so, he dragged Valpeters by the arm-pits in the ditch where, he said, he attempted to revive him and then he put the belt around his neck—an act for which, he testified, he was unable to account.

On this direct and other incriminating evidence of a circumstantial nature, the jury, having been directed particularly on the various issues raised in defence, to wit, drunkenness, provocation and self-defence, found the accused guilty of murder.

Respondent appealed and, by a unanimous decision, the Appellate Division of the Supreme Court quashed the verdict of murder, substituting thereto one of manslaughter.

The reasons for judgment were delivered by Ford C.J.A., and concurred in by the other members of the Court. In the opening paragraph of his reasons for judgment, the learned Chief Justice said:

I am strongly of opinion that the verdict of murder cannot be supported by the evidence. But I feel I must go further, and set out other reasons for setting aside the conviction.

He then proceeded to review the evidence, relating it to the offence of murder under s. 202 Cr.C., i.e., murder associated with robbery, and, having found fault with the address of the trial Judge in that respect, he disposed of the appeal in the manner just indicated.

The Crown then applied to this Court for leave to appeal. On this application, counsel for respondent, relying on the first sentence of the opening paragraph of the reasons for judgment, contended that this Court had no jurisdiction in the matter.

Subject to the right of respondent to raise the question of jurisdiction at the hearing of the appeal on the merit, leave to appeal was granted on questions of law here mentioned in the order in which they will hereafter be considered:

(i) Did the Appellate Division err in law in holding that only under section 202 of the Criminal Code could the jury have found the accused guilty of murder.

(ii) Did the Appellate Division err in law in finding that the trial judge should have put to the jury "a suggestion" that the accused put the belt around Valpeters' neck to assist in dragging him from the car to the ditch, in the absence of evidence to support any such suggestion;

(iii) Did the Appellate Division err in law in holding that there was nondirection amounting to misdirection, if not misdirection, in respect to the offence of murder under section 202 of the Criminal Code, and that the grounds on which the jury could find the accused guilty of murder while committing robbery were not placed before the jury as facts to be found by them;

(iv) Did the Appellate Division err in law in holding that the judge's charge was inadequate in failing to explain the theory advanced by the Crown that strangulation was used to facilitate the commission of robbery, and, hence, whether it was intended to cause death or not the act constituted murder;

Dealing with the objection to the jurisdiction of this Court.

It may well be impossible to affirm our jurisdiction in a case where a Court of Appeal states, clearly and without more, that a verdict is set aside on the ground that it cannot be supported by the evidence. This is not the situation in the present case. Here, the Chief Justice said:

I am strongly of the opinion that the verdict of murder cannot be supported by the evidence.

This sentence, he immediately and substantially qualified in adding:

But I feel I must go further, and set out other reasons for setting aside the conviction.

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Read together, these two sentences indicate, I think, that while entertaining, even to a strong degree, the opinion expressed, the Chief Justice was not ready to rest a decision upon it, but felt compelled to "go further" and give, not *the other reasons*, but *"other reasons"*, meaning reasons other than the opinion expressed, to justify the setting aside of the verdict of murder. In other words, strong as was this opinion, the Chief Justice was not satisfied that it had that degree of finality required to assert it as a distinct ground for the decision of the appeal which he ultimately rested on grounds stated as follows at the end of his reasons for judgment:

> I would hold that there was non direction amounting to misdirection, if not misdirection, in respect of the offence of murder under s. 202 of the Code. This is the only section under which the jury could have found the accused guilty of murder.

On this interpretation, the decisions in *Gravestock v. Parkin*[1] and *Jacobs v. London County Council*[2] have no application in this case.

If, however, it can be said that the decision of the Appellate Division was that the verdict of murder could not be supported on the evidence, we must, in that event, read the remainder of the reasons for judgment as being explanatory of the decision which had been reached. When that is done, it appears to me to be clear that the conclusion rested upon the proposition stated when the learned Chief Justice, after dealing with s. 202, said: "This is the only section under which the jury could have found the accused guilty of murder." This is tantamount to saying that there was no evidence on which the jury could have convicted under s. 201, and that is a question of law.

Has this Court jurisdiction to hear an appeal under such circumstances? In my opinion it has. The situation is somewhat analogous to that which arose in *Lizotte v. The King*[3]. In that case the Court of King's Bench had affirmed a conviction of murder, one of the grounds being that there was no substantial wrong or miscarriage of justice, notwithstanding certain errors of law at the trial. The Court[4] had declared "que la preuve justifie amplement le verdict". Before this Court it was contended, on behalf of the Crown,

[1] [1944] S.C.R. 150, 2 D.L.R. 337. [2] [1950] A.C. 361, 1 All E.R. 737.
[3] [1951] S.C.R. 115, 2 D.L.R. 754. [4] [1950] Que. K.B. 484.

that, as this was a decision of fact, or mixed law and fact, it was not subject to review in this Court. That argument was rejected in the following terms at p. 134:

> I do not think that this argument is entitled to prevail. In the case at bar it might perhaps be disposed of by pointing out that in my opinion there were serious errors in matters of law at the trial which the Court of Appeal did not regard as being errors at all; but even had the Court of Appeal found the existence of all the errors in law which in my view did occur and nonetheless dismissed the appeal pursuant to section 1014(2), I do not think that this court would be without jurisdiction.

Similarly, in my view, where it appears that a decision of a court of appeal, that a verdict cannot be supported by the evidence, has been founded on a wrong conclusion on a question of law, this Court is not without jurisdiction to entertain an appeal from it. That this occurred in the present case is shown in the consideration of the first ground of appeal.

Dealing with the merits of the appeal. The question whether the Appellate Division erred in law in holding that only under section 202 could the jury have found the accused guilty of murder, must be answered affirmatively. As presented to the jury, the case was not and could not have been legally confined to the issue of murder under section 202, i.e., murder associated with robbery, but included the issue of murder under section 201. On the latter issue, it was open to the jury to accept the opinion of the pathologist that the straplike constriction and the furrow around the neck resulted from a tension sustained for about five minutes on the free end of the belt and that prior to the exertion of the tension, Valpeters was alive. From these facts and subject to the consideration of the various defences raised,—which were rejected,—the jury could validly infer an intention to kill and reach a verdict of guilty of murder under section 201.

In his reasons for judgment, the Chief Justice said:

> No one can say with assurance that the accused did not believe Valpeters was dead on his becoming unconscious during the course of the struggle and after the efforts to revive him had failed.

It has been suggested that this constitutes a finding of fact which excludes the application of s. 201 of the Criminal Code, because, it is contended, if the respondent believed Valpeters to be dead he could not thereafter have conceived

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the intent to cause his death. It is then contended that, being a finding of fact, this Court has no jurisdiction to disturb it.

It should be noted, however, that the learned Chief Justice did not himself, in his reasons for judgment, relate the statement above quoted to the conclusion which he ultimately reached that the respondent could not have been convicted under s. 201. It occurs in the course of his consideration of the adequacy of the charge to the jury by the learned trial Judge in respect of the application of s. 202 of the Criminal Code, for, after discussing what was said in the charge in relation to that matter, he said:

> Taken by itself, this is not objectionable. But the real question for the jury was whether or not what the accused did was done in the course of a robbery and, basic to this, is the question of whether or not this was a robbery; and that, in turn, depends upon the intent in the mind of the accused up to the time that he thought the man was dead. No one can say with assurance that the accused did not believe Valpeters was dead on his becoming unconscious during the course of the struggle and after the efforts to revive him had failed.

The question of the belief of the respondent as to the condition of Valpeters after the struggle is thus related by the learned Chief Justice solely to the question as to whether, prior to Valpeters becoming unconscious during the course of the struggle, the respondent had formulated the intent to rob him.

In any event, even if it could be said that the respondent did believe Valpeters to be dead, it does not follow that, because of this belief, he could not conceive the idea and form the intent to make definitely certain that any possible spark of life be conclusively destroyed. It was clearly open to the jury to infer that such an intent accompanied the commission of the very acts of violence by which the respondent did actually kill his victim; and this is murder under s. 201.

It was, therefore, an error in law to say that there was no evidence upon which the jury could have found the accused guilty of murder under the latter section, which is the conclusion, in a relation to that section, which was ultimately reached by the learned Chief Justice.

With respect to the second question, there is nothing in the evidence suggesting that the accused put the belt around Valpeters' neck to assist in dragging him from the car to the

ditch. On the contrary, in both his statements to the police and in his testimony, the accused said that the placing of the belt took place once the victim was in the ditch. The presence of blades of grass stuck to the furrow found around the neck is significant. Moreover, on his own story given at the trial, the accused specified that he dragged his victim by the armpits in the ditch, in order to revive him by practising artificial respiration. The jury having rejected his defence of drunkenness, the suggestion of the Appellate Division is, with all deference, untenable. In directing a jury, the trial judge has not the duty to speculate and instruct them as to all the views which one might possibly take of the evidence.

As to the errors found in the Court below and referred to in the third and fourth grounds of the appeal for the Crown, and as to the numerous grievances alleged for respondent in the original and supplemental notices of appeal to the Court below, I must say that, after having considered the address of the trial Judge and the evidence, I can find nothing of real substance. The jury were directed with exceptional care and clarity on all the issues upon which it was the duty of the trial Judge to do so, and more particularly on the defence of drunkenness, provocation and self-defence raised by the accused and ultimately rejected by the jury. While failure of counsel for an accused to object to the address of the trial Judge at the stage of trial is not fatal, it may be added that though invited to submit objections, none were offered by counsel.

I would allow the appeal, set aside the judgment of the Appellate Division, and restore the verdict of the jury.

RITCHIE J.:—The circumstances giving rise to this appeal are outlined in the reasons for judgment of Mr. Justice Cartwright and Mr. Justice Fauteux which I have had the benefit of reading.

In my view the opening words of the decision rendered by Ford C.J. on behalf of the Appellate Division of the Supreme Court of Alberta are the controlling factor in the determination of the difficult question as to whether or not a question of law in the strict sense is raised by this appeal. The learned Chief Justice said:

> I am strongly of opinion that the verdict of murder cannot be supported by the evidence. But I feel I must go further, and set out other reasons for setting aside the conviction.

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In the course of his decision, the learned Chief Justice also held that s. 202 of the *Criminal Code* "is the only section under which the jury could have found the accused guilty of murder" and it was contended on behalf of the appellant that this finding constituted an error in law and formed the basis of the opinion of the Appellate Division that the verdict of murder could not be supported by the evidence. It, therefore, becomes necessary to examine the grounds upon which the Appellate Division based its conclusion with respect to s. 202 of the Code.

Dominant amongst the reasons set out by the learned Chief Justice for allowing this appeal is the finding that "no one can say with assurance that the accused did not believe Valpeters was dead on his becoming unconscious during the course of the struggle and after the efforts to revive him had failed".

In my view this finding must be interpreted as meaning that on the evidence before them, all the members of the Appellate Division concluded that there was a reasonable doubt as to whether or not the respondent believed his victim to be dead before the belt was placed around his neck. The medical evidence was that the deceased came to his death by being strangled with his belt and must, therefore, have been alive when the belt was first applied, and it is implicit in the decision of the Appellate Division that this evidence was accepted.

If the respondent had believed his living victim to be dead after his efforts to revive him had failed, it follows that he could not thereafter have conceived the intent to cause his death which is a necessary ingredient of the offence of murder as described in s. 201 of the *Criminal Code* for no man can intend to kill a person whom he thinks to be already dead. It, therefore, seems to me that in finding that a reasonable doubt existed as to whether or not the respondent believed his victim to be already dead at the time when he in fact caused his death, the Appellate Division made a finding of fact which excluded the application of s. 201 from the circumstances of this case and which is not subject to review in this Court.

If the Appellate Division erred in finding that such a doubt existed, then this was an error of fact from which other errors necessarily flowed, including the finding that

s. 202 was the only one under which the jury could have found the accused guilty of murder. The latter conclusion follows directly from the former, and, accordingly, in my view the error, if error it was, raises a mixed question of fact and law, and as such is not a competent ground of appeal to this Court (see *The King v. Décary*[1]).

I agree with Mr. Justice Cartwright that, as the Appellate Division quashed the conviction on the ground, *inter alia*, that it could not be supported by the evidence, no question of law in the strict sense is raised by this appeal.

I would dismiss this appeal.

Appeal dismissed, LOCKE, FAUTEUX, MARTLAND *and* JUDSON JJ. *dissenting.*

Solicitor for the appellant: The Attorney General of Alberta, Edmonton.

Solicitors for the respondent: Patterson, Patterson & Shelton, Edmonton.

HER MAJESTY THE QUEEN .....APPELLANT;

AND

JOSEPH MACHACEK .....RESPONDENT.

1960
*Dec. 2

1961
Jan. 24

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Taxation—Income tax—False statements in returns—Limitation of actions—Criminal Code, 1953-54 (Can.), c. 51, s. 693—Income Tax Act, R.S.C. 1952, c. 148, s. 132(1)(a), 136(4)—The Supreme Court Act, R.S.C. 1952, c. 259, s. 41.

Statutes—Whether repeal by implication of special enactment by later general enactment.

The respondent was charged under the *Income Tax Act* with having made false statements in his income tax returns for each of the years 1953 to 1956 inclusive. With the exception of the charge relating to the

*PRESENT: Locke, Fauteux, Abbott, Martland and Ritchie JJ.

[1] [1942] S.C.R. 80 at 83, 2 D.L.R. 401.

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year 1953, the charges were laid after the six-month period provided in s. 693(2) of the *Criminal Code* for summary conviction matters, but within the five-year time limit provided in s. 136(4) of the *Income Tax Act*. The charge with respect to 1953 was laid more than six months after the subject-matter arose, but within one year from the day certified by the Minister as the day on which evidence, sufficient, in his opinion, to justify a prosecution for the offence, came to his knowledge.

The respondent was convicted on all four charges, which convictions were affirmed on appeal to the district Court. The Appellate Division of the Supreme Court, by a majority, allowed the respondent's appeal from this decision on the grounds that, contrary to the provisions of s. 693(2) of the Code, the proceedings had been instituted more than six months after the time when the subject-matter of the proceedings arose. Leave was granted to the Crown to appeal to this Court.

Held: The appeal should be allowed and the convictions restored.

Section 136(4) of the *Income Tax Act* was properly applicable to the present proceedings. These were "proceedings" within the definition contained in s. 692(1)(*d*) of the *Criminal Code*. By virtue of s. 693(1), Part XXIV of the Code was applicable to them "except where otherwise provided by law". The words of this subsection meant not only that the application of the whole of Part XXIV may be excluded where it is otherwise provided by law, but also that, although Part XXIV may be generally applicable, any portion of it may be excluded from operation if otherwise provided by law. Subsection (2) of s. 693 is a part of Part XXIV and its application in these proceedings was excluded because s. 136(4) of the *Income Tax Act* otherwise provided with respect to the time for the taking of proceedings. *Jorgenson v. North Vancouver Magistrate et al.* 28 W.W.R. 265, referred to.

The contention of the respondent that s. 136(4) of the Act was repealed by implication by s. 693(2) of the Code (which took effect at a later date) was rejected.

The assessments of tax made by the Minister on the basis of the returns filed by the respondent had no bearing in relation to the charges laid and did not preclude the magistrate from trying them.

The two periods of time mentioned in s. 136(4) of the Act are alternative and the charges were properly laid within the five-year time limit provided in the subsection.

The final contention that this Court was without jurisdiction to hear the appeal because the *Supreme Court Act* gives no right of appeal to the Attorney General of Canada from a judgment of a provincial court of appeal quashing a conviction for a non-indictable offence was also rejected.

APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division[1], reversing a judgment of Feir C.J.D.C. Appeal allowed.

S. Samuels, for the appellant.

K. E. Eaton and *P. Haljan*, for the respondent.

The judgment of the Court was delivered by

[1] (1960), 32 W.W.R. 73, 14 D.T.C. 1166.

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Martland J.

MARTLAND J.:—The respondent was charged on April 20, 1959, under the *Income Tax Act,* with having made false statements in his income tax returns for each of the years 1953 to 1956 inclusive. With the exception of the charge relating to the year 1953, the charges were laid more than six months, but less than five years, from the time when the subject-matter arose. The charge with respect to the year 1953 was laid more than six months after the subject-matter arose, but within one year from the day certified by the Minister of National Revenue as the day on which evidence, sufficient, in his opinion, to justify a prosecution for the offence, came to his knowledge.

The respondent was convicted on all four charges, which convictions were affirmed, on appeal, by the Chief Judge of the District of Southern Alberta. The Appellate Division of the Supreme Court of Alberta, by a majority of two to one, allowed the respondent's appeal[1] from this decision on the grounds that, contrary to the provisions of s. 693(2) of the *Criminal Code,* the proceedings had been instituted more than six months after the time when the subject-matter of the proceedings arose. There were four other grounds of appeal raised before the Appellate Division, but the ground on which the majority decision was rested was the only one which was regarded as meriting consideration. Leave was granted to the appellant to appeal to this Court.

The ground on which the appeal was allowed raises the issue as to whether the time within which the proceedings had to be commenced was governed by subs. (4) of s. 136 of the *Income Tax Act,* R.S.C. 1952, c. 148, or by subs. (2) of s. 693 of the *Criminal Code.* The relevant subsection of the *Income Tax Act* and s. 693 of the *Criminal Code* provide as follows:

136. (4) An information or complaint under the provisions of the *Criminal Code* relating to summary convictions, in respect of an offence under this Act, may be laid or made on or before a day 5 years from the time when the matter of the information or complaint arose or within one year from the day on which evidence, sufficient in the opinion of the Minister to justify a prosecution for the offence, came to his knowledge, and the Minister's certificate as to the day on which such evidence came to his knowledge is conclusive evidence thereof.

693. (1) Except where otherwise provided by law, this Part applies to proceedings as defined in this Part.

[1] (1960), 32 W.W.R. 73, 14 D.T.C. 1166.

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(2) No proceedings shall be instituted more than six months after the time when the subject matter of the proceedings arose.

"Proceedings", for the purpose of Part XXIV of the *Criminal Code*, are defined in s. 692(1)(*d*) as follows:

(*d*) "proceedings" means

(i) proceedings in respect of offences that are declared by an Act of the Parliament of Canada or an enactment made thereunder to be punishable on summary conviction, and

(ii) proceedings where a justice is authorized by an Act of the Parliament of Canada or an enactment made thereunder to make an order;

The provision of the earlier *Criminal Code*, which preceded s. 693, was s. 1142, which read as follows:

1142. In the case of any offence punishable on summary conviction, if no time is specially limited for making any complaint, or laying any information, in the Act or law relating to the particular case, the complaint shall be made, or the information laid, within six months from the time when the matter of the complaint or information arose, except in the Northwest Territories and the Yukon Territory, in all which Territories the time within which such complaint may be made or such information laid shall be twelve months from the time when the matter of the complaint or information arose.

The *Income Tax Act*, as part of the Revised Statutes of Canada of 1952, was proclaimed in force on September 15, 1953. The present *Criminal Code* received royal assent on June 26, 1954, and took effect on April 1, 1955. The contention of the respondent, which succeeded before the Appellate Division, was that subs. (4) of s. 136 of the *Income Tax Act* was repealed by implication by subs. (2) of s. 693 of the *Criminal Code*. The issue was defined and resolved in the majority decision of the Appellate Division as follows:

In relation to the points in issue in the present case, it does seem to me that there are two reasonable constructions to be placed upon sec. 693(2) of the *Code*, the first being that its meaning is governed by the expression appearing in sec. 693(1) "Except where otherwise provided by law", and the second, that the limitation period of six months is of general application and would apply to sec. 132(1)(*a*) of the *Income Tax Act*, notwithstanding the provisions of sec. 136(4) of the latter Act.

Though I lean to the first construction as being the more reasonable, nevertheless I cannot say that the second construction is not reasonably possible. In other words, I have a reasonable doubt of the meaning of sec. 693, which the application of the canons of interpretation has failed to solve. I am in doubt whether the words of sec. 693(2) can have their proper operation without altering the effect of the limitation clause of the *Income Tax Act*.

Such being the case, it seems to me that considering that the statute is a penal one, I should give the benefit of the doubt to the accused and adopt the construction which is the more lenient one. When the liberty of the subject is involved, it seems to me that the legislation pertaining thereto should be so clear as to leave no room for reasonable doubt.

The issue had been decided adversely to the respondent in the Courts below on the ground that the application of s. 136(4) of the *Income Tax Act* was preserved by virtue of subs. (1) of s. 693 of the *Criminal Code*. Johnson J.A., who delivered the dissenting judgment in the Appellate Division, rested his decision on the proposition that the two subsections could stand independently of each other and that s. 136(4) of the *Income Tax Act* had not been repealed by implication. He referred to the proposition stated by A. L. Smith J. in *Kutner v. Phillips*[1]:

> Now a repeal by implication is only effected when the provisions of a later enactment are so inconsistent with or repugnant to the provisions of an earlier one, that the two cannot stand together, in which case the maxim, *"Leges posteriores contrarias abrogant"* (2 Inst. 685) applies.
>
> Unless two Acts are so plainly repugnant to each other, that effect cannot be given to both at the same time, a repeal will not be implied, and special Acts are not repealed by general Acts unless there is some express reference to the previous legislation, or unless there is a necessary inconsistency in the two Acts standing together: *Thorpe v. Adams* (1871) L.R. 6 C.P. 125, 40 L.J.M.C. 52.

The conclusion of Johnson J.A., respecting this issue, was as follows:

> Prosecutions for income tax offences, particularly of the kind we are considering, present particular problems. Because of the large number of returns which must be made before a certain date and because violations can only be detected after investigations which involve an examination of the suspect's books and records and other records (in the present case the records of banks and the wheat board provided some of the evidence) it becomes clear that a longer than ordinary limitation period must be required for such cases. To apply the limitation of the *Code* subsection to such cases would mean that few, if any, prosecutions could be laid under the summary trial provisions of the *Code*, and an accused could only be prosecuted, except in very few instances, by indictment with its heavier and mandatory penalties.
>
> These are matters which we are entitled to consider in deciding whether or not sec. 136(4) has been impliedly repealed.

My opinion is that s. 136(4) of the *Income Tax Act* is properly applicable to the present proceedings. These were "proceedings" within the definition contained in s. 692(1)(*d*) of the *Criminal Code*. By virtue of s. 693(1), Part XXIV of

[1] [1891] 2 Q.B. 267 at 271, 60 L.J.Q.B. 505.

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the *Criminal Code* was applicable to them "except where otherwise provided by law". I have considered carefully the view expressed by Coady J.A. in *Jorgenson v. North Vancouver Magistrate et al.*[1], as to the effect of this subsection, but I construe those words as meaning not only that the application of the whole of Part XXIV may be excluded where it is otherwise provided by law, but also that, although Part XXIV may be generally applicable, any portion of it may be excluded from operation if otherwise provided by law. Subsection (2) of s. 693 is a part of Part XXIV and, in my view, its application in these proceedings was excluded because s. 136(4) of the *Income Tax Act* otherwise provided when it stated:

> An information or complaint under the provisions of the *Criminal Code* relating to summary convictions, in respect of an offence under this Act, may be laid or made on or before a day 5 years from the time when the matter of the information or complaint arose . . .

In addition, I also agree with the conclusions reached by Johnson J.A., for the reasons which he states, that this is not a case in which it can be said that there has been any repeal of s. 136(4) by implication.

The respondent raised other grounds to support the quashing of the convictions, which had previously been submitted to the Appellate Division, and also one additional ground relating to the jurisdiction of this Court.

It was contended that in summary conviction proceedings for income tax offences an assessment made under the *Income Tax Act* is binding on the court of criminal jurisdiction which deals with the matter. In the present case no re-assessment had been made of the income tax payable by the respondent for the years in question and it was, therefore, urged that the magistrate who tried the charges was bound by the assessments which had been made. There does not appear to be any substance in this contention. The charges were laid, under s. 132(1)(*a*) of the *Income Tax Act,* for unlawfully making false statements in the returns filed by the respondent. It seems to me that the assessments of tax made by the Minister on the basis of those returns had no bearing whatever in relation to these charges and certainly did not preclude the magistrate from trying them.

[1] (1959), 28 W.W.R. 265 at 267, 30 C.R. 333.

It was also argued that, in so far as the charges relating to the years 1954 to 1956 inclusive were concerned, they were barred even under the provisions of s. 136(4) of the *Income Tax Act*. This argument rested on the proposition that the charges in question had not been brought within one year from the date when the Minister had sufficient evidence to justify a prosecution. No certificate as to the Minister's knowledge had been filed in respect of these three charges.

As I read s. 136(4), the charges could be laid within five years from the time when the matter of the information or complaint arose, irrespective of the day on which, in the Minister's opinion, there was sufficient evidence to justify a prosecution. It seems to me that the two periods of time mentioned in s. 136(4) are alternative and these charges were properly laid within the five-year time limit provided in the subsection.

As to the next point raised in argument, the material to which we were referred by counsel for the respondent does not justify the contention that the respondent had been deprived of a fair trial.

Finally it was contended that this Court was without jurisdiction to hear the appeal because the *Supreme Court Act*, R.S.C. 1952, c. 259, as amended, gives no right of appeal to the Attorney General of Canada from a judgment of a provincial court of appeal quashing a conviction for a non-indictable offence.

It is clear that under s. 41 of the *Supreme Court Act* leave may be given for an appeal from a final or other judgment of the highest court of final resort of a province upon a question of law in relation to an offence other than an indictable offence. Leave was given in this case on a motion made on behalf of Her Majesty the Queen, who had been described as the respondent in the notice of appeal filed by the present respondent, when he appealed to the Appellate Division of the Supreme Court of Alberta. In my opinion, leave could properly be given to the appellant named in the present appeal to appeal, on the questions of law stated, from the judgment which had been rendered by the Appellate Division. The case of *Dennis v. The Queen*[1], which was referred to in argument by the respondent, does not assist

[1] [1958] S.C.R. 473, 28 C.R. 173

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his contention. That case was concerned with the matter of the proper person to be served with a notice of appeal on an appeal under the provisions of Part XXIV of the *Criminal Code*. It was held that, on an appeal under that Part by the accused, the notice of appeal must be served upon the informant. I do not see how the decision has any application to the present issue.

For the foregoing reasons, in my opinion the appeal should be allowed and the convictions restored.

Appeal allowed and convictions restored.

Solicitor for the appellant: E. A. Driedger, Deputy Attorney General of Canada, Ottawa.

Solicitor for the respondent: Paul Haljan, Edmonton.

1960

*Nov. 10

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Jan. 24

JAVEX COMPANY LIMITED, CONSUMERS GLASS COMPANY LTD., DOMINION GLASS COMPANY LTD. ..... APPELLANTS;

AND

MRS. AMY OPPENHEIMER, MISS RUTH OPPENHEIMER, MRS. EDITH KRIEGER, DAVID OPPENHEIMER, ERNEST KRIEGER AND LESLIE McDONALD, carrying on business together in partnership at Vancouver, British Columbia, under the style of Oppenheimer Bros. & Company

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE. RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Revenue—Decision of Tariff Board that "Clorox" is properly classifiable under tariff item 219a—Earlier decision that product not so classifiable—Whether estoppel per rem judicatam—Product used as a bleach and as a disinfectant—Customs Act, R.S.C. 1952, c. 58, ss. 44(3), 46(1)(2).

The Tariff Board found that Clorox, a product consisting of sodium hypochlorite in solution and imported into Canada by the respondent, Oppenheimer Brothers & Company, was properly classifiable under

*PRESENT: Taschereau, Locke, Fauteux, Martland and Ritchie JJ.

Tariff Item 219*a*. An appeal from this decision was dismissed by the Exchequer Court, and the appellants then appealed to this Court. In both Courts the question of law considered was whether the Tariff Board erred in holding that the product known under the trade mark "Clorox" imported into Canada was properly classifiable for tariff purposes under Tariff Item 219*a*.

Appellants contended that the opinion of the Tariff Board in a former appeal (No. 363) that Clorox was not properly classifiable under Tariff Item 219*a*, formed an estoppel *per rem judicatam* to a consideration of the same issue in the present appeal (No. 398). They also argued that the principal and chief use of the product should be considered in determining whether the product could qualify as a preparation for disinfecting under Tariff Item 219*a* and that, as the principal use of Clorox was for bleaching and not for disinfecting, it did not so qualify.

Held: The appeal should be dismissed.

The opinion expressed by the Tariff Board in Appeal No. 363 could not be said to be a judgment determining the status of a person or of a thing. When the *Customs Act* states that an order, finding or declaration of the Tariff Board shall be final and conclusive, subject to further appeal, it does not mean anything more than that it shall be final and conclusive in relation to the appeal which is before the Board. It does not mean that a decision rendered on one appeal can preclude some other person, not a party to that appeal, from appealing a decision of the Deputy Minister made in relation to an importation of specific goods by him, nor does it preclude the Board from dealing with such an appeal upon its merits. The Board does not have a jurisdiction under the Act to decide general questions as to the status of goods or of persons with that finality which is necessary to set up an estoppel by a judgment *in rem*. *Society of Medical Officers v. Hope*, [1960] 1 All E.R. 317, referred to.

Therefore the opinion given by the Board to the Minister could not be regarded as being final and conclusive in relation to the appeal taken by the present respondents, who were not parties in Appeal No. 363. The principle of *res judicata* was not applicable in this case.

In deciding under which item Clorox should be classified, the choice was between Tariff Item 219*a*, which refers specifically to preparations "for disinfecting", and the so-called "basket item" 711, which contains no reference whatever to goods for bleaching or for disinfecting. Upon the facts found by the Tariff Board, as between these two items, the goods in question fell within Tariff Item 219*a*, the definition of which was properly applicable to them.

APPEAL from a judgment of Cameron J. in the Exchequer Court of Canada[1], dismissing an appeal from the Tariff Board. Appeal dismissed.

André Forget, Q.C., Miss Joan Clark and *A. S. Hyndman*, for the appellants.

Gordon F. Henderson, Q.C. and *R. H. McKercher*, for the respondents.

[1] [1959] Ex. C.R 439.

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JAVEX CO. LTD. *et al.* *v.* OPPENHEIMER *et al.* AND DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE

J. D. Lambert, for the Deputy Minister of National Revenue for Customs and Excise.

The judgment of the Court was delivered by

MARTLAND J.:—This is an appeal from a judgment of the Exchequer Court[1] which dismissed an appeal from the Tariff Board. The question of law considered in the Exchequer Court and in this Court was:

> Did the Tariff Board err, as a matter of law, in holding that the product known under the trade mark "Clorox", imported under Vancouver Entries Nos. 68405 of January 12th, 1956, 67200 of January 6th, 1956, 71357 and 71295 of January 26th, 1956, 70238, 70264 and 70292 of January 23rd, 1956, is properly classifiable for tariff purposes under Tariff Item No. 219*a*?

The Deputy Minister of National Revenue for Customs and Excise had decided that the product in question was dutiable under Tariff Item 711 and from that decision the respondents appealed to the Tariff Board, the appeal being numbered 398.

The relevant provisions of Tariff Items 219*a* and 711 are as follows:

		British Preferential Tariff.	*Most-Favoured-Nation Tariff.*	*General Tariff.*
219a	Non-alcoholic preparations or chemicals for disinfecting, or for preventing, destroying, repelling, or mitigating fungi, weeds, insects, rodents, or other plant or animal pests, n.o.p.:—			
	(i) When in packages not exceeding three pounds each, gross weight..	Free	20 p.c.	25 p.c.
	(ii) Otherwise	Free	7½ p.c.	15 p.c.

		British Preferential Tariff.	*Most-Favoured-Nation Tariff.*	*General Tariff.*
711	All goods not enumerated in this schedule as subject to any other rate of duty, and not otherwise declared free of duty, and not being goods the importation whereof is by law prohibited	15 p.c.	25 p.c.	25 p.c.

[1] [1959] Ex. C.R. 439.

Prior to the hearing by the Tariff Board of Appeal No. 398, the Board had considered, in Appeal No. 363, whether "Clorox" was properly classified under Tariff Item 219a and had expressed the opinion that it was not.

Appeal No. 363 arose as a reference by the Deputy Minister to the Tariff Board for an opinion as provided in s. 46 of the *Customs Act*, R.S.C. 1952, c. 58, which then provided:

46. (1) The Deputy Minister may refer to the Tariff Board for its opinion any question relating to the valuation or tariff classification of any goods or class of goods.

(2) For the purpose of section 44 a reference pursuant to this section shall be deemed to be an appeal.

The reference was in the form of a letter written by the Deputy Minister to the Tariff Board, dated July 29, 1955, as follows:

H. B. McKinnon,
Chairman, The Tariff Board,
Sussex and George Street,
Ottawa.

Dear Sir,

The Department has had for consideration a number of materials sold under different trade marked names, consisting of Sodium Hypochlorite in Solution. These products are generally described as bleaches, deodorizers, disinfectants and stain removers. They all have had an available chlorine strength of over 5% and they have been uniformly classified as non-alcoholic disinfectants under tariff item 219*a*.

This practice enables the manufacturers of similar products in Canada to import free of Customs duty under tariff item 791 "materials of all kinds" for use in producing or manufacturing their products in Canada. In this connection, a ruling has been made allowing empty glass bottles for use as containers for "Javex", a product manufactured in Canada by Javex Company Limited, under this tariff item.

The Canadian manufacturers of glass bottles who are affected by these rulings are disturbed thereby. I attach hereto a copy of a letter from Mr. Arthur May, Ottawa, acting on behalf of Dominion Glass Company Limited of Montreal.

I have reviewed the Department's rulings and I concur with them, but I am placing the issue before the Tariff Board as an appeal under Section 46 of the Customs Act.

(Signed) D. Sim
Deputy Minister for Customs and Excise

A hearing took place as a result of this reference, of which notice was published in the *Canada Gazette*. No specific notice was given to the respondents, who are importers of

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Clorox, or to Clorox Chemical Co. of Oakland, California, the manufacturer of Clorox, and they were not represented at the hearing.

Following this hearing the Tariff Board expressed the following opinion:

> The material involved in this reference is sodium hypochlorite having an available chlorine strength of not less than 5 per cent. It was admitted by all parties that such material is, *inter alia*, a disinfectant. It is non-alcoholic and is therefore, in appropriate circumstances, admissible under Tariff Item 219*a*, i.e., when used "for disinfecting".
>
> As regards imports of this material in relatively small packages for general distribution, a reasonable presumption as to end use may be obtained by an examination of the description and recommendations attached to or accompanying the containers.
>
> Of the two imported brands submitted by the Deputy Minister, viz. "Klenzade" and "Clorox": the former is plainly aiming primarily at a commercial or agricultural market and the only use indicated is as a disinfectant; the latter product is for general distribution to the householder as a bleach, deodorizer or disinfectant.
>
> It is therefore a very proper assumption that "Klenzade" is a "non-alcoholic preparation or chemical for disinfecting"; but no such assumption would be warranted in the case of "Clorox". On the contrary, such evidence as was adduced at the hearing in the matter suggests that "Clorox" is *rarely used* in such circumstances as would warrant classification under Tariff Item 219*a*.
>
> Accordingly, we are of opinion that "Klenzade" is properly classified under Tariff Item 219*a* and that "Clorox" is not.

The solicitors for Clorox Chemical Co., on February 21, 1956, wrote to the Tariff Board, pointing out that that company was affected by the opinion, that it had not had notice of the hearing and that it was seeking a re-hearing where it might have an opportunity to adduce evidence which would have an effect on the issue. Ultimately the respondents made an importation of Clorox which was classified by the Deputy Minister under Tariff Item 711, from which decision an appeal was taken to the Tariff Board as No. 398.

After the hearing of the appeal the Board made a majority decision, which concluded as follows:

> In the matter of the product "Clorox", which is at issue here, we believe the evidence establishes that it is ordinarily and regularly used in the family wash primarily as a bleach and, secondarily, as a disinfectant. Hence the appraiser must conclude that Clorox is, *inter alia*, "for disinfecting". Does the fact that it also bleaches have a bearing on its right to admissibility under tariff item 219*a*? There are no words in tariff item 219*a* which would warrant its exclusion on that ground. If it is a "non-alcoholic preparation for disinfecting", Clorox is admissible under tariff item 219*a*

even though it may perform an additional function at the same time and—unless more specifically provided for elsewhere in the tariff—is classifiable under tariff item 219*a*. There being no more specific provision for the product Clorox than under tariff item 219*a*, it is properly classifiable thereunder.

Two points were argued before the Exchequer Court. First it was contended that the opinion of the Tariff Board in Appeal No. 363 formed an estoppel *per rem judicatam* to a consideration of the same issue in Appeal No. 398. Second it was argued that the principal and chief use of the product should be considered in determining whether the product could qualify as a preparation for disinfecting under Tariff Item 219*a* and that, as the principal use of Clorox was for bleaching and not for disinfecting, it did not so qualify.

Cameron J. decided both points in favour of the respondents and I am in agreement with his conclusions.

The first argument is based upon the provision contained in subs. (2) of s. 46 of the *Customs Act* above quoted, which states that for the purposes of s. 44 a reference pursuant to s. 46 shall be "deemed to be an appeal", and upon subs. (3) of s. 44, which provides:

> 44. (3) On any appeal under subsection (1), the Tariff Board may make such order or finding as the nature of the matter may require, and, without limiting the generality of the foregoing, may declare
>
> (*a*) what rate of duty is applicable to the specific goods or the class of goods with respect to which the appeal was taken,
>
> (*b*) the value for duty of the specific goods or class of goods, or
>
> (*c*) that such goods are exempt from duty,
>
> and an order, finding or declaration of the Tariff Board is final and conclusive subject to further appeal as provided in section 45.

Reliance is placed upon the words "an order, finding or declaration of the Tariff Board is final and conclusive . . ."

The appellants contend that an opinion expressed by the Tariff Board pursuant to s. 46, as also any order, finding or declaration made on any appeal under s. 44, is final and conclusive, not only in relation to the parties who are before the Board on the appeal, but as against everyone. The Board's decision, it is said, is a judgment *in rem* and not merely a judgment *inter partes*.

Halsbury, 3rd ed., vol. 15, p. 178, para. 351, defines a judgment *in rem* as follows:

> A judgment *in rem* may be defined as the judgment of a court of competent jurisdiction determining the status of a person or thing, or the disposition of a thing (as distinct from the particular interest in it of a

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party to the litigation). Apart from the application of the term to persons, it must affect the *res* in the way of condemnation, forfeiture, declaration of status or title, or order for sale or transfer.

In my view the opinion expressed by the Tariff Board in Appeal No. 363 cannot be said to be a judgment determining the status of a person or of a thing. The *Customs Act* makes provision for appeals to the Board with respect to decisions made by the Deputy Minister in the administration of that Act. It confers a right of appeal on a person who deems himself to be aggrieved by such a decision in relation to certain specified matters and on such an appeal the Board may make an order, finding or declaration. When the Act states that such an order, finding or declaration shall be final and conclusive, subject to further appeal, I do not interpret it as meaning anything more than that it shall be final and conclusive in relation to the appeal which is before it. It does not mean that a decision rendered on one appeal can preclude some other person, not a party to that appeal, from appealing a decision of the Deputy Minister made in relation to an importation of specific goods by him, nor does it preclude the Board from dealing with such an appeal upon its merits. The Board does not have a jurisdiction under the Act to decide general questions as to the status of goods or of persons with that finality which is necessary to set up an estoppel by a judgment *in rem*. See *Society of Medical Officers of Health v. Hope*[1].

I do not think, therefore, that the opinion given by the Board to the Minister can be regarded as being final and conclusive in relation to the appeal taken by the respondents, who were not parties in Appeal No. 363. In my view the principle of *res judicata* is not applicable in this case.

The next question involves the merits in law of the actual decision made by the Tariff Board in Appeal No. 398. That decision is based upon an express finding of fact made by the Board that

> In the matter of the product "Clorox", which is at issue here, we believe the evidence establishes that it is ordinarily and regularly used in the family wash primarily as a bleach and, secondarily, as a disinfectant.

[1] [1960] A.C. 551, 1 All E.R. 317.

The issue is whether a product ordinarily and regularly used as a disinfectant, which otherwise meets the requirements of Tariff Item 219a, does not fall within it because that is a secondary and not its primary use.

I agree with Cameron J. that, if there had been some other tariff item applicable specifically to preparations for bleaching, the Board would have had to consider the primary use as a bleach in deciding whether Clorox should be classified under that item or under 219a. Here, however, the choice is between Tariff Item 219a, which refers specifically to preparations "for disinfecting", and the so-called "basket item" 711, which contains no reference whatever to goods for bleaching or for disinfecting. It seems to me that, upon the facts found by the Tariff Board, as between these two items, the goods in question here fall within Tariff Item 219a, the definition of which is properly applicable to them.

In my opinion, therefore, the Tariff Board did not err on a matter of law in making the classification which it did and the appeal should be dismissed. The appellants should pay the costs of the respondents other than the Deputy Minister of National Revenue for Customs and Excise. There should be no order as to the costs of that respondent.

Appeal dismissed with costs.

Solicitors for the appellants, Javex Company Ltd. and Dominion Glass Company Ltd.: Howard, Cate, Ogilvy, Bishop, Cope, Porteous & Hansard, Montreal.

Solicitors for the appellant, Consumers Glass Company Ltd.: Holden, Hutchison, Cliff, McMaster, Meighen & Minnion, Montreal.

Solicitors for the respondents, Mrs. Amy Oppenheimer et al.: Gowling, MacTavish, Osborne & Henderson, Ottawa.

Solicitor for The Deputy Minister of National Revenue for Customs and Excise: C. R. O. Munro, Ottawa.

1960
*Dec. 5

CANADIAN NATIONAL RAILWAY COMPANY (*Plaintiff*) ..... APPELLANT;

AND

1961
Jan. 24

NORTH-WEST TELEPHONE COMPANY (*Defendant*) ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Crown—Telephone and telegraph system—Breach of contract—Motion for interlocutory injunctions—Jurisdiction of Exchequer Court—Exchequer Court Act, R.S.C. 1952, c. 98, s. 17.

The Crown owned a portion of a certain telephone and telegraph system running between Edmonton, Alberta and Fairbanks, Alaska. The management and operation of this section was acquired by the appellant company. Certain other telephone facilities in northern British Columbia and in the Yukon, also owned by the Crown, were purchased by the respondent company. The latter agreed to route all traffic over the facilities of the appellant and also agreed not to interconnect, without consent, with any other facilities, which would result in by-passing the appellant's system.

Appellant alleged that the respondent breached the agreement, resulting in damage to the appellant, and immediately after delivering a statement of claim launched a motion for interlocutory injunctions. The Exchequer Court dismissed the motion on the ground that it lacked jurisdiction to entertain the action. On behalf of the appellant it was argued that this was a case in which "the claim arises out of a contract entered into by or on behalf of the Crown" within the meaning of s. 17 of the *Exchequer Court Act*.

Held: The appeal and the action should be dismissed.

From a reading of s. 18 of the old *Exchequer Court Act* before it was replaced by the precursor of the present s. 17, the conclusion was inescapable that there was no intention to confer exclusive jurisdiction on the Exchequer Court to adjudicate upon claims by the Crown arising out of contract,—thereby excluding the jurisdiction of provincial courts, or to restrict the well-recognized privilege of the Crown to choose its own Court. Section 17 must be restricted to claims against the Crown in the same way that old s. 18 was restricted. Any different construction would have the effect of compelling the Crown to sue in contract in the Exchequer Court.

Section 29(d) does not give jurisdiction to the Exchequer Court unless "the Crown is plaintiff or petitioner" *eo nomine*. Those words do not include an action in which the plaintiff or petitioner is not the Crown, but is an entity such as the appellant, even if the rights sought to be enforced may have been derived from the Crown.

The provisions of s. 44(1) and (3) of the *Canadian National Railway Act* did not assist the appellant because, while such a suit as that brought by the appellant may be brought and be heard in any court of competent jurisdiction, the question would still remain as to what is such a court,—and that was already answered.

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

APPEAL from an order of Cameron J. in the Exchequer Court of Canada, dismissing a motion for interlocutory injunctions. Appeal and action dismissed.

C. C. Locke, for the plaintiff, appellant.

K. E. Eaton, for the defendant, respondent.

D. S. Maxwell, for the Attorney General of Canada, intervenant.

The judgment of the Court was delivered by

THE CHIEF JUSTICE:—By leave of a member of this Court Canadian National Railway Company appeals from an order of Cameron J. dismissing a motion for interlocutory injunctions in an action in the Exchequer Court of Canada in which the appellant is plaintiff and the respondent, North-West Telephone Company, is defendant. The motion was launched immediately after the delivery of the statement of claim, whereupon the respondent served notice that a preliminary objection would be taken that the Exchequer Court had no jurisdiction to entertain the action. When the motion came on for argument, counsel for the Crown in the right of Canada, with the consent of both parties, appeared as *amicus curiae*. He supported the respondent's preliminary objection which Cameron J. sustained. Leave was granted the Attorney General of Canada to intervene in the appeal; a factum was filed on his behalf and he was represented by counsel on the argument. Notice of the appeal was served upon the Attorneys General of the Provinces but none asked to intervene and none was represented before us.

For the purposes of this appeal the allegations in the statement of claim are taken as true and the relevant ones are set forth substantially in the language used by the draftsman.

The respondent is incorporated by a private Act of the Legislature of British Columbia. The appellant is a company duly incorporated and constituted according to the laws of Canada by special acts of the Parliament of Canada as more particularly set out in s. 3 of c. 29 of the Statutes of Canada 1955, which section reads:

> The company incorporated under the name of Canadian National Railways Company by chapter 13 of the statutes of 1919, the company formed by the amalgamation of Canadian National Railways Company and the Grand Trunk Railway Company of Canada, and the Canadian National

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Kerwin C.J.

Railway Company referred to in chapter 33 of the statutes of 1932-33, are hereby declared to be and to have been one and the same company, and the said company is hereby continued under the name of Canadian National Railway Company.

In 1945 the Government of Canada had acquired title to a portion of a certain telephone and telegraph system running between Edmonton, Alberta and Fairbanks, Alaska, known as the Alaska Highway Telephone System. By Order in Council P.C. 4251, dated October 24, 1947, the management and operation of that portion of the system was turned over to the Canadian National Telegraph Company, a subsidiary of the appellant and the said portion was named the North-West Communications System. By Order in Council P.C. 1979, of April 26, 1949, the management and operation of that system by the Canadian National Telegraph Company was continued. On March 18, 1958, Order in Council P.C. 420 recited that it was proposed that the said system be placed on an entrustment basis similar to that of government railways entrusted to the Canadian National Railway Company in respect of management and operation, that is, title to remain in the Government of Canada, but the Canadian National Railway Company to assume direct responsibility for future capital requirements for any annual operating deficits out of its general revenues and retaining any profits that might develop. Order in Council P.C. 420 of March 18, 1958, revoked Orders in Council P.C. 4251 of October 24, 1947, and P.C. 1959 of April 26, 1949, and under the authority of s. 19 of the *Canadian National Railways Act* entrusted the North-West Communications System, as from and after April 1, 1958, in respect of management and operation thereof, to the appellant upon the terms specified in the last mentioned Act.

For some years prior to July 4, 1956, the Government of Canada owned certain telephone facilities in the northern part of British Columbia and in the Yukon, which were operated by an agency of the Crown known as "Government Telephone and Telegraph Service", including certain telephone facilities in Dawson Creek, Pouce Coupe and Fort St. John, all in British Columbia.

On July 4, 1956, an agreement was entered into between Her Majesty the Queen in the right of Canada, represented by the Minister of Transport, and the present respondent, whereby Her Majesty sold and the respondent purchased those telephone facilities. By clauses 6 and 7 of this agreement the respondent agreed to route after July 1, 1956, by way of the facilities of the system between Dawson Creek and Edmonton all long distance telephone traffic and private wire leases which, in accordance with accepted routing and leasing practices, would normally be so routed; and by which the respondent undertook and agreed not to interconnect, without the previous consent in writing of the Minister, any telecommunication facilities extending from the Dawson Creek-Fort St. John area with any telecommunication facilities of the Alberta Government Telephone or others, which would result in by-passing the facilities of the North-West Communications System between Dawson Creek and Edmonton.

Grande Prairie, Alberta, lies on the direct communication route between Dawson Creek and Edmonton and on or about December 20, 1959, the respondent set up telephone toll circuits between Dawson Creek, British Columbia, and Grande Prairie, Alberta, by connecting with the Alberta Government Telephones at a point on or near the British Columbia-Alberta border. From December 21, 1959, no long distance telephone traffic or private wire traffic has passed over the facilities of the plaintiff company.

Since on or about December 21, 1959, the respondent has routed all telephone messages between the Fort St. John, Pouce Coupe and Dawson Creek areas and the Grande Prairie Telephone Exchange area over its own toll circuits or those of the Alberta Government Telephones by means of the connection referred to in the preceding paragraph and has by-passed the facilities of the North-West Communications System. This connection was made without the previous consent in writing of the Minister. By so doing the respondent is said to have breached clauses 6 and 7 of the agreement of July 4, 1956, and, after alleging damage as a result of these continuing breaches, the appellant claims restraining and mandatory injunctions.

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On behalf of the appellant it is argued that the present case is one in which "the claim arises out of a contract entered into by or on behalf of the Crown", within the meaning of the last clause of s. 17 of the *Exchequer Court Act*, R.S.C. 1952, c. 98, which section reads as follows:

> The Exchequer Court has exclusive original jurisdiction in all cases in which the land, goods or money of the subject are in the possession of the Crown, or in which the claim arises out of a contract entered into by or on behalf of the Crown.

As was pointed out in the Court below, the forerunner of this section was s. 18 of the *Exchequer Court Act*, R.S.C. 1927, c. 34, as enacted by s. 1 of c. 5 of the Statutes of 1949 (2nd session). This last mentioned section repealed s. 18 of R.S.C. 1927, c. 34, which had provided:

> The Exchequer Court shall have exclusive original jurisdiction in all cases in which demand is made or relief sought in respect of any matter which might, in England, be subject of a suit or action against the Crown, and for greater certainty, but not so as to restrict the generality of the foregoing terms, it shall have exclusive original jurisdiction in all cases in which the land, goods or money of the subject are in the possession of the Crown, or in which the claim arises out of a contract entered into by or on behalf of the Crown.

When one looks at s. 18 of the old *Exchequer Court Act* before it was replaced by the precursor of s. 17 in 1949, the conclusion is inescapable that there was no intention to confer exclusive jurisdiction on the Exchequer Court to adjudicate upon claims by the Crown arising out of contract,—thereby excluding the jurisdiction of provincial courts, or to restrict the well-recognized privilege of the Crown to choose its own Court. I agree with Cameron J. that s. 17 must be restricted to claims against the Crown in the same way that old s. 18 was restricted. Any different construction would have the effect of compelling the Crown to sue in contract in the Exchequer Court.

This is sufficient to dispose of the appeal and, therefore, nothing need be said as to whether the appellant's claim arises out of a contract entered into by or on behalf of the Crown.

Many of the appellant's contentions based upon s. 29(*d*) of the *Exchequer Court Act*:

> The Exchequer Court has and possesses concurrent original jurisdiction in Canada
>
> .....
>
> (*d*) in all other actions and suits of a civil nature at common law or equity in which the Crown is plaintiff or petitioner.

were abandoned on the argument of the appeal, but counsel did submit that, even if the appellant were not a Crown agent, there was a Crown vesting or statutory assignment of a right entitling the appellant to exercise the Crown's prerogative of choosing its forum and to sue for the enforcement of that right in its own name or in the name of the Crown. Even if that proposition is correct, as to which it is not necessary to express an opinion, s. 29(*d*) does not give jurisdiction to the Exchequer Court to deal with the matter unless "the Crown is plaintiff or petitioner" *eo nomine*. Those words do not include an action in which the plaintiff or petitioner is not the Crown, but is an entity such as the appellant, even if the rights sought to be enforced may have been derived from the Crown.

Reference was made by counsel for the appellant to s. 44 of the *Canadian National Railways Act*, c. 29 of the Statutes of 1955, subss. (1) and (3) of which read as follows:

> 44. (1) Actions, suits or other proceedings by or against the National Company in respect of its undertakings or in respect of the operation or management of Canadian Government Railways, may, in the name of the National Company, be brought in and may be heard by any judge or judges of any court of competent jurisdiction in Canada, with the same right of appeal as may be had from a judge sitting in court under the rules of court applicable thereto.
>
> .....
>
> (3) Any court having under the statutes or laws relating thereto jurisdiction to deal with any cause of action, suit or other proceeding, when arising between private parties shall, with respect to any similar cause of action, suit or other proceeding by or against the National Company, be a court of competent jurisdiction under the provisions of this section.

These provisions do not assist the appellant, firstly, because it is clear, in view of the definition of "Canadian Government Railways" in s. 2(*b*) of the *Canadian National Railways Act*, that that term includes the management and operation of the property, works or interests and the powers, rights or privileges, the management and operation of which are entrusted to the National Company,—and which definition is certainly wide enough to include the management and operation alleged in the statement of claim,—and, therefore, an action such as this might be brought in the name of the appellant; secondly, because, while any such suit by the

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appellant may be brought and be heard in any court of competent jurisdiction, the question would still remain as to what is such a court,—and that has already been answered.

The appeal and the action should be dismissed with costs, except that there should be no costs to or against the Attorney General of Canada.

Appeal and action dismissed with costs.

Solicitors for the plaintiff, appellant: Ladner, Downs, Ladner, Locke, Clarke & Lenox, Vancouver.

Solicitors for the defendant, respondent: Gowling, MacTavish, Osborne & Henderson, Ottawa.

1960

*Oct. 25
Dec. 19

ALLEN O'BRIEN (*Plaintiff*) .....APPELLANT;

AND

LE PROCUREUR GENERAL DE LA PROVINCE DE QUEBEC (*Defendant*) ..... RESPONDENT.

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

Negligence—Damages—Liability of teacher—Duty of care—Pupil injured—Explosion caused by another pupil—Unforeseeable act—Absence of teacher—Regulations of school for discipline of staff—Civil Code, art. 1054.

The presumption under art. 1054 of the *Civil Code* that a teacher is liable for damage caused by his pupils while they are under his care can be rebutted if it is shown that the teacher has done what was reasonably possible to do, that he acted as a prudent man would have acted and that he took the ordinary precautions which a prudent man should take in similar circumstances.

While attending a Trade School under the control of the Government of the Province of Quebec, the plaintiff was severely injured by an explosion caused by another student. At the time, the students were verifying the results of experiments they had just made in booths provided for this purpose. A student entered the booth where the appellant and others were working with a magneto and caused the explosion by holding a dynamite cap to the magneto. The teacher was not there but was in another room on the same floor attending to other duties for the school. The action was maintained by the trial judge, but this judgment was reversed by the Court of Appeal. The plaintiff appealed to this Court.

*PRESENT: Taschereau, Locke, Fauteux, Martland and Judson JJ.

Held: The appeal should be dismissed.

The damage was not the result of a probable and foreseeable act and was not due to the lack of supervision on the part of the teacher. The action of the student could not have been anticipated. A teacher could not be required to supervise his pupils every moment, especially if they are 16 to 18 years old and were not left with any dangerous articles in their hands.

The rules and regulations enacted for the discipline of the staff applied only to the staff and did not create any rights *vis-à-vis* third parties if they were breached.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], reversing a judgment of Mitchell J. Appeal dismissed.

E. Veilleux, Q.C., and *J. L. Péloquin,* for the plaintiff, appellant.

M. Delorme, Q.C., for the defendant, respondent.

The judgment of the Court was delivered by

TASCHEREAU J.:—Comme résultat d'une entente intervenue entre les Commissions Scolaires Catholique et Protestante, la compagnie Johns-Manville, et le Gouvernement de la Province de Québec, le Ministre du Bien-Etre Social et de la Jeunesse a établi à Asbestos une école d'Arts et Métiers. Cette école située dans une bâtisse appartenant à la compagnie Johns-Manville, était sous la direction exclusive d'un directeur, nommé et payé par les autorités provinciales de Québec.

Dans ces écoles, on prépare les jeunes gens à l'exercice de certains métiers, comme la menuiserie, l'électricité, la ferblanterie et l'ajustage mécanique. A Asbestos, on a aménagé la construction de façon à ce que l'enseignement théorique se donne dans des salles spéciales, tandis que l'enseignement pratique se dispense au rez-de-chaussée, dans des ateliers répartis entre les quatre spécialités qui sont enseignées à l'école.

Ces ateliers sont de petites chambres ajourées où les élèves, par groupes de deux, peuvent travailler et faire des expériences sur les enseignements théoriques qui leur sont donnés.

Le professeur, qui dans le cas qui nous occupe, était M. Jules Dussault, un homme d'une compétence reconnue, surveillait les travaux pratiques d'électricité, comme le

[1] [1960] Que. Q.B 723.

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posage des fils, des lampes, des interrupteurs, etc., non reliés au courant de l'école. On se servait plutôt d'un courant développé par magnéto, qui était moins puissant et par conséquent moins dangereux. Il y a, à côté des cabines où travaillent les élèves, une pièce qu'on appelle le "magasin" où l'on remisait le matériel utile aux travaux des élèves. Le professeur M. Dussault surveillait donc ces travaux pratiques, où se développait l'initiative personnelle des élèves, mais il devait également s'occuper du magasin, du matériel et du système électrique de l'école.

Il est en preuve que des instructions sont données aux élèves de travailler toujours avec la plus grande attention, de ne jamais se servir dans l'atelier d'appareils qu'ils ne connaissent pas, d'exécuter à la lettre la tâche qui leur est assignée, et de ne pas entreprendre d'expériences dont ils ne connaissent pas la portée.

Il est arrivé que le 12 mars 1952, alors que la professeur Dussault était momentanément absent du local où se donnent les leçons pratiques, un élève du nom de Robert Lambert fit exploser un détonateur à dynamite, avec le résultat que l'appelant a souffert de graves blessures à l'oeil droit et à la figure. Le juge au procès lui a accordé la somme de $7,629.20, mais la Cour du banc de la reine[1] a renversé ce jugement, et a rejeté l'action avec dépens.

Le dossier révèle que le jour où ce malheureux accident s'est produit, environ quinze élèves suivaient les cours pratiques, sous la surveillance du professeur Dussault. Après que ce dernier eut vérifié que les travaux de deux élèves nommés Hamel et Ellyson avaient été bien accomplis, il leur demanda de vérifier, à l'aide du petit magnéto activé à la main, le travail des autres élèves dans les divers compartiments. Comme ils se trouvaient tous les deux dans le compartiment du jeune O'Brien et d'un autre élève, un étudiant du nom de Lambert quitta son propre compartiment, se rendit à l'endroit où Hamel et Ellyson travaillaient, et sortit de la poche de sa salopette une capsule de dynamite qu'il avait antérieurement trouvée hors de l'école. Il l'ajusta au fil du magnéto, et une explosion se produisit qui blessa plusieurs élèves dont le demandeur en reprise d'instance. Au moment où se produisit cet accident, le professeur Dussault avait temporairement quitté les lieux pour remplir d'autres

[1] [1960] Que. Q.B. 723.

fonctions sur le même étage. C'est la prétention de l'appelant qu'il y a eu négligence de la part de Dussault, et qu'il n'a pas exercé la surveillance nécessaire.

En vertu de l'art. 1054, para. 5, du *Code Civil*, l'instituteur est responsable du dommage causé par ses élèves pendant qu'ils sont sous sa surveillance. Il y a une présomption légale à cet effet, mais elle n'est pas invincible, et l'instituteur sera exempt de responsabilité s'il démontre qu'il n'a pu empêcher le fait qui a causé le dommage. L'instituteur est tenu de remplir bien et fidèlement son devoir de surveillance, et il doit aussi donner les instructions nécessaires pour que des imprudences ne soient pas commises.

Mais, il ne faut pas évidemment exagérer le standard de perfection qui est requis de l'instituteur. Il aura bien accompli son devoir, et il sera à l'abri de toute responsabilité civile, s'il démontre qu'il a fait ce qui était raisonnablement possible de faire, s'il a agi comme aurait agi un bon père de famille dans des conditions identiques, et s'il a pris les précautions ordinaires qu'un homme diligent devait prendre dans les mêmes circonstances. Vide: Sourdat "Traité de Responsabilité Civile", vol. 2, p. 105; *Alain v. Hardy*[1]; *Ouellet v. Cloutier*[2]; *Bisson v. Commissaires d'Ecoles de St-Georges*[3]; *Carty v. The Board of Protestant School of Sherbrooke*[4]; *L'Œuvre des Terrains de Jeux de Québec v. Cannon*[5].

On a dit et on a répété souvent qu'on ne peut pas demander à l'homme prudent, pas plus qu'à l'instituteur avisé, de prévoir toutes les possibilités. La loi n'a pas cette rigidité.

Dans le cas qui nous occupe, il importe de nous demander si le dommage qui est survenu est le résultat d'un acte probable et prévisible, et s'il est dû à un défaut de surveillance de la part de Dussault, employé de l'intimé. Je dois dire, en premier lieu, que ce n'est pas le devoir des autorités scolaires, dans des circonstances normales, d'exercer une surveillance de tous les instants sur les élèves qui

[1] [1951] S.C.R. 540.
[2] [1947] S.C.R. 521.
[3] [1950] Que. K.B. 775.
[4] (1926), 32 R. de J. 157.
[5] (1940), 69 Que. K.B. 112.

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Taschereau J.

fréquentent l'école. Vide: *The Board of Education for the City of Toronto et al. v. Higgs and Higgs et al.*[1]. Un instituteur doit nécessairement se déplacer, et il peut sûrement s'absenter momentanément quand il sait que le travail qu'il a donné à faire ne présente aucun danger, et surtout lorsqu'il a affaire à des élèves mûris de 16 à 18 ans. Dussault n'avait laissé aucun instrument dangereux entre les mains des élèves, et il n'y avait aucune raison de soupçonner ce qui est arrivé.

L'accident est survenu comme conséquence d'un acte spontané, impossible à prévoir. Le jeune Lambert a profité d'une courte absence du professeur pour tromper sa vigilance et mettre son projet à exécution, et il a violé les instructions qui avaient été données. On ne peut raisonnablement reprocher à Dussault de ne pas avoir prévu ni soupçonné que Lambert se livrerait à une telle expérience.

L'appelant a cité les règlements de l'École dans lesquels on donne des directives aux professeurs. Ces règlements ne s'adressent qu'à ces derniers, et ils ne font partie que de la régie interne de l'École; ils ne créent aucun droit vis-à-vis les tiers.

Je crois donc que la Cour du Banc de la Reine a bien jugé en déboutant de son action le demandeur en reprise d'instance, et je suis d'opinion que le présent appel doit être rejeté avec dépens.

Appeal dismissed with costs.

Attorneys for the plaintiff, appellant: Blanchette, Péloquin & Allaire, Sherbrooke.

Attorneys for the defendant, respondent: Leblanc, Delorme, Barnard, Leblanc & Fréchette, Sherbrooke.

[1] [1960] S.C.R. 174, 22 D.L.R. (2d) 49

HER MAJESTY THE QUEEN .....APPELLANT;

1960
*Nov. 4

AND

LEVY BROTHERS COMPANY LIMITED AND THE WESTERN ASSURANCE COMPANY ..... RESPONDENTS.

1961
Jan. 24

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Crown—Petition of Right—Conversion of parcel of diamonds by employee or employees of the Crown—Crown liable—Customs Act, R.S.C. 1952, c. 58, ss. 19, 23(1)—Post Office Act, R.S.C. 1952, c. 12, ss. 40, 44(1)(3)—Crown Liability Act, 1952-53 (Can.), c. 30, ss. 3 and 4.

A parcel of diamonds imported from Belgium by the appellant Levy Brothers Company Limited was lost in the premises of the Customs Postal Branch at Hamilton, Ontario. It was admitted that the parcel arrived by prepaid registered air mail at the Hamilton Post Office on or before Saturday, October 15, 1955, and was transferred to the Customs Postal Branch, where it was deposited in a bin to which members of the public were not permitted access. Notice of the arrival of the package of diamonds was sent to Levy Brothers Company Limited, and was received by it in due course. On October 18th it attended at the Customs Postal Branch to make due entry but the parcel could not be found. Levy Brothers brought a petition of right to recover from the Crown the value of the parcel of diamonds. The trial judge concluded that it was "a fair inference that the parcel was unlawfully converted by some one or more of the Crown employees who had access to the bin during working hours" and that ". . . the preponderance of probability, though slight, favours the view that the conversion occurred on the Saturday or Monday, during a time when both the office and the bunks were open and access to the bins could be had by an employee without using a key". He found that the Crown was liable to make good the loss. The Crown appealed to this Court.

Held: The appeal should be dismissed.

In the course of dealing with the respondent's parcel of diamonds the employee or employees of the Crown converted them to his or their own use. The employee or employees concerned were thus doing fraudulently that which, under s. 44(3) of the *Post Office Act*, they were employed to do honestly and the theft was, therefore, committed under such circumstances as to render the employer liable for the loss. *Lloyd v. Grace, Smith & Company*, [1912] A.C. 716; *Lockhart v. Canadian Pacific Railway Company*, [1941] S.C.R. 278; *W. W. Sales Limited v. City of Edmonton*, [1942] S.C.R. 467; *R. v. Spence*, [1952] 2 S.C.R. 517; *Percy v. Corporation of the City of Glasgow*, [1922] 2 A.C. 299; *United Africa Company Limited v. Saka Owoade*, [1955] A.C. 130, referred to. The liability of the Crown for the torts of its servants is now clearly established by ss. 3 and 4 of the *Crown Liability Act*.

The provisions of s. 40 of the *Post Office Act* were not applicable as at the time of the loss the diamonds in question were neither "deposited in a post office" nor "in the course of mail".

*PRESENT: Taschereau, Locke, Martland, Judson and Ritchie JJ.

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In order to invoke the provisions of s. 23(1) of the *Customs Act* under the circumstances disclosed in this case, it is "default of . . . entry . . . or payment of duty" by Levy Brothers which must be shown. The fact that the statement of agreed facts disclosed no default of any kind by Levy Brothers was sufficient to exclude the application of this subsection.

APPEAL from a judgment of Thurlow J. of the Exchequer Court of Canada[1], granting a petition of right. Appeal dismissed.

C. R. O. Munro and *J. D. Lambert,* for the appellant.

L. A. Fitspatrick, for the respondents.

The judgment of the Court was delivered by

RITCHIE J.:—This is an appeal from a judgment of Mr. Justice Thurlow of the Exchequer Court[1] whereby it is determined that the respondent, Levy Brothers Company Limited (hereinafter referred to as "Levy Brothers") is entitled to recover the sum of $3,191 from the appellant in respect of the loss of a parcel of diamonds shipped to it from Antwerp by prepaid registered air mail and presumably stolen by a person or persons unknown from the office of the Customs Postal Branch of the Department of National Revenue at Hamilton. By the same judgment the claim of the Western Assurance Company was dismissed and no cross-appeal has been asserted in this regard.

This action was tried on the basis of a statement of agreed facts which was signed by counsel for the respective parties and which stipulated that the parcel of diamonds in question, shipped and valued in manner aforesaid, arrived at Hamilton on or before Saturday, the 15th of October, 1955, on which day the Customs Postal Branch was not open to the public and that a skeleton staff of four employees of that branch sorted 213 dutiable items of mail (including the parcel of diamonds) from the non-dutiable, and having entered these items on a form headed "PACKAGES RECEIVED FROM POST OFFICE BY CUSTOMS POSTAL BRANCH" transferred them to the Customs Postal Branch office which was not open at all on Sunday, October 16th, and where they were deposited in bins situate in two large steel bunks to which members of the public are not permitted access and which face each other and

[1] [1960] Ex. C.R. 61, 20 D.L.R. (2d) 459.

are covered with wires and enclosed at each end by wire doors with locks on them. It is further agreed that there was mailed to Levy Brothers on Saturday, October 15th, a printed notice over the name of the Collector of Customs and Excise describing the package in question and stating in effect that it was liable to duty and had arrived at the office of the Customs Postal Branch at the Dominion Government Building, King and John Streets, Hamilton, Ontario, there to be opened, formally entered for customs and delivered to the addressee or its attorney on receipt of payment of duty if any were found to be payable. Having received this advice notice, in due course on Tuesday, October 18th, Levy Brothers attended at the office in question for the purpose of making due entry of the parcel but the parcel could not be found, and in spite of a thorough search by the R.C.M.P. and officers of the Department of National Revenue it had not been found at the time of the hearing of this appeal and is presumed to have been stolen.

Without further recitation of the facts, it is enough for me to say that I agree with the conclusion reached by the learned trial judge that it is

> . . . a fair inference that the parcel was unlawfully converted by some one or more of the Crown employees who had access to the bin during working hours.

and I also agree that

> . . . the preponderance of probability, though slight, favours the view that the conversion occurred on the Saturday or Monday, during a time when both the office and the bunks were open and access to the bins could be had by an employee without using a key.

Customs officers are required by s. 44(3) of the *Post Office Act*, R.S.C. 1952, c. 12, to "deal with" dutiable mail in accordance with the laws relating to customs pending delivery to the addressee or return to the Canada Post Office, and it was in the course of so dealing with the respondent's parcel of diamonds that an employee or employees of the Crown converted them to his or their own use. The employee or employees concerned were thus doing fraudulently that which they were employed to do honestly and the theft was, therefore, in my view, committed under such circumstances as to render the employer liable for the loss. The law governing these circumstances has been stated in Story on

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Ritchie J.

Agency, 7th ed., para. 452, in terms which have been approved in this Court on more than one occasion. It is there said:

> . . . he (the principal) is held liable to third persons in a civil suit for the frauds, deceits, concealments, misrepresentations, torts, negligences, and other malfeasances, or misfeasances, and omissions of duty, of his agent, in the course of his employment, although the principal did not authorize, or justify, or participate in, or, indeed, know of such misconduct, or even if he forbade the acts, or disapproved of them.

This language was adopted as applicable to the relationship between master and servant by Lord Macnaghten in *Lloyd v. Grace, Smith & Company*[1], and by this Court in *Lockhart v. Canadian Pacific Railway Company*[2], per Duff C.J., *W. W. Sales Limited v. City of Edmonton*[3], and *The Queen v. Spence*[4]. See also *Percy v. Corporation of the City of Glasgow*[5], and *United Africa Company Limited v. Saka Owoade*[6].

The liability of the Crown for the torts of its servants is now clearly established by the *Crown Liability Act*, Statutes of Canada, 1952-53, c. 30, ss. 3 and 4, by which it is provided that:

> 3. (1) The Crown is liable in tort for the damages from which, if it were a private person of full age and capacity, it would be liable
>
> (*a*) in respect of a tort committed by a servant of the Crown, or
>
> (*b*) in respect of a breach of duty attaching to the ownership, occupation, possession or control of property.
>
> 4. (2) No proceedings lie against the Crown by virtue of paragraph (*a*) of subsection (i) of section 3 in respect of any act or omission of a servant of the Crown unless the act or omission would apart from the provisions of this Act have given rise to a cause of action in tort against that servant or his personal representative.

It is, however, argued on behalf of the appellant that the Crown is exempt from liability under the present circumstances by reason of the provisions of s. 40 of the *Post Office Act*, R.S.C. 1952, c. 12, and s. 23(1) of the *Customs Act*, R.S.C. 1952, c. 58.

Section 40 of the *Post Office Act* provides that:

> 40. Neither Her Majesty nor the Postmaster General is liable to any person for any claim arising from the loss, delay or mishandling of anything deposited in a post office, except as provided in this Act or the regulations.

[1] [1912] A.C. 716 at 736-7.
[2] [1941] S.C.R. 278 at 281-2.
[3] [1942] S.C.R. 467 at 473-4.
[4] [1952] 2 S.C.R. 517 at 533.
[5] [1922] 2 A.C. 299 at 306.
[6] [1955] A.C. 130.

It was pointed out by counsel for the appellant that by s. 2(1)(*c*) of the same Act the words "deposit at a post office" are defined as meaning "to leave in a post office or with a person authorized by the Postmaster General to receive mailable matter" and that s. 2(2) provides that "an article shall be deemed to be in the course of post from the time it is deposited at a post office until it is delivered".

It was contended on behalf of the appellant that the application of s. 40 should not be limited to articles which are actually "in a post office" or in the custody of a person authorized by the Postmaster General to receive mail, but that it should be construed as referring to an article from the time it is deposited in a post office until it is delivered and that the parcel here in question, having been deposited in a post office and having been lost before it was delivered to the addressee must be taken to have been lost "in the course of post" and that the loss is, therefore, one for which the Crown is not liable by reason of the provisions of s. 40.

Section 44(1) of the *Post Office Act* requires that:

> All mail from a country other than Canada containing or suspected to contain anything subject to customs or other import duties . . . shall be submitted to a customs officer for examination.

and by s. 44(3) it is provided that:

> A customs officer shall, in accordance with the laws relating to customs and the importation of goods, deal with all mail submitted to him under this section, and upon compliance with such laws, may deliver such mail to the addressee, subject to the payment of any postage due thereon, or may return it to the Canada Post Office for transmission through the post in the usual way.

The parcel in question contained goods subject to duty, and at the time of its conversion it had been submitted to the Customs Postal Branch and had not been returned "to the Canada Post Office for transmission through the post in the usual way", but was in the course of being dealt with by customs officials pending delivery to the addressee upon payment of duty. In my view, at the time of the loss the diamonds in question were neither "deposited in a post office" nor "in the course of mail" and, accordingly, I agree with the learned trial judge that the provisions of s. 40 of the *Post Office Act* have no application to the present case.

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THE QUEEN v. LEVY BROS. CO. LTD. et al.

Ritchie J.

It was submitted, however, that the parcel in question was being kept in the Customs Postal Branch "at the risk and charge of the owner", and in this regard reliance was placed upon s. 23(1) of the *Customs Act* which reads:

> In default of such entry and landing, or production of the goods, or payment of duty, the officer may convey the goods to a customs warehouse, or some secure place appointed by the Collector for such purpose, there to be kept at the risk and charge of the owner.

The application of this subsection is, in my view, limited by its opening words to cases in which there has been a "default" in one or more of the ways specified therein. The words "landing, or production of the goods" appear to be referable to goods imported by sea or by inland navigation as will be seen by reference to s. 19 of the present *Customs Act* and s. 15 of the *Customs Act,* 1877, 40 Vict., c. 10, and it is "default of . . . entry . . . or payment of duty" by Levy Brothers which must be shown in order to invoke the provisions of this subsection under the circumstances here disclosed. The fact that the statement of agreed facts discloses no default of any kind by Levy Brothers is, in my view, sufficient to exclude the application of this subsection.

In its petition of right Levy Brothers did not base its claim on a conversion by a servant of the Crown in the course of his employment, but as the learned trial judge granted it leave to make the amendment necessary to include such a claim, and as the appellant in this Court agreed that the case should be treated as if such an amendment had been made, it becomes unnecessary to express any view as to the validity of the contention made by the respondent in the Court below that the provisions of s. 3(1)(*b*) of the *Crown Liability Act* have the effect of making the Crown liable as a bailee of goods in its possession under the circumstances here disclosed.

I would dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: W. R. Jackett, Ottawa.

Solicitor for the respondents: H. L. Rowntree, Toronto.

VERONA CONSTRUCTION LIMITED (*Plaintiff*) ..... APPELLANT;

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*May 27
Dec. 19

AND

FRANK ROSS CONSTRUCTION LIMITED (*Defendant*) ..... RESPONDENT.

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

Contracts—Breach of—Unexpected difficulties—Demand for new contract—Abandonment of work—Right to take over abandonned contract.

In 1949, the defendant company entered into a contract with the City of Dorval to construct sewers within the city, and gave a sub-contract to the plaintiff company for some of the work. Within a few weeks of the signing of this sub-contract, the plaintiff wrote to the defendant that having encountered quicksand the sub-contract would have to be cancelled and a new one made for an increased price. The defendant refused to change the sub-contract, and eventually the work was stopped and taken over by the defendant. The plaintiff alleged in its action that the defendant had prevented it from completing the contract. The defendant counterclaimed and alleged abandonment of the contract. The trial judge found that both parties had voluntarily put an end to the sub-contract. He maintained the action in part and dismissed the counterclaim. The Court of Appeal reversed this judgment and held that the plaintiff had abandonned the sub-contract and that the taking over of the work by the defendant did not amount to a consent to the abandonment. The plaintiff appealed to this Court.

Held: The appeal should be dismissed.

As held by the Court of Appeal, the *impasse* giving rise to this litigation was created by the plaintiff's decision to abandon the work when it came to the realization that it could not complete it without suffering a serious financial loss. The defendant did not have to remake its contract with the plaintiff or to temporize, and neither its refusal to do so nor the celerity with which it had the work completed could have changed the fact of the abandonment and its consequences.

The acceptation of the abandonment as a *fait accompli*, after the plaintiff had openly abandonned the contract and shown a clear intention to keep on doing so, did not imply that the defendant had consented to this unilateral act on the part of the plaintiff.

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

R. Duranleau, Q.C., for the plaintiff, appellant.

*PRESENT: Cartwright, Fauteux, Abbott, Martland and Ritchie JJ.

[1] [1959] Que. Q.B. 674.

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VERONA CONST. LTD. v. FRANK ROSS CONST. LTD.

J. G. Ahern, Q.C., for the defendant, respondent.

The judgment of the Court was delivered by

FAUTEUX J.:—Suivant un contrat d'entreprise à forfait, intervenu en juin 1949 entre elle et la ville de Dorval, la compagnie intimée assuma l'exécution de travaux d'installation de nouveaux égouts dans le territoire de la ville. Pour assurer la marche rapide du travail, l'intimée se chargea des travaux sur certaines sections et en confia l'exécution, sur les autres sections, à différents sous-entrepreneurs, dont l'appelante. A ces fins, elle passait avec celle-ci un contrat, le 8 août 1949. L'appelante avait à peine commencé l'exécution de son contrat qu'elle fit face à des difficultés attribuées à la nature du sol. Le 23 août 1949, elle adressait la lettre suivante à l'intimée:

Tel Dollard 7877 — 7470 Henri Julien

VERONA CONSTRUCTION LIMITED

MONTREAL, August 23rd, 1949.

REGISTERED
Frank Ross Construction Limited,
736 Cote St. Catherine Road,
Outremont, Que.

Dear Sir:—

With reference to our contract re SEWER WORK in Dorval, it does not mention any quick sand whatsoever; our prices were for earth and rock but not for quick sand. Since we have started the job, we have been working in quick sand and should it continue to be quick sand, we are sorry to say that our contract will have to be cancelled and a new contract will have to be made up with a different price.

Yours very truly,

VERONA CONSTRUCTION LTD.

(signed) N. Marzitelli.

L'appelante avait bien, cependant, accepté les risques attenant à la nature du sol. L'intimée refusa son accord à cette demande. Une mésentente s'ensuivit entre les parties et leurs relations s'aggravèrent. Éventuellement, l'appelante suspendit les travaux. C'est alors que l'intimée se chargea d'en exécuter une partie et de confier le reste à un autre entrepreneur.

Prétendant que l'intimée l'avait empêchée de poursuivre l'exécution de son contrat, l'appelante la poursuivit en fin de septembre 1949, pour lui réclamer une somme de

$7,870.22 pour les travaux faits jusqu'au 15 de ce mois. L'intimée contesta cette action et, de son côté, alléguant que, par suite de l'abandon des travaux par l'appelante, elle avait elle-même été obligée d'en faire une partie et en confier le reste à d'autres, lui réclama, par voie de demande reconventionnelle, une somme de $21,784.47, représentant, en substance, la différence entre le montant qu'elle aurait été obligée de payer à l'appelante—si cette dernière eût exécuté son contrat,—et le montant qu'elle dut effectivement payer pour faire compléter les travaux déjà commencés par l'appelante et ceux que cette dernière s'était engagée à faire.

De l'ensemble des griefs et moyens soulevés par les parties, le Juge de la Cour supérieure considéra que la question essentielle à décider était de savoir s'il y avait eu rupture de contrat et, dans l'affirmative, à qui cette rupture était imputable. Adjugeant sur la question, la Cour en vint à la conclusion que l'une et l'autre des parties avait volontairement et de propos délibéré, respectivement mis fin au contrat tout en cherchant à jeter sur l'autre partie la responsabilité de son inexécution. En conséquence, la Cour déclara résilié, par la volonté des parties, le contrat passé entre elles le 8 août 1949, maintint en partie l'action de l'appelante, condamna l'intimée à lui payer la somme de $1,885.92 et rejeta la demande reconventionnelle.

L'intimée logea deux appels contre ce jugement, l'un, portant le n° 5174, visant la décision sur l'action principale du sous-entrepreneur, et l'autre, portant le n° 5173, ayant trait à la décision sur sa demande reconventionnelle.

La Cour d'Appel[1] considéra qu'en fait, la preuve établissait que l'appelante avait abandonné son sous-contrat et qu'en droit, le fait par l'intimée d'avoir, subséquemment à cet abandon, assumé l'exécution des travaux avec d'autres entrepreneurs, ne pouvait équivaloir à un consentement à cet abandon des travaux et la priver du droit de réclamer les dommages lui résultant de cet acte unilatéral de l'appelante. Les dommages subis par l'intimée furent liquidés à la somme de $12,759.17. En conséquence, et par jugements unanimes, la Cour du banc de la reine fit droit à ces appels, rejeta

[1] [1959] Que. Q.B. 674.

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Fauteux J.

l'action principale de l'appelante, accueillit la demande reconventionnelle de l'intimée et condamna l'appelante à lui payer la somme des dommages ainsi liquidés

L'appelante se pourvoit maintenant à l'encontre de ces décisions.

Tous les Juges des Cours inférieures s'accordent à déclarer—et la preuve supporte amplement ces vues—que le 6 septembre, l'appelante a fait l'abandon de son contrat et que ce n'est qu'après le fait de cet abandon que l'intimée a pris l'initiative des travaux que l'appelante s'était engagée à faire, aux termes du contrat du 8 août 1949.

En vertu de son contrat, dit la Cour supérieure, la demanderesse avait l'obligation d'exécuter ces travaux; en les suspendant, avec l'intention de ne pas les reprendre, mais de manière à provoquer la défenderesse à les continuer à sa place, la demanderesse a violé son obligation. D'autre part, ajoute-t-elle, il appert de la preuve que l'intimée avait elle-même, le 6 septembre, perdu tout désir d'astreindre l'appelante à l'exécution de son contrat et que la signification, le même jour, d'un protêt enjoignant à l'appelante de reprendre les travaux dans les quarante-huit heures, n'avait pour objet véritable que de donner une couleur de droit aux dispositions qu'elle entendait prendre subséquemment pour assumer elle-même, avec d'autres, les travaux de l'appelante. Les parties, conclut la Cour, ont mis fin au contrat, non pas d'un commun accord, mais concurremment et partant, ni l'une ni l'autre n'ont droit à des dommages.

En tout respect, et d'accord avec les vues exprimées par M. le Juge Casey, de la Cour d'Appel, avec le concours de ses collègues, comme lui je dirais que l'impasse donnant lieu à ce litige est née de la décision de l'appelante d'abandonner ces travaux lorsqu'elle réalisa qu'elle ne pouvait les compléter sans subir une perte financière sérieuse; que l'intimée n'avait pas l'obligation de refaire le contrat ou de temporiser, et que ni son refus de ce faire, ni la célérité avec laquelle elle procéda à entreprendre et faire entreprendre par d'autres l'exécution des travaux abandonnés par l'appelante, n'affectent le fait de cet abandon et les conséquences qui en résultent.

Informée que l'appelante avait suspendu ses travaux et avait manifesté ouvertement, par des déclarations et des faits, l'intention de ne pas les reprendre aux conditions du

contrat, l'intimée mit l'appelante en demeure de les reprendre immédiatement, à défaut de quoi ceux-ci seraient terminés par d'autres à ses frais et dépens. L'acceptation de cet abandon comme fait accompli n'implique pas que l'intimée ait donné son accord à cet acte unilatéral posé par l'appelante. Rien n'indique d'ailleurs que si l'appelante, revisant sa position, s'était alors conformée au contrat ou à la mise en demeure, l'intimée aurait pris l'initiative que la conduite de l'appelante l'a forcée de prendre.

Quant aux dommages, la Cour d'Appel a accordé, après avoir fait certaines déductions, la somme de $12,784.47. A mon avis, il n'y a pas lieu d'intervenir.

Je renverrais les deux appels avec dépens.

Appeals dismissed with costs.

Attorneys for the plaintiff, appellant: Duranleau, Dupré & Duranleau, Montreal.

Attorneys for the defendant, respondent: Lefrançois, Goulet & Lalonde, Montreal.

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*Feb. 14
Feb. 21

ALICE VOGHELL (*Defendant*) .....APPLICANT;

AND

PAUL VOGHELL (*Plaintiff*) .....RESPONDENT.

MOTION FOR LEAVE TO APPEAL

Appeals—Custody of children—Leave to appeal—Territorial Court of the Northwest Territories.

In his action, commenced at Yellowknife, Northwest Territories, the plaintiff claimed the custody of the three children issue of his marriage with the defendant, and claimed also damages for criminal conversation from her co-defendant. Although the female defendant in her counterclaim had asked only for the custody of the children, the trial judge, considering that her evidence made it obvious that she wanted a divorce, directed that the counterclaim be amended so as to include a prayer for dissolution of the marriage. He then dissolved the marriage, granted custody of the children to the defendant and dismissed the claim for damages against the male defendant. The Court of Appeal for the Northwest Territories reversed in part this judgment, set aside the granting of the divorce and granted custody of the children to the plaintiff.

The defendant applied for leave to appeal to this Court with respect only to the custody of the children.

MOTION for leave to appeal from a judgment of the Court of Appeal for the Northwest Territories, reversing in part a judgment of Sissons J. of the Territorial Court.

W. G. Morrow, Q.C., for the defendant, applicant.

A. M. Dechene, Q.C., for the plaintiff, respondent.

The judgment of the Court was delivered by

THE CHIEF JUSTICE:—Mr. Morrow made it clear in his presentation that he was not arguing that leave to appeal should be granted on the ground that the Territorial Court of the Northwest Territories had jurisdiction to enter a decree of divorce, but only on the question as to the custody of the children. The motion for leave to appeal is dismissed without costs.

Leave refused without costs.

*PRESENT: Kerwin C.J. and Martland and Ritchie JJ.

EDWARD GEORGE DRIVER AND OTHERS (*Plaintiffs*) ..... } APPELLANTS; 1960 *May 25, 26 Dec. 19

AND

COCA-COLA LIMITED (*Defendant*) ....RESPONDENT.

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

Damages—Fatal accident—Child struck by truck—Child died on same day—What damages recoverable—Claim for shortening of life expectancy or loss of life—Claim by parents under art. 1056 of the Civil Code—Also claim by parents as heirs under art. 607 of the Civil Code.

The plaintiffs' female child was hit by a truck and died of her injuries on the same day. Her parents claimed damages under art. 1056 of the *Civil Code*. They also claimed with their other children, as legal heirs of the victim, damages for the shortening of the victim's life. The jury awarded damages under both heads. The Court of Appeal reduced the award given under art. 1056 as it found it to have been excessive, and dismissed the other claim. The parents appealed to this Court. The question of liability was not in issue.

Held (Cartwright J. dissenting in part): The appeal should be dismissed.

Per Curiam: Only the father and mother had a claim under art. 1056 of the Code, this claim was limited to the damages they suffered as a consequence of the death of their daughter, and the amount of damages under this head, as reduced by the Court of Appeal, was reasonable and should not be disturbed.

Per Taschereau, Abbott and Ritchie JJ.: The victim's heirs had no claim for the victim's pain and suffering and loss of life. Such a claim was not in the victim's *patrimoine* and could not, therefore, be transmitted to the heirs under art. 607 of the Code.

It is not contested that the victim of a delict or quasi-delict has a claim, transmissible to the heirs, for pain and suffering and shortening of life when the victim has actually felt the effect of these damages before dying, i.e., when the right arose *ante mortem*. This is not to be confused with *solatium doloris* which does not exist in the Quebec law. However, in the present case, since the victim died so shortly after the accident,—the evidence does not disclose whether she suffered and even whether she was conscious during the interval between the accident and her death,—it was not established that these essential elements of damage were part of her *patrimoine*.

The only claim, therefore, that could be made would be for loss of life. As the victim never had an action for damages resulting from her own death, such a claim could not be transmitted to her heirs. *C.P.R. v. Robinson*, 19 S.C.R. 292, applied.

Per Fauteux J.: At the very moment of a person's death, all juridical possibilities for that person to acquire rights or obligations become extinct. When, in the present case, the head of damage under which

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

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the claim was made, i.e., the loss of life, came to be realized, no right could henceforth accrue to the victim who had ceased to live. Consequently, since the victim's *patrimoine* was not increased by the loss of her life, she could not transmit any right arising from that head of damage to her heirs.

Per Cartwright J., *dissenting in part*: The victim had in her lifetime a right of action for damages for the shortening of her life which was transmissible to her heirs. The claim she was entitled to assert was for damages because the defendant's fault had deprived her of the reasonable prospect of an uncertain number of happy years of life. The inflicting of physical injury which cuts short the period during which the injured person had a normal expectation of living a reasonably happy life gives rise to a claim for damage which the injured person can assert under art. 1053 of the Code. Such damages are not to be confused with damages for life being rendered less enjoyable. The latter could be suffered only while the injured person is alive but the former are increased by the acceleration of his death.

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

J. Rosenblum and *B. B. Cohen,* for the plaintiffs, appellants.

J. F. Chisholm, Q.C., for the defendant, respondent.

The judgment of Taschereau and Ritchie JJ. was delivered by

TASCHEREAU J.:—Le 19 septembre 1955, vers 4.15 heures de l'après-midi, Beverley Driver a été frappée par le camion de la défenderesse, sur la route Chambly, dans la municipalité de St-Hubert, district de Montréal, et est décédée le même jour. Cette jeune enfant âgée de huit ans était la fille de Edward George Driver et de Dame Agnes Vickers, et avait sept frères et trois sœurs.

Comme conséquence de cet accident, une action a été instituée contre la compagnie défenderesse-intimée, dans laquelle le père a réclamé personnellement la somme de $23,376.19; la mère $7,376.19; et le père en sa qualité de tuteur à ses dix enfants mineurs $4,752.37, le tout formant un total de $35,504.75.

La cause a été inscrite devant un jury qui a accordé la somme de $13,249.50 qu'il a attribuée ainsi: Au père Edward George Driver, en sa qualité de tuteur à ses enfants mineurs $4,006; au père Edward George Driver personnellement

[1] [1960] Que. Q.B. 313.

$4,621.75; et à la mère Agnes Vickers Driver $4,621.75. M. le Juge J. P. Charbonneau de la Cour supérieure a confirmé ce verdict du jury.

La Cour du banc de la reine[1] a maintenu l'appel de la compagnie Coca-Cola Ltd. et a ordonné un nouveau procès, à moins que les demandeurs ne consentent à accepter dans un délai déterminé, la somme de $2,487 à être ainsi divisée: $1,000 à la mère Agnes Vickers et $1,487 au père Edward George Driver. La Cour a été d'opinion que les montants accordés aux père et mère étaient excessifs, et que le père en sa qualité de tuteur à ses enfants mineurs ne pouvait en droit exercer aucune réclamation. M. le Juge Casey, dissident en partie, a partagé l'opinion de l'honorable Juge en chef Galipeault et de M. le Juge Choquette concernant la réclamation du père, en sa qualité de tuteur, qu'il trouve non fondée, mais n'a pas cru devoir réduire les montants accordés aux père et mère personnellement.

La question de responsabilité ne se pose pas. Les père et mère réclament non seulement en vertu de l'art. 1056 du *Code Civil,* mais allèguent également qu'ils sont, avec les enfants survivants, les héritiers légaux de l'enfant décédée, et que de ce chef, ils peuvent exercer tous les droits qui faisaient partie du patrimoine de Beverley Driver.

Je dois dire en premier lieu que les père et mère peuvent sûrement exercer un recours en vertu de l'art. 1056 C.C. Cet article se lit ainsi:

> Art. 1056. Dans tous les cas où la partie contre qui le délit ou quasi-délit a été commis *décède en conséquence,* sans avoir obtenu indemnité ou satisfaction, *son conjoint, ses ascendants et ses descendants ont,* pendant l'année seulement à compter du décès, droit de poursuivre celui qui en est l'auteur ou ses représentants, *pour les dommages-intérêts résultant de tel décès.*

Cet article accorde donc une action *dans le cas de décès* au conjoint, aux ascendants et aux descendants seulement, et il refuse implicitement ce même droit aux frères et sœurs. Il est clairement limitatif et restreint, en conséquence, la portée et l'étendue de l'art. 1053. De plus, il ne donne aux personnes qui y sont mentionnées que le droit aux dommages que ces même personnes ont soufferts comme conséquence du décès de la victime. *Regent Taxi and Transport Co. v. La Congrégation des Frères Maristes*[2].

[1] [1960] Que. Q.B. 313. [2] [1929] S.C.R. 650, [1930] 2 D.L.R. 353.

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Taschereau J.

Evidemment, la situation pourrait être différente, si la victime n'était pas morte. Car, comme il a été décidé dans cette cause de *Regent Taxi, supra,* le mot «autrui» à l'art. 1053 ne signifie pas seulement la victime immédiate d'un délit ou d'un quasi-délit, mais aussi toute personne qui, comme conséquence d'un tort causé à une autre, souffre un dommage. Mais, tel n'est pas le cas qui nous occupe, vu que la victime est décédée comme conséquence de l'accident.

C'est donc avec raison, je crois, que la Cour du banc de la reine a accordé aux père et mère de la victime chacun $1,000, plus les frais funéraires, dommages qui leur ont été occasionnés par la mort de leur enfant, mais qu'elle a refusé la réclamation des frères et sœurs, qui sont exclus de cet art. 1056 C.C.

Mais, disent les appelants, le père, la mère et les enfants, sont les héritiers de la succession "ab intestat" de la défunte, en vertu de l'art. 626 C.C., et comme tels, ils peuvent exercer les droits et les recours en dommages dont la victime était titulaire. Ils auraient été, par l'opération de l'art. 607 C.C., saisis des droits et actions de la défunte. Cet art. 607 est rédigé dans les termes suivants:

> 607. 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.

Ils pourraient en conséquence réclamer pour douleurs et souffrances physiques, et pour la perte de la vie de la victime, une somme substantielle, droit dont Beverley Driver était personnellement investie durant sa vie. Il importe en premier lieu de nous demander si les souffrances et douleurs supportées par la victime, et le droit de poursuivre pour la perte de la vie, étaient des réclamations qui existaient dans le *patrimoine* de la défunte au moment de son décès, et s'il s'agit de biens *transmissibles* ou non à ses héritiers. Nous serions en présence, selon les appelants, non pas d'une réclamation *post mortem,* mais bien d'une réclamation *ante mortem,* transmise aux héritiers légaux.

La règle générale veut que les héritiers soient investis du patrimoine du défunt, c'est-à-dire de l'ensemble de ses droits et de ses obligations, appréciables en argent, dont le *de cujus* était titulaire. La totalité de ces biens constitue une universalité juridique. Entrent seuls dans le patrimoine les

biens qui ont une valeur économique, et ceux-là sont les *biens patrimoniaux* et sont évidemment transmissibles aux héritiers.

D'autre part, il existe *des droits extra-patrimoniaux* qui n'ont une valeur pécuniaire que pour leur titulaire, et par conséquent ne sont pas transmissibles. Ils s'éteignent avec la mort et ne font pas partie du corps ou de la masse de la succession qui s'ouvre. On peut véritablement dire que les biens pour lesquels le titulaire ne pouvait réclamer en son vivant, ne font pas partie de la succession, et il s'ensuit logiquement que l'héritier ne peut en être saisi.

Les appelants ont cité deux jugements rendus par la Cour du banc de la reine pour appuyer leur prétention à l'effet qu'ils ont droit de réclamer comme héritiers pour les peines et souffrances endurées par leur enfant défunte, ainsi que pour l'abrègement et la perte de sa vie survenue prématurément.

La première de ces causes est celle de *Green v. Elmhurst Dairy Ltd.*[1], où le jugé est rédigé dans les termes suivants:

> The right to recover damages for pain and suffering and for loss of enjoyment of life resulting from bodily injuries is a right of action which is transmissible to the heirs of the victim under article 607 C.C.

C'est M. le Juge Casey qui a écrit les raisons du jugement, et à son opinion se sont ralliés M. le Juge en chef Galipeault ainsi que MM. les Juges St-Jacques, McDougall et Rinfret. Voici ce que dit M. le Juge Casey à la page 89:

> There is no doubt that the claim for the items of pain and suffering and loss of life expectancy were personal to the victim. It may even be said that they were exclusively attached to the person within the meaning of C.C. 1031 and that the right to claim for these damages could not have been exercised by her creditors. But this does not mean that they were not transmissible. We have been referred by defendants to several decisions of this Court as well as the other Courts of this Province but with all respect I find these decisions completely beside the point. Thus, in the case of *Smith v. Pelletier* (1942 K.B. 664), the point was whether minor children could, as heirs, and altogether apart from their recourse under C.C. 1056, claim for the medical expenses incurred by their father prior to his death. It is true that at page 668 Mr. Justice Prévost says:
>
> "Les dommages dans sa personne, c'est la mutilation de son corps, l'altération de sa santé ou de ses forces, l'invalidité permanente, totale ou partielle qui en résulte, les souffrances physiques, etc. Ces dommages sont conditionnés par la survie de la victime. A la mort les souffrances et les infirmités prennent fin. Ces chefs de dommages si intimement liés à la personne de la victime disparaissent avec elle, et se trouvent par le fait même intransmissibles de leur nature."

[1] [1953] Que. Q.B. 85.

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But with all respect I do not think that too much importance should be attached to this statement. In the first place, it was not necessary for the decision of the case, and secondly it is not supported by authority.

Dans une seconde cause de *Lévesque v. Malinosky*[1], la Cour du banc de la reine a décidé (MM. les Juges Bissonnette, Hyde et Owen) que:

The victim had a claim for pain and suffering he endured from the date of his accident to the date of his death and this claim was transmissible to the heir. On the same basis, the victim's claim for shortening of life was also transmissible.

M. le Juge Bissonnette était dissident en partie. Cette dissidence ne portait pas sur le fond même de la question, mais sur un item de dommages fondé sur la perte d'un revenu annuel.

Dans la présente cause, M. le Juge Casey dit qu'il est allé trop loin, si son jugement dans la cause de *Elmhurst* doit être interprété comme voulant dire qu'il a maintenu la prétention que l'abrègement de la vie donne naissance à une réclamation *qui n'est pas limitée à la victime immédiate,* mais qui est aussi transmissible aux héritiers de cette dernière.

De son côté, M. le Juge en chef Galipeault s'exprime ainsi:

Quelles que soient les expressions employées dans les procédures, dans le jugement, ou dans d'autres décisions rapportées, il est bien certain que la réclamation est tout simplement *pour perte de vie.*

C'est comme héritiers de la victime décédée que les demandeurs ont réclamé $8,000.00 en vertu de la question 7 ci-dessus, soutenant que Beverley Driver a laissé dans sa succession cette somme de $8,000.00 qui a augmenté son patrimoine.

M. le Juge Choquette a concouru dans les vues exprimées par M. le Juge Casey. Et le jugement de la Cour contient un considérant à l'effet que la réclamation des héritiers pour la perte de la vie de la victime ne faisait pas partie du patrimoine de cette dernière. Il se lit ainsi:

CONSIDERANT que la somme de $8,000.00 réclamée par les héritiers leur a été accordée sans droit.

Je m'accorde avec M. le Juge en chef Galipeault, et je crois de plus que dans notre jurisprudence et dans les écrits de certains de nos auteurs, des expressions imprécises ont été employées, et qu'une certaine confusion existe entre les mots

[1] [1956] Que. Q.B. 351.

«abrègement de la vie» et «perte de la vie». Les deux, cependant, ne produisent pas les mêmes conséquences légales.

Je comprends très bien, et ceci ne peut être sérieusement contesté, qu'une personne victime d'un accident ait une réclamation en justice, lorsque sa condition fait naître la triste perspective d'avoir devant elle une vie abrégée, de traîner une existence misérable, remplie d'infirmités, de douleurs physiques, et d'angoisse et d'inquiétudes morales. C'est sur cela que peut et doit reposer, si la preuve le justifie, une réclamation en dommages comme celle qui est soumise à notre considération, car alors, *un droit, appréciable en argent, a pris naissance, et fait partie du patrimoine de la victime suivant les dispositions de l'art. 607 du Code Civil.*

Personne ne peut être l'auteur de pareilles infortunes, sans être tenu de payer une compensation proportionnée au tort qui a été causé par sa propre négligence. Cette source de dommages cependant ne doit pas être confondue avec le *Solatium Doloris,* qui serait une compensation pécuniaire pour la détresse morale ou la douleur éprouvée par une personne pour la perte d'un être cher. Un tel recours n'existe pas dans notre droit.

Mais si la douleur physique, l'abrègement de la vie et l'anxiété qui en résulte, constituent un sérieux élément de dommages, encore faut-il que la victime en ait ressenti les effets en son vivant, que le droit soit né avant sa mort.

Je ne crois pas que l'on trouve dans la présente cause les éléments nécessaires pour justifier la réclamation des héritiers. La victime est décédée presque instantanément. A-t-elle souffert physiquement et moralement? A-t-elle éprouvé cette douleur et cette angoisse que je signalais tout à l'heure? Nous n'en savons rien, et nous ne savons même pas si, après avoir été frappée par le camion de l'intimée, elle avait encore sa connaissance lorsque l'ambulance l'a conduite à l'hôpital.

Il n'est pas établi que ces éléments essentiels de dommages ont jamais fait partie du patrimoine de la victime, et les héritiers en conséquence ne peuvent en être investis. Il résulterait donc, comme le dit le Juge en chef Galipeault, une réclamation que veulent exercer les héritiers pour la perte de la vie de Beverley Driver. Je suis clairement

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d'opinion que la victime n'a jamais été titulaire de ce droit qui n'a pas pu être transmis. Elle ne pouvait sûrement pas poursuivre pour la perte de sa propre vie.

Mignault, vol. 5, p. 379, partage ces vues et s'exprime ainsi:

> *Le recours en dommages-intérêts, dans le cas de décès de la victime, ne fait pas partie de sa succession, et il ne peut être exercé par les héritiers de la victime, par exemple, ses frères et sœurs;* il ne peut être exercé que par les parents indiqués à l'article 1056 du code civil, de leur chef personnel, pour le tort qu'ils éprouvent;

Dans une cause de *C.P.R. v. Robinson*[1], les remarques du Juge Taschereau à la page 321 sont très au point, et elles ont été approuvées par Ritchie C.J. et par MM. les Juges Gwynne et Patterson. Il disait ceci:

> Of course her action (that is, the widow's) was not transmitted to her by the deceased. *He never had an action for damages resulting from his own death.* And her action is different in this, that she claims the damages resulting from his death whilst he would have claimed the damages resulting from the injury to himself; in other words, he would have claimed his damages whilst she claims her own damages.

Il est vrai que ce jugement de *Robinson, supra,* a été modifié par le Comité judiciaire[2], mais l'appel fut maintenu sur des points différents, de sorte que l'opinion de notre Cour sur cette question demeure définitive.

Dans leur factum et à l'argument, les appelants ont cité de nombreuses autorités anglaises, mais je ne crois pas qu'elles puissent nous éclairer. Elles ne servent qu'à démontrer les hésitations jurisprudentielles en Angleterre et dans les autres pays, mais qui ont été finalement déterminées par des lois spéciales. Comme mon collègue M. le Juge Cartwright, je crois qu'elles ne peuvent lier les tribunaux de la province de Québec, où il existe un système de droit complet par lui-même. *Desrosiers v. The King*[3].

Il résulte donc que dans la présente cause, les héritiers ne peuvent réclamer. Je m'accorde cependant avec le juge au procès, et la Cour du banc de la reine, qui ont maintenu qu'en leur qualité de père et mère, les appelants pouvaient exercer une réclamation sous l'art. 1056 du *Code Civil, non pas comme héritiers d'un droit faisant partie du patrimoine de la défunte, mais pour les dommages qui leur ont été*

[1] (1891), 19 S.C.R. 292 at 321. [2] [1892] A.C. 481.
[3] (1920), 60 S.C.R. 105 at 126, 55 D.L.R. 120.

causés personnellement. La Cour du banc de la reine a substantiellement réduit le montant qui avait été accordé par le jury, et je crois qu'elle a eu raison de le faire. Ce montant était exagéré, disproportionné aux dommages subis par les parents de Beverley Driver, et le montant de $1,000 accordé au père et $1,000 à la mère, plus les frais funéraires, est une ample compensation pour le dommage subi.

Comme on l'a dit déjà, il est difficile d'apprécier les dommages qui résultent aux parents de la perte de la vie d'un enfant. Mais, la jurisprudence veut qu'aucun *solatium doloris* ne soit accordé. *Daly v. McFarlane*[1]; *Town of Montreal West v. Hough*[2]; *Bouchard v. Gauthier*[3].

Les dommages doivent nécessairement être susceptibles d'une évaluation pécuniaire. Toute appréciation mathématique est impossible, mais doivent être accordés les frais funéraires et une compensation raisonnable pour la perte de soutien et des espérances de bénéfices futurs, que les parents pouvaient attendre de leur enfant décédée. De plus, comme l'a bien dit M. le Juge Dorion dans la cause de *Hunter v. Gingras*[4]:

> Peut-être faudrait-il admettre comme base de dommages la perturbation apportée dans la vie d'un père de famille par la mort d'un enfant, la perte de l'une de ces joies du foyer et d'une part du bonheur, qui constituent la récompense des sacrifices que coûte l'éducation d'un enfant.
>
> Le difficile est de fixer un chiffre qui ne soit pas dérisoire pour pareille compensation et qui ne soit pas trop élevé pour des accidents où la fragilité humaine a tant de part, et d'où toute idée de vindicte doit être bannie.
>
> Si l'on s'en tient à la perte purement pécuniaire, il est bien difficile d'évaluer en chiffres l'espoir des parents qu'une enfant de neuf ans leur rendra plus tard de services. Ne vaut-il pas mieux revenir à l'ancienne jurisprudence et considérer qu'un enfant, qui a cet âge, a coûté tant de soins, représente un actif, un appui moral, dont la perte n'est pas sans influence sur la santé, le courage ou l'activité de ceux qui l'ont subie.

Dans la même cause, M. le Juge Martin s'exprime ainsi:

> It is manifestly difficult to arrive at an exact conclusion in valuing this asset. One can imagine cases where many contingencies might arise where the child would be of little or no financial benefit and perhaps *become a liability to be sustained by the parent,* but we have to appreciate these matters in the ordinary run of human lives, and I should say, having regard to the circumstances of this case, that a sum of $500.00 over and above the amount awarded by the judgment appealed from, would be fair

[1] (1933), 55 Que. K.B. 230.
[2] [1931] S.C.R. 113, 4 D.L.R. 52.
[3] (1911), 17 R.L. 244.
[4] (1921), 33 Que. K.B. 403 at 415.

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and just compensation, and I would maintain the appeal and increase the condemnation by that sum, with costs against the respondent here and below.

Une nombreuse jurisprudence a été citée portant sur le montant de dommages qui doit être accordé aux parents pour la perte d'un enfant. Malgré qu'il s'agisse de cas isolés, il résulte de tous ces jugements qu'il faut bien se garder d'accorder des montants exagérés. Je dois donc conclure que le père et la mère pouvaient réclamer en vertu de l'art. 1056 C.C., mais que pas plus que leurs enfants, ils ne pouvaient réclamer comme héritiers. Je suis aussi d'opinion que le montant accordé aux parents par la Cour du banc de la reine est raisonnable.

L'appel doit donc être rejeté avec dépens, si réclamés, mais avec une légère modification: c'est que l'option accordée aux demandeurs de choisir entre un nouveau procès ou d'accepter la somme de $2,487, devra être exercée non pas dans les trente jours depuis la date du jugement de la Cour du banc de la reine, mais dans les soixante jours de la date où le présent jugement est rendu.

CARTWRIGHT J. (*dissenting in part*):—The relevant facts and the questions raised on this appeal are set out in the reasons of my brother Taschereau. I wish to add only one observation as to the facts, that is as to the length of time that Beverley Driver survived the happening of the accident. In the factum of the appellants it is stated that "she was taken to three different hospitals in an endeavour to save her life; nevertheless she died later in the same day". In the factum of the respondent it is said: "Beverley Driver died a few hours after the accident".

As to the claim of the parents of Beverley for damages pursuant to art. 1056 of the *Civil Code*, for the reasons given by my brother Taschereau I agree with his conclusion that we ought not to interfere with the judgment of the Court of Queen's Bench[1] on this branch of the case.

The remaining issue arises out of the answer of the jury to the seventh question submitted to them which was:

> Did Beverley Driver suffer any damages for the shortening of her life expectancy, and in the affirmative state at what amount you assess these damages?

[1] [1960] Que. Q.B. 313.

To this the jury answered "Yes" and assessed the damages at $8,000. The learned trial judge in affirming the verdict of the jury dealt with this item as follows:

> There remains the last item of $8,000.00 determined by the jurors as the amount of damages suffered by Beverley Driver for the shortening of her life expectancy, to which amount the Plaintiffs would be entitled as her heirs at law (C.C. Article 626).
>
> During the course of this trial, the undersigned considered, and still considers that he is bound by the decisions of the Court of Queen's Bench, sitting in Appeal in the cases of *Green v. Elmhurst Dairy* reported at 1953 Q.B., p. 85 and *Levesque v. Malinosky* 1956 Q.B., p. 351, in which cases it was decided that damages for pain and suffering and for loss of enjoyment of life, or shortening of life expectancy resulting from bodily injuries gave a right of action to the victim, which right was transmissible to its heirs, and that this right was separate and distinct from that which could be exercised under Article 1056 of the Civil Code.
>
> Applying the law as thus determined, the sum of $8,000.00 found by the jurors as damages suffered by the victim, then aged eight years, for the loss of all the years of life ahead of her, should be allotted to her heirs in proportion to their respective rights.

The members of the Court of Queen's Bench were unanimous in reversing the judgment of the learned trial judge on this item, which is dealt with in the formal judgment in the following terms:

> CONSIDÉRANT qu'en l'espèce, les demandeurs n'ont aucun recours en droit comme héritiers de Beverley Driver, la perte de vie de cette dernière n'ayant en rien accru son patrimoine ou sa succession, de sorte que du chef de son décès, elle n'a pu rien transmettre à ses héritiers;
>
> CONSIDÉRANT que la somme de $8,000.00 réclamée par les héritiers leur a été accordée sans droit;

The primary questions of law raised by these conflicting views are, (i) whether by the law of Quebec the victim of a delict or quasi-delict has a right of action for damages for the prospective shortening of his own life due to the fault of the defendant, and (ii) if so whether the heirs of the victim who dies before action brought can assert that right of action pursuant to art. 607 of the *Civil Code*.

While I do not rest my opinion on any supposed admission made by counsel, I did understand counsel for the respondent to take the position that if, contrary to his submission, the victim had such a right of action that right could be exercised by his heirs and that he disclaimed any suggestion that the maxim *actio personalis moritur cum persona* was applicable.

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We had the assistance not only of full and able argument but of elaborate factums. A consideration of these and of the authorities referred to has brought me to the conclusion that the learned trial judge was right in his view that these questions of law were decided by the Court of Queen's Bench in *Green v. Elmhurst Dairy Ltd.*[1] and in *Lévesque v. Malinosky*[2]. I am further of opinion that the judgments in those two cases correctly state the law.

In *Green v. Elmhurst Dairy Ltd.*, the plaintiffs' mother, who was 67 years of age, suffered bodily injuries on October 3, 1950, caused, as it was claimed, by the fault of the defendant, as a result of which she died three days later. The plaintiffs as the heirs of their mother brought action for damages and in their declaration claimed, *inter alia,* $500 for pain and suffering endured by the deceased and $3,500 for the shortening of her life expectancy. Batshaw J. maintaining a partial inscription in law struck from the claim these two figures and the paragraphs on which they were based. The Court of Queen's Bench in a unanimous judgment allowed the appeal of the plaintiffs and restored the two items and the paragraphs on which they were founded.

In the notes of Casey J., with whom Galipeault C.J. agreed, we find the following:

At page 87:

> Paragraphs 10 to 14 contain a recital of the facts upon which is based the assertion that the mother, had she sued, would have been entitled to $500 for pain and suffering and $3,500 for the shortening of her life expectancy. As the learned trial Judge struck these two figures from the claim he was obliged to strike the paragraphs upon which they were based.

At pages 88 and 89:

> In disposing of this appeal one must bear in mind that plaintiffs have invoked in one suit at least two separate rights of action; as descendant relations of the victim they claim under C.C. 1056 the items mentioned in par. 85; in addition, as legal heirs, under C.C. 607 they exercise the right of action which their mother could have exercised during her lifetime, i.e. the right to claim from defendants the sum of $500 and $3,500 mentioned in paragraphs 15*c* and 15*d*.
>
> Defendants object to the latter claim, urging in substance that it is purely personal to the deceased and could not have been transmitted to her legal heirs; and that in claiming under C.C. 1056 as well as under C.C. 607, plaintiffs were asking for the same damages, as is stated in the defendant's factum.

[1] [1953] Que. Q.B. 85. [2] [1956] Que. Q.B. 351.

There is no doubt that the claim for the items of pain and suffering and loss of life expectancy were personal to the victim. It may even be said that they were exclusively attached to the person within the meaning of C.C. 1031 and that the right to claim for these damages could not have been exercised by her creditors. But this does not mean that they were not transmissible.

The learned judge proceeded to refer to a number of decided cases and continued at page 90:

We must start with the premise that the generality of C.C. 607, couched as it is in the widest terms, is restricted only when we find the victim in possession of rights of action which by their very nature are incapable of being transmitted. The only rights of action not transmitted under 607 are the ones which cannot possibly survive the person who possessed or enjoyed them.

At pages 90 and 91:

It is well established that the victim of the accident may claim compensation for pain and suffering and for the loss of enjoyment of life, whenever these heads of damages arise as a consequence of the bodily injuries which he has suffered. This type of damage is generally referred to as "moral" as opposed to "material" of which examples would be loss of earning power or loss of a particular profit or gain. It is accepted that the right of the victim to claim for these "material" damages is transmissible. It is only with respect to the "moral" damages that we find differences of opinion based on distinctions of which Demolombe at least was unaware.

The learned Judge continued with a careful review of the statements of a number of authors and as a result expressed the following conclusion at page 94:

On the whole, I am unable to find any authority for excluding from the operation of C.C. 607 the right of action possessed by plaintiff's mother and which they are now attempting to enforce. I can find no reason for saying that while we must admit the transmissibility of the right to claim for the "material" damages arising out of bodily injuries, we must deny this character to the right to claim for those called "moral". In consequence, I would accept as applicable and in so far as heirs are concerned, as an accurate statement of our law, the following passage taken from par. 1902 (Mazeaud):

> Aucune raison de principe ne s'oppose à la transmissibilité de l'action en responsabilité. Rien dans la nature générale de cette action ne l'empêche de se transmettre comme se transmettent en principe toutes les actions dans notre droit. L'action est un élément du patrimoine de son titulaire, transmissible comme les autres éléments.
>
> On peut alors poser en règle générale que l'action en responsabilité qui appartient à la victime peut passer à ses ayants cause, qu'elle peut être ainsi exercée par ses héritiers ou par ses créanciers ou par un cessionnaire.

For these reasons I arrive at the conclusion that the right of action possessed by the plaintiffs' mother is not excluded from the rule of C.C. 607. That being so, they can claim what she could have claimed, and I would set aside the judgment *a quo* to restore to plaintiffs' declaration certain paragraphs and to restore to the conclusion par. 1 as originally drawn.

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Every judgment must, of course, be read in the light of the subject-matter with which the Court was occupied, and in all that is quoted above Casey J. was dealing with the question whether the claims by the heirs of the deceased for damages for pain and suffering suffered by her and for the shortening of her life expectancy were maintainable in law.

St. Jacques J., agreeing, in the result, dealt mainly with the question whether rights conferred by art. 1053 could be asserted in one action with those conferred by art. 1056 and concluded that they could.

Stuart McDougall J. agreed with both St. Jacques J. and Casey J.

Rinfret J. agreed with both St. Jacques J. and Casey J. and said at page 98:

> J'ai eu l'avantage de lire les notes de mes collègues les hon. juges St-Jacques et Casey; elles satisfont mon sens de justice et d'équité: la conclusion à laquelle ils en arrivent fait disparaître une anomalie qui m'a toujours frappé, en vertu de laquelle l'auteur d'un délit ou d'un quasi-délit s'en tirait à meilleur compte, si la victime décédait par suite d'un accident au lieu d'être simplement blessée.
>
> Je ne vois pas la nécessité d'écrire des notes additionnelles: celles de l'hon. juge Casey repassent de façon complète et coordonnée la jurisprudence et la doctrine sur le point en litige, et je ne ferais que répéter la distinction qu'il soumet à la suite de Mazeaud, entre la réparation d'un préjudice moral, d'un côté, et la réparation d'un préjudice corporel qui, lui, peut être d'ordre matériel ou d'ordre moral,—ces derniers étant transmissibles tandis que les autres ne le sont pas.

It appears to me that the judgment of the Court of Queen's Bench in the case at bar brings back the very anomaly the disappearance of which was approved by Rinfret J. in the passage last quoted.

In *Levesque v. Malinosky,* the facts were similar to those in *Green v. Elmhurst.* The plaintiff's father, aged seventy-six years, was struck by a taxi belonging to the defendant and died four days later. The plaintiff as sole testamentary heir brought an action claiming, *inter alia,* the following items of damages:

(*a*) Pain and suffering endured by the father from the date of the accident to the date of death	$ 1,000
(*b*) Shortening of father's life	5,000
(*c*) Father's loss of annual revenue of $8,500 during 9.1 years of normal life expectancy	77,208
(*d*) Plaintiff's loss of an annual revenue of $5,000 for 9.1 years on professional work which he would have received from clients referred to him by his late father if the latter had lived out its normal life expectancy	45,000

On a partial inscription in law the Superior Court struck out all four of these items. The Court of Queen's Bench allowed the plaintiff's appeal in part and restored items (*a*) and (*b*). The formal judgment of the majority as to these items reads as follows:

Considering that the victim had a claim for the pain and suffering he endured from the date of the accident to the date of his death and that this claim was transmissible to his heir so that item *a* should not have been struck out;

Considering that on the same basis the victim's claim for shortening of life was also transmissible to his heir and that item *b* should not have been struck out;

and that of Bisonnette J. as follows:

Considérant que de l'abrégement de la vie naît un droit susceptible de compensation pécuniaire que la victime peut réclamer à l'auteur du délit, droit qui est un bien patrimonial que recueille l'héritier, continuateur de la personne du *de cujus*;

As to the items (*a*) and (*b*) the members of the Court, Bissonnette, Hyde and Owen JJ. were unanimous.

At pages 363 and 364 Owen J. says:

It must be kept in mind that the basis of claims by the heir or legatee, such as we are now considering, is the damages suffered during his lifetime by the *de cujus* not the damages suffered subsequently by the heir or legatee. Under Quebec law the heir or legatee is not entitled to claim any damages he suffers personally as a result of the death of the *de cujus* unless he falls within the list of persons contained in art. 1056 C.C.

In the circumstances, and after much hesitation, I have come to the conclusion that the best practical solution is to lay down the general rule that the right which the *de cujus* had prior to his death to claim damages resulting from an offence or quasi-offence, including all items which are properly part of such claims, is transmissible *in toto* by succession.

Accordingly, I am of the opinion that the late Victor Lévesque, father of the plaintiff, at the time of his death, as the result of the alleged offence or quasi-offence, had the right to claim from defendants damages for (a) pain and suffering; (b) shortening of life; (c) loss of earnings, which he suffered from the date of the accident to the date of his death, that he had not waived this right, that the right to claim each of these items was transmissible and that as universal legatee plaintiff is entitled to claim these three items from defendants.

It will be observed that the last paragraph quoted is a clear decision on two points, (i) that the deceased at the time of his death had the right to claim damages for shortening of life and (ii) that such right was transmissible. If that decision is correct it is decisive of the question which I am now considering. With the greatest respect I am unable to

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find in the reasons of the Court of Queen's Bench in the case at bar, a sufficient ground for rejecting the decision in *Levesque v. Malinosky.*

The words of art. 1053 of the *Civil Code* are wide enough to embrace all damage caused to another by the fault of the defendant. It appears to me that the infliction of physical injury which cuts short the period during which the injured person had a normal expectation of living a reasonably happy life gives rise to a claim for damage which the injured person can assert. This view is, I think, supported by the authors referred to by counsel for the apellants. I refer particularly to Mazeaud & Tunc, Traité théorique et pratique de la responsibilité civile et délictuelle, 5th ed. 1956, vol. 2, nos. 1912 and 1913; and to Planiol et Ripert, Traité pratique de droit civil francais, 2nd ed. 1952, vol. 6 «Les Obligations», no. 658, n. 4.

On this point the underlying principles of the English common law do not appear to me to differ from those embodied in art. 1053 of the *Civil Code.* In both systems, generally speaking, the wrong-doer is liable to the person whom he has injured for all damages resulting directly from the injury inflicted. The reasoning of the Courts in England in the cases of *Flint v. Lovell*[1], *Rose v. Ford*[2] and *Benham v. Gambling*[3], appears to me to support the judgment of the Court of Queen's Bench in *Levesque v. Malinosky.* I refer to these decisions, as did counsel for the appellants, not as precedents binding upon the courts in a case arising under the *Civil Code* but because of what appears to me to be the clarity and cogency of their reasoning.

The nature of the claim I am now considering which, in my opinion, Beverley Driver was entitled to assert in her lifetime was for damages because the fault of the defendant had deprived her of the reasonable prospect of an uncertain number of years of life which the evidence as to the circumstances of her parents and their children permitted the jury to regard as likely to be, on balance, happy years. To place any exact pecuniary figure on such a deprivation is manifestly impossible, the task of assessment must be left to the good sense of the jury. The damages on this head are not

[1] [1935] 1 K.B. 354, 104 L.J.K.B. 199.
[2] [1937] A.C. 826, 106 L.J.K.B. 576, 3 All E.R. 359.
[3] [1941] A.C. 157, 110 L.J.K.B. 49, 1 All E.R. 7.

awarded for the mental suffering caused by contemplating the prospective loss but for the loss of the years of life themselves. The numerous uncertainties arising in making an assessment can not necessitate the injured person going without a remedy.

There is, I think, a danger of confusing the concept of damages for shortening of life with that of damages for life being rendered less enjoyable. The latter could be suffered only while the injured person is alive but the former are increased rather than diminished by the acceleration of his death.

For the above reasons I have reached the conclusion that *Green v. Elmhurst Dairy* and *Lévesque v. Malinosky* were rightly decided and that in the case at bar Beverley Driver had in her lifetime a right of action for damages for the shortening of her life which was transmissible to her heirs; and I would allow the appeal to the extent necessary to give effect to this view.

Having reached this conclusion it would next be necessary to consider the arguments of counsel for the respondent that, if his other submissions were rejected, (i) the assessment of $8,000 was excessive and (ii) there was a duplication of damages. It might also be desirable to say something further as to the manner in which the tribunal of fact should proceed in assessing damages for the shortening of life. However, as the majority of this Court are of opinion that the appeal fails nothing would be gained by my pursuing these questions further or endeavouring to formulate the exact terms of the order which I think should be made.

FAUTEUX J.:—Les faits et procédures conduisant à cet appel sont exposés aux raisons de notre collègue M. le Juge Taschereau. Bref, une fillette de huit ans décédait le 19 septembre 1955, ayant été heurtée mortellement, le même jour, par un camion appartenant à l'intimée et conduit par l'un de ses employés, dans l'exercice de ses fonctions. Par la suite, les parents de la victime ont poursuivi l'intimée en dommages.

La responsabilité de l'intimée n'est plus en question. Seuls deux points ayant trait aux dommages réclamés font l'objet de cet appel.

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Le père et la mère de l'enfant ont réclamé, en vertu de l'art. 1056, comme dommages leur résultant du décès de leur fillette, un montant de $5,000 en compensation de la perte d'assistance financière, des services domestiques et autres bénéfices d'ordre similaire qu'ils pouvaient raisonnablement anticiper recevoir de l'enfant dans l'avenir. Le montant accordé, de ce chef, par le jury, a été jugé excessif par M. le Juge en chef Galipeault et M. le Juge Choquette, de la Cour d'Appel et, en conséquence, réduit par jugement de cette Cour[1] à la somme totale de $2,487. Le montant ainsi revisé représentant, dans les circonstances, une compensation raisonnable, ne saurait être modifié.

Le père de l'enfant, tant personnellement qu'en sa qualité de tuteur à ses dix autres enfants mineurs, et son épouse, ont aussi, en leur qualité d'héritiers légaux de la jeune victime, réclamé une somme de $8,000 à titre de dommages que l'enfant elle-même aurait subis en raison de la perte de vie, devenant ainsi créancière d'un droit laissé par elle en son patrimoine.

Le savant Juge de la Cour supérieure, se croyant lié par les décisions rendues par la Cour d'Appel dans les causes de *Green v. Elmhurst Dairy*[1] et *Lévesque v. Malinosky*[2], confirma la décision du jury accordant, de ce chef, cette somme de $8,000. La Cour d'Appel considéra, comme, je crois, le Juge de première instance, que nonobstant la variété des expressions utilisées aux procédures pour désigner ce chef de dommages, il s'agissait clairement d'une indemnité réclamée exclusivement pour perte actuelle de la vie; la Cour jugea, cependant, que la perte de vie n'ayant, *per se*, en rien accru le patrimoine ou la succession de la fillette, cette dernière ne pouvait rien transmettre, de ce chef, à ses héritiers. En conséquence, elle rejeta comme mal fondée en droit cette partie du recours des présents appelants. Sur ce second point, la décision de la Cour d'Appel est unanime et est, je crois, comme d'ailleurs les motifs sur lesquels elle s'appuie, bien fondée.

Sans doute et dans l'intervalle de temps, fût-ce même un seul instant de raison, s'écoulant entre le coup mortel et la mort qui s'ensuivit, on peut dire que la victime a été nantie d'un droit à la réparation de tout préjudice subi par elle en

[1] [1953] Que. Q.B. 85. [2] [1956] Que. Q.B. 351.

raison du quasi-délit commis à son endroit. Encore faut-il, cependant, que le préjudice dont la réparation est demandée ait été actuellement souffert, et souffert par elle-même. Le préjudice invoqué au soutien de cette partie de la réclamation ne satisfait pas à ces conditions. Ayant à décider le même point, le tribunal de Toulouse, *Trib. Civ. Toulouse, 17 avril 1902, S. 1905 2.81,* a jugé que si le *de cujus* avait eu le temps d'intenter l'action en dommages-intérêts, celle-ci n'aurait évidemment eu pour objet que les dommages éprouvés par le demandeur antérieurement à son décès et que ses héritiers ne sont pas recevables à exercer une action qui n'a pu naître du vivant de celui qu'ils représentent.

Des vues différentes sont adoptées par Mazeaud, Responsabilité délictuelle et contractuelle, tome 2, 4e éd., au n° 1912, pp. 761 et 762, où il déclare que la victime, du fait de son décès, éprouve un dommage qui n'est pas postérieur à ce décès, et qu'il lui en résulte une créance transmissible à ses héritiers. Le même auteur, traitant au n° 1923, p. 767, du droit d'action résultant de l'outrage à la mémoire d'un mort, fait toutefois le raisonnement qui suit:

> Une fois morte, la personne est juridiquement disparue; elle est incapable d'être l'objet d'un préjudice, parce qu'elle ne peut plus être sujet de droits ou d'obligations. L'outrage à la mémoire d'un mort n'atteint donc pas le mort lui-même; aucune action en responsabilité ne naît à son profit; ses héritiers, pas plus d'ailleurs que ses créanciers, ne peuvent l'exercer en son nom.

En tout respect, je dirais qu'à cette proposition de Mazeaud voulant que la victime éprouve, du fait de son décès, un dommage qui n'est pas postérieur à ce décès, il y a lieu, en raison des motifs sur lesquels elle se fonde, de préférer l'opinion contraire, exprimée, dans les termes suivants, par Josserand: Les Transports, deuxième ed., n° 922, p. 975:

> Les héritiers du voyageur blessé et qui n'est décédé qu'après coup peuvent assurément demander, en son lieu et place, réparation du préjudice que lui avaient causé les *blessures* reçues: dans cette mesure, ils se bornent, en effet, à exercer l'action qui appartenait à leur auteur et dont le principe leur a été transmis, par voie de dévolution héréditaire, avec tous les autres éléments de son patrimoine. Au contraire, ils ne pourraient pas, au même titre, demander des dommages-intérêts à raison du *décès* de la victime; en tant qu'elle viserait ce chef d'indemnité, leur action aurait un principe posthume et ne pourrait donc être considérée comme ayant pris naissance dans le patrimoine de leur auteur: seule, la voie de l'action directe, basée sur un préjudice personnellement éprouvé, leur serait ouverte.

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La disparition juridique de la personne se produit à l'instant précis de son décès et, à ce même instant, s'éteint juridiquement la possibilité pour elle d'acquérir des droits ou des obligations. Lorsque le préjudice, pour lequel l'indemnité est recherchée en l'espèce, s'est réalisé, aucun droit ne pouvait désormais s'ouvrir au profit de la victime qui avait cessé de vivre; la naissance d'un droit d'action pour réclamer de ce chef était dès lors devenue juridiquement impossible.

Comme mon collègue, M. le Juge Taschereau, et les membres de la Cour d'Appel, je suis d'avis que la perte de vie de la fillette, n'ayant en rien accru son patrimoine ou sa succession, elle n'a pu, de ce chef, transmettre aucun droit à ses héritiers.

Je disposerais de l'appel tel que le propose M. le Juge Taschereau.

ABBOTT J.:—I am in agreement with the reasons and conclusions of my brother Taschereau, which I have had the advantage of reading, and have little to add.

In his factum and at the hearing before us, counsel for appellant made extensive reference to English decisions, all of which I have examined. I have reached the conclusion, however, that these decisions can be of no assistance in this case, which must be determined according to the principles enunciated in the *Civil Code* and the jurisprudence applying those principles.

A person injured as a result of the commission of a delict or quasi-delict acquires, of course, as of that moment, against the author of his misfortune, a claim in damages for the loss sustained by him, *inter alia,* by reason of (i) pain and suffering, (ii) loss of enjoyment of life, and (iii) loss of future earnings. If the injured person dies (either as a result of his injuries or for some other cause) before having received compensation for such loss, his claim—arising under art. 1053 C.C.—forms part of his *patrimoine* and is transmitted to his heirs, legal or testamentary. That proposition of law was in effect conceded by counsel for respondent, both in his factum and on the argument before us.

Whether a claim be described as one for deprivation of life, shortened life expectancy, loss of life expectancy, shortening of life, or other like terms, I share the view

expressed by Mr. Justice Casey that such a claim is, in reality, one for estimated loss of future earnings and of enjoyment of life. Since any claim for such loss is one for unliquidated damages, the Court in appreciating and liquidating the amount thereof must limit such damages to those actually sustained by the deceased from the date of injury to the date of death. It is this amount alone which the heirs of the deceased, *qua* heirs, are entitled to claim and receive.

As my brother Taschereau has pointed out, any claim for damages resulting from the premature death of the injured person can arise only under the provisions of art. 1056 C.C. and be exercised only by the persons specified in that article.

I would dismiss the appeal with costs.

Appeal dismissed with costs, CARTWRIGHT J. *dissenting in part.*

Attorney for the plaintiffs, appellants: M. H. Franklin, Montreal.

Attorneys for the defendant, respondent: Hugessen, Macklaier, Chisholm, Smith & Davis, Montreal.

LEVAL & COMPANY INCORPORATED (*Plaintiff*) ..... APPELLANT;

AND

COLONIAL STEAMSHIPS LIMITED (*Defendant*) ..... RESPONDENT.

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*Oct. 24

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Jan. 24

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA, QUEBEC ADMIRALTY DISTRICT

Shipping—Damage to cargo—Damage to ship brought about by peril or accident of the sea—Negligence in management of the ship—Control of ship not taken over by owner—Action taken by owner's assistant marine superintendent that of one of owner's servants—Water Carriage of Goods Act, R.S.C. 1952, c. 291, Art. IV, Para. 2(a) and (c).

The plaintiff company claimed for damage to a cargo of flax seed shipped by it from Port Arthur to Montreal. The cargo was trans-shipped at Port Colborne to the defendant's vessel "David Barclay". The plaintiff claimed that the defendant in breach of its undertaking and in

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

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dereliction of its duty failed to deliver the cargo in the same good order and condition in which it was received, but on the contrary on arrival in Montreal it was found to be wet, short and damaged. The defendant pleaded the *Water Carriage of Goods Act,* 1936, and alleged that the damage resulted from the fact that the "David Barclay" rubbed the starboard bank of the Soulanges Canal very heavily on its voyage from Port Colborne to Montreal.

The trial judge concluded that the damage to the ship resulting from the collision was occasioned or brought about by peril, danger or accident of the sea or navigable waters within the meaning of para. 2(c) of Article IV of the schedule to the *Water Carriage of Goods Act* and that it was negligence which related principally to the navigation or management of the ship under para. 2(a) of Article IV. The action was dismissed and the plaintiff appealed to this Court.

Held: The appeal should be dismissed.

Per Kerwin C.J. and Taschereau, Fauteux and Abbott JJ.: The principle, approved by the House of Lords in *Gosse Millerd Ltd. v. Canadian Government Merchant Marine,* [1929] A.C. 223, of distinguishing between want of care of cargo and want of care of vessel indirectly affecting the cargo was applicable in the present case. *The Glenochil,* [1896] P. 10; *Hourani v. Harrison* (1927), 32 Com. Cas. 305; *Kalamazoo Paper Co. v. Canadian Pacific Railway Co.,* [1950] S.C.R. 356, referred to. The steps taken by the master of the "David Barclay" related primarily to the safety and preservation of the vessel.

The contention that after the collision the ship's owners had intervened and taken over control of the vessel from the master was rejected. The defendant's assistant marine superintendent who, following receipt of a message reporting the accident, instructed the captain of the ship to proceed to Montreal was not the *alter ego* of the defendant. It must be the fault or privity of somebody who is not merely a servant or agent for whom the company is liable upon the footing *respondeat superior,* but somebody for whom the company is liable because his action is the very action of the company itself. *Lennard's Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd.,* [1915] A.C. 705, applied. The decision of the Supreme Court of the United States in *The Isis* (1934), 48 Ll. L. Rep. 35, is quite distinguishable, even if the decision might otherwise be relevant.

Per Locke J.: The failure, following the collision, to take steps to prevent the ingress of further water and also to get rid of the accumulation in the bilge was negligence in the management of the ship on the part of the master and, accordingly, the case fell within the exception in Article IV, para. 2(a) of the schedule of the Act. *The Rodney,* [1900] P. 112, referred to; *Kalamazoo Paper Co. v. C.P.R., supra,* applied.

The Isis, supra, had no application to the facts of this case, because there the question was whether the company had not by its action relieved the master of his responsibility for the voyage and taken charge. *Lennard's Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd., supra,* referred to.

APPEAL from a judgment of A. I. Smith D.J.A.[1], dismissing the plaintiff's action. Appeal dismissed.

C. Russell McKenzie, Q.C., for the plaintiff, appellant.

[1] [1960] Ex. C.R. 172.

L. Lalande, Q.C., for the defendant, respondent.

The judgment of Kerwin C.J. and of Taschereau, Fauteux and Abbott JJ. was delivered by

THE CHIEF JUSTICE:—This is an appeal by the plaintiff, Leval & Company Inc., from a judgment of the District Judge in Admiralty for the District of Quebec[1], dismissing the appellant's action against Colonial Steamships Limited, for damage to a cargo of 96,599.3 bushels of No. One Canada Western Flax Seed. This cargo was part of a total of 422,038.8 bushels shipped by the appellant on November 1, 1955, from Port Arthur, Ontario, to Montreal, Quebec, pursuant to a Canadian Lake Grain Bill of Lading, with "trans-shipment Port Colborne &/or Kingston &/or Prescott, Ont.". The bill of lading provided that all the terms, provisions and conditions of the Canadian *Water Carriage of Goods Act*, 1936, and of the rules comprising the schedule thereto, were, so far as applicable, to govern the contract contained in the bill of lading, which was to have effect, subject to the provisions of the rules as applied by the said Act. In due course the cargo of 96,599.3 bushels was trans-shipped at Port Colborne on the respondent's vessel "DAVID BARCLAY".

The relevant provisions of the *Water Carriage of Goods Act*, 1936, and the schedule thereto of Rules Relating To Bills Of Lading are the same as are contained in the *Water Carriage of Goods Act*, R.S.C. 1952, c. 291, and schedule. Section 2 of that Act enacts:

> 2. Subject to the provisions of this Act, the Rules relating to bills of lading as contained in the Schedule (hereinafter referred to as "the Rules") 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.

Rule 2 of Article III of the schedule provides:

> 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.

Rule 2, paras. (*a*) and (*c*) of Article IV of the schedule read as follows:

> 2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from,

[1] [1960] Ex. C.R. 172.

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(*a*) act, neglect, or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship,

.....

(*c*) perils, danger, and accidents of the sea or other navigable waters.

The statement of claim contained no allegation of negligence on the part of the respondent, but claimed that the respondent, in breach of its undertaking and in dereliction of its duty in the premises implied by law, failed to deliver the 96,599.3 bushels of flax seed in the same good order and condition as received by it at the time of shipment, which said goods arrived in Montreal wet, short and damaged. In its defence the respondent alleged that any alleged damage arose or resulted from the fact that the "DAVID BARCLAY" rubbed the starboard bank of the Soulanges Canal very heavily on its voyage from Port Colborne to Montreal and the respondent invoked all of the terms, conditions and provisions of the Act and Rules and, in particular, Rule 2, paras. (*a*) and (*c*) of Article IV.

Admittedly the "DAVID BARCLAY" was in seaworthy condition when she sailed from Port Colborne. The evidence led on behalf of the respondent shows that when the vessel reached a point about two miles east of Lock No. 5 in the Soulanges Canal she sheered suddenly and struck a stone on the starboard bank of the canal. The particulars of the collision and of what transpired thereafter are correctly set forth in the following extracts from the reasons for judgment at the trial:

> The collision with the canal-bank occurred at about 2:00 A.M. on November 10th and the mate Fournier, who was on the bridge at the time, immediately sent a man to take soundings in No. 2 bilge, where water was found to an approximate depth of 14 feet. The pumps were put in operation and the Master, who was asleep in his cabin, was called.
>
> It was noted that the ship had a slight list to starboard. She proceeded however to Lock No. 4 where it was ascertained that her draft had not altered since the first soundings taken and she therefore continued down to Lock No. 3, where the Master communicated with the Canal Superintendent and requested the services of a diver. The vessel then descended to Lock No. 1, where she was joined by a diver and the Assistant Canal Superintendent who ordered her to proceed to the foot of the canal. These instructions were complied with and the vessel on reaching the Eastern end of the canal was turned about and moored to the bank. Her draft was again checked and it was found not to have altered.
>
> A driver descended and went along the entire length of the vessel in an effort to locate the hole through which the water had entered the bilge. At the end of one hour he surfaced and reported that he had been unable

to find any hole or break in the vessel's skin. Captain Sauvageau however was not satisfied and requested him to go down and make a second examination which he did and after an hour and a half he reported that he had again failed to find any hole or break in the vessel's side. A further check of the vessel's draft satisfied the Master that it remained unchanged. He had two or more telephone conversations with the Defendant's Assistant Marine Superintendent, Captain Walton, in the course of which the collision and the results of the diver's exploration were reported. On the basis of these reports the Master was instructed by Walton to proceed to Montreal.

The vessel left Cascades around noon on the 10th of November and tied up at Elevator No. 2 in the Harbour of Montreal around 10 o'clock that evening. It was found that her draft had not altered and around 8 o'clock the following morning she commenced to discharge cargo. However, in the afternoon, it was notice for the first time that water was finding its way from No. 2 bilge into No. 2 cargo hold and a tarpaulin was hung against the starboard side of the vessel with the hope that the suction created by the pressure of the water through the hole in the ship's side might draw the tarpaulin against the break and thus prevent the further entry of water.

There is evidence to the effect that little water had actually gained access to the cargo prior to the commencement of unloading and this is accounted for by the fact that so long as the cargo maintained pressure against the "limber boards" at the top of No. 2 bilge water could not enter the hold but as soon as this pressure was removed water was permitted entry.

In rebuttal, the appellant called two expert witnesses who testified that, in their opinion, the failure to locate and stop immediately the hole which was finally discovered in the vessel and the fact that the "DAVID BARCLAY" continued on to Montreal, although it was known that the vessel was leaking, amounted to negligence and lack of good judgment.

A consideration of the evidence suggested to me that at no time was there any negligence in the navigation or management of the ship on the part of those in charge of her. The trial judge was inclined to the opinion that there was such negligence subsequent to the collision with the bank of the canal, but he concluded that in any event the damage to the ship resulting from the collision was occasioned or brought about by peril, danger or accident of the sea or navigable waters within the meaning of para. 2(*c*) of Article IV of the Schedule to the Act and that it was negligence which related principally to the navigation or management of the ship under para. 2(*a*) of Article IV. The contention on behalf of the appellant is that the damage to her cargo was not the direct result of the collision

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but was caused by the failure and negligence of those in charge of the vessel following the collision to properly care for and protect the cargo in compliance with Article III (2).

In *Gosse Millerd Limited v. Canadian Government Merchant Marine*[1], it was held by the House of Lords that negligence in the management of the hatches was not negligence in the management of a ship, but they referred to a number of earlier decisions and approved the principle laid down by a Divisional Court in *The Glenochil*[2]. That principle was accepted by the Supreme Court of the United States in cases arising under the American *Harter Act* and was affirmed and applied by the Court of Appeal in *Hourani v. Harrison*[3].

Their Lordships pointed out in the *Gosse Millerd* appeal that there might be cases on the border line "but if the principle is clearly borne in mind of distinguishing between want of care of cargo and want of care of vessel indirectly affecting the cargo, as Sir Francis Jeune puts it, there ought not to be very great difficulty in arriving at a proper conclusion".

The same principle was applied by this Court in *Kalamazoo Paper Co. v. Canadian Pacific Railway Co.*[4], in an action by the insurers of the cargo of a ship damaged by striking a rock and later beached to prevent sinking. The action was to recover damages alleged to have been suffered by the cargo after the beaching, owing to the failure on the part of the captain to direct the use of all available pumping facilities to prevent the entry of further water into the hold and away from the cargo. It was held that this was neglect of the master in "the management of the ship" within the meaning of para. 2(*a*) of Article IV of the rules.

That principle is applicable in the present case. I agree with the trial judge that the steps taken by the master of the "DAVID BARCLAY" related primarily to the safety and preservation of the vessel. As he points out the ship's no. 2 starboard bilge filled rapidly and remained filled, notwithstanding the operation of the vessel's pumps; the ship developed a list which caused the master concern for

[1] [1929] A.C. 223.
[2] [1896] P. 10.
[3] (1927), 32 Com. Cas. 305.
[4] [1950] S.C.R. 356, 2 D.L.R. 369.

the safety of his vessel; and the testimony of one of the experts called on behalf of the appellant shows that in his opinion the ship was in jeopardy following the collision.

After the conclusion of the trial counsel for the appellant referred the trial judge to a decision of the Supreme Court of the United States, *The Isis*[1], and raised the contention for the first time that after the collision the ship's owners had intervened and taken over control of the vessel from the master. As the trial judge points out there was no such allegation even though in its reply the appellant included the following general averment:

> The Plaintiff specifically states that at the appropriate and material times the Defendant failed to satisfy and discharge all its statutory duties and obligations required to be performed and discharged by the Defendant under the terms of the said Water Carriage of Goods Act, and puts the Defendant upon the strict proof of any defence afforded thereunder.

This was not a sufficient pleading within Admiralty Rules 70 and 215 and Exchequer Court Rule 93 and the point might well be disposed of on that ground alone. However, I proceed, as did the trial judge, to consider the general proposition and its applicability. I agree with him that the circumstances in *The Isis* case are quite distinguishable from those with which we are concerned, even if the decision might otherwise be relevant.

Captain James S. Walton, called on behalf of the respondent, was its assistant marine superintendent stationed at Port Colborne where the respondent had its head office. He had received a message from Captain Sauvageau reporting the accident and what had been done and Captain Walton instructed the captain of the ship to proceed to Montreal, in view of the fact that there had been no change in the list or the draft. Captain Walton was not the *alter ego* of the respondent and as the decision of the House of Lords in *Lennard's Carrying Company Limited v. Asiatic Petroleum Company Limited*[2], shows, it must be the fault or privity of somebody who is not merely a servant or agent for whom the company is liable upon the footing *respondeat superior,* but somebody for whom the company is liable because his action is the very action of the company itself.

The appeal should be dismissed with costs.

[1] (1934), 48 Ll. L. Rep. 35. [2] [1915] A.C. 705 at 713.

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LOCKE J.:—It is common ground that the "David Barclay" was seaworthy when she sailed from Port Colborne, and the finding of the learned trial judge that the damage caused to the ship by striking the canal bank while passing through the Soulanges Canal was occasioned or brought about by a peril or accident of the sea, within the meaning of Art. IV, para. 2(*c*) of the *Water Carriage of Goods Act*, R.S.C. 1952, c. 291, is not questioned.

The evidence shows that the diver employed to examine the hull following the accident, but before the ship left the Canal for Montreal, failed to find the hole caused by the collision which allowed water to enter the no. 2 starboard bilge to a depth of 14 ft. Subsequent examination of the hull after the discharge of the cargo, as declared by the protest and the survey report, showed that the bilge strake on the starboard side had been holed. According to the witness Walton, the assistant marine superintendent of the respondent, it was a crescent-shaped hole about 6 inches long and 3 inches wide. The appellant called two experienced ships' masters who gave evidence to the effect that, in view of the obvious fact that the hull had been holed and there being 14 ft. of water in the bilge, temporary repairs, either by blocking the hole externally by wedges or by placing a tarpaulin around the approximate position of the leak, should have been made before the ship sailed from the Canal for Montreal. Nothing, however, turns upon this since the appellant's case is that the damage to the grain was suffered after the ship had docked at the elevator in Montreal harbour and during the process of unloading.

According to the records, there was 14 ft. of water in the bilge at 23.30 o'clock on November 10, 1955. The "David Barclay" was then moored at the elevator where it was intended to discharge the cargo of flax. The unloading commenced on the following morning at 8 o'clock. Since it was evident that the hull had been holed to permit the water to enter the bilge in such quantities, it is, in my opinion, clear that a duty rested upon those in charge of the ship to take steps to prevent the ingress of further water and also to get rid of the accumulation in the bilge. It had already been demonstrated on the previous night, following the collision, that the bilge pumps on the vessel

were insufficient to pump out the bilge but this, presumably, would not have been so if, as suggested by the witness Crocker with whose evidence the witness Finch agreed, a tarpaulin had been stretched across that portion of the hull where it was holed. If the bilge pumps were found to be insufficient, additional pumps could have been employed. However, nothing was done and the evidence shows that after the operation of moving the flax commenced, relieving the pressure upon the limber or bilge boards, the water escaped from the bilge into the no. 2 cargo hold damaging the flax. While there may have been some trifling damage to the grain before the unloading commenced, practically all of it was caused in this manner.

In my opinion, the failure to take these steps was negligence in the management of the ship on the part of the master and, accordingly, the case falls within the exception in Art. IV, para. 2(*a*) of the schedule. To fail to do so was, in my opinion, "improper handling of the ship as a ship", to adopt the language of Gorell Barnes J. in *The Rodney*[1], which affected the safety of the cargo.

The conditions existing as the "David Barclay" lay at the elevator dock were very similar to those which existed after the second stranding of the "Nootka" in *Kalamazoo Paper Co. v. C.P.R.*[2]. The facts dealing with that aspect of the matter are stated at pp. 372 and 373 of the report. The cargo there was pulp and the ship first ran aground on Cross Island and remained there until the following tide and, as she was making a small amount of water when she became free, it was decided to proceed to Quatsino Wharf and run her aground there. The trial judge found that only a comparatively small amount of water had entered the vessel at the time of the second grounding and it was after this that the water entered the vessel which caused the damage to the cargo. The negligence in failing to employ other available pumps, in addition to the bilge pump, to prevent this was held to be negligence in management within the meaning of the article in question. The judgments in that case consider the authorities at length and, in my opinion, the principle upon which it was decided applies to the present matter.

[1] [1900] P. 112 at 117.
[2] [1950] S.C.R. 356, 2 D.L.R. 369.

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In the reasons for judgment delivered by the learned trial judge, reference is made to an argument advanced on the part of the plaintiff based upon the decision of the Supreme Court of the United States in *The Isis*[1], where, after the vessel had grounded in the course of its voyage, the ship owners had resumed control of the ship relieving the master from responsibility during the continuance of the voyage. The contention made on behalf of the appellant was that the act of Walton, the assistant marine superintendent of the defendant, in directing the master to proceed after the collision amounted to a resumption by the owners of the direction of the ship. The point was not argued in this Court, though in the appellant's factum it is said that the learned trial judge had misconstrued the decision in *The Isis*.

Had it been the intention of the appellant to raise this point, it should have been distinctly raised by way of a reply to the statement of defence and this was not done. But, apart from this, the case has no application to the facts of the present matter since nothing in the nature of a resumption of control of the ship by the owners took place. The master communicated with Walton and informed him of the condition of the ship and Walton instructed him to proceed. But, so far as the evidence disclosed, Walton was simply another servant of the respondent company and if he was negligent in giving these instructions the exception applies.

The learned trial judge referred in dealing with this aspect of the matter to the judgment of the House of Lords in *Lennard's Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd.*[2] In that case the question was whether a loss at sea had happened without the actual fault or privity of the owners, a limited company, within the meaning of s. 502 of the *Merchant Shipping Act,* 1894. This case has recently been considered in this Court in *Marwell Equipment Ltd. et al. v. Vancouver Tug Boat Co. Ltd.*[3] In *Lennard's* case Lord Haldane, at p. 713 of the report, said that the fault referred to must be that of somebody who is not merely a servant or agent for whom the company is liable upon the footing *respondeat superior,* but somebody for whom

[1] (1934), 48 Ll. L. Rep. 35. [2] [1915] A.C. 705.
[3] [1961] S.C.R. 43, 26 D.L.R. (2d) 80.

the company is liable because his action is the very action of the company itself. The principle acted upon in *The Isis*, while in some respects similar, was not the same, but rather whether the company had not by its action relieved the master of his responsibility for the voyage and taken charge.

I would dismiss this appeal with costs.

Appeal dismissed with costs.

Attorney for the plaintiff, appellant: *C. Russell McKenzie,* Montreal.

Attorneys for the defendant, respondent: *Beauregard, Brisset, Raycraft & Lalande,* Montreal.

VERA LEONA KRUGER (*Defendant*) .....APPELLANT;

AND

ERNEST WILLIAM BOOKER (*Plaintiff*) RESPONDENT.

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*Nov. 14, 15

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Jan. 24

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Infants—Custody—Separation of parents—Action for divorce—Judgment nisi and order for custody—Undertaking to Court violated by mother—Subsequent agreement by parents as to custody—The Infants Act, R.S.O. 1950, c. 180, ss. 1, 2 and 3—The Matrimonial Causes Act, R.S.O. 1950, c. 226, s. 5.

The plaintiff and the defendant were married in 1943, and three children were born to them: a boy in 1945, and two girls in 1951 and 1953 respectively. In June 1956, the parties entered into a separation agreement, which provided that during their minorities the son would remain with his father and the two girls with their mother. In June 1957, the plaintiff commenced an action against his wife for the dissolution of the marriage on the ground of her adultery with Richard Kruger. A decree nisi was granted on March 5, 1958, and custody of the daughters was awarded to the defendant upon her undertaking to discontinue any associations by her with Kruger.

In September 1958, the plaintiff instructed his solicitor to apply for an order rescinding the custody order in the decree nisi and giving him the custody of all three children, on the ground that the defendant had failed to carry out her undertaking to the Court. This application was later withdrawn. On November 6, 1958, an agreement was arrived at whereby the two girls would remain with the defendant and the son with the plaintiff. The plaintiff agreed to apply for judgment absolute

*PRESENT: Kerwin C.J. and Locke, Cartwright, Abbott and Judson JJ.

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forthwith, consented to the marriage of the defendant and Kruger following judgment absolute and agreed that the defendant's association with Kruger, following the judgment absolute, would not be raised by him as a ground for further application for custody of the children. The decree was made absolute on November 12, 1958. In the following month the defendant married Kruger and the plaintiff re-married.

On a further application by the plaintiff in May 1959 to vary the judgment of March 5, 1958, on the ground, *inter alia*, that the defendant had not adhered to her undertaking given at the trial, an order was made directing the trial of an issue as to who should have custody of the daughters. The trial judge directed that the custody of the two girls should be awarded to the plaintiff with rights of access to the defendant. The Court of Appeal, by a majority, dismissed an appeal from this order, and the defendant then appealed to this Court.

Held (Kerwin C.J. and Locke J. dissenting): The appeal should be allowed.

Per Cartwright, Abbott and Judson JJ.: The trial judge in dealing with the effect of the breach of the defendant's undertaking to discontinue associating with Kruger failed to give due weight to the complete change in circumstances resulting from the marriage of the defendant and Kruger, and to the fact that with full knowledge of that breach the plaintiff had signed the agreement of November 6, 1958. That agreement was a proper one and in the best interest of the daughters. The express power given to parents of an infant who are not living together to enter into a written agreement as to which parent shall have the custody of the infant is not abrogated by the circumstance that an order of the Court dealing with the custody is in effect.

Proof of a very real change of circumstance would be required to warrant the Court disregarding the agreement of November 6, 1958. The evidence fell far short of shewing any such change in circumstances as would enable the Court to say that in the best interests of the daughters their custody should be taken from their mother.

It was not a question whether Kruger or the plaintiff should have custody of the girls, but rather whether they were to be brought up by their mother or their step-mother. The record was replete with evidence that the defendant was a good and affectionate mother well fitted to care for and bring up her daughters.

Per Kerwin C.J., *dissenting*: There was evidence that the mother breached her undertaking given to the Court and that the breach affected the welfare of the children to their detriment. The agreement of November 6, 1958, could not tie the hands of the Court in considering the position of the mother who, wilfully and flagrantly, violated her promise to the Court, and in considering what was best for the children. It was impossible to say that the mother, now married to the man responsible for the wrecking of a home and family, was a proper person to have custody of the two girls.

Per Kerwin C.J. and Locke J., *dissenting*: The agreement entered into by the parties on November 6, 1958, which ignored the interest of the children, was of no legal effect. While s. 2(2) of *The Infants Act* permits parents who are divorced to agree as to the custody of their children, this could not mean that they may do so when an order made in the divorce proceedings, whether before or after the decree absolute, is in effect. To construe it otherwise would be to say that, at the will of the parents, the jurisdiction of the Court could be ousted.

The same principles applied to the exercise of the powers given by s. 5 of *The Matrimonial Causes Act*, under which the order for custody embodied in the decree *nisi* was made, as applied to the exercise of the powers given by s. 1 of *The Infants Act*.

It was unrealistic to suggest that in awarding custody to the mother the girls would not also be for all practical purposes in the custody of Kruger who, having married their mother, would stand in *loco parentis* to them. The Courts below were correct in finding that it was contrary to the interests of these children that they should be permitted to associate with Kruger.

The judges who decided this matter had rightly directed their attention to the paramount consideration in questions of custody (the welfare and happiness of the infant) to which all others yield. *McKee v. McKee*, [1951] A.C. 352, referred to. But if the matter were to be considered as merely a determination of the rights of the parents *inter se* without regard to this paramount consideration, the result would inevitably be the same. Section 1 of *The Infants Act* requires the courts in matters of custody to have regard, *inter alia*, to the conduct of the parents. Unless otherwise ordered by the court the parents are joint guardians and equally entitled to custody by virtue of s. 2. Section 3 requires that in questions relating to custody the rules of equity prevail.

There was no equitable principle which would justify an order to have these children taken from the home and custody of the father whose conduct was blameless throughout, so that they might be brought up by the defendant in the home maintained by the man whose adulterous conduct with her was the cause of the breaking up of the plaintiff's home.

APPEAL from a judgment of the Court of Appeal for Ontario, dismissing an appeal from a judgment of Spence J. Appeal allowed, Kerwin C.J. and Locke J. dissenting.

W. B. Williston, Q.C., and *R. D. Wilson*, for the defendant, appellant.

Malcolm Robb, Q.C., for the plaintiff, respondent.

THE CHIEF JUSTICE (*dissenting*):—We had a very complete argument in this appeal at the conclusion of which I was satisfied that the trial judge and the majority of the Court of Appeal had come to the right conclusion. Further consideration has confirmed that view.

We are asked to make an order directly opposed to concurrent findings of fact. That places a heavy burden upon the appellant,—particularly in a case relating to the custody of children. However, I do not rest my judgment upon the failure of counsel for the appellant to satisfy me that both Courts below were wrong, but proceed affirmatively upon a review of all the evidence and of the reasons for judgment in the Courts below.

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Laidlaw J.A., who dissented in the Court of Appeal, considered that the trial judge did not give proper consideration, weight or effect to a certain agreement between the parents; that the trial judge ought to have found that there was no evidence whatsoever that the breach of an undertaking given by the mother to the Court at the trial before the Chief Justice of the High Court in any way affected the welfare of the children to their detriment; that the trial judge ought to have held that the father entered into an agreement in writing with the mother that the latter's association with Kruger would not be raised by him as a ground for further application by him for custody of the children and that in the particular circumstances he was precluded from so doing; that the trial judge ought to have held that there is no evidence whatsoever of any circumstances subsequent to the order made by the Chief Justice whereby the custody of the two girls was awarded to the mother which in any way was detrimental to the welfare of the children or that would justify a reversal of the order made by the Chief Justice or that would support an order removing the children from the custody of their mother.

With respect I disagree with the learned Justice of Appeal. There was evidence that the mother breached her undertaking given to the Chief Justice of the High Court and that breach did and does affect the welfare of the children to their detriment. Any agreement entered into by the father was to avoid publicity, if possible. In any event such an agreement cannot tie the hands of the Court in considering the position of the mother who, so wilfully and flagrantly, violated her promise to the Court, and in considering what is best for the children. My brother Locke deals with all the circumstances in the case and I entirely agree with his reasons which I have had the opportunity of reading. I find it impossible to say that the mother, who is now married to the man responsible for the wrecking of a home and family, is a proper person to have custody of the two girls.

The appeal should be dismissed with costs.

LOCKE J. (*dissenting*):—This is an appeal from a judgment of the Court of Appeal for Ontario dismissing the appeal of the present appellant from an order made by

Spence J. on October 22, 1959, which awarded the custody of the two younger infant children of the parties to the respondent. Laidlaw J.A. dissented and would have allowed the appeal.

The parties were married at the city of Toronto on July 16, 1943, and three children were born to them: a boy on October 21, 1945, a girl on October 27, 1951 and a girl on November 3, 1953.

On July 5, 1957, the respondent commenced an action against his wife for the dissolution of the marriage on the ground of her adultery with one Richard Kruger. The acts of adultery alleged were said to have been committed during the years 1951, 1952, 1954, 1955 and 1956, variously at the city of Toronto, at Cove Island in the District of Muskoka, and at the city of Miami, Florida. The said Kruger to whom the appellant has been married since December 1958 was named as the co-respondent. Both parties entered defences to the action.

A decree *nisi* was granted by McRuer C.J. on March 5, 1958, directing that the marriage be dissolved by reason of the adultery of the defendant with Kruger, unless sufficient cause be shown to the court within three months as to why the judgment should not be made absolute. A term of the formal judgment which is of importance in considering the question of custody of the two female children read:

> AND THIS COURT DOTH FURTHER ORDER AND ADJUDGE that the defendant, Vera Leona Booker, upon her undertaking to this Court to discontinue any associations by her with the defendant, Richard Kruger, be and she is awarded the sole custody and control of the infants Susan Clair Booker, born on the 27th day of October, 1951 and Jennifer Lynn Booker, born on the 3rd day of November, 1953, subject however to the right of the Plaintiff, Ernest William Booker, to have access to the said infants on Saturday of each week from 9.00 A.M. to 6.00 P.M. and for three days during Easter vacation and for three weeks during summer school-vacation in each and every year.

On November 12th this decree was made absolute by a judgment delivered by Aylen J. In the following month the appellant married Kruger and the respondent married Ulrike Ehlers.

By a notice of motion dated May 8, 1959, the respondent gave notice of an application to be made before the Chief Justice of the High Court for an order varying the judgment of March 5, 1958, so as to provide that Booker should

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have custody of all three of the children, or alternatively for an order directing the trial of an issue as to the custody of the two younger children on the grounds that the present appellant had not adhered to the undertakings given by her at the trial, upon which she was awarded custody of the two young girls, that she had shown herself unfit to have the custody of these children and that it was not in their interest that she should have their custody and that, for all practical purposes, access to the children could not be obtained by Booker.

By order made on May 14, 1959, the Chief Justice directed that there should be a trial of an issue as to who should have the custody of the two girls, that pleadings be delivered upon this issue and that it be set down for trial before the Chief Justice during the week commencing June 15, 1959.

By a further order dated June 15, 1959, it was directed that the issue should be tried on September 8, 1959, and that the present respondent should have interim custody of the two young girls until that date, subject to any order that the judgment at the trial might make. The order contained provision for access by the mother. These children have remained since then in the custody of their father.

There was a lengthy hearing before Spence J. at which the appellant and the respondent gave evidence at length. Kruger was called by counsel for the present appellant, it was said for the purpose of submitting him to cross-examination and gave no evidence in chief. In a most carefully considered and exhaustive judgment Spence J. directed that the custody of the two girls should be awarded to the present respondent.

Section 1(1) of *The Infants Act,* R.S.O. 1950, c. 180, provides that the Supreme Court may on the application of the father or mother of an infant make such order as the court sees fit regarding its custody and the right of access thereto of either parent:

having regard to the welfare of the infant and to the conduct of the parents and to the wishes as well of the mother and of the father.

This section has been considered several times in this Court and was relevant to the issue to be determined in *McKee v. McKee*[1], where Lord Simonds, delivering the judgment of the Judicial Committee, said in part (p. 365):

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

The evidence taken at the proceedings for divorce before the Chief Justice of the High Court, and also the exhibits, were made part of the record in the trial of the issue by Spence J. by consent. In view of the fact that it is the moral as well as the physical welfare of the infants which must be considered, a thorough examination was made of the relations between the then Mrs. Booker and Kruger during the years preceding the divorce. This is not the ordinary case where a wife has been found guilty of adultery with another on a single occasion and where, after divorce, she has married some other person than the adulterer. Rather is this a case of a wife, confessedly an adulteress, marrying the adulterer who has been responsible for the breaking-up of the home.

I have read with care the lengthy record of both of these hearings and, having done so, I am in complete agreement with the conclusion of Spence J. as well as with the opinion expressed at the trial of the divorce proceedings by the Chief Justice of the High Court as to the undesirability of permitting these young girls to associate with the man who was the co-respondent.

While the fact that there had been adultery committed by the appellant and Kruger had been established to the satisfaction of the Chief Justice, the investigation at the hearing of the issue before Spence J. properly extended to matters that had occurred in the years preceding the adultery which was admittedly committed in Florida in March of 1956.

Kruger is the son of a German father and a Russian mother and was born in Russia and brought to Canada when he was four months old. When he was about 16 years of age, he and Booker became friends and the latter, who is some 8 years older, interested himself in the boy's

[1] [1951] A.C. 352, 1 All E.R 942.

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welfare, lending him substantial sums of money on various occasions for the purpose of assisting him to become established in life. Over the period of years between 1951 and the spring of 1956, the evidence shows that Kruger was constantly associating himself with the respondent and his wife in their home and, until the events to be hereafter referred to, Booker regarded Kruger as a trustworthy friend of both of them and treated him as such.

During the year 1947 Booker left for Venezuela as the representative of a Canadian life insurance company and his wife lived there with him but came to Canada when each child was born. Booker returned to Toronto to live in the year 1953. As pointed out by the Chief Justice in his oral reasons for judgment, Booker devoted himself to his business and his wife appears to have felt neglected, a situation which appears to have been favourable for Kruger's plans. On Booker's return from Venezuela he and his wife and children lived for a while with Kruger in the latter's home at 28 Ashley Park. In December 1954 Booker bought a house, 5 Darlingwood Crescent, and moved his family there. Relations between husband and wife became strained in the year 1955, Booker complaining of his wife being frequently out late at night and it would appear that, at least towards the end of that year, he became suspicious of his wife's association with Kruger. Booker says that he and his wife ceased to live as man and wife in October 1955.

In January 1956 the appellant, taking the two young girls with her, moved from their home to that of her mother claiming that her nerves were very bad. They remained away until the month of March and the husband, in June 1956, received an account from the Doctors' Hospital in Toronto for services rendered to his wife on March 14th and 15th. According to the hospital account, the diagnosis taken from the records was a threatened abortion. The wife had not told her husband that she was pregnant and he knew nothing of the matter until he received the account and, when he demanded an explanation, she refused to give it. It was while Mrs. Booker was staying with her mother that the first dispute arose between Booker and Kruger as to the latter's association with Mrs. Booker. During the month of March 1956 Booker had

telephoned one evening to the house where his wife was staying with her mother, wishing to speak to her, and was told by the mother that Mrs. Booker was going to bed early. Being suspicious, he went to the house and found that this was untrue and that his wife was out. He waited there and she returned at 2 o'clock in the morning with Kruger. A violent scene ensued, Booker assaulting Kruger. He then accused his wife of adultery with Kruger, which she denied.

Booker then decided, in an endeavour to prevent the break-up of his marriage, that it would be advisable if he and his wife and the children had a holiday together in Florida and took them there. In April 1956 Kruger also went to Florida and after a few days Booker returned to his business in Toronto. It was during the time that the wife was in Florida with the children that she admittedly committed adultery on various occasions with Kruger. The latter had been in Florida on one occasion but, unknown to Booker, made a second trip there.

In June of 1956 Booker received information to the effect that in the year 1952, when he was living in Venezuela and had come with his wife to Toronto on business, leaving her there, after he had returned she had gone on a motor trip for three weeks with Kruger, leaving the children with her mother. Believing this information which, apparently, confirmed his suspicions of his wife and Kruger, he rented a flat and moved his wife's belongings there, informing her by telephone to Florida that they were to live separate from each other thereafter. On the return of the wife to Toronto, a separation agreement was drawn which bears date simply June 1956 which provided, *inter alia,* that the boy John should remain with his father and the two girls with their mother during their respective minorities, the husband agreeing to pay a monthly amount for their maintenance. The agreement further provided that both parties should have reasonable access to the children.

In July 1956, at a time when Booker was at Cove Island with his son, he found several letters written to his wife by Kruger when she was in Florida which made it perfectly clear that while in Florida and prior to that time the two had been carrying on an adulterous relationship. Mrs. Booker was on the island when these letters, which are

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referred to in some detail in the judgment delivered by the Chief Justice in the divorce action, were found, and when Booker left the island taking them with him he was pursued by her in the company of Kruger, his wife using vile and abusive language to her husband in the presence of the little boy and demanding the return of the letters. Booker, however, retained possession of them and delivered them to his solicitor for safe-keeping. The wife thereafter went to the solicitor's office while her husband was there and again used abusive language of the same nature without result. Thereafter admittedly she, accompanied by Kruger, broke into her husband's house causing material damage in doing so, in an endeavour to recover the letters. The nature of the letters justified her perturbation.

For about a month after her return from Florida the appellant, together with the two younger children, lived in the flat which had been rented for her by her husband. After the separation agreement was made, the appellant and these children went to Kruger's place on Cove Island and spent the summer there, and it was during this time that the letters had been found.

The respondent issued a writ for the dissolution of the marriage on August 23, 1956, but this action was later discontinued and the action of July 5, 1957, commenced.

The respondent had been advised after the making of the separation agreement of June 1956 that he could not object to the action of his wife in living in Kruger's properties and was a consenting party to her going with the younger children to Cove Island. I disagree with the opinion upon which the respondent relied. The respondent took the precaution, however, of employing a man and wife to go to Cove Island and to live in the cottage to be occupied by the appellant but, shortly after their arrival there, they were moved out and during the summer Kruger occupied a room in the cottage with the appellant and the children on the frequent occasions that he was there.

The finding of the letters altered the situation. When the appellant and the children left Cove Island they, contrary to the wishes of the respondent, moved into Kruger's house at 28 Ashley Park and lived there until the trial of the divorce action in March of 1958. The respondent was paying to his wife under the terms of the separation agreement

an ample monthly allowance for the maintenance of herself and the two younger children, and the appellant claimed that he was paying Kruger a rent of $100 a month for the house. This was shown to be mere pretence, Kruger having given her the money with which to pay it. Kruger took roofs elsewhere when the appellant and the children moved into his house and, from the Fall of 1956 until the trial of the divorce action, the respondent, either alone or in the company of a witness, observed that Kruger constantly came to 28 Ashley Park in the evening, frequently leaving there in the early hours of the morning and that on many occasions the lights of the house were turned out. On January 9, 1958, for example, he arrived at 6 o'clock in the evening and stayed until after 3 o'clock the following morning. This was just two months before the trial of the divorce action.

At the time of the trial before the Chief Justice, Booker expressed his willingness to have the interim custody of the two younger children awarded to his wife, he having no facilities then to properly care for them, and it was on that footing that the Chief Justice made the order referred to. He, however, expressed his opinion as to the necessity of ensuring that the children were not permitted to associate with Kruger. In the reasons for judgment delivered orally at the conclusion of the trial, dealing with this aspect of the matter the learned Chief Justice said in part:

> Unfortunately early in their married life Mr. Booker made the acquaintance of Mr. Kruger, the Co-defendant, and he made a friend of him, taking him to his house and treating him as a friend for many years. Mr. Kruger appeared to respond to this friendship but all the while was developing an affection for Mrs. Booker, and that situation developed to the extent that it is quite clear to me that he, Kruger, was seeking to get rid of Mr. Booker so that he could marry Mrs. Booker. That becomes evident in some letters that I shall refer to in due course.

And after quoting some passages from the letters indicating an adulterous relationship it was said:

> In addition, Kruger had been acting as a companion, a very close companion, of Mrs. Booker for years. She was a guest at his cottage at Cove Island, where she would stay for periods of time. Mr. Booker foolishly concurred in this. He went there himself. The whole thing is a tangled mess and in some circumstances perhaps wouldn't raise too much suspicion but in the circumstances we have here it seems to me to be perfectly clear that there was a very definite affinity between Mrs. Booker and Kruger and that Kruger was ingeniously conniving to appear to be a friend of Mr. Booker while at the same time having the sort of relationship with Mrs. Booker that these letters indicate.

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These letters are not the scribblings of an adolescent child; they are the writings of a mature man. The words were written contemporaneously with the events as they were developing and as they ultimately did develop, to the extent of the frequent visits to the house during the late hours. I cannot conceive that a man who desired the body of a woman as Kruger clearly showed he desired the body of Mrs. Booker could remain in the house with her night after night during these later hours for any other purpose than having sexual intercourse with her.

I think on the whole course of conduct the inference to be drawn is irresistible and I draw the inference that adultery has been proved. I hope that Kruger will realize that he has been a party to destroying a home with all the incidents that will flow from it and the handicaps these little children will have as a result of his selfish sexual desires.

Dealing with the custody of the two young girls, the learned Chief Justice said:

Now as to the custody of the children, Mrs. Booker has given an undertaking to the Court which is recorded in the evidence, and I will not make any attempt to repeat it because it was specific, and I incorporate it in my judgment as it was given; I will ask the Reporter to do so:

HIS LORDSHIP: If the custody of these two little girls is awarded to you, are you willing to undertake that any associations that have been carried on between you and your co-defendant Kruger will be discontinued:

MRS. BOOKER: Yes, sir, I do.

HIS LORDSHIP: The little girls won't come under his influence at all?

MRS. BOOKER: No, sir.

HIS LORDSHIP: You will undertake that?

MRS. BOOKER: Yes, sir, I do.

I trust and hope that Mrs. Booker has learned by now that there are more valuable things in life than the affections of a deceitful man, a man that would steal the wife of another man. His affections are of no value to any woman, and I am anxious that these children will not come under his influence.

The reasons for judgment pointed out to both of the parties that the order for custody was not final and that if there was a change of circumstances the order might be changed. The order made permitted the parents access to the children not in their custody at defined times.

On March 10, 1958, following the granting of the decree nisi, the respondent arranged for a lease of a suitable house property for the appellant and the two girls but she refused to sign the lease or to live there.

Despite the undertaking given to the Chief Justice by her and the terms of the custody order, the appellant promptly resumed her association with Kruger and, shortly

afterwards with $5,000 lent to her by him, made the first payment on the purchase of a house property in Oakville. At the trial before Spence J. the appellant admitted that she was aware that this conduct jeopardized her right to custody under the terms of the order.

On June 13, 1958, Kruger filed a notice of intervention in the divorce action. This document which did not bear the name of any solicitor said that Kruger could show cause why the judgment in the action should not be made absolute, the causes of the intervention being, *inter alia,* that Booker had committed perjury at the trial and that collusion existed between the plaintiff and the defendants. An affidavit made by Kruger was filed in support of the intervention, the document bearing no solicitor's name, stating certain facts intended to indicate that the obtaining of the decree nisi had been collusive and containing also the grave charge that, to Kruger's knowledge, Booker had been having illicit relations with Ulrika Ehlers, a woman whom he intended to marry. No attempt was ever made to support this statement. The appellant knew that this notice of intervention was to be filed and said that she informed Booker of the fact.

According to the appellant, however, Kruger had told her that he had been advised by counsel that after filing the notice of intervention it was unobjectionable for them to associate with each other. Kruger who gave evidence before Spence J. did not support this statement and Spence J. did not believe it. It appears to me to be inconceivable that any such advice had been given.

According to the respondent, he became aware of the filing of the notice of intervention in July 1958 some weeks after it had been filed. The judgment of the Chief Justice had granted temporary custody of the two girls to the wife on the conditions above mentioned and, save in this respect, the separation agreement of June 1956 remained unchanged. The respondent was aware that his wife had resumed her association with Kruger, in disregard of the order of the Court, and instructed his solicitor to apply to the Chief Justice for an order rescinding the custody order in the decree nisi and giving him the custody of all three of the children. The motion was made returnable on September 5, 1958, and was supported by two affidavits of the respondent

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showing that the appellant had promptly resumed her association with Kruger and in premises where the two young girls were in her custody under the judgment. This was followed by negotiations between the solicitors for the parties and a solicitor on Kruger's behalf. It is clear from the evidence that the respondent was most unwilling to agree to his wife having custody of the two girls, knowing that she intended to marry Kruger. According to his evidence, however, being advised that his chances of obtaining an order for custody of these two children were very slight and acting on that advice, he authorized his solicitor to agree that the appellant should have the custody of the two girls. I do not agree with the opinion upon which the respondent relied. A memorandum to this effect was signed by the respondent and his solicitor and a formal agreement was drawn, though it was not signed. This was done without reference to the Chief Justice, the solicitors, apparently overlooking the fact that once the court had assumed jurisdiction over the children and had made an order for temporary custody, the provision could not be changed without its approval. The solicitor acting for the appellant, however, in advance of the application for the decree nisi informed the Chief Justice of what had been done.

By the terms of the separation agreement made in June 1956 it was agreed that the respondent should have the custody of the boy, the eldest of the children, and the appellant that of the two girls during their respective minorities. The agreement provided in general terms that both parties should have reasonable access at all times to each of the children and, with the approval of one another, to take any of the children for week-ends or holidays on giving reasonable notice to the other. This was before the discovery of the Kruger letters and the commencement of the first divorce action. Difficulties arose thereafter in the arrangements for access. On one occasion, the date of which is not made clear in the evidence, the respondent had arranged with his wife to take the two girls for the week-end but, when he arrived at Kruger's place where the appellant was then living, he found that his wife and Kruger had taken them away for the week-end. On their return, apparently a violent scene ensued between the respondent and Kruger, the respondent

threatening him with violence, as a result of which Kruger laid a charge in the police court and the respondent was bound over to keep the peace.

In the summer of 1957 when the appellant and the two girls were at Cove Island, the respondent was having great difficulty in obtaining access and accordingly applied in chambers to Treleaven J. on July 24, 1957, the latter directing that the respondent should have access for defined periods during the months of July and August 1957, and thereafter on Saturday and Sunday of each week between the hours of 9.00 a.m. and 6.00 p.m. The appellant had taken the position that the respondent had no right to see the young girls at all and, when the order was made, the respondent sent a telegram informing the appellant of the making of the order and that he proposed to call for the children, and it was shown that this telegram was received by the appellant. However, when the respondent arrived at Cove Island to take the children away, the appellant informed the respondent that no judge could tell her whether she could have her children or not.

In September 1958, after the decree *nisi* when the two girls were living with their mother at the house at Oakville and, at or about the time when the above mentioned application was launched, the respondent went there to take the two younger children with him when the appellant, in the presence of the little boy, attacked her husband using foul language and damaging the respondent's car to the extent of about $300. The two younger children were in the house at the time of this occurrence.

The decree absolute for divorce contained no provision for custody.

After the remarriage of both parties there was further trouble in carrying out the arrangements for custody. The respondent, who had evidently changed his mind as to the wisdom of having authorized his solicitor to make the agreement above mentioned, advised the appelant's solicitors that he did not propose to be bound by it. At the end of the year 1958 the appellant, having married Kruger, went with him for a holiday to the West Indies, leaving the two young children in the custody of some friend at Oakville, without informing the respondent of her intention to do so or of the whereabouts of the children. For

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several days he was unable to exercise his right to custody since he did not know where the children were. He was, however, able to locate them and take them to his home. In April 1959 the respondent called at Kruger's place at Oakville for the purpose of taking the two young girls into his temporary custody, having wired to the appellant saying he wished to do so and asking her to wire if she disagreed with the proposal. The respondent drove his car, in which his son was a passenger, and stopped at the front door of the place and, shortly afterwards, Kruger drove his car into the driveway blocking the exit and informing the respondent that he was going to leave his car there as long as was necessary and that he would call the police. The young girls were in the house at the time watching this. As they were not given into the respondent's custody and as there was no other means of exit from Kruger's property, the respondent drove his car across the lawn to enable him to leave the property. Kruger then prosecuted him in the police court for doing wilful damage to his property. The charge was dismissed.

The evidence of the respondent is that as the Easter holidays were approaching the situation in regard to the custody of the children was wholly intolerable and he thought that it was in their best interests that he should stay away altogether rather than to expose them to these recurring scenes. Having done this, he consulted another solicitor and the motion above mentioned was launched on May 8, 1959.

The trial of the issue before Spence J. lasted seven days during which there was a most extensive examination of the behaviour of the appellant and respondent during the years of their married life.

The evidence was most carefully and exhaustively examined by Mr. Justice Spence in his considered reasons for judgment. After having referred to what had been said by Roach J.A. in *Bell v. Bell*[1], as to the desirability of small girls being entrusted to the custody of their mother, the learned trial judge said:

> It is, therefore, the unpleasant duty of the Court to find whether in its opinion the present Mrs. Kruger is or is not an improper party to have the custody of these two little girls. That investigation must be carried on

[1] [1955] O.W.N. 341 at 344.

in light of the fact that I have already found that Mr. Booker is an excellent character and that his present wife, although only 24 years of age, is a calm, serene, capable young woman.

Spence J. did not believe the evidence of the appellant who had said that the only occasions on which she had committed adultery with Kruger was during her stay in Florida in the early summer of 1956. It was made quite clear by the letters written by Kruger to the appellant in 1956 that the affair between them was one of long standing. Referring to the occasion in 1952 when, in the absence of her husband, the appellant had driven with Kruger to Boston and New York, the learned judge said that he did not believe her explanation and did not believe her when she said that the trip was taken with her husband's knowledge. Cross-examined as to this, she said that she and Kruger had driven to Boston and thence on to New York and returned by air. Later she said, in answer to a question asked by the learned trial judge, that she had been away four or five days. She said she could not remember what hotel she had stayed at in New York. The information obtained by her husband was that it had been of some three weeks' duration, during which time she had left the children with her mother. The learned trial judge said as to this:

The defendant in the issue and her co-defendant Kruger knew of her husband's information on this trip to the east coast as early as June of 1956 and in the intervening 3½ years they have done nothing to refute the evidence which tends to show that it was far from an innocent trip made at the request of the husband. I agree with the view expressed by counsel for the plaintiff upon the argument that even if Mrs. Booker's version of the Boston or New York trip was one which should be accepted, then not one woman in a thousand would put herself in the position of making such a trip. I am convinced, however, that her version is not to be accepted and that rather the trip to the east coast was substantially that described to the plaintiff by the witness Barrett, that it was not innocent and that it constituted a most disturbing disregard for her marital vows or for the continued happiness of the home in which she and her husband and her then two children resided. It seems more than probable that the defendant in the issue and her co-defendant Kruger continued their surreptitious association, at any rate not infrequently, after 1952.

Dealing with a matter occurring in 1955, he said:

In 1955 the plaintiff left Cove Island expecting his wife, the defendant in the issue, and her co-defendant Kruger, to follow him down in an automobile within a very short time. Instead, they only arrived the next day with protestations of innocence.

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The learned judge further said:

> Upon the plaintiff and the defendant in the issue returning from Florida with their children she was installed in an apartment which her husband had rented for her and it was abundantly plain to her at that time that the marriage was a broken one and it must have been plain to her that the custody of her two daughters was in considerable jeopardy . . . From that time until the trial of the action in March of 1958 the defendant in the issue and her co-defendant Kruger associated openly in a district in which she and her husband, the plaintiff, had always lived and in front of their many mutual friends so that there could be no mistake in the view of all persons as to the relationship between the two defendants. The view taken by the Chief Justice of the High Court of such an association was made abundantly clear to the defendant in the issue and the defendant in the issue has acknowledged that when she left the courtroom she was in no doubt as to the danger which her continued association with her co-defendant Kruger would be to her retention of custody of the two infant daughters. Despite this as I have found that association continued unabated and in fact she accepted the bounty of the defendant in the issue firstly by living in his home at 28 Ashley Park for some months at a rent which if paid was ridiculously small, and it would appear that the alleged payment of rent was another mere sham, and thereafter moving to a house which she purchased with his money, some $5,000 in fact. All of this conduct I cannot help but feel, goes far to show that the defendant in the issue is such a person as would put the gratification of her own pleasures ahead of her interest in her two infant daughters and show that she would be ready to sacrifice that interest at any time it collided with her own personal pleasure.

After referring to the various violent displays of temper on the part of both parties and their effect on the children, the learned judge said:

> Some instances which follow the trial for dissolution are particularly disturbing. As I have said, the defendant in the issue then realized her conduct was under constant scrutiny by her husband or by his agents. I am of the opinion that this realization caused her and her co-defendant Kruger to take the most picayune methods of annoying the plaintiff. Among such instances were the departure of the defendant in the issue and her co-defendant to the Barbados after their marriage without any notification to the plaintiff of where they had left the two infant girls so that he might have them for the access to which he was entitled and the writing of such information to him from the Barbados only in such a fashion as would cause it to arrive some days after he was supposed to have access; and again, the ridiculous incident upon the plaintiff driving into the driveway at 1037 Lakeshore to pick up the children and having with him his son John at the time the defendant Kruger drove his automobile in back of the plaintiff blocking his exit and causing the plaintiff to drive across the lawn in order to leave and then charging the plaintiff with wilful damage to the lawn and shrubs. The latter incident occurred only in April of this year. Such instances may in themselves appear to be and be unimportant. They do exhibit a smallness of mind and a bitterness. The putting of their own selfish interests ahead of the interests of the children would tend to indicate that the defendant in the issue is not a proper person to have the custody of these young children.

There is, moreover, the most important circumstance that to award the defendant in the issue the custody of the two infant daughters, Susan and Jennifer, would be in effect awarding such custody to the defendant Kruger. Counsel for the plaintiff on the argument put it that Kruger was the moving spirit in this alliance and that he was the person who was in control and directed the conduct of the defendant in the issue throughout. Everything in the trial would seem to indicate such a conclusion to be the sound one. The defendant Kruger was a close friend of the plaintiff for ten years prior to the action for dissolution of marriage and what is more was an object of the plaintiff's bounty on more than one occasion. The plaintiff advanced the defendant Kruger large sums of money, which were subsequently repaid, and yet the Chief Justice of the High Court in the dissolution action and I in this action have found that the conduct of the defendant Kruger throughout was, in reference to the plaintiff, about as disgraceful as can be imagined. It would be with some very considerable misgiving that I would make an order which would have the practical effect of giving him the custody of the plaintiff's two infant daughters. Therefore, and for these reasons and despite the fact that it is with the utmost reluctance that I award the custody of the infant daughters to anyone but their mother. I must find that as between the plaintiff and the defendant, the plaintiff is the more proper person to have the custody of Susan and Jennifer Booker.

Aylesworth and LeBel JJ.A. agreed with the learned trial judge and the appeal was dismissed. Both of these learned judges held that the trial judge had proceeded upon the proper principles and, upon evidence, agreed with his conclusion that it was in the interests of the two little children that they should be given into the custody of their father.

There are thus concurrent findings upon this question of fact.

Laidlaw J.A. dissented. That learned judge said in part that McRuer C.J. had the same full opportunity as had Spence J. of seeing the parents and the children and that it was certain that he had given full effect to this before reaching his decision to award the custody of the children. This observation appears to me to overlook the evidence that it was with Booker's approval and consent that the Chief Justice awarded temporary custody to the appellant and that the reason for the consent was that, since the parties were separated, the father had no means at that time of properly caring for these little girls. It is also to be remembered that the learned Chief Justice expressed himself forcibly as to the undesirability of the children being permitted to have any association with Kruger and that this was a term of the order.

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Laidlaw J.A. was further of the opinion that Spence J. had erred in treating the hearing before him as a trial *de novo*. This he considered to have been error and held that it was not open to Spence J., in view of the order of the Chief Justice, to consider all of the facts and circumstances. With this conclusion I disagree.

The whole issue as to what was in the interest of the two little children was referred to Spence J. and every fact and circumstance necessary for the determination of that issue was relevant and admissible before him. That this was the view of the learned and experienced counsel who appeared for the present appellant in those proceedings is shown by the fact that he raised no objection to this being done. Laidlaw J.A. was further of the opinion that, by reason of the agreement made in advance of the making of the decree absolute, the respondent was precluded from making an application based on the ground of the wrongful association between the appellant and Kruger after the decree *nisi*. But this, with respect, is to misconceive the issue which Spence J. was required to try. This is not an ordinary law suit for the determination of legal rights, but an issue to decide what order for custody is in the best interests of these two little children. That is the primary consideration to which, as was said by the Judicial Committee in *McKee's* case[1], all other considerations are subservient. The rights of the mother and the father given to them by s. 2 of *The Infants Act* were merely matters to be considered in determining the real issue.

The learned judge further attached weight to the fact that the intervention filed by Kruger was withdrawn or abandoned on the faith of the agreement. The evidence as to the filing of this notice of intervention in June of 1958 shows that it was done by Kruger with the approval and consent of the then Mrs. Booker. The notice was supported by an affidavit made by Kruger to the effect that during the summer of 1956 an agreement had been made by him with Booker that he—Kruger—"would allow evidence of adultery to be established" but that Booker had brought the action for divorce in July, and accordingly he (Kruger) had "refused to commit the act of adultery

[1] [1951] A.C. 352.

necessary to support the action." The fact was that the action referred to was commenced on August 23, 1956, a month after the letters had been discovered by Booker. In view of the evidence afforded by the letters, the statement was patently untrue. Booker denied that there was any such agreement and Spence J. believed him. The filing of the notice of intervention containing the false statement that Kruger had evidence of misconduct between Booker and Miss Ehlers was apparently done by Kruger for the purpose of bringing pressure to bear upon Booker to agree to his wife having custody of the two younger children. It was apparently thought that he would do this rather than face the publicity attendant on a contest at the time of the granting of the decree absolute. No solicitor cared to put his name on the notice or the affidavit. Why any weight should be assigned to the withdrawal of this baseless intervention I cannot understand.

The learned judge of appeal further dealing with the facts said that the trial judge had given undue weight to the breach of the undertaking given by the appellant to the Chief Justice, having regard to the fact that, in his opinion, the breach became of little or no importance, in the absence of evidence that it affected the interest or welfare of the children while in her possession and under her care. This appears to overlook the fact that the renewed association with Kruger immediately after the decree nisi was a breach of an order of the court, and thus a contempt for which the appellant might have been committed, and that throughout the summer of 1958 the appellant constantly associated with Kruger, that he stayed late at the house in Toronto in which she and the two little girls were living, this being in the neighbourhood where she and her husband were well known and where the fact was known that she and Kruger had been found guilty of adultery, and in his summer place on Cove Island in his company together with the children. That such conduct by a parent having custody of children in such circumstances is not detrimental to their welfare is not, in my opinion, a tenable proposition.

It must be rarely, if it is ever the case, that decisions by other courts in questions of this nature, decided upon different facts, are of any assistance as precedents. Laidlaw

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J.A., after stating that the learned trial judge had clearly acted upon some wrong principle and had disregarded material evidence, referred to the cases of *Philpott v. Philpott*[1], and *Bell v. Bell*[2], as authority for the proposition that upon these grounds the Court of Appeal may reverse the judgment of a trial judge. I would not have thought that any authority was necessary for this. As the trial judge acted upon the principle enunciated by the Privy Council in *McKee's* case[3] and by this Court on many occasions, I think it cannot be said that he acted on some wrong principle. As to the statement that he disregarded material evidence, the majority of the members of the Court of Appeal were of the contrary opinion and, having read all of the evidence at both hearings with great care, I respectfully agree with them.

In *Philpott v. Philpott*[4] as the head note shows, the evidence did not establish moral misconduct on the part of the wife and it was held that the custody of the twin infant children, one a boy and the other a girl some three years of age, should be given to the mother. Pickup C.J.O. was of the opinion that the trial judge had erred in not giving due consideration to the welfare of the infants. Hogg J.A., with whom the Chief Justice agreed, after reviewing the facts and saying that there was no satisfactory evidence of misconduct on the part of the mother, was of the opinion that they would be properly cared for and that it was in their best interest that they should be with the mother. The decision enunciates no new principle and is simply a judgment on the facts.

In *Bell v. Bell*[5] there was no evidence or moral misconduct on the part of either the husband or the wife, both of whom were deeply religious. The child, a girl, was four years old and the Court of Appeal considered upon the facts that it was in her interest that she should be in the custody of the mother.

Laidlaw J.A. also referred to a judgment of the Court of Appeal in England in *Allen v. Allen*[6]. In that case, decided under the provisions of the *Guardianship of Infants Act,* 1925, which, by s. 1, provides that in deciding the question

[1] [1954] O.R. 120.
[2] [1955] O.W.N. 341.
[3] [1951] A.C. 352.
[4] [1954] O.R. 120.
[5] [1955] O.W.N. 341.
[6] [1948] 2 All E.R. 413, 64 T.L.R. 418.

of the custody of an infant the court shall regard its welfare as the first and paramount consideration, after a decree of divorce had been granted to a husband on the ground of the wife's adultery, the custody of the daughter of the marriage, 8 years old, who had lived with her mother from birth, had been given by Wallington J. to the husband. The assigned ground for this was that the wife, who had married the co-respondent, having once committed adultery was likely to do so again and that, as the husband was remarried to a wife against whose moral conduct no charge could be made, he was more fit to have the child. Wrottesley and Evershed L.JJ., after reciting the facts, were of the opinion that the fact that a woman had once committed adultery did not prove that she was unfit to look after a child. In that case, the father was a soldier and the adultery had been committed during his absence from England.

The only other case relied upon is *Willoughby v. Willoughby*[1]. In that case the husband had been unable to support his wife and she had to go out to work and it was shown that during this period she had commited adultery with the co-respondent and that she had lived with him until the husband divorced her in the following year. The child was not with the mother during this period, having been sent to the country to live with the mother of the husband. While the trial judge, Wallington J., who gave the custody of the child to the father gave no written reasons, it was agreed by counsel that the main reason which he gave for not giving custody to the mother was that a woman who had committed adultery once might commit it again. This was the opinion which the same judge had expressed in *Allen's* case. The Court of Appeal reversed this judgment. Cohen L.J. referred to the decision in *Allen's* case and said that apparently it had not been drawn to the attention of Wallington J. Upon the evidence he said there was no suggestion that the mother was promiscuous or a bad mother and accordingly considered that the child, a little girl, should be entrusted to her care until further order. The child was two years of age and Singleton L.J. agreed that it was better that she should be with the mother, at least for the present.

[1] [1951] P. 184.

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With great respect, I think none of these cases touch the matter for decision in the present case.

The order for custody embodied in the decree *nisi* was made under the provisions of s. 5 of *The Matrimonial Causes Act*, R.S.O. 1950, c. 226, which reads:

> 5. (1) In any action for divorce the court may from time to time and either before or after the judgment absolute, make such provision as appears to be just with regard to the custody, maintenance and education of the children of the marriage and may direct payment by either the father or the mother of such sum as may be necessary for the due care, maintenance and education of the children of the marriage.
>
> (2) An application under this section may be made by either husband or wife or by the children by their next friend either at the hearing of the case or upon summary application therein.

It is to be noted that under subs. (2) the right is given to the children to apply by their next friend recognizing, if any recognition is necessary, their interest in the matter.

The action was still pending at the time the respondent, acting upon legal advice, signed the memorandum of November 6, 1958, which purported to change the terms of the order. In my opinion, this agreement which ignored the interest of the children was of no legal effect. While s. 2(2) of *The Infants Act* permits parents who are divorced to agree as to the custody of their children, this cannot mean that they may do so when an order made in the divorce proceedings, whether before or after the decree absolute, is in effect. To construe it otherwise would be to say that, at the will of the parents, the jurisdiction of the court may be ousted.

This was the view forcibly expressed by McRuer C.J. when the application to change the order for custody was made before him in September 1958, at which time he directed the delivery of pleadings and the trial of an issue. The learned Chief Justice then pointed out to the parties that the children were not to be treated by the parents as though they were chattels and that the custody order of March 1958 was still in effect. This was also the view of Spence J. with whom the majority of the members of the Court of Appeal agreed.

The application which resulted in the trial of this issue was made in the divorce action. In my opinion, the same principles apply to the exercise of the powers given by s. 5 of *The Matrimonial Causes Act,* as applied to the exercise of those given by s. 1 of *The Infants Act.*

The two little girls are now nine and seven years old, respectively, and for the past year and a half have been in their father's custody at his home in Toronto. His second marriage has been a happy one. Spence J. found his wife to be a calm, serene, capable and very responsible young woman. As to Booker, he found him to have a scrupulous regard for the truth and "a fine citizen . . . who is normally of a calm and equitable temperament" and very fond of the children. The evidence is that they are very happy with their stepmother. They are going to a school nearby and to the Sunday school of the United Church in their neighbourhood. Booker is a successful business man with a substantial income and supports his family in comfort.

These findings as to the respondent and his wife are to be contrasted with those made by McRuer C.J. and Spence J. as to the appellant and Kruger. In one of the letters written by Kruger to the then Mrs. Booker when she was in Florida in the spring of 1956 he said that "the last ten years have been longing ones for both of us." Whether the adulterous relationship between the two had lasted as long as this is uncertain but the contents of these letters make clear that it had existed for some time prior to the time when they were written, probably as far back as 1952 when, after Booker had left Toronto to return to Venezuela, the appellant and Kruger went on the trip together, professedly to Boston and New York.

Booker apparently had complete trust in his wife and in his friend Kruger up to the fall of 1955, when he became suspicious of her relations with Kruger. When she left home in January 1956 and went to live with her mother, professedly on the ground that she was not well, he found his suspicions confirmed by the incident at her mother's house when she returned in the early hours of the morning with Kruger. It was not until July that he received the bill from the hospital with the details of the treatment

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given to his wife. She had not told him that she was pregnant and her account of this was obviously untrue, she having said that she went there for a blood transfusion.

The parties had not lived as man and wife since October, 1955. The conduct of the appellant in Florida at a time when the children were in her custody, living with her in a motel, afford some indication of her unfitness as custodian. After her husband had stayed with them there and returned to Toronto she engaged in a series of adulteries with Kruger in another motel nearby.

On her return to Toronto she lived with the two girls for a short time in the apartment provided by her husband, then at Kruger's place at Cove Island, and later in Kruger's home in Toronto. Their constant association continued up to the time of the trial. McRuer C.J., after referring to the fact that she had lived in Kruger's house between the fall of 1956 until the trial of the divorce action in March 1958 and after referring to the terms of Kruger's letters, said that he could not conceive that a man who desired the body of a woman as Kruger clearly showed he desired the body of Mrs. Booker could remain in the house with her night after night during these late hours for any other purpose than having sexual intercourse with her.

Her conduct following the granting of the decree nisi in continuing to associate with Kruger was a flagrant contempt of court committed at a time when, under the order of the Chief Justice, she had custody of the two little girls in Kruger's house. Spence J. indicated his view of her conduct in the summer and fall of 1958 when he said in the passage above quoted that she was such a person as would put the gratification of her own pleasures ahead of her interest in her two daughters.

These two young girls are now of an age when, if they are entrusted to the custody of their mother, they will undoubtedly ask why they are separated from their father and from his home where they are living so happily, and why their father and mother are not living together. It is scarcely to be expected that the appellant will tell them the truth, that being that her marriage to their father was broken up by her continued adultery with Kruger in whose home they would then be living. There would thereafter

be over the years these further deceptions practised by the appellant until a few years hence when it would be impossible to conceal the truth from the two children.

It is, in my opinion, unrealistic to suggest that in awarding custody to the mother these two young girls would not also be for all practical purposes in the custody of Kruger who, having married their mother, would stand in *loco parentis* to them (21 Hals., 3rd ed., 189; *Stone v. Carr*[1]). It is quite clear from the letters written and from the evidence given by the appellant at the trial that she had come completely under the domination of Kruger for some time prior to the bringing of the divorce action and, while in Florida, she knew and was a party to Kruger having her husband watched by private detectives in the vain hope of finding some impropriety by him which would enable her to secure a divorce. This was in advance of the discovery of Kruger's letters by Booker. On her own evidence, Kruger actively directed the negotiations on her behalf between the granting of the decree nisi and the decree absolute.

Kruger was befriended by Booker in his youth and assisted in getting a start in life by very considerable loans of money. While posing as Booker's friend, he was obviously engaged for years before March 1956 in an adulterous relationship with his wife and in an endeavour to break up the marriage of the man who considered him to be his friend and trusted him. His behaviour can only be described as contemptible throughout. McRuer C.J. said:

> I hope that Kruger will realize that he has been a party to destroying a home with all the incidents that will flow from it and the handicaps these little children will have as a result of his selfish sexual desires.

McRuer C.J. and Spence J. who have had the advantage of seeing these people were firmly of the opinion that it was contrary to the interests of these little children that they should be permitted to associate with Kruger. The majority of the members of the Court of Appeal have concurred in the opinion of Spence J. that it is in their best interests that they should remain in the custody of their father, and we are asked to reverse these concurrent findings. It would, in my opinion, be a grave injustice to these children to award their custody to their mother. They are now being brought

[1] (1799), 3 Esp. 1.

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up in the home of an honest clean-living man and his wife, are being properly educated and instructed in religious matters which will include instruction in the virtues of truthfulness and chastity. Much of the influence that all parents have upon their children is attributable to the example furnished by their own characters and conduct and these, in the case of Booker and his second wife, are unimpeachable. The character of the appellant and of the man to whom she is now married have been demonstrated to be such as to make neither of them a desirable custodian of these two small girls.

The learned judges who have decided this matter have rightly directed their attention to the paramount consideration in questions of custody to which, as stated by Lord Simonds, all others yield. But if the matter were to be considered as merely a determination of the rights of the parents *inter se* without regard to this paramount consideration, the result must inevitably, in my opinion, be the same. Section 1 of *The Infants Act* requires the court in matters of custody to have regard, *inter alia,* to the conduct of the parents. Unless otherwise ordered by the court the parents are joint guardians and equally entitled to custody by virtue of s. 2. Section 3 requires that in questions relating to custody the rules of equity prevail.

The contention of the appellant is that it is her right to have the children taken from the home and custody of the father whose conduct has been blameless throughout, so that they may be brought up by her in the home maintained by the man whose adulterous conduct with her was the cause of the breaking-up of the respondent's home. If there is any equitable principle which would justify such an order in these circumstances, we have not been referred to it and I am not aware that there is any.

I would dismiss this appeal with costs.

The judgment of Cartwright, Abbott and Judson JJ. was delivered by

CARTWRIGHT J.:—This appeal is brought, pursuant to an order of this Court granting leave to appeal made on June 20, 1960, from a judgment of the Court of Appeal for Ontario, pronounced on May 6, 1960, whereby an appeal

from a judgment of Spence J. pronounced on October 22, 1959, was dismissed; Laidlaw J.A. dissenting would have allowed the appeal.

The effect of the judgment of Spence J. was to award the custody of the two infant daughters of the appellant and the respondent, hereinafter referred to collectively as "the daughters", to the respondent and to give rights of access to the appellant. These infants are Susan Claire Booker born on October 27, 1951, and Jennifer Lynn Booker born on November 3, 1953. There is one other child of the parties John Scott Booker born on October 21, 1945, but his custody is not in question in this appeal; he is in the custody of the respondent and the appellant has rights of access to him.

It will be convenient to set out certain undisputed facts in chronological order.

The appellant and respondent were married on July 16, 1943.

Three children were born of the marriage as set out above.

In June 1956, the appellant and respondent entered into a separation agreement whereby during their minorities the custody and guardianship of John was given to the respondent and the custody of the daughters was given to the appellant. Paragraph 7 of this agreement read as follows:

> 7. The wife, in performing and observing the stipulations on her part stated herein, and provided she remains chaste shall have the custody and guardianship of the two girls, Susan and Jennifer during their respective minorities.

By writ issued on August 23, 1956, the respondent commenced an action for divorce against the appellant and Richard Kruger, hereinafter referred to as Kruger, but this action was discontinued in June 1957.

In September 1956, the appellant and respondent entered into a further agreement which provided as follows:

> 1. The Husband, Plaintiff in an action for divorce against the Wife, hereby WAIVES all claims for costs in connection with such action and to a complete release of any and all claims either against the Wife or the co-Defendant in the said action, Richard Kruger.
>
> 2. The Husband further AGREES to pay monies due under a Separation Agreement between the parties to the credit of a bank account in the name of the Wife as and where she shall designate.

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3. The Husband further AGREES to turn over to the Wife for her sole ownership, the following articles—Vibrator; Washer and Dryer;—out-board motor boat.

4. The Wife in turn RELINQUISHES all claim to any furniture presently in the possession of the Husband.

5. The Wife further AGREES that in the event of her remarriage in the event of a divorce being granted that she will agree to reduce the amounts payable under the Separation Agremeent entered into between the parties to $100.00 per month, subject to increase as the children get older to an amount to be agreed upon.

6. The boy John is to be left in care of the mother in the absence of the father at any time.

At the time of signing this agreement the agreement of June 1956 was amended by striking out the words "and provided she remains chaste" which appeared in paragraph 7 quoted above. This alteration was initialled by the respondent.

By writ issued on July 9, 1957, the respondent commenced a new action for divorce against the appellant and Kruger. In this action Mr. Gerard Beaudoin Q.C., acted as solicitor and counsel for the respondent.

On March 4 and 5, 1958, this action was tried before McRuer C.J.H.C. and at the conclusion of the trial, he pronounced a judgment nisi of divorce by reason of the adultery of the appellant with Kruger. Paragraph 3 of the formal judgment provided as follows:

3. AND THIS COURT DOTH FURTHER ORDER AND ADJUDGE that the defendant, Vera Leona Booker, upon her undertaking to this Court to discontinue any associations by her with the defendant, Richard Kruger, be and she is awarded the sole custody and control of the infants Susan Clair Booker, born on the 27th day of October, 1951 and Jennifer Lynn Booker, born on the 3rd day of November, 1953, subject however to the right of the Plaintiff, Ernest William Booker, to have access to the said infants on Saturday of each week from 9.00 A.M. to 6.00 P.M. and for three days during Easter vacation and for three days during Christmas vacation and for three weeks during summer school vacation in each and every year.

Paragraph 4 of the judgment ordered the respondent to pay $350 per month to the appellant for the support of the daughters so long as they should remain in the custody of the appellant and until they should attain 16 years of age or until the Court should otherwise order.

On June 13, 1958, Kruger served a notice of intervention.

On September 5, 1958, Mr. Beaudoin served a notice of motion on behalf of the respondent returnable before McRuer C.J.H.C. asking that the judgment of March 5,

1958, be varied to give sole custody of the daughters to the respondent, the ground alleged in the respondent's affidavit filed in support of the motion was that the appellant had failed to carry out her undertaking given to McRuer C.J.H.C. to discontinue any association by her with Kruger. The respondent deposed to his belief that the appellant was "still in constant association" with Kruger. The hearing of this motion was adjourned.

Between September 10, 1958, and November 6, 1958, negotiations were carried on between the solicitors for the parties.

On November 6, 1958, an agreement was arrived at following a discussion at which the following persons were present: the respondent, his counsel Mr. Beaudoin, the appellant, her counsel Mr. Brooke, and Mr. Hughes counsel for Kruger. This agreement was reduced to writing and is as follows:

PRESENT. G. Beaudoin, Q.C.
Wm. Booker,
R. Hughes,
Mrs. Booker
John W. Brooke

Agreed as follows

John Brooke Office
Nov. 6th, 1958.

1. Custody of the 2 girls to Mrs. Booker and custody of the son to Mr. Booker with mutual access in alternate weekends and at Christmas Easter Summertime as per Minutes of Settlement attached.

2. Mr. Booker will pay 250 per month for November and December 1958. The claims of Mr. Booker for rent paid 642.00 is considered as satisfied against the claim of Mrs. Booker for allowance for September and October 1958. The claim of Mr. Booker 300.00 for his car is settled.

3. Mr. Booker will apply for Judgment Absolute forthwith, and following Judgment absolute he consents to Mrs. Booker seeing Mr. Kruger pending marriage, and he consents to their marriage and that the association referred to in this paragraph shall not be raised as a ground for a further application for custody by Mr. Booker. It is understanding of the parties that marriage will take place in the immediate future. (Jan. 1, 1958)

4. If by Jan. 1st 1959 Mrs. Booker has decided against marriage to Kruger then Mr. Booker, Mrs. Booker and their solicitors shall meet to consider what financial arrangements are necessary for the welfare of the children and their future.

7A. Pending application custody to be abandoned.

8. If they marry (Kruger and Mrs. Booker) then husband will create trust fund referred to in draft minutes of settlement attached.

9. Provision as to telephone calls to children agreed per draft.

10. Provision as to removing the children from the jurisdiction agreed as per draft.

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11. Re item 4D pages 3 and 4 draft, upon return the spouse shall have that weekend with the children and thereafter weekends alternate once more.

(Signed) "Wm. E. Booker"
"Gerald Beaudoin"
Sol. for Wm. E. Booker
"Vera L. Booker"
"John W. Brooke"

Between November 6 and November 12, 1958, the notice of intervention filed by Kruger and the notice to vary the judgment of March 5, 1958, served by Mr. Beaudoin were withdrawn.

On November 12, 1958, judgment absolute of divorce was granted by Aylen J.

On December 13, 1958, the appellant and Kruger were married.

On December 23, 1958, the respondent and Miss Ulrike Ehlers were married.

On May 8, 1959, the respondent served a notice of motion returnable before McRuer C.J.H.C. for an order varying the judgment of March 5, 1958, so as to give custody of the daughters to the respondent on the grounds that:

1. The said Vera Leona Booker, now Vera Leona Kruger, did not adhere to the undertakings given at the trial upon which she was awarded custody of the two youngest children.

2. Since trial the said Vera Leona Kruger has shown herself unfit to have the custody of the two youngest children and it is not in their interest that she have their custody.

3. The right to access was an integral part of the judgment at trial but for all practical purposes access cannot be exercised by this applicant.

4. Such further and other grounds as counsel may advise and the court may permit.

On May 14, 1959, McRuer C.J.H.C. made an order directing the trial of an issue as to who should have the custody of the daughters.

On June 15, 1959, the issue came on for trial before McRuer C.J.H.C. but the learned Chief Justice decided that the issue should not be tried at that time. Some *viva voce* evidence was heard and it was directed that the issue should be tried on September 8, 1959, and that in the interim, commencing with July 1, 1959, the respondent should have the custody of the daughters with rights of access to the appellant.

The issue was tried before Spence J. on September 8, 9, 10, 11, 14, 15 and 16 and judgment was reserved.

On October 22, 1959, Spence J. delivered judgment.

From time to time during the course of the trial Spence J. appeared to rule that he was concerned only with events subsequent to March 5, 1958, the date of the judgment nisi. For example on the first day of the trial during the examination in chief of the respondent who was the first witness called the learned judge said:

> Just a moment. I am wondering what is the relevancy of all the evidence we have been having here. You have the Chief Justice of this Court has held a trial in which he considered the conduct of the parties up to the date of the judgment which he gave. I am not by any means a Court of Appeal to consider whether his findings would have been made by me. Surely we have to consider the conduct of the parties only in relation to the undertakings given at that time and the conduct of them both subsequently.

On the fourth day of the trial Mr. Williston, counsel for the appellant, asked a question relating to an occurrence in 1956; Mr. Robb, counsel for the respondent, intervened and the record proceeds:

> Mr. Robb: Excuse me, my lord. Just so that there can be no misunderstanding as to my position on these aspects, I do think that the Judgment of the Chief Justice cannot be gone behind. This matter was gone into there, and I think the Chief Justice expressed his opinion on the evidence, with respect. I cannot object to my friend, as it were proceeding with it if he says it has some other relevance, but I do wish to make it clear that on the argument we cannot go behind the Chief Justice.
>
> Mr. Williston: I don't suppose it is going to be necessary for my lord to make any specific finding of adultery or not; but I believe, if my lord is going to decide who the children should go to, he should have a certain background, even though possibly incidentally some of these matters were touched on before.
>
> His Lordship: Touched on? They were ruled on, surely, and I have no jurisdiction to arrive at any different conclusion if I had any intention of doing so.
>
> Mr. Williston: I am not asking my lord to.

In his reasons for judgment, however, the learned trial judge says:

> I think a critical review of the conduct of the defendant in the issue from 1952 up to the time of the trial of the issue is necessary in order to determine her fitness to be the custodian of her infant daughters as against the claim of her former husband, the plaintiff in the issue.

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The apparent inconsistency between these views may be explained by the need felt by the learned trial judge to determine how large a part the undertaking given by the appellant had played in bringing McRuer C.J.H.C. to the conclusion that the daughters should be committed to her custody and the weight which should be attached to its breach.

The undertaking was given under the following circumstances. The appellant was the only witness called for the defence. Her evidence takes up 92 pages of the record. At the conclusion of her cross-examination the transcript reads:

> By His Lordship:
>
> Q. If the custody of these two little girls is awarded to you, are you willing to undertake that any associations that have been carried on between you and your co-defendant, Kruger, will be discontinued?
>
> A. Yes, sir, I do.
>
> Q. The little girls won't come under his influence at all?
>
> A. No, sir.
>
> Q. You will undertake that?
>
> A. Yes, sir, I do.
>
> HIS LORDSHIP: All right. That is all.

Paragraph 3 of the formal judgment of McRuer C.J.H.C. shewing how this undertaking was embodied therein has already been quoted.

There is no doubt that the undertaking as embodied in the formal judgment was breached by the appellant on a number of occasions between the date of that judgment and November 6, 1958, the date of the last agreement between the parties; but the appellant denies that there was during that period any illicit relationship between her and Kruger and there is no finding against her on that point, nor is it shewn that at any time during that period did the daughters come under the influence of Kruger.

The breach of an undertaking given to the Court is never to be regarded lightly, but the fact of it having occurred cannot in this case be treated in isolation. I think it clear from reading the reasons of McRuer C.J.H.C. in their entirety that he regarded the appellant as a proper person and indeed the best person to have the custody of the daughters, provided she did not continue her association with Kruger and that the daughters did not come under his

influence. Mr. Robb submits that if the appellant had refused to give the undertaking the learned Chief Justice would not have awarded the custody to her; it is not possible to say just what would have occurred in that event; it may be that after discussion with counsel the terms of the undertaking would have been clarified and provision made for the eventuality of the appellant and Kruger being married. Be that as it may, the important fact remains that the learned Chief Justice was of opinion that apart from the part played by Kruger in the matter the mother was the person to whom in their own best interests the daughters' custody should be given.

It is important to remember that to the extent of keeping the daughters from coming under the influence of Kruger the undertaking appears to have been observed.

An affidavit of the respondent sworn on September 5, 1958, in support of the application made by Mr. Beaudoin to vary the judgment of McRuer C.J.H.C. as to custody shews that early in April 1958 he was aware that the appellant was associating with Kruger; but as has already been mentioned this application was withdrawn and the negotiations between the parties resulted in the agreement of November 6, 1958.

In my respectful view Spence J. in dealing with the effect of the breach of the undertaking failed to give due weight to the complete change in circumstances resulting from the marriage of the appellant and Kruger and to the fact that with full knowledge of that breach the respondent had on November 6, 1958, signed the agreement set out in full above, and containing, it will be remembered, the following provision:

> Mr. Booker will apply for judgment absolute forthwith, and following judgment absolute he consents to Mrs. Booker seeing Mr. Kruger pending marriage, and he consents to their marriage and that the association referred to in this paragraph shall not be raised as a ground for a further application for custody by Mr. Booker. It is understanding of the parties that marriage will take place in the immediate future.

In his reasons for judgment Spence J. said in reference to this agreement:

> Therefore I am of the opinion that if the agreement, exhibit 16, had been an agreement between the parties on well nigh any subject except the custody of children, it would be an effective and binding agreement upon them both and no attempt of the plaintiff to rescind it months after

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its execution and when it had been acted upon could be effective. Two factors, however, in the present situation very much alter the result. In the first place, it is an agreement which purports to amend a judgment of the Court and secondly, it is an agreement as to the custody of children.

Cartwright J.

On the argument before us Mr. Williston was proceeding to develop the submission that the parties were acting in good faith with the interest of the daughters in mind in entering into the agreement of November 6, 1958, when he was told by the Court that we would assume this good faith unless it was challenged in which case he could deal with it in reply; it was not challenged.

Counsel united in informing us that Mr. Beaudoin who advised the respondent to sign the agreement is a counsel of the highest standing and of great experience in cases of the sort with which we are concerned.

With the greatest respect to those who hold the contrary view, I am of opinion that the agreement was a proper one and in the best interest of the daughters.

Spence J. was of the opinion that until the judgment nisi was amended upon application the agreement of November 6, 1958, would be ineffective. I am unable to agree with this. The express power given to parents of an infant who are not living together to enter into a written agreement as to which parent shall have the custody of the infant is not, in my opinion, abrogated by the circumstance that an order of the Court dealing with the custody is in effect. Counsel very properly informed the Chief Justice that the agreement had been made and in my opinion nothing more was necessary. It may also be observed that the order as to who should have the custody of the daughters was not varied. The change was the releasing of the appellant from an undertaking which would obviously cease to have any object after her marriage to Kruger.

It was not argued that the Court has not jurisdiction to make an order contrary to the terms of an agreement between the parents as to the custody of an infant if this should be necessary for the welfare of the latter. It is not difficult to think of cases where a change of circumstances might make such a course imperative.

In the case at bar the respondent a highly intelligent and successful business man advised by eminent counsel and with the fullest knowledge of the appellant's breach of

undertaking and of all the conduct on the part of the appellant and Kruger with which they have been reproached, and in contemplation of their forthcoming marriage agreed that the appellant should have the custody of the daughters. I have already expressed my view that the agreement was a proper one.

In Ontario divorced persons are free to re-marry; no distinction is made in this regard between the "innocent" and the "guilty" party (as is done in some other jurisdictions). The evidence is that the home in which the appellant and her husband are living is a suitable one for the upbringing of the daughters.

It would, I think, require proof of a very real change of circumstances to warrant the Court disregarding this agreement of the parties. When the evidence as to what is complained of since the agreement was made is examined it appears to consist of disputes, disagreements and annoyances in regard to the access to the daughters, some of which were not inaptly described by the learned trial judge as "picayune" and "ridiculous". The evidence, in my opinion, falls far short of shewing any such change in circumstances as enables the Court to say that in the best interests of the daughters their custody should be taken from their mother.

It remains to consider the following paragraph in the reasons of the learned trial judge:

> There is, moreover, the most important circumstance that to award the defendant in the issue the custody of the two infant daughters, Susan and Jennifer, would be in effect awarding such custody to the defendant Kruger. Counsel for the plaintiff on the argument put it that Kruger was the moving spirit in this alliance and that he was the person who was in control and directed the conduct of the defendant in the issue throughout. Everything in the trial would seem to indicate such a conclusion to be the sound one. The defendant Kruger was a close friend of the plaintiff for ten years prior to the action for dissolution of marriage and what is more was an object of the plaintiff's bounty on more than one occasion. The plaintiff advanced the defendant Kruger large sums of money, which were subsequently repaid, and yet the Chief Justice of the High Court, in the dissolution action and I in this action have found that the conduct of the defendant Kruger throughout was, in reference to the plaintiff, about as disgraceful as can be imagined. It would be with some very considerable misgiving that I would make an order which would have the practical effect of giving him the custody of the plaintiff's two infant daughters. Therefore, and for these reasons and despite the fact that it is with the utmost reluctance that I award the custody of the infant daughters to anyone but their mother, I must find that as between the plaintiff and the defendant, the plaintiff is the more proper person to have the custody of Susan and Jennifer Booker.

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With great respect, I am unable to agree with this view. I will not repeat what I have said as to the agreement made with the fullest knowledge of Kruger's conduct. I think the error in this passage lies in approaching the matter as if the question were whether Kruger or the respondent should have the custody and upbringing of these little girls. That is not the question. The question is rather whether they shall be brought up by their mother or by their step-mother. I say this not merely because it is common knowledge that in the normal home the responsibility of bringing up young children, especially young girls, falls upon the mother rather than the father but also because the evidence in this case shews that the respondent is very fully occupied by the business in which he has been so successful and that the demands of that business necessitate his frequent absence from his home. Nothing has been said, and I certainly have nothing to say, against the respondent's wife but the record is replete with evidence, much of it coming from the respondent himself, that the appellant is a good and affectionate mother well fitted to care for and bring up her daughters.

Before parting with the matter I would deal in more detail with the effect of the evidence as to the fitness of the mother to have her children and the suitability of the home in which she is now established and would make reference to some relevant authorities were it not for the fact that, in my opinion, these matters have been so dealt with in the reasons of Laidlaw J.A. that there is nothing which I can usefully add. I wish to adopt those reasons in their entirety and to found my judgment upon them as well as on what I have said above and I refrain from further repetition of them.

It is most desirable in the interests of the parties that there should be an end to this litigation but under the terms of the order directing the issue and on the pleadings delivered pursuant thereto the question of what payments if any are to be made by the respondent for the benefit of the infants while they are in the custody of the appellant does not appear to me to be before us on this appeal.

I would allow the appeal, set aside the judgment of the Court of Appeal and the judgment of Spence J., except in so far as the latter deals with the custody of and access to the

infant John Scott Booker, and direct judgment to be entered awarding, until further order, the sole custody and control of the infants Susan Claire Booker, born October 27, 1951, and Jennifer Lynn Booker, born November 3, 1953, to the appellant Vera Leona Kruger subject to the right of the respondent Ernest William Booker to have access to the said infants as provided in the agreement of November 6, 1958, marked as Exhibit 16 at the trial of the issue and the draft minutes of settlement therein referred to and marked as Exhibit 15 at the said trial, and further directing that neither of the said infants shall be removed by either of the parties from the Province of Ontario without the consent in writing of the other party or leave of the Court. The appellant is entitled to recover from the respondent her costs of the issue, including the costs referred to in paragraph 8 of the order of McRuer C.J.H.C. made on June 15, 1959, her costs in the Court of Appeal and in this Court.

Appeal allowed with costs, KERWIN C.J. *and* LOCKE J. *dissenting.*

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

Solicitor for the plaintiff, respondent: Malcolm Robb, Toronto.

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DAME ERNESTINE CHARRON-PICARD (*Defendant*) ..... APPELLANT; *May 24, 25 Dec. 19

AND

J. OMER TARDIF (*Plaintiff*) .....RESPONDENT.

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

Debtor and creditor—Sale of debt—Effect of admission by purchaser that no payment made—Debtor becoming heir of vendor—Succession duties not paid—Whether mutual extinguishment of debts—Non adimpleti contractus—Civil Code, art. 1188.

Where the purchaser of a debt admits in evidence that he did not pay the price for it, that evidence must prevail over the evidence of the contract itself in which the vendor acknowledged having received payment

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

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without there being any necessity to proceed by way of improbation. The contract of sale is not thereby rendered null, but the consequence of the admission is that the purchaser remains debtor for the price.

When two debts are equally liquidated and have each for object a sum of money, compensation will not take place if one of the creditors is an heir and has not produced the certificate of payment or of non-exigibility of the succession duties pertaining to the debt. Until that certificate is produced, the debt is not demandable. The doctrine of *non adimpleti contractus* has no application in such a case.

APPEAL and CROSS-APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], reversing a judgment of Drouin J. Appeal and cross-appeal dismissed.

F. J. McNally, for the defendant, appellant.

G. Monette, Q.C., M. Cinq-Mars, Q.C., and *R. Barakett,* for the plaintiff, respondent.

The judgment of the Court was delivered by

TASCHEREAU J.:—Les faits de cette cause présentent peu de difficultés.

La défenderesse-appelante, Ernestine Charron-Picard, était l'épouse de Charles Eugène Charron maintenant décédé. Ils étaient mariés sous le régime de la communauté légale, et le 14 février 1952, ils ont obtenu une séparation judiciaire en vertu d'un jugement rendu par l'honorable Juge Choquette. Cette séparation de corps a naturellement entraîné la séparation de biens. Le 26 mai de la même année, comme conséquence d'ententes intervenues, les biens de la communauté ont été partagés, et un immeuble qui a été évalué à la somme de $18,000 a été attribué à Dame Ernestine Charron-Picard.

Cette dernière a cependant contracté l'obligation de payer à son époux une somme de $15,000, avec intérêt au taux de cinq pour cent (5%), par versements mensuels et consécutifs de $186.58 chacun. Et pour garantir le paiement de cette somme, l'appelante a hypothéqué le lot n° 174, du bloc 41, canton de Rouyn. Il a été aussi stipulé à l'acte de partage que si la débitrice faisait défaut d'exécuter l'un des versements dans les soixante jours de son échéance, la somme de $15,000 deviendrait immédiatement exigible.

[1] [1958] Que. Q.B. 857.

Quelque temps plus tard, soit le 10 mars 1954, par acte devant le Notaire Morissette, Charron cédait sa créance contre son épouse à J. Omer Tardif, le demandeur-intimé dans la présente cause, pour une considération qui est ainsi exprimée dans l'acte:

> Le présent transport a été consenti pour le prix de $11,946.61 que le cédant reconnaît avoir reçu du cessionnaire dont quittance.

Seize jours après ce transport, soit le 26 mars 1954, Charron décédait à Rouyn, laissant un testament antérieur à la date de la séparation judiciaire, dans lequel il instituait sa femme légataire universelle. Madame Charron a cessé d'effectuer ses versements le 1er mars 1954. Le 3 juin de la même année, le cessionnaire Tardif a institué contre l'appelante la présente action dans laquelle il réclame la somme de $11,946.61, plus $179.19 d'intérêt, formant un total de $12,125.80. Il demande en outre que la défenderesse soit condamnée à délaisser l'immeuble dans les quinze jours de la signification du jugement à intervenir, pour que ledit immeuble soit vendu en justice, et qu'à même le prix le demandeur soit payé, par préférence de sa créance, en principal, intérêts et frais.

La défenderesse-appelante a prétendu que le transport fait par son mari Charron à Tardif était nul, parce qu'à la date où il a été exécuté, Charron n'avait pas la plénitude de ses facultés mentales, qu'il était incapable de donner un consentement valide, qu'à tout événement ce contrat est fictif, qu'il n'est qu'une donation «mortis causa», et qu'il y a absence de considération valable. Le juge au procès, après avoir rejeté la prétention de la défenderesse-appelante concernant la capacité mentale du cédant, et après avoir écarté le motif qu'il s'agissait d'une donation à cause de mort, n'a retenu pour justifier son jugement que la légalité de la considération. Il est arrivé à la conclusion que le contrat était fait *sans considération,* parce que le prix du transport, quoiqu'il fût stipulé qu'il a été payé, *ne l'a pas été en réalité.*

La Cour du banc de la reine[1] a unanimement maintenu l'appel de Tardif, a décidé qu'il y avait bien *un contrat de vente* entre les parties, et que le défaut du paiement du prix ne faisait pas disparaître la considération qui était stipulée au contrat.

[1] [1958] Que. Q.B. 857.

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Taschereau J.

Devant cette Cour, les deux parties ont appelé. Madame Charron prétend toujours qu'il y a absence de considération, qu'on ne peut en conséquence donner effet à ce contrat, tandis que Tardif demande qu'il soit décidé qu'il ne s'agit pas d'une vente, mais bien d'une donation *inter vivos*; cette donation, prétend-on, était la récompense de services rendus pendant trente ans. Cette divergence d'opinion est facile à comprendre. Si ce transport constitue véritablement une *vente* par Charron à Tardif, et si ce dernier n'a pas payé le prix stipulé, comme c'est le cas, il s'ensuit que Charron, s'il eut vécu, aurait eu le droit de le réclamer. Comme il est décédé, sa veuve, légataire universelle, est titulaire de cette créance contre Tardif, et peut offrir en compensation le montant qu'elle devait à son mari, garanti par hypothèque, et dont Tardif est le cessionnaire. Si, d'un autre côté, il s'agit d'une donation *inter vivos,* faite par Charron à Tardif, aucune question de compensation ne se présente, et Tardif peut réclamer de madame Charron en vertu du transport en date du 10 mars 1954. C'est la seule question qui se présente devant cette Cour, les autres moyens ayant été abandonnés.

La Cour du banc de la reine en est arrivée à la conclusion que ce transport par Charron à Tardif constituait une vente, et je crois qu'elle a bien jugé. Les prétentions de Tardif à l'effet qu'il s'agissait d'une donation *inter vivos* sont complètement contredites par son témoignage. Examiné au préalable, il s'exprime ainsi:

> Il a commencé à me dire: «Je vais vous vendre mon affaire.» Je savais de quelle affaire il parlait, c'était le règlement avec sa femme, sa part de distribution avec sa femme. Il me disait ça souvent: «Je vais sous vendre ça mon affaire», et l'affaire s'est passée de même. A la fin de février ou au commencement de mars il est devenu plus insistant et une bonne journée il m'a dit: «L'achetez-vous ou si vous l'achetez pas? Si vous l'achetez pas, je vais la *vendre à un autre.*» J'ai dit: On va appeler le notaire, et on a pris le rendez-vous.

C'est comme conséquence de cette conversation que la cession a été faite. Ce témoignage de Tardif est conforme à l'écrit qu'il a signé; il a juré devant le tribunal qu'il s'agissait d'une vente, et il a signé un document qui constate qu'il y avait une vente où il était partie comme acheteur. L'écrit dit qu'il a payé, mais il jure qu'il n'a rien donné. Évidemment, son aveu vaut contre cet écrit, et toute la jurisprudence est à l'effet que dans un cas comme

celui-là, l'aveu est suprême, et qu'il n'est pas nécessaire de recourir à l'inscription en faux pour contredire les termes d'un écrit valablement fait. Le notaire a fidèlement rapporté dans son acte ce que les parties lui ont représenté, et l'inscription en faux ne peut être admise lorsque la partie reconnaît que l'officier public a exactement relaté les faits accomplis devant lui, sauf à prouver par toutes espèces de moyens qu'ils ont été simulés par les parties. (Garsonnet, vol. 2, 705, p. 503.) Il est de principe que lorsque l'on attaque seulement la sincérité des déclarations faites des parties devant le notaire, tout en reconnaissant que cet officier a bien constaté ce qu'il a vu et entendu, il n'est pas nécessaire de prendre la voie de l'inscription en faux, car la véracité de l'officier public n'est point mise en question. (1, Boitard, 425.)

Dans une cause de *Doyon v. Doyon*[1], il a été décidé qu'aucune inscription en faux n'est nécessaire pour permettre la preuve que de l'argent dont on a accusé réception dans l'acte n'a jamais été payé. Cette jurisprudence n'a jamais été changée, et c'est celle-là qui doit prévaloir.

Il résulte donc qu'il s'agit d'une vente de Charron à Tardif, dont le prix n'a pas été payé. La prétention que durant les trente ans qu'ils se sont connus, Tardif lui aurait prêté de l'argent, qu'il l'aurait visité de temps à autre, ne me paraît pas justifiée. La preuve révèle que durant cette longue période, Charron aurait emprunté de Tardif deux fois la somme de $50, qui d'ailleurs ont été remboursés, et que ce dernier est allé lui donner des conseils à l'Hôtel Union où il demeurait, après la séparation matrimoniale. Ces faits ne peuvent justifier une considération comme paiement de la cession de cette créance. D'ailleurs, le témoignage de Tardif détruit toutes ces suggestions, car Charron était prêt à vendre à un autre, envers qui il n'était pas obligé par aucune dette de reconnaissance, si Tardif n'achetait pas.

Il résulte qu'il s'agit bien d'une vente dont Tardif est le cessionnaire, par conséquent créancier de madame Charron, et qu'il a le droit de réclamer le paiement. La considération est le prix mentionné à l'acte, et si Tardif ne l'a pas payé, son défaut ne fait pas disparaître la considération du contrat. Tardif est le débiteur du montant vis-à-vis madame

[1] (1871) Que. R.J.R. (Mathieu) 526, 565.

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Charron, qui est légataire universelle de son époux décédé. Évidemment, la compensation n'a pas été plaidée, car la défenderesse niait la créance de Tardif, et on ne l'a même pas invoquée comme moyen subsidiaire de défense. On en a cependant parlé à l'argument, mais comme la Cour du banc de la reine, je crois que ce moyen ne peut être invoqué.

Madame Charron, héritière de son mari, ne pouvait sûrement pas poursuivre Tardif pour réclamer le montant, n'ayant pas payé les droits successoraux, ou n'ayant pas obtenu de certificat qu'il n'y en avait pas d'exigibles. Elle a évidemment été saisie de la créance de son mari contre Tardif. Elle en est aujourd'hui la titulaire; elle en est aussi la propriétaire, mais elle ne peut exercer les droits que lui confère cette propriété tant que les droits successoraux ne sont pas payés. *Jean v. Gagnon*[1]. Ne pouvant pas poursuivre parce que l'exercice de ses droits de propriété est suspendu, elle ne peut davantage offrir en compensation le montant de la créance qui lui vient de la succession de son mari. La créance de Tardif contre madame Charron, comme celle de madame Charron contre Tardif, sont toutes deux liquides, mais seule celle de Tardif est exigible. *Code Civil* 1188.

Dans le factum de l'appelante madame Charron, il semble y avoir confusion entre une action où l'on demande de se faire déclarer uniquement héritier, et une action où l'on réclame une créance faisant partie du patrimoine du défunt. Dans le premier cas, on ne demande que d'être reconnu propriétaire d'un bien, tandis que dans le second on exerce un droit conféré par la propriété, ce qui ne peut être fait tant que les impôts successoraux ne sont pas payés.

L'appelante madame Charron a également prétendu devant cette Cour que Tardif, s'il s'agit d'une vente de créance, ne pouvait légalement réclamer le montant de $12,125.80, sans offrir à madame Charron le montant dont il est son débiteur, ou le consigner au Bureau du Trésor provincial. On veut évidemment appliquer la doctrine de *Non Adimpleti Contractus* qui veut que dans un contrat synallagmatique, la partie poursuivie en paiement peut, si de son côté le demandeur n'a pas encore payé, refuser de s'exécuter. Il est certain que chaque contractant est autorisé à considérer ce qu'il doit comme garantie de ce qui lui est

[1] [1944] S.C.R. 175, 3 D.L.R. 277.

dû, et tant que l'autre partie refuse d'exécuter son obligation, l'autre partie peut agir de même. *Lebel v. Commissaires d'Écoles de Montmorency*[1].

Mais, tel n'est pas le cas qui se présente ici. Il n'est pas question d'un unique contrat bilatéral, en vertu duquel les parties ont contracté des obligations réciproques, que l'on veut faire annuler ou auxquelles on veut faire donner effect. Dans un cas comme celui-là, évidemment, chacune des parties ne pourrait exiger la prestation qui lui est due que si elle offre elle-même d'exécuter son obligation.

Je suis d'opinion que cette doctrine de *"Non Adimpleti Contractus"* ne peut trouver son application. Tardif poursuit en sa qualité de cessionnaire d'une créance qu'il a achetée, dont il n'a pas payé le prix mais dont il est quand même propriétaire. En sa qualité d'héritière de son mari, madame Charron pourrait répondre qu'il y avait compensation parce qu'elle est héritière de la créance de son mari contre Tardif, mais malheureusement, elle ne peut le faire parce que la loi le lui interdit tant que les droits successoraux n'ont pas été payés.

L'appel de *Charron v. Tardif* doit être rejeté de même que l'appel de *Tardif v. Charron,* mais étant donné que les succès des parties devant cette Cour sont divisés, et vu les circonstances spéciales de cette cause, il n'y aura pas d'Ordonnance quant aux frais sur les deux appels. Tous les droits que peut avoir l'appelante madame Charron de réclamer de Tardif le montant de la créance qu'elle a contre lui comme héritière de son mari, lui sont évidemment réservés.

Appeal and cross-appeal dismissed without costs.

Attorneys for the defendant, appellant: Garmaise & McNally, Rouyn-Noranda.

Attorneys for the plaintiff, respondent: Cinq-Mars, Grimard & Ryan, Rouyn-Noranda.

[1] [1955] S.C.R. 298 at 305.

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JAMIESON'S FOODS LIMITED (*Plaintiff*) ..... APPELLANT;

AND

ONTARIO FOOD TERMINAL BOARD (*Defendant*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Landlord and tenant—Lease of premises in food terminal granted by statutory Board—Right to make reasonable rules reserved—Rules not to limit or restrict nature or extent of tenant's business or mode of operation—Whether Saturday closing rule ultra vires—The Ontario Food Terminal Act, R.S.O. 1950, c. 261, as amended.

The defendant Board, a statutory corporation, owned and operated a food terminal in which the plaintiff, a wholesale fruit dealer, leased premises. The leases contained a clause reserving to the landlord the right to make reasonable rules, regulations and by-laws relating to operation and maintenance of the terminal, such rules not to limit or restrict the nature or extent of the tenant's business or the mode of operation thereof.

On the recommendation of an association of wholesale fruit and produce tenants, the defendant passed a resolution on November 23, 1956, providing for Saturday closings of the terminal, and a rule to this effect was made on February 21, 1957. The plaintiff contended that the rule as to Saturday closing was *ultra vires* of the Board, that it did not constitute a reasonable rule within the meaning of the leases, and claimed an injunction and damages.

Judgment at trial was given in favour of the plaintiff. This judgment was reversed by the Court of Appeal and the plaintiff appealed to this Court.

Held: The appeal should be dismissed.

Prior to the enactment of ss. 13 and 14 of *The Ontario Food Terminal Act*, which conferred certain legislative powers to make regulations and rules, the Board had the necessary powers to carry on its business as defined in s. 4 of the Act, which included the operation of the terminal and the doing of such acts as might be necessary or expedient for carrying out those operations. The decision as to the times during which the terminal should be open for business was a part of the operation of the terminal and was a part of the business of the Board. The enactment of ss. 13 and 14 did not curtail those powers. It did not compel the Board to transact all business respecting the operation of the terminal by means of regulations or rules.

The provision for Saturday closing did not limit or restrict the nature or extent, or the mode of operation of the plaintiff's business, and in the light of the circumstances which preceded the Board's decision that the wholesaler's portion of the terminal should be closed every Saturday throughout the year, the rule could not be considered as not being reasonable.

*PRESENT: Kerwin C.J. and Cartwright, Abbott, Martland and Judson JJ.

Therefore the closing requirement did not involve a breach of the leases, because such procedure was permissible under the reservation clause.

The plaintiff had further contended that if the Board did have power to compel Saturday closing without breach of its leases, it could only do so, under the relevant clause, by means of a rule, regulation or by-law. During the period from December 1, 1956, when Saturday closings had commenced, until February 1, 1957, the only authority for closing had been the resolution made on November 23, 1956.

The effect of the clause was to reserve to the Board, as a contractual right, the power to control the hours of business in the terminal. As between itself and the plaintiff as its tenant, it could make rules relating thereto without the necessity of resorting to the legislative authority which it subsequently acquired under ss. 13 and 14 of the Act. The resolution of November 23, 1956, was a "rule" within the meaning of the clause in the lease and it was passed as a part of the operation of the Board's business.

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

A. L. Fleming, Q.C., and *Meredith Fleming, Q.C.*, for the plaintiff, appellant.

R. E. Shibley and *R. E. Scane,* for the defendant, respondent.

The judgment of the Court was delivered by

MARTLAND J.:—The respondent, which is hereinafter referred to as "the Board", is a corporation created by statute passed by the Legislature of Ontario, c. 63, Statutes of Ontario 1946. It was continued as a body corporate by the provisions of *The Ontario Food Terminal Act,* R.S.O. 1950, c. 261.

Section 4 of that Act defines its objects as follows:

4. (1) The objects of the Board shall be,

(*a*) to acquire, construct, equip and operate a wholesale fruit and produce market in the County of York to be known as the Ontario Food Terminal and to acquire and operate such facilities for the transportation and handling of fruit and produce as may be necessary for the purposes of the Terminal; and

(*b*) to do such other acts as may be necessary or expedient for the carrying out of its operations and undertakings.

Section 5 of the Act provides:

5. The Board may rent space in the Terminal to such persons and upon such terms as to the Board may seem proper and may make such arrangement and enter into such agreement with any such person as it may deem advisable in the circumstances.

[1] [1959] O.W.N. 141, 18 D.L.R. (2d) 168.

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Section 13 of that Act empowered the Minister of Agriculture, subject to the approval of the Lieutenant-Governor in Council, to make regulations in relation to various matters, including limiting or regulating the objects and powers of the Board and their exercise and also respecting any other matter necessary or advisable to carry out the intent and purpose of the Act.

The appellant is a corporation which imports, processes and distributes bananas as a wholesaler. It leased premises from the Board in the Ontario Food Terminal under a lease dated August 12, 1953, and additional premises in the terminal under a further lease dated July 1, 1954. Each lease was for a term of thirty years, with provision for renewal. Except for the dates, the description of the premises leased and the amounts of rental payable, the provisions of the two leases were the same.

Each lease included a clause in the following terms:

IT IS SPECIFICALLY UNDERSTOOD AND AGREED that the Landlord shall have the right to make all reasonable rules, regulations and by-laws relating to the operation and maintenance of The Ontario Food Terminal, including hours of business, sanitation, traffic control and all such matters as are required for or normally incidental to the proper management of a public market, but no such rules, regulations or by-laws shall in any way limit or restrict the nature or extent of the business carried on by the Tenant within the covenants hereinbefore expressed or the mode of operation thereof. The Tenant covenants and agrees that he will observe, abide by and conform to all such reasonable rules, regulations and by-laws made or established by the Landlord as aforesaid. If the Tenant shall fail to observe, abide by and conform to any such rules, regulations or by-laws, then the Landlord may give notice to the Tenant, giving particulars of any such failure and appointing a time and place for the hearing of any complaint in connection therewith and if the Tenant shall fail to comply with the decision of the Landlord forthwith or to rectify the matter complained of the Landlord shall have the right to suspend or revoke any or all rights or privileges of the Tenant at The Ontario Food Terminal or the use of the facilities or equipment thereof and forthwith to determine this Lease.

At the times these leases were granted *The Ontario Food Terminal Act* did not contain any provisions regarding the making of rules or regulations by the Board. On March 31, 1955, by c. 52, Statutes of Ontario 1955, s. 13 of the Act was repealed and a new s. 13 was enacted, together with ss. 14 and 15. Sections 13 and 14 provided:

13. Subject to the approval of the Lieutenant-Governor in Council, the Board may make regulations,

(*a*) prescribing the officers of the Board;

(*b*) prescribing the powers and duties of the manager of the Terminal and of the officers of the Board;

(*c*) prescribing the form of the seal of the Board;

(*d*) respecting the operation, management and maintenance of the Terminal;

(*e*) respecting any other matter necessary or advisable to carry out effectively the intent and purpose of this Act.

14. Subject to the regulations, the Board may make rules with respect to,

(*a*) the conduct of the Board's employees;

(*b*) the conduct of the Board's tenants and their employees;

(*c*) the conduct of any person on the Board's premises for any purpose;

(*d*) the use by any person of the Board's facilities and equipment.

Section 15 provided for the imposition of penalties for violations of the provisions of the Act, the regulations or any rule made under the Act.

Most of the wholesale fruit and produce merchants who leased premises in the terminal were members of an association called the Toronto Wholesale Fruit and Produce Merchants Association (hereinafter referred to as "the Association"). On October 30, 1956, a meeting of the Association was called, which all tenants of the Board, whether members of the Association or not, were invited to attend. The purpose of the meeting was to determine whether representations should be made to the Board to have the terminal closed on Saturdays. This question had been under consideration by the Association for some time previously.

The appellant was not a member of the Association, but its president and controlling shareholder, Mr. R. H. Jamieson, attended the meeting and moved a resolution to the effect that the market should be closed each Saturday in the year, without any exception. This motion was put to a vote and was carried by about a two-thirds majority.

A second meeting of the Association was held on November 1, 1956, with a view to presenting "a unanimous front" in making the Association's recommendation to the Board. At this second meeting a motion to recommend that the terminal be closed on each Saturday throughout the year, with certain exceptions, was passed by a vote of 31 in favour and 3 against. Included in the resolution was an exception in favour of Power Food Markets, one of the Board's tenants, which was not in the wholesale business,

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but used its accommodation as a warehouse for itself. At the second meeting Mr. R. H. Jamieson opposed the resolution because of the exception made in favour of Power Food Markets.

The resolution passed at the meeting of November 1, 1956, was communicated to the Board for its consideration. At a meeting of the Board on November 23, 1956, a resolution was passed providing for the closing of the terminal on Saturdays throughout the period from December 1, 1956, to May 1, 1957. A copy of this resolution, as passed by the Board, was sent to its tenants on November 26, 1956, and notice was given that the terminal would be closed in accordance with the resolution. The terminal was, in fact, closed, for selling fruit and produce, on Saturdays from and after December 1, 1956, in accordance with the resolution.

On February 1, 1957, a rule was made and filed by the Board, as O. Reg. 17/57, the material portion of which provided as follows:

HOURS OF OPERATION OF TERMINAL

16. Except for

(*a*) Sundays,

(*b*) New Year's Day, Good Friday, Victoria Day, Dominion Day, the first Monday in August, Labour Day, Thanksgiving Day and Christmas Day, and

(*c*) Saturdays in the months of December, January, February, March and April, other than a Saturday that falls immediately after a Friday, or before a Monday, on which any day mentioned in clause *b* falls,

the terminal shall be open for selling fruit and produce.

The appellant commenced action against the Board on April 8, 1957, claiming a declaration that para. (*c*) of this rule was *ultra vires* of the Board, that it did not constitute a reasonable rule within the meaning of the leases and claiming an injunction to restrain the Board from acting in pursuance of it. The appellant also claimed damages at the rate of $400 for each Saturday that the terminal was closed from and after December 1, 1956.

Prior to the action coming on for trial, rule 16, as set forth in O. Reg. 17/57, had been replaced by a new rule 16, by O. Reg. 91/57, made and filed on April 18, 1957. The

exact terms of this rule are not material. Its effect, as in the case of the preceding rule 16, was to make provision for closing on Saturdays during specified portions of the year.

Subsequently, rule 16, as contained in O. Reg. 91/57, was replaced by rule 16 as contained in O. Reg. 64/58, made and filed on March 19, 1958. Subpara. (3) of this rule provided that:

> (3) The Terminal, other than the Farmers' Market section thereof, shall not be open for selling fruit and produce on Saturdays.

Finally on May 16, 1958, regulations were made by the Board, pursuant to s. 13 of the Act, which were approved on May 22, 1958, and filed on May 23, 1958, included in which was a provision in terms identical to those of rule 16(3) as contained in O. Reg. 64/58.

Judgment at the trial was given in favour of the appellant. The learned trial judge held that the various rules regarding Saturday closing were *ultra vires* of the Board and further held that the Board had committed a breach of the leases made with the appellant by closing the terminal on Saturdays. He directed a reference to ascertain the damages sustained by the appellant.

This judgment was reversed on appeal by the Court of Appeal for Ontario[1], the conclusion of Laidlaw J.A., who delivered the judgment of the Court, being as follows:

> My conclusion and opinion is that the case for the plaintiff fails because it has not been shown that the act of the Board in closing the Terminal, including the space occupied by the respondent, for selling fruit and produce on Saturdays was unlawful, but, on the contrary, I am satisfied that the act of the Board in doing so was clearly within the right possessed by it under the leases made by it with the respondent and, in any event, within the power possessed by it under sec. 4 of The Ontario Food Terminal Act.

I am in agreement with this conclusion.

It was contended by the appellant that the Board could not require the closing of the terminal on Saturdays, unless provision was made for such requirement in a regulation made by the Board, with the approval of the Lieutenant-Governor in Council, pursuant to s. 13 of the Act, or by a

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rule authorized by such a regulation. No regulation, pursuant to s. 13, dealing with Saturday closing, had been made by the Board until O. Reg. 131/58, which was filed on May 23, 1958.

I do not agree with this contention. Sections 13 and 14 of the Act do confer upon the Board certain legislative powers to make regulations and rules. For breaches of such regulations and rules penalties are provided. But this power to make regulations and rules was not given to the Board until the enactment of c. 52, Statutes of Ontario 1955. Prior to that time the Board had the necessary powers to carry on its business as defined in the objects clause, s. 4, which included the operation of the terminal and the doing of such acts as might be necessary or expedient for carrying out those operations. The decision as to the times during which the terminal should be open for business was, in my opinion, a part of the operation of the terminal. It was a part of the business of the Board. The enactment of ss. 13 and 14 did not curtail those powers. It did not compel the Board to transact all business respecting the operation of the terminal by means of regulations or rules. In my opinion the Board had the necessary power to pass and to put into effect its resolution of November 23, 1956, by virtue of s. 4 of the Act.

This brings us to the question as to whether the change respecting the times when the terminal should be open, which was made by the Board after it had granted leases to the appellant, was a derogation from the grants made by those leases. Each of them contained a covenant for quiet enjoyment. Each of them also contained the covenant, which has previously been quoted in full, reserving to the Board the right to make all reasonable rules, regulations and by-laws relating to the operation and maintenance of the terminal, including hours of business.

The Board relies upon that clause for the contention that what it did in relation to Saturday closing involved no breach of its leases. The appellant argues that the clause does not assist the Board, because it contains the proviso "but no such rules, regulations or by-laws shall in any way limit or restrict the nature or extent of the business carried on by the Tenant within the covenants hereinbefore expressed or the mode of operation thereof". It is urged

that the Saturday closing requirement limited or restricted the nature or extent of the appellant's business and the mode of operation thereof. It is further argued that the clause only permits "reasonable" rules, regulations and by-laws and that the Saturday closing requirement was not reasonable.

With respect to the question as to whether the provision for Saturday closing limited or restricted the nature or extent, or the mode of operation of the appellant's business, I agree with the reasoning of Laidlaw J.A. when he said:

> Does a rule or an order that the Terminal shall not be open for selling fruit and produce on Saturdays limit or restrict the nature or extent of the business carried on by the respondent? The nature of the respondent's business is "importing, processing and wholesaling bananas". Plainly, in my opinion, the nature of the respondent's business is not affected in any way by the fact that the Terminal is closed on Saturday. The nature of its business remains the same whether the business is carried on one day a week or six days a week. Counsel emphasized that the "extent" of the business carried on by the respondent is limited or restricted by closing the Terminal on Saturday. He argued that the word "extent" as used in the clause is synonymous with "volume" or "quantity". I do not think so. The word "extent" means "space over which a thing extends; width of application; scope." (The Concise Oxford Dictionary.) That is the meaning which in my opinion should be given to the word in the clause under consideration. When it is read with that meaning it becomes plain that it is not applicable to a rule or regulation fixing the hours the Terminal is open for business for the sale of fruit or produce.
>
> The main contention on behalf of the respondent is that the mode of operation of the business carried on by it is limited or restricted by the act of the appellant in closing the Terminal on Saturdays. Again I refer to the dictionary meaning of the word "mode". It is "the way, manner in which a thing is done." It is quite true that the *operation* of the business carried on by the respondent is limited or restricted by a rule or regulation respecting the hours of business, but I am quite unable to see how the *mode of operation* is in any way limited or restricted thereby. There is no evidence that the mode, manner or way of operation of the respondent's business of "importing, processing and wholesaling bananas" was any different on one day of the week from another or that it was altered, limited or restricted in any way by reason of the fact that the operation was carried on for five days of the week and not for six days.

As to the reasonableness of the closing requirement, the evidence shows that the terminal was closed on Saturdays only after strong representations from the Association and at first was not closed on Saturdays throughout the year, as had been requested by the Association. It was only after a period of experiment, from December 1, 1956, to May 1, 1957, and a further period in the summer of 1957, that the Board decided that the wholesalers' portion of the

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terminal should be closed every Saturday throughout the year. It is clear that the Saturday closing requirement was favoured by the great majority of the tenants of the Board having premises in the terminal. In the light of these circumstances, it does not appear to me that it can be contended successfully that the requirement imposed by the Board could be considered as not being reasonable.

In my opinion, therefore, the requirement for Saturday closing did not involve a breach of the leases with the appellant, because such procedure was permissible under the clause of the leases which has just been considered.

It was contended, finally, by the appellant that, if the Board did have power to compel Saturday closing without breach of its leases, it could only do so, under the relevant clause, by means of a rule, regulation or by-law. It was then pointed out that no "rule", under s. 14 of the Act, had been filed pursuant to *The Regulations Act,* R.S.O. 1950, c. 337, until O. Reg. 17/57 was made and filed on February 1, 1957. Saturday closing had commenced on and after December 1, 1956, and during the period from that time until February 1, 1957, the only authority for closing had been the resolution of the Board made on November 23, 1956.

In my view, for the reasons already given, the Board had the necessary power to close its terminal without a legislative act. It did not have to make a regulation or a rule, under s. 13 or 14 of the Act, in order to do so. It is true that the clause of the leases refers to "rules, regulations or by-laws", but it must be remembered that at the time the leases were made ss. 13 and 14 of the Act did not exist. At that time the only regulations mentioned in the Act itself were those which could be made by the Minister of Agriculture.

In my opinion, the effect of the clause was to reserve to the Board, as a contractual right, the power to control the hours of business in the terminal. As between itself and the appellant as its tenant, it could make rules relating thereto without the necessity of resorting to the legislative authority which it subsequently acquired under ss. 13 and 14 of the Act. The resolution of the Board on November 23,

1956, was a "rule" within the meaning of the clause in the lease and it was passed as a part of the operation of the Board's business.

In my opinion, therefore, the appeal should be dismissed with costs.

Appeal dismissed with costs.

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Solicitors for the plaintiff, appellant: Fleming, Smoke & Burgess, Toronto.

Solicitors for the defendant, respondent: White, Bristol, Beck & Phipps, Toronto.

OSCAR THIBODEAU AND DAME ANITA BOURNE (*Plaintiffs*) ..... } APPELLANTS:

1960

*Oct. 24, 25
Dec. 19

AND

MARCEL THIBODEAU (*Defendant*) ....RESPONDENT.

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

Contracts—Sale—Annulment—Valid consent—Insanity—Civil Code, arts. 331, 332, 351, 831, 986.

To pronounce the nullity of a contract or a will on the ground of mental incapacity, it is not necessary that the party contracting or the testator be totally insane. The deed will be null for lack of valid consent if the person lacks the capacity to understand its significance; if the person lacks the will to appreciate the deed, to resist or consent to it; if by reason of a weakness of mind the person cannot evaluate the deed or its consequences; if, in one word, the person has no control over his mind.

Where the evidence discloses that the plaintiff, who is seeking the annulment of two deeds of sale by which he exchanged with the defendant a house for a grocery store, was mentally sick at the time although not insane, but was prevented by his weakness of mind from giving the valid consent required by art. 986 of the Civil Code, the deeds must be annulled.

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

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

[1] [1960] Que. Q.B. 960.

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THIBODEAU et al. v. THIBODEAU

J. G. Ahearn, Q.C., for the plaintiffs, appellants.

G. Laurendeau, Q.C., and *P. Champagne*, for the defendant, respondent.

The judgment of the Court was delivered by

TASCHEREAU J.:—Un court résumé des faits est essentiel pour la complète intelligence de cette cause.

Durant plusieurs années, l'appelant Oscar Thibodeau était propriétaire d'une épicerie, qu'il a vendue en subissant une perte d'environ $800. Il acheta alors une maison sur la rue Ste-Elizabeth à Montréal, pour laquelle il paya $11,000, mais en 1955, il vendit pour la somme de $20,000 une autre maison dont il était propriétaire sur la même rue. Le 28 juin de la même année, avec le produit de cette vente, par acte devant Lamarre N.P., il acheta d'Oscar Leduc une autre maison située sur la rue St-Hubert, pour le prix de $29,000, dont $13,000 furent payés comptant, et il assuma une hypothèque de $15,000 due par son vendeur. Quant à la balance de $1,000, il s'est engagé à la payer le ou avant le 1er janvier 1956.

Après avoir acheté cet immeuble de la rue St-Hubert, le demandeur l'échangea, le 13 septembre 1955, avec son frère Marcel Thibodeau, défendeur-intimé, et en considération de cet échange, il reçut un fonds de commerce ainsi désigné:

> Un certain fonds de commerce d'épicerie et de boucherie licencié, exploité au numéro 301 de la rue Gilford en la Cité de Montréal, comprenant tous les accessoires et toute la marchandise actuellement sur lesdits lieux, tous ses droits au bail actuel ainsi que tous ses droits dans le permis spécial émis en son nom par la Commission des Liqueurs de la Province de Québec permettant la vente de la bière.

Cet échange a été effectué sous la forme de deux actes de vente, en date du 13 septembre 1955. Dans l'un, Oscar Thibodeau, l'appelant, a vendu l'immeuble de la rue St-Hubert pour la somme de $29,000 dont $13,000 payés comptant. La balance de $16,000 devait être payable par l'acheteur intimé, jusqu'à concurrence de $14,700, à la Caisse Populaire de St-Jacques à l'acquit du vendeur, et $1,300 devaient être versés au domicile de l'appelant à raison de cent dollars par mois. Le montant de $16,000 était garanti par hypothèque sur l'immeuble vendu, en faveur d'Oscar Thibodeau.

Dans l'autre document portant la même date du 13 septembre 1955, l'intimé Marcel Thibodeau a vendu le fonds de commerce ci-dessus décrit et dont il était le propriétaire, pour la somme de $13,000; de sorte qu'il n'y a pas eu de paiements d'effectués. Ces deux montants de $13,000 qui étaient réciproquement dus, se sont mutuellement éteints par l'effet de la compensation. Il ne restait à l'acheteur intimé qu'à effectuer le paiement de $16,000, tel que je l'ai exprimé précédemment.

L'appelant Oscar Thibodeau a été interdit pour *démence* le 13 octobre 1955. La requête en interdiction a été présentée par sa belle-mère, Dame Georgiana Duford, et son épouse Anita Bourne Thibodeau a été nommée curatrice à son mari. Il est bon de noter, cependant, que le conseil de famille s'est divisé également sur la nécessité de cette interdiction.

Le 14 décembre 1955, Dame Anita Bourne, dûment autorisée par jugement de la Cour supérieure, a, en sa qualité de curatrice à son mari, institué contre Marcel Thibodeau, le présent intimé, des procédures légales pour faire annuler les deux actes notariés en date du 13 septembre 1955. Elle allègue que lorsque son mari les a signés, il souffrait de troubles mentaux qui l'empêchaient nécessairement de donner un consentement valide.

Le 21 mars 1956, alors que l'instance était pendante, à à la requête de Marcel Thibodeau, l'intimé dans la présente cause, l'honorable Juge Marier de la Cour supérieure, siégeant à Montréal, a cassé et annulé le jugement rendu par le Protonotaire le 13 octobre 1955, qui prononçait l'interdiction d'Oscar Thibodeau pour cause de démence. Procédant à rendre le jugement qui aurait dû être rendu par le Protonotaire, le juge a nommé Dame Anita Bourne, épouse de l'appelant, conseil judiciaire de son mari. *Code Civil,* arts. 331-332. L'appelant a dans la suite personnellement repris l'instance, avec l'assistance de son conseil judiciaire. C.C. 351.

Le juge au procès a conclu que le demandeur appelant a établi qu'au moment où il a signé les deux actes en date du 13 septembre 1955, devant Lamoureux N.P., et dont il demande la résiliation, il ne jouissait pas de toutes ses facultés mentales, et n'était pas en mesure de donner un

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Taschereau J.

consentement valide. La Cour du banc de la reine[1] (Taschereau et Choquette JJ. dissidents) a renversé cette décision, a rejeté l'action, et a maintenu que si l'appelant a donné en certaines circonstances des signes d'instabilité, ou a pris des attitudes bizarres, ou fut enclin à des périodes de mélancolie, ceci n'était pas suffisant pour annuler des contrats synallagmatiques, quand il n'y a pas de véritables indices d'aberration mentale.

L'action dans laquelle on demande la nullité des deux contrats, repose évidemment sur l'art. 986 C.C. qui veut que les personnes aliénées ou souffrant d'une *aberration temporaire* causée par maladie, accident, ivresse ou autre cause, ou qui, à raison de la *faiblesse de leur esprit,* sont incapables de donner un consentement valable, ne peuvent contracter.

Les tribunaux ont souvent eu l'occasion d'examiner cette question d'incapacité, et de se prononcer sur le degré d'aberration mentale que les parties doivent atteindre pour que les actes qu'elles posent soient frappés de nullité. Les jugements qui ont été rendus n'ont pas toujours porté sur la capacité mentale exigée lorsqu'il s'agit de la validité de contrats synallagmatiques. Le plus souvent, le litige portait sur la capacité mentale d'un testateur, mais je ne vois pas qu'il y ait lieu d'établir une différence entre la capacité de celui qui contracte, et celle de celui qui dispose par testament. C'est d'ailleurs ce que précise l'article 831 C.C. lorsqu'il conditionne la capacité de tester à la capacité d'aliéner ses biens.

La règle veut qu'il n'est pas nécessaire, dans un cas comme dans l'autre, pour que la nullité soit prononcée, que le signataire d'un document soit frappé d'insanité totale. La loi n'exige pas qu'il soit détenu dans un asile d'aliénés, ni même qu'il soit interdit ou ait besoin de l'assistance d'un conseil judiciaire. Si le contractant, ou le testateur, n'a pas la capacité de comprendre la portée de son acte, s'il n'a pas la volonté de l'apprécier, d'y résister ou d'y consentir, si à raison de la faiblesse de son esprit, il ne peut peser la valeur des actes qu'il pose ou les conséquences qu'ils peuvent entraîner, si en un mot il ne possède pas le pouvoir de contrôler son esprit, son acte sera nul faute de consentement

valide. Vide: *Baptist v. Baptist*[1]; *Russell v. Lefrançois*[2]; *Léger v. Poirier*[3]; *Rosconi v. Dubois*[4]; *Mathieu v. St-Michel*[5]; *McEwen v. Jenkins*[6].

Dans le cas qui nous occupe, la preuve révèle que le demandeur était sûrement un malade mental. Les actes dont on demande la nullité remontent au 13 septembre 1955. Avant cette date, il avait manifesté déjà des indices sérieux de dérangement et d'instabilité intellectuels. Le juge au procès les rapporte dans son jugement, et il constate de la contradiction dans les témoignages qu'il a entendus. Il relate cependant la version de plusieurs témoins qui affirment qu'au cours de l'année 1955, Oscar Thibodeau agissait de façon pour le moins étrange. Ainsi, il regrettait ses transactions immobilières, parlait seul, et suivait difficilement les conversations; il faisait des crises violentes, se projetait sur les murs, et se frappait la tête. Il se livrait à la mélancolie, pleurait souvent, s'arrachait les cheveux, et voulait même s'enlever la vie. Contre ces faits positifs, qui sûrement démontrent un déséquilibre mental, d'autres témoins ont déclaré l'avoir vu accidentellement durant 1955, et n'ont rien trouvé d'anormal.

Le 29 juin, c'est-à-dire près de trois mois avant la signature des actes, le Dr Rodrigue a été appelé en consultation, et il a constaté que l'appelant était un psycho-névrose, et il l'a référé à la clinique psychiatrique de l'Hôtel Dieu, où le Dr DesRochers lui a appliqué, durant le mois d'août 1955, un électro-choc, afin de calmer la dépression nerveuse. Thibodeau retourna alors chez lui où, le 13 septembre, il signa les documents attaqués, mais le 7 octobre, le Dr Archambault le fit entrer à l'Hôpital Maisonneuve. Ce médecin constata l'existence d'une psychose et remit le demandeur entre les mains du Dr Fernand Côté, un psychiatre qui le soigna jusqu'au 7 novembre 1955.

Le témoignage du Dr Côté a fortement impressionné l'honorable Juge André Demers. Il résulte de ce témoignage comme de celui du Dr Archambault, que Thibodeau, quoique sa santé fut substantiellement améliorée en novembre,

[1] (1894), 23 S.C.R. 37.
[2] (1883), 8 S.C.R. 335.
[3] [1944] S.C.R. 152, 3 D.L.R. 1.
[4] [1951] S.C.R. 554.
[5] [1956] S.C.R. 477, 3 D.L.R. (2d) 428.
[6] [1958] S.C.R. 719.

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ne pouvait pas en septembre 1955, donner un consentement valide. Le Dr MacKay, appelé par l'intimé, dit que la psychose est un état d'esprit où le patient est hors de contact avec la réalité, et par conséquent irresponsable. C'est cette preuve médicale qui a entraîné le juge au procès à croire que l'appelant n'avait pas la capacité mentale voulue pour donner un consentement libre.

Après avoir revu toute la preuve, j'en suis arrivé à la conclusion qu'il n'y a pas d'erreur, encore moins d'erreur manifeste dans le jugement de M. le Juge Demers. Il a vu et entendu tous les témoins; il a apprécié la valeur des témoignages rendus, et il m'est impossible de dire qu'il n'a pas eu raison. Thibodeau n'était pas un complet aliéné, mais il souffrait sûrement d'une faiblesse d'esprit qui l'a empêché de donner un consentement valide, et c'est ce qui fait que les actes attaqués doivent être annulés.

L'appel doit donc être maintenu, et le jugement du juge au procès rétabli. L'appelant aura droit à ses frais devant la Cour du banc de la reine et devant cette Cour.

Appeal allowed with costs.

Attorneys for the plaintiffs, appellants: Hyde & Ahern, Montreal.

Attorneys for the defendant, respondent: Champagne & Leblanc, Montreal.

ZAMBON COMPANY LIMITED (*Defendant*) ..... APPELLANT;

AND

ADRIANUS SCHRIJVERSHOF, SR. (*Plaintiff*) ..... RESPONDENT;

AND

JOHN ZAMBON AND GEORGETTE SICOTTE ..... MIS-EN-CAUSE

1960
*Oct. 27

1961
Feb. 7

ZAMBON COMPANY LIMITED (*Defendant*) ..... APPELLANT;

AND

GEORGETTE SICOTTE (*Plaintiff*) .....RESPONDENT;

AND

JOHN ZAMBON .....MIS-EN-CAUSE.

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

Master and servant—Negligence—Use of employer's motor vehicle to go out for supper and return to complete urgent work—Accident occurred while en route from home to pick up wife so that she could prepare meal—Whether employee in the performance of the work for which he was employed—Civil Code, art. 1054.

When an employee goes out for a meal, he acts for himself in his own interest and ceases consequently to be in the performance of the work for which he is employed, even if, in so doing, he uses with permission his employer's motor vehicle.

But when, as disclosed by the evidence in the present case, the employee is instructed to use the employer's vehicle to go out to supper and return immediately after to finish an urgent work, the employee is then acting in the interest or business of his employer and therefore is in the performance of the work for which he is employed within the meaning of art. 1054 of the *Civil Code*.

In such circumstances, the employer will be liable for any damage caused by the fault of the employee, unless the employee had converted the use of the vehicle to his own exclusive interest. No such conversion

*PRESENT: Taschereau, Locke, Fauteux, Martland and Ritchie JJ.

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of interest occurred when the employee, finding that his wife was not at home, had the accident while en route to pick up his wife so that she could prepare his meal. The least that can be said here is that the employee was not using the vehicle exclusively in his own interest, but equally and principally in his employer's interest.

APPEALS from two judgments of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], affirming two judgments of Demers J. Appeals dismissed.

A. J. Campbell, Q.C., and *G. Allison*, for the defendant, appellant.

R. Lette, for Schrijvershof, plaintiff, respondent.

H. P. Lemay, for Sicotte, plaintiff, respondent.

The judgment of the Court was delivered by

FAUTEUX J.:—Le 18 mai 1954, vers les 7 heures de l'après-midi, une collision se produisit à l'intersection des rues Blair et Champagneur, à Montréal, entre le camion de l'appelante, alors conduit par son employé John Zambon dans une direction est sur la rue Blair, et l'automobile de Georgette Sicotte, conduite par elle-même vers le nord sur la rue Champagneur. En soi insignifiante, cette collision eut de sérieuses conséquences. Mademoiselle Sicotte perdit contrôle et son véhicule alla s'écraser sur un immeuble sis au coin nord-est où elle-même et un enfant de quatre ans qui s'y trouvait, Adrianus Schrijvershof, furent grièvement blessés. Cet enfant dut, par la suite, subir l'ablation des deux jambes.

Deux actions en dommages furent intentées; l'une par Mademoiselle Sicotte contre la compagnie Zambon et son employé, et l'autre par le père et tuteur de la jeune victime contre les mêmes défendeurs et Mademoiselle Sicotte.

La partie demanderesse dans chacune de ces deux actions fit requête et obtint, sans objection de la défense, que la preuve soit commune et serve aux deux causes.

Au mérite, la Cour supérieure trouva faute chez les deux conducteurs de véhicules. Elle attribua deux-tiers de la responsabilité au conducteur du camion, en raison de la vitesse à laquelle il était venu dans l'intersection et de sa violation de la priorité de passage de Mademoiselle Sicotte,

[1] [1959] Que. Q.B. 679.

et un tiers à cette dernière pour n'avoir prêté aucune attention aux véhicules susceptibles de venir à sa gauche. La Cour rejeta la prétention de la compagnie Zambon voulant qu'au moment de cet accident, le conducteur de son camion, John Zambon, n'était pas dans l'exécution des fonctions auxquelles il était employé. La compagnie Zambon et son employé furent donc condamnés à payer à Mademoiselle Sicotte la somme de $2,390.58, représentant les deux-tiers des dommages subis par elle, et furent également condamnés, avec cette dernière, à payer au père et tuteur de l'enfant, la somme de $40,647.39, représentant le préjudice subi par l'enfant. Dans les deux cas, il va de soi, les défendeurs ont été condamnés conjointement et solidairement.

Portés en appel par la compagnie, ces deux jugements furent confirmés par décisions unanimes de la Cour du banc de la reine[1] laquelle jugea, comme le Juge de première instance, que les deux conducteurs des véhicules étaient responsables dans la proportion ci-dessus et qu'au moment de l'accident, John Zambon était dans l'exercice de ses fonctions.

L'appelante se pourvoit maintenant à l'encontre de ces deux jugements.

En cette Cour, comme en Cour d'Appel, seule la question de responsabilité demeure en litige.

L'appelante a soumis (i) que l'accident n'avait pas été causé par la négligence de son employé et (ii) que, de toutes façons, ce dernier n'était pas dans l'exécution des fonctions auxquelles il était employé, au moment où cet accident se produisit.

Sur le premier point. Il s'agit, en somme, d'une question de fait sur laquelle, comme déjà indiqué, les Juges de la Cour d'Appel ont été unanimes à partager la conclusion à laquelle en était arrivé le Juge de première instance. Cette conclusion est supportée par la preuve et, ainsi que les avocats des parties en ont été informés à l'audition, il n'y a pas lieu de la modifier.

[1] [1959] Que. Q.B. 679.

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Sur le second point, l'argument de l'appelante a porté tant sur l'interprétation des faits prouvés que sur le droit. Il convient donc de préciser, en premier lieu, les circonstances dans lesquelles et les raisons pour lesquelles l'appelante a, le soir en question, confié son camion à son employé.

La compagnie Zambon entreprend des travaux de marbre, tuile et terrazzo. Au temps qui nous intéresse, Dominique Zambon en était le président. C'est lui qui engageait le personnel et en dirigeait le travail. Lui-même participait activement aux travaux. Bref, il était le patron actif de l'établissement. John Zambon, son frère, y était régulièrement employé à titre d'estimateur des prix auxquels la compagnie entreprenait ces travaux. Comme les autres membres du personnel, il utilisait à l'occasion le camion de la compagnie. Le jour de l'accident, les deux frères avaient travaillé ensemble durant les heures régulières de travail à la préparation d'une soumission dont la remise au client devait être faite incessamment. Advenant 6.30 heures de l'après-midi, le patron jugea qu'il était nécessaire de poursuivre dans la soirée la tâche commencée et décida en conséquence que l'employé utiliserait le camion de la compagnie pour aller prendre son repas du soir, qu'il reviendrait à l'établissement le remplacer pour lui permettre, à son tour, d'aller souper, et que les deux, par la suite, continueraient ensemble la préparation de cette soumission. L'employé prit donc le camion pour se rendre chez lui, à 1045 rue Blair, où il constata, à son arrivée, qu'il n'y avait personne. Apprenant, à la maison voisine,—où demeure son frère Dominique—que sa femme était chez sa mère, à 7060 Boulevard Saint-Laurent, il lui téléphona pour l'informer qu'il devait travailler durant la soirée et qu'il allait immédiatement la quérir afin qu'elle puisse apprêter son repas. C'est en allant chercher sa femme à ces fins que l'accident se produisit.

L'appelante a soumis que, suivant l'interprétation qu'il convient donner à la preuve, c'est dans l'unique but d'accommoder son employé que le patron lui a permis d'utiliser le camion pour aller prendre son repas du soir. L'employé, ajoute-t-on, avait lui-même une voiture personnelle qui, subissant à ce temps des réparations, n'était pas en disponibilité.

Telle n'est pas l'interprétation donnée à la preuve par le Juge de la Cour supérieure et les Juges de la Cour d'Appel. Tous ont été d'accord à juger, en fait, que John Zambon avait reçu, de Dominique Zambon, instructions de prendre le camion pour hâter son retour au travail, qu'il s'en servait au temps de l'accident, non pas pour ses fins personnelles, mais dans l'intérêt de la compagnie dont le travail devait être poursuivi sans délai.

Seuls le patron, Dominique Zambon, et l'employé, John Zambon, ont témoigné sur le point.

Entendu au préalable, dans l'action intentée par Mademoiselle Sicotte, le premier rend le témoignage suivant:

EXAMINED BY MTRE H. P. LEMAY,

Attorney for Plaintiff:

Q. You are the President of the Defendant Company, Zambon Company Limited, also known as Zamzon Cie Limitée? A. Right.

Q. Do you actively work for the Defendant, Zambon Company Limited? A. Well, I am the President of the firm.

Q. And actively engaged in the performance of duties for that company? A. Yes, sir.

Q. In your capacity as President of the company, you hire personnel for the Zambon Company Limited? A. Right.

Q. Where is the office of the defendant located, Zambon Company Limited? A. 8815 Park Avenue.

.....

Q. Was the work finished in the afternoon? A. No, sir.

Q. Were you contemplating continuing the work in the evening? A. That's right.

Q. Were you expecting or had you instructed John Zambon to work with you in the evening also? A. That's right.

Q. Towards supper time did you tell him to go out for supper? A. I told him to go out for supper and I would wait for his return so I could go myself for supper.

Q. At the time of the accident the Ford Truck was being driven by your brother John Zambon? A. Yes.

Q. Was that the first time he was driving the truck, at the time of the accident? A. No, sir.

Q. You were instructing him from time to time to use the truck? A. Yes.

Q. Did you tell him to use the truck that evening to go out for dinner and come back as soon as possible? A. That is right.

CROSS-EXAMINATION
BY MTRE BEAULIEU

Attorney for Zambon Company Limited:

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Fauteux J.

Q. Did you have a specific time to submit your estimate? A. Right. We did.

.....

.....

Q. But the question is did you instruct your brother to take that truck that evening? A. Yes, sir.

Q. You told him?—A. That's right, I told him to pick up the truck and go for supper and to replace me afterwards.

Le second, examiné au préalable, dans l'action prise par le tuteur et père de la jeune victime, donne sur la question le témoignage qui suit:

EXAMINED BY MR. J. DUPRE, Q.C.,
Attorney for Plaintiff:
MR. DUPRE:

.....

Q. At the time you were driving the truck, were you in the exercise of your functions? A. I was.

Q. As an employee of the defendant company, Zambon Co. Ltd.? A. I was.

Q. You were, at the time, driving that truck for the use of the company? A. That's right.

Q. And, in the exercise of . . . A. My work.

Q. (Continuing) . . . your work? A. That's right.

.....

Q. Was it agreed with your employers that you would go for supper and go back to the office? A. I was instructed to by him to go for supper and then return to the office to relieve him, for him to go to supper and then return to the office also and with him continue with our work.

.....

Au procès, le même témoin est questionné par la Cour:

MR. JUSTICE DEMERS:

Q. Your brother told you to take the truck, go and have supper and come back to work? A. That is right, yes.

Ces témoignages, et plus particulièrement celui donné par Dominique Zambon en réponse aux questions posées par le procureur même qui alors représentait l'appelante, supportent clairement la conclusion à laquelle en sont venus tous les Juges des Cours inférieures sur l'interprétation de la preuve. En obéissance aux instructions du patron, l'employé était tenu de travailler dans la soirée. Il devait revenir immédiatement après son souper remplacer son

patron afin que celui-ci puisse à son tour, aller prendre son repas, et les deux, par la suite, poursuivre ensemble le travail commencé. C'est pour assurer la continuation, hâter la reprise conjointe d'un travail pressant de la compagnie appelante que le patron donna instructions à l'employé d'utiliser le camion afin de faire, en moins de temps, la course nécessaire pour aller prendre son repas. Bref, si l'on peut dire généralement qu'en allant prendre un repas, l'employé fait son affaire, l'appelante, en l'espèce, faisait la sienne et agissait dans son intérêt en lui donnant instructions de se servir du camion dans les circonstances et pour les fins ci-dessus.

Voilà les faits qui se dégagent, en substance, des témoignages acceptés par les deux Cours et qu'elles ont retenus comme représentant la véritable situation de fait dont elles avaient à juger en droit.

En droit. L'employé qui, conformément aux instructions, dans l'intérêt ou pour faire l'affaire de son patron, en utilise l'automobile, agit, en ce faisant, dans l'exercice des fonctions à l'exécution desquelles il est employé, au sens du dernier paragraphe de l'art. 1054 C.C. Et si, en de telles circonstances, il commet, dans la conduite de l'automobile, une faute causant du dommage à autrui, il engage la responsabilité de l'employeur, à moins qu'il n'apparaisse qu'au moment de l'accident, il avait absolument fait sienne la possession qu'il avait légalement obtenue de l'automobile en la convertissant à son usage exclusif. Ces règles bien établies par la jurisprudence reçoivent leur application en l'espèce. On en trouve l'expression dans *Moreau v. Labelle*[1] où sont citées et commentées plusieurs décisions sur la question. Voir aussi *Gagnon v. Deroy*[2], où les Juges de cette Cour, bien que se divisant sur l'interprétation des faits, sont d'accord sur les principes de droit. On peut considérer qu'en se servant du camion dans les circonstances, l'employé bénéficiait d'une accommodation pour aller prendre son repas et revenir au travail. Ce n'est pas à cette fin personnelle, cependant, que l'usage lui en avait été donné. Et le moins que l'on puisse dire, c'est que l'employé ne s'en servait pas exclusivement pour ses propres fins mais également

[1] [1933] S.C.R. 201, [1934] 1 D.L.R. 137. [2] [1958] S.C.R. 708.

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et principalement dans l'intérêt et pour faire l'affaire de l'appelante. En de telles circonstances, la responsabilité de celle-ci demeure. *Jarry v. Pelletier*[1].

Au soutien de ses prétentions, l'appelante a invoqué, en Cour du banc de la reine comme en cette Cour, plusieurs décisions. M. le Juge Choquette, de la Cour d'Appel, y réfère dans ses notes et, d'accord avec lui, je dirais que dans chacune de ces causes, la situation de faits diffère de celle qui nous occupe. La plupart, au surplus, sont des décisions rendues sous le régime du droit de la Common Law. Les règles de droit qui se dégagent de toutes ces causes ne viennent aucunement en conflit avec les principes qui doivent nous guider, en l'espèce, et qui ont été expliqués par cette Cour dans *Moreau v. Labelle, supra,* et *Gagnon v. Deroy, supra.* On peut ajouter, bien qu'il ne soit pas nécessaire, que la règle pertinente sous la Common Law ne vient pas en conflit avec celle qui, sous le droit civil de Québec, s'applique à l'instance. Dans *Ormrod and Another v. Crosville Motor Services Ltd. and Another. Murphie, Third Party*[2], Lord Denning, à la page 1123, déclare ce qui suit:

.....

> The law puts an especial responsibility on the owner of a vehicle who allows it out on to the road in charge of someone else, no matter whether it is his servant, his friend, or anyone else. If it is being used wholly or partly on the owner's business or for the owner's purposes, then the owner is liable for any negligence on the part of the driver.

.....

Enfin, l'appelante a soumis que même si le conducteur du camion doit être considéré comme ayant été dans l'exécution des fonctions auxquelles il était employé au moment où il se dirigeait chez lui, il ne l'était plus dès l'instant où il partit de chez lui pour aller quérir son épouse. A l'appui de cette prétention, on a référé à *Moreau v. Labelle, supra,* et *Dallas v. Home Oil Distributors Limited*[3]. Les instructions de l'appelante étaient d'utiliser le camion pour aller souper. Rien dans la preuve ne suggère qu'en agissant comme il l'a fait dans les circonstances, l'employé ait, contrairement aux instructions qu'il avait reçues, fait sienne la possession qu'il avait légalement obtenue du camion en le

[1] [1938] S.C.R. 296.
[2] [1953] 1 W.L.R. 1120, 1 All E.R. 711.
[3] [1938] S.C.R. 244, 2 D.L.R. 673.

convertissant à son usage exclusif. Il a fait normalement, au contraire, ce qui, dans les circonstances, était devenu nécessaire pour y satisfaire.

Etant d'avis que les deux jugements de la Cour du banc de la reine sont bien fondés, je renverrais les deux appels avec dépens.

Appeals dismissed with costs.

Attorneys for the defendant, appellant: Walker, Chauvin, Walker, Allison & Beaulieu, Montreal.

Attorneys for the plaintiff, Schrijvershof: Duranleau, Dupré, Duranleau, Lette & Cousineau, Montreal.

Attorneys for the plaintiff, Sicotte: Lemay, Poulin & Corbeil, Montreal.

ALCYON SHIPPING CO. LTD. (*Defendant*) ..... APPELLANT;

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*Jan. 25, 26
Mar. 27

AND

FRED O'KRANE (*Plaintiff*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Labour—Workmen's compensation—Subrogated action by Workmen's Compensation Board—Whether action lies—Determination of certain matters by Board—Board's exclusive jurisdiction—Workmen's Compensation Act, R.S.B.C. 1948, c. 370, ss. 11(3), 12(1) and (4), 76.

The plaintiff was injured while working as a longshoreman in the employment of a stevedoring company which was loading lumber on a ship owned by the defendant shipping company. The latter was incorporated under the laws of Greece with head office in Athens. The cause of the injury was the breaking of a rung in a steel ladder attached to the hull of the ship. The workman claimed and was awarded compensation under the *Workmen's Compensation Act* of British Columbia, and subsequently the Board, acting under the right of subrogation given to it by s. 11(3) of the Act, brought an action in the name of the workman and claimed damages for the injury.

*PRESENT: Taschereau, Locke, Martland, Judson and Ritchie JJ.

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After the writ was issued and before the action was tried, the Board held a hearing and found, *inter alia*, that the defendant company was not an employer within the scope of Part I of the Act, and that the action against the defendant was one the right to which was not taken away by Part I. These findings were filed at trial, where judgment was given in favour of the plaintiff. The Court of Appeal dismissed the appeal and the defendant then appealed to this Court.

Held: The appeal should be dismissed.

The matters whether the defendant company was an employer within Part I of the *Workmen's Compensation Act* and whether the right to bring the action had been taken away were conclusively determined by the Board, and that Board had exclusive jurisdiction in these matters whether before or after the institution of an action. With respect to whether it was an employer within Part I of the Act, the defendant's submission that the Board may determine this matter in the administration of the Act but that nothing done in the administration of the Act can preclude an independent determination of the problem by the Court was rejected. *The Dominion Canners Ltd. v. Costanza,* [1923] S.C.R. 46, discussed and followed.

It was questionable whether, as claimed by the defendant, the Board's assertion of a workman's common law rights in an action such as this could be characterized as an invalidating interest in any decision which the Board might make in the performance of its statutory duties, but interest or no interest, this was expressly what the Board was authorized to do by the plain terms of the Act and no such limitation could be imposed on the plain meaning of the Act.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], affirming a judgment of Lett C.J.S.C. Appeal dismissed.

Hugo Ray, Q.C., and *W. J. Walker,* for the defendant, appellant.

Ray Anderegg, for the plaintiff, respondent.

The judgment of the Court was delivered by

JUDSON J.:—The appellant is a corporation incorporated under the laws of Greece and has its head office in Athens. It is the owner of the freighter *Eleni D.* In April 1953 this ship docked in Tahsis, B.C., to take on a cargo of lumber. The respondent was injured while working as a longshoreman in the employment of the stevedoring company which was loading lumber on the ship. The cause of his injury was the breaking of a rung in a steel ladder attached to the hull of the ship. The stevedoring company was an employer

[1] (1960), 24 D.L.R. (2d) 119, 32 W.W.R. 178.

within the meaning of Part I of the *Workmen's Compensation Act,* R.S.B.C. 1948, c. 370. The workman claimed and was awarded compensation under the Act, and subsequently the Board, acting under the right of subrogation given to it by s. 11(3) of the Act, brought an action in the name of the workman and claimed damages for the injury.

The only defence argued by the shipping company on this appeal was that this action does not lie because it is an employer within Part I of the Act. If it is, the right of action of the workman is taken away by s. 11(4) of the Act. At trial the workman recovered judgment for $21,548.60. The Court of Appeal[1] dismissed the appeal and the shipping company now appeals to this Court.

The writ was issued on September 6, 1956. Two years later, on September 15, 1958, and before the action was tried, the Board held a hearing at which both sides were present and made the following findings:

> THIS BOARD DOES FIND AND DETERMINE that on April 30, 1953, Tahsis Company Ltd., was an employer in or about an industry within Part I of the Workmen's Compensation Act; that on April 30, 1953, the Plaintiff was a workman within the scope of Part I of the said Act; that on the date aforesaid the Plaintiff sustained personal injuries by accident arising out of and in the course of his employment with Tahsis Company Ltd.; that on the date aforesaid Alcyon Shipping Co. Ltd. was not an employer in or about an industry within the scope of Part I of the Workmen's Compensation Act.
>
> AND THIS BOARD DOES FIND AND DETERMINE that the said action against the Defendant Alcyon Shipping Co. Ltd. is one the right to bring which is not taken away by Part I of the said Workmen's Compensation Act.

When the action came on for trial on March 11, 1959, these findings were filed before the learned trial judge.

It will be seen that the Board made five findings. The two that are attacked on this appeal are the last two, namely: (a) that Alcyon was NOT an employer in or about an industry within the scope of Part I of the *Workmen's Compensation Act,* and (b) that the action against Alcyon is one the right to bring which is NOT taken away by Part I of the Act.

The learned trial judge held that he was precluded by the Board's determination from entering into any inquiry whether the shipping company was an employer within the

[1] (1960), 32 W.W.R. 178, 24 D.L.R. (2d) 119.

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scope of Part I of the Act and whether the right to bring the action was one which was taken away by Part I of the Act. In the Court of Appeal, Smith J.A. took the same view. Davey J.A. expressed doubt concerning the jurisdiction of the Board to make this finding but he held that it was unnecessary to make a final determination on this matter because he came to the same conclusion of fact as the Board, namely, that this shipping company was not an employer within Part I of the Act, the *Workmen's Compensation Act* not applying to foreign ship owners. On this appeal the shipping company says that the Court, and the Court alone, should have made the determination whether the shipping company was an employer within Part I of the *Workmen's Compensation Act* and whether the right to bring the action had been taken away.

I would dismiss the appeal but on the grounds given by the learned trial judge and the minority opinion in the Court of Appeal, namely, that these two matters were conclusively determined by the Board and that the Board had exclusive jurisdiction in these matters whether before or after the institution of an action.

The scheme of the Act is well-known by this time. Most industries are under Part I of the Act and if a workman employed in one of these industries is injured in the course of his employment, he has no right of action against his employer but must claim compensation. This is the simplest situation. Not only this, the right of action is taken away against any other employer within Part I of the Act. This follows from s. 11(4), which reads:

> (4) In any case within the provisions of subsection (1), neither the workman nor his dependent nor the employer of the workman shall have any right of action in respect of the accident against an employer in any industry within the scope of this Part;

Therefore, no employer within Part I of the Act whether or not he is the employer of the particular workman may be sued for an accident arising out of and in the course of the employment.

But the workman may have a right of action against a person who is not his employer or another employer within Part I of the Act. This is dealt with by s. 11(1) of the Act:

> 11. (1) Where an accident arising out of and in the course of his employment happens to a workman in such circumstances as entitle him or his dependents to an action against some person other than his employer

and other than an employer in an industry within the scope of this Part or against the Crown, the workman or his dependents, if entitled to compensation under this Part, may claim such compensation or may bring such action.

The present action is brought under the provisions of s. 11(3) of the Act. This injured workman did claim compensation and the Board awarded it. In consequence the Board was entitled to be subrogated to the rights of the workman and it brought this action in the name of the workman as authorized by the subsection:

11. (3) If any such workman or his dependents makes application to the Board claiming compensation under this Part, neither the making of such application nor the payment of compensation thereunder shall restrict or impair any such right of action against the party or parties liable, but as to every such claim the Board shall be subrogated to the rights of the workman or his dependents and may maintain an action in his name or their names or in the name of the Board, and if more is recovered and collected than the amount of the compensation to which the workman or his dependents would be entitled under this Part, the amount of the excess, less costs and administration charges, may be paid to the workman or his dependents.

The other relevant sections of the Act are ss. 12(1) and 12(4) and 76. They provide:

12. (1) The provisions of this Part shall be in lieu of all rights and rights of action, statutory or otherwise, to which a workman or the members of his family are or may be entitled against the employer of such workman for or by reason of any accident happening to him or any industrial disease contracted by him on or after the first day of January, 1917, while in the employment of such employer, and no action in respect thereof shall lie.

12. (4) Where an action in respect of an injury is brought against an employer by a workman or a dependent, the Board shall have jurisdiction upon the application of any party to the action to adjudicate and determine whether the action is one the right to bring which is taken away by this Part, and such adjudication and determination shall be final, and conclusive; and if the Board determines that the action is one the right to bring which is taken away by this Part the action shall be for ever stayed.

Section 76 provides:

(1) The Board shall have exclusive jurisdiction to inquire into, hear, and determine all matters and questions of fact and law arising under this Part, and the action or decision of the Board thereon shall be final and conclusive and shall not be open to question or review in any Court . . .

The shipping company complains that the Board had no jurisdiction to determine that it was not an employer within Part I of the Act so as to preclude the independent

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determination of this problem in the Supreme Court of British Columbia. It says that the Board may determine this matter in the administration of the Act but that nothing done in the administration of the Act can preclude an independent determination by the Court.

In my opinion there is a conclusive decision of this Court adverse to this submission in the case of *Dominion Canners v. Costanza*[1]. This case was decided under the provisions of the Ontario *Workmen's Compensation Act* but there are no differences between the Ontario Act and the British Columbia Act in scheme, structure or wording which would affect the application of the decision to the British Columbia Act.

In the *Costanza* case the workman sued his employer for damages caused by negligence. He obtained judgment at trial and an appeal by the employer failed. The Ontario Courts ruled that this was not an action the right to bring which was taken away by *The Workmen's Compensation Act* because the injury of which the workman complained was not an accident within the meaning of the Act. Not until after the judgment of the Court of Appeal was there any reference to the Board for a determination of this matter in spite of the fact that the defendant had pleaded that the plaintiffs ought to apply to the Board for a determination. It had not, however, pleaded that the Board had exclusive jurisdiction. After the judgment of the Court of Appeal the plaintiffs did so apply *ex parte* and the Board decided that the accident was not one arising out of and in the course of employment. The consequence of this finding was that the workman's right of action was not taken away by the Act. This was the position when the case reached this Court where the judgment was that the Board had exclusive jurisdiction in this matter. This Court had before it the *ex parte* order made by the Board. The proceedings on the appeal were stayed pending the determination of the matter by the Board in a proper proceeding on notice to the defendant. This was an explicit recognition of the exclusive jurisdiction of the Board.

As far as I know, this principle has never been in doubt since this decision. If it is departed from it will involve a serious breach in the administration of the *Workmen's*

[1] [1923] S.C.R. 46, 1 D.L.R. 551.

Compensation Acts across the country. The Acts were drawn as they are to avoid "the waste of energy and expense in legal proceedings and a canon of interpretation governed in its application by refinement upon refinement leading to uncertainty and perplexity in the application of the Act." (Per Duff J. in *Dominion Canners Limited v. Costanza, supra,* at p. 54)

The shipping company questions the application of the *Costanza* case on the ground that the Board has an interest in its own decision when it is asserting the rights of a workman against a third party by way of subrogation under s. 11(3) of the Act. Such a situation, it is urged, should suggest to the Court a limitation of the Board's powers of exclusive decision to those cases where it has no interest—and this as a matter of interpretation and not by way of attack on the constitutional validity of the legislation. I question whether the Board's assertion of a workman's common law rights in an action such as this can be characterized as an invalidating interest in any decision which the Board may make in the performance of its statutory duties, but interest or no interest, this is expressly what the Board is authorized to do by the plain terms of the Act and no such limitation can be imposed on the plain meaning of the Act.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the defendant, appellant: Bull, Houser, Tupper, Ray, Guy & Merritt, Vancouver.

Solicitors for the plaintiff, respondent: Howard & Anderegg, Vancouver.

1961

*Mar. 10
Mar. 20

PHILIPPE FERLAND (*Creditor*) .....APPLICANT;

AND

HECTOR DESJARDINS (*Debtor*) .....RESPONDENT;

AND

GERARD BLAIS (*Trustee*) .....MIS-EN-CAUSE.

MOTION FOR LEAVE TO APPEAL

Jurisdiction—Appeal—Bankruptcy—Extension of time for applying for leave to appeal—The Bankruptcy Act, 1949 (Can.), 2nd Sess., c. 7, ss. 2(g), 144 (11), 151 (R.S.C. 1952, c. 14, ss. 2(g), 144 (11), 151)—Bankruptcy Rules 50, 53, 54, 105.

A judge of this Court has no jurisdiction to extend the time, prescribed by Rule 53 of the General Rules established under the *Bankruptcy Act*, for applying for leave to appeal to this Court from the decision of a Court of Appeal rendered in a bankruptcy matter.

No such jurisdiction can be found in Rule 53 governing appeals to this Court, nor can it be validly derived from the Rules of this Court which in bankruptcy matters are subject to Rule 53.

APPLICATION for leave to appeal and for an extension of time to make such application from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec, in a bankruptcy matter. Application dismissed.

R. Quain, Q.C., for the applicant.

C. Beland, for the respondent.

FAUTEUX J. (in chambers):—This is an application, in a bankruptcy matter, for special leave to appeal from a decision made, on the 15th of November, 1960, by the Court of Appeal for the Province of Quebec.

The relevant provisions of the *Bankruptcy Act*, 1949, and of the General Rules established thereunder on the 16th day of December 1954, (P.C. 1954-1976) are respectively:

Section 151 of the Act:

The decision of the Court of Appeal upon any appeal is final and conclusive unless special leave to appeal therefrom to the Supreme Court of Canada is obtained from a judge of that court.

Rule 53:

An application for special leave to appeal from a decision of a Court of Appeal and to fix the security for costs, if any, may be made to a Judge of the Supreme Court of Canada within 60 days after the date of the decision appealed from and notice of the application shall be served on the other party at least 14 days before the hearing thereof.

*PRESENT: Fauteux J. in chambers.

Rule 54:

Subject to section 53, appeals to the Supreme Court of Canada shall be regulated as nearly as may be by the rules of that Court relating to appeals in civil actions or matters.

Section 53, referred to in Rule 54, is manifestly Rule 53 above and not section 53 of the Act which deals with the effect of sales of property by the trustee.

Dated the 12th of January, 1961, the present application was served on the 6th of March, 1961, filed two days later with the Registrar of this Court, and came for hearing on the date indicated in the notice of application, to wit, on the 10th of March, 1961. The material date according to Rule 53 is not that of the application or of its filing with the Registrar, but the date when it is actually made to a Judge of this Court. *In re Boivin v. Larue*[1]. Thus it appears that the application was not made within the delay of sixty days specified in Rule 53. This delay was expired on the 15th of January, 1961. For this reason, counsel for the applicant also demanded that the time set in Rule 53 be extended. Counsel for respondent consented to the granting of this request. The trustee was not represented and the material does not show that he received notice of the application.

As jurisdiction cannot be acquired by consent, the question to be determined is whether a power to extend the time for applying for leave to appeal to this Court from a decision of a Court of Appeal, rendered in a bankruptcy matter, is in the jurisdiction of a Judge of this Court.

A right of appeal is a right of exception which exists only when authorized by statute. *Okalta Oils Limited v. Minister of National Revenue*[2]. Substantive and procedural provisions related to the exercise of this right, when given, are generally regarded as exhaustive and exclusive. This need not be expressly stated in the statute authorizing the appeal; it necessarily flows from the exceptional nature of this right. *Welch v. The King*[3].

[1] [1925] S.C.R. 275, 5 C.B.R. 790, 3 D.L.R. 311.
[2] [1955] S.C.R. 824, 55 D.T.C. 1176, [1955] C.T.C. 271, 5 D.L.R. 614.
[3] [1950] S.C.R. 412, 97 C.C.C. 177, 10 C.R. 97, 3 D.L.R. 641.

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With respect to appeals to the Court of Appeal in bankruptcy matters, a power to extend the time within which an appeal may be brought is given in the following rule:

Rule 50(1). No appeal to the Court of Appeal shall be brought unless notice thereof is filed with the Registrar and served within ten days after the day of the order or decision appealed from or within such further time as a Judge of the Court of Appeal allows.

A power to extend time, however, cannot be found in Rule 53 governing appeals to the Supreme Court of Canada. Nor can it be validly derived from the Rules of this Court which, as provided by Rule 54 of the *Bankruptcy Act,* regulate appeals to this Court in bankruptcy matters, subject, however, to the provisions of Rule 53.

Rule 53 corresponds to and is in terms similar to the 1949 Rule 65(1) and to the pre-1949 Rule 72(1). In all the reported decisions in this Court, with respect to pre-1949 Rule 72(1), it was held that the power to extend the delay specified in the statutory rule was not in the jurisdiction of a Judge of this Court. *In re Boivin v. Larue, supra*; *In re North Shore Trading Company*[1]; *In re Louis Webber*[2]. It was also decided that a Judge of the Supreme Court of Canada is not empowered to abridge the delay of fourteen days specified in statutory Rule 50. *In re Hudson Fashion Shoppe*[3].

In re North Shore Trading Company, supra, Migneault J. made the following comments at the bottom of page 181:

I must say, however, that I think General Rule 72 should be amended so as to give a Judge of this Court the power to extend the time for application for leave to appeal either before or after the expiration. It seems incongruous and it adds to the costs as well as delays the proceedings, to oblige an applicant to go back to the trial Court to obtain an extension of the time specified by Rule 72. I may add that Rule 68 governing appeals to the Appeal Court gives a like power to a Judge of the Court of Appeal.

The relevant part of Rule 68, referred to by Migneault J., was paragraph (1) of the Rule, the provisions of which are literally the same as those of the 1949 Rule 62(1) and those of present Rule 50. Notwithstanding the amendment suggested by Migneault J., and the fact that since that decision, the Bankruptcy Rules have twice been subjected to revision, the Rule governing appeals to this Court has

[1] [1928] S.C.R. 180.
[2] [1931] S.C.R. 498, 4 D.L.R. 244.
[3] [1926] S.C.R. 26.

not been changed. Nor has there been, up to this time, any reported cases in this Court showing that the views expressed in the above quoted decisions have been modified. See also Bradford & Greenberg's Canadian Bankruptcy Act, 3rd ed., p. 322, as to 1949 Rule 65(1), and Houlden and Morawetz, Bankruptcy Law of Canada, p. 342, as to present Rules 53 and 54.

In a memorandum filed subsequent to the hearing, counsel has referred to s. 144(11) of the *Bankruptcy Act* and also to Rule 105 made thereunder, as affording support to the application.

144(11). Where by this Act, the time for doing any act or thing is limited, the Court may extend the time either before or after the expiration thereof upon such terms, if any, as it thinks fit to impose.

A like submission has previously been made, but it was rejected by Migneault J., in the case of *In re North Shore Trading Co., supra,* and by Cannon J., in the case of *In re Webber, supra.* Referring to the definition of the word "court", then appearing in s. 2(*l*), and now in s. 2(*g*), both of them held that the power given in s. 163(5), the predecessor to s. 144(11), was in the Court vested with original jurisdiction in bankruptcy under the Act. The original and amended definition of the word "court" read:

s. 2(l). "Court" or "the Court" means the Court which is invested with original jurisdiction in bankruptcy under this Act.

s. 2(g). "Court" means the Court having jurisdiction in bankruptcy or a Judge thereof and includes a registrar when exercising the powers of the Court conferred upon him under this Act.

While s. 2(*g*) has widened the original definition of the word "Court" in order to include Judges and Registrars, the section does not purport to constitute the Supreme Court of Canada as "*the* Court having jurisdiction in bankruptcy . . .", even though under and in the terms of s. 140(3), this Court "has jurisdiction to hear and to decide according to its ordinary procedure any appeal so permitted and to award costs."

It may be added that the opening words of s. 163(5) were: "Where by this Act or by General Rules" and that the words "or by General Rules" have been deleted in s. 144(11).

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Rule 105:

Non-compliance with any of these rules or with any rule of practice shall not render any proceeding void unless the court so directs, but the proceeding may be set aside, either wholly or in part, as irregular, or amended or otherwise dealt with in such manner and upon such terms as the court considers necessary or desirable.

This Rule corresponds to 1949 Rule 120 and pre-1949 Rule 168 and is, in terms, literally similar to the former and substantially similar to the latter.

If, as I think, the power to extend the time for applying for leave to this Court from a decision of a Court of Appeal rendered in a bankruptcy matter, is not in the jurisdiction of a Judge of this Court, Rule 105 is not, in my opinion, apt *per se* to confer such a jurisdiction.

It is appropriate to say, I think, that I have considered the grounds raised in support of the application for special leave to appeal, the reasons for judgment delivered in the Court of Appeal and the sections of the *Bankruptcy Act* having relevancy on the merits of the application. Even if I had jurisdiction, I would not, under all the circumstances, be justified to grant leave.

The application is dismissed with costs.

Motion dismissed with costs.

Attorneys for the creditor, applicant: Quain & Quain, Ottawa.

Attorneys for the debtor, respondent: Badeaux, Filion & Beland, Montreal.

1961

*Feb. 1, 2
Mar. 27

ST. MARY'S PARISH CREDIT UNION LIMITED (*Defendant*) — APPELLANT;

AND

T. M. BALL LUMBER COMPANY LIMITED (*Plaintiff*) ..... — RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Real property—Filing of caveat by equitable mortgagee with knowledge of prior unregistered equitable mortgage—Priority as between equitable mortgages—Subsequent registered mortgage—Question of merger—The Land Titles Act, R.S.S. 1953, c. 108, ss. 65(1)(2), 71, 138, 145.

*PRESENT: Kerwin C.J. and Locke, Martland, Judson and Ritchie JJ.

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Z, a building contractor, pledged the title to his house property by way of equitable mortgage in favour of the defendant credit union "to secure the repayment of $2,000 and any moneys borrowed" by him from the defendant. The duplicate certificate of title was deposited with the defendant pursuant to this agreement. In the course of his business Z made purchases of building materials from the plaintiff and became indebted to it for the purchase price. Security was asked for this debt and Z, after telling the plaintiff that there was a mortgage in favour of the credit union, and that it had the duplicate certificate of title, executed an equitable mortgage upon "his equity in" the land in favour of the plaintiff. The latter filed a caveat claiming an interest in the land by virtue of its mortgage.

Subsequently Z executed, in favour of the credit union, a mortgage in registrable form, under *The Land Titles Act,* which was later registered. The plaintiff commenced action against Z, and the credit union was added as a party defendant. The plaintiff sought a declaration that it had a valid charge against the land and foreclosure of its mortgage. At trial judgment was given in favour of the plaintiff, and this judgment was sustained by a majority in the Court of Appeal. The credit union appealed to this Court.

Held: The appeal should be allowed, the judgment at trial should be set aside and the appellant should be entitled to a declaration that its equitable mortgage had priority over that of the respondent.

In addition to priority as to time, the defendant's mortgage ranked ahead of that of the plaintiff because of the form of the latter mortgage, which was not drafted as a registrable mortgage under *The Land Titles Act,* but only purported to charge Z's equity in the land. The defendant had a valid equitable interest in the land at the time that the plaintiff took the mortgage of Z's equity. The wording of the plaintiff's mortgage took the form which it did because both Z and the plaintiff knew of the existence of the defendant's equitable mortgage and intended that Z could only mortgage his remaining equitable interest in the land.

The two equitable mortgages which were in competition here were not the same. That of the plaintiff, by its terms, was expressly limited to a charge upon "my equity". It was, therefore, a mortgage of only a limited interest in the land. The filing of the caveat could not create a charge upon more than that which had been charged by Z under the terms of the instrument itself. Stated at its highest, the plaintiff's position after registration of the caveat could only be the same as if the equitable mortgage itself could have been and had been registered as an instrument under the Act. According to the tenor and intent of that document it only constituted a mortgage upon a partial interest in the land.

Jellett v. Wilkie (1896), 26 S.C.R. 282, followed; *Hackworth v. Baker,* [1936] 1 W.W.R. 321; *Clark v. Barrick,* [1949] 2 W.W.R. 1009, explained; *Bank of Hamilton v. Hartery* (1919), 58 S.C.R. 338; *Davidson v. Davidson,* [1946] S.C.R. 115; *Church v. Hill,* [1923] S.C.R. 642; *McKillop & Benjafield v. Alexander* (1912), 45 S.C.R. 551, referred to.

With respect to the question of merger, the defendant could not be considered to have intended to surrender a prior interest, in favour of the plaintiff's subsequent interest, by the taking of the legal mortgage in substitution for its existing security. It could not, in the circum-

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stances, have intended to effect a merger of its two securities. Even if a merger were held to have occurred that would not automatically increase the interest granted to the plaintiff by the terms of its mortgage. At no time did Z have a complete interest in the land which he could mortgage to the plaintiff by a mortgage of "his equity", because at all times there existed a charge on the land in favour of the defendant. This situation continued, even if it were held that a merger had taken place. *Ghana Commercial Bank v. Chandiram,* [1960] 2 All E.R. 865, referred to.

APPEAL from a judgment of the Court of Appeal for Saskatchewan[1], affirming a judgment of Davis J. Appeal allowed.

D. A. Schmeiser, for the defendant, appellant.

James L. Robertson, for the plaintiff, respondent.

The judgment of the Court was delivered by

MARTLAND J.:—Anton Zirtz, who was a building contractor carrying on business in Saskatoon, borrowed money from the appellant in order to build his own house and to assist him in his business. On June 14, 1957, he executed, in favour of the appellant, a "Pledge of Title" by way of equitable mortgage upon his house property, comprising Lots 27 to 30 inclusive, in Block 28, in the city of Saskatoon, according to plan of record in the Land Titles Office for the Saskatoon Land Registration District as No. G. 131 (hereinafter referred to as "the land"), "to secure the repayment of $2,000 and any moneys borrowed" by Zirtz from the appellant. The duplicate certificate of title for the land was deposited with the appellant pursuant to this agreement. In addition to the $2,000 mentioned in the agreement, $4,400 was loaned by the appellant to Zirtz after June 14, 1957, and prior to June 19, 1958.

In the course of his business Zirtz made purchases of lumber and other building supplies from the respondent and became indebted to it for the purchase price. The respondent asked for security for this debt and Zirtz, on June 19, 1958, executed an equitable mortgage, in favour of the respondent, upon the land. This document recited a present indebtedness in excess of $26,000 and that the respondent had requested Zirtz to give a charge and mortgage on his equity in the land for the sum of $6,000 as collateral security for his indebtedness as well as for any

[1] (1960), 32 W.W.R. 97, 24 D.L.R. (2d) 284.

moneys which might become owing to the respondent for lumber and supplies purchased by Zirtz. It then went on to provide:

> NOW THEREFORE the debtor does hereby charge and mortgage his equity in said Lots 27 & 28, in Block 28, Plan G. 131, Saskatoon, Saskatchewan, to the extent of $6,000 to the Company as collateral security for payment of the lumber and builder's supplies heretofore purchased by the debtor from the Company or which may hereafter be purchased by him from the Company;

It is conceded that this document was not a registrable mortgage under *The Land Titles Act* of Saskatchewan, R.S.S. 1953, c. 108, which was in force at all times material to these proceedings. Even if it had been in registrable form, it could not have been registered by the respondent because of the fact that the duplicate certificate of title for the land was in the possession of the appellant as security for its equitable mortgage.

The circumstances relating to the granting of this equitable mortgage by Zirtz to the respondent are summarized in the judgment of Gordon J.A., using Zirtz's own words, as follows:

> I told Mr. Ball and Mr. Dingwall that there was a mortgage against my home for $6,400 in favour of The St. Mary's Parish Credit Union and that they had the title. I told them the building was worth $15,000. Although the word "equity" was not used I told them that I could only use my interest in the property to get material to finish the buildings.

Ball was the President of the respondent at that time and Dingwall was then a Vice-President.

The respondent filed a caveat on June 20, 1958, claiming an interest in the land under the document of June 19, 1958, wherein the respondent stated that Zirtz had "mortgaged and charged the said land" to the respondent.

On July 15, 1958, Zirtz executed, in favour of the appellant, a mortgage in registrable form, under *The Land Titles Act*, which was registered on the following day. It was not until the time of registration of this document that the appellant became aware of the existence of the respondent's caveat.

The respondent commenced action against Zirtz and the appellant was added as a party defendant. The respondent sought a declaration that it had a valid charge against the land and foreclosure of its mortgage. The appellant, in its

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statement of defence, asked for a declaration that its interest in the land was entitled to priority over any interest of the respondent.

At the trial, judgment was given in favour of the respondent. It was held that its mortgage took priority over that of the appellant and a foreclosure order in favour of the respondent was granted.

This judgment was sustained on appeal to the Court of Appeal of Saskatchewan[1], McNiven J.A. dissenting. The contention of the respondent on that appeal, which was accepted by the majority of the Court, is summarized in the majority judgment as follows:

> The contention of the plaintiff is that it and the Cerdit Union were both creditors of Zirtz, each endeavouring to obtain security for the sums that he owed them; that they knew that the title to the property was clear but for three mechanic's liens, two of them filed by the plaintiff itself, and a third by Myers Construction Co., Ltd., for the small sum of $98. They knew that any equitable mortgage held by the Credit Union was unregistered and that it passed no interest until registered and that therefore the equity that Zirtz had to offer as security was the full equity as shown by the title. The plaintiff relies on the cases of Hackworth v. Baker [1936] 1 W.W.R. 321, and Clark v. Barrick [1949] 2 W.W.R. 1009.

The following conclusion is stated:

> In this case, at the time the respondent obtained the mortgage from Zirtz, it is fair to say that both Zirtz and the respondent believed such mortgage would be subject to the prior claim by the appellant. The priority which the respondent obtained upon registration of the caveat was simply by the operation of the provisions of *The Land Titles Act,* a priority which under the Act is unassailable in the absence of fraud.

It was also held that the appellant's equitable mortgage of June 14, 1957, had become merged in the registered mortgage of July 15, 1958, and that, as the latter document had been registered subsequent to the filing of the respondent's caveat, it ranked subject to the respondent's equitable mortgage.

McNiven J.A. held that there had been fraud on the part of the respondent, within the meaning of *The Land Titles Act,* in the light of the construction placed on the meaning of that word by the Court of Appeal of Saskatchewan in *Independent Lumber Company v. Gardiner*[2].

[1] (1960), 32 W.W.R. 97, 24 D.L.R. (2d) 284.
[2] (1910), 13 W.L.R. 548, 3 Sask. L.R. 140.

He also held:

> Zirtz recognized his obligation to St. Mary's—told the plaintiff St. Mary's held the duplicate certificate of title and that he could not and would not mortgage its interest in the home property. The plaintiff agreed and the agreement prepared by the plaintiff was in my opinion intended to exclude St. Mary's claim from its operation. It was carved out of the security given the plaintiff under its mortgage with its consent. In case of doubt as to its meaning a document is most strongly construed against the party who prepared it.

He further held that the respondent's caveat had misrepresented the document upon which it was based.

The appellant has appealed from the judgment of the Court of Appeal. Zirtz is not a party to this appeal.

Up to the time of the filing of the respondent's caveat the situation was that both the appellant and the respondent had equitable mortgages upon the land. That of the appellant was prior in time to that of the respondent and ranked first in equity. Neither mortgage was in registrable form under the provisions of *The Land Titles Act,* but the appellant had possession of the duplicate certificate of title for the land. In addition to priority as to time, it seems to me that the appellant's mortgage ranked ahead of that of the respondent because of the form of the latter mortgage. It appears clear, from the terms of that document and in the light of the evidence, that it was intended to charge, not the whole of the owner's interest in the land, but only the equitable interest which remained in Zirtz after he had granted to the appellant the earlier mortgage. The respondent's mortgage, which was drawn by its solicitors, was not drafted as a registrable mortgage under *The Land Titles Act,* but only purported to charge "his equity" in the land.

What was that equity? It was the interest which he retained in the land, subject to the appellant's equitable mortgage. It is true that the appellant's interest was an unregistered interest, but it did confer rights on the appellant and such rights were enforceable against Zirtz. Several cases in this Court have recognized the validity of equitable interests in lands which are subject to the Torrens system of titles and which are not themselves registrable interests

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under that system. The leading case is *Jellett v. Wilkie*[1], which held that a writ of execution registered pursuant to the provisions of the *Territories Real Property Act*, 49 Vict. (Can.), c. 51, would only attach the interest of the registered owner of the lands subject to existing equities and that, therefore, it would not take priority over a previous unregistered transfer of those lands.

It was suggested in *Clark v. Barrick*[2], a decision of the Court of Appeal of Saskatchewan, which is cited in the majority decision in the present case, that *Jellett v. Wilkie* had been overruled by the judgment of this Court in *Bank of Hamilton v. Hartery*[3]. It appears to be clear, however, from the judgment in *Davidson v. Davidson*[4], which was not referred to in the reasons in *Clark v. Barrick*, that this conclusion is not correct. The judgment in the *Bank of Hamilton v. Hartery* case turned on the interpretation of certain sections of the *Land Registry Act of British Columbia*, R.S.B.C. 1911, c. 127, which had been amended prior to the decision in the *Davidson* case. The principle formulated in *Jellett v. Wilkie* was applied by this Court in the latter case.

The position of equitable interests under a Torrens system of titles is clearly stated by Anglin J., as he then was, in *Church v. Hill*[5], as follows:

> The result of decisions of this court in Jellett v. Wilkie, (1896) 26 Can. S.C.R. 282, Williams v. Box, (1910) 44 Can. S.C.R. 1, Smith v. National Trust Co., (1912) 45 Can. S.C.R. 618, Yockney v. Thomson, (1914) 50 Can. S.C.R. 1, Grace v. Kuebler, (1917) 56 Can. S.C.R. 1, and other cases, is that, notwithstanding such provisions as s. 41 of ch. 24 of the Alberta statutes of 1906, equitable doctrines and jurisdiction apply to lands under the Land Titles or Torrens system of registration and equitable interests in such lands may be created and will be recognized and protected.

The section of the Alberta *Real Property Act* to which he refers provided as follows:

> 41. After a certificate of title has been granted for any land, no instrument until registered under this Act shall be effectual to pass any estate or interest in any land (except a leasehold interest for three years or for a less period) or render such land liable as security for the payment of money; but upon the registration of any instrument in the manner hereinbefore prescribed the estate or interest specified therein shall pass, or, as the case may be, the land shall become liable as security in manner and

[1] (1896), 26 S.C.R. 282.
[2] [1949] 2 W.W.R. 1009.
[3] (1919), 58 S.C.R. 338.
[4] [1946] S.C.R. 115.
[5] [1923] S.C.R. 642 at 644, 3 D.L.R. 1045.

subject to the covenants, conditions and contingencies set forth and specified in such instrument or by this Act declared to be implied in instruments of a like nature.

The equivalent section of *The Land Titles Act* of Saskatchewan provides:

65. (1) After a certificate of title has been granted no instrument shall until registered pass any estate or interest in the land therein comprised, except a leasehold interest not exceeding three years where there is actual occupation of the land under the same, or render such land liable as security for the payment of money except as against the person making the same.

(2) Every instrument shall become operative according to the tenor and intent thereof when registered and shall thereupon create, transfer, surrender, charge or discharge, as the case may be, the land, estate or interest therein mentioned.

It will be noted that subs. (1) of s. 65 contains, as s. 41 of the Alberta *Real Property Act* did not, the significant words "except as against the person making the same". A similar change in wording had occurred in the *Land Registry Act* of British Columbia in the interval between the decisions in *Bank of Hamilton v. Hartery* and *Davidson v. Davidson.*

In my opinion the appellant had a valid equitable interest in the land at the time that the respondent took the mortgage of Zirtz's equity in the land. The wording of the respondent's mortgage is significant and, in my view, took the form which it did because both Zirtz and the respondent knew of the existence of the appellant's equitable mortgage and intended that Zirtz could only mortgage his remaining equitable interest in the land.

What then was the effect of the registration of the respondent's caveat? The judgment of the Court of Appeal is that the respondent thereby obtained a priority over the appellant's mortgage by reason of the operation of the provisions of *The Land Titles Act.* That decision is based upon the authority of *Hackworth v. Baker*[1] *and Clark v. Barrick, supra.*

The former case involved the issue of priority as between two transfers of the same land. The one which had been executed the later was registered and the earlier one was not. The Court ruled in favour of the transferee who had registered his transfer. It held that the fact that a person,

[1] [1936] 1 W.W.R. 321.

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who obtained a transfer of land and registered it, knew that there was an outstanding unregistered transfer of the same land did not amount to "fraud" within the meaning of s. 216 of *The Land Titles Act*, R.S.S. 1930, c. 80.

Clark v. Barrick was a case in which the competing interests were as between two agreements for sale of the same lands. The purchaser under the agreement which was later in point of time registered a caveat against the lands to protect his interest. The purchaser under the earlier agreement did not. The Court held in favour of that purchaser who had filed a caveat, holding that an unregistered instrument, protected by a caveat claiming an estate or interest in land, must, when the claim is established, be given its full effect according to its tenor, regardless of any other unregistered instrument, whether prior or subsequent, not protected by a caveat, or protected by a caveat subsequent to the one first mentioned.

Clark v. Barrick was overruled in this Court[1], but on other grounds.

The relevant sections of *The Land Titles Act* which deal with the filing and the effect of caveats are ss. 138 and 145, which provide as follows:

138. Any person claiming to be interested in land may file a caveat with the registrar to the effect that no registration of any transfer or other instrument affecting the land shall be made, and no certificate of title to the land granted, until the caveat has been withdrawn or has lapsed as provided by section 146, 147, 148 or 149, unless such instrument or certificate of title is expressed to be subject to the claim of the caveator as stated in the caveat.

145. While a caveat remains in force the registrar shall not enter in the register any memorandum of a transfer or other instrument purporting to transfer, encumber or otherwise deal with or affect the land with respect to which the caveat is registered, except subject to the claim of the caveator.

The matter of the priority of registered instruments is dealt with in s. 71 of the Act, which reads:

71. Instruments registered in respect of or affecting the same land shall be entitled to priority, the one over the other, according to the time of registration and not according to the date of execution.

Counsel for the appellant argued that a caveat filed under s. 138 of the Act did not have the effect attributed to it in the judgment in *Clark v. Barrick*. His contention was that the caveat would serve only as a stop order to preserve the

[1] [1951] S.C.R. 177, [1950] 4 D.L.R. 529.

status quo as of the time of its filing, so as to prevent any further dealing with the lands thereafter, save subject to the unregistered instrument which the caveat protected. He pointed out that the Saskatchewan Act does not contain any provision such as s. 148(1) of the Manitoba *Real Property Act*, R.S.M. 1954, c. 220, or s. 152 of the Alberta *Land Titles Act*, R.S.A. 1955, c. 170, the relevant portions of which sections provide as follows:

148(1) The filing of a caveat by the district registrar or by a caveator gives the same effect, as to priority, to the instrument or subject matter on which the caveat is based, as the registration of an instrument under this Act;

* * *

152 Registration by way of caveat, whether by the Registrar or by any caveator, has the same effect as to priority as the registration of any instrument under this Act . . .

Each of the Manitoba and the Alberta Acts contains a provision similar to s. 71 of the Saskatchewan Act dealing generally with the priority of registered instruments.

I do not find it necessary to resolve this question because, even if the view of the effect of filing a caveat in Saskatchewan as stated in *Clark v. Barrick* is correct, I do not think that it establishes the respondent's claim in this case. In both that case and *Hackworth v. Baker* the competing interests were the same in form. In the former case a caveat had been registered by one purchaser, under an agreement for sale, who was thereby held to have obtained a priority over another purchaser, under an earlier agreement for sale, of the same lands. In the latter case a transferee who registered his transfer obtained priority over the holder of an earlier, unregistered transfer of the same lands. In each case it was held that under the provisions of the Act the registration of the instrument conferred priority.

In the present case, however, the two equitable mortgages which are in competition are not the same. That of the respondent, by its terms, was expressly limited to a charge upon "my equity". It was, therefore, a mortgage of only a limited interest in the land. The filing of the caveat gave notice of that interest in the respondent, and any one dealing thereafter with the land could do so only subject to that interest of the respondent, but the filing of the caveat could not and did not increase the extent of the respondent's

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interest in the land. It could not create a charge upon more than that which had been charged by Zirtz under the terms of the instrument itself.

This proposition is clearly stated in the judgment of Duff J., as he then was, in *McKillop & Benjafield v. Alexander*[1], where he said, in reference to the Saskatchewan *Land Titles Act*, 6 Edw. VII, c. 24:

> The fundamental principle of the system of conveyancing established by this and like enactments is that title to land and interests in land is to depend upon registration by a public officer and not upon the effect of transactions *inter partes*. The Act at the same time recognizes unregistered rights respecting land, confirms the jurisdiction of the courts in respect of such rights and, furthermore, makes provision—by the machinery of the caveat—for protecting such rights without resort to the courts. This machinery, however, was designed for the protection of rights—not for the creation of rights. A caveat prevents any disposition of his title by the registered proprietor in derogation of the caveator's claim until that claim has been satisfied or disposed of; but the caveator's claim must stand or fall on its own merits.

Duff J. dissented in this case on the issue as to whether the respondent, Alexander, had acquired an interest in the lands in question, but the majority of the Court did not disagree with the above statement of the law.

Subsection (2) of s. 65 of the Act previously quoted, referring to the effect of a registered instrument under the Act, says that, when registered, it shall become operative "according to the tenor and intent thereof".

Stated at its highest, the respondent's position after registration of the caveat could only be the same as if the equitable mortgage itself could have been and had been registered as an instrument under the Act. According to the tenor and intent of that document it only constituted a mortgage upon a partial interest in the land.

For these reasons, therefore, I do not agree that, by virtue of the filing of its caveat, the respondent obtained, under the provisions of *The Land Titles Act*, a priority over the prior equitable interest of the appellant.

I turn now to the question of merger. The respondent's argument is that the rule stated in Halsbury, 3rd ed., p. 420, para. 819, applies:

> As a general rule a person, by taking or acquiring a security of a higher nature in legal valuation than one he already possesses, merges and extinguishes his legal remedies upon the inferior security or cause of

[1] (1912), 45 S.C.R. 551 at 566, 1 D.L.R. 586.

action; thus the taking of a bond or covenant, or the obtaining of a judgment for a simple contract debt, merges and extinguishes the simple contract debt. For this purpose, however, the superior security must be co-extensive with the inferior security and between the same parties; and a security, given by one of two co-debtors to secure a simple contract debt, does not merge the simple contract debt.

He also relies on para. 821, which states:

A mere charge created by deposit of deeds is extinguished by the taking of a formal mortgage, even though the mortgage does not confer a legal estate, and the sum thenceforth secured is the sum mentioned in the mortgage, notwithstanding that other sums were covered by the deposit. But, where a charge on two estates is kept alive in equity in favour of a person paying it off, he does not lose the benefit of the charge by taking a mortgage of one estate, and an equitable security is not merged by taking a security which is ineffectual.

The rule at common law as to merger in relation to a mortgage was that, if a mortgage on land and the ownership of the land subject to the mortgage became united in the same person, the mortgage was merged in the ownership and the mortgage was extinguished. In equity merger did not necessarily follow upon the union of the two interests and whether or not such union did occur depended upon the intention, express or implied, of the mortgagee. Dealing with the matter of intention, Falconbridge on The Law of Mortgages, 3rd ed., p. 372, para. 204, says:

In the absence of evidence of actual intention, either express or implied from the circumstances of the transaction, the presumption of merger ordinarily arising from the union of a charge and the estate subject to the charge may be rebutted by the consideration that it is more for the benefit of the owner of the charge and the estate that merger shall not take place, as, for example, if the effect of merger would be to confer priority upon subsequent encumbrancers.

While this proposition, as stated by Falconbridge, relates to a merger of a mortgage and the estate, it is also, in my opinion, applicable with respect to the matter of the merger of a security of a lower nature into one of a higher nature in legal valuation.

Authority for this view is found in a recent decision of the Privy Council in *Ghana Commercial Bank v. Chandiram*[1]. That was a case in which it was argued that the appellant bank, possessed of an equitable charge on land, had merged that charge in a legal mortgage of the

[1] [1960] 2 All E.R. 865, 3 W.L.R. 328.

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same land which was subsequently taken. The legal mortgage proved to be invalid. The argument in favour of merger was rejected and it was said at p. 871:

> While not disputing that the Ghana Bank's intention was to substitute the legal mortgage for the equitable charge, they find it impossible to accept the view that the Ghana Bank intended the equitable charge to be extinguished in the event of the legal mortgage proving for any reason to be invalid or ineffective. In other words, their Lordships take the intention of the Ghana Bank to have been to replace the equitable charge by a valid and effective legal mortgage, but to keep it alive for their own benefit save in so far as it was so replaced.

In that case the legal mortgage was invalid. The appellant's legal mortgage in the present case was valid, but, if it were to rank subsequent to the respondent's caveat, so that the respondent's mortgage would charge the entire interest of Zirtz in the land, it would be ineffective. I think the same reasoning is applicable in the present case in seeking to determine what was the appellant's intention. I do not see how the appellant could be considered to have intended to surrender a prior interest, in favour of the respondent's subsequent interest, by the taking of the legal mortgage in substitution for its existing security. It cannot, in the circumstances, have intended to effect a merger of its two securities.

In any event, even if a merger were held to have occurred, I do not see how that would automatically increase the interest granted to the respondent by the terms of its mortgage. At no time did Zirtz have a complete interest in the land which he could mortgage to the respondent by a mortgage of "his equity", because at all times there existed a charge on the land in favour of the appellant. This situation continued, even if it were held that a merger had taken place.

For these reasons, in my opinion, the appeal should be allowed, the judgment at the trial should be set aside and the appellant should be entitled to a declaration that its equitable mortgage had priority over that of the respondent.

There is one further point to be determined and that is as to the amount of the appellant's prior charge. At the time the respondent took its mortgage on the equity of Zirtz he was indebted to the appellant in the principal amount of $6,400. Subsequent to the execution of the equitable mortgage to the respondent and the registration of

its caveat, a further $3,000 was advanced to Zirtz by the appellant, making a total of $9,400, which appears as the principal amount of the appellant's legal mortgage. The appellant contended that it was entitled to priority for the entire amount, but I cannot accept that contention. The respondent's mortgage, protected by caveat, applied to the equity of Zirtz as it existed at the time of the execution of the respondent's mortgage. At that time and at the time of the filing of the caveat the principal amount of the prior mortgage was $6,400. As from the time of the registration of its caveat the respondent had a valid charge upon the remaining interest of Zirtz in the land. In my opinion, therefore, the appellant's priority is limited to the extent of $6,400, together with simple interest, at the rate of one per cent per month as provided in the appellant's equitable mortgage, from time to time on unpaid balances to June 19, 1958.

The appellant, in my opinion, is entitled to its costs throughout, including the costs of the motions for leave to appeal to this Court made before the Court of Appeal and this Court.

Appeal allowed with costs.

Solicitor for the defendant, appellant: Douglas A. Schmeiser, Saskatoon.

Solicitors for the plaintiff, respondent: Moxon, Schmitt, Estey and Robertson, Saskatoon.

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THE CORPORATION OF THE TOWN OF COPPER CLIFF .... APPELLANT;

AND

THE DEPARTMENT OF MUNICIPAL AFFAIRS FOR THE PROVINCE OF ONTARIO, THE CORPORATION OF THE TOWNSHIP OF NEELON & GARSON, *ET AL.* .....RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Taxation—Apportionment among municipalities of cost of maintaining home for the aged—Revision and equalization of assessment rolls by Department of Municipal Affairs—Appeal to Ontario Municipal Board from equalization report—Stated case submitted by Municipal Board—The Homes for the Aged Act, 1955 (Ont.), c. 30, ss. 1(c) (1956 Am., c. 30, s. 1), 19(1)—The Assessment Act, R.S.O. 1950, c. 24, s. 97 (17) (1955 Am., c. 4, s. 24).

The Homes for the Aged Act of Ontario, as amended, provided that the cost of maintaining homes would be defrayed by municipalities in proportion to their last revised assessment rolls as revised and equalized by the assessor of the territorial district, or if there was no district assessor, by the Department of Municipal Affairs. The department prepared an equalization report for the district of Sudbury by which the local assessment in the municipality of Copper Cliff was greatly increased. The equalization report took into consideration a smelter that had not been assessed by the municipality. The Town of Copper Cliff appealed from this report to the Ontario Municipal Board. Shortly thereafter, an amended equalization report, which purported to amend the earlier one, was forwarded to the municipalities concerned. The amended report was also appealed, and a request was made by the present appellant that a case be stated by the Board for the opinion of the Court of Appeal upon certain questions of law. Leave to appeal from the judgment of the Court of Appeal was granted by this Court.

Held: The appeal and cross-appeal should be dismissed.

1. The Department of Municipal Affairs had jurisdiction to make the equalization report.
2. The report did not require the signature of the Minister of Municipal Affairs.
3. The legislation did not contemplate a succession of equalization reports for any one year. The first report alone was authorized and was to be considered.
4. In preparing its equalization report, the department was not restricted to a mere examination of the assessment rolls of the interested municipalities. Everything which was done by the department came under the heading of revision and equalization.

*PRESENT: Kerwin C.J. and Locke, Cartwright, Judson and Ritchie JJ.

5. The jurisdiction of the Ontario Municipal Board was not limited merely to a dismissal of the appeal from the equalization report or to a granting thereof by setting aside the report, but this did not mean that the Board had jurisdiction to determine whether a particular property was or was not assessable. *Toronto v. Olympia Edward Recreation Club Ltd.*, [1955] S.C.R. 454, distinguished; *Metropolitan Toronto v. Eglinton Bowling Co.*, [1957] O.R. 621, referred to.

APPEAL from a judgment of the Court of Appeal for Ontario[1], dealing with questions of law submitted to that Court by the Ontario Municipal Board. Appeal and cross-appeal dismissed.

J. T. Weir, Q.C., and *B. M. Osler, Q.C.*, for the appellant.

J. E. Eberle, for the respondents.

The judgment of Kerwin C.J. and of Judson and Ritchie JJ. was delivered by

THE CHIEF JUSTICE:—The Corporation of the Town of Copper Cliff appealed from a judgment of the Court of Appeal for Ontario[1], dated June 24, 1957, and, objection having been taken, leave to appeal was granted by this Court at the opening of the argument.

At the outset attention should be drawn to the time that has elapsed since the judgment of the Court of Appeal in a matter affecting the proper amount of the assessment roll of the appellant for the year 1954 as equalized for the purpose of defining its proportion of the cost of maintaining a home for the aged under *The Homes for the Aged Act*, Statutes of Ontario 1955, c. 30, as amended in 1956. Notice of appeal to this Court was given October 11, 1957, by Copper Cliff and the Corporation of the Town of Frood Mine. A notice of cross-appeal by the respondent, The Department of Municipal Affairs for the Province of Ontario, was dated October 17, 1957. On December 21, 1959, Frood Mine gave notice of discontinuance of its appeal. Copies of these notices were duly filed in the office of the Registrar of this Court, but it was only in March 1960, that a motion was launched to dismiss the appeal for want of prosecution. When the matter came before a member of this Court, to whom the Registrar had referred the motion, an order was made putting the appellant upon terms as to the filing of the case and factums for the October

[1] [1957] O.W.N. 411, 9 D.L.R. (2d) 630.

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1960 sittings. It is true that by an amendment to *The Homes for the Aged Act* (subs. 3 of s. 4 of c. 45 of the Statutes of 1957), subs. 5 of s. 19 of the Act was added, but this cannot account for or excuse the delay.

There is a home for the aged in the District of Sudbury and it has been taken for granted that that home had been established under s. 4 of the Act, because the parties to this appeal agreed that subs. 1 of s. 19 applies:

> 19. (1) The cost of maintaining a home established under section 4 shall be defrayed in each year by the municipalities in the territorial district in proportion to the amounts of their assessments according to their last revised assessment rolls as equalized.

An amendment to the Act, s. 1 of c. 30 of the Statutes of Ontario for 1956, which came into force as of January 1, 1955, added clause (*c*) to s. 1 of the Act, which now reads, with the introductory words, as follows:

> 1. In this Act,
>
> .....
>
> (*c*) "last revised assessment rolls as equalized" means last revised assessment rolls as revised and equalized for the purposes of this Act by the assessor of the territorial district, or, if there is no district assessor, by the Department of Municipal Affairs.

At the outset it is important to bear in mind the distinction between counties and territorial districts in Ontario. *The Territorial Division Act,* R.S.O. 1950, c. 388, provides that the province shall consist of counties and districts. In the list of districts is "The Territorial District of Sudbury", consisting of the City of Sudbury, eight towns, including Copper Cliff and Frood Mine. It was not made clear how and when the Improvement District of Renabie came into being, but no party took exception to the fact that that Improvement District appears in the equalization report to be mentioned shortly. By s. 97 of *The Assessment Act,* R.S.O. 1950, c. 24, as amended, provision is made for the appointment by the Minister of Municipal Affairs of a district assessor for any territorial district described in *The Territorial Division Act.* By subs. 17 of that section "if any municipality or locality in a district is dissatisfied with the last revised assessment as equalized for any purpose by the district assessor or by the department", which means the Department of Municipal Affairs, "the municipality or trustees of an improvement district may appeal to the

Ontario Municipal Board". There being no district assessor in the District of Sudbury, the department made a 1955 equalization report, dated January 30, 1956, with explanatory notes. Copper Cliff and Frood Mine appealed from this report to the Municipal Board. By a letter dated March 13, 1956, the Director of Municipal Assessment wrote the Clerk of Copper Cliff that he had been instructed by the Minister of Municipal Affairs to forward an amended 1955 equalization report, made under the provisions of the Act. This report purported to supersede the earlier one of January 30th. An appeal by the same two municipalities was launched against this report. When both appeals came before the Board the two municipalities requested that a special case be stated for the opinion of the Court of Appeal, in accordance with s. 96 of *The Ontario Municipal Board Act,* R.S.O. 1950, c. 262, as amended. I agree with the Court of Appeal that we need not concern ourselves with the later report.

The first report increased the 1956 local assessment of Copper Cliff from $8,625,264 to $49,627,520. At the request of the council of Copper Cliff, the supervisor of municipal assessment informed it of the basic principles applied in equalizing the assessment. It is sufficient to state that in applying these principles the supervisor explained that the equalization report had taken into consideration property that had not been assessed in Copper Cliff,—apparently a smelter which had been omitted being responsible for the great increase noted above. In the case of some municipalities, assessments were added to cover buildings erected after the return of the local assessment roll and for other reasons, in accordance with s. 51(*a*) of *The Assessment Act,* as amended.

The words "for any purpose", which have been underlined in the extract from subs. 17 of s. 97 of *The Assessment Act,* quoted above, should be noted, as it is important to bear in mind that the last revised assessment of Copper Cliff was equalized for the purpose of fixing that municipality's proportion of the cost of maintaining the Sudbury District Home for the Aged.

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As is pointed out by Aylesworth J.A., speaking for the Court of Appeal, the case as stated by the Board is most unsatisfactory, but I agree that that learned judge has correctly stated the questions to be answered as follows:

(1) Had the Department of Municipal Affairs in 1956, jurisdiction to make an Equalization Report? This question is academic so far as future years are concerned by reason of a subsequent amendment to the Home for the Aged Act, enacted in 1957.

(2) Is the January 1956 Equalization Report of the Board a nullity, by reason of the fact that it does not bear the signature of the Minister of Municipal Affairs?

(3) Did the Department of Municipal Affairs have jurisdiction to make its so-called amended Equalization Report in March, 1956, having already delivered its Equalization Report in January of that year?

(4) In making its Equalization Report, was the Department of Municipal Affairs restricted merely to an examination of the assessment rolls of the interested municipalities as those rolls were closed pursuant to Section 53 of The Assessment Act and as those rolls had been revised and certified, pursuant to Section 54, of The Assessment Act, for the purpose of ascertaining whether the valuations of real property, made by the assessors in each municipality, bear a just relation one to another, and for the purpose of increasing or decreasing the aggregate values shown in the local assessments, by adding or deducting so much percent as, in the opinion of the Department, was necessary to produce a just relation between such valuations?

(5) Is the jurisdiction of the Ontario Municipal Board on the applications to it by way of appeals from the said Equalization Report limited merely to a dismissal of the appeal or to a granting thereof by setting aside the Equalization Report?

I agree with the Court of Appeal that Question 1 should be answered in the affirmative. Clearly, by the relevant statutes quoted above, the Department of Municipal Affairs had jurisdiction to make the equalization report of January 30, 1956.

With reference to Question 2, the Court of Appeal decided that the January 1956 equalization report was not a nullity by reason of the fact that it did not bear the signature of the Minister of Municipal Affairs. It was upon this point that the cross-appeal to this Court was launched and argued. *The Executive Council Act,* R.S.O. 1950, c. 121, provides by s. 1 that the Executive Council shall be composed of such persons as the Lieutenant-Governor from time to time appoints. Section 2 provides that the Lieutenant-Governor may appoint under the Great Seal from

among the Ministers of the Crown certain named Ministers to hold office during pleasure, among them being a Minister of Municipal Affairs. Section 5 reads as follows:

> 5. No deed or contract in respect of any matter under the control or direction of a minister shall be binding on His Majesty or be deemed to be the act of such minister unless it is signed by him or is approved by the Lieutenant Governor in Council.

The Department of Municipal Affairs Act, R.S.O. 1950, c. 96, as amended, provides for a Department of Municipal Affairs over which the Minister shall preside. While subs. 1 of s. 2 states "The Minister shall have power and authority to act for and on behalf of the Department", subs. 3 provides for the appointment by the Lieutenant-Governor in Council of such officers, clerks and servants as from time to time may be deemed necessary for the proper conduct of the business of the department. By s. 3 the department is to administer all acts in respect to municipal institutions and affairs. It appears to me to be clear, in view of these enactments, that the Court of Appeal was correct in answering Question 2 in the negative.

I agree with the Court of Appeal's answer to Question 3 and have nothing to add to the reasons given by that Court for its answer in the negative.

With respect to Question 4, I agree with the Court of Appeal for the reasons given by it that everything done by the department in preparing the report of January 1956, comes under the heading of revision and equalization.

As to Question 5, it should be reiterated that the equalization is made for the purpose of defining the share of each municipality in the territorial division of the cost of maintaining the home for the aged, which is to be in proportion to the amounts of their assessments according to their last revised assessment rolls as equalized which, as shown by the amendment of 1956, means "as revised and equalized". We are not concerned with the amendments to s. 80 of *The Assessment Act* dealing with appeals to the Municipal Board from a County Judge, nor with appeals to the Court of Appeal from a County Judge, nor with the amendment in 1956 to *The Assessment Act* which added s. 81(*a*) thereto. As has been pointed out, this is an appeal under s. 97 of *The Assessment Act*. The Board is to determine

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whether the equalization report was proper and is not concerned with the question of whether the smelter, for instance, referred to above, is or is not assessable or taxable in Copper Cliff.

The appeal and cross-appeal should be dismissed without costs.

LOCKE J.:—This is an appeal by leave granted by this Court from a judgment of the Court of Appeal for Ontario[1] dealing with questions of law submitted to that Court in a case stated by the Ontario Municipal Board, a body constituted under the provisions of *The Ontario Municipal Board Act,* R.S.O. 1950, c. 262.

The Town of Copper Cliff is one of the 29 municipalities in the District of Sudbury and, as such, liable to contribute to the establishment and maintenance of a home for the aged in that district by reason of s. 4 of *The Homes for the Aged Act,* 1955.

By s. 19(1) of the last mentioned Act it is provided that:

> The cost of maintaining a home established under section 4 shall be defrayed in each year by the municipalities in the territorial district in proportion to the amounts of their assessments according to their last revised assessment rolls as equalized.

By s. 1 of c. 30 of the Statutes of Ontario for 1956 there was added to s. 1 the following:

> (c) "last revised assessment rolls as equalized" means last revised assessment rolls as revised and equalized for the purposes of this Act by the assessor of the territorial district, or, if there is no district assessor, by the Department of Municipal Affairs.

Acting under these powers the department prepared and forwarded to the Town of Copper Cliff and other municipalities in the district who were liable to contribute to the support of the home for the aged a document described as the 1955 equalization report. According to the 1954 assessment rolls of the town, properties in the town were assessed for a total amount of $8,625,264 and the department's equalized assessment raised this figure to $49,627,520. This was forwarded to the clerk of the town by the director of municipal assessment on January 30, 1956. The council of the town, by letter dated February 3, 1956, addressed to the Department of Municipal Affairs, asked it for certain

[1] [1957] O.W.N. 411, 9 D.L.R. (2d) 630.

information as to the manner in which the equalized assessment had been made. This was answered by a letter from the supervisor of municipal assessment under date February 20, 1956. The great disparity between the total assessment of the town and that in the equalized assessment of the department was mainly attributable to the fact that the town had not assessed the smelter of the International Nickel Co. Ltd.

On March 13, 1956, the director of municipal assessment forwarded an amended 1955 equalization report for the district to the municipalities concerned.

In February 1956 the Town of Copper Cliff appealed to the Ontario Municipal Board from the equalization report forwarded to it in January under the provisions of s. 97(17) of *The Assessment Act,* R.S.O. 1950, c. 24, and, when the second equalization report was received, also appealed from it. These appeals came before the Municipal Board and the request was then made by the present appellant that a case be stated for the opinion of the Court of Appeal upon certain questions of law under the terms of s. 96 of *The Ontario Municipal Board Act.* By an order of the Board dated November 14, 1956, it was directed that this be done.

The questions of law submitted for the opinion of the court are more conveniently summarized and stated in the judgment of the Court of Appeal delivered by Aylesworth J.A. and are as follows:

(1) Had the Department of Municipal Affairs in 1956, jurisdiction to make an Equalization Report? This question is academic so far as future years are concerned by reason of a subsequent amendment to the Home for the Aged Act, enacted in 1957.

(2) Is the January 1956 Equalization Report of the Board a nullity, by reason of the fact that it does not bear the signature of the Minister of Municipal Affairs?

(3) Did the Department of Municipal Affairs have jurisdiction to make its so-called amended Equalization Report in March, 1956, having already delivered its Equalization Report in January of that year?

(4) In making its Equalization Report, was the Department of Municipal Affairs restricted merely to an examination of the assessment rolls of the interested municipalities as those rolls were closed pursuant to Section 53 of The Assessment Act and as those rolls had been revised and certified, pursuant to Section 54, of The Assessment Act, for the purpose of ascertaining whether the valuations of real property, made by the assessors in each municipality, bear a just relation one to another, and for the purpose of increas-

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ing or decreasing the aggregate values shown in the local assessments, by adding or deducting so much percent as, in the opinion of the Department, was necessary to produce a just relation between such valuations?

(5) Is the jurisdiction of the Ontario Municipal Board on the applications to it by way of appeals from the said Equalization Report limited merely to a dismissal of the appeal or to a granting thereof by setting aside the Equalization Report?

The Home for the Aged Act, 1955, provides for the establishment and maintenance of persons over the age of 60 years who are unable to care for themselves, whether through the disabilities of age or sickness or mental incompetence. The home for the district in question is situated in Sudbury and all persons eligible for admission to it resident in the district and complying with the provisions of the Act may be admitted. The cost of a home to which s. 4 applies may be contributed to the extent of fifty per cent by the province; the balance is to be provided by the municipalities in proportion to the amount of their assessments, as required by s. 19.

By s. 33 of *The Assessment Act,* land is to be assessed at its actual value, subject to the provisions of that section. If any municipality in the district fails to assess the property within its limits which are subject to assessment and taxation as required by s. 33, or if there is omitted from the assessment roll properties liable to assessment and taxation, the result is, of necessity, that the municipality does not pay its fair share toward the support of the home for the aged and an undue burden is cast upon the other municipalities in the district. It is, apparently, to guard against any evasion of this statutory obligation that the provision is made for equalization and revision.

I see no ambiguity in the language of s. 19 as amended and I agree with Aylesworth J.A. that the first question should be answered in the affirmative.

The January equalization report was not signed by the Minister of Municipal Affairs, being merely forwarded to the town by the director of municipal assessment. The language of the 1956 amendment to s. 1 which defines the expression "their last revised assessment rolls as equalized" in s. 19(1) declares this to mean the last revised assessment roll, as revised and equalized for the purposes of the Act

by the Department of Municipal Affairs. There is no requirement that the equalization report should be signed by the Minister and, in my opinion, that is unnecessary. The second question should be answered in the negative.

As to the third question, I agree with the answer of Aylesworth J.A. that the legislation does not contemplate a succession of equalization reports, but one only, and that it is the first alone that was authorized and is to be considered.

As to the fourth question, the department is authorized and required not merely to equalize but to revise the asssessment. To correct assessments which would not comply with s. 33 of *The Assessment Act* and to include property which had not been assessed at all was a proper exercise, in my opinion, of the powers given to the department and the question should be answered in the negative.

The fifth question restates the matter raised by paragraph 12 of the special case.

In my opinion, this question should be answered by a simple negative. I think it inadvisable in answering it to attempt to define the limits of the jurisdiction vested in the Municipal Board by subs. (17) of s. 97 of *The Assessment Act* and s. 40 of *The Municipal Board Act* and that any question respecting that jurisdiction should be submitted in a concrete form stating the exact matter in respect of which it is questioned.

In the answer given to this question by Aylesworth J.A. the following passage appears:

> I think the purpose, intent and scheme of the legislation and in particular the provisions of Section 97 of the Assessment Act, as amended, envisage the Board, sitting in appeal, dealing with the Report at large and determining all questions of fact and of law raised in and relevant to the appeal.

I do not construe this language as meaning that the Board, contrary to what was decided by this Court in *Toronto v. Olympia Edward Recreation Club Ltd.*[1], and by the Court of Appeal in *Metropolitan Toronto v. Eglinton Bowling Co.*[2], has jurisdiction to determine whether a particular property is or is not assessable. The former case dealt with the powers of the Board to decide such questions

[1] [1955] S.C.R. 454, 3 D.L.R. 641. [2] [1957] O.R. 621.

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of law under the powers given to it by ss. 80(6) and 83 of *The Assessment Act* of 1950, as amended, and the decision applies with equal force to the determination of such questions under s. 97, as amended. Had this been intended, no doubt it would have been pointed out how these cases were to be distinguished, but neither case is mentioned.

I would dismiss both the appeal and the cross-appeal.

CARTWRIGHT J.:—The relevant facts and the questions of law which were raised for the decision of the Court of Appeal in the case stated by the Ontario Municipal Board (which were conveniently summarized in the form of five questions by Aylesworth J.A.) are set out in the reasons of other members of the Court.

I agree with the Chief Justice and with my brother Locke that the first three of these questions were answered correctly by the Court of Appeal.

Questions (4) and (5) read together appear to me to involve a question of considerable difficulty.

It is clear from the material in the record that in making the equalization of the last revised assessment rolls of the municipalities in the territorial district for the purposes of *The Homes for the Aged Act* the Department of Municipal Affairs included in the amount at which it equalized the last revised assessment roll of the appellant a sum of about $40,000,000 which it regarded as the amount at which a smelter which had been omitted from the last revised assessment roll ought to have been assessed.

It appears to me that in reaching the decision to add this amount the department must have considered and decided the question whether or not this smelter was assessable. It is true that the decision of that question by the department or the Board would not, as between the owner of the smelter and the Town of Copper Cliff, render the former liable to taxation in respect of the smelter; it was, however, in my opinion, a necessary and not merely an incidental step in arriving at the end result as to the total amount at which the roll of the appellant should be equalized. In view of the decision of the majority of this Court in *Toronto v. Olympia Edward Recreation Club Ltd.*[1], I find some difficulty in holding that either the Department of Municipal

[1] [1955] S.C.R. 454, 3 D.L.R. 641.

Affairs or the Ontario Municipal Board was clothed with the necessary jurisdiction to decide, even for the limited purpose of making the equalization, the question whether or not the smelter was assessable.

However, as if we were untrammelled by authority I would have no hesitation in agreeing that the appeal and cross-appeal fail and as I understand that all the other members of the Court are of opinion that there is a sufficient difference between the circumstances of the case at bar and those of the *Olympia* case to prevent the last mentioned judgment being decisive of the case before us, I am content to concur in the disposition of the appeal and cross-appeal proposed by the Chief Justice and by my brother Locke.

Appeal and cross-appeal dismissed without costs.

Solicitors for the appellant: Osler, Hoskin & Harcourt, Toronto.

Solicitors for the Department of Municipal Affairs for the Province of Ontario: Kimber, Dubin & Eberle, Toronto.

Solicitors for the Corporation of the Township of Neelon and Garson: Waisberg & Waisberg, Sudbury.

GUISEPPE COTRONI (*Appellant*) .....APPLICANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

1961
*Mar. 13
Mar. 27

MOTION FOR LEAVE TO APPEAL

Criminal law—Leave to appeal to the Supreme Court of Canada—Extension of time—"Special reasons"—The Criminal Code, 1953-54 (Can.), c. 51, s. 597 (1)(b), as re-enacted by 1956, c. 48, s. 19.

Where it has not been shown that "special reasons" exist to extend the time within which leave to appeal to this Court may be obtained under s. 597(1)(b) of the *Criminal Code*, as re-enacted in 1956, such extension will not be granted.

APPLICATION for leave to appeal from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1]. Application refused.

*PRESENT: Taschereau, Fauteux and Abbott JJ.

[1] [1961] Que. Q.B. 173.

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COTRONI v. THE QUEEN

L. Corriveau, for the appellant, applicant.

M. H. Franklin, Q.C., for the respondent.

THE COURT:—We all agree that this application should be dismissed, and one of the reasons that justifies our refusal is that it is unreasonably tardy.

Under the *Criminal Code* (s. 597), a person convicted of an indictable offence, whose conviction is affirmed by the Court of Appeal, may appeal to this Court if leave is granted within twenty-one days after the judgment appealed from is pronounced. This Court, however, may for *special reasons* extend the time. Here, the judgment was pronounced by the Court of Queen's Bench on January 9, 1961, and the notice of motion asking for leave to appeal was filed only on the 9th of March.

The delay of twenty-one days is imperative unless, for special reasons, this Court extends such time. *Beaver v. The Queen*[1]. It has not been shown to us that any special reasons exist in the present instance.

The application should be refused.

Application refused.

Attorney for the applicant: Lawrence Corriveau, Quebec.

1960

*Nov. 2

1961

Mar. 27

CITY PARKING LIMITED (Claimant) ..APPELLANT;

AND

THE CORPORATION OF THE CITY OF TORONTO (Contestant) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Expropriation—By municipality of leasehold interest—Principles applicable in determining compensation—Value of leasehold interest to lessee—The Municipal Act, R.S.O. 1950, c. 243.

The City of Toronto appealed from the award of an arbitrator who awarded the claimant $50,193.45 compensation for the compulsory acquisition of a parking lot and a service station located thereon. By

*PRESENT: Kerwin C.J. and Locke, Cartwright, Abbott and Judson JJ.

[1] [1957] S.C.R. 119, 117 C.C.C. 340.

the judgment of the Court of Appeal the compensation was reduced to $5,149.82 with interest, which represented the amount spent on improvements, plus 10 per cent of that sum for time and effort spent on the improvements, and $1,200 for being deprived of possession.

The claimant held the lot under a ten-year lease which contained a provision as to the lessor's right of sale in the event of her receiving an offer to purchase the property and an option to the lessee to make an identical offer. Approximately two months after the claimant had taken possession the city passed a by-law expropriating the property for municipal purposes.

The arbitrator found that a reasonable lessee in the position of the claimant at the date of the by-law would have been prepared to agree to pay a rental of 61 per cent of the gross parking revenue and 1¼ cents per gallon of gasoline sold rather than surrender possession of the demised premises. The Court of Appeal was of the opinion that the rental value of the premises at the date of expropriation was no more than the rent reserved in the lease (50 per cent of the gross parking revenue, with a minimum of $770 per month).

The claimant appealed from the judgment of the Court of Appeal to this Court.

Held (Locke and Cartwright JJ. dissenting): The appeal should be dismissed.

Per Kerwin C.J. and Abbott and Judson JJ.: The principles to be applied in determining the compensation to be awarded the claimant whose interest as lessee was to be valued were as stated in *Bignall v. The Municipality of Metropolitan Toronto,* [1957] O.W.N. 408. The value of the lease to the claimant was the difference between what he had to pay as rental and what he would be prepared to pay as a reasonable man rather than surrender possession of the premises.

The Court of Appeal had not overlooked the evidence that the amounts derived from parking and from sales of gasoline had increased over the estimates of the claimant at the time of the making of the lease, and therefore no additional amount should be allowed because of this evidence.

Per Locke J., *dissenting*: While the award made by the arbitrator could not be supported, the conclusion reached by the Court of Appeal was not supported by the evidence.

The arbitrator, having formed his estimate of what he considered to be the premium value of the lease, in determining the compensation to be paid, apparently proceeded upon the basis that the annual profits from the property would at least be equal in each year to the amounts comprising the premium value since, otherwise, the full benefit of this premium value would not be realized. To do so was to follow the course condemned by the Judicial Committee in *Pastoral Finance Association v. the Minister,* [1914] A.C. 1083. Furthermore the provision for the earlier termination of the lease appeared to have been ignored in deciding the amount of the award, and a further material matter not mentioned was the amount of income tax which would be levied upon the claimant's profits.

The lot in question was, due to its location, a very valuable one for public parking, and the fact that the claimant company was skilled in the operation of such a business was not a factor to be disregarded in estimating the value of the lease to it.

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CITY PARKING LTD. v. CORPN. OF THE CITY OF TORONTO

The admissible evidence (evidence of earnings following the date of the expropriation by-law should be excluded as irrelevant) supported the view taken by the arbitrator that the business done would, in all probability, have exceeded very considerably that contemplated both by the lessor and the claimant's president at the time when the lease was executed.

A prudent person in the position of the claimant would have paid a sum of $10,000 rather than be dispossessed, plus the amount expended for improving the property.

Per Cartwright J., *dissenting*: The findings of fact made by the arbitrator were supported by the evidence of the actual parking revenues and sales of gasoline up to May 31, 1956, and should not have been disturbed. This evidence was admissible under a term of the agreement by which the claimant remained in possession up to January 7, 1957.

However the arbitrator did not attach sufficient weight to the existence of the sale clause in the lease. Having arrived at the increased rental which a prudent lessee would have been prepared to agree to pay rather than give up possession, it was next necessary to convert the difference between that rental and the rental reserved in the lease into a lump sum. This involved a calculation factors in which would be the rate of percentage to be used and the time which the lease had to run. The last mentioned of these factors was uncertain by reason of the sale clause and made the question as to what lump sum should be awarded difficult to answer. If one-half of the amount fixed by the arbitrator were awarded, the reasons of the arbitrator (which were correct) for not awarding any additional amounts for the improvements made by the claimant would still be applicable.

APPEAL from a judgment of the Court of Appeal for Ontario[1], varying an expropriation award of an official arbitrator. Appeal dismissed, Locke and Cartwright JJ. dissenting.

J. D. Arnup, Q.C., and *R. B. Robinson*, for the claimant, appellant.

J. Sedgwick, Q.C., for the contestant, respondent.

The judgment of Kerwin C.J. and of Abbott and Judson JJ. was delivered by

THE CHIEF JUSTICE:—There is no dispute as to the principles to be applied in determining the compensation to be awarded the appellant whose interest as lessee is to be valued. The arbitrator and the Court of Appeal accepted as correct the following statement of Aylesworth J.A. in *Bignall v. The Municipality of Metropolitan Toronto*[2]:

It is clear that the only element to be taken into consideration is the value to the owner of the land expropriated. That means in the case of a lessee such as the present respondent, that the value for which he is to

[1] [1959] O.W.N. 303, 19 D.L.R. (2d) 689.

[2] [1957] O.W.N. 408 at 410.

receive compensation is the value of the lease to him. The value of the lease to him, in my view, is the difference between what he is called upon to pay as rental and what he would be prepared, as a reasonable man, actually to pay rather than surrender possession of the premises.

However, there is a great divergence of opinion as to the amount to be awarded under the circumstances existing in the present case. The Court of Appeal unanimously arrived at an estimate different from that of the arbitrator, one Member of this Court would substitute another amount and a third Member still another.

I do not read the reasons of Chief Justice Porter and of Roach J.A. as overlooking the evidence that the amounts derived from parking and from sales of gasoline had increased over the estimates made by Herman at the time of the making of the lease. I am, therefore, unable to agree that something additional should be allowed because of this evidence. The question of the effect of income tax was not argued before us and such a point would require careful consideration and possibly further evidence.

I am not prepared to disagree with the amount fixed by the Court of Appeal and would, therefore, dismiss the appeal with costs.

LOCKE J. (*dissenting*):—The question to be determined is the value to the appellant of its leasehold interest in the property in question as of November 7, 1955, being the date of the bylaw expropriating the lands for municipal purposes under the provisions of *The Municipal Act,* R.S.O. 1950, c. 243. The principle to be applied is that which has been stated many times in judgments of this Court and which was restated in *Woods Manufacturing Co. Ltd. v. The King*[1].

The lease is dated August 17, 1954, and was for a term of 10 years to commence on September 1, 1955. The negotiations for the lease were carried on by Mr. W. B. Herman, the president of the appellant, with Mr. Louis Rotenberg, the husband of the lessor. The property was at that time occupied by a tenant who used it as a public parking lot and gasoline filling station, upon terms which were not disclosed. A provision of the lease which is of importance permitted the lessor, in the event of her receiving a *bona fide*

[1] [1951] S.C.R. 504 at 508, 2 D.L.R. 465.

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offer to purchase the land, to advise the lessee of her intention of accepting such offer, whereupon the lessee should have ten days from the date of such notification to offer to purchase the premises. The lessor agreed that if the lessee's offer was on the same terms and conditions and otherwise identical with the offer received by her, to accept the offer of the lessee. If the lessee failed to submit such an offer and the lessor should accept the offer made to her, the lease might be terminated on 90 days' notice. There were provisions for reimbursing the lessee for improvements made by it upon the property, in the event of the termination of the lease under this provision.

Herman had prior to this time a long experience in directing the operation of parking lots in the City of Toronto. The appellant company was one of the most extensive operators in that business at the time in question, having some 65 to 70 locations where such business was carried on. He was aware at the time of the negotiation of the lease that the then occupant of the premises was carrying on an unsuccessful operation, both from the amount of revenue derived from the parking of cars and from the sale of gasoline. According to the evidence, the sales of gasoline on the premises were at the rate of about 40,000 gallons a year, which would be insufficient to make the business profitable. The lease in question required the lessee to pay to the lessor one-half of the gross receipts from the parking of automobiles and trucks and some incidental revenue, but expressly excepted any receipts from the operation of the service station on the premises. While greatly experienced in the parking end of the business at the time the lease was negotiated, the appellant had not theretofore been engaged in the sale of gasoline. Giving evidence, Herman said that he had underestimated very badly the amount of parking revenue the lot would produce and the amount of gasoline that his company could sell on it, saying that he had thought they might get a gross parking revenue of from $1,500 to $1,800 a month and that they might sell 100,000 gallons of gasoline a year. He said that at the time he negotiated the lease he did not attach much importance to the possible sales of gasoline and that he would have made the same deal as to parking revenue even if there had been no service station on the property.

The appellants took possession on the date specified in the lease and made improvements to the building and paved the lot. The pumps and storage tanks used by the former defendant were replaced by such equipment provided by the British American Oil Co. Ltd. The appellant had been in possession for the period of slightly more than two months when the expropriation by-law was passed. The evidence is undisputed that the revenue from parking in the months of September and October were greatly in excess of what Herman had anticipated, being $2,778.62 for September and $2,872.65 for October. Gasoline was apparently sold only during the last two weeks of September and the sales amounted to 1,184 gallons. In October this was increased to 5,282 gallons. Evidence for the appellant showed that these sales very greatly increased from November 1, 1955, to May 31, 1956, averaging monthly during that period some 22,000 gallons. The monthly parking revenue during the same period averaged slightly in excess of $3,000.

No objection was made before the arbitrator to the admission of this evidence and, as the matter is not mentioned in the reasons delivered in the Court of Appeal, I assume that its admissibility was not argued there. Since the appellant is entitled to be compensated for the value of the lease to it and since that matter is to be determined by estimating what the lessee would, as a prudent person, have paid at the relevant date for the leasehold interest rather than be deprived of it, there appears to be no logical basis for the admission of evidence of matters thereafter occurring of which, of necessity, the appellant could know nothing and which could not influence its decision as to what it could prudently pay. That decision could be based only on facts known to the lessee at the time of making it. It is "what would he as a prudent man *at that moment* pay for the property rather than be ejected from it" (*Woods Manufacturing Co. Ltd. v. The King,* at p. 508). Had there been a disastrous slump of business after November 7, 1955, evidence of that fact would be equally inadmissible. In my opinion, the evidence in either case should be excluded as irrelevant. I consider that nothing that was said by Kerwin

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J. (as he then was) in *The King v. Halin*[1], or by Nolan J. in the judgment of this Court in *Roberts v. The Queen*[2], supports the admissibility of this evidence. In the latter case, evidence to establish market value was admitted of sales of land on the open market within a reasonable period after the date of the expropriation, it being proved that there was no material change in the market for such land in the *interim*. The evidence received in this case was for an entirely different purpose, being to show the earning capacity of the property as of a later date. If it were in law admissible, its weight would, in my opinion, be negligible, though it would afford some support for Herman's evidence that he was of opinion that the revenue from parking would be greatly in excess of the amounts contemplated at the time the lease was negotiated and possession taken.

The appellant sought to establish the value of the leasehold interest by evidence to the effect that the rent reserved of 50 per cent. of the gross receipts from other than gasoline sales was substantially less than it would have been prepared to pay for such a lease on November 7, 1955, rather than be dispossessed. The lease provided that land taxes, except to such extent as they might be increased by improvements made by the lessee, were to be paid by the lessor. Taxes and other expenses incident to the operation of the business were payable by the lessee. The main expense of operating both the parking and service station businesses was for labour, this requiring the employment of three men. According to Herman, the cost of operation of such a property for labour does not increase in proportion to the increase of parking revenue and he said that it cost no more to operate the lot when it was producing a gross revenue of $3,000 a month from parking than it would have, had his original estimate of a revenue of about $1,500 a month from this source proved accurate. He said that no additional men were employed or required for the operation of the service station.

The lessor received no share of the revenue or profit derived from the sale of gasoline. The appellant had made a written agreement with the British American Oil Company for the use of equipment supplied by it, and the

[1] [1944] S.C.R. 119.
[2] [1957] S.C.R. 28 at 36, 6 D.L.R. (2d) 305.

purchase of gasoline and oil at the current rate charged to retail dealers by that company in Toronto. Herman, however, said that before the appellant took possession of the property he had made an agreement with the oil company entitling it to purchase gasoline at .02cts less per gallon than the price defined in the written agreement. This arrangement was not apparently reduced to writing and while the witness Hodgins, an employee of the company, was called by the appellant, he said nothing about the matter. The arrangement apparently enabled the appellant to sell gasoline at .05cts less than the price current at the majority of other filling stations and, according to Herman, at a profit.

Herman's evidence was that as of November 7, 1955, the appellant would have agreed to pay to the lessor 66⅔ per cent. of the revenue derived from the property, other than from the sales of gasoline.

Mr. Murray Bosley, an experienced real estate agent and valuator living in Toronto, said that he considered from the standpoint of the lessee that a fair economic rent to pay for the property as of the relevant date was 65 per cent. of the parking revenue. The witness formed this opinion after considering figures supplied to him by the appellant as to the parking revenue and sales of gasoline during the period September 1, 1955, to May 31, 1956, and assuming the continuance of revenue at the level shown during the balance of the year.

Mr. Frederick Hotrom, who was shown to have some forty years' experience in the real estate business in Toronto, expressed the opinion that the rent reserved of 50 per cent. of the gross revenue was about normal, compared with that payable for other such lots in Toronto. He had not considered the possible revenue to be derived from the sale of gasoline but said that this would not affect his opinion. He was satisfied that Rotenberg would not rent the property for less than a rental that was fair to the lessor and appeared to be of the view that, since he had not stipulated for a share of the profit from sales of gasoline, he did not regard this as of importance. The witness, while of very long experience, had not theretofore had anything to do with leases and rent for parking purposes when the

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rental reserved was a percentage of the gross receipts and he had not considered the figures as to the receipts after November 7, 1955, in forming his opinion.

Mr. R. F. Heal, who had had an extensive experience in dealing in real estate in Toronto, was of the opinion that 50 per cent. of the gross revenue was practically a standard rate for leases of this nature and that the leasehold interest was of no value at the time of the expropriation. He considered, rightly in my opinion, that only the result of the operations up to that date were to be considered in deciding the value to the lessee. Dealing with gasoline sales, as these had been only at the rate of some 14,000 gallons in October 1955 and, assuming a continuance of this rate of sales, he did not consider that the business would be profitable and said that he could not understand how anyone could make money on such a turnover when selling gasoline at .05cts less than the current price.

Mr. John W. Walker, the general manager of the parking authority in the city of Toronto, had negotiated a large number of leases for the parking lots of his employer and showed that, when leased on a percentage basis, there was a considerable variation in the rent reserved. The city operated 40 of such lots and the witness showed that some rentals paid were less than 50 per cent. of the gross revenue and some exceeded that amount. It was apparently considered that the site in question was a desirable parking site as the purpose of the expropriation was to construct a parking garage having a capacity of several times that of the lot, as used by the appellant. The witness agreed that the higher the gross revenue the higher the percentage a lessee could afford to pay. He had not been asked to consider the rental value of the property in the light of the revenue derived after November 7, 1955.

The learned arbitrator, while referring to a passage of the judgment of Aylesworth J.A. in *Bignall v. Municipality of Metropolitan Toronto*[1], which dealt with the expropriation of a leasehold interest where that learned judge stated that the lessee was entitled to the value of the lease to him, that being the difference between what he is called upon to pay as rental and what he would be prepared as a reasonable man to pay rather than surrender possession of the

[1] [1957] O.W.N. 408.

premises, and to the further fact that there was a clause permitting the termination of the lease upon the conditions above referred to, computed the compensation by allowing the present value of the sum of what he considered to be the annual premium value of the lease throughout the balance of the ten year term. The arbitrator was apparently invited to determine the value of the lease to the appellant as of the date of the expropriation by considering, *inter alia,* the revenue derived from the property, both from parking and from the sale of gasoline up to a date some six months after November 7, 1955, and upon his estimate of its continuance at this high level during the balance of the term.

Dealing with the matter on this footing, he considered that the annual sales of gasoline would approximate 260,000 gallons and that the fair rental value of the premises for this purpose for which nothing was paid was .01¼ cts. per gallon, amounting to $3,250 annually. He estimated that the gross earnings from parking for the remaining period of the lease would average $36,301.20 a year, that a fair rental on this basis was 61 per cent of these gross figures and that, as the lease called for payment of only 50 per cent of such gross, the lease had a premium or added value for this purpose of $3,933.13. The total of these two estimates is $7,243.13.

While the appellant did not undertake to estimate the gross annual profit which might be anticipated, sufficient evidence was adduced which, if accepted by the arbitrator, would tend to show that the annual profits reasonably to be expected would be in excess of the above mentioned sum.

In arriving at the present value of the lease to the appellant the arbitrator adopted a figure used by the witness Bosley, who had expressed the opinion that what the arbitrator referred to as the premium value of the lease per annum was $9,739.80 and took the sum of this difference for 8 years and 8 months, being the balance of the 10 year term as of the date the appellant gave up possession, and calculated that the present value of that sum was 6.29982 times the said annual premium value. The arbitrator, using this method of computation, multiplied the figure of $7,243.13 by 6.29982 thus arriving at a total figure of $45,630.41, to which was added 10 per cent for compulsory taking.

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The judgment of the Court of Appeal set aside this award and reduced the total compensation to $5,149.82 and allowed interest on that sum at 5 per cent from January 7, 1957.

All of the learned judges of the Court of Appeal were of the opinion that the rent reserved by the lease was the full rental value of the property for the purposes to which it was being put and that, accordingly, the lease had no market value. The learned Chief Justice of Ontario, while referring to the revenue from the operations of the property between November 1955 and May 1956, said that there was no evidence to indicate that the lease was worth more as a parking lot than at the date of the lease "when the claimant puts its own valuation upon it." Roach J.A., referring to the fact disclosed by the evidence that both Rotenberg and Herman were shrewd and experienced business men and it was reasonable to conclude that when they finally settled upon the terms of the lease the claimant got no better bargain than anyone else could have got, considered that the rental value in the open market as of that date was thereby established.

While, in my opinion, the award made by the arbitrator cannot be supported, I am unable with great respect to agree with the conclusions reached in the Court of Appeal or with the reasons advanced for those conclusions.

In *Pastoral Finance Association v. The Minister*[1], Lord Moulton, delivering the judgment of the Judicial Committee, after referring to the fact that at the hearing evidence of the prospective savings and additional profits had been put forward in support of a claim that the capitalized value of the increase in the profits of the business due to them should be added to the market value of the land in arriving at the compensation, said in part (p. 1088):

> That which the appellants were entitled to receive was compensation not for the business profits or savings which they expected to make from the use of the land, but for the value of the land to them. No doubt the suitability of the land for the purpose of their special business affected the value of the land to them, and the prospective savings and additional profits which it could be shewn would probably attend the use of the land in their business furnished material for estimating what was the real value of the land to them. But that is a very different thing from saying that they were entitled to have the capitalized value of these savings and additional profits added to the market value of the land in estimating their

[1] [1914] A.C. 1083.

compensation. They were only entitled to have them taken into consideration so far as they might fairly be said to increase the value of the land.

The learned arbitrator, having formed his estimate of what he considered to be the premium value of the lease, in determining the compensation to be paid in the manner above explained, apparently proceeded upon the basis that the annual profits from the property would at least be equal to these amounts in each year since, otherwise, the full benefit of this premium value would not be realized. To do this was to follow the course condemned by the Judicial Committee. Furthermore, while mentioning the provision for the earlier termination of the lease and saying that he regarded it as lessening its value, this appears to have been ignored in deciding the amount of the award.

A further material matter which would, of necessity, affect the judgment of the appellant in deciding what amount it would pay rather than be dispossessed was the amount of income tax which would be levied upon its profits. During the cross-examination of Herman he was asked as to the annual income of the appellant, to which he replied that he did not know at what point in 1955 the company "reached $20,000" and said that he did not have the income tax statement there. The matter was not further mentioned in the evidence and, from the fact that it was not mentioned in the reasons for the award, it was presumably not argued before the arbitrator. It is to be remembered that the appellant operates some 65 to 70 filling stations in Toronto and elsewhere and, accepting Herman's evidence as to the expected profit from the operation of the property in question, it may properly be assumed that the total net income from all of the company's operations would be greatly in excess of $20,000 during the years when the lease continued in effect. Corporation incomes in excess of that amount were subject to tax in the amount of $3,600 plus 45 per cent. of the amount by which the amount taxable exceeded $20,000, a rate which applied also to the taxation years 1957 and 1958. In 1959 the percentage rate mentioned applied to incomes in excess of $25,000. It would obviously be only the net

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income that would be considered by a lessee in deciding what amount it could prudently pay rather than be dispossessed.

In my opinion, it is made clear by the evidence in this matter that the lot in question was, due to its location, a very valuable one for public parking and that the appellant, by reason of its long experience, could utilize its natural advantages to the fullest extent. It was shown that the business activities carried on in the vicinity of the property attracted large numbers of persons who required parking facilities. The property was expropriated by the city for that purpose, the evidence disclosing that after possession was taken a garage having six times the parking capacity of the bare lot was erected upon the property. The fact that the appellant was skilled in the operation of such a business is not a factor to be disregarded in estimating the value of the lease to it and, in my opinion, the evidence supports the view taken by the arbitrator that the business done would, in all probability, have exceeded very considerably that contemplated both by the lessor and by Herman when the lease was executed in 1954.

The parking receipts for September and October were between $1,200 and $1,300 in excess of the amount necessary to pay the minimum rent reserved by the lease of $770 a month and exceeded Herman's estimate by more than $1,000 a month. As the lessee was entitled to half of the gross revenue from parking it was thus assured a gross monthly return of roughly $1,400 which would yield an additional $500 a month gross profit if that figure could be maintained. The lessee might further reasonably anticipate, in my opinion, that the arrangement which enabled it to sell gasoline at such a considerable discount would attract added custom for the parking facilities. Herman was not experienced in the operation of filling stations, according to his evidence, up to the time that this lease was negotiated. The sales for the portion of the month of September in which the filling station was operated and for the month of October were small, only totalling some 6,600 gallons. Herman said that he anticipated that the

filling station would operate at a profit and that its operation would not increase the cost of labour for the operation of the parking lot. There is, however, nothing in the admissible evidence to support the arbitrator's estimate of average annual sales of 260,000 gallons. The evidence given by Herman to the effect that the greater the revenue to be derived from parking the larger percentage of the gross revenue could be paid as rent is supported by the evidence of the witness Walker, and the learned arbitrator has accepted the evidence that for a lease of property producing a gross revenue from parking of $3,000 a percentage of 61 per cent. was a fair rental at the time.

I do not think that this is a case which should be sent back for rehearing by the arbitrator since it appears to me that there is no further evidence relevant to the point to be decided that could be adduced. Upon the evidence in the record it is my opinion that a prudent person in the position of the appellant would have paid a sum of $10,000 rather than be dispossessed, plus the amount expended for improving the property as to which I would adopt the figure accepted by the Court of Appeal of $3,590.75.

I would allow this appeal with costs in this Court and direct that the respondent pay to the appellant the sum of $13,590.75 and, in addition, 10 per cent thereof for forceable taking, and interest on these amounts since January 7, 1957.

CARTWRIGHT J. (*dissenting*):—This is an appeal from a judgment of the Court of Appeal for Ontario[1] pronounced on July 2, 1959, allowing an appeal by the City of Toronto from an award made by Harold W. Timmins, Esquire, Q.C., an official arbitrator, dated February 24, 1958, fixing the compensation payable to the appellant for its leasehold interest in a parcel of land in downtown Toronto expropriated by the respondent for municipal purposes.

By the award the compensation payable to the appellant was fixed at $50,193.45 plus interest and costs. By the judgment of the Court of Appeal this was reduced to $5,149.82 plus interest and costs.

[1] [1959] O.W.N. 303, 19 D.L.R. (2d) 689.

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There does not appear to have been any difference of opinion between the learned arbitrator and the members of the Court of Appeal as to the principle to be applied in fixing the compensation. All accepted as accurate the statement of Aylesworth J.A. in *Bignall v. The Municipality of Metropolitan Toronto*[1]:

> It is clear that the only element to be taken into consideration is the value to the owner of the land expropriated. That means in the case of a lessee such as the present respondent, that the value for which he is to receive compensation is the value of the lease to him. The value of the lease to him, in my view, is the difference between what he is called upon to pay as rental and what he would be prepared, as a reasonable man, actually to pay rather than surrender possession of the premises.

On the argument before us, I did not understand counsel to question either the accuracy of this statement or, subject to the effect of the sale clause to be mentioned hereafter, its applicability to the case at bar.

The demised premises were owned by one Minnie Rotenberg. The negotiations leading to the making of the lease were carried on in August 1954, at which time the premises were in the possession of a tenant under a lease expiring on August 31, 1955. On behalf of the owner the negotiations were conducted by Mr. Louis Rotenberg, hereinafter referred to as Rotenberg, and on behalf of the appellant by its president Mr. W. B. Herman, hereinafter referred to as Herman. It is common ground that both of these persons are shrewd and experienced business men.

A formal lease was executed; it is dated August 17, 1954, and is for a term of ten years to be computed from September 1, 1955, on which date the appellant was to be given possession. The appellant went into possession early in September 1955 and commenced selling gasoline on September 14, 1955.

On November 7, 1955, the respondent passed a by-law expropriating the lands in question for municipal purposes, and it is as of that date that the compensation is to be fixed.

The parcel expropriated is of an irregular shape having a frontage on Dundas Square, its south boundary, of 121 feet 9 inches, a frontage on Victoria Street, its east boundary, of 58 feet 11 inches, a frontage on Dundas Street East, its north-east boundary, of 148 feet 3½ inches and a frontage

[1] [1957] O.W.N. 408 at 410.

on O'Keefe's Lane, its west boundary, of 148 feet 3½ inches. On the south-west portion of the expropriated parcel stood a two-storey brick building having a frontage of 18 feet on Dundas Square and 89 feet on O'Keefe's Lane. The land leased to the appellant consisted of the whole of the expropriated parcel except the part occupied by this brick building. It is clear from the description of the demised lands in the lease that the portion occupied by the brick building was not included and this was confirmed by Mr. Herman's evidence. The learned arbitrator appears to have been under the impression that it was included and the terms of paragraph 3 of the lease, to be referred to later, seem inconsistent with the view that it was excluded. However, nothing seems to turn upon this and neither counsel made any point of the provision in paragraph 3 referring to this building.

While the expropriating by-law was passed on November 7, 1955, the appellant was permitted to remain in possession and to continue to operate its business until January 7, 1957; but it was a condition of this permission that in arbitration proceedings to fix the compensation to which it was entitled the appellant should not make use of any statements as to its earnings subsequent to May 31, 1956.

The rent payable was set out in paragraph 2 and part of paragraph 3 of the lease as follows:

2. YIELDING AND PAYING THEREFOR unto the Lessor, her heirs, executors, administrators and assigns, yearly and every year during the said term a rental equivalent to 50 per centum (50%) of the amount of the gross receipts (as hereinafter defined) in each year, but in no event shall the minimum annual rental hereunder be less than the sum of $9,240.00 which rental shall be payable $770.00 monthly in advance on the first day of each and every month commencing September 1st, 1955 and the balance of any rental, if any, which may become owing shall be ascertained and paid as hereinafter provided.

3. The term "gross receipts" shall include the gross receipts of each year from the following sources:

(a) All revenue derived from parking of automobiles and motor trucks on the demised premises.

(b) All rent revenue which the lessee may derive from the second floor of the building on the demised premises.

(c) All revenue derived from the leasing of billboards, taxi stalls and telephone booths and any other rental revenue which the Lessee shall derive by virtue of its use of the demised premises.

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The gross receipts shall not include the revenue derived from the first floor of the building on the demised premises and shall not include the receipts derived from the operation of the service station on the demised premises.

* * *

For the purpose of calculating rental, any Dominion, Provincial or Municipal taxes which the Lessee or other occupant of the demised premises is required to collect from its customers shall not be included as gross receipts.

We were informed by counsel that clauses (*b*) and (*c*) of paragraph 3, quoted above, are of no importance.

The lease contained a provision that if at any time during the term the lessor should receive a *bona fide* offer to purchase the demised premises which she wished to accept she should give the lessee 10 days' notice of her intention to accept and if within that period the lessee made an identical offer she would accept the offer of the lessee but if the lessee failed to make such an offer the lessor would be free to accept the first mentioned offer and have the right to require the lessee to vacate upon 90 days' notice after the completion of the sale. In the event of the lessee being required to vacate under this clause it was provided that the lessor should repay the cost of repairs and improvements made by the lessee to the demised premises and the costs of paving the lot but in no event was the lessor to be liable to repay more than $5000 if possession were taken during the first year of the term, $4000 if possession were taken during the second year of the term, $3000 if possession were taken during the third year of the term, $2000 if possession were taken during the fourth year of the term, $1000 if possession were taken during the fifth year of the term. If possession was taken thereafter no repayment was to be made to the lessee.

At the date of the lease there was on the demised premises a stucco service station building in a poor state of repair to the east of which was a gasolene pump "island" on which were two pumps. The terms of the lease to the former tenant are not in evidence. The business carried on on the premises by the former tenant was that of a parking lot and a service station selling Supertest gasolene; there is little evidence as to what revenue he in fact derived from either of these activities but there is evidence that at the time of negotiating the lease Herman believed that

the former tenant's operations had not been very successful, that his sales of gasolene had amounted to about 40,000 gals. a year, that the rental paid to Mrs. Rotenberg was substantially less than the $770 a month which was to be the minimum rental under the lease to the appellant and that in view of the results under the former lease Rotenberg thought he was making a "very good deal" with the appellant.

In the course of the negotiations for the lease Rotenberg asked for an estimate of the appellant's probable receipts and Herman's evidence as to this is as follows:

Q. At the time you negotiated that lease were you making forecasts of what you might make on it? A. We were at Mr. Rotenberg's request, because he was interested in knowing what he might earn with his fifty percent.

Q. And did you give him some estimates of yours before you signed the lease?—A. Yes, we did, sir.

Q. What did you estimate? A. Well, we estimated and we told him we thought it would gross at least fifteen hundred dollars a month, and that is why we were quite prepared to guarantee seven hundred and seventy dollars a month.

Q. That is where the figure in the lease comes in? A. Yes. It was originally seven hundred and fifty. I don't know where the other twenty came in, and we thought we could probably gross as high as seventeen or eighteen hundred, and in the last months of the year, which was the fall of the year, there was a chance we might reach two thousand, which would give him a rent of a thousand dollars a month.

Q. And on that basis the two of you agreed on the terms of this lease in August, nineteen fifty-four? A. Yes, sir.

Herman testified that he understood that Rotenberg attached little significance to the operation of the service station; his actual words were:

. . . and he (Rotenberg) furthermore knew, Mr. Campbell, that his previous tenant had not sold enough gasoline to—to use the vernacular—to put in your left eye, and he didn't think that we would either, so he didn't attach very much importance to the gasoline business.

Herman's evidence as to his own view as to this at the time of entering into the lease is as follows:

Q. What do you pay for this service station on subject lot—did you pay? A. We paid nothing.

Q. You paid nothing for it? A. Yes.

Q. The rent for that lot—did the fact that you were getting that service station thrown in influence you in your tender and the amount of rent that you agreed on? A. As I told you earlier, I didn't attach too much importance or rate very highly the possible gasoline volume in that location at the time I entered into my lease with Mr. Rotenberg; and it is

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difficult for me to say to what extent I was influenced. I think I probably would have made the same deal with Mr. Rotenberg even if there hadn't been a service station on that lot.

Q. You say you would? A. I think I would have. You see, I had what appeared to be a profitable operation without the service station—just running a parking lot. I wasn't sure at the time I went in whether—I didn't know what the service station would bring.

The learned arbitrator, in his reasons for the award, after an elaborate examination of the evidence made the following findings of fact: (i) that the appellant had in fact made a "good deal"; (ii) that the revenues both from parking and the operation of the gasolene station went far beyond what the previous operators of the lot had been able to achieve; (iii) that this great increase of revenue was due largely to the skilful management of the appellant; (iv) that a substantial increase in the amount of gasolene sold would tend to some extent to reduce the gross revenue from parking; (v) that the lot was a small one as parking lots go and that its best use at the date of the by-law was that which was being made of it, i.e., "a small transient service station and a parking lot"; (vi) that the future of the business was subject to hazards and uncertainties such as competition from other parking lots and service stations which might be opened in the vicinity and the possibility of alteration in traffic and parking regulations by municipal by-laws; (vii) that the sale clause was a detriment to the lease; (viii) that the gross parking revenue for the balance of the term of the lease to be reasonably anticipated at the date of the by-law was $36,301.20 a year; and (ix) that the amount of the annual sales of gasolene for the balance of the term to be reasonably anticipated at the date of the by-law was 260,000 gallons.

The learned arbitrator went on to find that a reasonable lessee in the position of the appellant at the date of the by-law would have been prepared to agree to pay a rental of 61 per cent. of the gross parking revenue and $1\frac{1}{4}$ cents per gallon of gasolene sold rather than surrender possession of the demised premises.

I have read all the record with care and, in my opinion, the above findings are all supported by the evidence. The estimates of gross parking revenue and of sales of gasolene made by the learned referee are substantially less than those

made in the testimony of Herman who said he would have been prepared to pay a rental of 1½ cents per gallon of gasolene and more than 66⅔ per cent of the gross parking revenue rather than give up possession; but I think it clear from reading the whole record that the learned arbitrator regarded Herman as an honest and truthful witness.

Having made the above findings the learned arbitrator arrived at the amount of compensation by the following calculation:

61 per cent of estimated annual parking revenue of $36,301.20 —	22,143.73
50 per cent of estimated annual parking revenue of 36,301.20 —	18,150.60
Difference	3,993.13
1¼ cents per gal. on estimated annual sale of 260,000 gallons	3,250.00
Total	$7,243.13

Taking $7,243.13 as the difference between the annual rental payable under the lease and that which a prudent lessee would have been willing to pay, the present value of this difference as of January 7, 1957, calculated over the period from the date of giving up possession to the date of expiration of the lease, i.e., from January 7, 1957, to August 31, 1965, was arrived at by applying the factor of 6.29982 which brings out the result of $45,630.41. On the assumption that the other figures arrived at by the learned arbitrator were correct counsel did not question the correctness of the factor mentioned.

The learned arbitrator added 10 per cent for compulsory taking and awarded as total compensation $50,193.45 with interest from January 7, 1957.

In the Court of Appeal the learned Chief Justice of Ontario was of opinion that there was no evidence that the rental value of the premises at the date of expropriation was more than the rent reserved in the lease, and Roach J.A. said in part:

> The claimant contended that, quite apart from the improvements, the actual rental value was considerably greater than the rental reserved by the lease because it got this lease at a bargain price or as Mr. Herman put it,—he got a "good deal". The learned official arbitrator gave effect to that contention; I would not. In his reasons he said: "The evidence of Mr. W. B. Herman, President of City Parking Limited, is that the claimant company has been in the parking business in Toronto and elsewhere for ten or twelve years and that they have had wide experience in

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the parking business and in the negotiating of leases and purchase of properties for parking stations." Mr. Rotenberg, who negotiated the lease on behalf of his wife, the owner, was also a shrewd, keen and experienced businessman. He was not likely to lease the lot to the claimant for a rental less than he could get from someone else on the open market at that time. He and Mr. Herman dealt at arms' length each unquestionably attempting to get on behalf of those whom he represented, the best possible terms. I think it is reasonable to conclude that when they finally settled on the terms of the lease, the claimant got no better bargain than anyone else could have got. The rental value on the open market as of that date, expressed in terms of a percentage of "gross receipts" with a guaranteed minimum, was thereby established. This is the cogent and compelling evidence to which I earlier referred. That value was increased only by the improvements that the claimant made.

With great respect, these observations appear to me to overlook the facts, (i) that by the date of the passing of the expropriating by-law it had already become apparent that the revenues to be derived from parking were greatly in excess of the estimates made by Herman and communicated to Rotenberg at the time of the making of the lease, and (ii) that the evidence as to the sales of gasolene made up to the end of May, 1956, shewed that the revenues from that source would greatly exceed those obtained by the former tenant. The preponderance of the evidence was to the effect that, generally speaking, the greater the gross parking revenue the greater will be the percentage thereof charged as rental. There was uncontradicted evidence that even if the appellant were obligated to pay a rental of $1\frac{1}{2}$ cents per gallon of gasolene sold sales of gasolene of the annual volume found by the learned arbitrator to be probable would yield a substantial profit; it is true that this was to some extent dependent on the favourable arrangement as to price which the appellant had made with the company from which it purchased its gasolene but there was evidence that this arrangement was likely to continue.

In determining what rental a prudent man in the position of the appellant would have agreed to pay at the date of expropriation rather than give up possession of the demised premises it was necessary for the learned arbitrator to decide, amongst other things, what estimate as to the revenues which would probably be derived in the future during the currency of the lease would be made by that prudent man. In doing this, he was, in my opinion, entitled to consider the evidence of the actual parking revenues and sales

of gasolene up to May 31, 1956. It appears from the whole record that the parties made it a term of the agreement under which the appellant remained in possession of the expropriated premises up to January 7, 1957, that in any arbitration proceedings evidence might be given of earnings up to May 31, 1956, but not of earnings subsequent to that date. In civil cases the rules of evidence may be relaxed by consent or contract of the parties; (vide the cases collected in Phipson on Evidence, 9th edition, p. 8).

In this case, the agreement of the parties relieves us of the task of deciding whether in the absence of any agreement evidence of the revenues actually derived from the demised premises during the period that the appellant remained in possession would have been admissible. Had it become necessary to decide that question, careful consideration would have had to be given to the judgment of the House of Lords in *Bwllfa and Merthyr Dare Steam Collieries (1891) Limited v. Pontypridd Waterworks Company*[1], and to the comments made thereon by Lord MacMillan, in *Lincolnshire Sugar Co. v. Smart*[2].

In my opinion the findings of fact made by the learned arbitrator which I have set out above were supported by the admissible evidence and should not have been disturbed, and I would have been of opinion that the final result at which he arrived was a proper one if the lease had been for a term certain of ten years.

I have, however, reached the conclusion that the learned arbitrator did not attach sufficient weight to the existence of the sale clause in the lease. Having arrived at the increased rental which a prudent lessee would have been prepared to agree to pay rather than give up possession it was next necessary for the learned arbitrator to convert the difference between that rental and the rental reserved in the lease into a lump sum. This involved a calculation factors in which would be the rate of percentage to be used and the time which the lease had to run. The last mentioned of these factors was, by reason of the sale clause, uncertain; it might well continue to August 31, 1965; it might equally well terminate in a little over ninety days.

[1] [1903] A.C. 426. [2] [1937] A.C. 697 at 705.

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The evidence as to the probability of the lessor receiving an acceptable offer to purchase the property is understandably scanty, but Herman says in his evidence that it is true of most of the appellant's rented lots that there is a scheme to build on them in the future, that the rented lots they have lost in the past have usually been lost because someone decided to build on them or because they were sold and that "the casualty rate in regard to those lots is large". Against this is to be set Herman's evidence that the appellant was in a financial position to meet an offer made to purchase the property and purchased many of its lots; but if the appellant purchased the lot pursuant to the sale clause the lease would none the less be at an end, and, as is pointed out in the reasons of the Court of Appeal, there was no reason to suppose that the appellant would acquire the lot in this way for less than its full market value.

In view of this uncertainty as to how long the lease would have continued in force I find the question as to what lump sum should be awarded an extremely difficult one to answer but have reached the conclusion that this should be fixed at one half of the amount fixed by the learned arbitrator. If this amount is awarded the reasons of the learned arbitrator for not awarding any additional amounts for the improvements made by the appellant will still be applicable and I agree with those reasons.

For the above reasons I would allow the appeal and direct that the order of the Court of Appeal be varied to provide that the contestant do pay to the claimant the sum of $25,096.73 together with interest thereon at 5 per cent per annum from January 7, 1957, as full compensation for the lands taken including all damage suffered by the claimant by reason of the expropriation; the order of the Court of Appeal as to the costs in that Court and of the proceedings before the Official Arbitrator should stand; the appellant is entitled to its costs in this Court.

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

Solicitors for the appellant: Mason, Foulds, Arnup, Walter, Weir & Boeckh, Toronto.

Solicitor for the respondent: W. G. Angus, Toronto.

JACQUELINE ROCHON (*Defendant*) .....APPLICANT;

AND

JOSEPH FRANCOIS CASTONGUAY (*Plaintiff*) ..... } RESPONDENT.

1960
*Oct. 24
Nov. 10

MOTION FOR LEAVE TO APPEAL

Judicial separation—Separation from bed and board—Custody of child—Civil Code, art. 214.

The general rule under art. 214 of the *Civil Code* is that children are entrusted to the party who has obtained the separation, unless the Court orders differently, for the greater advantage of the children.

The respondent obtained a judicial separation from bed and board from his wife. Custody of their male child, who was just over a year old, was granted to the mother. When the child reached the age of six years, the father sought its custody pursuant to art. 214 of the Code. The trial judge granted him the custody, and this judgment was affirmed by the Court of Queen's Bench. The mother applied for leave to appeal to this Court.

Held: The application should be dismissed.

What was done was not illegal and obviously the Courts below decided that it was in the child's best interest not to be deprived of the custody of his father. The reason which had justified the Court in granting the custody to the mother no longer existed, since the child was older and had less need for maternal attention. No circumstances had been proved which would suspend the application of art. 214 of the Code.

APPLICATION for leave to appeal from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], affirming a judgment of Charbonneau J. Application refused.

A. Flamand, for the defendant, applicant.

E. Lafontaine, Q.C., for the plaintiff, respondent.

The judgment of the Court was delivered by

TASCHEREAU J.:—La règle générale veut que les enfants soient confiés à l'époux qui a obtenu la séparation de corps, à moins que le tribunal n'en ordonne autrement pour le plus grand avantage des enfants. (C.C. 214).

Dans le cas qui nous occupe, l'intimé a obtenu contre son épouse une séparation de corps et de biens en date du 20 décembre 1955, et le jugement qui a prononcé cette

*PRESENT: Taschereau, Fauteux and Abbott JJ.

[1] [1961] Que. Q.B. 29.

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séparation a accordé la garde de l'enfant à la mère. Cet enfant, à cette date, n'était âgé que d'un an et quelques mois, et à cause de son bas âge, il était naturel qu'il reçoive les soins maternels.

Plus tard, quand cet enfant eut atteint l'âge de six ans, une requête fut faite à la Cour supérieure du District de Montréal, siégeant à Montréal, demandant qu'il fût remis à la garde de son père, qui avait obtenu la séparation de corps. Le juge a accordé cette requête, et la Cour du banc de la reine[1] a confirmé ce jugement.

La requérante demande aujourd'hui la permission d'appeler de ce jugement, mais je ne crois pas qu'il s'agisse de l'un de ces cas où cette Cour doive intervenir pour renverser la décision unanime des deux tribunaux inférieurs. Il n'y a rien d'illégal dans ce qui a été fait, et évidemment, la Cour supérieure et la Cour du banc de la reine ont jugé qu'il était dans l'intérêt de cet enfant qu'il ne fût pas soustrait à la garde de son père. La raison qui a justifié les tribunaux d'accorder en premier lieu la garde de cet enfant à sa mère, n'existait plus lors de la seconde demande, alors que l'enfant était plus âgé, avait moins besoin des attentions maternelles, et qu'aucune circonstance n'a été établie pour suspendre l'application de l'art. 214 C.C.

La requête doit être rejetée avec dépens.

Application dismissed with costs.

Attorney for the defendant, applicant: Alban Flamand, Montreal.

Attorney for the plaintiff, respondent: Ernest Lafontaine, Montreal.

[1] [1961] Que. Q.B. 29.

HER MAJESTY THE QUEEN .....APPELLANT;

AND

PREMIER MOUTON PRODUCTS INC. ..... RESPONDENT.

1960
*Oct. 31
Nov. 1

1961
Mar. 27

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Excise tax—Tax paid on "mouton" under protest—Product not taxable—Petition of right to recover amounts—Whether paid under mistake of law or fact—Whether under duress or compulsion—Whether refund provisions of statute applicable—The Special War Revenue Act, R.S.C. 1927, c. 179, ss. 80A, 105(5) and 105(6) (Excise Tax Act, R.S.C. 1952, c. 100, ss. 24(1) [repealed in 1954], 46(5) and 46(6)).

The respondent company was engaged in the business of processing sheepskins into "mouton". From March 30, 1950, to January 29, 1952, it was compelled to pay excise tax on this product which was considered to be a fur under the *Excise Tax Act*. After being threatened with the cancellation of its licence, the respondent paid the tax demanded "under protest", and its cheques were so marked. In 1956, it was decided by this Court in *Universal Fur Dressers and Dyers Ltd. v. The Queen*, [1956] S.C.R. 632, that mouton was not a fur and therefore not subject to excise tax. In October 1957, by petition of right, the respondent sought to recover the moneys paid under protest. The petition was granted by the Exchequer Court of Canada. The Crown appealed to this Court.

Held (Kerwin C.J. and Abbott J. dissenting): The respondent was entitled to recover from the Crown the amounts paid as taxes.

Per Taschereau and Cartwright JJ.: The refund provisions of the *Excise Tax Act*, which refer to taxes imposed by the Act, paid or overpaid by "mistake of law or fact", did not apply since the amounts were not paid by mistake of law or fact. The evidence was clear that there was on the part of the officers of the respondent no error of law. The failure of the respondent to make an application for refund within the time limit specified in the Act was not, therefore, a bar to the present proceedings. The true reason why the payments were made under protest was that the respondent wished to continue its business and feared that it would be "closed". The payments were not prompted by the desire to discharge a legal obligation, or to settle definitely a contested claim. The pressure which was exercised was sufficient to negative the expression of free will of the respondent's officers. It flowed from the circumstances of this case that the respondent clearly intended to keep alive its right to recover the sum paid.

The consent not having been legally and freely given, an essential requisite to the validity of the payment was therefore lacking. Moreover, art. 998 of the *Civil Code* applied as the respondent, who did not owe any money to the Crown, was unjustly and illegally threatened in order to obtain its consent.

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

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Per Cartwright and Fauteux JJ.: The payments were not voluntary payments, but involuntary payments made because of fear of the serious consequences threatened. Under the general law, and more particularly under art. 998 of the *Civil Code,* the respondent had the right, in the circumstances of this case, to recover the moneys paid. This right was not barred in the present instance by any of the statutory provisions of the *Excise Tax Act.* The refund provisions, contained in s. 105(6) of this Act, had no application as they apply only where the refund claimed is for moneys paid under a mistake of law or fact. Nor was s. 105(5) applicable, since the refund was not for taxes imposed by this Act but for moneys exacted without legal justification.

Per Kerwin C.J. and Abbott J., *dissenting*: The payments implied a reservation by the respondent of its right to claim repayment of the amounts paid. In the circumstances here, they also implied a doubt on its part as to its right to recover these amounts. The payments clearly fell within the terms of s. 46(6) of the Act. The amounts paid were claimed by the Crown as taxes due by the respondent, were accepted and dealt with by the Department as such, and it was not possible to limit the operation of s. 46(6) to claims for the repayment of taxes validly imposed.

Assuming that duress was raised or argued in the Court below, in any event, these payments were not so made by the respondent. The respondent paid the tax claimed in the mistaken belief that it was obliged to do so. The respondent paid the amount claimed as tax because it found it expedient to do so, and not under duress or through fear within the meaning of arts. 994 et seq. of the Code.

APPEAL from a judgment of Fournier J. of the Exchequer Court of Canada[1], granting a petition of right. Appeal dismissed, Kerwin C.J. and Abbott J. dissenting.

Paul Ollivier, for the appellant.

Roch Pinard, for the respondent.

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

ABBOTT J. (*dissenting*):—Respondent is a processor of sheepskins, and during a period between March 1950 and January 1952, was engaged in the city of Montreal, in processing such skins into what are known in the trade as mouton products, which in their finished state closely resemble certain types of fur such as beaver or seal.

During the period referred to, respondent paid to the Department of National Revenue, as tax claimed on the processing of sheepskins into mouton products, sums totalling $24,681. These amounts were claimed by the Department under the provisions of s. 80A of the *Excise Tax Act,*

[1] [1959] Ex. C.R. 191, 59 D.T.C. 1199.

R.S.C. 1927, c. 179, as amended (now R.S.C. 1952, c. 100, s. 24), which imposes an excise tax calculated upon the current market value of "all dressed furs, dyed furs, and dressed and dyed furs . . . dressed, dyed, or dressed and dyed in Canada, payable by the dresser or dyer at the time of delivery by him".

The said payments, totalling $24,681, were so paid by respondent by means of cheques bearing on the back thereof, in almost every case, such words as "paid under protest" or "tax paid under protest", and the total amount so paid is not in issue. No further objection, verbal or written, was made to payment of the tax claimed until the present proceedings were taken some five years later. These payments "under protest" implied a reservation by respondent of its right to claim repayment of the amounts paid. In the circumstances here, in my view, they also implied a doubt on the part of respondent as to its right to recover these amounts.

The circumstances under which these payments were thus made were found by the learned trial judge[1] to have been as follows:

Lorsque la requérante commença ses opérations, en 1950, elle reçut la visite de deux inspecteurs du ministère qui venaient faire l'évaluation ou l'estimation de ces marchandises pour fin d'imposition de la taxe d'accise. Il y eut discussion entre les inspecteurs et un représentant de la requérante. Ce dernier a exprimé l'opinion que les peaux de mouton n'étaient pas soumises à la taxe d'accise sur les fourrures. L'inspecteur lui aurait répondu "qu'il fallait payer cette taxe, que c'était la loi".—S'il faut payer, nous paierons *sous-protêt.*" "Très bien, payez comme vous voudrez, mais payez." L'inspecteur se rappelle avoir discuté avec les représentants de la requérante, mais il ne peut se souvenir si ces derniers lui ont dit que la taxe n'était pas exigible. Toutefois, vers ce temps-là, il avait entendu dire par des personnes intéressées dans l'industrie et le commerce de fourrures que les peaux de mouton séchées, apprêtées et transformées n'étaient pas imposables.

Un autre directeur de la requérante a souvent pris part aux discussions avec les officiers du ministère. Il prétend qu'il y était question des évaluations et cotisations et de la taxe. Dès les débuts, les paiements ont été faits sous protêt parce que la requérante croyait que les peaux de mouton apprêtées n'étaient pas des fourrures et qu'elles étaient, par conséquent, non imposables. Les gens du métier partageaient cette opinion. Même les inspecteurs auraient entendu des remarques à ce sujet.

A la suite de ces discussions et après avoir été informée que ses permis pourraient être annulés si elle ne se conformait pas à la loi, la requérante décida de payer les montants cotisés, mais par chèques endossés "Taxe payée sous protêt" ou "Payé sous protêt". La requérante a produit

[1] [1959] Ex. C.R. 191 at 194, 59 D.T.C. 1199.

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une liasse de chèques comme pièce P-1, lesquels portent l'endos susdit, sauf quelques exceptions. D'ailleurs, l'intimée dans sa défense admet que le montant payé par la requérante pour taxe, du 30 mars 1950 au 29 janvier 1952, s'élève à $24,681.

In April 1953 an action—apparently in the nature of a test case—was brought in the Exchequer Court in which the Crown claimed from Universal Fur Dressers and Dyers Limited, a sum of $573.08 as taxes under s. 80A of the *Excise Tax Act,* together with certain penalties. The purpose of this litigation appears to have been to determine whether the product described as "mouton" was to be considered as a fur, and therefore subject to tax under the Act. That question was decided in the affirmative in the Exchequer Court in 1954: *The Queen v. Universal Fur Dressers and Dyers Limited*[1], but on June 11, 1956, that judgment was reversed by this Court: *Universal Fur Dressers and Dyers Limited v. The Queen*[2]. More than a year later, on October 8, 1957, respondent instituted these proceedings, to recover the amounts paid by it as aforesaid.

Before this Court it was conceded by counsel for appellant that, in view of the decision rendered in *The Queen v. Universal Fur Dressers and Dyers Limited, supra,* the respondent was not legally liable for the amounts paid by it, and the sole question in issue here is as to the right of respondent to be reimbursed the amounts so paid. The relevant statutory provision is subs. 6 of s. 46 of the *Excise Tax Act,* R.S.C. 1952, c. 100, which reads as follows:

> (6) If any person, whether by mistake of law or fact, has paid or overpaid to Her Majesty, any moneys which have been taken to account, as taxes imposed by this Act, such moneys shall not be refunded unless application has been made in writing within two years after such moneys were paid or overpaid.

The learned trial judge found that the payments made by appellant were so made in error, but that s. 46 had no application because it applied only in the case of the payment of taxes validly imposed. Relying upon the provisions of the *Civil Code* and more particularly upon arts. 1047 and 1048 he maintained the petition of right and declared respondent entitled to recover the sum of $24,681.

[1] [1954] Ex. C.R. 247, [1954] C.T.C. 78, 54 D.T.C. 1069.
[2] [1956] S.C.R. 632, 56 D.T.C. 1075.

With respect, I am unable to agree with the finding that s. 46(6) had no application. In my view, the payments made by respondent clearly fall within the terms of that section. The amounts paid were claimed by the Crown as taxes due by respondent, were accepted and dealt with by the Department as such, and with great respect for the view expressed by the learned trial judge, I am unable to limit the operation of the said section to claims for the repayment of taxes validly imposed. Moreover, I think it is clear from the decision of this Court in *The Queen v. Beaver Lamb and Shearling Co. Ltd.*[1], that no such limitation exists.

Before this Court, counsel for respondent also urged that the payments in question were made under duress and for that reason recoverable. This ground does not appear to have been raised or argued in the Court below, and I question whether it is open to respondent on the pleadings. However, in any event, I am satisfied that these payments were not so made by respondent. As found by the learned trial judge: «Sa décision de payer résulte du fait que les autorités l'ont convaincue que c'était la loi et qu'elle a craint de voir ses opérations industrielles et commerciales mises en danger.»

Whether or not mouton products were liable to tax as fur under section 80A of the *Excise Tax Act,* remained in doubt until judgment was rendered by this Court in the *Universal Fur Dressers and Dyers Limited* case, *supra,* reversing the judgment of the Exchequer Court which had held that they were so liable, and in my opinion the respondent paid the tax claimed in the mistaken belief that it was obliged to do so.

There is no doubt that the officers of the Department were in good faith in claiming payment of the tax from respondent and the trial judge so found. They were doing no more than their duty in insisting upon payment of a tax, which they believed to be exigible from respondent as well as from all other like processors. To have allowed those who were unwilling to pay, to postpone or avoid payment of the tax, while receiving payment from those who did not dispute liability, would have been manifestly unfair, since

[1] [1960] S.C.R. 505, 23 D.L.R. (2d) 513.

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it is a reasonable inference that those who paid would be obliged to try to recover the tax paid in the resale price of the finished product.

The distinction made in the common law between a voluntary payment which is not recoverable and an involuntary payment which is, does not exist in the civil law of Quebec. Under art. 1047 of the *Civil Code,* he who receives what is not due to him through error of law or of fact is bound to restore it. Generally speaking, the payment of any sum claimed as tax is made under compulsion of the taxing statute which usually contains an appropriate penalty for non-payment, and in my opinion respondent paid the amount claimed as tax here because it found it expedient to do so, under the circumstances found by the learned trial judge, and not under duress or through fear within the meaning of arts. 994 *et seq.* of the *Civil Code.* At any time within two years after the payments were made, appellant could have taken advantage of the provisions of s. 46(6) of the *Excise Tax Act* and made written application for a refund of the amounts so paid. It failed to do so and first claimed repayment some five years later, when it instituted these proceedings.

I would allow the appeal and dismiss the petition of right with costs throughout.

TASCHEREAU J.:—During the relevant periods, the respondent was engaged in the processing of raw sheepskins which it transformed into finished mouton skins and shearling. It alleges in its petition that from March 30, 1950, to January 29, 1952, it was *called upon and forced* to pay to the Department of National Revenue a total excise tax amounting to $25,269.76, which it did not owe. It was its contention that sheepskins, as processed and sold to its clients, were not subject to the excise tax claimed by the appellant. The Exchequer Court[1] allowed the petition and held that the respondent had the right to claim from the appellant $24,681 with costs.

[1] [1959] Ex. C.R. 191, 59 D.T.C. 1199.

The tax is imposed by the *Excise Tax Act*, R.S.C. 1952, c. 100, s. 24 (formerly R.S.C. 1927, c. 179, s. 80A) which reads as follows:

> 1. There shall be imposed, levied and collected, an excise tax equal to fifteen per cent of the current market value of all dressed furs, dyed furs and dressed and dyed furs,—
>
> (i) imported into Canada, payable by the importer or transferee of such goods before they are removed from the custody of the proper customs officer; or
>
> (ii) dressed, dyed, or dressed and dyed in Canada, payable by the dresser or dyer at the time of delivery by him.

In *Universal Fur Dressers and Dyers Limited v. The Queen*[1], it was held that sheepskin cannot be described as a fur, and that therefore, in that case, s. 80A of the *Excise Tax Act* could not find its application. In the present case, the appellant admits that mouton is not a fur and that no tax is payable on the processing of sheepskin into mouton products. The grounds on which the appellant relies are the following, with which I will presently deal.

It is first submitted on behalf of the appellant that the respondent is barred from claiming any refund as it failed to make any application in writing within two years after the moneys were paid or overpaid. (Section 46, para. 6 of the Act, 1952 R.S.C., c. 100). This section applies, when the payment has been made by mistake of law or fact, but I do not think that such is the case here. The officers of the company were not mistaken as to the law or the facts. They had been in the fur business since many years, and it was in 1950 that they commenced the processing of raw sheepskins.

When they started that business, they immediately received the visit of two inspectors of the Excise Department, with whom they had numerous discussions in the course of which they continuously maintained that mouton was not a fur, and therefore not subject to the tax. After being told that they would be "closed up" if they did not pay, they decided, with the agreement of the inspectors, to pay "under protest". This was done from March 23, 1950, until September 7, 1951, and all the fifty-eight cheques were endorsed "paid under protest" or "tax paid under protest".

[1] [1956] S.C.R. 632, 56 D.T.C. 1075.

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Taschereau J.

The evidence is clear to me that there was on the part of the officers of the company no error of law. They had the conviction that they did not owe the tax, and their numerous discussions with the departmental officers, and the payments made under protest, negative any suggestion of a mistake of law.

At that time, other firms engaged in the same business as the respondent had contested the validity of this tax and had refused to pay it. A test case was made, and a few years later this Court, in *Universal Fur Dressers and Dyers Ltd. v. The Queen*[1], held that the tax was not payable. The respondent's officers were aware of the position taken by the others operating in the same field, and of their refusal to comply with the request of the Department. When the respondent finally decided to pay under protest, I am quite satisfied that it was not because the officers were mistaken as to the law; they were fully aware of their legal position, and had repeatedly set forth their contentions to the Department's officers from the beginning of the discussions in 1950. There being no mistake of law or fact, s. 46(6) does not apply, and therefore the failure by the respondent to give a written notice is not a bar to the present proceedings.

I do not agree with the trial judge who says in his reasons, although he allows the claim, that the respondent paid as a result of a mistake of law. The respondent is not bound by this pronouncement, and is of course entitled to have the judgment upheld for reasons other than those given in the Court below. The true reason why the payments were made under protest, is that the respondent wished to continue its business and feared that if it did not follow the course that it adopted, it would be "closed". Eli Abramson, one of the officers of the respondent says in his evidence:

> Q. What were you told by the officers of the Department with whom you were discussing this?
> A. Well, they told me I have to pay the tax. So, I says, 'Why do I have to pay the tax?' They said 'If you don't pay the tax we will close you up, because that is the law, and you must pay the tax.'

This statement is not denied by the two inspectors who were called as witnesses. Instead of seeing their business ruined, which would have been the inevitable result of their

[1] [1956] S.C.R. 632, 56 D.T.C. 1075.

refusal to pay this illegal levy, they preferred, as there was no other alternative, to comply with the threatening summons of the inspectors. As Abramson says: "Well, if I have to pay, I feel I am going to pay it under protest". This is what was done, and I am satisfied that the payments made were not prompted by the desire to discharge a legal obligation, or to settle definitely a contested claim. The pressure that was exercised is sufficient, I think, to negative the expression of the free will of the respondent's officers, with the result that the alleged agreement to pay the tax has no legal effect and may be avoided. The payment was not made voluntarily to close the transaction. Vide *Maskell v. Horner*[1], also *Atlee v. Backhouse*[2], *Knutson v. Bourkes Syndicate*[3], *The Municipality of the City and County of St. John et al. v. Fraser-Brace Overseas Corporation et al.*[4] As it was said in *Valpy v. Manley*[5], the payment was made for the purpose of averting the threatened evil, and not with the intention of giving up a right, but with the intention of preserving the right to dispute the legality of the demand. The threats and the payments made under protest support this contention of the respondent. Vide: *The City of London v. London Club Ltd.*[6]. Of course, the mere fact that the payment was made "under protest" is not conclusive but, when all the circumstances of the case are considered, it flows that the respondent clearly intended to keep alive its right to recover the sum paid. Vide *supra.*

In *Her Majesty the Queen v. Beaver Lamb and Shearling Co. Ltd.*[7], decided by this Court, the situation was entirely different. The majority of the Court reached the conclusion that the company paid as a result of a compromise and that there was no relation between the agreement that was reached and the threats that had been made. The payment was made voluntarily to prevent all possible litigation, and to bring the matter to an end.

[1] [1915] 3 K.B. 106 at 118.
[2] (1838), 3 M. & W. 633, 646, 650, 150 E.R. 1298.
[3] [1941] S.C.R. 419, 3 D.L.R. 593.
[4] [1958] S.C.R. 263, 13 D.L.R. (2d) 177.
[5] (1845), 1 C.B. 594, 602, 603, 135 E.R. 673.
[6] [1952] O.R. 177, 2 D.L.R. 178.
[7] [1960] S.C.R. 505, 23 D.L.R. (2d) 513.

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Taschereau J.

I must add that in the province of Quebec, the law is substantially in harmony with the authorities that I have already cited. The consent to an agreement must be legally and freely given. This is an essential requisite to the validity of a contract. Moreover, I think that art. 998 of the *Civil Code* applies, as the respondent who did not owe any amount to the appellant was unjustly and illegally threatened in order to obtain its consent. Articles 1047 and 1048 of the *Civil Code* do not apply, and are not a bar to respondent's claim. These sections suppose the existence of an error of law or of fact, which does not exist here.

It has been submitted by counsel for the appellant that the pleadings are insufficient and not specific enough to justify a finding of duress or compulsion. In paragraph 6 of its petition, the respondent alleges that it was "called upon and *forced to pay*" the tax. The respondent could have been asked to furnish particulars, but the appellant did not choose to follow that course of action. I am, therefore, of the opinion that this allegation is sufficient to allow the evidence that was adduced at trial.

I would dismiss the appeal with costs.

CARTWRIGHT J.:—For the reasons given by my brother Taschereau and those given by my brother Fauteux I would dismiss the appeal with costs.

FAUTEUX J.:—This is an appeal from a judgment of the Exchequer Court[1] maintaining respondent's claim and declaring that it is entitled to recover from appellant the sum of $24,681.

It is admitted that this amount was paid by respondent to appellant, between March 1950 and January 1952; that the payment of that sum was exacted from the former by the latter as excise tax purported to be imposed, under the *Excise Tax Act*, R.S.C. 1927, c. 179 and its amendments, on the processing of sheepskins into mouton products; that these moneys were paid by means of a number of cheques issued every month throughout the period, all of these cheques, with very few exceptions, bearing on the back the words "paid under protest" or "tax paid under protest"; and that, at all relevant times, no such tax was imposed by the

[1] [1959] Ex. C.R. 191, 59 D.T.C. 1199.

Excise Tax Act on the processing of sheepskins into mouton products, as it was indeed eventually decided by this Court in *Universal Fur Dressers and Dyers Ltd. v. The Queen*[1].

The only question in issue is as to the right of respondent to obtain reimbursement of these moneys.

It is convenient to say immediately that the claim of respondent is not that it paid these moneys by mistake of either law or fact, but under illegal constraint giving a right of reimbursement. That this is really the true nature of the claim appears from the petition of right. It is therein alleged that from the beginning and throughout the period during which these moneys were exacted, there were, between the officers of the Department of National Revenue and those of the respondent company, numerous discussions in the course of which the latter (i) claimed that no excise tax could be imposed on these sheepskins; (ii) demanded that the officers of the Department alter their illegal attitude; (iii) opposed the payment of such tax which it was "forced" to pay and which it did pay under protest at the suggestion of the officers of the Department. Surely, one who makes such allegations and says that he did pay under protest does not indicate that he was under the impression that he owed the money and that he paid through error. As was said by Taschereau J. in *Bain v. City of Montreal*[2], at the bottom of page 285:

> Of course, one who pays through error, cannot protest: he is under the impression that he owes, and has nothing to protest against, or no reasons to protest at all.

Furthermore, the evidence adduced by respondent is consistent with this view as to the nature of the claim. Indeed the evidence accepted by the trial Judge shows that, to the knowledge of the officers of the Department, other processors in the trade entertained the view that such a tax was not authorized under the Act. It also shows that respondent, who was opposed to its payment, would not have paid it, as it did under protest, had not its officers been intimidated, threatened by those of the Department, and in fear of the greater evil of having their business closed up.

[1] [1956] S.C.R. 632, 56 D.T.C. 1075.
[2] (1883), 8 S.C.R. 252.

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Fauteux J.

The trial Judge so found and, in this respect, expresses himself as follows:

> Il n'y a pas de doute qu'elle ne les aurait pas payés si elle n'avait pas été intimidée par les remarques et informations des officiers du Ministère du Revenu National, à l'effet qu'elle devait payer parce que c'était la loi et qu'au cas de refus, elle pourrait voir son entreprise close.

Having said this, the trial Judge continues:

> La preuve m'autorise, je crois, à conclure qu'elle a réellement pensé qu'elle devait payer et que la taxe était exigible; le paiement a donc été fait par erreur. Dans ces circonstances, il est logique de croire que son consentement au paiement a été vicié par les représentants de l'autorité et que les paiements n'ont pas été faits volontairement mais par suite d'erreur et *de crainte d'un mal sérieux.*
> (The italics are mine).

I agree with the trial Judge that these payments were not voluntary payments, but involuntary payments made because of fear of the serious consequences threatened. I must say, however, that I find it difficult to reconcile that conclusion, which is supported by the evidence, with the statement that these payments were made through error. And if the trial Judge really meant that the payments were made through error, in the sense that respondent officers really thought that they owed these moneys to the appellant, I must say, with deference, that such an inference is not supported by the evidence.

The right of respondent to be reimbursed these moneys, which it paid to appellant, involves the consideration of two questions:—(i) Whether, under the general law, there is, in like circumstances, a right to recover moneys paid, and, in the affirmative, (ii) Whether this right to recover, under the general law, is barred, in the present instance, by any of the statutory provisions of the *Excise Tax Act.*

The first question must be decided according to the principles of the Civil Law of the province of Quebec where the facts leading to this litigation took place and where, in particular, these payments were made.

Article 998 of the *Civil Code,* relating to the incidence of constraint as affecting consent, reads as follows:

> If the violence be only legal constraint or the fear only of a party doing that which he has a right to do, it is not a ground of nullity, but it is, if the forms of law be used or threatened for an unjust and illegal cause to extort consent.

In *Wilson et al. v. The City of Montreal*[1], the Superior Court condemned respondent to repay to appellants moneys it had collected from them under an illegal assessment roll made to defray the costs of certain municipal improvements. These moneys were paid under protest, as evidenced by the receipt obtained from the City and which read:

> Received from the Hon. Charles Wilson, the above amount which he declares he pays under protest and to save the proceedings in execution with which he says he is threatened.

This judgment, being appealed, was confirmed by the Court of Appeal[2].

In *The Corporation of Quebec v. Caron*[3], the Court of Appeal again confirmed a judgment condemning the City to reimburse a payment made, not by error, but "sciemment" by Caron, under protest. The claim of the City was for arrears of water rate and it had, in like cases, the power to shut off the water. The claim, however, was prescribed. Caron was threatened, on the one hand, by his tenant, to be sued in damages in the event of a stoppage of water and was threatened, on the other hand, by the City, of a stoppage of water unless payment was made. The Court of Appeal said:

> It is true that there was no physical force employed to compel the payment but there was a moral force employed which compelled the respondent to choose one of two evils, either to pay a debt which he could not by law be forced to pay, or to pay damages which he desired to avoid; in neither case could the payment have been voluntary; it was the effect of moral pressure, and would not have been made without it. It was an influence which took away the voluntary character from the payment and yet which could not be ranked with «crainte et violence». Under these circumstances, this payment was not being voluntary but was made under pressure; the plaintiff's action must stand and the appeal be dismissed.

Baylis v. The Mayor of Montreal et al.[4] This was an action brought to recover from the City an amount collected from the appellant for assessment not legally due, the assessment roll, under which the payment was exacted, being a nullity. The appellant did not protest or make any

[1] (1878), 24 L.C.J. 222, 1 L.N. 242.
[2] (1880), 3 L.N. 282.
[3] (1866), 10 L.C.J. 317.
[4] (1879), 23 L.C.J. 301.

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reserve when he paid. He paid only when compelled to do so by warrant of distress. Sir A. A. Dorion, C.J. said, at the bottom of page 304:

* * *

And it has repeatedly been held that a payment made under such circumstances is not a voluntary payment and did not require that the party making it should pay, under protest, to enable him to recover back what has been illegally claimed from him.

In *Bain v. City of Montreal, supra,* the above decisions are referred to, with virtual approval, by Taschereau J., at page 286, where he makes the following comments as to the significance and necessity, or non necessity, of protest:

I cannot help but thinking that, that when a party pays a debt which he believes he does not owe, but has to pay it under *contrainte* or fear, he ought to accompany this payment with a protest, if not under the impossibility to make one, and so put the party whom he pays under his guard, and notify him that he does not pay voluntarily, if this party is in good faith. If he is in bad faith and receives what he knows is not due to him, he is, perhaps, not entitled to this protection. A distinction might also perhaps be made between the case of a payment under actual *contrainte,* and one made under a threat only of *contrainte,* or through fear.

If there is an actual *contrainte,* a protest may not be necessary, and in some cases, it is obvious, may be impossible, but if there is a notice of threat only of *contrainte,* then, if the party pays before there is an actual *contrainte,* he should pay under protest. *Demolombe* Vol. 29 No. 77 seems, at first sight, to say that a protest is not absolutely necessary, but he speaks, it must be remarked, of the case of an actual *contrainte.*

Of course, each case has to be decided on its own facts. It is not as a rule of law that a protest may be said to be required. For a protest is of no avail when the payment or execution of the obligation is otherwise voluntary. *Favard de Langlade,* Rép. Vo. *Acquiescement,* Par. XIII; *Solon,* 2 Des Nullités, No. 436; *Bédarride* De La Fraude, Vol. 2, No. 609.

Being of opinion that, under the general law, respondent is entitled to be reimbursed of the moneys it paid to appellant, there remains to consider the contention of the Crown that this right is barred under the provisions of s. 105 of the *Excise Tax Act.*

Appellant relies on s. 105(6):

6. If any person, whether by mistake of law or fact, has paid or overpaid to His Majesty, any moneys which have been taken to account, as taxes imposed by this Act, such moneys shall not be refunded unless application has been made in writing within two years after such moneys were paid or overpaid.

The French version of s. 105(6) reads:

(6) Si quelqu'un, par erreur de droit ou de fait, a payé ou a payé en trop à Sa Majesté des deniers dont il a été tenu compte à titre de taxes imposées par la présente loi, ces deniers ne doivent pas être remboursés à moins que demande n'ait été faite par écrit dans les deux ans qui suivent le payement ou le payement en trop de ces deniers.

The two texts make it clear that these provisions apply only where the refund claimed is for moneys paid under a mistake of law or fact. They have no application in this case.

The other provisions of the Act, which may be referred to, are in s. 105(5) reading:

5. No refund or deduction from any of the taxes imposed by this Act shall be paid unless application in writing for the same is made by the person entitled thereto within two years of the time when any such refund or deduction first became payable under this Act or under any regulation made thereunder.

These provisions are also inapplicable to the present case. The refund claimed is not for "taxes imposed by this Act" but for moneys exacted without legal justification.

It was further conceded that s. 105 is not exhaustive of the cases where refund may be made. Indeed one would not expect the Act to provide that moneys exacted under threat as a tax not imposed under the Act, may be reimbursed.

For these reasons, I am of the opinion that the respondent's petition of right is well founded.

I may add that this case is entirely different from the case of *The Queen v. Beaver Lamb & Shearling Co. Ltd.*[1] In that case, the payments of the moneys claimed were found to have been made long after and not consequential to the alleged duress, but under a mistake of law.

I would dismiss the appeal with costs.

Appeal dismissed with costs, KERWIN C.J. *and* ABBOTT J. *dissenting.*

Solicitor for the appellant: W. R. Jackett, Ottawa.

Solicitor for the respondent: R. Pinard, Montreal.

[1] [1960] S.C.R. 505, 23 D.L.R. (2d) 513.

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*Mar. 9, 10
Mar. 27

IRENE REBRIN ..... APPELLANT;

AND

PHILLIP W. BIRD AND THE MINISTER OF CITIZENSHIP AND IMMIGRATION ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Immigration—Validity of deportation order—Whether provisions of an Act for the Recognition and Protection of Human Rights and Fundamental Freedoms, 1960 (Can.), c. 44, infringed—Immigration Act, R.S.C. 1952, c. 325, ss. 36(1), 61, 63—Immigration Regulation 13.

The appellant, a "stateless" person born in Peking, China, of "White Russian" parents, obtained a six-months' non-immigrant visa in Brazil for admission to Canada and, following her arrival in this country, applied to an Immigration Officer "for permission to work in Canada". The latter reported to a Special Inquiry Officer that he was of the opinion that it would be contrary to the provisions of the *Immigration Act* to grant the appellant admission to Canada by reason of her coming under the prohibited class of s. 5(t) of the Act, in that she could not or did not fulfil or comply with the conditions or requirements of s. 20 of the Immigration Regulations. An inquiry was held before the Special Inquiry Officer who found that the appellant might not come into or remain in Canada as of right and ordered her detention and deportation. An appeal from this order to the Minister of Citizenship and Immigration was dismissed. The appellant applied in the Supreme Court of British Columbia for a writ of *habeas corpus* with *certiorari* in aid. This motion was dismissed; an appeal to the Court of Appeal was also dismissed but the latter granted leave to appeal to this Court.

Held: The appeal should be dismissed.

The Acting Minister of Citizenship and Immigration was vested with power under the provisions of ss. 61 and 63 of the *Immigration Act* and clause 13 of the Immigration Regulations to prescribe the form of deportation order that was used by the Special Inquiry Officer. The form was one that had been in use for some time, but the words at the end through which lines had been drawn were so deleted because the Acting Minister, pursuant to s. 63 of the Act and the Regulations and Amendments thereto, had prescribed a new form of deportation order,—the only difference between the old and new forms being the omission of the deleted words. The submission that paragraphs 2 and 3 of regulation 13 indicated that the order should have used all the words in subs. (1) of s. 36 of the Act was rejected, as those paragraphs apply to circumstances that did not exist in this case.

There was no infringement of *An Act for the Recognition and Protection of Human Rights and Fundamental Freedoms* as the appellant had not been deprived of her liberty except by due process of law. The contention that matters irrelevant to a proper determination of whether the appellant should be deported had been considered at all levels failed.

*PRESENT: Kerwin C.J. and Taschereau, Locke, Cartwright, Fauteux, Abbott, Martland, Judson and Ritchie JJ.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], dismissing an appeal from a judgment of Norris J. Appeal dismissed.

A. E. Branca, Q.C., for the appellant.

W. R. Jackett, Q.C., and *N. A. Chalmers,* for the respondent.

The judgment of the Court was delivered by

THE CHIEF JUSTICE:—By leave of the Court of Appeal for British Columbia Irene Rebrin appeals from a judgment of that Court[1] dismissing an appeal from the judgment of Norris J. who had dismissed the appellant's motion for a writ of *habeas corpus* with *certiorari* in aid. All of the points taken in the Courts below on behalf of the appellant were abandoned before us except two.

Miss Rebrin, who describes herself as a "stateless" person, was born in Peking, China, of "White Russian" parents. About 1948 she and her parents were given permission to leave China provided they left their assets there. This they did and a United Nations Refugee Certificate was issued to her in China, and, together with her parents, she travelled to Brazil whither her brother had already escaped from China. At the invitation of a friend whom she had met while in China, she came to Canada as a tourist or visitor on July 5, 1958, presumably having been permitted entry under s. 7(1)(*c*) of the *Immigration Act,* R.S.C. 1952, c. 325, which authorizes "tourists or visitors" to be allowed to enter and remain in Canada as non-immigrants. Before leaving Brazil the appellant had obtained a six-months' non-immigrant visa under subs. (4) of para. 18 of the Immigration Regulations. She secured employment at the University of Toronto in the autumn of 1958. In the summer of 1959 she was employed by the Canadian Pacific Railway Company as a cashier at the Banff Springs Hotel; in the autumn of 1959 she was a member of the staff of the Department of Slavonic Languages at the University of British Columbia where she lectured in the Russian language. She was requested to resume her teaching at the summer school at the University during 1960 and to return to her teaching

[1] (1960), 32 W.W.R. 400, 24 D.L.R. (2d) 593.

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Kerwin C.J.

duties again in the autumn of 1960. At the time of the hearing of this appeal, we were advised that she is at present continuing her work at the University. Since coming to Canada and taking up employment she has been self-supporting, living in West Vancouver.

In August 1958, the appellant applied to an Immigration Officer "for permission to work in Canada" and, having thus ceased to be in the "particular class in which he was admitted as a non-immigrant", that is, the class of "tourist or visitor"—she was, by virtue of subs. (3) of s. 7 of the *Immigration Act* "deemed to be a person seeking admission to Canada". The text of this subsection is as follows:

> (3) Where any person who entered Canada as a non-immigrant ceases to be a non-immigrant or to be in the particular class in which he was admitted as a non-immigrant and, in either case, remains in Canada, he shall forthwith report such facts to the nearest immigration officer and present himself for examination at such place and time as he may be directed and shall, for the purposes of the examination and all other purposes under this Act, be deemed to be a person seeking admission to Canada.

She was therefore properly treated by the Immigration Officer as though she had appeared before him under subs. (1) of s. 20 of the *Immigration Act* "for examination as to whether he is or is not admissible to Canada or is a person who may come into Canada as of right".

On November 19, 1958, the Immigration Officer reported to Special Inquiry Officer Clifford Ireland as follows:

> I have examined Irene Rebrin, a person seeking to come into Canada and in accordance with Section 23 of the Immigration Act, I hereby report I am of the opinion it would be contrary to the provisions of the Immigration Act to grant admission to or otherwise let the said Irene Rebrin come into Canada by reason of her coming under the prohibited class of Section 5 paragraph (t) thereof in that she cannot or does not fulfil or comply with the conditions or requirements of Section 20 of the Regulations of the Immigration Act.

On January 22, 1959, pursuant to subs. (2) of s. 24 of the Act, an inquiry was held at Toronto before Mr. Ireland, at which Miss Rebrin was present together with her counsel, who was permitted to ask such questions as he desired of Miss Rebrin who was the only person who testified. At the conclusion of this inquiry Mr. Ireland rendered the following decision:

> Miss Irene Rebrin, on the basis of the evidence adduced at this Inquiry, I have reached the decision that you may not come into or remain in Canada as of right and that:—
>
> (1) you are not a Canadian citizen;

(2) you are not a person having Canadian domicile;

(3) you are a member of the prohibited class described under paragraph (t) of Section 5 of the Immigration Act in that you cannot or do not fulfil or comply with the conditions or requirements of this Act or the Regulations by reason of the fact that:

(a) you cannot or do not fulfil or comply with the conditions or requirements of Section 20 of the Regulations of the Immigration Act.

I hereby order you to be detained and to be deported.

The formal deportation order made by Mr. Ireland and made part of the return in these proceedings is as follows:

(Seal)

CANADA

DEPARTMENT OF CITIZENSHIP AND IMMIGRATION
DEPORTATION ORDER AGAINST

Miss Irene Rebrin

6 Lowther Avenue, Toronto, Ontario (Formerly of Brazil, South America) under section 28 of The Immigration Act.
On the basis of the evidence adduced at an inquiry held at 175 Bedford Road, Toronto, Ontario on 22nd of January 1959 I have reached the decision that you may not come into or remain in Canada as of right and that (1) you are not a Canadian citizen; (2) you are not a person having Canadian domicile; (3) you are a member of the prohibited class described under paragraph (t) of Section 5 of the Immigration Act in that you cannot or do not fulfil or comply with the conditions or requirements of this Act or the Regulations by reason of the fact that (a) you cannot or do not fulfil or comply with the conditions or requirements of Section 20 of the Regulations of the Immigration Act.

I hereby order you to be detained and to be deported ~~to the place whence you came to Canada,~~
C.I. ~~or to the country of which you are a national or citizen, or to the country of your birth, or to such country as may be approved by the minister:~~

"C. Ireland"

Date Jan. 22, 1959 .....

Special Inquiry Officer.

Service Hereof Acknowledged by
..... "Irene Rebrin" .....

This form has been prescribed by the Minister of Citizenship and Immigration.

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From this order Miss Rebrin appealed to the Minister of Citizenship and Immigration by notice dated January 22, 1959, and pending the disposition of the appeal she was conditionally released in accordance with s. 18 of the Act on her own recognizance in the sum of $200. On January 22, 1960, E. P. Beasley, Chief of the Admissions' Division of the Department of Citizenship and Immigration wrote Miss Rebrin that he had been directed to inform her that her appeal from the deportation order of January 22, 1959, had been duly considered and dismissed.

The first question raised on behalf of the appellant is that the deportation order of Special Inquiry Officer Ireland is invalid because it failed to comply with subs. (1) of s. 36 of the Act since, as put in the appellant's factum and elaborated by counsel, "it does not set out the place to which the appellant is to be deported". This subsection reads as follows:

> 36. (1) Subject to subsection (2), a person against whom a deportation order has been issued shall be deported to the place whence he came to Canada or to the country of which he is a national or citizen or to the country of his birth or to such country as may be approved by the Minister under this Act.

Subsection (2) does not affect the questions in dispute. The printed form used by Mr. Ireland was one that had been in use for some time but the words at the end through which lines have been drawn were so deleted because, on October 28, 1957, the Acting Minister of Citizenship and Immigration for Canada, pursuant to s. 63 of the Act and the Regulations and Amendments thereto, had prescribed a new form of deportation order,—the only difference between the old and new forms being the omission of the deleted words. Section 63 of the Act is as follows:

> 63. The Minister may
>
> (*a*) prescribe such forms and notices as he deems necessary for the carrying out of this Act and the regulations;
>
> (*b*) designate ports of entry and immigrant stations for the purposes of this Act; and
>
> (*c*) prescribe and arrange for the procurement of suitable uniforms and insignia to be worn by immigration officers.

Under s. 61 of the Act power is given to the Governor in Council to make regulations for carrying into effect the purposes and provisions of the Act. Regulations were duly promulgated, Clause 13 of which reads:

Deportation Orders

13. (1) A deportation order in the form prescribed by the Minister shall be executed in duplicate and one duplicate original shall be served upon the person ordered deported by remitting such duplicate original to him personally whenever practicable and in other instances, by forwarding it by registered mail to his last known address.

(2) A copy of the deportation order shall be forwarded to the transportation company that is obligated to remove or to pay the costs of deportation of the person ordered deported and such copy may form part of a notice in the form prescribed by the Minister.

(3) A transportation company may request once only in each case that deportation be made to a country other than that designated in the deportation order or other order made by the Minister, Director or a Special Inquiry Officer.

The Acting Minister of Citizenship and Immigration was thus vested with power to prescribe the form that Mr. Ireland used. Paragraphs 2 and 3 of regulation 13 were relied upon by counsel for the appellant as indicating that the deportation order should have used all the words in subs. (1) of s. 36 of the Act, but we are unable to agree as they apply to circumstances that do not exist in this case. The appellant fails on her first point.

The only remaining point involves a submission that the provisions of *"An Act for the Recognition and Protection of Human Rights and Fundamental Freedoms"*, c. 44 of the Statutes of 1960, were infringed. There was no infringement as the appellant has not been deprived of her liberty except by due process of law. Involved in this second submission is the contention that matters irrelevant to a proper determination of whether the appellant should be deported had been considered at all levels. Nothing was put forward which indicated Mr. Ireland considered any such matters, but reference was made to certain correspondence between the appellant or persons on her behalf on the one hand, and the Minister of Citizenship and Immigration on the other, and also to certain statements made in the House of Commons by the Prime Minister and by the Minister. In view of the liberty of an individual or her liability to deportation being at stake, no objection was raised by counsel on behalf

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Kerwin C.J.

of the respondents to the reading of these statements, but there is nothing in them or in the correspondence to warrant the suggestion that matters irrelevant to the proper determination of the appeal to the Minister were considered.

By subs. (2) of s. 31 of the Act "All appeals from deportation orders shall be reviewed and decided upon by the Minister" except where the Minister directs that the matter should be dealt with by an Immigration Appeal Board and by subs. (3) "An Immigration Appeal Board or the Minister, as the case may be, has full power to consider all matters pertaining to a case under appeal and to allow or dismiss any appeal". One of the letters sent on Miss Rebrin's behalf was clearly a request to the Minister to take steps to permit the appellant to remain in Canada notwithstanding the probable validity of the deportation order. We agree with the submission on behalf of the respondents that the material discloses nothing from which any inference may be drawn that in disposing of the appellant's appeal from the deportation order the Minister was in any way acting upon any evidence or information against the appellant which had not been brought to the attention of Miss Rebrin and which she had not had an opportunity to answer. The statement of the Minister in the House of Commons distinguished between the dismissal of such appeal and the review made of the case "to see whether the strict application of the law should be waived by the exercise of the discretion vested in the Minister under The Immigration Act". That discretion arises under s. 8 of the Act whereby the Minister has power to issue a written permit for the appellant to remain in Canada for a specified time, not exceeding twelve months, and also power to extend or cancel such permit.

The appeal is dismissed.

Appeal dismissed.

Solicitor for the appellant: G. H. Dowding, Vancouver.

Solicitors for the respondents: Tysoe, Harper, Gilmour, Grey, De Vooght & Levis, Vancouver.

1961

THE GOVERNMENT OF CANADA (*Respondent*) ..... APPELLANT;

*Jan. 24
Mar. 27

AND

THE GOVERNMENT OF THE PROVINCE OF NEWFOUNDLAND (*Claimant*) ..... RESPONDENT.

AND

THE ATTORNEY GENERAL OF CANADA ON BEHALF OF HER MAJESTY THE QUEEN IN RIGHT OF CANADA ..... APPELLANT;

AND

THE GOVERNMENT OF THE PROVINCE OF NEWFOUNDLAND (*Claimant*) ..... RESPONDENT.

MOTIONS TO QUASH PROCEEDINGS BY WAY OF CROSS-APPEAL

Courts—Order of Exchequer Court for examination for discovery of Crown official—Applications for leave to appeal to Supreme Court granted—Whether notices of cross-appeal appeals in substance—Whether leave of Judge of Supreme Court required—Exchequer Court Act, R.S.C. 1952, c. 98—Supreme Court Act, R.S.C. 1952, c. 259—Supreme Court rules 63 and 100.

In an action with respect to an alleged breach of an agreement between the Government of Canada and the Government of the Province of Newfoundland, pertaining to employment of the Royal Canadian Mounted Police, a notice of motion was served on behalf of Newfoundland, pursuant to Exchequer Court rule 130, for the examination for discovery of a departmental or other officer of the Crown. The notice did not name the officer sought to be examined. At the hearing of the motion counsel for Newfoundland requested that the person to be examined should be the Attorney General of Canada. In the event that such request should be denied, the suggestion was made that the then Deputy Minister of Justice should be the officer named and that, failing the naming of either of these, an officer who was one of the then Assistant Deputy Ministers should be named. In his judgment the President of the Exchequer Court directed that the Assistant Deputy Minister, who in the meantime had been appointed Deputy Minister, be examined.

*PRESENT: Kerwin C.J. and Taschereau, Locke, Cartwright, Fauteux, Martland, Judson and Ritchie JJ.

1961

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Applications on behalf of Canada and the Attorney General of Canada for leave to appeal to this Court from the order of the Court below having been granted, notices of cross-appeal were served on behalf of Newfoundland pursuant to Supreme Court rule 100. Motions were then brought for orders quashing the proceedings by way of cross-appeal commenced by Newfoundland, on the ground that no appeal lies to this Court from an interlocutory judgment pronounced by the Exchequer Court except with leave of a judge of this Court and Newfoundland had neither sought nor obtained such leave.

Held: The motions should be dismissed.

Had there been no appeal taken by Canada, Newfoundland could not have appealed from the order of the President of the Exchequer Court without first obtaining leave; but the notices which it was sought to quash were not the initiation of appeals by Newfoundland, they gave notice that on the hearing of Canada's appeals Newfoundland would ask the Court to exercise in a particular way the jurisdiction which it possessed by reason of the fact that those appeals were properly before it, a jurisdiction which it was free to exercise whether or not notice under rule 100 had been served.

While the notices served by Newfoundland were not necessary to clothe this Court with jurisdiction to give the relief for which they asked, it was proper to serve them.

The procedure to be followed by a respondent in an appeal taken to this Court who wishes to cross-appeal or to contend that the decision of the Exchequer Court should be varied is regulated by rule 100. The question whether this Court has jurisdiction to entertain an appeal brought from a decision of the Exchequer Court must be determined by reference to the provisions of the *Exchequer Court Act*, but once that question has been answered in the affirmative the procedure to be followed by a respondent who seeks a variation of the judgment appealed from and the powers of this Court to treat the whole case as open and to give the judgment that the Court appealed from should have given are to be found in the *Supreme Court Act* and the rules made thereunder.

British American Brewing Company Ltd. v. The King, [1935] S.C.R. 568, considered.

MOTIONS to quash proceedings by way of cross-appeal commenced by the respondent by notice of cross-appeal from an order of Thorson P. of the Exchequer Court of Canada directing the examination for discovery of a Crown official.

W. R. Jackett, Q.C., for the respondent, appellant.

K. E. Eaton, for the claimant, respondent.

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

THE CHIEF JUSTICE:—I am not persuaded that the respondent has the right to proceed as it did but as the majority of the Court are of a contrary opinion, I do not register a formal dissent.

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

CARTWRIGHT J.:—These are motions brought on behalf of the appellant for orders "quashing the proceedings by way of cross-appeal commenced herein by the respondent by notice of cross-appeal dated the 31st day of October 1960 on the ground that no appeal lies to the Supreme Court of Canada from an interlocutory judgment pronounced by the Exchequer Court except with leave of a judge of the Supreme Court of Canada and the respondent has neither sought nor obtained leave as required by law". As a matter of convenience the appellant will hereinafter be referred to as "Canada" and the respondent as "Newfoundland".

On October 2, 1959, pursuant to s. 30 of the *Exchequer Court Act,* a statement of claim was filed in the Exchequer Court on behalf of Newfoundland as claimant, commencing proceedings against Canada as respondent. The statement of claim alleged an agreement dated June 12, 1957, between the Government of Canada and the Government of the Province of Newfoundland although the agreement referred to is in fact expressed to be between Her Majesty the Queen in right of Canada, of the first part, and the Government of the Province of Newfoundland, of the second part. This document has reference to the employment in Newfoundland of the Royal Canadian Mounted Police Force or any portion thereof, in aiding the administration of justice in the province and in carrying into effect the laws of the legislature of the province. Clause 13 provides:

> 13. Where in the opinion of the Attorney General of the Province an emergency exists within the province requiring additional members of the Force to assist in dealing with such emergency, Canada shall, at the request of the Attorney General of the Province addressed to the Commissioner, increase the strength of the division as requested if in the opinion of the Attorney General of Canada, having regard to other responsibilities and duties of the Force, such increase is possible.

The Commissioner referred to is the Commissioner of the Royal Canadian Mounted Police Force. The claim is for a declaration that the agreement is valid and subsisting, that Canada is in breach of Clause 13, and for damages.

The statement of defence was filed on November 12, 1959. Pursuant to Exchequer Court Rule 130 a notice of motion was served on behalf of the claimant on December 2,

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1959, for an order for the examination for discovery of a departmental or other officer of the Crown. The notice did not name the officer sought to be examined. The motion was returnable before the Presiding Judge in Chambers of the Exchequer Court on December 17, 1959; it came on before the President on January 12, 1960, when it was adjourned to February 23, 1960. In the meantime, pursuant to leave granted by the President, an affidavit was filed on behalf of the claimant which had as an exhibit a copy of the agreement of June 12, 1957, showing that the parties to the agreement were as noted above instead of as mentioned in the statement of claim. That affidavit also contained the following paragraphs:

> 3. That I am informed and verily believe that the Honourable Edmund Davie Fulton is the Minister of Justice of Canada and Her Majesty's Attorney General of Canada, appointed pursuant to the Department of Justice Act, Revised Statutes of Canada 1952, Chapter 71.
>
> 4. That I am informed and verily believe that Wilbur Roy Jackett is the Deputy Minister of Justice and the Deputy Attorney General of Canada, appointed pursuant to the said Act.
>
> 5. That I am informed and verily believe that Elmer A. Driedger and Guy Favreau are Assistant Deputy Ministers of Justice, appointed pursuant to the said Act.
>
> 6. That I believe that the persons mentioned in paragraphs 3, 4 and 5 of this affidavit are officers of the Respondent who are in positions of responsibility and authority and are qualified to represent the Respondent on examination for discovery in this proceeding, make discovery of the relevant facts within the knowledge of the Respondent and make such admissions on its behalf as may properly be made.

As appears from the reasons for judgment, when the motion came on for argument on February 23, 1960, the first request made to the President by counsel for the claimant was that the person to be examined should be the Attorney General of Canada. In the event that such request should be denied, the suggestion was made that the then Deputy Minister of Justice should be the officer to be named and that, failing the naming of either of these, Mr. E. A. Driedger, Q.C., of the Department of Justice, should be named.

Judgment upon this motion was delivered on July 15, 1960. The President refused to name the Attorney General of Canada as he was of opinion that the Attorney General was not an officer of the Crown within the meaning of Rule 130; he refused to name the then Deputy Minister of

Justice as that officer had been instructed to act as senior counsel for the respondent in the proceedings, and directed that Mr. Driedger, who in the meantime had been appointed Deputy Minister of Justice and Deputy Attorney General, be examined.

At the same time the President considered that it would be appropriate that the style of cause should be changed so that the party against whom the proceedings were taken should be described as Her Majesty the Queen in right of Canada instead of the Government of Canada, and that the statement of claim should be amended so that the allegations in it might conform to the agreement in order to make it clear that any reference in it to the Government of Canada or to Canada meant Her Majesty the Queen in right of Canada and it was so ordered. It does not appear whether the necessary steps were taken by the claimant to carry out the order of the President that the style of cause be amended, but it may be assumed that this either has been done or will be done.

Two notices of motion for leave to appeal to the Supreme Court of Canada from the order of the President of July 15, 1960, were thereupon served, on behalf of Canada. Both notices used the old style of cause, i.e., The Government of the Province of Newfoundland, claimant, and The Government of Canada, respondent. In one the application was made on behalf of the Attorney General of Canada asking for leave to appeal from the President's order; this was signed by Mr. Driedger as Deputy Attorney General of Canada. In the other notice of motion, which was for the same purpose, the application was made on behalf of the respondent as originally named in the statement of claim and was signed by Mr. Driedger, as solicitor for the respondent. These applications came before the Chief Justice of Canada who made the orders requested on October 25, 1960.

The appeals are brought pursuant to s. 82(1)(*b*) of the *Exchequer Court Act*, which reads:

> 82. (1) An appeal to the Supreme Court of Canada lies
>
> * * *
>
> (*b*) with leave of a judge of the Supreme Court of Canada, from an interlocutory judgment,
>
> pronounced by the Exchequer Court in an action, suit, cause, matter or other judicial proceeding, in which the actual amount in controversy exceeds five hundred dollars.

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It is conceded that the actual amount in controversy in the action exceeds five hundred dollars.

On the argument of these motions to quash counsel for Canada stated that his appeals are based on two grounds: (i) that in an action of this sort there is no right to order the examination of any officer of the Crown and (ii) that, if this first ground be rejected, the learned President erred in naming Mr. Driedger as the officer to attend.

Newfoundland served notices dated October 31, 1960, each of which so far as relevant reads as follows:

NOTICE OF CROSS-APPEAL

TAKE NOTICE that the Respondent intends upon the hearing of this appeal to contend that the Order of the Honourable the President of the Exchequer Court of Canada dated the 15th day of July, 1960, should be varied so as to provide that the Honourable Edmund Davie Fulton be examined for discovery herein instead of Elmer A. Driedger.

This Notice is given pursuant to Rule 100.

Counsel for Canada argues that these notices are in substance appeals from the order of the learned President which do not lie without leave. He submits that the power of this Court to make rules does not extend to creating a right of appeal without leave in a case in which an Act of Parliament makes the granting of leave a condition precedent to the existence of a right of appeal, and that therefore the plaintiff is not assisted by rule 100 of the Supreme Court Rules.

Rule 100 is as follows:

Rule 100. It shall not, under any circumstances, be necessary for a respondent to give notice of motion by way of cross-appeal, but if a respondent intends upon the hearing of an appeal to contend that the decision of the court below should be varied, he shall, within fifteen days after the security has been approved, or such further time as may be prescribed by the Court or a Judge in Chambers, give notice of such intention to all parties who may be affected thereby. The omission to give such notice shall not in any way interfere with the power of the Court on the hearing of an appeal to treat the whole case as open, but may, in the discretion of the Court, be ground for an adjournment of the appeal or for special order as to costs.

In the case at bar the effect of this rule is not to create a right of appeal but to set out the manner in which the Court may exercise the jurisdiction conferred upon it by the *Supreme Court Act,* and particularly s. 46 thereof, in appeals properly brought before it.

It is clear that if there had been no appeal taken by Canada Newfoundland could not have appealed from the order of the learned President without first obtaining leave; but the notices which it is sought to quash are not the initiation of appeals by Newfoundland, they give notice that on the hearing of Canada's appeals Newfoundland will ask the Court to exercise in a particular way the jurisdiction which it possesses by reason of the fact that those appeals are properly before it, a jurisdiction which it is free to exercise whether or not any notice under rule 100 has been served.

In my opinion while the notices served by Newfoundland were not necessary to clothe this Court with jurisdiction to give the relief for which they ask, it was proper to serve them.

This Court is now validly seized of Canada's appeals; if those appeals should succeed on the first ground mentioned above and the Court should decide that, in this case, there is no power to order any officer to attend for examination that will, of course, be an end of the matter. If, on the other hand, the Court should be of opinion that the first ground of appeal should be rejected it would then have to enter upon the second ground and decide whether Mr. Driedger was the proper officer to be selected. Under s. 46 of the *Supreme Court Act* the Court has power to give the judgment and award the process or other proceedings that the learned President should have given or awarded, and I think it clear that the Court would have jurisdiction to name the officer who, in its opinion, should be ordered to attend for examination.

The rules of this Court have the force of statute by virtue of s. 103(3) of the *Supreme Court Act* which reads:

(3) All such rules as are not inconsistent with the express provisions of this Act have force and effect as if herein enacted.

Rule 63 is as follows:

Rule 63. Except as otherwise provided by the Exchequer Court Act, these Rules shall, so far as applicable, apply to appeals from the Exchequer Court of Canada.

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Cartwright J.

I can find nothing in the *Exchequer Court Act* providing that rule 100 shall not apply to appeals from that Court. Neither in the *Exchequer Court Act* nor in the rules made thereunder is there any provision as to the procedure to be followed by a respondent in an appeal taken to the Supreme Court who wishes to cross-appeal or to contend that the decision of the Exchequer Court should be varied. In my opinion that procedure is regulated by rule 100. The question whether this Court has jurisdiction to entertain an appeal brought from a decision of the Exchequer Court must be determined by reference to the provisions of the *Exchequer Court Act*, particularly ss. 82, 83 and 84, but once that question has been answered in the affirmative the procedure to be followed by a respondent who seeks a variation of the judgment appealed from and the powers of this Court to treat the whole case as open and to give the judgment that the court appealed from should have given are to be found in the *Supreme Court Act* and the rules made thereunder.

I have not overlooked Mr. Jackett's argument based on s. 82(4) of the *Exchequer Court Act* which corresponds to s. 64 of the *Supreme Court Act* and reads as follows:

> 82 (4) In such notice the party so appealing may, if he so desires, limit the subject of the appeal to any special defined question or questions.

In the case at bar one of the questions raised by Canada's appeals is as to which officer of the Crown should be ordered to attend; the appeals have not been limited so as to exclude that question.

In my opinion nothing that I have said above conflicts with the decision of this Court in *British American Brewing Company Ltd. v. The King*[1].

The nature of the judgment of the Exchequer Court from which the appeal in that case was brought is described in the reasons of the Court at page 571, as follows:

> This is a judgment at the trial of the action dismissing it. True, as the suppliant was not prepared to prove his case, the matter of substance considered by the trial judge was whether or not the trial should be adjourned in order to give the suppliant a further opportunity to produce evidence. Nevertheless, it is a judgment pronounced at a trial, both parties being present, after the suppliant, on whom the burden of proof lay, had declared he had no evidence to offer. Such a judgment, we have no doubt, is a final judgment within the meaning of section 82, subsection 4, of the *Exchequer Court Act*.

[1] [1935] S.C.R. 568, 4 D.L.R. 750.

At the date of the decision s. 82 of the *Exchequer Court Act*, R.S.C. 1927, c. 34, was worded somewhat differently from the corresponding section, s. 82 of the present act, but it did not differ in substance. It gave to any party to an action a right of appeal to the Supreme Court provided two conditions existed (i) the judgment sought to be appealed was a final judgment and (ii) the actual amount in controversy in the judicial proceeding in which such judgment was given exceeded five hundred dollars.

Sections 38 and 44 of the *Supreme Court Act*, R.S.C. 1927, c. 35 (the predecessors of sections 44 and 42 of the present Act) were 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.

* * *

44. Notwithstanding anything in this Act contained the court shall also have jurisdiction as provided in any other Act conferring jurisdiction.

The Court having quoted section 44, said in part at page 570:

As regards appeals from the Exchequer Court, the right of appeal is given by section 82 of the *Exchequer Court Act*; and it is contended on behalf of the Crown that section 38 of the *Supreme Court Act* applies to such appeals. In our opinion, the jurisdiction of this Court in respect of appeals in exercise of a right of appeal given by the *Exchequer Court Act* is not affected by section 38 of the *Supreme Court Act*; which section, we think, is limited in its application to those cases in respect of which the jurisdiction is set forth and defined immediately or referentially by the *Supreme Court Act*.

Assuming for the purposes of the argument that this lays down the principle that the question whether this Court has jurisdiction to entertain an appeal from the Exchequer Court in any given case depends on the provisions of the *Exchequer Court Act* alone, it does not appear to me to suggest that where those provisions confer jurisdiction on this Court it shall deal with the appeal otherwise than in conformity with the relevant provisions of the *Supreme Court Act* and the rules made thereunder in regard to all matters which are not dealt with in the *Exchequer Court Act*.

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Cartwright J.

For these reasons I would dismiss the motions with costs.

Motions dismissed with costs.

Solicitor for the respondent, appellant: E. A. Driedger, Deputy Attorney General of Canada, Ottawa.

Solicitors for the claimant, respondent: Gowling, MacTavish, Osborne & Henderson, Ottawa.

1961

*Jan. 31
Feb. 1
Apr. 25

CITY OF EDMONTON, TOWN OF JASPER PLACE, CITY OF RED DEER AND TOWN OF VEGREVILLE (*Respondents*) ..... APPELLANTS;

AND

NORTHWESTERN UTILITIES LIMITED (*Applicant*) ..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Public utilities—Jurisdiction of Board in fixing rates to allow for transitional losses between date of application and date of decision—Meaning of statutory phrase "undue delay"—Jurisdiction to approve of purchased gas adjustment clause—The Public Utilities Act, R.S.A. 1955, c. 267, as amended by 1959 (Alta.), c. 73.

In June 1958 the respondent utility company applied to the Public Utilities Board to fix a new schedule of rates. The hearing of the application commenced in the following December and continued intermittently until February 26, 1959. The Provincial Legislature amended *The Public Utilities Act* on April 7, 1959, to provide by s. 67(8) as follows: "It is hereby declared that, in fixing just and reasonable rates, the Board may give effect to such part of any excess revenues received or losses incurred by a proprietor after an application has been made to the Board for fixing of rates as the Board may determine has been due to undue delay in the hearing and determining of the application".

Effect was given to this amendment in an order of August 28, 1959, by which the Board approved an increase in the utility's rates as of September 1, 1959. An application was then made on behalf of the appellants under s. 49 of the Act for leave to appeal from the Board's order on the grounds that (i) the Board erred in law and had no jurisdiction to fix rates enabling the respondent to collect through its rates an additional amount for transitional losses during 1959, and that

*PRESENT: Kerwin C.J. and Locke, Cartwright, Abbott and Judson JJ.

(ii) the Board erred in law and had no jurisdiction to approve the principle of a purchased gas adjustment clause. Another question raised was as to whether there had been "undue delay" within the meaning of the amendment to s. 67. Leave to appeal was granted and the Appellate Division, by a majority decision, dismissed the appeal on the first ground. The appeal on the second ground was allowed unanimously. The appellants appealed to this Court on the first question and the respondents cross-appealed on the second.

Held: The appeal should be dismissed. The cross-appeal should be allowed, and in lieu of the answer made by the Appellate Division to the second question, judgment should be entered declaring that the Public Utilities Board did not err in law and had jurisdiction to approve the principle of a purchased gas adjustment clause.

Per Kerwin C.J. and Cartwright J.: It was not necessary to express an opinion on the contention of the respondent that the question whether there had been undue delay in the hearing and determination of the application to the Board was not open to the appellants. On the assumption that the question was open the Board had decided it correctly.

Per Locke, Abbott and Judson JJ.: The language of subs. 8 of s. 67 of the Act, which gave the Board power to provide for transitional losses, made it clear that the amendment was intended to be retroactive. *Sussex Peerage* case (1844), 11 Cl. & Fin. 85 and *Vacher v. London Society of Compositors,* [1913] A.C. 107, referred to. It is only, however, such losses as have been due to undue delay in the hearing and determining of the application which may be permitted to be recovered. In the decision to authorize the utility to collect an additional amount for 1959 it was implicit that the Board held that the delay after December 31, 1958, was undue within the meaning of that expression in the subsection. It was clear that the Board attributed to the expression the meaning "more than was reasonable in the circumstances", and it was correct in doing so. As to whether the delay after December 31 was more than was reasonable, this was a question of fact as to which there could be no appeal under the statute.

The proposed order, with respect to the purchased gas adjustment clause, would be made in an attempt to ensure that the utility should from year to year be enabled to realize, as nearly as may be, the fair return mentioned in s. 67(2) and to comply with the Board's duty to fix just and reasonable rates to permit this to be done. How this should be accomplished, when the prospective outlay for gas purchases was impossible to determine in advance with reasonable certainty, was an administrative matter for the Board to determine.

APPEAL and cross-appeal from a judgment of the Supreme Court of Alberta, Appellate Division[1], reversing in part a decision of the Alberta Board of Public Utility Commissioners. Appeal dismissed and cross-appeal allowed.

A. F. Macdonald, Q.C., and *W. R. Sinclair,* for the City of Edmonton.

G. J. Bryan, Q.C., for the Town of Jasper Place.

[1] (1961), 34 W.W.R. 241, 25 D.L.R. (2d) 262.

1961

CITY OF EDMONTON *et al.* *v.* NORTH-WESTERN UTILITIES LTD.

J. W. Beames, for the City of Red Deer.

W. H. Hurlburt, for the Town of Vegreville.

George H. Steer, Q.C., and *B. V. Massie, Q.C.,* for the applicant, respondent.

THE CHIEF JUSTICE:—Subject to the same reservation expressed in the reasons of Mr. Justice Cartwright and on the same assumption that he makes, I agree with the reasons of Mr. Justice Locke.

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

LOCKE J.:—The respondent is the owner and operator of a natural gas transmission and distribution system serving large numbers of domestic, commercial and industrial consumers in the City of Edmonton, the Town of Jasper Place, the City of Red Deer and the Town of Vegreville and some 55 other municipalities or places in the Province of Alberta. The respondent is a public utility within the meaning of *The Public Utilities Act,* R.S.A. 1955, c. 267, as amended.

On June 13, 1958, the respondent applied to the Public Utilities Board, constituted under the said Act, for an order:

> fixing and approving as of the return date of this motion, or such other date as the Board may deem proper, such new rates as are necessary to meet the applicant's costs, including its return.

The hearing of the said application commenced on December 9, 1958, and continued intermittently until February 26, 1959.

On June 29, 1959, the Board rendered its decision fixing a rate of depreciation, working capital allowance and estimated expenses of operation, and held the respondent entitled to a rate of return of 7.5 per cent upon its property used or required to be used in its service to the public within Alberta as determined and that the respondent was entitled to an increase in its revenue of $2,817,929 for the year 1959 and $3,019,792 for 1960, and directed that the respondent file schedules of rates for the approval of the Board, indicating how it suggested such amounts should be obtained.

The value of the properties of the respondent upon which it was permitted the annual return above stated was fixed for the year 1959 at $48,568,892 and for the year 1960 at $51,412,702. The respondent has large natural gas reserves of its own but, in addition, purchases large quantities, for use in the operation, from the owners of other gas wells and operators of oil wells. The Board's estimate of its expense for this purchased gas for the year 1959 was $3,825,690 and for the year 1960 $3,722,300.

Section 67(*a*) of the Act reads:

> The Board, either upon its own initiative or upon complaint in writing, may by order in writing, which shall be made after giving notice to and hearing the parties interested,
>
> (*a*) fix just and reasonable individual rates, joint rates, tolls or charges or schedules thereof, as well as commutation, mileage and other special rates, which shall be imposed, observed and followed thereafter by any proprietor.

During the lengthy proceedings before the Board it was contended on behalf of the respondent that the Board had power to make provision for the loss sustained by the respondent between June 13, 1958, the return date of its motion, and the date of the coming into effect of new rates. This loss referred to in the proceedings as "transitional loss" was the difference in the revenue of the respondent under the old rates, which remained applicable throughout the time consumed by the hearings and until the new rates became effective, and the amount which would have been received had the new rates to be authorized been in effect throughout this period. It was contended by the present appellants that the Board was without jurisdiction to make any such order, a contention which was upheld by the Board. As to this, the decision made in March 4, 1959, read in part:

> The board has no doubt that the application of the principle of transitional loss is in effect fixing rates retroactively. The principle results in rates which are determined being dated back to the time of the application. The board can find no authority for it to do this either in The Public Utilities Act or elsewhere. The language used in The Public Utilities Act is prospective rather than retrospective. The authority of the board in this regard is limited to fixing rates for the future. The board accordingly has come to the conclusion that it cannot give effect to the principle of transitional loss.

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CITY OF EDMONTON *et al.* *v.* NORTH-WESTERN UTILITIES LTD.

Locke J.

On April 7, 1959, the Legislature amended section 67 of the Act by, *inter alia,* adding thereto the following:

(8) It is hereby declared that, in fixing just and reasonable rates, the Board may give effect to such part of any excess revenues received or losses incurred by a proprietor after an application has been made to the Board for the fixing of rates as the Board may determine has been due to undue delay in the hearing and determining of the application.

The amendment and the matter of the delays which had occurred between the filing of the application and the date of the Board's decision were dealt with in the following terms in the decision of June 29, 1959:

Counsel for the consumers have asked that the decision upon transitional loss given by this board respecting the application of Canadian Western Natural Gas Company Limited be applied to this case. In the Canadian Western case this board came to the conclusion that it could not give effect to the principle of transitional loss as it could find no authority for it to do so either in The Public Utilities Act or elsewhere. Since that decision The Public Utilities Act has been amended and Section 67(8) now provides:—(reciting the above amendment).

In this case, as has been pointed out above, the company's motion was returnable June 13, 1958. The hearing commenced December 9, 1958. There were unavoidable adjournments from December 19, 1958 to January 15, 1959, and from January 24, 1959, to February 24, 1959, and the hearing finally concluded February 26, 1959. There has been an inevitable delay from that date to the date of this decision and it appears that it will not be possible to have the new rates effective until August 1 at the earliest. It is apparent that the losses due to undue delay in the hearing and determining of the application have been considerable. The Board considers that it is only fair, in the circumstances, to reserve this question until the hearing of the second phase of this application.

It was impossible in the circumstances disclosed by the evidence for the respondent to determine with certainty in advance the amounts it would expend for purchased gas from year to year, and the figures above mentioned were, of necessity, estimates only. The respondent, accordingly, asked that the order to be made by the Board should contain what was called a purchased gas adjustment clause, a provision which, it was said, was approved by public utility boards in various states of the Union. The practical effect of such a clause would be that, assuming by way of illustration that the estimate of the cost of purchased gas for the year 1959 should prove to be $800,000 less than the actual expenditure for that purpose, this amount would be recouped by the company by an increase in the price of gas to consumers for the year 1960.

Should, however, the estimated figure for this cost, used in approving the rates for the year 1959, be greater than the actual expenditure, the rates fixed for the year following would be reduced to give to the purchasers of gas the benefit of the saving. The details of the manner in which this would, in practice, be worked out was given by the witness Wilson, the executive vice-president of the respondent, and was explained in Exhibit 3 filed before the Board. It is unnecessary for the disposition of this aspect of the matter to examine these details in any more particularity.

In its decision of June 29, 1959, the Board said:

> The evidence disclosed that the company faces a serious problem in estimating, with any degree of accuracy, the volumes of oil field gas which it will be required to purchase in any particular year. Added to this is the problem resulting from the fact that contracts between producers and exporters contain escalation and favoured nations clauses which affect future prices. In view of these problems the company led evidence as to a possible purchased gas adjustment clause which might be inserted in the board's order. Counsel for the company point out in argument that the company's proposal at no time involved, and does not now involve, rate changes without board approval.

After pointing out that a further amendment had been made to the Act as s. 42(*a*) which might affect the matter, the Board reserved judgment until further representations might be made to it.

As to the transitional losses, the company was, as above stated, given permission to file rate schedules for the approval of the Board, calculated to produce an increase in its revenue for the calendar year 1959 of $2,817,929. In preparing these schedules the respondent company proceeded on the basis that the Board had decided that the delay in disposing of the application from January 1st onward had been undue delay within the meaning of s. 67(8), since the figure of $2,817,929 included, according to the respondent's computation, $1,845,000 as the transitional loss from January 1st to August 31, 1959. The schedule of rates filed proposed that this amount should be recouped from the rates to be imposed during the four and one-third years immediately succeeding September 1st, 1959. After further hearings for the purpose of hearing objections to the rates proposed, the Board rendered its decision on August 26th.

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In dealing with the question of transitional loss, the Board quoted that portion of its decision of June 29th, above referred to, and said:

> The board in its decision of June 29 last quoted above, after citing the many adjournments and delays held that there had been undue delays and is still of the same opinion.

After saying that the amendment to s. 67 permitted it to allow for losses sustained before the amendment was passed, the decision read in part:

> In its decision of June 29th the Board held:
>
> > Subject to the above the board finds that the additional revenue to meet the deficiency as set out in detail in Schedule "B" amounts to $2,817,929.00 for 1959 and $3,019,792.00 for 1960. The company may now file schedules of rates for the approval of the board indicating how it suggests such amounts should be obtained.
>
> It will be noted that there is no mention of transitional loss in Schedule "B" which gives the details of the computation of the deficiency. It is considered clear that the board by this finding authorized the company to collect an additional $2,817,929.00 for the year 1959. The manner of collecting that amount was not broken down by months, the intention, which appears obvious, being that an additional amount of $2,817,929.00 would be collected for the entire year. Since new rates cannot be made effective until September 1 at the earliest it is apparent that to recover such an amount in the four remaining months of the year would result in very high rates for those months. The company accordingly designed its rates to recover the amount over a period of several years and this commends itself to the board.

Dealing with the proposed purchased gas adjustment clause and the objections raised to the application of any such principle, the Board said in part:

> The board undoubtedly has jurisdiction to fix just and reasonable individual rates, joint rates, tolls or charges or schedules thereof as well as other special rates which shall be imposed, observed and followed thereafter by any proprietor. It appears to the board that it has jurisdiction to say that the rate would be a certain amount per MCF. or per therm plus the cost of purchased gas or a certain rate plus or minus an adjustment for any variation in the cost of purchased gas which is in effect what is done by the adoption of a purchased gas adjustment clause.

After pointing out that the cost of purchased gas was one of the main items of expense of the company and that it was obvious that it is entitled to recover this expense through the rates charged, the Board said:

> After reviewing very carefully all the evidence in this respect and giving consideration to what was said in argument this board is convinced that a provision for purchased gas adjustment is in the best interests of the consumer and is essential to the company if its financial integrity is to

be maintained, which of course is also in the best interests of the consumer. The detailed provisions of the necessary order need not be discussed in this decision as these can be worked out between representatives of the consumers and the company subject to the approval of the board. The right is reserved to the company to file revised estimates of its purchased gas expense if for any reason it is found to be impossible to make such order effective.

By a formal order dated August 28, 1959, the Board approved the proposed rates as interim rates, to become effective on and after September 1, 1959, and dealt with the proposed purchased gas adjustment clause in the following terms:

> The principle of a purchased gas adjustment clause as proposed by the Applicant is approved and the form of Order submitted in evidence by the Applicant is referred to the Applicant and the Respondents to consider whether agreement can be reached among them as to the wording of such a clause to be submitted to the Board for its approval. Failing such agreement the Applicant on ten (10) days' notice to the communities or persons who appeared on the said hearings may submit for the approval of the Board a form of Order providing that the rates as shown in Schedule "A" may be increased or decreased by Order of the Board to reflect changes in the average cost to the Applicant of gas and to reflect surpluses or deficiencies in revenue which have accrued to the Applicant due to the over or under provisions in the said rates for such average cost of gas.

No agreement was reached as to the wording of such a clause and the record does not indicate that the Board made any further order thereafter dealing with the question.

Section 49 of *The Public Utilities Act* provides that leave to appeal to the Appellate Division of the Supreme Court of Alberta upon a question of jurisdiction or upon a question of law may be obtained from a judge of the Court of Appeal upon application within a defined time. Such an application was made to Johnson J.A. who, by order dated October 20, 1959, gave leave to appeal upon the following grounds:

> (*a*) That the said Board erred in law and had no jurisdiction under the provisions of The Public Utilities Act or otherwise to fix rates enabling the Respondent to collect through its rates an additional $2,817,929 for the year 1959, as provided in the said decision;
>
> (*b*) That the Board erred in law and had no jurisdiction to approve the principle of a purchased gas adjustment clause as referred to in the said decision and order.

The questions upon which leave to appeal was granted are, according to the reasons delivered by the learned judge, those proposed on behalf of the City of Edmonton. Another question raised on the argument before him was as to

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whether there had been "undue delay" within the meaning of the amendment. This would appear to be a question which would arise in considering the first question upon which leave was granted. Whether the applicants proposed that a separate question should be submitted as to this is not clear. Johnson J.A. said that the question was not a question of law but, at the highest, a mixed question of fact and law. I mention the matter because it was contended by the respondent that the question of whether there had been undue delay within the meaning of that expression in the amendment was not open to the appellants, a contention with which I do not agree.

The Appellate Division, by a decision of the majority of the court, dismissed the appeal on the first ground, Porter J.A., with whom Milvain J. agreed, dissenting. The appeal upon the second ground was allowed by a unanimous judgment of the court.

The appellants have appealed to this Court from the judgment on the first question and the respondent has cross-appealed from the judgment dealing with question (*b*).

A public utility, such as the respondent, in Alberta may not change a rate theretofore fixed by the Public Utility Board without its approval (s. 83(1)). The rates, we are informed, had last been fixed several years earlier. The Board was empowered at the time of the application to require the utility to furnish safe, adequate and proper service and to keep and maintain its property and equipment in such condition as to enable it to do so (s. 67(*d*)(ii)) and to make extensions to its facilities when, in the judgment of the Board, to do so was reasonable and practicable (s. 67(*d*)(iii)). These powers were continued in the 1959 amendments to ss. 66 and 67. The utility was further under the obligation to supply and deliver gas at such rates and upon such terms as the Board might direct (s. 67(*d*)(viii); s. 67(1)(*e*) as amended). The rates thus to be fixed from time to time were such as the Board considered to be just and reasonable.

Unlike the British Columbia Act, considered by this Court in *B.C. Electric Railway Company v. Public Utilities Commission*[1], the expression "unjust and unreasonable rates" is not defined. Section 66(*b*), however, as it read prior

[1] [1960] S.C.R. 837, 25 D.L.R. (2d) 689.

to the 1959 amendment, empowered the Board to value the property of the public utility, and the purpose of these powers was explained and they were amplified in the amendment of 1959. This required the Board, in fixing just and reasonable rates, to determine a rate base for the property of the proprietor that is used or required to be used in his service to the public within Alberta and to fix a fair return thereon.

There is no explanation in the record of the delay in considering the respondent's application between June 13, 1958, and December 9, 1958. While the respondent might have applied for an interim order increasing the rates under s. 41(2), this was not done, presumably because in a matter involving so many varied interests this was deemed impractical. A further delay occurred between the conclusion of the main hearings on February 26 and the rendering of the decisions of June 29 and August 26 and, as shown, the new rates did not come into effect until September 1, 1959.

The right of the consumers to require the respondent to supply them with gas, conferred by the statute, would, in my opinion, even in the absence of any statutory provision, impose upon them an obligation at common law to pay for the service on the basis of a *quantum meruit*. In such circumstances, I consider that the position of the utility would be similar to that of a common carrier upon whom is imposed, as a matter of law, the duty of transporting goods tendered to him for carriage at fair and reasonable rates (*Great Western Railway v. Sutton*[1]). Here the duty of determining what rates are fair and reasonable is imposed upon the Board. In the result, in the present matter the consumers paid less than a fair price for a period of something more than a year.

As shown by the decision of March 4, 1959, while on various earlier occasions the Board had made provision for the recovery of transitional losses in fixing rates, this had apparently been done by consent of the parties. When its power to do so was questioned in the present matter, the Board came to the conclusion that its powers were limited to fixing rates to apply in the future. While the reasons given do not explain the grounds upon which the Board proceeded, it may, I think, be fairly assumed that it was

[1] (1869), L.R. 4 H.L. 226 at 237, 38 L.J. Ex. 177.

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based upon the language of s. 67(*a*) which speaks of rates which shall be imposed, observed and followed thereafter by any proprietor. The amendment adding subs. (8) to s. 67 was passed in the following month and the Board acted upon the powers which it considered were given to it.

There has been much discussion in argument before the Appellate Division and in this Court as to whether the amendment was retroactive, or whether it was simply declaratory of the law as it stood before its enactment. In my opinion, it is unnecessary to determine this question since, in agreement with the majority of the learned judges of the Appellate Division, I consider that the language of the amendment is perfectly clear.

Under the decision approving the new rate schedule made on August 26, 1959, authority was given to add to the rates over a term of years the amount by which the revenue of the company fell short of what it would have been, had the new rates been in effect throughout the year 1959. No doubt, the vast majority of the consumers who purchased gas from the utility during the first eight months of the year 1959 continued as customers thereafter. Those persons had paid the rates approved by the Board during this period and, while they were less than what was fair and reasonable, it is clear that in the absence of an order of the Board the utility had no enforceable claim against them for any difference. The new rates while prospective created a new obligation in respect of transactions already past in the case of these consumers and, in that respect, were retroactive (Craies on Statute Law, 5th ed. 357).

This, however, is exactly what the amendment authorized since it empowered the Board to give effect to such part of any excess revenues received or losses incurred by a proprietor after an application has been made to the Board for the fixing of rates, to the extent that the Board may determine these to have been due to undue delay in the hearing and determining of the application. The amendment applies to both losses and gains and, if during the prescribed interval it were shown that the proprietor had earned amounts in excess of what were determined to be fair and reasonable, the continuing consumers might be given the benefit in the rates to be fixed. Since in the interval between the return date of the application and

the going into effect of the new rates the customers would be required to pay the existing rate on the former date, of necessity an order made under the subsection would be retroactive in its effect, whether the proprietor had suffered losses or realized excess revenues in the sense that these expressions are used.

In the *Sussex Peerage* case[1], Tindal C.J. said that:

> the only rule for the construction of Acts of Parliament is that they should be construed according to the intent of the Parliament which passed the Act. If the words of the statutes are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense.

In *Vacher v. London Society of Compositors*[2], where the question was as to the interpretation of a section of the *Trade Disputes Act,* of 1906, Haldane L.C. said (p. 113) that he proposed:

> to exclude consideration of everything excepting the state of the law as it was when the statute was passed, and the light to be got by reading it as a whole, before attempting to construe any particular section. Subject to this consideration, I think that the only safe course is to read the language of the statute in what seems to be its natural sense.

Section 9 of *The Interpretation Act of Alberta,* R.S.A. 1955, c. 160, declares that every Act shall be deemed remedial and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.

In my opinion, the language of the subsection makes its meaning perfectly clear and it is unnecessary to resort to any outside aid to interpretation. If, however, it were otherwise, as the evidence shows, the state of the law as of March 5, 1958, was considered by the Public Utility Board to be that it was without power to provide for transitional losses, a state of affairs which the amendment passed so soon thereafter was clearly and obviously designed to remedy.

It is only, however, such losses as have been due to undue delay in the hearing and determining of the application which may be remedied. As to this, it must be said that the finding of the Board might have been expressed

[1] (1844), 11 Cl. & Fin. 85 at 143, 8 E.R. 1034.
[2] [1913] A.C. 107, 82 L.J.K.B. 232.

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with greater clarity. The passage from the decision of June 29, 1959, above quoted recites the various delays, referring particularly to the adjournments after December 19, 1958, and the delay in giving the decision following the conclusion of the hearings on February 26. As has been shown, however, at the same time the Board held that there would be a deficiency of revenue for the years 1959 and 1960 and authorized the company to file rates for the approval of the Board, suggesting how such amounts should be obtained. In referring to this in its final decision the Board said that it was clear that it had by this finding authorized the company to collect an additional amount of $2,817,929 for the year 1959. In my opinion, it is implicit in this decision that the Board held that the delay after December 31, 1958, was undue within the meaning of that expression in the subsection. I think it is clear that the Board attributed to the expression the meaning "more than was reasonable in the circumstances" and, in my opinion, it did not err in doing so. As to whether the delay after December 31 was more than was reasonable, that is a question of fact as to which there can be no appeal under the statute.

Porter J.A. has criticized the manner in which effect was given to the Board's order permitting the recovery of the transitional loss for the year 1959, in various respects. The schedule approved by the Board appears to have capitalized the actual net deficiency of revenue after income tax, and added the income tax which would have been paid by the company if the new rates had been applicable for the year 1959. I think there is much to be said for these views but the questions are not those in respect of which leave to appeal was granted, and it is, no doubt, for that reason that they were not raised before the Appellate Division. The question is whether the Board erred in law and was without jurisdiction to fix rates enabling the respondent to collect the transitional loss for the year 1959, and not as to whether, granted the Board had power to do this, the method approved to carry the decision into effect was authorized by the statute. In these circumstances, I express no opinion upon these matters.

The respondent cross-appeals from the judgment of the Appellate Division by which the decision of the Board upon the purchased gas adjustment clause was set aside, on the ground that there was no jurisdiction to make such an order.

As I have pointed out, no formal order was made by the Board, the order of August 29 simply approving the principle of such a clause as proposed by the utility but referring the settlement of the form of the order to the parties in the hope that they could agree. Failing such agreement, permission was given on ten days' notice to submit an order for the approval of the Board. The respondent contends that since no formal order was made there was no right of appeal to the Appellate Division. Section 49(2) reads that leave to appeal may be obtained from a judge of the Court of Appeal within one month after the making of the order, decision, rule or regulation sought to be appealed from. I agree with the learned judges of the Appellate Division that there was such a decision from which the appeal was properly taken.

In approving rates which will yield a fair return to the utility upon its rate base, it is, of course, essential for the Board to estimate the expenses which will necessarily be incurred thereafter in rendering the service. The fair return permitted is, after deducting from the gross revenue these necessary estimated expenditures and such necessary outgoings as taxes, including income taxes. The Board can only come to a conclusion as to what rates should be approved by determining as closely as may be done in advance the probable amount of these expenditures.

Upon the application in the present matter, the expense which would be incurred for purchased gas in the year 1959 was estimated by the applicant as an amount which, as of August 1959, appeared to be approximately $800,000 less for that year than the amount which would necessarily be expended. For the year 1960, in respect of which an estimate had been given for the use of the Board in considering the application, the amount that would be expended for this purpose had been underestimated, in the opinion of the executive vice-president of the applicant, by $1,300,000. The reason for these inaccurate estimates was explained at length in the evidence of this witness.

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That, in determining what was a fair return and deciding what rates should be authorized to earn such a return, the expenses of operation must be estimated as accurately as is reasonably possible is not questioned by anyone. The Board was apparently satisfied that, in the circumstances, it was not possible to estimate for years in advance the cost to which the respondent would be put for purchased gas from year to year, and concluded that such a provision as was proposed was in the best interests of the consumers and essential to the company if its financial integrity was to be maintained.

What was proposed was that the utility should submit to the Board, and to such other interested parties as the Board might direct should be notified, not later than November 1st in each year, the figures as to its cost for purchased gas during the first nine months of the year and its estimate of the amounts required for such purpose during the months of October, November and December. Dependent upon whether these costs were in excess of or less than the amount estimated, in approving the rates the Board would be asked to make such adjustments in the rates for the following year to carry out the purpose above explained.

Macdonald J.A., with whom the Chief Justice and Johnson J.A. agreed, was of the opinion that in adopting the proposed clause the Board intended to fix gas rates without compliance with s. 67(2) of the 1959 amendment which reads:

> In fixing just and reasonable rates, tolls or charges, or schedules thereof, to be imposed, observed and followed thereafter by a proprietor, the Board shall determine a rate base for the property of the proprietor that is used or required to be used in his service to the public within Alberta and fix a fair return thereon.

With great respect, however, the proposed order would be made in an attempt to ensure that the utility should from year to year be enabled to realize, as nearly as may be, the fair return mentioned in that subsection and to comply with the Board's duty to permit this to be done. How this should be accomplished, when the prospective outlay for gas purchases was impossible to determine in advance with reasonable certainty, was an administrative matter for the Board to determine, in my opinion. This, it would appear, it proposed to do in a practical manner which would, in its judgment, be fair alike to the utility and the consumer.

As pointed out by Porter J.A., s. 67(5) does not touch the matter and this the respondent concedes, but the Board has not assumed to act under that subsection. Rather did it propose to make the order under the powers given to it and the duty imposed upon it by the sections to which I have referred to fix just and reasonable rates which would yield the fair return mentioned in s. 67(2).

I would dismiss the appeal with costs. I would allow the cross-appeal with costs and direct that, in lieu of the answer made by the Appellate Division to the second question, judgment be entered declaring that the Public Utility Board did not err in law and had jurisdiction to approve the principle of a Purchased Gas Adjustment Clause, as referred to in the said decision and order.

CARTWRIGHT J.:—I agree with the reasons of my brother Locke subject only to one reservation. I do not find it necessary to express an opinion on the contention of the respondent that the question whether there had been undue delay in the hearing and determination of the application to the Board was not open to the appellants and I wish to reserve my opinion on that contention.

On the assumption that the question was open I would agree, for the reasons given by my brother Locke, that the Board decided it rightly.

I would dispose of the appeal and the cross-appeal as proposed by my brother Locke.

Appeal dismissed with costs, cross-appeal allowed with costs.

Solicitor for the City of Edmonton: A. F. Macdonald, Edmonton.

Solicitors for the Town of Jasper Place: Bryan, Foote, Andrekson & Wilson, Edmonton.

Solicitors for the City of Red Deer: Kirby, Murphy, Armstrong & Beames, Red Deer.

Solicitors for the Town of Vegreville: Kane, Hurlburt and Kane, Edmonton.

Solicitors for the applicant, respondent: Milner, Steer, Dyde, Massie, Layton, Cregan & Macdonnell, Edmonton.

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*Feb. 15
Mar. 27

DAME MARIA GARBERI (*Plaintiff*) ....APPELLANT;

AND

CITE DE MONTREAL (*Defendant*) ....RESPONDENT.

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

Damages—Negligence—Fall by pedestrian on sidewalk—Ice—Sanding—Test to determine liability.

The plaintiff fell on the sidewalk in the city of Montreal and broke her right elbow. That day, the temperature had varied, and as the sun disappeared melted snow and water turned to ice. The employees of the City had sanded the sidewalks earlier in the day. The action was maintained by the trial judge, but this judgment was reversed by the Court of Appeal. The plaintiff appealed to this Court.

Held: The appeal and the action should be dismissed.

To succeed, the plaintiff had to prove that the city or its employees had been negligent, and that the injury was the result of this negligence. In a country such as ours, where temperatures vary greatly, sudden dangers can be created by the changing weather. So long as the City proved that it exercised reasonable care and took the precautions that a prudent person would take, the action could not succeed. In the present case the City had acted with prudence and was not in any way negligent.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], reversing a judgment of Collins J. Appeal dismissed.

Dominique di Francesco, for the plaintiff, appellant.

D. A. McDonald, Q.C., and *P. Casgrain,* for the defendant, respondent.

The judgment of the Court was delivered by

TASCHEREAU J.:—Le 29 février 1952, l'appelante a glissé et est tombée sur le trottoir du côté ouest du Boulevard Monk, dans la cité de Montréal. Dans cette chute, elle s'est fracturé le coude droit et causé d'autres blessures et diverses contusions. M. le Juge Collins de la Cour supérieure a trouvé que la responsabilité de la ville avait été établie, et l'a condamnée à payer à la demanderesse la somme de $3,795.28 avec intérêts et dépens. La Cour du banc de la reine[1] a maintenu l'appel et a rejeté cette action.

*PRESENT: Taschereau, Fauteux, Abbott, Martland and Ritchie JJ.

[1] [1959] Que. Q.B. 805.

La preuve révèle que le jour de l'accident, la température était variable. Après quelques chutes de neige au cours de la matinée, le temps était devenu doux et ensoleillé. A certaines heures de la journée, l'eau coulait dans les rues et sur les trottoirs, et plus tard dans l'après-midi, le temps est devenu plus frais et le sol s'est recouvert d'une légère couche de glace.

Les employés de la ville préposés à l'entretien des rues et des trottoirs ont commencé, ce matin là, à sabler les rues à 6.30 heures a.m., et c'est vers 10.00 heures a.m. qu'ils ont placé du sable à l'endroit même où l'accident s'est produit. Des équipes ont pratiqué des drains et des rigoles afin de libérer les trottoirs de l'eau qui s'accumulait et qui, à cause du gel, pouvait devenir un danger. Ceci évidemment facilitait le sablage rendu difficile par la fonte de la glace et de la neige.

De 11.00 heures a.m. à 3.00 heures p.m., à peu près à l'heure où l'accident est arrivé, la température à l'ombre a varié de quelques degrés seulement, soit de 28 à 30 Fahrenheit, ce qui implique qu'elle était plus élevée où se faisaient sentir les rayons du soleil. Des centaines d'hommes bien équipés étaient en alerte, et se promenaient de rues en rues dans le quartier, et partout dans la ville afin d'assurer la sécurité des piétons.

La présente action ne peut réussir, à moins qu'il ne soit démontré qu'il y a eu négligence de la part de la cité ou de ses employés, et que c'est de cette négligence que le dommage a résulté. Dans notre pays, où les intempéries de nos saisons sont fréquentes, où la température hivernale présente de soudaines variations, on ne peut évidemment pas s'attendre sur nos trottoirs à la sécurité dont bénéficient ceux qui vivent sous des ciels plus cléments. Ces changements climatiques offrent toujours des dangers subits, dont ne peuvent dans tous les cas, être tenues responsables les municipalités.

Ce que l'on exige de ces dernières, ce n'est pas un standard de perfection. Elles ne sont pas les assureurs des piétons, et on ne peut leur demander de prévoir l'incertitude des éléments. La vigilance simultanée de tous les moments, dans tous les endroits de leur territoire, serait leur imposer une obligation déraisonnable. Il peut arriver, et il arrive malheureusement des accidents. où s'exerce cependant très

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Taschereau J.

bien la surveillance municipale, qui résultent d'aucune négligence et pour lesquels il n'y a pas de compensation sanctionnée par la loi civile. Lorsque la municipalité fait preuve de soin et de diligence raisonnables, lorsqu'elle agit "en bon père de famille", lorsqu'elle prend les précautions que prendraient des personnes prudentes dans des circonstances identiques, elle ne peut être recherchée devant les tribunaux civils.

Dans la présente cause, je suis clairement d'opinion qu'étant donné toutes les circonstances, l'intimée a agi avec prudence, qu'aucune négligence n'a été établie contre elle, et qu'elle doit être libérée de toute responsabilité. Je crois que la Cour du banc de la reine a bien jugé en maintenant l'appel et en rejetant l'action.

L'appel doit être rejeté avec dépens.

Appeal dismissed with costs.

Attorney for the plaintiff, appellant: Dominique di Francesco, Montreal.

Attorneys for the defendant, respondent: Berthiaume & McDonald, Montreal.

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*Feb. 13
Feb. 13

WILFRED BOSS .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

EDWARD KLINE .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

LEO ARSENAULT .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

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

Criminal law—Theft of case of cigarettes—Accused peddling cigarettes—Circumstantial evidence—Misdirection as to rule in Hodge's case—Suspicion—Doctrine of recent possession—Criminal Code, 1953-54 (Can.), c. 51, s. 296.

*PRESENT: Kerwin C.J. and Locke, Cartwright, Judson and Ritchie JJ.

A wholesale store in Truro, N.S., was broken into on the night of January 24, 1960, and nine cases of cigarettes were reported missing. The three accused were charged and tried separately by the same magistrate for unlawfully possessing a quantity of cigarettes, knowing that they were obtained by the commission of an indictable offence, contrary to s. 296(a) of the *Criminal Code*. The evidence disclosed that they were trying to dispose of a case containing 49 cartons of cigarettes of an unidentified brand in a neighbourhood town on the day following the break-in, and that they were travelling in a two-tone 1956 Buick convertible, with Ontario licence plates. A two-tone car, with Ontario licence plates, containing two occupants whom the police could not identify, had been seen in the area near the store on the evening of January 24. The evidence of the police was that all the nine cases were returned; the owner's evidence was that eight cases were recovered and that the missing case contained Player's Cigarettes. Accused B and K stated that they never had any cigarettes in their possession, but that they were endeavouring to dispose of some on behalf of another person. The magistrate convicted the accused, basing his reasoning on the express finding that the cigarettes they were trying to sell had been stolen by them from the wholesale store. The convictions were affirmed by the Supreme Court of Nova Scotia, *in banco*. The accused were granted leave to appeal to this Court upon certain questions of law.

Held: The appeals should be allowed, the convictions quashed and the accused acquitted.

There was no direct evidence that the cigarettes were in the possession of anyone other than the true owners. There was, however, no doubt that the three accused were attempting to dispose of cartons of unidentified cigarettes. This was a circumstance to be weighed by the magistrate, together with the other circumstances disclosed by the evidence in accordance with the rule in *Hodge's* case. The magistrate had misdirected himself in applying this rule. The evidence of any cigarettes having been stolen at all was at best equivocal, and there was no evidence of the kind of cigarettes tendered for sale by the accused. Furthermore, there was no evidence that the accused B or A were in that area on the previous night. It was undoubtedly suspicious to find these men driving a two-tone 1956 Buick with Ontario licence plates and peddling cigarettes, but suspicion is not a substitute for proof and the convictions on circumstantial evidence appeared to be based upon a misconception of the rule in *Hodge's* case. The magistrate had erred in proceeding on the assumption that the accused had admitted having been in the area together on the night of the break-in. The doctrine of recent possession could not apply to the case, since the magistrate had based his decision on the express finding that the accused had themselves stolen the cigarettes in question. The further submission that the appeals should be dismissed because no substantial wrong or miscarriage of justice had occurred, failed for lack of evidence.

APPEALS from a judgment of the Supreme Court of Nova Scotia *in banco*, affirming the accused convictions. Appeals allowed.

L. L. Pace and *Chas. W. MacIntosh*, for the appellants.
Malachi C. Jones, for the respondent.

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The judgment of the Court was delivered by

RITCHIE J.:—These three appeals were heard together. The three appellants were charged and tried separately by the same Magistrate for unlawfully having in possession at or near Amherst, Nova Scotia, on January 25, 1960,

> . . . a quantity of cigarettes, the property of Truro Wholesalers Limited, knowing that it was obtained by the commission of an offence punishable by indictment contrary to s. 296(a) of the Criminal Code.

The evidence taken against Boss was used by consent in the other two cases, and the evidence given by Kline in his own defence was similarly used in the case of Arsenault.

In each case the evidence discloses that these three men were trying to dispose of a case containing 49 cartons of cigarettes of an unidentified brand at Amherst on the 25th of January, and that they were then travelling in a two-tone 1956 Buick convertible with Ontario license plates, but the evidence does not indicate that cigarettes were found in the possession of any of the appellants, and it is stated by both Boss and Kline that they had never had any cigarettes in their possession but that they were endeavouring to dispose of some on behalf of another person.

Coupled with this evidence is the fact that on the morning of January 25 the secretary-treasurer of Truro Wholesalers Limited found that his store had been broken into, and that, as far as he could tell from his records, one full case containing 50 cartons of cigarettes was missing and that marks in the snow which had fallen during the night before indicated that a case of Player's cigarettes had been put out and taken away. In this latter regard the same secretary-treasurer states that there were originally nine cases missing of which eight were recovered, whereas the police officer concerned swears that nine cases were returned to Truro Wholesalers Limited.

The other circumstance strongly relied upon by the Crown was the fact that an Ontario two-tone 1956 convertible Buick containing two occupants whom the police could not identify was seen in Truro near Truro Wholesalers Limited on the evening of January 24.

In a statement made to the police which was produced at his trial, Boss said that he had been in Truro with the other two appellants on the 25th of January, but denied knowing about the break, and Kline, giving evidence at his own trial, stated that he was in Truro on the evening of the 24th in a two-tone 1956 Buick convertible of a different shade from that described by the two police officers, but did not name either of the other appellants as his companion.

In convicting each of the appellants it is quite apparent that the learned Magistrate based his reasoning on the express finding that the cigarettes which these men were trying to sell in Amherst on the 25th of January had been stolen by them from Truro Wholesalers Limited. He says, in convicting Boss, "I have to find that these fellows stole them in order to convict them", and in convicting the other two appellants, "In this case I am well satisfied that they not only had possession of them but that they are the thieves".

In appealing from these convictions to the Supreme Court of Nova Scotia *en banc,* each of the appellants gave notice of appeal on the following, amongst other, grounds:

1. There was not sufficient evidence presented at the trial to prove beyond reasonable doubt that the accused was guilty of the offence charged.
2. The learned Magistrate did not give the accused the benefit of reasonable doubt as to his guilt.
3. The learned Magistrate failed to comprehend or to apply the rules of law applicable to circumstantial evidence.
4. The conviction is against the weight of evidence and the proper application of the evidence.

The decision of the Supreme Court *en banc* was rendered by Ilsley C. J. who found:

1. THAT there was evidence in the proceedings against Boss (admissible only against Boss) on which the learned Magistrate could properly find, as he did, that Boss jointly participated with Kline in the theft of a case of cigarettes at Truro from Truro Wholesalers Limited;
2. THAT in the proceedings against Kline there was evidence (admissible only against Kline) that Kline jointly participated with Boss in the same theft;

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3. THAT there was evidence in each of the three cases that later, in Amherst, each of the three appellants had, jointly with the others, possession of or control over this case of cigarettes less one carton, or aided in concealing or disposing of it;
4. THAT at that time Boss and Kline must, of course, each have known that the cigarettes had been stolen;
5. THAT the evidence in the proceedings against Arsenault was sufficient to justify the Magistrate in properly inferring that Arsenault also knew that they had been stolen; and
6. THAT each of the explanations given by Boss and Kline was one which the Magistrate was quite justified in finding not to be an explanation that could reasonably be true.

From this judgment the appellants sought leave to appeal to this Court, and by Order dated December 19, 1960, leave was granted upon the following questions of law:

1. Did the Supreme Court of Nova Scotia en banc err in failing to hold that the learned magistrate misdirected himself on the law in his application of the rule relating to circumstantial evidence known as the rule in Hodge's case?
2. Did the Supreme Court of Nova Scotia en banc err in failing to hold that there was no evidence against the appellants to sustain a conviction?
3. Did the Supreme Court of Nova Scotia en banc err in failing to hold that the learned magistrate misdirected himself as to the doctrine of recent possession of stolen goods?
4. Did the Supreme Court of Nova Scotia en banc err in failing to hold that the learned magistrate misdirected himself as to the doctrine of reasonable doubt?

The offence here charged is complete when a person has (alone or with another person) possession of or control over goods which he knows to have been obtained by the commission of an indictable offence or when he aids in concealing or disposing of such goods (see s. 300 of the *Criminal Code*).

In the present case, while there is no direct evidence of "a quantity of cigarettes, the property of Truro Wholesalers Limited", being in the possession of anyone other than the true owner, there is no doubt that the three appellants were attempting to dispose of 49 cartons of unidentified cigarettes in Amherst on January 25. This was a circumstance to be weighed by the Magistrate, together with the other circumstances disclosed by the evidence in accordance with the rule of law which has come to be known as

the rule in *Hodge's* case[1] and which was expressed by Sir Lyman Duff, speaking on behalf of this Court in *The King v. Comba*[2], where he said:

> It is admitted by the Crown, as the fact is, that the verdict rests solely upon a basis of circumstantial evidence. In such cases, by the long settled rule of the common law, which is the rule of law in Canada, the jury, before finding a prisoner guilty upon such evidence, must be satisfied not only that the circumstances are consistent with a conclusion that the criminal act was committed by the accused, but also that the facts are such as to be inconsistent with any other rational conclusion than that the accused is the guilty person.

To this statement there should be added what was said by Cartwright J. in *Lizotte v. The King*[3], as follows:

> *Hodge's* case was a case where all the evidence against the accused was circumstantial. It is argued that the direction there prescribed is not necessary in a case where there is direct evidence against the accused as well as circumstantial evidence. However that may be, it is my opinion that where the proof of any essential ingredient of the offence charged depends upon circumstantial evidence it is necessary that the direction be given.

In the course of his reasons in the case of Boss which he applied to the other two cases, the learned Magistrate is reported, according to the record before this Court, as having stated the rule in the following language:

> If they (the Crown) had to prove they were stolen and these people knew they were stolen, there would be no sense in rule in Hodge's case. The rule in Hodge's case is the rule that circumstantial evidence, if no other reasonable explanation they are in their possession, then they are guilty.

If the learned Magistrate was correctly reported, as we must take him to have been, he misdirected himself in this regard, but it is not so much the language which he is reported to have used as the manner in which he applied the rule which is of importance in determining the disposition of these appeals.

It is an essential ingredient of the offences charged that it should at least be proved that cigarettes were missing from Truro Wholesalers Limited, and as to this phase of the matter the opening words of the learned Magistrate's reasons for judgment are significant. He there says:

> I must say there is a bit of doubt as to whether any cigarettes were missing at all. According to the evidence as far as Nichols (Secretary-Treasurer of Truro Wholesalers Limited) is concerned he said according to his records it looked as though there were nine cases of cigarettes missing and they recovered eight. I think the Detective said they recovered nine.

[1] (1838), 2 Lew. C.C. 227, 168 E.R. 1136.
[2] [1938] S.C.R. 396 at 397, 3 D.L.R. 719.
[3] [1951] S.C.R. 115 at 133, 11 C.R. 357, 99 C.C.C. 113, 2 D.L.R. 754.

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The secretary-treasurer stated that as far as he could tell there was one full case missing, and when asked to explain this statement he said:

> We keep a record of our stock, sir, and as far as we could tell from our records there was one full case missing and evidence of one case being put over a fence. The mark of the imprint was there in the snow. Therefore, that case would have to be put down in the snow and taken away by some one.

The evidence of any cigarettes having been stolen at all is, therefore, at best equivocal, and although the secretary-treasurer adds that as far as he could tell the imprint in the snow was that of a case of Player's cigarettes, there is no evidence whatever of the kind of cigarettes tendered for sale in Amherst. There is no evidence that either Boss or Arsenault were in Truro on the night of the 24th of January, the police were unable to identify any of the appellants as the men seen in the Buick near Truro Wholesalers Limited that evening, and Kline says that the Buick he was in that night was a different colour from that described by the police.

It was undoubtedly suspicious to find these men driving a two-tone 1956 Buick with Ontario license plates and peddling cigarettes in Amherst the day after a break into premises at Truro from which cigarettes were thought to have been missing and outside of which a similar car had been seen on the night of the break, but suspicion is not a substitute for proof, and insofar as these convictions rest upon circumstantial evidence, they appear to me to be based in large measure on the misconception of the rule in *Hodge's* case to which reference has been made. In my opinion, if the learned Magistrate had properly directed himself as to the law in his application of the rule in *Hodge's* case to the circumstances here disclosed, he would have concluded that there was no evidence to sustain a conviction against these appellants.

It should be pointed out, however, that the Magistrate appears to have proceeded on the assumption that the appellants admitted having been in Truro together on the night of the break. In this he was in error.

As the learned Magistrate based his decision on the express finding that the appellants had themselves stolen the cigarettes in question, there was no room for the

application of the "doctrine of recent possession" which is directed to the question of whether or not an accused who is found to be in possession of goods recently stolen is aware of the fact that they are stolen goods nor indeed is there any occasion to invoke this doctrine on the view which I take of these cases because, as I have indicated, I do not consider that the evidence is of a kind upon which it is safe to base a finding that there were cigarettes missing from Truro Wholesalers Limited.

It is argued on behalf of the respondent that notwithstanding the errors in law which there may have been in the trial of these cases, the appeals should nevertheless be dismissed on the ground that no substantial wrong or miscarriage of justice has occurred. The test to be applied to this argument is to be found in the decision of Viscount Simon in *Stirland v. Director of Public Prosecutions*[1], the following portion of which was adopted by this Court in *Schmidt v. The King*[2]:

> . . . the provision that the Court of Criminal Appeal may dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred in convicting the accused assumes a situation where a reasonable jury, after being properly directed, would on the evidence properly admissible, without doubt convict.

I am of opinion, with the greatest respect, that there was no evidence upon which the learned Magistrate could properly find that Boss and Kline jointly participated in the theft of this case of cigarettes or that the appellants had possession of it or aided in concealing or disposing of it with knowledge that it had been stolen.

The judgment of this Court has already been rendered allowing these appeals, quashing the convictions and directing verdicts of acquittal to be entered.

Appeals allowed, convictions quashed and verdicts of acquittal ordered.

Solicitor for the appellants: L. L. Pace, Halifax.

Solicitor for the respondent: M. C. Jones, Halifax.

[1] [1944] A.C. 315, 113 L.J.K.B. 394, 2 All E.R. 13.
[2] [1945] S.C.R. 438 at 440, 83 C.C.C. 207, 2 D.L.R. 598.

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*Jan. 30
Apr. 25

THE VANCOUVER REAL ESTATE BOARD (*Defendant*) ..... APPELLANT;

AND

MOSCROP REALTY LIMITED (*Plaintiff*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Associations—Expulsion of member from real estate board—Employee taking secret commissions—Member not advised of remedial measures—Action to recover damages for wrongful expulsion and to have membership restored.

The plaintiff real estate company was expelled from membership of the defendant board, a voluntary society incorporated for the purposes of promoting the interests of real estate agents in the city of Vancouver and establishing proper standards of conduct of its members. Without the company's knowledge one of its employees had taken secret commissions in respect of two mortgage transactions. Following a hearing before a committee of the board, the company was informed that the committee had recommended its expulsion, but it was not advised that this recommendation might be waived if corrective action were taken nor was it informed of the kind of corrective action contemplated by the directors. An appeal to an appeal board of directors and a further appeal to the membership as a whole were without success. The company then brought an action to recover damages for wrongful expulsion and to obtain an order restoring it to membership in the board. The trial judge found in favour of the defendant; the Court of Appeal reversed this decision and directed that the action be referred back to the Court below for a new trial confined solely to the assessment of damages. By leave of this Court the defendant appealed from the judgment of the Court of Appeal.

Held: The appeal should be dismissed.

(1) The company, having been elected to active membership in the defendant board, remained a member at all times relevant to the action. Steps had not been taken to terminate the company's membership on the ground that it had no individual representative as a member of the board, and as the by-laws made no provision for automatic expulsion of a corporation on this ground, the validity of the membership to which it was initially admitted remained undisturbed.

(2) As the plaintiff had already been elected to membership at the time when the by-law providing that persons seeking election sign an "irrevocable Waiver of Claim against the Society" came into effect, it could not be construed as being in any way bound by that provision.

(3) The defendant's contention that the plaintiff's pleadings had been designedly limited to a claim for "general damages" and that only nominal damages are recoverable under this heading in an action for

*PRESENT: Locke, Cartwright, Fauteux, Martland and Ritchie JJ.

breach of contract was rejected. *Wyman and Moscrop Realty Limited v. Vancouver Real Estate Board (No. 4)* (1959), 27 W.W.R. 476, followed.

(4) The question of whether or not the company suffered damage must await the outcome of the new trial directed by the Court of Appeal to be confined to the question of damages only.

APPEAL from a decision of the Court of Appeal for British Columbia[1], reversing a judgment of Maclean J. Appeal dismissed.

W. J. Wallace, for the defendant, appellant.

T. R. Berger, for the plaintiff, respondent.

The judgment of the Court was delivered by

RITCHIE J.:—This is an appeal brought by leave of this Court from a judgment of the Court of Appeal of British Columbia[1] allowing the appeal of Moscrop Realty Limited (hereinafter referred to as "Moscrop") from the judgment of Maclean J., and directing that the action be referred back to the Court below for a new trial confined solely to the assessment of damages. This action was originally brought by both Moscrop and E. C. Wyman claiming damages for wrongful expulsion from the appellant Board and for loss of business and profits arising therefrom, and also for an order restoring them to membership in the Board, but Wyman's membership was not alleged in the pleadings, and his appeal having been dismissed by the Court of Appeal on the assumption that he was not a member, he is not a party to this appeal.

The appellant Board is a society incorporated under the *Societies Act,* R.S.B.C. 1948, c. 311, for the purposes of promoting the interests of real estate agents in the city of Vancouver and establishing and maintaining proper standards of conduct by its members. Real estate agents in the city of Vancouver are not obliged to be members of the Board but it is apparent that such membership enhances an agent's prestige and, in particular, that it makes available to him a system of multiple listings maintained by the Board which is considered to be of value in the conduct of the real estate business.

[1] (1960), 23 D.L.R. (2d) 21.

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Moscrop was duly admitted to membership on November 22, 1951, on the application of G. Gamble, its then manager-owner, and from that date until the expulsion complained of it paid all membership dues and subscriptions for group insurance, was listed on the official list of members and treated in every respect by the Board as an active member in good standing.

In January 1953 Gamble, who was then Moscrop's representative on the Board, sold his interest in that company to Wyman who, as it must be assumed, did not become a member of the Board although his name appears to have been entered in the Board's register as the Moscrop representative. The change of ownership was communicated orally to the secretary of the Board but no new application for membership was made when Wyman acquired his interest.

In January and February 1956 the Board received two letters of complaint from former clients of Moscrop, alleging that an employee of that company had taken secret commissions in respect of two mortgage transactions. There followed a hearing before the Complaints and Discipline Committee of the Board at which the employee admitted taking the commissions, but stated that this was done without the knowledge of either Moscrop or Wyman. The decision of this Committee having been communicated to the Board of Directors, the latter body recorded a resolution in its minutes of March 1, 1956, which read in part as follows:

> After much discussion, it was on motion resolved that Secretary be instructed to inform Mr. Wyman of a recommendation of the Complaints and Discipline Committee that he be expelled and also that the directors had considered this matter and instructed the Secretary to advise him that he may file notice of appeal within seven days of receipt of this letter and further that this recommendation for expulsion may be waived if necessary corrective action is taken by him. It was further resolved that until the seven day period for appeal has elapsed, services should not be discontinued to Moscrop Realty Ltd. and the membership at large are not to be informed of the proposed action.

The action taken by the Secretary pursuant to these instructions was to write a letter to Wyman saying:

> . . . I have been instructed to inform you that it has been recommended that Moscrop Realty Ltd. be expelled from the Vancouver Real Estate Board.

I have further been instructed to advise you that under Article 5, Part B, Section 8, Paragraph g of the Bylaws of the Board, you have seven days in which to appeal this decision.

It does not appear that either Wyman or anybody else on behalf of Moscrop was ever advised that the recommendation of expulsion might be waived if corrective action were taken nor does the kind of corrective action contemplated by the directors appear to have been communicated to Moscrop notwithstanding the fact that the by-law authorizing the directors' action reads in part as follows:

. . . where the Board of Directors deems it proper to do so, they may instruct the member to take such remedial action as may be required to correct the matter of the complaint and/or to bring about a satisfactory and fair settlement of the matter of the complaint, allowing the member a reasonable period of time but not in excess of ninety days to carry out the recommended action.

It is true that the secretary did tell Wyman in a telephone conversation that he thought the Board might withdraw the expulsion if the offending employee was dismissed by Moscrop but he did not commit himself and this conversation did not constitute an instruction to the member "to take such remedial action as may be required . . .".

An appeal was taken to an appeal board composed of seven directors on the ground, *inter alia,* that the penalty of expulsion was too severe in light of the fact that neither Wyman nor Moscrop was implicated in the employee's misconduct, and upon this appeal being dismissed a further appeal was taken without success to the membership as a whole.

The present action was then brought, alleging that the proceedings before the committee, the directors and the full Board and the resultant expulsions were contrary to law, natural justice and the constitution and by-laws of the Board. The defence was threefold in that the Board denied all allegations whereby the regularity of any of its proceedings or those of its directors or committees was impugned and pleaded also that the plaintiffs were not members of the Board "at all times relevant to the proceedings or at all", and, in the alternative, that if they were such members they were barred from bringing this action by reason of a waiver of all rights of action arising out of the disciplining of members, which waiver is contained in the by-laws of the Board.

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In his decision, the learned trial judge, after a very lengthy review of the evidence, concluded that there were no irregularities in the proceedings of the Board, its directors or its committee of such a character as to invalidate the expulsion which he found to have been lawfully imposed and directed. Having reached this conclusion, the learned trial judge did not find it necessary to deal with the allegation that the plaintiffs were never properly elected to membership or the alternative defence that if they were members their right of action was barred by the by-laws.

In the course of his decision, rendered on behalf of the Court of Appeal of British Columbia, Davey J.A., having found that Moscrop was a member of the Board at all relevant times, went on to say:

> But, in my opinion, this appeal must be determined against the Board upon the invalidity of the order of expulsion itself, resulting from serious violations of the bylaws in respect of the form the order took and the notice given the Company. It will not be necessary to consider the validity of the appeal proceedings, except to say that these initial violations of the bylaws vitiated all that followed.

Later in the same judgment it is said:

> Thus the directors' failure to specify on March 1st, 1956, the corrective action that they recommended and upon which they might waive the expulsion, and the appellants' ignorance that the expulsion might be waived if they took the appropriate action dogged the appellants throughout all appeal proceedings and nullified them.
>
> In my opinion, the expulsion order cannot stand against the Company and must be set aside, and the Company restored to full membership in the Board.

The Court of Appeal further held that the allegation that Moscrop was barred from bringing the action by the terms of its membership could not be supported because the requirement for members to sign a waiver of claim against the Society at the time of their election did not come into existence until the enactment of the by-laws of 1955 and was only referable to and binding upon members who were elected subsequent to that date.

Although in its pleadings Moscrop described its claim as one for "general damages", (a) for wrongful expulsion; and (b) for loss of business and profits arising out of such wrongful expulsion, the Court of Appeal nevertheless held, following its own decision on an interlocutory appeal (see

Wyman and Moscrop Realty Limited v. Vancouver Real Estate Board No. 4)[1], "that in the circumstances of this case there was a sufficient allegation of and prayer for special damages" and accordingly ordered a new trial confined solely to the question of damages which were not assessed by the learned trial judge.

In the factum filed on behalf of the appellant, it is alleged that the Court of Appeal erred in manner following:

1. In holding that Moscrop was a member of the appellant Board at all times material to this action.
2. In failing to hold that *if* Moscrop was a member of the appellant Board and wrongfully expelled, that it had waived its claim to damages.
3. In failing to award nominal damages only in that Moscrop asked for general damages only and did not plead or prove any special damages.
4. In failing to find that Moscrop had suffered no financial loss and was therefore entitled to nominal damages only.
5. In directing that the action be referred back to the Court below for a new trial.

In support of the first of these allegations, counsel for the appellant drew attention to the fact that the by-laws as revised to August 1953 contained the following provision in Art. 1(1):

> In the case of firms or corporations, in order that a firm or corporation may be deemed a member of the Society, it shall be necessary that a partner of such firm, or an official of such corporation, be elected as a member of the Society . . . .

It was argued that Moscrop's compliance with the terms of this by-law at the time of its initial election only accorded it the status of being "deemed a member" and that this did not constitute active membership and in any event that it lost the status of being "deemed a member" when it ceased to have an official as its nominee on the Board and that it certainly could not be said to have continued to be "deemed a member" after the new by-laws were enacted in 1955 because those by-laws contemplate the election of individuals only to membership on the Board.

[1] (1959), 27 W.W.R. 476.

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Great stress was laid by appellant's counsel on the meaning to be attached to the word "deemed" as used in the above-quoted article of the by-law, and it was urged that it should be given the meaning attributed to it by Cave J. in *Regina v. Norfolk County Council*[1], where, in construing the phrase "the following areas shall be deemed to be highway areas . . . .", he said:

> Generally speaking when you talk of a thing being deemed to be something, you do not mean that it is that which it is deemed to be. It is rather an admission that it is not what it is deemed to be, and that, notwithstanding it is not that particular thing, nevertheless for the purposes of the Act, it is deemed to be that thing.

The word "deemed" is obviously capable of more than one meaning depending upon the context in which it is used. In the present circumstances, although far from saying that the quotation is of general application, I am of opinion that the word bears the meaning assigned to it by Coleridge J. in *Wolton v. Gavin*[2], where he was construing the phrase "deemed to be enlisted as a soldier in Her Majesty's Service" and said:

> When an Act of Parliament says that a person is deemed to be in any particular capacity, surely that must be understood to mean that he is thenceforward taken as actually the very person that he is deemed to be.

I am accordingly of opinion that Moscrop, having been duly elected to active membership in the appellant Board in 1951, remained a member at all times relevant to these proceedings. It does not appear that any steps were ever taken to terminate Moscrop's membership on the ground that it had no individual representative as a member of the Board, and as the by-laws make no provision for automatic expulsion of a corporation on this ground, the validity of the membership to which it was initially admitted remains undisturbed.

In construing these by-laws, it is to be remembered that they are the by-laws of the very Board which now seeks to invoke them against the respondent and that this same Board recognized the respondent's membership for four years and endorsed this recognition by ordering its expulsion.

[1] (1891), 60 L.J.Q.B. 379, 65 L.T. 222.
[2] (1850), 16 Q.B. 48 at 81, 20 L.J.Q.B. 73.

The allegation that Moscrop was barred from recovering any damages by the terms of its membership was based on the following provision of the 1955 by-laws of the appellant Board:

Article 2—Membership

Part A—Qualifications

. . . Section 2—Qualification for Membership . . .

The Directors may elect to membership, in accordance with the terms of these By-laws, any individual who is eligible for membership in the Society . . . *and signs an irrevocable Waiver of Claim against the Society,* or any member or agent for any act in connection with the business of the society, and particularly as to its or their acts in electing or failing to elect or disciplining him as a member . . . .

As Moscrop had, in my opinion, already been elected to membership at the time when this by-law came into effect, it cannot, in my view, be construed as being in any way bound by the "irrevocable Waiver of Claim against the Society" which persons seeking election after 1955 were required to sign. I agree with the Court of Appeal that Moscrop's claim for damages is in no way affected by the terms of the by-law last referred to.

On the question of damages the appellant contends that the respondent's pleadings have been designedly limited to a claim for "general damages" and that only nominal damages are recoverable under this heading in an action for breach of contract.

This very point was the subject of an appeal to the Court of Appeal of British Columbia from the dismissal of an application to strike out the claim for "general damages" in the respondent's statement of claim, and in the course of delivering the reasons for judgment of that Court which have heretofore been referred to (see *Wyman and Moscrop Realty Limited v. Vancouver Real Estate Board No. 4*) *supra,* Coady J.A. read:

It is contended that this should be a claim for special damages and not general damages. I think that submission finds some support in the cases to which counsel for the appellant has referred, but in that connection the observations of Atkinson J. in *Aerial Advertising Co. v. Batchelor Peas Ltd.* [1938] 2 All E.R. 788 at 795 are to be noted. In this case, however, since particulars of what was claimed under this heading were upon demand supplied to the appellant and since counsel for the appellant admits that he is not therefore embarrassed by this pleading of general damages, if the action proceeds to trial in the form it now appears, it would therefore appear that the learned Judge below was right, in the

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exercise of his discretion, in his refusal to strike out that pleading which designated the damages claimed for loss of business and profits under a heading of general damages rather than special damages.

The pleadings were amended and the action proceeded to trial in accordance with this decision from which no appeal has been taken to this Court and which must, for the purposes of this case, be regarded as conclusive.

It was also contended on behalf of the appellant that the evidence does not disclose that Moscrop suffered any financial loss, but the Court of Appeal, acting pursuant to the powers conferred upon it by the *Court of Appeal Act*, R.S.B.C. 1948, c. 74, and the rules made thereunder has directed a new trial confined to the question of damages only and as I do not feel that this order should be interfered with, it follows that the question of whether or not Moscrop suffered damage must await the outcome of such new trial.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the defendant, appellant: Bull, Housser, Tupper, Ray, Guy & Merritt, Vancouver.

Solicitors for the plaintiff, respondent: Shulman, Tupper, Gray, Worrall & Berger, Vancouver.

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HOPITAL SAINTE-JEANNE D'ARC DE MONTREAL (*Defendant*) ..... APPELLANT;

AND

GEORGES GARNEAU (*Plaintiff*) .....RESPONDENT;

AND

JEAN MERCILLE .....MIS-EN-CAUSE.

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

Hospital—Resolution of Board of Directors—Termination of engagement of doctor—Nullity of resolution—Mandamus refused—Whether judgment declaratory only—Code of Civil Procedure, art. 541.

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

The by-laws of the defendant hospital enact that all doctors attached to the hospital in any capacity whatsoever shall constitute the medical board of the hospital; that the appointment of doctors to the staff of the hospital is to be made by the Board of Directors on the recommendation of the Medical Board; that if the Board of Directors refuse to re-appoint a doctor to the Medical Board it must notify the Medical Board, give reasons for its decision and request the recommendation of another doctor; that in no case can the Board of Directors dispose of an application, refuse to renew, or annul a nomination made prior without the recommendation of the Medical Board. On January 31, 1956, the Board of Directors passed a resolution refusing to renew the plaintiff's engagement as a member of the Medical Board, although the Medical Board had recommended the renewal of his appointment.

In his action the plaintiff asked for a writ of *mandamus* ordering the defendant to renew his nomination, and the annulment of the resolution. The trial judge granted both these conclusions. This judgment was modified by the Court of Appeal which declared the resolution illegal, null and void, but deleted the part which dealt with the *mandamus*. The defendant appealed to this Court and there was no cross-appeal with respect to the writ of *mandamus*.

Held: The appeal should be dismissed.

The plaintiff's engagement was not legally terminated. The resolution was in direct contradiction with the by-laws of the hospital since the refusal to renew the engagement was made without the recommendation of the Medical Board. The Board of Directors could not act *ex parte* and bypass the by-laws.

The fact that the judgment below refused the *mandamus* did not make that judgment merely declaratory. The judgment annuled the resolution and redressed a wrong complained of. The remedy was the annulment of the resolution and that is where the execution of the judgment was to be found.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], modifying a judgment of Sylvestre J. Appeal dismissed.

J. Filion, Q.C., and *J. Laurendeau, Q.C.*, for the defendant, appellant.

J. G. Ahern, Q.C., and *J. Y. Debrabant*, for the plaintiff, respondent.

The judgment of the Court was delivered by

TASCHEREAU J.:—L'intimé a demandé l'émission d'un bref de mandamus enjoignant à l'appelante de renouveler sa nomination comme membre du bureau médical de la corporation appelante pour l'année 1956, et l'annulation d'une résolution adoptée le 31 janvier 1956.

[1] [1959] Que. Q.B. 583.

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L'intimé est membre du Collège des médecins et chirurgiens de la province de Quebec, et au moment où ont commencé les présentes procédures, exerçait sa profession depuis au delà de quinze ans. En qualité de médecin au service de la corporation appelante, il a fait partie du bureau médical de cette dernière depuis 1940 jusqu'au début de février 1956, date où il a été informé de sa destitution.

L'intimé soutient que la résolution en date du 31 janvier 1956, dont copie lui a été transmise, est illégale, contraire à la lettre et à l'esprit des dispositions législatives et réglementaires qui régissent la corporation, et il demande qu'elle soit déclarée nulle.

L'appelante a contesté la requête, et l'honorable Juge Sylvestre de la Cour supérieure de la province de Québec, siégeant à Montréal, a maintenu la prétention de l'intimé, a déclaré nulle et illégale la résolution en date du 31 janvier 1956, et a enjoint à la corporation appelante de renouveler la nomination de l'intimé comme membre du bureau médical de la corporation pour l'année 1956, et de permettre au requérant de faire hospitaliser, et de soigner ses patients à l'Hôpital Sainte-Jeanne d'Arc de Montréal.

La Cour du banc de la reine[1] a modifié ce jugement, et a fait droit à l'appel à la seule fin de retrancher du jugement frappé d'appel la partie qui a trait aux conclusions du mandamus. La Cour du banc de la reine a donc maintenu l'action du requérant avec dépens contre la corporation en ce qui concerne seulement la demande de nullité de la résolution ci-dessus mentionnée.

La corporation appelante a logé un appel devant cette Cour, après avoir obtenu la permission d'appeler par jugement rendu le 26 novembre 1958. Il se trouve donc que le seul point en litige devant cette Cour est d'examiner la validité de la résolution qui mettait fin à l'engagement du Dr Garneau, et nous n'avons pas en conséquence à juger du droit au mandamus réclamé par l'intimé, vu que devant cette Cour aucun contre-appel n'a été logé.

L'appelante est une corporation autorisée à recevoir des patients et à les traiter. Cet hôpital est régi par une charte amendée, adoptée par la Législature en 1939 (3 Geo. VI, ch. 143). En vertu de cette charte, la corporation est formée

[1] [1959] Que. Q.B. 583.

de gouverneurs choisis et nommés suivant les règlements de la corporation. Tous les règlements de la corporation doivent être approuvés par le Lieutenant-Gouverneur en Conseil, sur la recommandation du Ministre provincial de la Santé. La charte pourvoit en outre à ce que la corporation soit dirigée et administrée par un bureau d'administration désigné et élu de la manière prescrite aux règlements qui doivent être établis par le bureau d'administration, et qui doivent recevoir également l'approbation du Lieutenant-Gouverneur en Conseil sur la recommandation du Ministère de la Santé.

Les médecins attachés à l'hôpital constituent le bureau médical, et ce bureau est autorisé à passer des règlements qui doivent être approuvés par le bureau des gouverneurs et par le Lieutenant-Gouverneur en Conseil. Les mots «Bureau Médical» sont définis dans les règlements et signifient «l'ensemble des médecins ayant le privilège de traiter des patients à l'hôpital Sainte-Jeanne d'Arc».

En vertu des règlements qui ont été adoptés par le bureau médical, à la fin de chaque année, c'est-à-dire dans le cours du mois de décembre, les officiers pour l'année à venir doivent être élus «et les recommandations pour les nominations des membres en service actif doivent également être faites». Ces recommandations doivent être transmises au bureau d'administration, vu que c'est le devoir de ce dernier de nommer les membres du bureau médical pour l'année à venir.

Le 28 décembre 1955, les administrateurs de l'hôpital Sainte-Jeanne d'Arc n'avaient pas encore reçu les recommandations que devait leur faire parvenir le bureau médical pour l'année 1956. Apparement, un plan avait été suggéré pour recruter des médecins et des chirurgiens, et une résolution fut passée suspendant toutes les recommandations par le bureau médical, et on voulait évidemment établir une procédure nouvelle afin de déterminer les nominations qui devaient être faites.

Le 19 janvier 1956, les administrateurs se sont réunis en assemblée, et aucune recommandation pour la nomination de médecins au bureau médical n'ayant été reçue, les administrateurs furent informés que les recommandations avaient été faites, mais pas encore transmises au bureau. Le jour suivant, soit le 20 janvier 1956, une lettre signée

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par le Dr Ducharme, secrétaire du bureau médical, a été adressée au Dr Mercille. Cette lettre contenait les noms de tous les médecins recommandés pour l'année 1956, et demandait l'approbation des administrateurs. Parmi ces noms recommandés par le bureau médical se trouvait le nom l'intimé, le Dr Georges Garneau.

Le plan suggéré par le bureau des administrateurs était que tous les médecins attachés à l'hôpital à la fin de 1955, devaient écrire personnellement à l'hôpital pour obtenir un renouvellement de leur emploi. Plusieurs se rendirent à cette exigence du bureau des administrateurs, mais d'autres, comme le Dr Garneau, le Dr Manseau et le Dr Larichelière, ne firent pas parvenir de semblable lettre.

Le 31 janvier 1956, à une réunion du bureau des administrateurs, il a été décidé d'ignorer les recommandations faites par le bureau médical, de refuser la nomination des trois médecins ci-dessus mentionnés pour l'année 1956 "pour cause de refus total de coopération et d'insubordination marquée"; de nommer au bureau médical tous les médecins qui avaient fait leur application par écrit, et de suspendre tous les autres médecins qui ne s'étaient pas rendus à la demande du bureau des administrateurs, telle que contenue dans sa lettre du 19 janvier 1956. C'est alors que l'intimé Garneau institua les présentes procédures.

L'appelante soutient que la Cour du banc de la reine, ayant refusé d'accorder les conclusions contenues au bref de mandamus, n'avait pas de juridiction l'autorisant à déclarer invalide la résolution du bureau d'administration en date du 31 janvier 1956, car ce jugement n'étant qu'un jugement déclaratoire, n'était pas susceptible d'exécution en vertu des dispositions de l'art. 541 du *Code de procédure civile*. L'appelante soutient additionnellement que la résolution du 31 janvier 1956 est légale, régulière et valide, et qu'elle a été passée par le bureau d'administration dans l'exercice de sa discrétion.

La charte de la corporation appelante a été refondue par la Législature de Québec en 1939, et la loi se trouve au statut 3 Geo. VI, 1939, ch. 143. En vertu de cette loi, la corporation est formée de gouverneurs choisis et nommés suivant les règlements de la corporation, et celle-ci est dirigée et administrée par un bureau d'administration désigné et élu de la manière prescrite aux règlements. En

outre, tous les médecins attachés à l'hôpital, à quelque titre que ce soit, forment le bureau médical de l'hôpital. Ce bureau établit les règlements concernant les services médicaux, chirurgicaux et scientifiques de l'hôspital, et ces derniers, avant de devenir en vigueur, doivent être approuvés par le bureau d'administration et par le Lieutenant-Gouverneur en Conseil sur la recommandation du Ministre de la Santé.

Pour donner suite à cette législation, le bureau d'administration a établi des règlements modifiant les anciens qui ont été approuvés par le Lieutenant-Gouverneur en Conseil, tel que ci-dessus requis. Le bureau médical a également adopté ces règlements qui ont été approuvés par le bureau d'administration et aussi sanctionnés par le Lieutenant-Gouverneur en Conseil. Le nombre des gouverneurs est illimité, mais le nombre des administrateurs est de vingt-quatre, désignés, choisis ou élus parmi les gouverneurs. Les administrateurs ont une juridiction et une autorité complètes et absolues sur tout l'hôpital. Ces administrateurs doivent se réunir au moins une fois par mois, et dans le bureau des administrateurs, il doit y avoir deux délégués du bureau médical. Le quorum d'une assemblée du bureau d'administration est de cinq administrateurs ayant droit de vote, et en cas d'égalité des votes, le président a une voix additionnelle prépondérante. Le surintendant fait partie *ex officio* du bureau d'administration où il siège à titre consultatif seulement et il remplit, en vertu de l'art. 30 (c), la fonction d'agent de liaison entre le bureau médical et le bureau d'administration. Dans le temps où ce litige a pris naissance, le Dr Mercille remplissait la fonction de surintendant.

Les articles des règlements qui nécessitent considération spéciale dans la présente cause, sont les arts. 37 et 38 qui se lisent de la façon suivante:

37. Les nominations doivent être faites par le bureau d'administration de l'hôpital pour une période d'un an ou pour la balance de l'année alors en cours.

38. A la fin de l'année fiscale, le bureau d'administration peut renommer tous les membres du bureau médical à la condition que le bureau médical n'ait pas recommandé que telle nomination en particulier ne soit pas renouvelée. Sauf ce cas, toutes les nominations peuvent être renouvelées. Cependant, si le bureau d'administration veut prendre l'initiative de refuser le renouvellement d'une nomination, il doit en aviser le bureau médical, donner les raisons de sa décision et demander la recommandation d'un

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autre candidat. En aucun cas, le bureau d'administration ne disposera d'une candidature, refusera de renouveler ou annuler une nomination faite antérieurement, *sans la recommandation du bureau médical.*

On voit donc à la lecture de ces deux règlements adoptés par la corporation appelante, qu'il appartient au bureau des administrateurs de faire les nominations des médecins qui doivent être attachés au bureau médical pour une période d'un an.

Mais avant que la décision du bureau des administrateurs ne soit rendue, il y a certaines exigences requises par les règlements. Ainsi, à la fin de l'année fiscale, la nomination de tous les membres du bureau médical par le bureau d'administration peut être faite, à condition que le bureau médical n'ait pas recommandé que telle nomination ne soit pas faite. Tel n'est pas le cas qui nous occupe, car tous les médecins ont été recommandés. Mais il peut arriver que le bureau des administrateurs décide de prendre l'initiative, malgré la recommandation du bureau médical, de refuser un ou plusieurs renouvellements, mais dans ce cas, il doit en aviser le bureau médical, donner les raisons de sa décision, et demander la recommandation d'un autre candidat. Dans aucun cas cependant, ajoute le règlement 38, le bureau des administrateurs ne peut disposer d'une candidature, refuser un renouvellement, ou *annuler une recommandation faite antérieurement,* sans la recommandation du bureau médical.

Le bureau des administrateurs aurait pu, en vertu de ce règlement no. 38, prendre l'initiative de refuser le renouvellement de l'engagement du Dr Garneau; c'eut été son droit, en vertu des règlements, d'adopter cette attitude. Mais, il aurait fallu que le bureau des administrateurs avise le bureau médical du refus et demande sa recommandation. Le règlement est précis, et même s'il y a eu une recommandation faite antérieurement, il faut une nouvelle recommandation du bureau médical pour refuser le renouvellement.

Ce n'est évidemment pas ce qui a été fait. Le bureau des administrateurs a pris une autre initiative, et à sa réunion du 19 janvier 1956, date où l'assemblée était informée par le Dr Manseau que les nominations et les recommandations avaient été faites par le bureau médical, le conseil des administrateurs a décidé d'adresser à chacun des médecins

du bureau médical, une lettre l'enjoignant d'adresser par écrit, le ou avant le 29 janvier 1956, au surintendant médical de l'hôpital, une demande de renouvellement d'engagement s'il désirait faire partie du bureau médical pour l'année 1956. Ce n'est pas là la procédure qu'il faut suivre pour les renouvellements. On a plutôt suivi la procédure pour les nouvelles applications, et non celle qui doit être adoptée pour les renouvellements.

A une réunion du conseil d'administration tenue le 31 janvier 1956, le Dr Jean Mercille, surintendant et directeur médical, a fait rapport aux administrateurs que trente-et-un médecins s'étaient rendus à la demande du conseil d'administration, et avaient requis par écrit le renouvellement de leur engagement; un médecin a adressé une lettre de démission, un autre a fait adresser un avis d'absence, et un troisième a envoyé un télégramme. L'intimé le Dr Garneau, qui avait été recommandé suivant le règlement 38 par le bureau médical, n'a pas fait d'application, de même que les Docteurs Raymond Larichelière et J. A. Manseau. Il a en conséquence été proposé à l'assemblée et résolu ce qui suit:

1° de mettre fin, pour cause de refus total de coopération et d'insubordination marquée, à l'engagement de messieurs les docteurs J. A. Manseau, Georges Garneau et Raymond Larichelière comme membres du bureau médical de l'Hôpital Ste-Jeanne d'Arc de Montréal, de refuser le renouvellement de leur engagement *pour l'année 1956*, de leur refuser en conséquence, dès réception par chacun d'eux des présentes, tous les privilèges accordés aux médecins attachés à l'hôpital, de leur refuser l'accès de tous les services de l'hôpital, de refuser d'accepter leurs patients dans l'un quelconque des services d'hospitalisation, d'enlever leurs noms du tableau des médecins attachés à l'hôpital et d'ordonner à l'administrateur général et au surintendant et directeur médical d'exécuter la présente décision du conseil d'administration et de la faire respecter dans tous et chacun des services de l'Hôpital Ste-Jeanne d'Arc de Montréal;

2° de nommer messieurs les médecins dont les noms suivent et qui ont demandé leur admission et le renouvellement de leur engagement conformément à l'avis du 19 janvier 1956, membres du bureau médical de l'Hôpital Ste-Jeanne d'Arc de Montréal et faisant partie comme tels du groupe des médecins attachés à la corporation.

(Suit la liste des noms des médecins dont l'engagement a été renouvelé par le Conseil d'Administration.)

Il est bon de remarquer que le bureau médical avait fait ses recommandations en décembre 1955, à une assemblée où le représentant du conseil d'administration était présent, et que le conseil d'administration a reçu ces recommandations par écrit le 20 janvier 1956.

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L'on peut voir à la lecture du paragraphe 2 de la résolution citée plus haut que le conseil d'administration a renouvelé l'engagement seulement de ceux qui s'étaient conformés à la demande faite par le bureau des administrateurs, de faire parvenir une demande de renouvellement. Ceci n'est pas la procédure qui doit être suivie, suivant les règlements sanctionnés par le Lieutenant-Gouverneur en Conseil. La procédure à suivre, c'est celle prévue à l'art. 38 des règlements, et évidemment, elle n'a pas été suivie. On objecte que le bureau des administrateurs peut prendre l'initiative que j'ai signalée précédemment et refuser un renouvellement proposé par le bureau médical, mais dans ce cas, le bureau médical doit en être avisé, les raisons doivent être données, et *dans aucun cas,* dit le règlement 38, le bureau des administrateurs ne peut disposer d'une candidature, refuser un renouvellement ou annuler une nomination sans la recommandation du bureau médical. Dans le cas qui nous occupe, le bureau des administrateurs ne pouvait pas de sa propre initiative nommer seulement ceux qui en avaient fait la demande par écrit, vu que cette procédure n'est pas autorisée dans les cas de renouvellements. Si le bureau des administrateurs a voulu agir suivant les dispositions du règlement 38, alors, il devait, s'il refusait de nommer de nouveau l'intimé, demander la recommandation du bureau médical suivant les dispositions impératives de ce règlement. C'est ce qui doit être fait dans tous les cas, et c'est ce qui n'a pas été fait dans le cas présent.

Il s'ensuit donc que le bureau des administrateurs n'a pas suivi les prescriptions imposées par les règlements de la corporation, et que l'intimé n'a pas été légalement démis de ses fonctions. Le conseil d'administration, lorsqu'il s'agit de renouvellements d'engagements des membres du corps médical, n'a pas de pouvoirs dictatoriaux. Il ne peut agir *ex parte,* et ignorer les règlements qui lui imposent l'obligation d'obtenir la recommandation du bureau médical. Il est impératif qu'il en soit ainsi, et le Lieutenant-Gouverneur en Conseil, en sanctionnant le règlement n° 38, a évidemment jugé bon que le bureau médical ait son mot à dire dans le choix des médecins.

Étant donné la conclusion à laquelle je suis arrivé concernant la validité de la résolution, il devient inutile d'examiner la question de savoir s'il y avait le quorum requis à l'assemblée du bureau médical.

L'appelante a enfin invoqué l'argument que le jugement rendu par la Cour du banc de la reine n'est qu'un jugement déclaratoire, non susceptible d'exécution. Je ne puis m'accorder avec cette prétention que je crois non fondée. Il est certain que les tribunaux ne doivent pas donner des consultations légales, et qu'ils doivent s'abstenir de se prononcer sur des questions académiques, mais tel n'est pas le cas qui se présente. Ici, le jugement de la Cour du banc de la reine, s'il refuse le mandamus demandé, il annule une résolution et redresse un tort dont l'intimé souffrait préjudice. Il apporte un remède qui est l'annulation de la résolution, et comme le dit M. le Juge Cross, c'est là même que se trouve l'exécution du jugement. *Harbour Commissioners of Montreal v. Record Foundry Company*[1].

L'appel doit être rejeté avec dépens.

Appeal dismissed with costs.

Attorneys for the defendant, appellant: Badeaux, Filion, Badeaux & Béland, Montreal.

Attorneys for the plaintiff, respondent: Prévost & Blais, Montreal.

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*Oct. 17, 18

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Apr. 25

E. GAGNON AND OTHERS (*Defendants*) ..... APPELLANTS;

AND

FOUNDATION MARITIME LIMITED (*Plaintiff*) ..... RESPONDENT.

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

Labour—Request of unregistered unions for recognition refused—Subsequent picketing resulting in work stoppage—Unlawful strike constituting tortious conspiracy—Labour Relations Act, R.S.N.B. 1952, c. 124, ss. 22(1), 23.

While the plaintiff company was engaged in the construction of a wharf at St. John, New Brunswick, under a contract with the Department of Public Works, certain union organizers, who claimed that they repre-

*PRESENT: Kerwin C.J. and Locke, Cartwright, Judson and Ritchie JJ.

[1] (1911), 21 Que. K.B. 241.

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sented more than fifty per cent of the employees, asked for recognition of their unions. The company refused their request on the ground that the unions had not been certified under the *Labour Relations Act*. The subsequent establishment of a picket line brought the entire operation to a halt, and the work stoppage continued until an interim injunction was obtained to stop the picketing. At the trial, the plaintiff was awarded damages and an injunction restraining all picketing. On appeal, the damages were reduced but the injunction was affirmed. The defendants appealed to this Court.

Held (Judson J. dissenting): The appeal should be dismissed.

Per Kerwin C.J. and Cartwright and Ritchie JJ.: The submission that the prohibition with respect to striking contained in s. 22(1) of the *Labour Relations Act* only applied to employees on whose behalf an application for certification was pending before the Board was rejected.

The defendants not only formed a common design to obtain recognition for their uncertified unions, which would not of itself have been unlawful, but agreed to achieve this end by organizing a stoppage of work, which constituted a "strike" within the meaning of the Act on the part of a group of employees who were prohibited from striking by the terms of s. 22(1).

It was unnecessary to determine whether or not a breach of s. 22(1) gave rise to a statutory cause of action because when inquiry was "made of the statute law" it disclosed that the means here employed by the defendants were prohibited, and this of itself supplied the ingredient necessary to change a lawful agreement which would not give rise to a cause of action into a tortious conspiracy, the carrying out of which exposed the conspirators to an action for damages if any ensued therefrom. *Therien v. International Brotherhood of Teamsters,* [1960] S.C.R. 265, referred to.

It was not necessary for the plaintiff to prove that actual breaches of contract took place in order to sustain the plea of conspiracy because the evidence supported the allegation that the defendants wrongfully conspired to procure, cause and induce the employees of the plaintiff to abstain from work.

Per Locke J.: The action of the defendants in causing or inducing the employees to cease to work was a tortious act for which they were liable in damages. It was clear that their actions in setting up the picket line were carried on in combination for the purpose of causing injury to the plaintiff by unlawful means.

At the time the picket line was established the plaintiff, by virtue of its contract, was entitled and was required to enter upon the premises of the Crown for the purpose of carrying on the work of construction and to do so, in the circumstances then existing, without interference by the defendants or anyone else with the entry of its employees upon the premises. In these circumstances the conduct of the defendants was a private nuisance and, as damage resulted, actionable. *Lumley v. Gye* (1853), 2 E. & B. 216; *Quinn v. Leathem,* [1901] A.C. 495; *Lyons v. Wilkins,* [1899] 1 Ch. 255, referred to; *Williams v. Aristocratic Restaurants (1947) Ltd.,* [1951] S.C.R. 762, distinguished.

Per Judson J., *dissenting*: The prohibitions of s. 22 of the Act applied only where an application for certification was pending, and the only other prohibition against striking was contained in s. 23 which did not touch this case. Therefore there was no breach of the Act which could turn the conduct here complained of into a tortious conspiracy.

The conspiracy as found by the Court of Appeal was never pleaded. It was not open to that Court to base its judgment, of its own mere motion, on a conspiracy which had never been pleaded and which the defendants had no opportunity to answer.

The defendants in pursuit of the legal object of union recognition employed means which were neither criminal nor tortious in themselves but which, on one reading of the Act, could be held to be prohibited conduct. This did not make them guilty of the tort of conspiracy. In the law of civil conspiracy the unlawful means must be found in nominate torts or crimes.

There was no question of doing something lawful by unlawful means. If the conduct of the defendants was held to be contrary to the legislation, then the conspiracy was to do something forbidden by the Act. They should have been prosecuted for this breach, with leave of the Board, or if the plaintiff wanted damages, its claim was to be founded on a breach of the Act and no more—not on conspiracy.

APPEAL from a judgment of the Supreme Court of New Brunswick, Appeal Division[1], varying a judgment of Ritchie J. as to damages but affirming injunction granted. Appeal dismissed, Judson J. dissenting.

I. P. Macklin, for defendants, appellants.

A. B. Gilbert, Q.C., P. M. Laing, Q.C., and *T. L. McGloan,* for the plaintiff, respondent.

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

RITCHIE J.:—The evidence in this case discloses that in the early days of July 1958, at a time when the respondent company was employing some 190 workmen without labour difficulty, dispute or complaint of any kind, on the construction of a wharf for the Department of Transport at Saint John, New Brunswick, the three appellants Gagnon, Blackman and Merloni, accompanied by others, called on the superintendent on this job, asking that the company recognize certain unions which they claimed to represent. The superintendent told these men that the matter was one which would have to be decided by other company officials who would be in Saint John during the following week, and, accordingly, on July 15 the same three appellants and some other persons called on the company's construction manager who describes the interview in the following terms:

Mr. Merloni appeared to be the spokesman for the group. He asked if we would be prepared to recognize their union and sign an agreement with them. I asked him if their unions were certified and they were the

[1](1960), 44 M.P.R. 203, 23 D.L.R. (2d) 721.

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> legal bargaining agents and he replied they were not certified under the New Brunswick laws but had more than fifty per cent of the men who had signed cards with their groups and would we recognize them on that basis. I said "No," they should be certified under the law and we would not recognize them or sign an agreement with them on that basis. . . . The discussion I had was with Mr. Merloni. He was the spokesman. When I told him we would not recognize them or sign an agreement with them, the discussion ended and they left. When leaving Mr. Merloni said they were willing at this time to discuss the matter with us but there would come a time when we would have to bargain with them on their terms.

The superintendent, who was also present at the meeting, recounts Merloni's parting words as being, "the time will come when you will recognize us on our basis and there will be no discussion."

On the morning of July 23 (eight days after the meeting) it became apparent that the means which Gagnon, Blackman and Merloni had decided to adopt to achieve recognition without certification under the *Labour Relations Act,* R.S.N.B. 1952, c. 124, was to bring about a cessation of work at the company's premises by persuading the other appellants to parade outside the entrances thereto, carrying placards which read "Engineers, Teamsters & Labourers on strike against Foundation Maritime Limited". Although the picketing itself was, in my opinion, peaceful, it would be totally unrealistic to regard it as an exercise of any right of employees to peacefully inform other persons that they were on strike. There is no evidence that there was anything in the nature of a strike in progress before the placards were paraded and the picket line established. The purpose of the picketing and parading of placards was not to inform other people that a strike existed but rather to create a situation which would result in a cessation of work, constituting a strike within the meaning of the *Labour Relations Act,* s. 1(p), and thus to achieve recognition for unions which were not prepared to comply with the provisions of the statute regarding certification.

The result of these activities was that none of the company's employees (except office workers and supervising staff) crossed the picket line although there were employees who otherwise would have been willing to return to work. Work ceased entirely until July 28th, when, after an interlocutory injunction had been granted to restrain the picketing, some 30 per cent of the men returned to work to be followed by others during the next seven days.

The judgment of the learned trial judge which declared the strike and picketing to have been unlawful, awarded damages in the sum of $22,712.39 and granted an order restraining the appellants from picketing, was based on the grounds that the employees had been intimidated by the pickets, that there had been a tortious interference with the company's contractual relations with its employees and with the Department of Public Works, and that any picketing in furtherance of an illegal strike should be restrained.

In affirming the decision of the learned trial judge, subject to a reduction of the damages to the amount of $12,500, the Appeal Division of the Supreme Court of New Brunswick[1] based its decision on the ground that the appellants had brought about a strike in contravention of the *Labour Relations Act* and had thus employed unlawful means to achieve their object so as to make them parties to an actionable conspiracy and liable for the damages flowing therefrom and subject to restraint by injunction from repetition of any acts in furtherance of such unlawful means.

In resting his decision on this ground, Bridges J.A., speaking on behalf of the Appeal Division, said:

> In an action based on conspiracy we do not think it necessary for the plaintiff to prove that actual breaches of contracts took place. In the case at bar the plaintiff's employees were induced to abstain from work, which, in our view, is sufficient.
>
> In our opinion, Gagnon, Blackman, Merloni and the other defendants who acted as pickets combined in inducing workmen of the plaintiff to refrain from working. Their object was to obtain recognition of the Unions without certification, which, in itself, was not unlawful but the means they used, a strike in violation of the Labour Relations Act, was and they have therefore no defence to the action. Any act done in furtherance of the unlawful means should, in our opinion, be restrained. The plaintiff was therefore entitled to an injunction against picketing in addition to damages.

A conspiracy consists, not merely in the intention of two or more but in the agreement of two or more, to do an unlawful act or to do a lawful act by unlawful means. The essence of the crime of conspiracy lies in the agreement itself which may be punishable, although no action has been taken pursuant to it, but the tort of conspiracy sounds in damages and is concerned only with the effect upon others of steps taken to carry out such an agreement.

[1] (1960), 44 M.P.R. 203, 23 D.L.R. (2d) 721.

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It is apparent from the language used by Merloni, coupled with the stoppage of work for which he, Blackman and Gagnon were primarily responsible, not only that they had formed a common design to obtain recognition for their uncertified unions, which would not of itself have been unlawful, but that they had agreed to achieve this end by organizing and creating a stoppage of work at the respondent's premises. In carying out this design, they enlisted the aid of the other appellants who thus became parties to the agreement. There can be no doubt that the means employed by the appellants resulted in damages to the respondent, but the question which bears further examination is whether or not these means were unlawful in such manner as to taint the whole agreement with the tortious quality necessary to give rise to liability.

Both the learned trial judge and the Appeal Division were satisfied that this stoppage of work constituted a strike which was in contravention of s. 22(1) of the *Labour Relations Act* and therefore unlawful, but as there is a wide difference between the parties to this appeal as to the true meaning to be attached to this subsection, it becomes necessary to analyze its provisions in the framework of the statute as a whole. Section 22 reads as follows:

> 22. (1) No employee in a unit shall strike until a bargaining agent has become entitled on behalf of the unit of employees to require their employer by notice under this Act to commence collective bargaining with a view to the conclusion or renewal or revision of a collective agreement and the provisions of section 20, or as the case may be, have been complied with.
>
> (2) No employer shall declare or cause a lockout of employees while an application for certification of a bargaining agent to act for such employees is pending before the Board.

The conditions under which a bargaining agent may become entitled to require an employer by notice to commence collective bargaining are prescribed in s. 11 of the Act which reads as follows:

> 11. Where the Board has under this Act certified a trade union as a bargaining agent of employees in a unit and no collective agreement with their employer binding on or entered into on behalf of employees in the unit, is in force,
>
> (*a*) the bargaining agent may, on behalf of the employees in the unit, by notice require their employer to commence collective bargaining; or

(*b*) the employer or an employers' organization representing the employer may, by notice, require the bargaining agent to commence collective bargaining;

with a view to the conclusion of a collective agreement.

That it is an essential prerequisite to certification of a bargaining agent that the Board shall have first determined whether or not the "unit" in respect of which application for certification is made is "appropriate for collective bargaining" appears from the following provisions of s. 8(1):

8. (1) Where a trade union makes application for certification under this Act as bargaining agent for employees in a unit, the Board shall determine whether the unit in respect of which the application is made is appropriate for collective bargaining and the Board may before certification, if it deems it appropriate to do so, include additional employees in, or exclude employees from, the unit, and shall take such steps as it deems appropriate to determine the wishes of the employees in the unit as to the selection of a bargaining agent to act on their behalf.

Some assistance as to the intent of the legislature can also be derived by reading s. 22(1) in conjunction with s. 20, bearing in mind that the former section provides *inter alia* that "No employee in a unit shall strike until . . . the provisions of section 20, or as the case may be, have been complied with." The latter section reads:

20. Where a trade union on behalf of a unit of employees is entitled by notice under this Act to require their employer to commence collective bargaining with a view to the conclusion or renewal or revision of a collective agreement, the trade union shall not take a strike vote or authorize or participate in the taking of a strike vote of employees in the unit or declare or authorize a strike of the employees in the unit, and no employee in the unit shall strike, and the employer shall not declare or cause a lockout of the employees in the unit, until

(*a*) the bargaining agent and the employer, or representatives authorized by them in that behalf, have bargained collectively and have failed to conclude a collective agreement; and either

(*b*) a Conciliation Board has been appointed to endeavour to bring about agreement between them and seven days have elapsed from the date on which the report of the Conciliation Board was received by the Minister; or

(*c*) either party has requested the Minister in writing to appoint a Conciliation Board to endeavour to bring about agreement between them and fifteen days have elapsed since the Minister received the said request, and

(i) no notice under sub-section (2) of section 27 has been given by the Minister, or

(ii) the Minister has notified the party so requesting that he has decided not to appoint a Conciliation Board.

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The respondent contends that the purpose and effect of s. 22(1) is to prohibit all employees from striking unless and until a bargaining agent has been certified to act on their behalf and until the collective bargaining and conciliation procedures established by the Act have failed.

On the other hand, it is argued on behalf of the appellants that the prohibition is only directed against employees who are members of a group on behalf of which application for certification has been made to the Board and that it is only effective during the time when those employees are waiting for the Board's decision.

In support of this contention it is urged that the words "no employee in a unit shall strike . . ." as used in s. 22(1) should be construed as meaning "no employee in a unit appropriate for collective bargaining shall strike", and that a unit on whose behalf an application for certification has been made is to be regarded as a "unit appropriate for collective bargaining". It is upon this basis that the appellants' counsel contends that the prohibition does not extend to the strike organized by them because at the time of the strike no application for certification had been made on behalf of the employees concerned.

It will accordingly be seen that it is of fundamental importance to determine the meaning which the legislature intended to be attached to the word "unit" as it first appears in s. 22(1), and in so doing it is necessary also to determine the purpose and function of this subsection as a part of the legislative scheme embodied in the statute.

The word "unit" is defined in s. 1(3) of the Act as follows:

> 1. (3) For the purposes of this Act, a "unit" means a group of employees, and "appropriate for collective bargaining" with reference to a unit, means a unit that is appropriate for such purposes whether it be an employer unit, craft unit, technical unit, plant unit, or any other unit and whether or not the employees therein are employed by one or more employers.

As the meaning attached to the words "appropriate for collective bargaining" by s. 1(3) is confined to their use "with reference to a unit" and as these words are not used at all in s. 22, it seems to me that the meaning attributed to them in this definition has no relevance in the context of s. 22(1).

As has been seen, the opening words of s. 8(1) indicate that the question of whether or not a group of employees is appropriate for collective bargaining is a matter for the Board and in this regard the provisions of s. 55 appear to me to be significant. That section provides:

> 55. (1) If in any proceeding before the Board a question arises under this Act as to whether
>
> * * *
>
> (*f*) a group of employees is a unit appropriate for collective bargaining;
>
> * * *
>
> the Board shall decide the question and its decision shall be final and conclusive for all the purposes of this Act.

It seems to me, therefore, that when an application is made to the Board for certification, the "unit" on whose behalf it is made must be regarded for the purposes of this Act as simply being "a group of employees" until such time as the Board has determined that it is "a unit appropriate for collective bargaining". It is true that when the application is first made, the unit concerned is one which the applicant trade union is claiming to be "appropriate for collective bargaining" (see s. 6), but the whole scheme of the collective bargaining sections of the Act seems to me to contemplate that a "unit" cannot have the status of one which is "appropriate for collective bargaining" until the Board has decided the question.

In view of the above, and with the greatest respect for those who hold a different view, I am of opinion that when the Act is read as a whole its language gives no support to the contention that the legislature intended the word "unit" as first used in s. 22(1) to have the limited meaning of "a unit appropriate for collective bargaining" nor do I think that, for the purposes of this Act, "a group of employees" becomes "a unit appropriate for collective bargaining" simply because a trade union claims that it has that character when making application for certification under s. 6. I cannot, therefore, agree with the submission made on behalf of the appellants that the prohibition contained in s. 22(1) only applies to employees on whose behalf an application for certification is pending before the Board.

Insofar as this Act is designed to secure a greater measure of industrial peace to the public by encouraging collective bargaining and conciliation procedures rather than strikes

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as a method of resolving industrial disputes, the attainment of its purpose would, it seems to me, be gravely hampered if, as appellants' counsel contends, the effect of the language used in s. 22(1) is that in the Province of New Brunswick employees who ignore the Act can strike without offending against its provisions, and that those on whose behalf a bargaining agent has been appointed can strike under the circumstances outlined in s. 20 while those and only those whose application for certification is pending before and being held up by the Board are absolutely prohibited from striking between the time when the application is made and the time when it is granted or refused.

A consideration of s. 23 of the Act also appears to me to weigh heavily against the contention made on behalf of the appellants. This section reads:

> 23. A trade union that is not entitled to bargain collectively under this Act on behalf of a unit of employees shall not declare or authorize a strike of employees in that unit.

If effect were given to the construction sought to be placed on s. 22(1) by the appellants' counsel, it would mean, when read in conjunction with the last-quoted section, that the legislature intended to exercise no control whatever over strikes by employees who are not members of any trade union while prohibiting strikes by trade unions which have not been certified as bargaining agents. That the legislature should have intended this result seems to me to be inherently unlikely, having regard to the recognition accorded to trade unions by the other provisions of the Act.

It is further said, however, on behalf of the appellants that to read s. 22(1) as prohibiting all strikes by employees until a bargaining agent has been certified on their behalf is to attribute to the legislature the intention of creating one standard for the employee and another for the employer because s. 22(2) only prohibits "a lockout" while an application for certification is pending before the Board and the employer is left free to declare or cause a lockout at any earlier time, although, of course, after certification this right is restricted by ss. 20 and 21.

This objection must be viewed in light of the fact that the Act provides an elaborate and workable procedure whereby employees may compel their employer to bargain collectively with them with a view to concluding a collective agreement as to terms and conditions of employment, whereas no such right and no such procedure is provided for the employer unless and until a bargaining agent has been certified at the instigation of his employees.

It must be emphasized that the only statute in question in this appeal is the *Labour Relations Act* of New Brunswick, and that this Court is not here concerned with the statutes existing in other provinces concerning labour relations which, in many cases, are differently framed and worded.

The regulation of a system whereby collective bargaining and conciliation procedures are to be exhausted before resorting to strikes appears to me to be one of the chief functions which this *Labour Relations Act* purports to accomplish, and I am unable to agree that by using the phrase "No employee in a unit shall strike . . ." instead of "No employee shall strike . . .", the legislature intended s. 22(1) to have the effect of relieving employees who disregard the Act from any obligation to make use of those procedures for which such elaborate provision is made elsewhere.

Adopting this view, I have concluded that the appellants organized, directed and participated in a cessation of work constituting a "strike" within the meaning of the Act on the part of a group of employees who were prohibited from striking by the terms of s. 22(1). The appellants Gagnon, Blackman and Merloni designedly and deliberately adopted this unlawful means of achieving their object, and for the reasons hereinafter specified I am of opinion that they, together with those who were persuaded to join their enterprise, must bear responsibility for any damage which ensued to the respondent.

Section 40 of the Act provides a penalty for breach of s. 22(1), and although it is true that "No prosecution for an offence under this Act shall be instituted except with the consent in writing of the Board" (s. 44(1)) this does not, in my view, alter the fact that s. 22(1) constitutes a

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mandatory prohibition enforceable by penalty if the Board deems it appropriate to consent to such method of enforcement.

In the case of *Therien v. International Brotherhood of Teamsters*[1], Mr. Justice Sheppard of the British Columbia Court of Appeal had occasion to consider whether breaches of the *Labour Relation Act* of that province by the defendant constituted "illegal means" whereby the company there in question was induced to cease doing business with the plaintiff. In the course of his decision, Mr. Justice Sheppard said at p. 680:

> In relying upon ss. 4 and 6 of the statute the plaintiff is not to be taken as asserting a statutory cause of action. The plaintiff is here founding upon a common law cause of action within *Hodges v. Webb* [1920] 2 Ch. 70 which requires as one of the elements that an illegal means be used or threatened. To ascertain whether the means was illegal enquiry may be made both at common law and at statute law.

When the *Therien case*[2], reached this Court, Mr. Justice Locke, speaking on behalf of the majority of the Court, said at p. 280:

> I agree with Sheppard J.A. that in relying upon these sections of the Act the respondent is asserting, not a statutory cause of action, but a common law cause of action, and that to ascertain whether the means employed were illegal inquiry may be made both at common law and of the statute law.

In light of these observations, it becomes unnecessary to embark upon the difficult exercise of determining whether or not a breach of s. 22(1) of the *Labour Relations Act* gives rise to a statutory cause of action because when inquiry is "made of the statute law" in the present case it discloses, as has been said, that the means here employed by the appellants were prohibited, and this of itself supplies the ingredient necessary to change a lawful agreement which would not give rise to a cause of action into a tortious conspiracy, the carrying out of which exposes the conspirators to an action for damages if any ensue therefrom.

[1] (1959), 16 D.L.R. (2d) 646, 27 W.W.R. 49.
[2] [1960] S.C.R. 265, 22 D.L.R. (2d) 1.

The only plea of conspiracy in this case is contained in para. 10 of the statement of claim which reads as follows:

> 10. In the alternative the Defendants wrongfully and maliciously conspired and combined amongst themselves to procure, cause and induce the employees of the Plaintiff to break their contracts of employment with the Plaintiff and to leave its service and to abstain from continuing therein.

I agree with Bridges J.A. that it is not necessary for the respondent to prove that actual breaches of contract took place in order to sustain the plea of conspiracy because the evidence supports the allegation that the appellants wrongfully conspired to procure, cause and induce the employees of the respondent to abstain from work. Although the wrongful means are not specifically alleged in the paragraph pleading conspiracy, all the ingredients of an unlawful strike are elsewhere alleged and the pleadings are sufficiently explicit to have made the appellants aware of the fact that the legality of the means which they employed to obtain recognition was being placed in issue.

Thomas Onno never entered an appearance, although his name appears in the notice of appeal to the Appeal Division as one of the appellants. However, as against him the damages awarded by the Appeal Division should be substituted for the amount fixed by the judge of first instance.

Onno and Roy Carr did not appeal to this Court, although named as parties appellant. There should, therefore, be no costs of this appeal as against them. Save for varying the amount of damages as against Onno, the appeal should be dismissed with costs.

LOCKE J.:—This is an appeal from a judgment of the Appeal Division of the Supreme Court of New Brunswick[1] which, with a variation as to the damages to be awarded, affirmed the judgment of Ritchie J. at the trial. The respondent company was on July 15, 1958, engaged in the construction of a wharf for the Department of Transport in the Harbour of St. John, employing on the work some 190 men engaged as labourers, timbermen, carpenters, operating engineers, riggers and a number of office workers.

Some days previous, one Capone and the appellants Merloni, Blackman, Gagnon, and two men name Kaiser and Evans, called upon the superintendent of construction of

[1] (1960), 44 M.P.R. 203, 23 D.L.R. (2d) 721.

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the work, Gerald H. Lilly, asking that the company recognize certain unions which, they said, they represented. The names of the unions were not stated at that time. Lilly told them that he had no authority to deal with the matter but told them that other company officials would be in town on the following week when they could discuss the matter.

On July 15 these men came again to the company's office, together with one Murray Stanton and some other official of the carpenters' union, and presented the same request to Lilly and J. A. Marshall, the construction manager of the company. They asked Marshall if the company would recognize their unions and, according to Lilly, when asked if they were certified by the Labour Relations Board, they said they were not but that they would produce cards of fifty per cent of the men if the company "would recognize them on that basis." According to Marshall, he informed them that they should be certified under the law and that the company would not recognize them or sign an agreement with them until that was done. Merloni said that the time would come when the company would have to recognize them "on our basis and there will be no discussion", which terminated the interview.

While there was no issue of any kind between the respondent and any of its employees as to wages, hours or any similar matters and nothing to indicate that the employees were not satisfied with the conditions as they were, on July 23 a picket line was established outside the site of the work organized and under the direction apparently of the defendants Gagnon, Blackman and Merloni, exhibiting placards on some of which there appeared the words "Operators, engineers and labourers on strike against Foundation Maritime Ltd." These placards were carried from time to time by the defendants Roach, O'Neill, Morrison, Blackman, Merloni, Michaelson, Onno, Hachey, Armstrong, Lundman and Grant. When the various employees other than the office staff came to work they were faced with this picket line and, in the result, did not enter the premises and the entire operation was brought to a halt, the work stoppage continuing for five days when an injunction in the present action was effective to stop further picketing and work was resumed.

There is no evidence that there was any violence employed by the pickets Blackman and Merloni who were, apparently, in charge on the morning of July 23. When Cecil Bellefontaine, a workman employed on a hydraulic jack, was stopped, he was told by them that " there was a strike on and we could not go in to work." Bellefontaine said that he did not go through the picket line saying that "they erupt sometimes." He went back the following morning in a further attempt to go to work and was again stopped and said as to this that he was afraid to go through the picket line.

Arthur Neilson, who was working as a mechanic, endeavoured to go to work on July 23 and was stopped by three pickets who told him that "the company was on strike." He asked Gagnon what the strike was about and he said that they were on strike for recognition. Neilson told him there was no necessity of striking because if they went through the proper channels they would get recognition. He did not go through the picket line and explained this by saying:

> Judging from the way that the pickets spoke if a man went through he would be in trouble.

He tried to go to work on the following morning and was again stopped.

By an order made on July 25, 1958, by Ritchie J. certain of the defendants who were engaged in the picketing and some persons who are not now defendants in the action were enjoined from watching, besetting or picketing the premises until July 30. A second order was made by Ritchie J. on July 30 naming the present appellants and continued the injunction until the trial.

It was shown by the evidence of the witness Lilly that on July 23 Gagnon and Blackman represented themselves as officers of the Operating Engineers' union and the International Teamsters' union, respectively. The identity of the union represented by Merloni is not shown.

That the respondent suffered substantial damage from the work stoppage is not and cannot on the evidence be disputed. The argument for the appellants, however, is that the evidence does not disclose a cause of action against the defendants or any of them.

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The *Labour Relations Act* of New Brunswick, R.S.N.B. 1952, c. 124, provides the means whereby a trade union may be certified as a bargaining agent on behalf of employees such as those with whom this case is concerned and, on their behalf, negotiate with the employer and enter into a collective agreement. It was shown at the trial that none of the unions claimed to have been represented by Capone, Merloni, Blackman and Gagnon had been certified as bargaining agents for any of the employees concerned. Whether any of such employees were members of these unions on July 23, 1958, was not shown, the defendants electing not to give any evidence at the trial.

The word "strike" is defined by s. 1 of the Act to include:

> a cessation of work or refusal to work or to continue to work by employees in combination or in concert or in accordance with a common understanding.

and the expression "to strike" is defined to include:

> to cease work, or to refuse to work or to continue to work, in combination or in concert or in accordance with a common understanding.

Section 1(3) reads in part:

> For the purposes of this Act, a "unit" means a group of employees.

Section 22(1) reads:

> No employee in a unit shall strike until a bargaining agent has become entitled on behalf of the unit of employees to require their employer by notice under this Act to commence collective bargaining with a view to the conclusion or renewal or revision of a collective agreement and the provisions of section 20 (which provides for the appointment of a conciliation board), or as the case may be, have been complied with.

Section 23 reads:

> A trade union that is not entitled to bargain collectively under this Act on behalf of a unit of employees shall not declare or authorize a strike of employees in that unit.

Section 39 provides, *inter alia*, that every trade union that declares or authorizes a strike contrary to the Act is guilty of an offence and liable to a penalty, and s. 40 provides, *inter alia*, that every person who does anything prohibited by the Act is liable to a fine.

The purpose of this statute and others of the same nature in Canada is the prevention of strikes and lockouts and the maintenance of industrial peace. As none of the unions said to be represented had been certified or, so far as the

evidence in this case goes, authorized in any manner to act on behalf of any of the employees, the attitude taken by the officers of the respondent on July 15 was correct.

It is apparent that Merloni, Gagnon and Blackman had decided to ignore the provisions of the Act and to endeavour to compel the respondent to negotiate with their unions by bringing about a stoppage of work. The remaining defendants were apparently duped by these three into taking part in bringing about that stoppage.

Ritchie J. was of the opinion that the cessation of work was a strike and was unlawful as being contrary to the provisions of s. 22(1) of the Act; that to induce and persuade the employees not to report for work was a tortious interference with the contractual relations existing between the plaintiff and its employees; that there was evidence that the employees Neilson and Bellefontaine were intimidated by the picket line and thus prevented from reporting for work, and that the picketing itself in support of an illegal strike was unlawful. He awarded damages in the sum of $22,712.39.

Bridges J.A., who delivered the judgment of the Appeal Division, agreed that there was a strike within the meaning of the Act. He was of the opinion that the evidence did not support the charge of intimidation but considered that there was evidence that the defendants had conspired together to injure the respondent in its trade or business and, further, that as the strike itself was unlawful the picketing was unlawful. He, however, considered that the damages awarded were excessive and they were reduced to $12,500.

There was at the time in question no statute in New Brunswick such as the *Trade-unions Act,* R.S.B.C. 1948, c. 342, which was considered in the decision of this Court in *Williams v. Aristocratic Restaurants (1947) Ltd.*[1] In that case the trade union had been certified as the bargaining authority for the employees of one of the respondent's five restaurants, but did not represent any of the employees of the other restaurants which were operated in Vancouver. The conduct complained of was to have men walk back and forth on the sidewalk in front of each of the five restaurants,

[1] [1951] S.C.R. 762, 3 D.L.R. 769, 101 C.C.C. 273.

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bearing a placard to the effect that the employees did not have an agreement with the union. It was held in this Court, reversing the judgment of the Court of Appeal, that this conduct was permissible under the provisions of ss. 3 and 4 of the *Trade-unions Act*.

In the present case the statement exhibited in the placards carried by Merloni *et al.* on the morning of July 23 that there was a strike was untrue, to the knowledge of all of the defendants who took part in the picketing. So far as the evidence goes, at the time the picketing commenced no single employee of the respondent company was a member of any of the unions. There was no dispute between the company and any of its employees of the kind commonly known as a trade dispute, nor any difference between them on any ground that might become the subject of such a dispute. The defendants Merloni, Gagnon and Blackman, who claimed to represent certain trade unions, were well aware of this fact, and such of the other defendants as were employees at least knew that in their own case they had no dispute with their employer and that no one had been authorized to represent them and that no strike had been called.

While, by paragraph 10 of the statement of claim, the respondent alleged that the defendants had wrongfully and maliciously conspired and combined among themselves to induce its employees to break their contracts of employment and to leave its service and to abstain from continuing therein, no evidence was given as to any contract of employment other than that of Lilly who said that the men were required to fill in a standard form used by their company when they went to work, but he was unable to give any further details. The evidence, therefore, is insufficient to show whether or not the failure of the men to report for work on the morning of July 23 was a breach of contract on their part. The respondent's right to recover, however, does not turn upon this, in my opinion. It is, however, clear that the respondent expected them to return to their work on the morning of July 23 and that they intended to do so.

In my opinion, the presence of the picket line did not excuse the actions of the employees in failing to continue to work on the morning of July 23 and on the succeeding

days and I consider that the learned trial judge was justified, in view of the fact that none of them other than the office workers did pass the picket line, in drawing the inference that the cessation of work was done by them in concert or in accordance with a common understanding, within the meaning of s. 1(p) and (q), and was unlawful under the terms of s. 22(1). All of these employees must have known when they reported for work on that day that the statement that there was a strike on was false and that Merloni *et al.* did not represent the employees. I agree with the learned trial judge and with Bridges J.A. that the action of the defendants in causing or inducing them to cease to work was a tortious act for which they are liable in damages. It is clear from the evidence that the purpose of setting up the picket line was to inflict injury upon the respondent by halting the work for the purpose of compelling it to contract with the unions which, so far as the evidence goes, represented no one.

By the statement of claim the respondent alleged, *inter alia,* that the defendants wrongfully and maliciously conspired and combined amongst themselves to procure and induce the employees of the plaintiff to abstain from continuing in its employment. That the actions of Merloni, Gagnon and Blackman were carried on in combination for the purpose of causing injury to the respondent by unlawful means is made clear by the evidence. Neither the learned trial judge nor Bridges J.A. found that these actions were malicious but this was not essential. While in *Lumley v. Gye*[1], the head note to the report says that an action lies for maliciously procuring a breach of contract to give exclusive personal services for a time certain, Lord Macnaghten in *Quinn v. Leathem*[2], said that the real basis of the finding in that case was not on the ground of malicious intention but on the ground that a violation of a legal right committed knowingly is a cause of action. Lord Lindley, speaking of *Lumley v. Gye,* said at p. 535:

> Further, the principle involved in it cannot be confined to inducements to break contracts of service, nor indeed to inducements to break any contracts. The principle which underlies the decision reaches all wrongful acts done intentionally to damage a particular individual and actually damaging him.

[1] (1853), 2 E. & B. 216, 22 L.J.Q.B. 463.
[2] [1901] A.C. 495 at 510, 70 L.J.P.C. 76.

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And at p. 538 he said:

> A combination not to work is one thing, and is lawful. A combination to prevent others from working by annoying them if they do is a different thing, and is *prima facie* unlawful.

On July 23, 1958, the respondent, by virtue of its contract, was entitled and was required to enter upon the premises of the Crown for the purpose of carrying on the work of construction and to do so, in the circumstances then existing, without interference by the defendants or anyone else with the entry of its employees upon the premises.

In these circumstances, it is my opinion that the conduct of the defendants was a private nuisance and, as damage resulted, actionable.

In Clerk & Lindsell on Torts, 11th ed. at p. 560, nuisance is defined as:

> an act or omission which is an interference with, disturbance of or annoyance to a person in the exercise of enjoyment of (a) a right belonging to him as a member of the public, when it is a public nuisance, or (b) his ownership or occupation of land or of some easement, quasi-easement, or other right used or enjoyed in connection with land, when it is a private nuisance.

The respondent, by virtue of its contractual relationship with the Crown, had an easement in the nature of a right-of-way across the property of the Crown, in order to carry on its work, and that right was interfered with.

In *Lyons v. Wilkins*[1], the head note reads:

> Per Lindley M.R. and Chitty L.J.: To watch or beset a man's house, with the view to compel him to do or not to do that which it is lawful for him not to do or to do, is, unless some reasonable justification for it is consistent with the evidence, a wrongful act: (1) because it is an offence within s. 7 of the Conspiracy and Protection of Property Act, 1875; and (2) because it is a nuisance at common law for which an action on the case would lie; for such conduct seriously interferes with the ordinary comfort of human existence and the ordinary enjoyment of the house beset.

Section 7 of the Act referred to is to the same effect as s. 366 of the *Criminal Code*. There was in s. 7 an exception from the penal provisions dealing with watching or besetting which read:

> Attending at or near the house or place where a person resides, or works, or carries on business, or happens to be, or the approach to such house or place, in order merely to obtain or communicate information, shall not be deemed a watching or besetting within the meaning of this section.

[1] [1899] 1 Ch. 255.

To the same effect is the exception in s. 366 of the Code. In *Lyons'* case it was held upon the facts that the conduct of the defendants did not fall within the exception.

In *Quinn's* case at p. 541 Lord Lindley said that:

> there are many ways short of violence, or the threat of it, of compelling persons to act in a way which they do not like. There are annoyances of all sorts and degrees: picketing is a distinct annoyance, and if damage results in an actionable nuisance at common law, but if confined merely to obtaining or communicating information it is rendered lawful by the Act (s. 7).

In the *Aristocratic Restaurant* case the claim that the conduct above mentioned was a private nuisance was rejected by the majority of the court by reason of the provisions of s. 3 of the *Trade-unions Act,* which provided, *inter alia,* that no officer, agent or servant of a trade union or any other person should be liable in damages for persuading or endeavouring to persuade by fair or reasonable argument, without unlawful threats, intimidation or other unlawful acts, any person to refuse to become the employee or customer of any employer. As there is no such statutory provision in New Brunswick, the case does not affect the present matter.

While named as parties appellant, the defendants Onno and Carr did not appeal to this Court and there should, accordingly, be no costs of this appeal awarded against them. I would direct that as against Onno the amount of damages awarded by the Appeal Division should be substituted for the amount fixed by the trial judge.

With the exception above mentioned, I would dismiss this appeal with costs.

JUDSON J. (*dissenting*):—The first three named appellants are trade union organizers and the others were employees of the respondent on July 23, 1958. The respondent sued them all for damages and an injunction against picketing because of a strike which they began on July 23, 1958, and which lasted for a few days. At the trial, the respondent obtained judgment for $22,712 in damages and the injunction. On appeal[1], the damages were reduced to $12,500 but the injunction was affirmed as having been

[1] (1960), 44 M.P.R. 203, 23 D.L.R. (2d) 721.

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rightly granted, although the need for it had disappeared. The appellants appeal both against the award of damages and the injunction.

In the summer of 1958 Foundation Maritime Limited was building a wharf in the city of Saint John under a contract with the Department of Public Works of Canada. On July 13 the three union organizers met an official of the company and asked for recognition of their unions, claiming that they represented more than 50 per cent of the employees. A week later they made the same request to a higher official of the company. The company refused their request on the ground that the unions had not been certified as representing the men under the *Labour Relations Act,* R.S.N.B. 1952, c. 124. Pickets appeared on July 23 outside both jobs on which the company was engaged. These pickets carried notices stating "Engineers, Teamsters and Labourers on strike against Foundation Maritime Limited". The company obtained an interim injunction against all picketing on July 25, and on July 30 this order was continued until the trial. For 5 days the stoppage of work appears to have been complete and for an additional 7 days, while the men were drifting back to work, the company claims that the efficiency of its operation was reduced. This was the main basis of its claim for damages.

The injunction against picketing was completely prohibitory and it was based upon the threefold conclusion of the learned trial judge that there had been intimidation of employees reporting for work, a tortious interference with contractual relations between the company and its employees and also between the company and the Department of Public Works, and picketing in furtherance of a strike which was prohibited by the *Labour Relations Act.* The Court of Appeal, after a full review of the evidence, found that the picketing was peaceful and that there was no basis for a finding of intimidation. The Court of Appeal also found that there was no plea of interference with contractual relations with the Department of Public Works and no evidence that by stopping work the employees broke their contracts of employment or that they were

under any legal obligation to work during the days of the strike. The findings of the Court of Appeal raise three issues in this Court:

(a) Was this strike prohibited by the *Labour Relations Act*;

(b) Was the conspiracy as found by the Court of Appeal the one which was sued on and pleaded;

(c) Was this strike for union recognition a tortious conspiracy from the mere fact that there was no compliance with the certification provisions of the *Labour Relations Act*, and was picketing in pursuance of such a strike properly enjoinable even though it was peaceful and was carried on without violence, intimidation or obstruction?

These are the issues raised in the *ratio decidendi* of the Court of Appeal which is contained in the following paragraphs:

> In an action based on conspiracy we do not think it necessary for the plaintiff to prove that actual breaches of contracts took place. In the case at bar the plaintiff's employees were induced to abstain from work, which in our view, is sufficient.
>
> In our opinion, Gagnon, Blackman, Merloni and the other defendants who acted as pickets combined in inducing workmen of the plaintiff to refrain from working. Their object was to obtain recognition of the unions without certification, which, in itself, was not unlawful but the means they used, a strike in violation of the Labour Relations Act, was and they have therefore no defence to the action. Any act done in furtherance of the unlawful means should, in our opinion, be restrained. The plaintiff was therefore entitled to an injunction against picketing in addition to damages.

The appellants question the judgment on all three grounds. On the first, they submit that since there was no collective agreement in existence, their conduct in this case was not in breach of the Act. This submission requires an examination of all the sections of the Act relating to strikes and lockouts and the reading of s. 22(1), which has been taken to be the applicable section, in the context of the other sections.

Section 20 provides that where a trade union has been certified there shall be no strike vote, no strike and no lockout until there has been failure to conclude a collective agreement and conciliation proceedings have been taken. This section does not apply because no union had been certified in this case.

Section 21 deals with the case where there is a collective agreement in force whether entered into before or after the commencement of the Act. In this situation there are to

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be no strikes or lockouts until certain procedures have been exhausted. This section does not apply because there was no collective agreement of any kind in force.

Section 22 I now set out in full:

> 22(1) No employee in a unit shall strike until a bargaining agent has become entitled on behalf of the unit of employees to require their employer by notice under this Act to commence collective bargaining with a view to the conclusion or renewal or revision of a collective agreement and the provisions of section 20, or as the case may be, have been complied with.
>
> (2) No employer shall declare or cause a lockout of employees while an application for certification of a bargaining agent to act for such employees is pending before the Board.

I take this section to be applicable as a whole to the case where there is an application for certification pending before the Board. The second subsection says so expressly in dealing with the right of lockout. The employer's right is limited only during this period. Outside this period, unless the case is one within ss. 20 and 21, there is no restriction on the right of lockout. Under the same conditions, that is outside the stated period, unless the case is one to which ss. 20 and 21 apply, is the employee's position made inferior by the first subsection to that of the employer? The company submits that it is and that s. 22 treats employee and employer on a different basis. It requires very plain language to reach such an anomalous conclusion. Far from cogently pointing to this conclusion, it is my opinion that subsection (1) does equate the positions of employee and employer and that the whole section applies only when the certification proceedings are pending. The language of subsection (1) is "No employee in a unit shall strike" not "No employee shall strike". The company says that there is no difference between these two expressions and that unit merely means a group of employees—any group of employees—but the definition (s. 1(3)) continues:

> and "appropriate for collective bargaining" with reference to a unit, means a unit that is appropriate for such purposes whether it be an employer unit, craft unit, technical unit, plant unit, or any other unit and whether or not the employees therein are employed by one or more employers.

When does a unit become appropriate for collective bargaining? Only when the claim is made in an application for certification of the bargaining agent under s. 6, or the

Board has made a determination under s. 8 that the unit in respect of which the application is made is appropriate for collective bargaining.

I therefore conclude that the prohibitions of s. 22 apply only where an application for certification is pending and that both employer and employee are treated by this Act on a footing of equality and that there is nothing in s. 22(1) or anywhere else in the Act to prohibit an employee who may be a member of an uncertified union withholding his labour in concert with others and engaging in peaceful picketing in a case where there is no collective agreement in effect. If the legislature had intended to prohibit this conduct, there is a simple way to do it by imposing the prohibition in all cases, whether or not there is a collective agreement in force and whether or not the collective agreement was made before or after the coming into force of the Act. This is not what this legislation has attempted to do.

The only other prohibition against striking imposed by the Act is contained in s. 23, which reads:

> 23. A trade union that is not entitled to bargain collectively under this Act on behalf of a unit of employees shall not declare or authorize a strike of employees in that unit.

This prohibition is imposed on the trade union. It does not touch the individual who may be a member of the union. The action in this case is taken entirely against three individual union organizers and individual employees. The penalty provisions of the Act against the trade union are in s. 39(3) and (4). The trade union is liable to a fine of $150 for each day that the strike exists and the officer or representative of the union to a fine not exceeding $300. The individual employee is dealt with only by s. 40, which imposes a penalty not exceeding $100 on every person who does anything prohibited by the Act. All these penalties are subject to the condition that there is to be no prosecution under the Act except with the consent in writing of the Board. My conclusion is that s. 23 does not touch this case.

The reasoning of the Court of Appeal, in my respectful opinion, therefore fails in the first place on an interpretation of the Act. There was no breach of the Act which could turn the conduct complained of in this case into a tortious conspiracy.

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In the second place, the conspiracy as found by the Court of Appeal was never pleaded. Paragraphs 7, 8 and 9 of the statement of claim complain with some repetition of threats of violence, coercion, procuring breach of contract between the company and its employees, misleading placards and the establishment, wrongfully and illegally, of a picket line whereby workmen were intimidated and prevented from working. Up to this point there is no plea of conspiracy. This is contained in para. 10 of the statement of claim, which reads:

> 10. In the alternative the Defendants wrongfully and maliciously conspired and combined amongst themselves to procure, cause and induce the employees of the Plaintiff to break their contracts of employment with the Plaintiff and to leave its service and to abstain from continuing therein.

This is the plea of conspiracy in a very bare framework without any particulars and its basis has been expressly denied by the finding of the Court of Appeal. There is no other plea of a combination to do any other act or acts causing damage against which the defendants might have pleaded that their predominant purpose was to advance their own lawful interests. There was no plea of the use of unlawful means which might bring liability in a conspiracy case. The defendants successfully met the only conspiracy charged against them. If they were to be expected to meet others, they are reasonable in their assertion that they should know in the pleading what they have to meet. A finding of a conspiracy based upon a breach of the Act appeared for the first time in the reasons of the Court of Appeal. Counsel for the appellants stated without contradiction that the point had never up to that time been argued. In my respectful opinion, it was not open to the Court of Appeal to base its judgment, of is own mere motion, on a conspiracy which had never been pleaded and which the defendants had no opportunity to answer.

The judgment under appeal has wide implications and involves, in my respectful opinion, an erroneous extension of the law of civil conspiracy. After the decision in *Crofter Hand Woven Harris Tweed Company Limited v. Veitch*[1], there could, on the facts of this case, be no liability

[1] [1942] A.C. 435, 111 L.J.P.C. 17.

in tort at common law. If this was a strike, its predominant purpose was for the legitimate promotion of the interests of the persons who were acting in concert. The *Crofter* case holds that if the means employed are neither criminal nor tortious in themselves, the combination is not unlawful. This judgment makes a strike, which was formerly not actionable, actionable in conspiracy, solely on the ground of violation of the *Labour Relations Act*, when there is no conduct on the part of the participants which can be labelled as criminal or tortious.

This extension of liability appears to me to be based on a very insecure foundation. It is not to be found in *Williams v. Aristocratic Restaurants (1947) Ltd.*[1] At the trial of that action there was, among others, a plea of conspiracy based solely upon a breach of the statute and it failed. The breach alleged was failure to take a strike vote. On appeal to the Court of Appeal, liability was imposed on this as well as other grounds. But on appeal to this Court no attempt was made to support the judgment on the ground of conspiracy in breach of the statute. The ratio of the judgment in this Court which restored the judgment at trial was that the picketing did not amount to a criminal offence or to a common law nuisance.

The case of *International Brotherhood of Teamsters v. Therien*[2], does not carry the matter any further. It was not a conspiracy case. A business agent of a union attempted to compel Therien who was an independent trucker and an employer of labour, to join the union. Therien had a business relationship with a construction company and the union agent, for the purpose of compelling Therien to do his bidding, threatened to picket the job, with the result that Therien lost his business relationship and the construction company ceased to do business with him. The case was therefore one where a union organizer intentionally inflicted harm upon Therien without justification. His attempt to justify his conduct on the ground of advancing union interests could not stand because of the prohibition in the statute against harassing an employer or independent con-

[1] [1951] S.C.R. 762, 3 D.L.R. 769, 101 C.C.C. 273.
[2] [1960] S.C.R. 265, 22 D.L.R. (2d) 1.

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tractor into union membership. The case is not authority for the establishment of a statutory breach or a threat to compel a statutory breach as an independent basis of unlawful means in the law of civil conspiracy. It is no more than *Allen v. Flood*[1] over again with the added element of a statute which prevented a justification of the conduct complained of.

Further, these union agents made no threat to the Foundation Company to compel it to do something in violation of the Act. On any reading of the Act it was open to the company to negotiate a collective agreement without resort to prior certification proceedings. It is, of course, equally clear that the company had the right to refuse to do this. These defendants, then, in pursuit of the legal object of union recognition employed means which were neither criminal nor tortious in themselves but which, on one reading of the Act, could be held to be prohibited conduct. I do not think that this makes them guilty of the tort of conspiracy. I prefer the view that in the law of civil conspiracy the unlawful means must be found in nominate torts or crimes. On this point, I adopt the statement in Salmond on Torts, 12th ed., 678, to the following effect:

> It is submitted that when the object of the combination is legitimate the unlawful means which will give a good ground of action against persons acting in concert are the same as the unlawful means which will give a good ground of action against a defendant acting alone.

Could it be said here that the plaintiff has a good cause of action against any of these defendants as individuals? According to the Court of Appeal they did not commit any tort apart from conspiracy founded upon a statutory breach. If there is to be any liability in this case it must be on the grounds pleaded, namely, the commission of nominate torts or conspiracy with nominate torts as the unlawful means.

If this is not so any strike in violation of the Act which by definition means "a cessation of work or refusal to work or to continue to work by employees in combination or in concert or in accordance with a common understanding" would be actionable as a conspiracy even in the extreme case where hourly paid employees did nothing more than

[1] [1898] A.C. 1, 67 L.J.Q.B. 119.

stay at home. If there is to be liability in damages for the tort of conspiracy founded solely upon a breach of the *Labour Relations Act,* it should, in my respectful opinion, be imposed by the legislature and not by what I regard as an unwarranted extension of the case law.

So far I have accepted the distinction drawn in the reasons of the Court of Appeal between the end and the means in the consideration of the acts of these defendants. What did these individuals do? Acting under the leadership of the three union organizers, they withdrew their labour, established a picket line and carried placards. Following this no employees except supervisory and office staff went to work for some days. If there was a combination it was to do these acts. If the doing of these acts is held to be contrary to the legislation, then the conspiracy is to do something forbidden by the Act. There is no question of doing something lawful by unlawful means. A more accurate way of stating the problem is whether an agreement to strike, which is carried out, in the face of a statutory prohibition is actionable as a conspiracy.

At this point it is reasonable to ask what need there is for the tort of conspiracy. On the assumptions made there has been a breach of the Act by people acting in concert. Does it add anything to the liability, if there is any, by calling the conduct by the name of conspiracy? To give rise to tortious liability for conspiracy, there must be more than the mere fact of agreement. There must be some carrying out of the agreement, causing damage. The agreement in itself does not cause the damage. If the agreement is to commit a tort and it is carried out or if the agreement is to do something lawful, but its carrying out involves the commission of a tort, what need is there in either case for the tort of conspiracy? The defendants in each of these two situations could always be sued as joint tortfeasors under some other special heading of tortious liability.

What we have in this case then, if every assumption is made against the defendants is an agreement to breach the Act which was carried out. Does this involve any more than a breach of the Act? If this is the basis of liability the defendants should have been prosecuted for this breach, with leave of the Board, or if the plaintiff wants damages,

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its claim must be founded on a breach of the Act and no more—not on conspiracy. Whether such a claim is maintainable in this action, it is unnecessary to decide. It was not pleaded and not argued. This is a picketing case in its simplest elements. According to the finding of the Court of Appeal, threats, coercion, intimidation and procuring breach of contract are all absent. The problem is therefore reduced to one of breach of statutory duty.

I would allow the appeal with costs both here and in the Court of Appeal. The injunction should be dissolved and judgment entered dismissing the action with costs.

Appeal dismissed with costs, Judson J. dissenting.

Solicitor for the defendants, appellants: Ian P. Mackin, St. John.

Solicitors for the plaintiff, respondent: Gilbert, McGloan & Gillis, St. John.

THE JEWISH HOME FOR THE AGED OF BRITISH COLUMBIA (*Defendant*) .....APPELLANT; 1961 *Jan. 26, 27 Apr. 25

AND

THE TORONTO GENERAL TRUSTS CORPORATION (*Plaintiff*) .....RESPONDENT;

AND

THE NEXT-OF-KIN of the Estate of the late Louis Brier, Deceased, and the Residuary Legatees named in the Will of the late Rose L. Brier, Deceased (*Defendants*) .....RESPONDENTS;

AND

THE RESIDUARY LEGATEES in the Will of the late Louis Brier, Deceased (*Defendants*) ....RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Wills—Direction to accumulate funds for charitable purposes—Immediate gift to charity—Accumulation not a condition precedent to existence of charitable trust—Rule against perpetuities—Cy-près doctrine—Accumulations Restraint Act, R.S.B.C. 1948, c. 5.

The testator, who died on July 7, 1936, left his property in trust to a corporate trustee. After making provision for certain bequests, he directed the accumulation out of residuary income of three funds, each of $20,000, the first for a Jewish hospital, the second for a Jewish orphan asylum and the third for a Jewish old men's home. No such institutions were in existence at the date of the testator's death. The appellant society, incorporated in 1950, claimed the third fund under a clause of the will which provided for the fund being paid out in the event that a Jewish old men's home of a minimum specified cost was built within fifty years of the testator's death, or such extended time as might be allowed, and on condition that admittance and care were on a non-sectarian basis. The will contained identical provisions with respect to the hospital and the orphan asylum. The appellant also claimed under the residuary clause which provided that the residue of the estate was to be divided equally among the three institutions and that if the institutions were not in existence within the specified period, everything that remained was to be distributed by the trustee among charitable objects.

The trustee applied for directions and submitted questions relative to the construction of the will. The Courts below rejected the appellant's claims on the ground that the dispositions in question offended the rule against perpetuities.

*PRESENT: Kerwin C.J. and Locke, Cartwright, Martland and Judson JJ.

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Held: The appellant was entitled to the fund and one-third of the residue as they existed on July 5, 1957. All surplus income after that date must be applied cy-près and a scheme settled by the Court.

(1) This was not a case where the gift for charitable purposes was contingent upon the happening of an event which may not happen within the perpetuity period, but rather one of an immediate unconditional gift to charity with a designation of certain particular modes of application of the property to charitable purposes. The validity of this charitable trust was not affected by the directions to accumulate the three funds out of residuary income. The accumulation was not a condition precedent to the existence of the charitable trust. *In re Lord Stratheden and Campbell,* [1894] 3 Ch. 265; *Kingham v. Kingham,* [1897] 1 I.R. 170; *Re Schjaastad Estate* (1920), 50 D.L.R. 445; *In re Wightwick's Will Trusts,* [1950] Ch. 260; *In re Mander,* [1950] Ch. 547, referred to; *Attorney-General v. Bishop of Chester* (1785), 1 Bro. C.C. 444; *Sinnett v. Herbert* (1872), 7 Ch. App. 232; *Chamberlayne v. Brockett* (1872), 8 Ch. App. 206; *Wallis v. Solicitor-General for New Zealand* [1903] A.C. 173; *In re Swain,* [1905] 1 Ch. 669; *Re Mountain* (1912), 26 O.L.R. 163, applied.

(2) Under the provisions of the *Accumulations Restraint Act* all accumulation must stop, both in the three funds and the residue, as of July 5, 1957, which was twenty-one years from the death of the testator.

(3) With respect to the surplus income after July 5, 1957, the testator had directed an accumulation to extend beyond the legal limit in the carrying out of a general charitable intention. In these circumstances the surplus income did not go to the next-of-kin but was to be applied cy-près. *In re Monk,* [1927] 2 Ch. 197; *In re Bradwell's Will Trusts,* [1952] 2 All E.R. 286; *Re Burns Estate* (1960), 32 W.W.R. 689, referred to.

(4) It made no difference that the appellant admitted men and women. The institution qualified as a Jewish old men's home.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], affirming a judgment of Ruttan J. Appeal allowed.

Hon. J. W. de B. Farris, Q.C., and *D. A. Chertkow,* for the defendant, appellant.

C. W. Brazier, Q.C., for the plaintiff, respondent.

F. H. Bonnell, Q.C., and *W. D. Tuck,* for the defendants, respondents, the next-of-kin and the residuary legatees of the Estate of Rose L. Brier.

D. A. Freeman, for the defendants, respondents, the residuary legatees of the late Louis Brier.

The judgment of the Court was delivered by

[1] (1960), 23 D.L.R. (2d) 229.

JUDSON J.:—The appellant was incorporated in the year 1950 under the *Societies Act*, R.S.B.C. 1948, c. 311. It appeals against the rejection of its claims to an accumulated fund and a share of the residue under the will of the late Louis Brier. The British Columbia Courts[1] have rejected these claims on the ground that the dispositions in question offend the rule against perpetuities.

Louis Brier made his will in 1934 and died in 1936. He left all his property in trust to the Toronto General Trusts Corporation as executor and trustee. We are concerned on this appeal with his disposition of the residue of his estate. After making provision for his wife and certain distant relatives, he directed the consecutive accumulation out of residuary income of three funds each of $20,000. The first fund was for a Jewish Hospital, the second for a Jewish Orphan Asylum and the third for a Jewish Old Men's Home. No institutions answering these descriptions were in existence at the date of death. The appellant came into existence only in 1950 and is the claimant to the third of these funds, which have all been fully accumulated. The appellant claims the fund under clause (*p*) of the will, which, apart from the named beneficiary, is in precisely the same terms as the two preceding paragraphs which direct the prior accumulation of funds for the hospital and the orphan asylum. Clause (*p*) reads:

(*p*) As soon as the provisions of the preceding paragraph (*o*) of this my will have been complied with by my said executor and trustee in so far as having the sum of Twenty thousand ($20,000) dollars set aside by either deposit or investment in said paragraph herein provided and as soon as there is a further sum of Twenty thousand ($20,000) dollars available from the income of my estate, then I direct my said executor and trustee at its discretion to deposit in the Savings Department of some chartered bank in the City of Vancouver or to invest in either Dominion Government bonds or securities or any bonds or securities of any of the Provinces of the Dominion of Canada the further sum of Twenty thousand ($20,000) dollars which sum of Twenty thousand ($20,000) dollars with accumulated interest thereon from the date same is so deposited or invested to be paid out as follows:— In the event the Jewish people of British Columbia build a Jewish Old Men's Home within the Province of British Columbia that will cost the sum of One hundred thousand ($100,000) dollars or more at any time within fifty (50) years after my decease said sum of Twenty thousand ($20,000) and accumulated interest to be paid by my said executor and trustee to the proper officers of said Jewish Old Men's Home on condition, however, that the said Jewish Old Men's Home shall by its rules and regulations admit and care for Gentile

[1] (1960), 23 D.L.R. (2d) 229, affirming (1959), 28 W.W.R. 207, 18 D.L.R. (2d) 670.

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patients on the same terms and conditions as Jewish patients are admitted and cared for but in the event the said condition is not complied with and in the further event that the said Jewish people of British Columbia do not build a Jewish Old Men's Home in the Province of British Columbia within fifty (50) years after my death then this bequest shall lapse and the said further sum of twenty thousand ($20,000) dollars so deposited and accumulated interest thereon shall at the end of fifty (50) years after my decease be given by my said executor and trustee to some other charitable institution in the Province of British Columbia that in the good judgment of my said executor and trustee it may deem worthy. Having in mind that I would prefer to give same to some Jewish Institution but my said preference not to bind my said executor and trustee in exercising its discretion in the event, however, the Jewish people of British Columbia express to my executor and trustee in writing their desire to build a Jewish Old Men's Home within British Columbia but are unable to so build same within the said Fifty (50) years then my executor and trustee shall have the right to extend the time for the completion of said Old Men's Home for such time beyond the said Fifty (50) years as my said executor and trustee shall deem just and this bequest shall upon completion of said Jewish Old Men's Home within the time so extended be paid as aforesaid. Otherwise this bequest to lapse.

Clause (*p*) must, however, be read in conjunction with the final residuary clause (clause (*s*)), which reads:

(*s*) All the rest and residue of my estate not hereinbefore disposed of by this my will including all lapsed legacies I direct my said executor and trustee to distribute same among the three institutions referred to in paragraphs (*n*), (*o*) and (*p*) of this my will, one third to each, such distribution to be made as hereinbefore provided to such three institutions. In the event only one or more of such institutions is in existence in the said fifty (50) years after my death or such extended period as hereinbefore provided then one third of said rest and residue of my estate shall be given to such of the three institutions as shall be in existence at the end of the said Fifty (50) years or such extended period if such period is extended as hereinbefore provided and in the event any one or more of said three Jewish Institutions is not in existence within the time as hereinbefore provided then I direct that the rest and residue that then remains undisposed of be distributed by my said executor and trustee to such worthy charitable object or objects, institution or institutions, person or persons in the Province of British Columbia that in the good judgment of my said executor and trustee it may deem best.

The British Columbia Courts have held that the gift to the charity could not arise until there was an accumulation of the specified fund and until the institution named came into existence and qualified under the will. This gift, therefore, offended the rule against perpetuities and the gift over of the residue failed for the same reason. In my respectful opinion, there is error in this construction. To me, the case is not one where the gift for charitable purposes is contingent upon the happening of an event which

may not happen within the perpetuity period but rather one of an immediate unconditional gift to charity with a designation of certain particular modes of application of the property to charitable purposes. The particular mode of application may be subject to a condition precedent which may not happen within the perpetuity period, but the charitable trust does not fail if the testator had a general unconditional intention to devote the property to charitable purposes. It is saved by the application of the *cy-près* doctrine.

The two principles which I have just summarized are clearly stated in the judgment of Lord Selborne in *Chamberlayne v. Brockett*[1], which is usually taken as a starting point in an inquiry of this kind. There the testatrix, after reciting her intention to give her estate to charity, directed her trustees to apply the residue of her estate to the building of alms-houses and the support of the inmates in three specified places as soon as land should be given (by others) on which the buildings could be erected. This was held to be an absolute immediate gift to charity with a mode of execution dependent on future events which might happen outside the perpetuity period. The mode of execution did not make the gift to charity conditional or contingent.

If one reads clauses (*n*), (*o*) and (*p*), directing the accumulation and application of the three funds, along with the residuary clause of this will, there is a clearly expressed general charitable intention. Nothing is left to inference or surmise. Once the testator began to deal with the residue of his estate, there is only one possible view and that is that his intention was a general charitable one. It is true that the ability of the particular institutions to qualify for the accumulations and share of residue is subject to the many contingencies mentioned. These have been taken, in the judgment under appeal, to be the determining factor. Such a view, in my opinion, ignores the expressed immediate general charitable intention and holds that there is only a particular charitable intention to be found in the particular mode of application. The concluding words of the residuary clause provide that if these three Jewish institutions are not in existence within the specified time

[1] (1872), 8 Ch. App. 206 at 211, 42 L.J. Ch. 368.

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limits, everything that remains is to be distributed by the trustee among worthy charitable objects in British Columbia.

With respect, the error in the judgment under appeal is in its foundation upon the cases where the gift to a particular charity was in itself contingent upon the happening of a future uncertain event which might not happen within the perpetuity period. A mere listing of them is sufficient to give point to the distinction between them and the present case. Some of these cases are: *In re Lord Stratheden and Campbell*[1], where a gift to a regiment was postponed until the appointment of the next Lieutenant-Colonel; *Kingham v. Kingham*[2], where a gift to the General Assembly of a church was contingent upon the sale of certain premises not owned by the testator and the delivery of the proceeds of the sale to the trustees under the will; *Re Schjaastad Estate*[3], where the gift was to the first Norwegian Lutheran Orphans' Home to be built in Saskatchewan and Alberta; *In re Wightwick's Will Trusts*[4], where the gift was to a named charity when the practice of vivisection should be abolished; *In re Mander*[5], where there was a gift of a fund for the training of a candidate for the priesthood, the fund to be invested until such time as a candidate should come forward from a certain church.

The applicable line of authority is to be found, not in these cases dealing with a contingent gift to a particular charity but in those where there was the general charitable intention and an immediate unconditional gift to charity, with a term of postponement or a condition attached to the particular mode of execution. Such cases are: *Attorney-General v. Bishop of Chester*[6]; *Sinnett v. Herbert*[7]; *Chamberlayne v. Brockett*[8]; *Wallis v. Solicitor-General for New Zealand*[9]; In *re Swain*[10]; *Re Mountain*[11], per Boyd C.

The principle is stated in 4 Hals., 3rd ed., p. 286:

> A gift to charity is not allowed to fail merely because the application to the particular purpose is postponed, as by a direction to accumulate. An immediate gift to a charity is valid, although the particular application of the fund directed by the will may not of necessity take effect within any

[1] [1894] 3 Ch. 265.
[2] [1897] 1 I.R. 170.
[3] (1920), 50 D.L.R. 445.
[4] [1950] Ch. 260.
[5] [1950] Ch. 547.
[6] (1785), 1 Bro. C.C. 444.
[7] (1872), 7 Ch. App. 232.
[8] (1872), 8 Ch. App. 206.
[9] [1903] A.C. 173.
[10] [1905] 1 Ch. 669.
[11] (1912), 26 O.L.R. 163 at 173.

assignable limit of time, or may never take effect at all except on the occurrence of events in their essence contingent and uncertain. Accordingly, bequests for the erection of almshouses or schools when the necessary sites should be obtained, to endow a bishopric in a certain place in case a bishop should be appointed, or to endow any additional church which might be erected, or bequests the application of which is postponed until a licence in mortmain is obtained, have been supported.

A similar statement is to be found in Gray, The Rule Against Perpetuities, 4th ed., p. 581:

607. If the Court, however, can see an intention to make an unconditional gift to charity (and the Court is very keen-sighted to discover this intention), then the gift will be regarded as immediate, not subject to any condition precedent, and therefore not within the scope of the Rule against Perpetuities. The mode pointed out by the testator is only one way, though the preferable way, of carrying out the charitable purpose; and if it cannot, with regard to the general charitable intention, be carried out in that way, it will be carried out *cy pres*. Thus while the Court will allow the fund to be transferred to a corporation not in existence at the time of the gift, if such corporation is constituted in a reasonable time, it will not recognize the right of such non-existent corporation to keep the fund locked up until such time as it may please itself to be incorporated. The formation of the corporation is not a condition precedent to the charitable trust, and therefore the trust is not too remote. The cases where charitable gifts to non-existent corporations or societies have been sustained are numerous.

My conclusion therefore is that the validity of this charitable trust is not affected by the directions to accumulate these three funds out of residuary income. The accumulation is not a condition precedent to the existence of the charitable trust. Precisely the same point as to the effect of a direction to accumulate arose in *Re Swain, supra*. After the termination of a life interest in the residue of the estate, the trustees were directed to accumulate a reserve fund and then to begin paying three charitable annuities to poor inhabitants of a certain town. The direction to accumulate was not a condition precedent to the validity of the charitable bequest but a direction as to the particular application of the charitable fund.

I turn now to the validity of the provision for accumulation. In the absence of a statute a direction to accumulate in favour of a charity would be subject only to judicial supervision as to its duration. But the *Accumulations Restraint Act* of British Columbia has been in force during the relevant period. Its principles are those contained in the corresponding English legislation under which the statutory restriction has been held to be applicable to charitable

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funds which are directed to be accumulated beyond the time permitted by the statute (4 Hals., 3rd ed., 302). The result is that on July 5, 1957, which is 21 years from the death of the testator, all accumulation must stop, both in the three funds and the residue itself. The appellant is therefore entitled now to the fund and one-third of the residue as they existed on that date.

The next question is the destination of the surplus income after July 5, 1957. All that has happened here is that the testator has directed an accumulation to extend beyond the legal limit in the carrying out of a general charitable intention. In these circumstances, the surplus income does not go to the next-of-kin but is to be applied *cy-près*. This was the result in *Re Monk*[1], and in *Re Bradwell's Will Trusts*[2]. The rule is stated in Gray, 4th ed., at p. 630, as follows:

> But where there is an unconditional gift to charity, the gift will be regarded as immediate and good, although the particular mode of carrying out the charity which the donor has indicated is too remote. Consequently in such a case if a direction for accumulation is invalid the only result is that the income is immediately distributable in charity; the heirs or next of kin are not let in.

The same principle is stated in 4 Hals., 3rd ed., 319. I notice a recent application of it in *Re Burns Estate*[3]. A scheme must therefore be settled by the Court for the *cy-près* application of all the surplus income after July 5, 1957.

The only remaining question is whether the appellant is a beneficiary answering the description contained in the will. The trustee raises this doubt because the testator spoke of a Jewish Old Men's Home whereas the appellant is a Jewish Home for the Aged and admits men and women. In all other respects the appellant qualifies under the will. In my opinion, it makes no difference that the appellant admits aged women. The institution qualifies as a Jewish Old Men's Home.

The questions submitted to the Court will therefore be answered in accordance with the following principles. The appellant is entitled now to the fund and one-third of the residue as they existed on July 5, 1957. All surplus income after July 5, 1957, must be applied *cy-près* and a scheme

[1] [1927] 2 Ch. 197, 96 L.J. Ch. 296.
[2] [1952] 2 All E.R. 286, [1952] Ch. 575.
[3] (1960), 32 W.W.R. 689, 25 D.L.R. (2d) 427.

settled by the Court. Further than that I would not go on this application but I do suggest that when the application is made for *cy-près* administration of the surplus income, the interested parties should at the same time consider joining with it an application for *cy-près* administration of the two remaining funds and the two-thirds of the residue. It is now nearly 25 years since the death of the testator.

The costs of all parties throughout these proceedings including the costs of the motion for leave to appeal should be taxed on a solicitor and client basis and paid out of the remaining two-thirds of the residue. I make this order because the appellant has carried the burden throughout and because counsel for the next-of-kin and for others potentially interested in the residue were appointed by the Court to represent these interests.

Appeal allowed.

Solicitor for the defendant, appellant: D. A. Chertkow, Vancouver.

Solicitors for the plaintiff, respondent, The Toronto General Trusts Corporation: Davis & Company, Vancouver.

Solicitors for the defendants, respondents, the next-of-kin of the estate of the late Louis Brier, and the residuary legatees named in the will of the late Rose L. Brier: Campney, Owen & Murphy, Vancouver.

Solicitors for the defendants, respondents, the residuary legatees in the will of the late Louis Brier: Freeman, Freeman, Silvers & Koffman, Vancouver.

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*Mar. 6, 7
Apr. 25

HAROLD C. BANKS (*Plaintiff*) .....APPELLANT;

AND

THE GLOBE AND MAIL LIMITED

AND

OAKLEY DALGLEISH (*Defendants*) ....RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Libel and Slander—Newspaper—Editorial concerning activities of union organizer—Defence of qualified privilege fails—Unfair comment—Rights and duties of newspapers.

The plaintiff, a vice-president of the Seafarer's International Union of North America, brought an action for libel in connection with an editorial published in a newspaper of which the corporate defendant was proprietor and the individual defendant was editor and publisher. It was alleged that the defendants falsely and maliciously published the editorial and that the same was defamatory of the plaintiff. The defences pleaded were, *inter alia*, a plea of qualified privilege and a plea of the defence of fair comment. At trial, on a motion for dismissal of the action, it was ruled that the editorial was published on an occasion of qualified privilege but that there was evidence of malice to go to the jury. The jury in answer to questions put by the trial judge negatived express malice but found that the comment was unfair. The action was dismissed and this decision was affirmed by the Court of Appeal; the latter granted leave to appeal to this Court.

Held: The appeal should be allowed.

On the assumption that the allegations of facts and circumstances on which the plea of qualified privilege was founded were proved, they were not such as to render the occasion privileged. The *right* which the publisher of a newspaper has, in common with all Her Majesty's subjects, to report truthfully and comment fairly upon matters of public interest was not to be confused with a *duty* of the sort which gives rise to an occasion of privilege. *Globe and Mail Ltd. v. Boland*, [1960] S.C.R. 203; *Arnold v. The King-Emperor* (1914), 30 T.L.R. 462; *Adam v. Ward*, [1917] A.C. 309; *Allbutt v. General Council of Medical Education and Registration* (1899), 23 Q.B.D. 400, referred to.

The proposition of law that given proof of the existence of a subject-matter of wide public interest throughout Canada, without proof of any other special circumstances, any newspaper in Canada (and *semble* therefore any individual) which sees fit to publish to the public at large statements of fact relevant to that subject-matter is to be held to be doing so on an occasion of qualified privilege was untenable.

APPEAL from a judgment of the Court of Appeal for Ontario, affirming a judgment of Spence J. Appeal allowed.

B. J. MacKinnon, Q.C., and *L. F. Curran*, for the plaintiff, appellant.

*PRESENT: Kerwin C.J. and Cartwright, Martland, Judson and Ritchie JJ.

C. F. H. Carson, Q.C., C. H. Walker, Q.C., and *J. S. Southey,* for the defendants, respondents.

The judgment of the Court was delivered by

CARTWRIGHT J.:—This is an appeal, brought pursuant to leave granted by the Court of Appeal for Ontario, from a judgment of that Court, dismissing an appeal from a judgment of Spence J. whereby the appellant's action was dismissed with costs.

The action was for damages for libel.

The appellant is a vice-president of the Seafarers' International Union of North America; he resides in the town of Pointe Claire in the Province of Quebec. The corporate respondent is the proprietor of a daily newspaper published under the name of "The Globe and Mail", of which the individual respondent is the editor and publisher.

The words complained of were published as the leading editorial in the issue of "The Globe and Mail" dated Monday, November 11, 1957, and are as follows:

MISSION ACCOMPLISHED

It would seem in retrospect that Mr. Harold C. Banks, Canadian director of the Seafarers' International Union, was brought to this country for the specific purpose of scuttling Canada's deep sea fleet. If this was indeed the case, he has succeeded admirably. With the decision by Canadian National Steamships to strike its eight vessels on West Indian service from Canadian registry, Canada is left with only three ocean-going merchant ships—as against the hundred or more it had when Mr. Banks took over the SIU eight years ago.

Considering his record of criminal offenses in the United States, which he diversified and extended after coming to Canada, this country has done rather well by Mr. Banks. He enjoys great power and considerable wealth, his salary being a reported $12,000 a year. Unlike most other union leaders in Canada, he does not have to go through the irritating business of getting himself re-elected at periodic intervals; indeed, he was never elected in the first place. And he has influential friends; when he applied for Canadian citizenship this year, who should show up to vouch for him but such people as Mr. Claude Jodoin, president of the Canadian Labor Congress, and Mr. Frank Hall, head of the Brotherhood of Railway Clerks.

But if Canada has done well by Mr. Banks, it cannot be said that Mr. Banks has done well by Canada. It is true that, by his forcible demands on ship owners he has made Canada's ocean-going seamen the most highly paid in the world. But in so doing, he has put virtually all of them out of employment. With Mr. Banks directing the SIU, almost every Canadian-owned deep sea ship has been transferred to a foreign flag, and is being worked by a foreign crew.

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This will now be the case with the eight West Indies vessels of CNS, which are to be registered in Port of Spain, Trinidad. The eight ships have been tied up since last July, owing to a strike called by Mr. Banks. At the time, he demanded a 30 per cent wage increase for the SIU members working them; CNS offered 10 per cent, which it later raised to 15 per cent—not unreasonable considering that the West Indian service has run at a heavy loss for the last seven years. This latter offer was rejected by Mr. Banks even when CNS warned him that rejection would mean the registry transfer, and consequent unemployment of all the crew members concerned.

Mr. Banks' application for citizenship is still, apparently, before the Canadian Government, which has reached no final decision in the matter. We suggest, in the light of the CNS fiasco, that the application be turned down, and Mr. Banks be sent back to the U.S. He came here to preside over the dissolution of the Canadian Merchant Marine; the Canadian Merchant Marine has been dissolved. Why, then, should he remain? His mission has been accomplished, his work is done.

The action was commenced on December 3, 1957.

In the statement of claim it is alleged that the defendants falsely and maliciously published this editorial of and concerning the plaintiff and that in its plain and ordinary meaning it is defamatory of him and of and concerning him in the way of his office as vice-president of his union. In paragraph 6, thirteen innuendoes are alleged. In paragraph 7 it is alleged that notice of complaint was served on the defendants on November 21, 1957.

In the statement of defence publication is admitted. The defences pleaded are, (i) that the words complained of in their natural and ordinary meaning are no libel, (ii) that the said words do not bear and were not understood to bear and are incapable of bearing or being understood to bear the meaning alleged in the statement of claim, (iii) a plea of qualified privilege and (iv) a plea of the defence of fair comment.

The plea of qualified privilege is contained in paragraphs 3 and 4 of the statement of defence as follows:

3. The Defendants say that the words complained of were published under the following circumstances—

The said words were published following the decision by Canadian National Steamships to transfer its eight vessels on West Indian service from Canadian Registry to a Foreign Registry on the 9th of November, 1957. In July 1957 the Seafarers' International Union, of which the Plaintiff is the Canadian Director, called a strike which tied up the said eight vessels. After more than four months the strike was still not settled and the vessels were transferred to Foreign Registry as aforesaid, all of which was the subject of discussion and comment in the House of Commons and in the Public Press.

4. By reason of such circumstances it was the duty of the Defendants to publish, and in the intrests of the public to receive communications and comments with respect to the strike and the resultant transfer of eight vessels from Canadian Registry and by reason of this the said words were published under such circumstances and upon such occasion as to render them privileged.

The plea of the defence of fair comment is set out in paragraphs 6 and 8 of the statement of defence as follows:

6. Insofar as the said words consist of statements of fact the said words are in their natural and ordinary meaning, and without the meanings alleged in paragraphs 6 of the Statement of Claim, true in substance and in fact; and insofar as the said words consist of expressions of opinion they are fair comment made in good faith and without malice upon the said facts which are a matter of public interest in the circumstances stated in paragraph 3.

* * *

8. In the alternative if any of the said words are capable of the meanings alleged in paragraph 6 of the Plaintiff's Statement of Claim then they are fair comment made in good faith and without malice on a matter of public interest. The said comment was based upon the transfer by Canadian National Steamships of eight vessels from Canadian Registry to Foreign Registry in the circumstances referred to in paragraph 3.

The action was tried in June 1958. Counsel for the appellant called two witnesses, the plaintiff and a Mr. Leonard McLaughlin who was the secretary-treasurer of the Seafarers' International Union of North America, Canadian District. Counsel then read some questions and answers from the examination for discovery of the respondent Dalgleish and closed his case.

Counsel for the respondents then moved, in the absence of the jury, for the dismissal of the action on the ground that the words complained of were published on an occasion of qualified privilege and that there was no evidence of malice to go to the jury.

It appears that before commencing his argument on this motion, counsel for the respondents had announced his decision not to call any evidence. Shortly after counsel for the appellant had commenced his argument on the motion the learned trial judge called attention to this as follows:

HIS LORDSHIP: May I interrupt you for a moment. I think it is only proper, Mr. Walker, that I should ask you, when you commenced your argument, the thing which I did ask you in chambers and therefore I omitted to ask for the record. Is it the intention of counsel for the defendants to adduce evidence?

MR. WALKER: No, my lord, I am calling no evidence.

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At a later stage of his argument on this motion counsel for the plaintiff admitted that the strike and the resultant transfer of the ships involved to foreign registry constituted a matter of public interest; but, as I read the record, counsel did not admit that the statements and comments made about the plaintiff were made on a matter of public interest. This accords with the position taken by counsel in his opening to the jury in the course of which he said:

> We shall also contend throughout this trial that what was said about Mr. Banks was not said on a matter of public interest; that it was substantially a personal attack and not mere comment or expressions of opinion on a matter of public interest.

These circumstances have a bearing on the submission of counsel for the respondents, to be mentioned later, that counsel for the plaintiff at the trial had in effect admitted that the editorial was published on an occasion of qualified privilege.

At the conclusion of the argument on the motion the learned trial judge ruled that the editorial was published on an occasion of qualified privilege but that there was evidence of malice to go to the jury.

In his charge the learned trial judge made it clear to the jury that they had the right to bring in a general verdict but he invited them to answer a number of questions and the jury followed this course. The questions and answers are as follows:

1. Were the statements complained of and set out in Exhibit 1 under the circumstances in which they were used, defamatory of the plaintiff?

Answer "Yes" or "No".

Answer: Yes.

2. (*a*) Insofar as the statements are of fact were they all true?

Answer "Yes" or "No".

Answer: No.

(*b*) Insofar as the statements are expressions of opinion did they exceed the limit of fair comment? Answer "Yes" or "No".

Answer: Yes.

3. Do the words complained of and set out in Exhibit 1 mean—

(*a*) that the plaintiff came from the United States to Canada for the specific purpose of ending the existence of Canadian ships at sea, contrary to the interests of members of his Union and the people of Canada?

Answer "Yes" or "No".

Answer: Yes.

(*b*) that the plaintiff committed a substantial number of criminal offences in the United States?

Answer "Yes" or "No".

Answer: Yes.

(*c*) that the plaintiff has committed a substantial number of criminal offences of diverse kinds after coming to Canada?

Answer "Yes" or "No".

Answer: No.

(*d*) that the plaintiff is a dictatorial and irresponsible union officer not subject to removal or re-election by the membership of his Union?

Answer "Yes" or "No".

Answer: Yes.

(*e*) that the plaintiff has used threats of force in making demands upon Canadian ship owners?

Answer "Yes" or "No".

Answer: No.

(*f*) that the plaintiff has caused loss of employment to be suffered by most or all of Canada's ocean-going seamen?

Answer "Yes" or "No".

Answer: Yes.

(*g*) that the plaintiff, on his own initiative and without the authority of the membership of his Union, called a strike against Canadian National Steamships?

Answer "Yes" or "No".

Answer: No.

(*h*) that the plaintiff, on his own initiative and without reference to the membership of his Union, demanded a 30 per cent wage increase for such members.

Answer "Yes" or "No".

Answer: No.

(*i*) that the plaintiff, on his own initiative and without reference to the membership of his Union, rejected an offer of a 10 per cent wage increase?

Answer "Yes" or "No".

Answer: No.

(*j*) that the plaintiff, while posing as a representative of working seamen, was indifferent or hostile to their interests?

Answer "Yes" or "No".

Answer: No.

(*k*) that the plaintiff deliberately used an office of trust held by him to cause injury and loss to the membership of his Union by whom he was employed?

Answer "Yes" or "No".

Answer: No.

(*l*) that the plaintiff is an unfit person to be granted Canadian citizenship?

Answer "Yes" or "No".

Answer: Yes.

(*m*) that the plaintiff is an unfit person to be permitted to reside in Canada?

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Answer "Yes" or "No".

Answer: Yes.

4. If you have answered "Yes" to any of the sub-questions in 3 above, does such meaning exceed the limit of fair comment?

Answer "Yes" or "No".

Answer: Yes.

5. When the defendants published this statement were they actuated by any motive other than their duty to publish communications and comments on a matter of public interest?

Answer "Yes" or "No".

Answer: No.

6. At what amount do you assess the damages of the plaintiff?

$3500.00 (Thirty-five hundred dollars).

Upon these answers the learned trial judge directed judgment to be entered dismissing the action with costs.

The appellant appealed to the Court of Appeal. The first ground set out in the notice of appeal was:

That the learned trial judge erred in holding that the words complained of were protected by the defence of qualified privilege.

Laidlaw J.A., who delivered the unanimous judgment of the Court of Appeal, in summarizing the grounds of appeal presented in argument before that Court described the first of those grounds as follows:

First, that the decision of the learned trial Judge that the occasion was one of qualified privilege, was erroneous, or, in the alternative, that the learned Judge ought to have found that part of the published article was within the privilege and part of it was not within the privilege;

I have reached the conclusion that the learned trial judge and the Court of Appeal were in error in holding that the occasion on which the editorial was published was one of qualified privilege and consequently do not find it necessary to consider the other grounds urged by Mr. MacKinnon in support of the appeal.

The reasons of the learned trial judge for holding that the occasion was privileged are as follows:

The first branch of the application may be disposed of very shortly. I think it is quite evident by consideration of the cases cited by counsel for the defendant, particularly *Jenoure vs Delmege,* [1891] Appeal Cases 73; *Pittard v. Oliver,* [1891] 1 Queen's Bench 474; *Mangena vs Wright,* [1909] 2 King's Bench 958; *Adam vs Ward,* [1917] Appeal Cases 309; *Showler vs MacInnes,* [1937] 1 Western Weekly Reporter 358; *Dennison vs Sanderson,* [1946] Ontario Reports 601; and *Drew vs Toronto Star,* [1947] Ontario Reports 730; that the class of cases to which the defence of qualified privilege extends have, during the course of recent years, been extended, and

that that extension will cover editorial comment by a metropolitan newspaper upon matters of public interest. It is difficult to conceive a matter in which the public would be much more interested in the year 1957 than the most important topic of industrial relations, when added to that there is the topic of the continued existence of a deep-sea fleet under Canadian registry. The latter topic, in fact, had so interested the public that it was included in a reference of matters to a Royal Commission, the report of which had not yet been rendered at the time of this alleged libel.

There is no more efficient organ for informing the public and for disseminating to the pubilc intelligent comment on such matters of public interest, than a great metropolitan newspaper, which the plaintiff has proved the defendant to be. The members of the public have a real, a vital—I might go so far as to say—a paramount interest in receiving those comments.

The decision of Mr. Justice Manson in *Showler vs MacInnes* has been critized but I feel that his words are most applicable to the particular situation which existed here, and I propose to adopt those words in this case where he said:—

> The whole citizenhood of Vancouver has and had at the time of the address in question a vital concern in the matter of industrial relations in the community and in knowing under what circumstances strikes might be called.

adding the comment that for "all the citizens of Vancouver" I would insert "citizens of Canada".

The statement of the rule as to the burden of proof where a defence of qualified privilege is set up, contained in Gatley on Libel and Slander, 4th edition, at page 282 (stated in the same words in the 5th edition of that work at page 270) was approved by this Court in *Globe and Mail Ltd. v. Boland*[1], and is as follows:

> Where a defence of qualified privilege is set up, it is for the defendant to allege and prove all such facts and circumstances as are necessary to bring the words complained of within the privilege, unless such facts are admitted before or at the trial of the action. Whether the facts and circumstances proved or admitted are or are not such as to render the occasion privileged is a question of law for the judge to decide.

In the case at bar the evidence of the plaintiff shewed that the strike referred to in the editorial had commenced in July 1957 and that it had not been settled at the date of the trial. His evidence in cross-examination continued:

Q. So that when the defendant says in the Statement of Defence that after four months the strike was still not settled, that is correct.

A. That is correct.

Q. And you also told us that the vessels were transferred to foreign registry. Now, Mr. Banks, I suppose you read the newspapers, do you?

A. Occasionally.

[1] [1960] S.C.R. 203 at 206, 22 D.L.R. (2d) 277.

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Q. And was there considerable newspaper publicity with reference to this strike and with reference to the transfer of the vessels?

A. There was.

Q. And was there discussion in the House of Commons with reference to the strike and the transfer of the vessels?

A. There was.

It has already been mentioned that counsel for the plaintiff admitted that the strike and the transfer of the ships involved to foreign registry constituted a matter of public interest.

I do not find it necessary to consider whether the allegations of fact on which the plea of qualified privilege was founded were sufficiently proved. If it be assumed for the purposes of argument that all the facts and circumstances alleged in paragraphs 3 and 4 of the statement of defence were proved it is my opinion that they were not such as to render the occasion privileged.

With the greatest respect it appears to me that in his reasons quoted above the learned trial judge has fallen into the same error as was pointed out in the judgment of this court in *Globe and Mail Ltd. v. Boland, supra,* at p. 207, and has confused the *right* which the publisher of a newspaper has, in common with all Her Majesty's subjects, to report truthfully and comment fairly upon matters of a public interest, with a *duty* of the sort which gives rise to an occasion of privilege. It is not necessary to refer again to the authorities discussed in the case last cited, but I think it desirable to recall the passage from the judgment of Lord Shaw in *Arnold v. The King-Emperor*[1]:

> The freedom of the journalist is an ordinary part of the freedom of the subject, and to whatever lengths the subject in general may go, so also may the journalist, but apart from statute law, his privilege is no other and no higher. The responsibilities which attach to his power in the dissemination of printed matter may, and in the case of a conscientious journalist do, make him more careful; but the range of his assertions, his criticisms, or his comments, is as wide as, and no wider than, that of any other subject. No privilege attaches to his position.

The following statement in Gatley on Libel and Slander 5th ed., at pages 322 and 323 is, in my opinion, accurate:

> The defence of fair comment must also be distinguished from that of qualified privilege. In the defence of fair comment the right exercised by the defendant is shared by every member of the public. Who is entitled to comment? The answer to that is 'everyone'. A newspaper reporter or

[1] (1914), 30 T.L.R. 462 at 468, 83 L.J.P.C. 299.

a newspaper editor has exactly the same rights, neither more nor less, than every other citizen. In that of qualified privilege the right is not shared by every member of the public, but is limited to an individual who stands in such relation to the circumstances that he is entitled to say or write what would be libellous or slanderous on the part of anyone else. For instance, if a master is asked as to the character of a servant, and he says that the servant is a thief, he has a privilege which no one else would have. A privileged occasion is one on which the privileged person is entitled to do something which no one who is not within the privilege is entitled to do on that occasion. A person in such a position may say or write about another person things which no other person in the kingdom can be allowed to say or write. But, in the case of a criticism upon a matter of public interest whether it be the conduct of a public man or a published work, every person in the kingdom is entitled to do, and is forbidden to do exactly the same things, and therefore the occasion is not privileged.

The judgments given at trial in the cases of *Dennison v. Sanderson, supra,* and *Drew v. Toronto Star, supra,* relied on by the learned trial judge, in so far as they deal with the question of qualified privilege, must be regarded as having been overruled by the judgments of this Court in *Douglas v. Tucker*[1] and in *Globe and Mail Ltd. v. Boland, supra.* The judgment in *Showler v. MacInnes*[2], is, in my opinion, inconsistent with the two last mentioned judgments of this Court and with our judgment in the case at bar and ought not to be followed. The other decisions referred to in the reasons of the learned trial judge are all distinguishable on their facts from the case at bar.

There are of course many cases in which publication of defamatory matter in a newspaper may be privileged either by statute or at common law; examples are to be found in *The Libel and Slander Act,* R.S.O. 1950, c. 204, ss. 9 and 10, and in such cases as *Adam v. Ward*[3] and *Allbutt v. General Council of Medical Education and Registration*[4]. In the first of these it was held that the Army Council owed a duty to publish to the whole world a letter vindicating a General who had been falsely accused before the same audience of discreditable conduct and that publication in the press was therefore privileged; in the second it was held that publication in the press of an accurate report of proceedings within the jurisdiction of the General Medical

[1] [1952] 1 S.C.R. 275, 1 D.L.R. 657.
[2] (1937), 1 W.W.R. 358, 51 B.C.R. 391.
[3] [1917] A.C. 309, 86 L.J.K.B. 849.
[4] (1889), 23 Q.B.D. 400, 58 L.J.Q.B. 606.

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Council erasing the name of the plaintiff from the medical register was privileged on the ground, *inter alia,* that it was the duty of the Council to give the public accurate information as to who is on the register and if a person's name is erased accurate information of the cause of its erasure.

The decision of the learned trial judge in the case at bar, quoted above, appears to involve the proposition of law, which in my opinion is untenable, that given proof of the existence of a subject-matter of wide public interest throughout Canada without proof of any other special circumstances any newspaper in Canada (and *semble* therefore any individual) which sees fit to publish to the public at large statements of fact relevant to that subject-matter is to be held to be doing so on an occasion of qualified privilege.

Having reached the conclusion that the learned trial judge was in error in deciding that the editorial complained of was published on an occasion of qualified privilege, it is not necessary to consider what judgment should have been given on the answers of the jury had the ruling of the learned trial judge been upheld; but I do not wish to be understood as agreeing that even in that event the action should have been dismissed; while the plea of qualified privilege and the answer of the jury negativing express malice would, on the hypothesis mentioned, have afforded a defence to the action in so far as it was based on the publication of defamatory statements of fact there remained the finding of the jury that the comment (and the editorial consisted partly of comment) was unfair. However, I do not pursue this question further.

It remains to consider what order should be made. Counsel for the respondents argued that if we should hold the publication was not made on an occasion of qualified privilege a new trial should be directed; this argument was based in part on the submission that at the trial counsel for the plaintiff had admitted that the occasion was one of qualified privilege. I have read all the record with care and cannot find that any such admission was made. Doubtless both counsel at the trial were familiar with the ruling which had been made by the learned trial judge a short time before in the case of *Boland v. The Globe and Mail Ltd.,*

supra, and, perhaps for that reason, counsel for the plaintiff concentrated his argument on the submission that even if the occasion was one of privilege the bounds of the privilege had been exceeded. The following passage at the end of the argument of the motion, and particularly the words I have italicized, would be inconsistent with the view that the learned trial judge considered that any such admission had been made.

Mr. JOLLIFFE: Therefore the gist of my submission is that *even if the Court holds the occasion to be a privileged one,* the editorial . . .

His LORDSHIP: In short, *even if the Court holds it is qualified privilege,* qualified privilege only exists for the purpose for which the privilege is set up.

Mr. JOLLIFFE: Exactly, my lord.

His LORDSHIP: And if the motive goes beyond that, it is evidence of malice to go to the jury.

Mr. JOLLIFFE: Exactly, my lord. That is what I am attempting to say.

His LORDSHIP: I understand that.

I am unable to find any sufficient ground for directing a new trial; I have given my reasons for holding that the defence of qualified privilege fails; the answers of the jury negatived the defence of fair comment; the error in law which, in my respectful opinion, was made by the trial judge was not one which would cause the jury to increase the amount of the damages or would otherwise prejudice the position of the respondents.

I would allow the appeal, set aside the judgment of the Court of Appeal and that of the learned trial judge and direct that judgment be entered for the plaintiff for $3500 with costs throughout.

Appeal allowed with costs.

Solicitors for the plaintiff, appellant: Jolliffe, Lewis, Osler & Gilbert, Toronto.

Solicitors for the defendants, respondents: Macdonald & Macintosh, Toronto.

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*Nov. 28, 29, 30
Dec. 1

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THE UPPER OTTAWA IMPROVEMENT COMPANY, CANADIAN INTERNATIONAL PAPER COMPANY, CONSOLIDATED PAPER CORPORATION LTD., THE E. B. EDDY COMPANY and GILLIES BROS. & CO. LTD. (*Plaintiffs*) APPELLANTS;

AND

THE HYDRO-ELECTRIC POWER COMMISSION OF ONTARIO (*Defendant*) .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Water and watercourses—Log-driving—Construction of dams by riparian owner—Velocity of natural current altered—Necessity to tow logs—Rights of log-owners.

The plaintiff company was engaged in driving logs and timber down the Ottawa river, which, in the area concerned, forms the dividing line between the Provinces of Ontario and Quebec. The defendant commission, a body corporate engaged in the production and distribution of electrical energy in Ontario, was enabled under an interprovincial agreement to utilize the water power of the river by the erection of dams at certain sites. Under the agreement the defendant acquired rights to the relevant portions of the river-bed and adjacent lands. Paragraph 44 of the agreement reserved the lawful rights of timber owners or others to drive their logs down the river.

As a result of the closing of the dams the flow of the river was so altered that the plaintiff was obliged to tow the logs which formerly floated freely in the current. The plaintiff's action for damages was dismissed at trial and this judgment was affirmed by the Court of Appeal. The plaintiff appealed to this Court.

Held: The appeal should be dismissed.

Per Kerwin C.J. and Taschereau, Locke, Fauteux, Abbott and Judson JJ.: It was a common law right of a riparian owner in Upper Canada and in Ontario since 1792 to dam the waters of a stream or river flowing through or past his lands for the purpose of using the water power, subject to the condition that he should not interfere with the rights of other proprietors, either above or below him. *Wright v. Howard* (1823), 1 Sim. & St. 190; *Mason v. Hill* (1832), 3 B. & Ad. 304; *Embrey v. Owen* (1851), 6 Exch. 353; *Miner v. Gilmour* (1859), 12 Moo. P.C.C. 131; *Chasemore v. Richards* (1859), 7 H.L. Cas. 349, referred to.

The right of lumbermen to float or drive their logs past dams lawfully erected in the province was one given by statute, c. 4 of 1828. This Act and subsequent statutes which gave and now give that right recognized the common law right of the riparian owner. *McLaren v. Caldwell* (1881), 6 O.A.R. 456, referred to.

The plaintiff's contention that the meaning to be attributed to the words "driving" in s. 26(4) of *The Lakes and Rivers Improvement Act* and "to drive" in para. 44 of the agreement is the floating or transmission

*PRESENT: Kerwin C.J. and Taschereau, Locke, Cartwright, Fauteux, Abbott, Martland, Judson and Ritchie JJ.

of logs and timber with the aid of the natural current was rejected. The legislature and the parties to the agreement intended nothing more than the perpetuation of the log-owners' former rights of passage.

There was nothing inconsistent with the exercise of riparian owner rights to their fullest extent by the defendant with the exercise by the plaintiff of the easement or right of passage for its timber to which it was entitled under *The Lakes and Rivers Improvement Act. Orr Ewing v. Colquhoun* (1877), 2 App. Cas. 839; *Ward v. Town of Grenville* (1902), 32 S.C.R. 510; *Quyon Milling Co. v. E. B. Eddy Co.*, [1926] S.C.R. 194, applied.

The plaintiff's further contention that the right to drive its logs free in the current was made clear by para. 44 of the agreement was also rejected. The agreement clearly reserved to timber owners or others only such rights to drive their logs and timber down the Ottawa River as then existed. It did not purport to add to or implement such rights.

The issue as to whether the plaintiff's rights under the laws of Quebec differed from those in Ontario was not properly before this Court as this was an appeal from the Court of Appeal and the issue, not having been pleaded, was not considered by that Court.

Per Cartwright, Martland and Ritchie JJ.: The right of lumbermen in Ontario to use such rivers as the Ottawa for the transportation of their logs was recognized at common law as a part of the right of navigation on such rivers. Provincial legislation dealing with the rights of lumbermen driving logs and the rights of riparian owners to construct dams defined the manner in which the common law rights of each were to be exercised concurrently. In re *Provincial Fisheries* (1884), 9 App. Cas. 392; *North Shore Railway Co. v. Pion* (1889), 14 App. Cas. 612, referred to.

The rights of loggers were in no way greater than those of other members of the public. As they possessed no right of property in the water they had no rights as regards its flow, and so long as their right to pass their logs down the river was maintained in the manner provided by statute they had no cause of action against a riparian owner exercising his right to dam the river. *Ward v. The Township of Grenville* (1902), 32 S.C.R. 510; *Caldwell v. McLaren* (1884), 9 App. Cas. 392; *Orr Ewing v. Colquhoun* (1887), 2 App. Cas. 839, applied.

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

J. D. Arnup, Q.C., André Forget, Q.C., A. McN. Austin and *G. LeDain*, for the plaintiffs, appellants.

C. F. H. Carson, Q.C., John L. O'Brien, Q.C., L. R. McDonald, Q.C., Allan Findlay, Q.C., and *E. E. Saunders*, for the defendant, respondent.

The judgment of Kerwin C.J. and of Taschereau, Locke, Fauteux, Abbott and Judson JJ. was delivered by

LOCKE J.:—This is an appeal from a judgment of the Court of Appeal for Ontario[1] which dismissed an appeal of the present appellants, the plaintiffs in the action, from the judgment of Gale J. at the trial dismissing the action.

[1] [1959] O.R. 473, 19 D.L.R. (2d) 111.

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Locke J.

The Upper Ottawa Improvement Company was incorporated in the year 1859 and is engaged in the business of driving logs and timber down the Ottawa River from the head of Lake Temiskaming to the cities of Ottawa and Hull for such parties, including the other appellants, as may turn their logs and timber over to it for that purpose. The other appellants are the principal shareholders of that company and the services rendered by it are carried on at rates which approximate the cost of such services and, accordingly, any increase in such cost must in the main be borne by them. It will be convenient to refer to the Improvement Company hereinafter as the appellant.

The Ottawa River flows from Lake Temiskaming to the River St. Lawrence and forms the dividing line between the provinces of Ontario and Quebec in the area with which this case is concerned. The respondent commission is a body corporate engaged in the production and distribution of electrical energy in Ontario and its general operations are carried on pursuant to *The Power Commission Act,* R.S.O. 1950, c. 281, and predecessor statutes.

By an agreement dated January 2, 1943, made between His Majesty the King in the right of the Province of Ontario, His Majesty the King in the right of the Province of Quebec, the respondent and the Quebec Streams Commission, Quebec leased to the respondent certain tracts of land upon the Quebec side of the Ottawa River and the portions of the bed of the Ottawa River necessary to enable the respondent to utilize the water power of the river at La Cave, Des Joachims and Chenaux, with the right to enter upon, possess, occupy, use and enjoy such additional lands owned by the province as were necessary to enable the head water level of the dams to be raised to specified levels. The lands on the Quebec side of the river required for the purposes of the dams to be constructed and the approaches thereto were leased to the respondent for a term of 999 years. On its part the Province of Ontario granted rights in Ontario similar in their nature, to the Quebec Commission

for the purpose of the construction of two other power sites on the Ottawa River. Paragraph 44 of the agreement provided that:

> The granting of these presents shall not take away the lawful rights of timber owners or others to drive their logs or timber down the Ottawa River, not only within but also beyond the limits of the lands comprised in these presents.

The execution of this agreement, in so far as it referred to lands in Quebec, was authorized by c. 33 of the statutes of 1942 of that province and, by paragraph 6 of that statute, it was provided that:

> It shall be a condition of the leases contemplated under sections 1 and 2 that no third party claiming to have been injured by reason of any development contemplated by the said leases shall have any remedy by way of injunction or other process but by way of damages only.

In Ontario, by *The Ottawa River Water Powers Act, 1943,* being c. 21 of the statutes of that year, the agreement referred to, which had been executed, was ratified and confirmed and the respondent commission authorized to do all acts and things necessary to carry out its terms. The commission was further authorized by s. 3 to exercise in its own name, on behalf of His Majesty the King in the right of the Province of Ontario without the authority of the Lieutenant-Governor in Council, for the purposes of the said agreement all powers conferred upon it by *The Power Commission Act* and the provisions of *The Public Works Act* incorporated in *The Power Commission Act* by s. 21. The nature of the rights acquired by the respondent are described in an agreed statement of facts as follows:

> The Defendant at all material times was the owner, lessee, or licensee with a licence to develop waterpower, of all lands on which the dams at Des Joachims, Chenaux and Cave & Fourneaux were constructed and of all lands forming the bed of the said river above each of the said dams as far as the upstream limit of the pool formed by raising the water at each of the said dams and of all lands adjacent to the said river which were flooded as a result of closing the said dams, with certain exceptions which are not relevant to this action.

Section 11 of the statute read:

> No person claiming that he has been or may be injured by reason of any development contemplated by the said agreement shall have any remedy by way of injunction or other process but by way of damages only.

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Part of that portion of the Ottawa River with which we are concerned was navigable and, accordingly, approval of the contemplated works under the *Navigable Waters Protection Act,* R.S.C. 1927, c. 140, was required and obtained. The works were also approved in the manner required by *The Lakes and Rivers Improvement Act,* R.S.O. 1950, c. 195 and predecessor statutes.

The dams at Chenaux and Des Joachims were closed in 1950 and the dam at La Cave in 1952. That at Des Joachims is approximately 130 ft. high, at La Cave approximately 100 ft. and at Chenaux 35 to 40 ft. The effect of the closing of the dams at La Cave and Des Joachims was to create large bodies of water above each dam in which there was virtually no current, where previously the logs had run freely in the river. The dam at Chenaux materially reduced the current in the river upstream for a distance of approximately 6 miles, though the logs still run freely at a reduced rate of speed. As a result, the appellant is obliged to tow its logs for almost the entire length of the ninety mile stretch of the river in question. Each of the dams is equipped with an apron or slide through which timber being brought downstream may be passed, and these have been approved as required by *The Lakes and Rivers Improvement Act* above mentioned.

It is the contention of the appellant that its costs of operation have been greatly increased by the necessity of towing logs which formerly floated freely in the current and that additional expenditures are required to enable it to carry on its operations: that, in common with all other persons who float or drive logs down the Ottawa River, it is entitled to the benefit of the natural current of the river and that the action of the respondent in depriving it of that right is actionable.

While the title to the bed of the river to midstream and the river's northerly banks between Lake Temiskaming and the city of Ottawa is in the Province of Quebec in the portion of the river flowing through that province, the pleadings treated the matter as if the laws of Ontario were alone to be considered in determining the issues and the case was argued either on that footing or on the assumption that there was no difference between the rights of the parties under the laws of Quebec and of Ontario at the trial and

in the Court of Appeal. When the appeal was brought before this Court, however, the appellant applied for leave to amend the statement of claim by pleading certain present and former provisions of the laws of the Province of Quebec and, while this application was refused, the appellant was given permission to file a supplementary factum dealing with the asserted rights of the appellant under the laws of Quebec and we have had the advantage of hearing argument in support of and against this contention.

It is convenient to deal with the matter by considering in the first instance the rights of the respective parties, both at common law and under the existing statutes in the Province of Ontario.

The right of a riparian owner to dam the waters of a stream or river flowing through or past his lands for the purpose of operating a mill has been since 1792, in my opinion, a common law right in Upper Canada and in the Province of Ontario. That right was subject to certain restrictions at common law and has been made subject to certain statutory restrictions to be hereinafter referred to.

In the Province of Ontario the laws of England, as they stood on the 15th of October 1792, except to the extent that they have been altered or modified by statute, are to be resorted to (R.S.O. 1950, c. 293).

From very early times the right of the riparian owner to utilize the current of such waters for the operation of a mill was recognized in England (see *Cox v. Matthews*[1], *Hebblethwaite v. Palmes*[2], Blackstone Commentaries, 1766, vol. 2, p. 14, Holdsworth History of English Law, vol. 7, p. 338).

In *Wright v. Howard*[3], Sir John Leach, V.C. said in part (p. 203):

> The right to the use of water rests on clear and settled principles. *Prima facie* the proprietor of each bank of a stream is the proprietor of half the land covered by the stream, but there is no property in the water. Every proprietor has an equal right to use the water which flows in the stream, and consequently no proprietor can have the right to use the water to the prejudice of any other proprietor. Without the consent of the other proprietors, who may be affected by his operations, no proprietor can either diminish the quantity of water, which would otherwise descend to the proprietors below, nor throw the water back upon the proprietors above.

[1] (1673), 1 Vent. 239. [2] (1685), 3 Mod. Rep. 48.
[3] (1823), 1 Sim. & St. 190.

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This statement of the law was approved by Tenterden C.J. in *Mason v. Hill*[1].

In *Embrey v. Owen*[2], the head note reads in part:

> The right to have a stream of water flow in its natural state, without diminution or alteration, is an incident to the property in the land through which it passes; but this is not an absolute and exclusive right to the flow of all the water, but only subject to the right of other riparian proprietors to the reasonable enjoyment of it; and consequently it is only for an unreasonable and unauthorized use of this common benefit that any action will lie.

Parke B., delivering the judgment of the Exchequer Chamber, quoted with approval what had been said in *Wright v. Howard* and *Mason v. Hill*, and said in part (p. 369):

> The right to have the stream to flow in its natural state without diminution or alteration is an incident to the property in the land through which it passes; but flowing water is *publici juris*, not in the sense that it is a *bonum vacans*, to which the first occupant may acquire an exclusive right, but that it is public and common in this sense only, that all may reasonably use it who have a right of access to it, that none can have any property in the water itself, except in the particular portion which he may choose to abstract from the stream and take into his possession, and that during the time of his possession only. But each proprietor of the adjacent land has the right to the usufruct of the stream which flows through it.
>
> This right to the benefit and advantage of the water flowing past his land, is not an absolute and exclusive right to the flow of all the water in its natural state; . . . but it is a right only to the flow of the water, and the enjoyment of it, subject to the similar rights of all the proprietors of the banks on each side to the reasonable enjoyment of the same gift of Providence.

Baron Parke quoted with approval a statement of the law in Kent's Commentaries, where the learned author said that all that the law required of the party from or over whose lands the stream passes is that he should use the water in a reasonable manner and so as not to destroy or materially diminish or affect the application of the water by the proprietors above or below the stream and, accordingly, he must not shut the gates of his dams and detain the water unreasonably or let it off in unusual quantities, to the annoyance of his neighbour.

In *Miner v. Gilmour*[3], where the action concerned the respective rights of riparian owners on the Granby River in Quebec, Lord Kingsdown referred to the fact that it was the French law prevailing in Lower Canada which governed

[1] (1832), 3 B. & Ad. 304 at 311. [2] (1851), 6 Exch. 353.
[3] (1859), 12 Moo. P.C.C. 131, 14 E.R. 861.

the matter but said that it did not appear that, for the purposes of that case, any material distinction existed between the French and the English law. The judgment reads in part (p. 156):

By the general law applicable to running streams, every riparian proprietor has a right to what may be called the ordinary use of the water flowing past his land; for instance, to the reasonable use of the water for his domestic purposes and for his cattle, and this without regard to the effect which such use may have, in case of a deficiency, upon proprietors lower down the stream. But, further, he has a right to the use of it for any purpose, or what may be deemed the extraordinary use of it, provided that he does not thereby interfere with the rights of other proprietors, either above or below him. Subject to this condition, he may dam up the stream for the purpose of a mill, or divert the water for the purpose of irrigation. But, he has no right to interrupt the regular flow of the stream, if he thereby interferes with the lawful use of the water by other proprietors, and inflicts upon them a sensible injury.

In *Chasemore v. Richards*[1], the House of Lords approved the decisions in *Mason v. Hill, Wright v. Howard* and *Embrey v. Owen.* Lord Wensleydale said in part (p. 382):

The subject of right to streams of water flowing on the surface has been of late years fully discussed, and by a series of carefully considered judgments placed upon a clear and satisfactory footing. It has been now settled that the right to the enjoyment of a natural stream of water on the surface, *ex jure naturae,* belongs to the proprietor of the adjoining lands, as a natural incident to the right to the soil itself, and that he is entitled to the benefit of it, as he is to all the other natural advantages belonging to the land of which he is the owner. He has the right to have it come to him in its natural state, in flow, quantity and quality, and to go from him without obstruction; upon the same principle that he is entitled to the support of his neighbour's soil for his own in its natural state. His right in no way depends upon prescription, or the presumed grant of his neighbour.

The elaborate judgment of Lord Denman in the case of *Mason v. Hill* (5 Barn. and Ad. 1), in 1833, reviewed most prior judgments and authorities of importance up to that date, and fully established that proposition. But former authorities, and of a very early date when carefully considered, really left no room for doubt on this subject.

While in some of the earlier cases it is suggested that the right to utilize the flow of the stream or to construct a dam in the bed of the stream depended to some extent upon the ownership of the bed of the stream, in *Lyon v. Fishmongers' Co.*[2], Lord Cairns, referring with approval to what had been said by Lord Wensleydale in *Chasemore v. Richards,* said that the right to the use of the stream did not depend upon the ownership of the soil, but was a right of the riparian owner.

[1] (1859), 7 H.L. Cas. 349, 11 E.R. 140 [2] (1876), 1 App. Cas. 662.

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The decisions after the year 1792, in my opinion, simply declare what was the common law of England prior to that date.

The statutes which were passed by the Province of Upper Canada, by the Province of Canada, and thereafter by the Province of Ontario, which have dealt with the respective rights of riparian owners of all constructed dams on the streams or rivers in the province and of lumbermen driving logs upon such waters, do not in terms, except to a very limited extent, declare the right of the riparian owner but, in certain respects, restrict the manner of its exercise.

The first of these Acts which requires examination is c. 4 of the statutes of 1828 passed by the Legislature of Upper Canada. The preamble recited that, whereas it was expedient and found necessary to afford facility to those engaged in the lumber trade in conveying their rafts to market, as well as for the ascent of fish in various streams now obstructed by mill-dams for the accommodation of those residing at a distance from the mouths thereof, from and after May 1, 1829, every owner or occupier of any mill-dam which is or may be legally erected or where lumber is usually brought down the stream on which such mill-dam is erected and where salmon or pickerel abound therein in this province, who shall neglect to construct or erect a good and sufficient apron to the dam shall be guilty of an offence. The dimensions of the apron to be constructed were prescribed.

This was followed by an Act of the Province of Canada, c. 87 of the statutes of 1849, which amended the statute of 1828. It was recited that it was necessary to declare that aprons to mill-dams which are now required by law to be built and maintained by the owners and occupiers thereof in Upper Canada should be so constructed as to allow a sufficient draught of water to pass over such aprons as shall be adequate for the ordinary flow of the streams to permit saw-logs and other lumber to pass over the same without obstruction. After imposing the duty on the owner or occupier of the mill-dam to maintain such an apron or slide, s. 1 read:

> Provided always, that every such owner or occupier of any such Dam may construct a Waste Gate or put up Brackets and Slash Boards in, upon and across any such Apron for the purpose of preventing any unnecessary waste of water therefrom, and to keep the same closed at all times when

no person or persons shall be ready and require to pass or float any Craft, Lumber or Saw Logs over any such Apron or Slide, but not until such Craft, Raft, Lumber or Saw Logs shall have gained the main Channel of the Stream.

This section not merely recognized, but authorized the damming of the waters except in the circumstances described.

Section 5 read:

And be it enacted, That it shall be lawful for all persons to float Saw Logs and other Timber Rafts and Craft down all Streams in Upper Canada, during the Spring, Summer and Autumn Freshets, and that no person shall by felling trees or placing any other obstruction in or across such Stream, prevent the passage thereof; Provided always, that no person using such Stream in manner and for the purposes aforesaid, shall alter, injure or destroy any Dam or other useful erection in or upon the bed of or across any such Stream, or do any unnecessary damage thereto or on the Banks of such Stream: Provided there shall be a convenient Apron, Slides, Gate, Lock or opening in any such Dam or other structure made for the passage of all Saw Logs and other Timber, Rafts and Crafts authorized to be floated down such Stream as aforesaid.

By c. 48 of the statutes of 1859 [consolidated] entitled *An Act Respecting Mills and Mill-Dams* which dealt, *inter alia,* with tolls payable to the owners of mills operated by water power, the owner or occupier of a mill-dam "legally erected on any stream down which stream lumber is usually brought" was required to maintain an apron of the nature described, and the provision for the construction of a waste-gate upon or across the apron for preventing any unnecessary waste of water therefrom and permission to keep the same closed when no person was ready to float any lumber or saw-logs over such apron or slide, contained in the Act of 1849 was repeated. By s. 15 the right declared by s. 5 of the Act of 1849 was given in an abbreviated form. Section 16 imposed upon those persons using such apron or slide, for the purpose of passing saw-logs and other timber, the duty to refrain from causing injury to such works.

After Confederation the same subject-matter was dealt with in 1877 in Ontario by R.S.O. c. 113, being *An Act Respecting Mills and Mill-Dams,* and by R.S.O. c. 115, *An Act Respecting Rivers and Streams.* The first of these statutes substantially repeated the provisions of the Act of 1859 as to the requirements of the apron or slide upon such dams, and permitting the closing of the waste-gate when no person was ready to float lumber or saw-logs over the dam.

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The second statute provided that, so far as the Legislature of Ontario had authority to so enact, all persons may during the Spring, Summer and Autumn freshets float saw-logs and other timber down all streams and contained provisions imposing liability for any injury occasioned to such structure by timber floated down them. By s. 6 it was provided that the Act should not extend to the Ottawa or St. Lawrence Rivers.

By *An Act for protecting the Public interest in Rivers, Streams and Creeks,* being c. 17 of the statutes of 1884, the right to float and transmit saw-logs and other timber is restated and in s. 12 reference is made to "persons driving saw-logs other timber . . . down any such river, creek or stream."

The first of the statutes passed thereafter that requires consideration is R.S.O. 1914, c. 130 entitled *The Rivers and Streams Act.* This by s. 3 again declared the right of all persons to float and "transmit" timber, rafts and crafts down a river during the Spring, Summer and Autumn freshets, subject to the provisions of the Act. Section 17 authorized the Lieutenant-Governor in Council to make regulations as to the description and dimensions of aprons and slides on dams, and such other regulations as to the mode of constructing them and the provisions to be made for the passage of timber, rafts and crafts as might be deemed necessary. Section 18 required all dams theretofore or thereafter erected upon any river down which timber is usually floated to be provided with a slide or apron, and s. 19 declared that, unless otherwise provided by the regulations, such apron shall be of the nature described. Section 21 substantially repeated the provisions of the Act of 1859 permitting the owner or occupier of a dam to keep the waste-gate closed when it was unnecessary to permit the passage of timber. Section 27 declared that where a dam or other structure for the development of a water power has been or should thereafter be constructed the Lieutenant-Governor in Council may make such regulations as he may deem expedient respecting the use of the river or the waters of it.

The last mentioned statute was amended by c. 15 of the statutes of 1915 which declared that the Lieutenant-Governor in Council might by proclamation declare that any river, stream or creek to which *The Rivers and Streams*

Act applied, should be subject to the Act and under the jurisdiction and control of the Minister of Lands, Forests and Mines. Section 4 provided that no person shall erect a dam, weir or other structure or work upon any river brought under the Act, except with the permission of the Minister and subject to such terms and conditions as he may see fit to impose:

> for the efficient and proper user of such river as between the persons having a right to use the river or any works or other improvements thereon for lumbering, power or other purposes.

The statute in force at the time the construction of the works in question in this action was undertaken was *The Lakes and Rivers Improvement Act,* R.S.O. 1937, c. 45. That statute appeared as R.S.O. 1950, c. 195.

Section 9 of c. 195 provided in more detail for the obtaining of the approval of the Lieutenant-Governor in Council to the construction of a dam in any lake or river and s. 10 specified that such approval should be obtained for any improvements to any existing dam. Section 17 provided that where a dam or other structure for the development of a water power on any river down which any timber is floated has been heretofore or shall hereafter be constructed, the Minister may make such order as he deems expedient respecting the use of the river or the waters thereof by, *inter alia,* persons using the river for the purpose of floating timber. Sections 20 and 21 require the maintenance of slides or aprons in dams theretofore or thereafter constructed and require that they shall afford sufficient depth of water to admit the passage of such timber as is usually floated down the lake or river on which the dam is constructed. Section 26(1) declared the public right of all persons to float timber down all lakes and rivers. Subsection (4) provides that persons "driving" timber down a lake or river have the right to go along the banks to assist in "floating" it.

While there have been various other statutes enacted since 1828 dealing with the manner in which logs may be floated or driven upon rivers and streams in Ontario, I find nothing in their provisions which affects the matter to be considered.

It appears to me to be implicit in the terms of the statute of 1828 that the common law right of riparian owners to dam streams or rivers flowing through or past their lands for the purpose of utilizing the water power was recognized

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and the subsequent legislation to which I have referred up to the year 1915 merely regulated the manner in which that right was to be exercised for the protection of those persons desiring to obtain passage for their timber. From that date up to the present time that right can be exercised only with the permission and upon terms to be prescribed by the Minister of Lands, Forests and Mines and, in the present case, that permission was given. The right to close such dams when it was unnecessary to open them to allow passage of timber was in terms recognized by s. 1 of the statute of 1849 and by s. 1 of the statutes of 1859 and 1877. The erection of any dam in a river or stream of sufficient height to obstruct its flow must, of necessity, lessen the strength of the current, and so the log-drives of lumbermen upon such streams in Ontario during the last century must have been to a greater or lesser extent impeded by dams erected for the operation of lumber, grist or other mills from the time such operations were carried on in Upper Canada and Ontario. While we have been referred to many authorities in which there has been conflict between lumbermen and riparian owners who have exercised their right to dam streams or rivers in the province, in none of them has the question been raised as to the loss sustained by such drives being delayed. That is, no doubt, due to the fact, as disclosed by the evidence, that the first large installation of dams for the purpose of generating electrical energy in Ontario was at or about the commencement of the present century. These works, of necessity, affect the flow of rivers in which they are constructed for very much greater distances than was the case of the dams erected for the purposes I have mentioned.

If the common law right of the riparian owners to utilize the force of the river for the purpose of generating energy has been taken away, it must be the case that this has been done either impliedly by the rights given to lumbermen by the statutes to which I have referred or, as it is contended, by the terms of the agreement of January 2, 1943, or by the statutes authorizing and confirming the making of that agreement. There is no evidence in the case as to the existence of a custom permitting lumbermen to float or drive their logs past dams lawfully erected upon streams or rivers in Upper Canada prior to the year 1828. The statute passed

that year recognized the necessity of permitting this to be done and imposed an obligation on the owners of mill-dams legally erected to provide a good and sufficient apron to the dam to permit such passage. I agree with the opinion of Patterson J.A. in *McLaren v. Caldwell*[1], that the right is one that has been given by statute and the statutes which gave and now give that right are those in which the common law right of the riparian owner is recognized.

The statute of 1828 recites that it is expedient to afford facility to lumbermen in conveying their rafts to market to provide means whereby they may pass dams upon the stream. The statute of 1849 speaks of allowing a sufficient draught of water to pass over the aprons to permit saw-logs and other lumber to pass over the same and requires that the aprons afford a depth of water sufficient to admit the passage of such logs as are usually floated down such streams, and the section which declares for the first time in express terms the right of the log-owners reads that it shall be lawful for them to float the logs down all streams in Upper Canada. The same language is employed in s. 15 of the Act of 1859 and in s. 1 of c. 115 of the statutes of 1877.

The word "driving" first appeared in the statute of 1884, s. 12 of which read:

> All persons driving saw-logs or other timber, rafts or crafts, down any such river, creek or stream shall have the right to go along the banks of any such river, creek or stream, and to assist the passage of the timber over the same by all means usual amongst lumbermen, doing no unnecessary damage to the banks of the said river, creek or stream.

In subsection 4 of s. 26 of the Act of 1950 which deals with the same subject-matter the language is:

> all persons driving timber down a lake or river shall have the right to go along the banks of the lake or river for the purpose of assisting, and to assist the floating of the timber by all means usual with lumbermen doing no unnecessary damage to the banks of the river.

As I have pointed out, para. 44 of the agreement uses the expression

> the lawful rights of timber owners or others to drive their logs or timber down the Ottawa River.

It is contended by the appellant that the meaning to be attributed to the words "driving" in the statute and "to

[1] (1881), 6 O.A.R. 456 at 476.

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drive" in para. 44 of the agreement is the floating or transmission of logs and timber with the aid of the natural current. Evidence was given without objection by both parties as to the meaning the expression "drive" or "driving" bore in the timber trade along the Ottawa River. To some of the witnesses the expression "to drive" meant allowing the logs to flow freely down the current without "pushing them or forcing them down". To others, the word "drive" meant, as a noun, a body of logs in the process of being floated, and "to drive" the floating of logs or permitting them to run free with the current. I do not think this evidence is of any assistance in interpreting these expressions. While the language of the 1884 section refers to driving timber down a river or stream, the 1950 section includes driving timber down a lake where, admittedly, there is either no or no appreciable current. The contention was carefully considered by the learned trial judge and led him to the conclusion that the parties to the agreement and the legislature intended nothing more than the perpetuation of the log-owners' former rights of passage. With this I agree.

In *Orr Ewing v. Colquhoun*[1] Lord Blackburn said in part (p. 854):

> Now the public who have acquired by user a right of way on land, or a right of navigation on an inland water, have no right of property. They have a right to pass as fully and freely, and as safely as they have been wont to do, but unless there is a present interference with that right, or it can be shewn that what is now done will necessarily produce effects which will interfere with that right, there is no *injuria,* and I think that if there be no *injuria,* the foundation of the right to have the thing removed, fails.

In *Ward v. Town of Grenville*[2], which dealt with the rights of lumbermen to float timber down the River Rouge in the Province of Quebec, Girouard J., delivering the judgment of the majority of the court, said that lumbermen merely enjoy a right of servitude to transmit their logs along a floatable river. Davies J. at p. 528 said:

> The true rule would seem to me to be that the right to float logs down such a river or stream as the one in question, being in the nature of a public easement, the rights of the log-owners and the riparian proprietors are concurrent and must be enjoyed reasonably without unnecessary interference one with the other, and without negligence.

[1] (1877), 2 App. Cas. 839. [2] (1902), 32 S.C.R. 510.

In *Quyon Milling Co. v. E. B. Eddy Co.*[1], Rinfret J. (as he then was), delivering the judgment of the court, said in part (p. 196):

> The right of lumbermen or others floating or "driving" timber is not a paramount right but an easement, which must be exercised with such care, skill and diligence as may be necessary to prevent injury to or interference with the concurrent rights of riparian proprietors and public corporations entitled to bridge or otherwise make use of the rivers, streams and watercourses.

As pointed out by Baron Parke in *Embrey v. Owen* and by Lord Kingsdown in *Miner v. Gilmour,* the right of a riparian owner to utilize the flow of the stream at common law was subject to the condition that he should not interfere with the rights of other proprietors, either above or below him. No such question arises in the present action. There is nothing inconsistent with the exercise of these rights to their fullest extent by the respondent with the exercise by the appellant of the easement or right of passage for its timber to which he is entitled under *The Lakes and Rivers Improvement Act.* We are asked to say in the present matter that these ancient rights of the riparian owner, so long embedded in the common law, have been taken away by inference, a conclusion which I find impossible to reach. Had the legislature intended that these rights should be restricted to any greater extent than has been done by the statute it would, no doubt, have said so in clear terms.

It is contended for the appellant that its right to drive its logs free in the current is made clear by para. 44 of the agreement of January 2, 1943. Apart from the fact that the appellant is not a party to that agreement, its terms clearly reserve to timber owners or others only such rights to drive their logs and timber down the Ottawa River as then existed. It does not purport to add to or implement such rights. Since there is, in my opinion, no basis for the right asserted under the legislation to which I have referred, para. 44 cannot affect the matter.

This action was commenced on March 31, 1954. By an amendment to the statement of claim made on March 5, 1957, a claim for damages was asserted with respect to what was said to be the practice at the dam at Des Joachims of decreasing on week-ends the amount of water flowing

[1] [1926] S.C.R. 194, 1 D.L.R. 1142.

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through the dam, with a consequent decrease in the quantity of water below it which occasioned loss of time and additional expense. Gale J. declined to deal with this claim for the reason that the damage complained of was said to have been caused after the issue of the writ, a conclusion with which I agree.

There remains for consideration the argument which has been addressed to us, based upon the laws of the Province of Quebec. If it had been intended by the plaintiff to assert that its rights under the laws of Quebec differed from those in Ontario, this should have been pleaded and the laws of Quebec proven at the trial (*Canadian National Steamships Co. Ltd. v. Watson*[1]). As this was not done, the matter was not considered either by Gale J. or by the Court of Appeal and when, as I have pointed out, an application for leave to amend the statement of claim was made before this Court, it was refused. In these circumstances, the issue is not properly before us since this is an appeal from the Court of Appeal and no such case was made before it. While it is true that in a proper case this Court requires no evidence of the laws in force of any of the provinces or territories of Canada (*Logan v. Lee*[2], *Canadian Pacific Railway Company v. Parent*[3]) such a case arises only when a law foreign to that of the *lex fori* has been pleaded.

It was said by the Judicial Committee in *Miner v. Gilmour*[4] and in *North Shore Railway v. Pion*[5], which concerned rights of riparian proprietors in Quebec, that there was no material distinction between the law of Quebec or Lower Canada and the law of England with respect to such rights and the case was conducted until it reached this Court on the assumption that this was the case. In the absence of evidence to the contrary, the learned trial judge, had the issue been raised, would have been required to assume that there was no difference and, in my opinion, the matter must be treated in this Court on that basis.

I would dismiss this appeal with costs, including the costs of the motion of May 30, 1960.

[1] [1939] S.C.R. 11, 1 D.L.R. 273.
[2] (1908), 39 S.C.R. 311.
[3] [1917] A.C. 195 at 201.
[4] (1859), 12 Moo. P.C.C. 131, 14 E.R. 861.
[5] (1889), 14 App. Cas. 612, 59 L.J.P.C. 25.

The judgment of Cartwright, Martland and Ritchie JJ. was delivered by

RITCHIE J.:—The circumstances giving rise to this appeal are fully outlined in the reasons for judgment delivered by Mr. Justice Locke with whose disposition of this appeal I am in full agreement.

It does, however, appear to me that the right of lumbermen in the Province of Ontario to use such rivers as the Ottawa for the transportation of their logs is a right which was recognized at common law as a part of the public right of navigation on such rivers, and that the statutes passed by the Province of Upper Canada, the Province of Canada and thereafter by the Province of Ontario dealing with the rights of lumbermen driving logs and the rights of riparian owners to construct dams did not have the effect of restricting the rights of riparian owners or of creating any new rights in the lumbermen but rather served to define the manner in which the common law rights of each were to be exercised concurrently.

In the case of *Caldwell v. McLaren*[1], the defendant did not claim that his right to use the stream in question for transporting lumber was a common law right, but rested his case entirely on the statutes of Upper Canada then in force. In the course of his decision Lord Blackburn said at p. 405:

> No question arises in the present case as to this right of navigation; and, at all events up to a period later than 1849, it was a question of great doubt what the law of Upper Canada was on this subject. The right now claimed to use streams, not navigable for general purposes, to float down timber, was one which in England, if it existed at all, from the nature of the country, could not be important: it never came in question in any case of which we are aware. It is one which, in a new wild country overgrown with timber, might be very important, and it must have been a question of doubt what was the right.

He goes on to say:

> It is obvious that it was very desirable that, for the purposes of encouraging the development of the country, these doubts should, as soon as possible, be solved. And as the legislature of Upper Canada had full power to enact what should be the law in that country, the real question is what did they enact?

[1] (1884), 9 App. Cas. 392.

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That the same considerations did not and do not apply to the Ottawa River can be seen from the decision of Strong C.J. in *In Re Provincial Fisheries*[1], where he says in relation *inter alia* to the Ottawa River:

> It appears from several cases decided in the courts of the province of Ontario that such lakes and rivers are to be considered navigable waters and that the rule of the English law as to navigable tidal waters applies to them. I refer particularly to the cases of *Parker v. Elliott*, 1 U.C.C.P. 470; *The Queen v. Meyers*, 3 U.C.C.P. 305; *The Queen v. Albert Sharp*, 5 Ont. P.R. 140; *Gage v. Bates*, 23 U.C.C.P. 116; *Dixson v. Snetsinger*, 23 U.C.C.P. 235.
>
> It is true that the right of fishing was not in question in any of these cases, the point in controversy in each of them having been the right of the riparian owner claiming under a grant from the Crown to the property in the bed of the river or lake opposite their land frontage. *It follows, however, from the reasoning of the courts that such navigable waters were to be likened in all respects to rivers which, according to the common law, came within the definition of navigable rivers.* (The italics are mine.)

As I read it, the passage from the judgment of Lord Kingsdown in *Miner v .Gilmour*[2], (a Quebec case) to which Mr. Justice Locke refers is definitive of the general law applicable to non-navigable rivers under which a riparian proprietor had the right to use the water flowing past his land for any purpose whatever, provided that he did not thereby interfere with the rights of other proprietors either above or below him. When the same passage is quoted by Lord Selborne in *North Shore Railway Company v. Pion*[3], (which was also an appeal from the Province of Quebec) it is immediately followed by this paragraph:

> The question, whether this general law was, in England, applicable to navigable and tidal rivers arose, and (*with the qualification only that the public right of navigation must not be obstructed or interfered with*) was decided in the affirmative by the House of Lords, in *Lyon v. Fishmongers' Company*, (1876), 1 App. Cas. 662 at p. 683. That decision was arrived at not upon English authorities only, but on grounds of reason and principle which (if sound, as their Lordships think them) must be applicable to every country in which the same general law of riparian rights prevail, unless excluded by some positive rule or binding authority of the lex loci. (The italics are mine.)

The public right of navigation in the tidal rivers of England is described in Halsbury's Laws of England, 2nd ed., vol. 33, at p. 566, in the following terms:

> The right of navigation in tidal waters is a right of way thereover for all the public for all purposes of navigation, trade, and intercourse. *It is a right given by the common law,* and is paramount to any right that the

[1] (1895), 26 S.C.R. 444.
[2] (1859), 12 Moo. P.C.C. 131 at 156, 14 E.R. 861.
[3] (1889), 14 App. Cas. 612, 59 L.J.P.C. 25.

Crown or a subject may have in tidal waters, except when such rights are created or allowed by Act of Parliament. Consequently every grant by the Crown in relation to tidal waters must be construed as subject to the public rights of navigation. It is not a right of property; it is merely a right to pass and repass, and to remain for a reasonable time. (The italics are mine.)

The fact that this right was long ago recognized as extending to the rivers of England which are *de facto* navigable can be seen from a tract entitled "De Jure Maris" which was published in 1787 and is attributed to Lord Hale. In this tract, under the heading "Concerning public stream", the following paragraph is to be found:

> There be some streams or rivers, that are private not only in propriety or ownership, but also in use, as little streams and rivers that are not a common passage for the king's people. Again, there be other rivers, as well fresh as salt, that are of common or publick use for carriage of boats and lighters. And these, whether they are fresh or salt, whether they flow and reflow or not, are *primâ facie publici juris,* common highways for man or goods or both from one inland town to another.

That the right of navigation extends to the movement of logs down the navigable rivers of Canada has been recognized in a great number of Canadian cases, including *The Queen v. Meyers, supra,* at p. 341, *Rowe v. Titus*[1], *Esson v. M'Master*[2], *Keewatin Power Company v. Town of Kenora*[3], per Anglin J., *Ward v. The Township of Grenville*[4], and *The Queen v. Robertson*[5].

The fundamental issue raised by this appeal, as I see it, is whether the log-owners' common law "right of passage" on such rivers as the Ottawa includes a right to the benefit of the flow of the waters thereof which has not been extinguished by statute and therefore constitutes one of "the lawful rights of timber owners and others to drive their logs or timber down the Ottawa River . . . ." which are expressly reserved by the terms of para. 44 of the agreement of January 2, 1943, between The King in the right of the Provinces of Ontario and Quebec, the respondent and the Quebec Streams Commission.

[1] (1849), 6 N.B.R. 326 at 333.
[2] (1842), 3 N.B.R. 501 at 507.
[3] (1907), 13 O.L.R. 237 at 243.
[4] (1902), 32 S.C.R. 510.
[5] (1882), 6 S.C.R. 52.

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It is clear that the rights of log-owners are not paramount to the rights of riparian proprietors and other users of the river, and this is specificially noted by Girouard J. in *Ward v. The Township of Grenville, supra,* at p. 524, where he said:

> We are now brought to face the proposition of law set up by the appellant, that "the use of the river as a highway for logs is the paramount use", and that the municipal bridge, although lawfully erected, was an obstruction to the river. I cannot assent to this proposition of law. It is contrary to the well settled jurisprudence not only of the Province of Quebec, but throughout the whole Dominion and the continent of America.

In the same case, Davies J. (as he then was) said of the rights of loggers at p. 531:

> I think their right to float logs down the river is a *concurrent* right which they can enjoy reasonably with those of the riparian owners and the municipalities which have by statutory authority constructed bridges in the public interest across the river, and not a paramount right, and must be exercised with due regard to the rights of these others.

In *Caldwell v. McLaren, supra,* at p. 404, Lord Blackburn put the matter thus:

> One of the practically most important rights of the owner of a portion of the soil of the river is the right to use the water for a mill, and in order to do so, or indeed for any other lawful purpose, to erect a dam on it. The public may have rights to navigate the stream, and whenever such a right exists, the right of the mill-owner and the right of the public come into conflict. They may co-exist, but when they do one or the other must be modified.

The respective rights of riparian owners and those using the waters of the river for purposes of navigation are carefully distinguished in the case of *Orr Ewing v. Colquhoun*[1], where Lord Hatherley said at p. 846:

> Now it appears to me that there are two totally distinct and different things; the one is the right of property, and the other is the right of navigation. The right of navigation is simply a right of way, and with that right of way you must not interfere in any manner by any course you take.

In the same case at p. 871 Lord Gordon made the following statement with which I respectfully agree:

> But, in my opinion, the interests of the public in such a case as your Lordships are considering are very different from those of conterminous proprietors. The rights of the public are of a limited nature. They possess no right of property in the water itself. They have a right to the use of it only for the purpose of navigation. They have no rights as regards the flow of the water, or the withdrawing of water, if the right of navigation is not affected. If that right is not interfered with, they are not, in my opinion, entitled to complain of operations by proprietors for the beneficial use and occupation of their properties.

[1] (1877), 2 App. Cas. 839.

In my view the rights of loggers are in no way greater than those of other members of the public. As they possess no right of property in the water they have no rights as regards its flow, and so long as their right to pass their logs down the river is maintained in the manner provided by statute they have no cause of action against a riparian owner exercising his right to dam the river.

I agree with Mr. Justice Locke and the learned trial judge that the use of the words "driving" and "to drive" as they occur in certain sections of the relevant statutes and in para. 44 of the agreement in no way affects or enlarges the common law rights of loggers and in my view the parties to the agreement and the legislature intended nothing more than the perpetuation of the log-owners' common law right of passage, subject to such modifications as are necessary to enable this right to coexist and be exercised concurrently with the right of the riparian owner to dam the river. The formula adopted by the legislature was to impose the requirement that riparian owners should construct and maintain slides or aprons for the passage of logs in the dams erected by them, and under this legislation the log-owners' right of passage is limited to the use of such slides or aprons.

I would dismiss this appeal with costs, including the costs of the motion of May 30, 1960.

Appeal dismissed with costs.

Solicitors for the plaintiffs, appellants: Mason, Foulds, Arnup, Walter, Weir & Boeckh, Toronto.

Solicitors for the defendant, respondent: Tilley, Carson, McCrimmon & Wedd, Toronto.

1961
*Feb. 14
Apr. 25

THE SOUTHERN CANADA POWER COMPANY LIMITED AND LA CORPORATION MUNICIPALE DE LA CITE DE GRANBY (*Defendants*) .. } APPELLANTS;

AND

DAME MARIE-PAULE TURGEON (*Plaintiff*) ..... } RESPONDENT.

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

Damages—Negligence—Infants—Municipal snow dump—Open to public—Power lines above land—Accumulation of snow reducing distance from ground to wires—Infant seriously burned while playing—Liability of municipality and power company—Civil Code, arts. 1053, 1054.

The defendant municipality was using a vacant lot, with the permission of its owners, as a dump for the snow removed from its streets. The transmission lines of the defendant power company were above the lot. The lot was open from all sides and was used by children to play. The municipality dumped snow up to a level of six to seven feet from the lines. A child, while playing on the snow, suffered severe burns when he came into contact with an 18 inch steel cable hanging from one of the lines.

The trial judge found both defendants jointly and separately liable. This judgment was affirmed by the Court of Queen's Bench. The defendants appealed to this Court.

Held: The appeals should be dismissed. The accident was the result of the common fault of both defendants.

The fault of the City was in the fact that it participated in the creation of a danger by dumping snow in such a dangerous place which was frequented by and accessible to young children. As to the power company, it was negligent in omitting to do anything, since it knew or should have forseen the danger caused by the accumulation of snow under its transmission lines.

APPEALS from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], affirming a judgment of Cliche J. Appeals dismissed.

G. Emery, for the defendant, appellant, Southern Canada Power Co.

G. Normandin, Q.C., for the defendant, appellant, the City of Granby.

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

[1] [1960] Que. Q.B. 1077.

M. Archambault, Q.C., and *G. Bélanger,* for the plaintiff, respondent.

The judgment of the Court was delivered by

TASCHEREAU J.:—Le 20 février 1955, le jeune Guy Turgeon âgé de 12 ans, a été victime d'un sérieux accident alors qu'il a reçu un choc électrique qui lui causa de graves blessures. Sa mère tant personnellement qu'en sa qualité de tutrice, a réclamé de la Southern Canada Power Company et de la Corporation Municipale de la Cité de Granby, la somme de $67,000.

L'honorable Juge Cliche de la Cour supérieure de Québec a condamné les défenderesses conjointement et solidairement à payer la somme de $31,658 sur la demande principale, et $1,302.50 sur la demande incidente. La Cour du banc de la reine[1] a unanimement confirmé ce jugement. Le montant accordé n'est pas contesté devant cette Cour, et seule la question de responsabilité doit être déterminée.

Les faits de cette cause ne présentent pas de difficultés et peuvent se résumer ainsi.

Il y a plusieurs années, la Southern Canada Power, l'une des défenderesses-appelantes, a construit une ligne de transmission de pouvoir électrique, sur un terrain appartenant en partie à la Miner Rubber Company et en partie à M. W. H. Miner. Ces derniers ont consenti en faveur de la compagnie un droit de servitude. Une ruelle partant de la rue Cowie divise les cimetières protestant et catholique dans la cité de Granby, et aboutit à un versant assez escarpé borné au sud par la rivière Yamaska. C'est au bas de cette pente que se trouve, courant dans une direction est-ouest, la ligne de transmission, parallèle à la rivière.

Cette ligne à haut voltage, a été construite suivant les règles de l'art, et la distance réglementaire de 25 pieds entre le sol et les fils électriques a été soigneusement observée. Mais il est arrivé, comme d'ailleurs la chose s'était produite dans le passé, que la Ville de Granby, l'une des défenderesses-appelantes, avec le consentement des propriétaires, a déposé de la neige à l'endroit où s'exerce la servitude de la Southern Canada Power. C'est là que se trouvait le dépotoir de la ville pour y jeter la neige qu'on ramassait dans les rues. Ceci a eu pour effet, évidemment, de réduire substantiellement la distance séparant les fils du sol.

[1] [1960] Que. Q.B. 1077.

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SOUTHERN CANADA POWER CO. *et al.* *v.* TURGEON

Taschereau J.

A la date où l'accident qui fait l'objet de ce litige s'est produit, soit le 20 février 1955, les enfants de la ville, avec le consentement tacite des intéressés, sont venus comme d'habitude par la petite ruelle séparant les deux cimetières, jouer et prendre leurs ébats, propres à leur jeune âge, sur les bancs de neige déposée et accumulée là par la ville.

La preuve révèle que comme conséquence de l'élévation du niveau de la neige, les fils électriques ne se trouvaient plus qu'à environ 6 ou 7 pieds du sol, et qu'un fil d'environ 18 pouces de longueur pendait accroché à la ligne, et offrait un danger additionnel. C'est pendant qu'il jouait avec ses compagnons sur l'amoncellement de la neige, que le jeune Turgeon a touché ce fil suspendu et a reçu les blessures pour lesquelles on réclame.

Comme la Cour supérieure et celle du banc de la reine, je suis d'opinion que cet accident est le résultat de la faute commune des deux appelantes. La faute de la Ville se trouve dans le fait qu'elle a participé à la création du danger qui a eu les tristes conséquences que l'on connaît. Le fait d'accumuler ainsi de la neige sous la ligne de transmission, dans un endroit où le public avait accès, présentait sans doute un danger pour la jeunesse tolérée sur ces lieux. Cette accumulation dans ce dépotoir réduisait la hauteur des fils, contrairement aux règlements qui prescrivent une plus grande distance afin d'offrir plus de sécurité. Je suis d'opinion que la Ville ne peut être justifiée de la faute qui lui est imputée.

La faute de la compagnie est une faute d'omission. Cette dernière savait ou devait savoir le danger que faisait naître cette accumulation de neige sous sa ligne de transmission. Cependant, elle n'a rien fait pour prévenir le danger. La dernière inspection a été faite le 21 décembre de l'année précédente, et depuis cette date elle est demeurée passive, alors qu'elle ne pouvait ignorer que la Ville déposait de la neige sous ses fils électriques. Elle a négligemment fermé les yeux devant un danger probable et facilement prévisible. Son inaction doit nécessairement engendrer sa responsabilité.

L'appel de la Cité de Granby, de même que l'appel de la Southern Canada Power Company Limited, doivent être rejetés avec dépens.

Appeals dismissed with costs.

Attorneys for the defendant, appellant, Southern Canada Power Co.: Létourneau, Quinlan, Forest, Emery, Raymond & Bouchard, Montreal.

Attorneys for the defendant, appellant, the City of Granby: Normandin & Léveillé, Granby.

Attorney for the plaintiff, respondent: G. Bélanger, Granby.

WESLEY GOLDBORN HARNISH .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

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*Feb. 13, 14
Apr. 25

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA

In Banco

Criminal law—Habitual criminal—Application for preventive detention of accused as an habitual criminal—7 clear days notice to be given accused—Time when notice to be given—Evidence of persistent criminal life—Whether trial judge entitled to look at evidence leading to conviction on substantive offence—Criminal Code, 1953-54 (Can.), c. 51, ss. 660, 662.

The accused was convicted on the charge of breaking and entering and committing theft. On the day of his conviction, but before the time set for the sentencing, notice was given by the Crown that an application would be made 10 days later to impose upon him a sentence of preventive detention on the ground that he was an habitual criminal. The notice set out prior convictions and alleged that the accused was leading persistently a criminal life. A period of 25 months had elapsed since the accused was released from imprisonment for the last of these offences and his commission of the substantive offence in the present case. The trial judge found the accused to be an habitual criminal and took into consideration the nature and circumstances surrounding the commission of the substantive offence. This judgment was affirmed by the Supreme Court of Nova Scotia *in banco*. The accused appealed to this Court.

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*PRESENT: Taschereau, Locke, Fauteux, Abbott, Martland, Judson and Ritchie JJ.

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Held: The appeal should be dismissed.

1. Notice of the application required by s. 662(1)(*a*)(ii) of the *Criminal Code* may be given at any time that allows 7 clear days before the application and is also before the day of sentence on the substantive offence. There is nothing in the present *Criminal Code* to preclude such notice being initiated, as it was in the present case, by the giving of 7 days notice after conviction but before sentencing, although notice given 7 days before the trial, as was done under the provisions of the former Code, would still be valid as this would necessarily be 7 days before the conviction and therefore before the time of making the application. *R. v. Stepanoff,* 33 C.R. 273, overruled.

2. The object of the notice is to prevent the accused from being taken by surprise as to the circumstances upon which the Crown intends to rely, but as the statute makes consideration of the substantive conviction a prerequisite to the hearing of the application, the Court is entitled to treat it as a material circumstance in reaching its conclusion on the merit of the application, whether such conviction is specifically mentioned in the notice or not. The trial judge, in reaching his conclusion, was fully justified in considering the conviction for the substantive offence and the circumstances surrounding it in light of the accused's past record. The finding of the trial judge should not be disturbed, as the nature of the substantive offence which was not only carefully planned but was similar in nature to four other crimes for which the accused had been previously convicted, was in itself evidence that he was leading persistently a criminal life.

3. The fact that a conviction which had not been specified in the notice of application and which had occurred before the appellant was 18 years of age, was wrongly admitted together with evidence of an acquittal, did not influence or prejudice the trial judge against the accused.

APPEAL from a judgment of the Supreme Court of Nova Scotia *in banco*[1], affirming a judgment of Ilsley C.J. Appeal dismissed.

L. L. Pace and *Chas. W. MacIntosh,* for the appellant.

Malachi C. Jones, for the respondent.

The judgment of the Court was delivered by

RITCHIE J.:—This is an appeal brought by leave of this Court from a judgment of the Supreme Court of Nova Scotia en banc[1] affirming the finding of Ilsley C.J. that the appellant was an habitual criminal and the consequent imposition of a sentence of preventive detention pursuant to the provisions of s. 660 of the *Criminal Code.*

[1] (1961), 45 M.P.R. 141, 34 C.R. 21, 129 C.C.C. 188.

On February 5, 1960, the appellant was convicted on an indictment charging that he did

> . . . on or about the 6th day of December, 1959, unlawfully break and enter the store of H. G. Guild Limited, situate at Musquodoboit and did there and then commit the indictable offence of theft contrary to Section 292 of the Criminal Code.

On the day of the conviction but before the time had arrived for considering the question of sentence thereon, the appellant was served by the prosecutor with notice that an application would be made to the Court on the 15th of February to impose upon him a sentence of preventive detention on the ground that he was an habitual criminal. This notice specified seven separate and independent occasions on which the appellant, since attaining eighteen years of age, had been convicted of an indictable offence for which he was liable to imprisonment for five years or more and proceeded to allege that the appellant practised no trade or profession, lived without employment on the proceeds of crime and was leading persistently a criminal life.

At the hearing held before the Chief Justice pursuant to this notice, the Crown produced the very considerable criminal record of the appellant, and in the course of so doing inadvertently introduced evidence of a conviction and an acquittal which had not been mentioned in the notice. At this hearing evidence was given by police officers that the appellant had been under police surveillance since his last release from prison in October 1957, that he had no regular employment, and that his general reputation in the community where he lived was not good, but there was no suggestion that he had been convicted or even arrested between the time of his last release and the time when he committed the substantive offence and it appeared that he had made some money by selling beer bottles to the Nova Scotia Liquor Commission.

In determining that the appellant was an habitual criminal and sentencing him accordingly, the learned Chief Justice undoubtedly took into account the nature and circumstances of the offence of which he had just been convicted which is hereinafter referred to as "the substantive offence".

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In dismissing the appellant's appeal from this determination, the Supreme Court of Nova Scotia en banc held that, having regard to the nature of the substantive offence and the circumstances of preparation, planning and deliberation which accompanied it, the evidence as a whole supported the conclusion that the accused was leading persistently a criminal life and found that the Chief Justice had not been influenced by the fact that the evidence of an acquittal and a conviction referred to above had been admitted at the hearing.

In holding that the notice of the application required by s. 662(1)(*a*)(ii) of the *Criminal Code* "may be given at any time that allows seven clear days before the application and is also before the day of sentence on the substantive offence", Mr. Justice Doull had occasion to state:

> I am quite clear that it (the notice) is sufficient and I am of opinion that *R. v. Stepanoff* (32 C.R. 362) was wrongly decided by following words of the former Act which have now been carefully omitted and by reading Section 662(*a*)(ii) as if it were the same as former Section 575C(4)(*b*).

The case of *R. v. Stepanoff*[1] to which the learned judge referred was a decision of Lazure J. of the Quebec Court of Queen's Bench, Crown Side, which was subsequently affirmed by the Court of Appeal[2], holding that "the notice called for in s. 662 must be given before the trial on the primary charge commences". In the course of his reasons for judgment on appeal Mr. Justice Hyde said at p. 276:

> There is nothing in the terms of these sections of the new Code indicating any reason for a change in the practice followed under the old one. Furthermore, as the learned trial judge points out in his notes, the economy of our criminal law requires that an accused shall know before he makes his plea the exact nature of the charge with which he is faced and the consequences thereof.

As a conflict plainly exists between the Appellate Courts of Nova Scotia and Quebec respecting the very important question of the time at which notice of application for imposition of the sentence of preventive detention is to be initiated and as the difference of opinion turns in some degree on the wording of both the present *Criminal Code*

[1] (1960), 32 C.R. 362. [2] (1960), 33 C.R. 273, 128 C.C.C. 48.

and that of c. 55 of the Statutes of Canada, 1947, it will perhaps be convenient to consider the relevant provisions of these two statutes together:

THE PRESENT CRIMINAL CODE

660. (1) Where an accused is convicted of an indictable offence the court may, upon application, impose a sentence of preventive detention in addition to any sentence that is imposed for the offence of which he is convicted if

(*a*) the accused is found to be an habitual criminal, and

(*b*) the court is of the opinion that because the accused is an habitual criminal, it is expedient for the protection of the public to sentence him to preventive detention.

660. (2) For the purposes of subsection (1), an accused is an habitual criminal if

(*a*) he has previously, since attaining the age of eighteen years, on at least three separate and independent occasions been convicted of an indictable offence for which he was liable to imprisonment for five years or more and is leading persistently a criminal life, or

(*b*) he has been previously sentenced to preventive detention.

CHAPTER 55, STATUTES OF CANADA, 1947

575B. Where a person is convicted of an indictable offence committed after the commencement of this Part and subsequently the offender admits that he is or is found by a jury or a judge to be a habitual criminal, and the court passes a sentence upon the said offender, the court, if it is of the opinion that, by reason of his criminal habits and mode of life, it is expedient for the protection of the public, may pass a further sentence ordering that he be detained in a prison for an indeterminate period and such detention is hereinafter referred to as preventive detention and the person on whom such a sentence is passed shall be deemed for the purpose of this Part to be a habitual criminal.

575C. (1) A person shall not be found to be a habitual criminal unless the judge or jury as the case may be, finds on evidence,

(*a*) that since attaining the age of eighteen years he has at least three times previously to the conviction of the crime charged in the indictment, been convicted of an indictable offence for which he was liable to at least five years' imprisonment, whether any such previous conviction was before or after the commencement of this Part, and that he is leading persistently a criminal life; or

(*b*) that he has on a previous conviction been found to be a habitual criminal and sentenced to preventive detention.

575C. (2) In any indictment under this section it shall be sufficient, after charging the crime, to state that the offender is a habitual criminal.

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662.(1) The following provisions apply with respect to applications under this Part, namely

(a) an application under subsection (1) of section 660 shall not be heard unless

(i) the Attorney General of the province in which the accused is to be tried consents,

(ii) seven clear days' notice has been given to the accused by the prosecutor specifying the previous convictions and the other circumstances, if any, upon which it is intended to found the application, and

(iii) a copy of the notice has been filed with the clerk of the court or the magistrate, as the case may be,

662. (2) An application under this Part shall be heard and determined before sentence is passed for the offence of which the accused is convicted and shall be heard by the court without a jury.

662. (3) For the purposes of section 660, where the accused admits the allegations contained in the notice referred to in paragraph (a) of subsection (1), no proof of those allegations is required.

575C. (3) In the proceedings on the indictment the offender shall in the first instance be arraigned only on so much of the indictment as charges the crime, and if on arraignment he pleads guilty or is found guilty by the judge or jury, as the case may be, unless he thereafter pleads guilty to being a habitual criminal, the judge or jury shall be charged to enquire whether or not he is a habitual criminal and in that case it shall not be necessary to swear the jury again.

575C. (4) A person shall not be tried on a charge of being a habitual criminal unless

(a) the Attorney General of the province in which the accused is to be tried consents thereto; and

(b) not less than seven days' notice has been given by the proper officer of the court by which the offender is to be tried and the notice to the offender shall specify the previous convictions and the other grounds upon which it is intended to found the charge.

In the 1947 statute these sections are grouped under the heading "PART X(A) HABITUAL CRIMINALS" whereas the sections of the present Code appear in Part XXI under the heading "PREVENTIVE DETENTION". That these headings reflect a basic difference in approach to the question with which both enactments are concerned can be seen from the fact that the 1947 statute provides for a *trial* "on a charge of being a habitual criminal" whereas the proceeding for which provision is made in the present *Criminal Code* is the hearing and determination of an

application to impose a sentence of preventive detention. The following differences between these two enactments are at once apparent:

1. Under the 1947 statute the method of bringing the matter before the Court was to include in the indictment for the substantive offence a statement that "the offender is a habitual criminal" (s. 575C(2)) whereas under the present Code the matter is to be raised by an application to impose a sentence of preventive detention (s. 660(1)).
2. Under the 1947 statute the decision as to whether or not a sentence of preventive detention was to be imposed was not to be made until after sentence had been passed for the substantive offence (s. 575B) whereas under the present Code the application for imposition of such sentence is to be heard and determined before sentence is passed on the substantive offence (s. 662(2)).
3. Under the 1947 statute the issue of whether or not the accused is an habitual criminal may be tried by a jury (s. 575C(3)) whereas under the present Code the application to impose preventive detention is to be heard by the Court without a jury (s. 662(2)).

The case of *Brusch v. The Queen*[1] clearly establishes that "the charge of being a habitual criminal" referred to in s. 575C(4) was not a criminal offence and it is noteworthy, as has been indicated, that the new Code omits all reference to such "a charge" and the relevant sections do not purport to make provision for its trial but are carefully restricted to the hearing and determination of an application to impose sentence of preventive detention.

The fact that the 1947 statute, like that in force in England, (*Prevention of Crime Act*, (1908), c. 59) provided for the inclusion of the allegation of being an habitual criminal in the indictment charging the substantive offence (s. 575C(2)) has a significant bearing on the question of the time when notice was required to be given. It has been held under the equivalent provisions of the English statute that

> . . . when a prisoner is found guilty of the first charge, the charge as to being a habitual criminal must be tried at the same sessions, and cannot be postponed. You cannot split an indictment. . . .

(per Phillimore J. in *The King v. George Jennings*[2]).

It follows that as the substantive offence and the habitual criminal charge were required to be disposed of at the same sessions, the seven days' notice required under the old

[1] [1953] 1 S.C.R. 373, 16 C.R. 316, 105 C.C.C. 340, 2 D.L.R. 707.
[2] (1910), 4 Cr. App. R. 120.

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s. 575C(4)(*b*) was necessarily referable to seven clear days before the trial of the indictment which contained both allegations.

As was said by Mr. Justice Estey in *Brusch v. The Queen, supra,* at p. 381:

> What is more significant is that even in the indictment it is sufficient "to state that the offender is a habitual criminal" (575C(2)) and this statement can be added only after "not less than seven days' notice" (575C(4)(b)).

It can be seen, therefore, that whereas under the 1947 statute notice that the offender was to "be tried on a charge of being a habitual criminal" had to be given seven days before the trial of the substantive offence with which it was linked in the indictment, there is nothing in the present *Criminal Code* to preclude the notice of an application for preventive detention being initiated as it was in the present case by the giving of seven days' notice after conviction but before sentence, although notice given seven days before the trial as heretofore would still be valid as this would necessarily be seven days before the conviction and therefore before the time of making the application.

In the case of *Regina v. Stepanoff, supra,* both the trial judge and the judges of appeal appear to have placed reliance on the decision of this Court in *Parkes v. Regina*[1], as holding that the preventive detention application contemplated by s. 660 must be heard "immediately after conviction of the substantive offence".

In the course of his decision, Lazure J. says:

> From the various reasons for judgment given in the *Parkes* case, it is evident that this notice must be given at least seven days before the trial of the accused and that immediately after the verdict, the Crown must request the judge to defer sentence and forthwith hear the evidence supporting the allegations contained in the notice.

With all respect, I am unable to find support for such a contention in the reasons of this Court in *Parkes v. The Queen, supra,* and I can only think that the learned judge fell into the error of attributing the meaning of "forthwith" to the word "immediately" as used in that case.

[1] [1956] S.C.R. 768, 24 C.R. 279, 116 C.C.C. 86.

In the course of his reasons in *Parkes v. The Queen, supra,* Mr. Justice Rand traces the history of the use of the word "immediately" in this connection and at p. 773 refers to the meaning attributed to it by Branson J. in *Rex v. Vale*[1], where he said at p. 356:

> "Follow immediately" means dealing with the case without hearing the man's previous history and before sentencing him.

Parkes v. The Queen, supra, is certainly authority for the proposition that statements concerning the character or past life of an accused person are not to be interposed before the court between the time of his conviction and the opening of the hearing on the application to sentence him to preventive detention, but the fact that no such step is to be taken between the entering of the conviction and the opening of the hearing does not mean that the one must follow the other immediately in point of time. It is true that in *Parkes v. The Queen, supra,* this Court approved of the notice of application which in that case was given before the trial of the substantive charge, but as Mr. Justice Doull has said in the course of his reasons in the present case, ". . . it does not follow that a notice at any time that is seven clear days before the 'application' is not sufficient."

In support of the contention that our criminal law requires that an accused shall know before he makes his plea the exact consequences of conviction of the offence with which he is charged, counsel for the appellant cited the provisions of s. 572(1) of the present *Criminal Code* which are as follows:

> Where an accused is convicted of an offence for which a greater punishment may be imposed by reason of previous convictions, no greater punishment shall be imposed upon him by reason thereof unless the prosecutor satisfies the court that the accused, before making his plea, was notified that a greater punishment would be sought by reason thereof.

In my view this section has no application to the imposition of a sentence of preventive detention. There is no valid analogy between the imposition of punishment "by reason of previous convictions" and the imposition of a sentence of preventive detention; in the former case "previous convictions" automatically expose the offender to greater punishment, whereas in the latter the separate and distinct

[1] [1938] 3 All E.R. 355.

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issue of whether or not he is an habitual criminal must be determined against him before the sentence of preventive detention can be imposed.

With the greatest respect for the views expressed by the courts of the Province of Quebec in the case of *Regina v. Stepanoff, supra,* I share the opinion expressed by Mr. Justice Doull that the notice of an application for imposition of a sentence of preventive detention may be given at any time that allows seven clear days before the application and is also before the day of sentence on the substantive offence. There can, accordingly, be no valid objection to the notice given in the present case.

It was, however, strongly contended before this Court that this appeal should be allowed on the ground that the evidence leading to the conviction on the substantive offence should not have been taken into consideration by the learned trial judge in making his determination under s. 660 of the Code. This contention was supported on the ground that the conviction for the substantive offence was not set out in the notice of application as one of the "previous convictions and other circumstances upon which it is intended to found the application" which are required to be specified in such notice under the terms of s. 662(1)(*a*)(ii). It is to be remembered, however, that an accused must have been convicted of the substantive offence before the Court can hear the application to which the notice relates (see s. 660(1)). Such conviction is, therefore, not one of "*the previous convictions*" referred to in s. 662(1)(*a*)(ii) *but the conviction* upon which the jurisdiction of the Court to hear the application is founded. The object of the notice is to prevent the accused from being taken by surprise as to the circumstances upon which the prosecution intends to rely, but as the statute itself makes consideration of the substantive conviction a prerequisite to the hearing of the application, the Court is also entitled to treat it as a material circumstance in reaching its conclusion on the merits of the application whether such conviction is specifically mentioned in the notice or not.

In the present case, however, the conviction of the substantive offence was recited in the first paragraph of the notice in the following terms:

TAKE NOTICE that, whereas you have been convicted for that you did at or near Musquodoboit Harbour in the County of Halifax on or about

the 6th day of December, A.D. 1959, unlawfully break and enter the store of H. G. Guild Limited, situate at Musquodoboit Harbour and did then therein commit the indictable offence of theft contrary to Section 292 of the Criminal Code.

There can be no doubt that the learned trial judge was fully justified in considering the conviction for the substantive offence and the circumstances surrounding it in light of the appellant's past record in reaching his conclusion.

Although the evidence taken at the trial for the substantive offence was not before this Court, I accept Mr. Justice Currie's statement that it shows

a system, a deliberate planning, a careful preliminary examination of the premises where the safe was blown open at night and money stolen therefrom.

As Mr. Justice Doull says, "This was no crime on the spur of the moment, but a carefully planned crime."

Consideration must, of course, be given to the fact that the appellant had not been convicted of any offence since his release from prison in October 1957, that there is some evidence of his having made a little money selling beer bottles and that the police evidence as to his criminal character and reputation was largely based on past experience, but these circumstances which were primarily for the consideration of the learned trial judge are not sufficient in my view to counteract the effect of the substantive crime which was not only carefully planned but was similar in nature to four other crimes for which the appellant had been previously convicted.

In the case of *Kirkland v. The Queen*[1], the accused had been out of prison for six months before the commission of the substantive offence, the circumstances of which were consistent with the view that he yielded to a sudden temptation, and in the course of his decision allowing the appeal from a sentence of preventive detention Mr. Justice Cartwright said:

It was argued on behalf of the respondent that the appellant's criminal record coupled with the conviction of the substantive offence formed a sufficient basis for the finding that he was an habitual criminal. As to this I agree with the view expressed by Lord Reading L.C.J. giving the judgment of the Court of Criminal Appeal in *Rex v. Jones* (1920) 15 Cr. App. R. 20 at 21:

> "The legislature never intended that a man should be convicted of being a habitual criminal merely because he had a number of previous convictions against him."

[1] [1957] S.C.R. 3, (1956), 25 C.R. 101, 117 C.C.C. 1.

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There have however been cases in which the Court of Criminal Appeal has upheld a finding that a prisoner was an habitual criminal on the ground that the nature of the substantive offence viewed in the light of his previous record was in itself evidence that he was leading persistently a criminal life.

In my view the present case comes within the latter category and the evidence of the appellant selling beer bottles and perhaps doing other odd jobs between convictions is subject to the consideration referred to by Darling J. (as he then was) in *Rex v. George Jennings, supra,* at p. 122, when he said:

> If a man occupies a day or two of his time in doing work, that does not prevent him from being a habitual criminal. The word "habitual" is used in other collocations than in the phrase "habitual criminal". For instance, it is applied to drunkards, but a habitual drunkard does not mean a person who is never sober. Drunkenness is not continuous, nor are the acts of committing crimes.

I am accordingly of opinion that the finding and the sentence imposed by Chief Justice Ilsley should not be disturbed on this ground.

It was also contended on behalf of the appellant that evidence of a conviction which had not been specified in the notice of application and which had occurred before the appellant was eighteen years of age was wrongly admitted together with evidence of an acquittal.

Apparently these items were inadvertently not deleted when the appellant's record was put in evidence but no objection was taken to their admissibility, and I agree with Currie J. that

> It is seriously to be doubted if the learned Chief Justice did more than glance at the matters to which objection is now taken. It is inconceivable that such an experienced judge would be influenced or prejudiced against the accused to even the slightest extent even if he did look at them.

I would dismiss this appeal.

Appeal dismissed.

Solicitor for the appellant: L. L. Pace, Halifax.

Solicitor for the respondent: M. C. Jones, Halifax.

E. R. HABLIZEL AND KATHERINE HABLIZEL (*Claimants*) ..... } APPELLANTS; *Nov. 22, 23

1960

AND

THE MUNICIPALITY OF METROPOLITAN TORONTO (*Contestant*) } RESPONDENT.

1961 Apr. 25

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Expropriation—Strip of land—Non-conforming use of remaining land—Basis of valuation by Court of Appeal upheld.

The appellants owned certain lands, roughly triangular in shape, on which they grew and sold nursery stock. As the nursery business had been established prior to the passage of a by-law which zoned the property for single family detached residences, it was a legal non-conforming use of the land. A municipal by-law expropriated a strip from the frontage of the land for a grade separation and the subsequent raising of the grade cut off access to the street. The appellants could not get out on the second side of their property because of a railway line, nor for business purposes on the remaining side, where they had sold a parcel of land but had made no reservation for right of access for business purposes. The purchaser had conveyed a one-foot reservation to the township, which initially permitted the reservation to be crossed for any purpose, but later only on condition that the appellants used their property in conformity with the zoning by-law. As a result, the appellants could use the land only for residential purposes. The appellants appealed to this Court from a judgment of the Court of Appeal reducing the amount of the award made by the arbitrator in arbitration proceedings resulting from the expropriation.

Held: The appeal should be dismissed, subject to a correction in the item of land for growing purposes.

The only difference in the amount of compensation between the arbitrator and the Court of Appeal was in the value of the land. The former reached his figure by allowing a specified amount per foot on an assumed frontage, whereas the Court of Appeal separated the value of that part of the land used as a sales station from that part used for growing purposes.

The Court of Appeal was right in its finding of error in the award of the arbitrator in his finding of value to the owner based on a valuation of land as though it were open for unrestricted commercial development, whereas it had but a limited non-conforming use.

The Court of Appeal correctly regarded the earnings record of the business as significant in arriving at value to the owner. This evidence had been overlooked by the arbitrator. The appellant's evidence of higher earnings to be attributed to the business based upon an annual accretion in the value of the inventory, which did not show in the income tax return, was not entitled to any weight.

Evidence of value of commercial property used for a sales station, and evidence of value of commercial properties in the neighbourhood had little or no relation to the valuation of the appellant's non-conforming user, when the only alternative use to which the land would be put was for residential purposes.

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

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HABLIZEL v. MUNICIPALITY OF METROPOLITAN TORONTO

APPEAL from a judgment of the Court of Appeal for Ontario, reducing the amount of the award of the arbitrator in arbitration proceedings. Appeal dismissed.

B. W. Grossberg, Q.C., and *H. J. Bliss*, for the claimants, appellants.

A. P. G. Joy, Q.C., and *G. M. Mace*, for the contestant, respondent.

The judgment of the Court was delivered by

JUDSON J.:—The appellants were the claimants in arbitration proceedings resulting from the expropriation of part of their lands on the south side of Dundas Street in the Township of Etobicoke. The arbitrator awarded them the sum of $143,000. On the appeal of the municipality the Court of Appeal reduced this to $55,825. The appellants now seek to have the arbitrator's award restored or, in the alternative, an increase in the amount awarded by the Court of Appeal.

In 1936, the appellants purchased a parcel of land containing 8.77 acres for the sum of $4,000. In 1953, they sold 6 acres for $45,000. They were then left with a parcel of 2.77 acres roughly triangular in shape and fronting on Dundas Street. The frontage on Dundas Street was 563 feet but because of the shape the usable frontage has been taken to be about 400 feet.

The appellants grew and sold nursery stock on the premises. They also had a larger property at Caledon which they used for the growing of other stock which they used in their landscaping business.

The lands on Dundas Street were zoned by the municipality for single family detached residences. The nursery business was established before the zoning by-law was passed and was therefore a legal, non-conforming use of the land.

On March 6, 1956, the Municipality of Metropolitan Toronto passed a by-law which expropriated a strip of land on the Dundas Street frontage containing .773 acres for a grade separation at the railway. The subsequent raising of the grade on Dundas Street has cut the appellants off from access to that street. They cannot get out on the east side because of the Canadian Pacific Railway line; they cannot get out on the south side for business purposes because of their sale of the 6 acres. When they sold this property they

made no reservation of a right of access for business purposes. The purchaser of the 6 acres conveyed a one-foot reservation to the Township of Etobicoke and this blocks the end of Cedarcrest Drive which was established on the six-acre subdivision. The township permitted the reservation to be crossed for any purpose up to October 31, 1958, but only afterwards on the condition that the appellants used their property in conformity with the zoning by-law. The appellants were, therefore, finally in this position. They had a house on a two-acre lot which they could use only for residential purposes. They had no access to Dundas Street and they could not continue their business on the property.

The arbitrator accepted the appellants' submission that the highest and best use of the land before the expropriation was for the nursery business and determined the compensation on that basis as follows:

Value before expropriation—Land		$120,000.00
Buildings		35,000.00
		$155,000.00
Less value after expropriation—		
Land and buildings		25,000.00
		$130,000.00
Compulsory taking 10 per cent.		13,000.00
Total		$143,000.00

The Court of Appeal also valued the land before expropriation on the basis of its business use but divided it into two parts and made separate valuations of that part of the land used for the growing of stock and that part used for its sale. On this basis, the Court of Appeal determined the compensation as follows:

Land for sales station purposes (approximately ½ acre)	$ 30,000.00
Land for growing purposes (about 1½ acres)	10,750.00
Buildings	35,000.00
	$ 75,750.00
Less value of remaining property	25,000.00
	$ 50,750.00
Compulsory taking 10 per cent.	5,075.00
Total	$ 55,825.00

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It is apparent from these figures that the only difference between the learned arbitrator and the Court of Appeal is in the value of the land—in the one case $120,000 and in the other $40,750. The arbitrator reached his figure by allowing $300 per foot on an assumed frontage of 400 feet. The Court of Appeal, being of opinion that the appellants were carrying on a combined business, allowed $30,000 for that part used as a sales station, calculated on the basis of $300 per foot frontage of 100 feet and $7,500 per acre for that part used for growing purposes.

The Court of Appeal found error in the award of the learned arbitrator in his finding of value to the owner based on a valuation of land as though it were open for unrestricted commercial development, whereas it had but a limited non-conforming use. What is being expropriated here is a strip of land containing .773 acres and the non-conforming use. The task of determining value to the owner, on the evidence given in this case was not an easy one but evidence of value based upon a right of commercial development could be of no assistance. In my respectful opinion the Court of Appeal was right in approaching the problem as it did. The compensation of $30,000 as the value of the land attributable to the sales station was generous, based as it was upon the high figures which were given for commercial land. The value of $7,500 per acre for land used for growing purposes was the highest permitted by the evidence and on this point, as is pointed out in the reasons of the Court of Appeal, there was no contradiction.

The learned arbitrator made a finding that the claimant as a prudent man would pay $143,000 rather than be deprived of the property expropriated. To me this is a startling figure. I cannot see how the claimant or any prudent man in his position could possibly think of paying such a sum. The Court of Appeal correctly regarded the earnings record of this business as significant on this point. The income tax returns, which included earnings attributable to the Caledon property, showed the following net earnings:

1951	$3,801.18
1952	4,347.84
1953	4,514.01
1954	4,925.04
1955	4,641.77
1956	3,678.13
1957	7,116.02

In arriving at these earnings no deductions were made for wages of the claimant nor for interest on invested capital. I think that it is clear on these statements that the business was doing nothing more than producing a modest wage for one of the owners. Yet the original award gives the owners a sum which would produce, if invested at 5 per cent per annum, more than the entire business ever brought in, and that, without risk or the necessity of working. In addition they are left with the house and 2 acres.

The appellant submits that the Court of Appeal was in error in its emphasis upon the significance of the earnings of the business as shown by the income tax statements and also in its failure to attribute higher earnings to the business based upon an annual accretion in the value of the inventory which did not show in the income tax return. On the second point it is quite impossible to come to a conclusion which differs from that of the arbitrator and the Court of Appeal. Neither tribunal thought that the evidence on this matter, which came entirely from the appellant, was entitled to any weight. I am also of the opinion that there was no error in the Court of Appeal in its estimate of the importance of the earnings from the business in arriving at value to the owner and that this evidence was overlooked by the arbitrator when he made his finding that the appellant "as a prudent man would pay $143,000 rather than be deprived of the property expropriated".

The award of the arbitrator ignored the fact that the use of the land was a non-conforming use and that the only change that could be made was to a use for single family detached residences. The Court of Appeal was right in its opinion that evidence of value of commercial property on Yonge Street, used for a sales station, and evidence of value of commercial properties in the neighbourhood had little or no relation to the valuation of the appellant's non-conforming use when the only alternative use to which the land would be put was for residential purposes as above defined.

My conclusion therefore is that the Court of Appeal was correct in its review of this award and that no error has been shown except in the item of land for growing purposes (about 1½ acres)—$10,750. Both parties agree that this figure, as a matter of calculation, should be approximately

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$18,000. The parties can agree on the precise figure and the total amount to which the award should be increased. Subject to this, the appeal should be dismissed with costs.

It should be noted that both the arbitrator and the Court of Appeal made a 10 per cent allowance for compulsory taking. The arbitrator stated that loss of stock and merchandise arising out of business disturbance was included in this item. There was no cross-appeal on this point. I mention this matter because the propriety of this allowance is under consideration in this Court in two other reserved cases and has not been raised in this case.

Appeal dismissed with costs.

Solicitors for the appellants: Levinter, Grossberg, Shapiro & Dryden, Toronto.

Solicitor for the respondent: C. Frank Moore, Toronto.

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*Feb. 21
May 29

QUEENSWAY CONSTRUCTION LTD. AND FRANCES TRUMAN (*Respondent*) ..... APPELLANT;

AND

TRUSTEEL CORPORATION (CANADA) LTD. (*Applicant*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Sale of land—Contract made in contemplation of compliance with planning statute—Whether contract illegal as being in contravention of statutory prohibition—The Planning Act, 1955 (Ont.), c. 61, s. 24.

The vendor who had entered into a contract for the sale of 95 building lots subsequently moved for a declaration that the contract was one that was prohibited by s. 24 of *The Planning Act*. Subsection (1) of the section prohibits agreements for the sale and purchase of land in an area of subdivision control unless the land is described in accordance with and is within a registered plan of subdivision. The lots, which were within such an area, were described by reference to a plan which was to be registered in the county Registry Office. At the hearing the declaration was made as asked and affirmed on appeal. The assignee-purchaser appealed to this Court.

*PRESENT: Kerwin C.J. and Locke, Abbott, Martland and Judson JJ.

Held (Martland J. dissenting): The appeal should be allowed.

Per Kerwin C.J. and Locke, Abbott and Judson JJ.: The contract was not void for illegality as being made in contravention of a statutory prohibition. On the contrary, the contract was entered into in contemplation of compliance with the statute, which, by s. 24(3)(*c*), provides for this very situation by way of exception to the prohibition. The statute permits vendor and purchaser to enter into a contract subject to the condition of subsequent consent of the planning board. This was all that the parties had done in this case. *Zhilka v. Turney*, [1956] O.W.N. 369 and 815; *Re Karrys Investments Ltd.*, [1959] O.W.N. 325, approved; *Glenn v. Harvic Construction Co.*, [1958] O.W.N. 406, disapproved.

Per Martland J., *dissenting*: The entering into the agreement was prohibited by subs. (1) of s. 24 of *The Planning Act*. The fact that it contemplated future registration of a plan did not take it out of that prohibition. The agreement was not saved by subs. (3)(*c*) of s. 24 because the necessary consent of the planning board was not obtained, nor was the agreement conditional upon its being obtained. *Boulevard Heights, Limited v. Veilleux* (1915), 52 S.C.R. 185; *George v. Greater Adelaide Land Development Co. Ltd.* (1929), 43 C.L.R. 91, referred to.

APPEAL from a judgment of the Court of Appeal for Ontario[1], affirming an order of Wilson J. declaring a certain agreement to be illegal in view of s. 24(1) of *The Planning Act* (Ont.). Appeal allowed, Martland J. dissenting.

W. J. Smith, Q.C., for the respondent, appellant.

J. J. Robinette, Q.C., for the applicant, respondent.

The judgment of Kerwin C.J. and of Locke, Abbott and Judson JJ. was delivered by

JUDSON J.:—The appellant Frances Truman is the assignee from the trustee-in-bankruptcy of Queensway Construction Company Limited of a contract for the purchase of land. It is admitted that she has all the rights of the original purchaser. The contract was for the purchase of 95 building lots which were described by reference to a plan which was to be registered in the Registry Office of the County of Halton. The contract was made in February 1956, and in April 1959 the respondent-vendor moved, pursuant to Rule 605 of the Consolidated Rules of Practice, for a declaration that the contract was one that was prohibited by s. 24 of *The Planning Act*, 1955, c. 61. At the hearing the declaration was made as asked and affirmed on appeal[1]. The assignee-purchaser now appeals.

[1] [1960] O.W.N. 183, 22 D.L.R. (2d) 616.

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The purchase price for the 95 lots was $285,000. $2,500 was paid as a deposit on the signing of the contract; $62,500 was to be paid within 30 days of the installation of certain services later referred to in the contract. This date is called "the date of completion". The balance of the purchase price was to be paid within 12 months after the date of completion.

To find the date of completion one has to turn to para. 14 of the contract, which reads:

14. It is a condition of this Agreement that the following installations and services will be furnished in respect of the said lands at the sole cost of the Vendor, graded and gravelled roads, watermains, main sanitary sewers, as may be required by the Township.

(*a*) The Vendor will, on or before the time of granting a deed to the Purchaser, have paid to the Township of Trafalgar the sum required by them in respect to contributions to the parks and schools, sewage scheme, sidewalks and roads.

(*b*) The purchaser shall pay to the vendor for sewer and water connections the sum of ($200) TWO HUNDRED dollars for each lot at the time of taking up a deed.

The statutory prohibition in s. 24 upon which the judgment of the Court of Appeal is founded is not an absolute one. The section first permits a municipality by by-law to designate any area within the municipality as an area of sub-division control. Then follows the prohibition. After the passing of such a by-law

no person shall convey land in the area by way of a deed or transfer on any sale, or enter into an agreement of sale and purchase of land in the area, . . . unless the land is described in accordance with and is within a registered plan of subdivision,

These are the parts of the prohibition relevant to this appeal. Then the exception is stated in the following terms:

(3) Nothing in subsection 1 or 2 prohibits any conveyance or agreement respecting land

(*c*) if the consent,

(i) of the planning board of the planning area in which the land lies, or

(ii) where the land lies in more than one planning area, of the planning board designated by the Minister from time to time, or

(iii) where there is no planning board, of the Minister,

is given to the conveyance or agreement.

In addition to the exception by way of consent to the conveyance or agreement there are two other well defined exceptions where no consent is needed. These are not

relevant to this appeal. The section ends with a penalty provision. A person who contravenes the section is guilty of an offence and is liable on summary conviction to a fine of not more than $500.

With respect, I differ from the conclusion of the Court of Appeal. I do not think that this contract is void for illegality as being made in contravention of a statutory prohibition. On the contrary, this contract was entered into in contemplation of compliance with the statute and, as I read s. 24, the statute provides for this very situation by way of exception to the prohibition. The exception speaks of consent to a conveyance or agreement not of consent to a proposed conveyance or agreement. The statute permits vendor and purchaser to enter into a contract subject to the condition of subsequent consent and this is all that the parties have done in this case.

The conditional nature of the contract is shown by an analysis of the terms of payment and the obligations assumed by the vendor. After the payment of the deposit no further performance is required of the purchaser before the date of completion and before that date arrives the vendor must have complied with para. 14—a performance which presupposes a compliance with *The Planning Act* and the completion by the vendor of the application for registration of the plan of subdivision. The consent provision in the Act permits the parties to enter into a contract of this kind and the contract itself provides for no illegal performance. Beyond the payment of the deposit, there is to be no further performance until the Act has been complied with. This is not illegality. The purpose of the prohibition is by the very terms of the section defined as subdivision control and there is nothing in this contract to do anything but carry out this purpose.

The course of judicial decision in Ontario on this statutory prohibition has not been uniform. In *Zhilka v. Turney*[1], the vendor agreed to sell a farm property with the exception of an ill-defined area on which the buildings stood. The purchaser obtained a decree for specific performance at the trial subject to compliance with *The Planning Act* within

[1] [1955] O.R. 213, 4 D.L.R. 280; on appeal, [1956] O.W.N. 369, 3 D.L.R. (2d) 5, and [1956] O.W.N. 815, 6 D.L.R. (2d) 223.

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a reasonable time. The defence of illegality for non-compliance with s. 24 of *The Planning Act* was raised at the trial and also argued on appeal and there is no suggestion in the reasons of either Court that the contract could be declared void for illegality. The case was before the Court of Appeal on two occasions. On the first occasion the Court suspended judgment until the final disposition of the application for consent under *The Planning Act*. On the second occasion, when the appeal had to be re-argued because of the death of one of the appellate judges, the consent had still not been obtained, no doubt because of the uncertainty of the description of the property excepted from the sale. Nevertheless the Court allowed further time for it and directed a reference to the Local Master to ascertain the description.

Implicit in the reasons of the Court of Appeal up to this point, with the defence of illegality squarely raised, is the principle that parties may make a contract and subsequently obtain the consent under s. 24 of the Act. On appeal to this Court[1] it was held that the contract could not be enforced because of the uncertainty in the description of the lands to be retained and non-performance of a condition precedent. The Court declined to express any opinion on the defence based upon non-compliance with *The Planning Act*. Schatz J. in *Re Karrys Investments Ltd.*[2] correctly, in my respectful opinion, followed the principle which underlay the judgment of the Court of Appeal.

The contrary line of authority in Ontario is to be found in *Glenn v. Harvic Construction Company*[3] and in the case presently under appeal. In the *Glenn* case the plaintiff was the vendor of a landlocked 5 acre parcel. The case was one where the consent of the planning board was required. The plaintiff applied for and obtained this consent to the conveyance of this land. The consent of the board was given upon the condition that the purchase of the parcel in question was for the purpose of land assembly. The plaintiff had mistakenly but innocently represented to the board that Harvic owned adjoining land. The board then withdrew its consent. The action for specific performance at the suit

[1] [1959] S.C.R. 578, 18 D.L.R. (2d) 447.
[2] [1959] O.W.N. 325, 19 D.L.R. (2d) 760.
[3] [1958] O.W.N. 406.

of the vendor and the counterclaim for the return of the deposit were both dismissed on the ground that the agreement of sale was illegal when entered into.

The judgment of the Court of Appeal raises certain difficulties. The Court did not decide the case on the simple ground of illegality. Its first finding was that the planning board had no power to give a conditional consent. Then followed the conclusion that, with the withdrawal of the consent, the contract was one prohibited by the section and therefore illegal. I can, of course, understand the result in the *Harvic* case. Without the consent, the vendor could not succeed in a claim for specific performance. I can also understand as an alternative basis for the decision a finding of illegality in the making of the contract. I cannot understand why illegality in the making of the contract should be made to depend upon the withdrawal of a conditional consent.

For the reasons I have given, I am of the opinion that a contract may be made in contemplation of planning board approval and that on this point the *Zhilka* case was well decided rather than *Glenn v. Harvic* and the case presently under appeal. This is all that has to be decided on this appeal and I express no opinion on the rights and obligations of the parties relating to the performance of the contract.

I would allow the appeal with costs both here and in the Court of Appeal. Judgment should be entered dismissing with costs the motion for the declaration of illegality.

MARTLAND J. (*dissenting*): The circumstances giving rise to this appeal and the relevant portions of s. 24 of *The Planning Act,* Statutes of Ontario 1955, c. 61, have been set out in the reasons for judgment of my brother Judson.

In my opinion the conclusions reached by the learned trial judge and by the Court of Appeal were correct. Subsection (1) of s. 24 expressly prohibits any person from entering into an agreement of sale and purchase of land in an area in a municipality which the council of that municipality, by by-law, has designated as an area of subdivision control, unless the land is described in accordance with and is within a registered plan of subdivision. The lands in question here were within such an area and were

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not described in accordance with a registered plan of subdivision. The description is of a number of lots on a plan "to be registered in the County Registry Office of Halton".

Subsection (3)(*c*) of s. 24 enacts that nothing in subs. (1) prohibits any agreement respecting land if the consent of the planning board of the planning area in which the land lies is given to the agreement. However, no such consent was given to this agreement. Furthermore there is nothing in the agreement to indicate that there was any intention that application should be made to the planning board to give its consent to the agreement. The agreement did contemplate that, pursuant to s. 26 of the Act, an application would be made to the Minister of Planning and Development for the approval of a subdivision plan. But that approval could only be granted by the Minister. It could not be given by the consent of the planning board. In my view, therefore, this is not the case of an agreement for sale of lands made conditionally upon consent being given pursuant to s. 24(3).

My conclusion is that the entering into the agreement in question here was prohibited by subs. (1) and that the fact that it contemplated the future registration of a plan does not take it out of that prohibition. The agreement is not saved by subs. (3)(*c*) of s. 24 because the necessary consent was not obtained, nor was the agreement conditional upon its being obtained. I find some support for the conclusion which I have reached in the judgment of this Court in *Boulevard Heights, Limited v. Veilleux*[1], and in the judgment of the High Court of Australia in *George v. Greater Adelaide Land Development Company Limited*[2].

For these reasons, in my opinion, the appeal should be dismissed with costs.

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

Solicitors for the respondent, appellant: Prouse & Mackie, Brampton.

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

[1] (1915), 52 S.C.R. 185.

[2] (1929), 43 C.L.R. 91.

LOUIS WILLIAM BALDWIN FISHER ..APPELLANT; 1961

*Apr. 25, 26
May 15

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Murder—Drunkenness—Capacity to form intent—Admission of doctor's evidence—Instructions to jury—Criminal Code, 1953-54 (Can.), c. 51, s. 201(a)(i) and (ii).

The accused was convicted of murder. He did not deny the killing, and he gave to the police a statement the admissibility of which was affirmed in the Courts below and is now unchallenged. After drinking heavily in a hotel until closing time, the accused met a woman who asked him to take her out in his car. While in the car she made sexual advances to him. After driving through various streets, he drove into a service station parking area. He then stabbed her with a knife, some fifteen times, pushed her out of the car and drove off.

A psychiatrist was called by the Crown to give expert evidence on hypothetical questions in which were substantially included the material facts related in the accused's statement. He expressed the opinion that any one, able to do what the accused was alleged to have done, would have the capacity to form the intent to murder. The defence was accused's lack of capacity, on account of drunkenness, to form the intent to commit murder either under s. 201(*a*)(i) or s. 201(*a*)(ii) of the Code.

The conviction was affirmed by a majority judgment of the Court of Appeal, the dissent being in respect of the admissibility of the psychiatrist's evidence. The accused appealed to this Court (1) on questions of law as to which there was a dissent in the Court below and (2) on other questions of law by leave of this Court granted under s. 597(1)(*b*) of the Code.

Held: The appeal should be dismissed.

The evidence of the psychiatrist had been properly admitted.

The instructions given by the trial judge to the jury as to the intent required under s. 201(*a*)(ii) of the Code and those he gave in answer to the questions put to him by a juror were in both respects according to law.

APPEAL from a judgment of the Court of Appeal for Ontario[1], affirming the accused's conviction on a charge of murder. Appeal dismissed.

J. B. Pomerant, for the appellant.

W. C. Bowman, Q.C., for the respondent.

*PRESENT: Kerwin C.J. and Taschereau, Locke, Cartwright, Fauteux, Abbott, Martland, Judson and Ritchie JJ.

[1] [1961] O.W.N. 94, 34 C.R. 320.

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The judgment of the Court was delivered by

FAUTEUX J.:—At the conclusion of a jury trial presided over by Thomson J., at Toronto, the appellant was convicted of the murder of one Margaret "Peggy" Bennett, on or about the 10th of June, 1960, at the municipality of Metropolitan Toronto.

His appeal from this conviction was dismissed by a majority decision of the Court of Appeal for Ontario[1].

Appellant then appealed to this Court (i) on questions of law as to which there was a dissent in the Court below, as provided under s. 597(1)(*a*), and (ii) on other questions of law by leave of this Court granted under s. 597(1)(*b*).

The circumstances surrounding the commission of the offence are described mainly in a statement made to the police by appellant some ten days after the fatal occurrence. The admissibility of this statement in evidence was affirmed in the two Courts below and is now unchallenged.

For the purposes of this appeal, this summary of the facts is sufficient. At about 9 o'clock in the evening of the 9th of June, 1960, appellant, his wife, Douglas Zachariah and Hubert Vincent Baker went to the Wembley Hotel on Danforth Avenue, in Toronto. Shortly after they arrived, Mrs. Fisher returned home and the men, who had consumed beer in her company in the Ladies' Beverage Room, moved to the Men's Beverage Room where they drank beer and remained up to closing time, shortly after midnight. The material events that took place thereafter are related with minute details in appellant's statement. Upon leaving the hotel, he met Peggy Bennett, whom he knew by sight as a patron of the hotel beverage room, and was asked if he had his car. He told her to wait while he went home to get it. He came back with the car and, upon her suggestion that they go to a restaurant to have some coffee, declared that he did not have any money. As they drove away, she asked him for a cigarette and he stopped at a restaurant where he knew he could get some and pay the next day. He thus obtained a package of Black Cat filter tips. They sat in the car outside the restaurant, smoking, and she commenced "fondling" him. He drove off again and she continued the fondling. He then indicated the various streets on which he travelled, with particulars as to traffic lights and signs.

[1] [1961] O.W.N. 94, 34 C.R. 320.

Finally, he told her that if she wanted to get it, she was going to get it, and wheeled into a service station parking area. There, with a knife, which he carried in his car, he stabbed her—some fifteen times, according to the evidence of the pathologist who performed the autopsy—pushed her out of the car and drove off. On his way home, he threw away one of her shoes and part of the contents of her purse.

Towards the end of his statement, he said, with respect to the actual time of the fatal stabbing:

> I really went off my rocker, I guess, or I must have been drunk, or a combination of both.

At trial, both Zachariah and Baker gave evidence as part of the case for the Crown and were then cross-examined by defence counsel as to the quantity of beer consumed by appellant at the hotel. According to Zachariah, appellant had four glasses of beer with him, but in the course of the evening visited other tables where, he assumes, appellant also drank. Baker declared that appellant had, that night, a "considerable quantity" of beer.

Before closing the case for the prosecution, the Crown called Dr. Norman Lewis Easton, Director of Psychiatry at the Ontario Hospital, New Toronto, and a practitioner of long standing in that particular branch of medical treatment. Having read appellant's statement and being asked an hypothetical question, in which were substantially included the material facts related in the statement, he expressed the opinion that any one, able to do what appellant was alleged to have done, would have the capacity to form the intent to murder, even if he had consumed twenty-five glasses of beer or more. Appellant, testifying subsequently in his own defence, swore that he had drunk, on that occasion, about twenty-five glasses of beer and that he had no recollection of what took place after he left the hotel.

That appellant killed Mrs. Bennett by the infliction, with a knife, of numerous kinds of wounds, including the perforation of the aorta, is not in issue. The defence was appellant's lack of capacity, on account of drunkenness, to form the intent to commit murder either under s. 201(*a*)(i) or s. 201(*a*)(ii).

The dissent in the Court of Appeal is with respect to the admissibility of the evidence given by Dr. Easton. In the view of the minority, that evidence was inadmissible on

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grounds related to the qualifications of Dr. Easton, the nature of the opinion he gave, the form of the questions put to him to elicit that opinion, the facts he took into consideration to form it and the manner in which he expressed it. It is particularly emphasized that by giving that opinion, which, it is said, required no scientific knowledge or training and which any layman was in as good a position to form, Dr. Easton usurped the function of the jury. If admissible at all, it is added, it was at least inadmissible as part of the case for the prosecution when, at that stage of the trial, the issue of drunkenness as affecting the capacity to form an intent, had not been raised. The Judges of the majority considered that the Crown had to prove beyond doubt, as an essential element of its case, the intent required to constitute the offence of murder; that the issue of drunkenness had been raised in the cross-examination of Zachariah and Baker by counsel for the defence and in the appellant's statment; that Dr. Easton was qualified and in a better position than a layman to form an opinion in the matter and that there was no fault in the manner in which this opinion was elicited by the Crown or formed and expressed by the expert. They concluded that the evidence had been properly admitted.

With deference to the views of the learned Judges who dissented in the Court below, we are all in substantial agreement with the reasons expressed by Aylesworth J.A., who spoke for the majority, and concur in the conclusion which he reached.

The grounds upon which leave to appeal was granted are related (i) to the directions given by the trial Judge as to the intent required under s. 201(*a*)(ii) and to those he gave in answer to the questions put to him by a juror. After carefully considering the submissions made at the hearing by counsel for appellant, in his full and able argument, we are all satisfied that the instructions given, in both respects, were according to law.

The appeal should be dismissed.

Appeal dismissed.

Solicitor for the appellant: J. B. Pomerant, Toronto.

Solicitor for the respondent: The Attorney-General of Ontario.

GLOBAL GENERAL INSURANCE COMPANY (*Defendant*) ..... APPELLANT;

AND

HAROLD FINLAY (*Plaintiff*) .....RESPONDENT.

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*May 8, 9
June 12

GLOBAL GENERAL INSURANCE COMPANY (*Defendant*) ..... APPELLANT;

AND

IVAN LAYNG (*Plaintiff*) .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Insurance—Automobile—Death of insured—Subsequent accident within policy period—Whether third party claims covered—Matters requiring proof to maintain third party action—The Insurance Act, R.S.O. 1950, c. 183, s. 214(1).

The predecessor of the defendant company issued a standard insurance policy to R.C. for a period of one year, during which time R.C. died. Her will, by which she devised and bequeathed all her property to her daughter and appointed her sole executrix, was admitted to probate. Subsequently, but within the policy period, the automobile, while being driven by L with the consent of the executrix, was involved in a collision with an automobile owned and driven by F. In an action for damages, judgment was given against the executrix in her capacity as such, and against L. Recovery was sought from the insurance company by F under s. 214(1) of The Insurance Act. An action against the same company was commenced by L, who claimed payment of his legal expenses incurred in defending the action brought against him and R.C.'s daughter, which action the company had refused to defend. At trial the actions were dismissed, but on appeal both F and L were successful. The Court of Appeal granted the defendant special leave to appeal to this Court.

Held: The appeals should be dismissed.

On the true construction of the policy, the claims against R.C.'s daughter as executrix of the estate, and L, who was driving the automobile with the daughter's consent, were covered.

The matters which the plaintiff F was required to prove to maintain his action under s. 214(1) of the *Insurance Act* were: (1) the motor vehicle liability policy, and (2) that he had recovered judgment against a person insured under the policy for a claim for which indemnity was provided by the policy. As to item (1) the policy was proved and filed and its issue and terms were admitted in the pleadings. As to the

*PRESENT: Kerwin C.J. and Taschereau, Cartwright, Judson and Ritchie JJ.

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matters set out in item (2) the plaintiffs made out a *prima facie* case in regard thereto by proving: (i) the formal judgment in the action of *Finlay et al. v. Layng and Campbell*; (ii) the record in the action; and (iii) the reasons for judgment. *Continental Casualty Co. v. Yorke*, [1930] S.C.R. 180, distinguished; *Dokuchia v. St. Paul Fire and Marine Insurance Co.* [1947] O.R. 417 and [1949] O.R. 170, discussed.

In the present case no attempt had been made to impeach any of the findings in *Finlay et al. v. Layng and Campbell* except the finding that at the time of the accident the automobile was owned by the daughter in her capacity as executrix. That point had been decided adversely to the defendant at trial and was not now questioned.

The trial judge was right in his conclusion that in the circumstances of this case the fact that at the time of the accident the automobile was owned by the daughter in her capacity as executrix was sufficiently established by proof of the judgment in *Finlay et al. v. Layng and Campbell*, the record of the action, and the reasons for judgment, and that it was unnecessary for counsel for the plaintiffs to call further evidence.

The judgment in that action, from which no appeal was taken, read in the light of the pleadings, furnished the best evidence of the nature of the claim against R.C.'s daughter in her capacity as executrix for which the judgment had been recovered; and the question whether or not that claim, which had become merged in the judgment, was covered became simply a question of the construction of the terms of the policy.

APPEALS, argued together, from judgments of the Court of Appeal for Ontario[1], reversing judgments of Spence J. Appeals dismissed.

G. L. Mitchell, Q.C., R. E. Shibley, and *J. K. MacKenzie,* for the defendant, appellant, in both appeals.

M. Lerner, Q.C., and *M. A. Bitz,* for the plaintiff, respondent, Harold Finlay.

J. J. Robinette, Q.C., and *W. E. Bell,* for the plaintiff, respondent, Ivan Layng.

The judgment of the Court was delivered by

CARTWRIGHT J.:—These appeals, which were argued together, are from judgments of the Court of Appeal for Ontario[1] pronounced on February 26, 1960, allowing appeals from judgments of Spence J. delivered on July 7, 1959.

Regal Insurance Company Limited, the predecessor of the appellant, issued a standard automobile policy (owner's form) to Mrs. Rheta Campbell. The automobile described in the policy was a Chevrolet Sedan. The policy period was from June 14, 1957, to June 14, 1958. The perils insured

[1] [1960] O.R. 167, 23 D.L.R. (2d) 376.

against were (i) third party liability up to the limit of $100,000 resulting from any one accident, (ii) medical expenses incurred by persons who sustain bodily injury while in the automobile up to the limit of $500 for each person, and (iii) loss or damage to the automobile except by collision or upset but including fire and theft up to the actual cash value of the automobile at the time of loss or damage. The perils of damage to the automobile by collision or upset were not covered.

Rheta Campbell died on January 10, 1958. By her will, which was admitted to probate on February 3, 1958, she devised and bequeathed all her property to her daughter, Margaret Jean Campbell, and appointed her sole executrix.

On April 20, 1958, the respondent Layng was driving the automobile with the consent of Margaret Jean Campbell. It was found by the learned trial judge and by the Court of Appeal that at this time Margaret Jean Campbell was the owner of the automobile in her capacity as executrix; this finding was not questioned on the argument before us. While so driving the automobile Layng was involved in a collision with an automobile owned and driven by the respondent Harold Finlay, as a result of which Harold Finlay suffered injuries, his wife was killed and his six infant children were injured.

On August 5, 1958, the six infants by their next friend Harold Finlay and the said Harold Finlay commenced an action in the Supreme Court of Ontario against the respondent Layng, Margaret Jean Campbell and Margaret Jean Campbell in her capacity as executrix of the last will of Rheta Campbell, claiming damages for the personal injuries sustained by them and damages under *The Fatal Accidents Act*. Prior to the date of the commencement of this action Margaret Jean Campbell and Layng had called upon the appellant to defend any proceedings against them which might result from the accident but it refused to do so on the ground stated in the following words in a letter from its solicitors:

> We have advised the Insurance Company that under the existing circumstances the policy contract in question afforded no coverage to either Miss Jean Campbell or Ivan Layng, nor to the executrix of the will of Rheta Campbell deceased, in respect of loss or damage arising from the

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ownership, use or operation of the automobile described in the policy, on April 20, 1958 (the date of the accident in question), the insured person Rheta Campbell having died January 10, 1958.

Under the circumstances the Company is denying coverage and/or liability under the policy and the Company has no intention of defending any actions which may be commenced against any or all of the said parties for damages allegedly resulting from the said accident although the Company will be obliged to receive notice of any such actions so that it may apply under the provisions of Section 214(9) of the Insurance Act to be added as a Third Party thereto.

Copies of the writ and statement of claim served on Margaret Jean Campbell and Layng were furnished to the appellant's solicitors but the appellant did not make application to be added as a third party.

Margaret Jean Campbell and Layng were separately defended. The statement of defence of each defendant denied negligence on the part of Layng and claimed that the collision was caused by the negligence of Harold Finlay. The action was tried before Stewart J., without a jury, and on February 3, 1959, that learned judge gave judgment finding that both Layng and Harold Finlay were negligent, apportioning the blame 90 per cent to Layng and 10 per cent to Finlay, and directing judgment to be entered in favour of the plaintiffs against Margaret Jean Campbell in her capacity as executrix of the last will and testament of Rheta Campbell and against Layng for the following amounts:

Harold Finlay	$20,287.96
Elizabeth Finlay	1,350.00
John Finlay	630.00
Mary Finlay	855.00
Emma Finlay	2,610.00
James Finlay	4,230.00
Margaret Finlay	1,530.00

and also for the costs of the action which were taxed at $2,447.55.

The action as against Margaret Jean Campbell in her personal capacity was dismissed without costs.

The solicitor and client costs payable by Layng to his solicitors for defending the Finlay action were taxed at $3,932.75.

On February 24, 1959, the respondent Finlay brought action against the appellant pursuant to section 214(1) of *The Insurance Act*, R.S.O. 1950, c. 183, which reads as follows:

214(1) Any person having a claim against an insured, for which indemnity is provided by a motor vehicle liability policy, shall, notwithstanding that such person is not a party to the contract, be entitled, upon recovering a judgment therefor against the insured, to have the insurance money payable under the policy applied in or towards satisfaction of, his judgment and of any other judgments or claims against the insured covered by the indemnity and may, on behalf of himself and all persons having such judgments or claims, maintain an action against the insurer to have the insurance money so applied.

The statement of claim alleged the judgment of Stewart J., the issue of the policy to Rheta Campbell and its relevant terms including the description of the insured automobile, the death of Rheta Campbell, the issue of letters probate of her will to Margaret Jean Campbell, and continued:

6. The said motor car while being driven by one Ivan Layng, with the consent and knowledge of the said executrix, was in a collision with a motor car owned and operated by the Plaintiff, Harold Finlay, in which the other persons referred to in Paragraph 3 above were passengers, at the intersection of the Poplar Hill Sideroad, and the 12th Concession of the Township of Lobo, in the County of Middlesex, on Sunday, April 20, 1958.

7. Following the trial of the action instituted on August 5, 1958 in the Supreme Court of Ontario by the parties referred to in Paragraph 3 above for their damages arising out of the said collision, Mr. Justice Stewart who presided at the said trial reserved Judgment and pronounced Judgment on February 3, 1959 in the terms set forth in Paragraph 3 above.

In its statement of defence the appellant pleaded the terms of the policy, the death of Rheta Campbell on January 10, 1958, the grant of letters probate to Margaret Jean Campbell on February 3, 1958, the date of the accident April 20, 1958, and continued:

5. At the time of the said accident the said vehicle was being driven by one Ivan Layng and the Judgment referred to in the Statement of Claim was granted against him as well as against the said Margaret Jean Campbell in her capacity as Executrix of the last will and testament of Rosieta Martha Campbell, also known as Rheta Campbell.

6. Upon the death of the named insured Rheta Campbell, that part of the insuring contract relating to third party liability as set forth in Section A thereof, came to an end, and any right of indemnity thereunder became confined to any claim which may have raisen prior to such death.

7. The Defendant submits that no obligation exists under the said policy of automobile insurance to indemnify Margaret Jean Campbell in her capacity as Executrix of the last will and testament of Rosieta Martha

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Campbell, also known as Rheta Campbell, in respect of the amounts awarded under the Judgment referred to in Paragraph 3 of the Statement of Claim because:—

(a) The insurer agreed "to indemnify the insured, his Executors or Administrators . . . against the liability imposed by law upon the insured", the insured being Rheta Campbell;

(b) The liability imposed by the said Judgment upon Margaret Jean Campbell arose by reason of the negligence of Ivan Layng while driving the vehicle described in the policy with the consent of the said Margaret Jean Campbell, and there is no obligation upon the Defendant to indemnify her against the said liability under the circumstances;

(c) In any event, at the date of the accident in question April 20, 1958, the vehicle described in the policy was owned by Margaret Jean Campbell in her personal capacity and she was not insured by the policy.

The Defendant, therefore, submits that this action be dismissed with costs.

On April 20, 1959, Layng commenced action against the appellant. In his statement of claim he alleged the issue and terms of the policy, the death of Rheta Campbell, the appointment of Margaret Jean Campbell to be her executrix, the consent of Margaret Jean Campbell as executrix to his having possession of the automobile, the happening of the accident, the bringing of the action by the Finlays against him and Margaret Jean Campbell, the giving of notice of the action to the appellant, its refusal to defend, the trial before Stewart J. and his judgment, the retaining by Layng of his own solicitors to defend the action and the incurring by him of the liability to pay their costs of $3,932.75. The prayer for relief asked for payment of this amount.

In its statement of defence the appellant admitted the giving of notice of the action to it and its refusal to defend and set out the facts as to the issue of the policy and the death of Rheta Campbell. Its grounds of defence were set out in paragraphs 5 and 7 which reads as follows:

5. Upon the death of the named insured Rheta Campbell, that part of the insuring contract relating to third party liability as set forth in Section A thereof, came to an end, and any right of indemnity or defence thereunder became confined to any claim which may have arisen prior to such death.

* * *

7. At the time of the accident mentioned in paragraph 7 of the Statement of Claim, the plaintiff was not driving the automobile with the consent of the person insured by the said policy of insurance, she having previously died as aforesaid and the terms of the policy relating to consent

having thereby become terminated; and the plaintiff was not entitled to have the action Harold Finlay et al. vs. Ivan Layng et al. defended on his behalf by the defendant; nor is he now entitled to be indemnified against the costs of defence incurred by him, as claimed in this action.

The two actions came on for trial at London in June, 1959, before Spence J. and were ordered to be tried together.

Before any evidence was tendered there was some discussion between the Court and counsel in the course of which the following appears:

Mr. Mitchell (counsel at the trial for the appellant):

> In order perhaps to clarify the issues, which are set forth fairly clearly in the pleadings, if your lordship would refer for a moment to the Statement of Defence it sets forth our position. Your lordship will notice paragraph Six in what we call a Fresh Statement of Defence:

Mr. Mitchell then read the whole of paragraphs 6 and 7 of the statement of defence in the Finlay action which have been quoted above and the discussion continued:

HIS LORDSHIP: Certainly, the late Mrs. Campbell was not driving the vehicle. There is a judgment against her estate on the ground of her ownership, and surely that is *res judicata,* and I do not deal with that defence—

Mr. MITCHELL: I submit it is not *res judicata* as against the Global General Insurance Company. We were not a party to those proceedings.

HIS LORDSHIP: I presume the estate gave you notice and you preferred not to defend, and I am afraid you are going to be bound by it under those circumstances. However, we will not argue the case at the beginning—

Mr. MITCHELL: I submit that it is not *res judicata* and it is one of the things to be determined before your lordship.

HIS LORDSHIP: Well, proceed.

Counsel for Finlay then called the local registrar of the Court at London and filed as Exhibit 1 a certified copy of the formal judgment of Stewart J. of February 3, 1959, and as Exhibit 2 the record in that action. He then tendered a copy of the reasons for judgment of Stewart J., and counsel for the appellant objected as follows:

Mr. MITCHELL: May I object to the production and filing of the reasons for judgment. I do not think they are evidence in this action—the judgment is evidence, but surely the reasons for judgment cannot be evidence in this action. I know of no rule that would make those reasons for judgment evidence.

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After hearing argument on the objection the learned judge admitted the evidence and the reasons were filed as Exhibit 3. The ruling was expressed as follows:

HIS LORDSHIP: Well, I will have all the material—I do not see how a judgment was recovered in that action against the estate of Rosieta Martha Campbell unless the estate of Rosieta Martha Campbell was the owner of the vehicle at the time the accident occurred. If there was that judgment recovered, then it is *res judicata* between the parties, and I am going to have all the material before me before I determine that it is *res judicata,* so I will permit it to be filed. Your objection is noted.

However, Layng was later called as a witness and on his evidence the learned trial judge found as a fact that at the time of the accident the automobile was owned by Margaret Jean Campbell in her capacity as executrix; that finding was affirmed in the Court of Appeal and, as has been mentioned, it was not questioned before us.

Counsel for the plaintiffs filed the insurance policy, the letters probate of the will of Rheta Campbell, the certificate of taxation of the costs in the action of *Finlay v. Layng et al.,* the certificate of taxation of the bill payable by Layng to his solicitors, and a number of letters establishing that due notice of all relevant claims and proceedings had been given to the appellant and that it had refused to defend the action on behalf of either Margaret Jean Campbell or Layng.

Harold Finlay was called and proved that nothing had been paid on account of the judgment awarded to him.

It would appear from the reasons of the learned trial judge that only two questions were argued before him, (i) whether the third party liability coverage afforded by the policy terminated upon the death of Rheta Campbell except as to any claim which might have arisen prior to her death, and (ii) whether at the time of the accident giving rise to the judgment obtained by Finlay the automobile was owned by Margaret Jean Campbell in her capacity as executrix.

The learned trial judge decided the first of these questions in favour of the appellant and the second in favour of the respondents and accordingly dismissed both actions.

Both Finlay and Layng appealed to the Court of Appeal for Ontario and their appeals were allowed. The Court of Appeal granted the appellant special leave to appeal to this

Court in the Layng action and in the Finlay action with respect to the interests of those persons represented by the plaintiff whose interests do not exceed $10,000.

The reasons for the unanimous judgment of the Court of Appeal were delivered by Schroeder J.A. They deal fully with the question of the proper construction of the policy in the light of the relevant statutory provisions. I am in substantial agreement with those reasons and wish to adopt the following conclusions stated by the learned Justice of Appeal:

> On a careful consideration of the words used, read in the light of the provisions of statutory condition 1(*a*)(*b*)(i) to which I shall refer later, it is evident that the parties had in contemplation the continuance of the insurance protection provided in section A of the insuring agreement in favour of the executors or administrators of the insured applicant in the event of her death occurring during the currency of the policy. In the view which I take the policy, in its primary import, is doubtless a single insurance for the benefit of a single insured. The identity of the insured changes, however, when her death occurs, and her executor or administrator is then substituted in her place as the insured for the balance of the term of the policy with all the rights to indemnification of the primary insured so long as the executor or administrator remains the owner of the vehicle specified in the policy. If that be the correct view then the words "every other person who with the insured's consent personally drives the automobile" refer to the consent of the primary insured's executor or administrator and the words "against the liability imposed by law upon the insured" are to be construed in the same manner.
>
> * * *
>
> The executrix of the primary insured is an insured person within the meaning of this policy to the same extent as she would be if she had been identified therein *suo proprio nomine,* because the executor or administrator of an insured is a person who is readily identifiable, and the maxim *certum est quod certum reddi potest* applies. It follows that the executrix has been sufficiently named as the insured to entitle her to recover, and the same right enures to the benefit of the plaintiff Layng who, on the occasion in question, was driving the automobile with the consent of the then named insured, the executrix of the deceased policyholder.

There remains a question argued before us but not dealt with in the reasons of the learned trial judge or in those of the Court of Appeal, and not included in Part II of the factum filed by the appellant in this Court. In the course of the argument set out in Part III of the appellant's factum the point is stated as follows:

> The plaintiffs maintain these actions under s. 214(1) of the Insurance Act . . .
>
> In order to succeed under this section a judgment creditor must prove:
>
> (1) The Agreement to indemnify;

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(2) That his loss or damage arose from the use or operation of the motor vehicle in respect of which the policy of insurance was issued;

(3) That the insured person was legally liable to him in damages for such loss or damage.

* * *

Proof that loss or damage arose from the use or operation of the motor vehicle in respect of which the policy of insurance was issued, and that the insured was legally liable to a judgment creditor for damages for such loss or damage, is not established by merely filing the formal judgment and reasons therefor in the action giving rise to an action under Section 214(1) supra.

* * *

It is submitted that the plaintiffs failed to make out their case at the trial of this action because they attempted to do so by filing the formal judgment and the Reasons for Judgment in the action Finlay et al vs. Campbell and Layng and did not prove the fundamental requisites required by the decision in the *Yorke* case. (i.e. *Continental Casualty Co. v. Yorke* [1930] S.C.R. 180).

In support of this submission counsel for the appellant cites the *Yorke* case, *supra,* and the two judgments of the Court of Appeal for Ontario in *Dokuchia v. St. Paul Fire and Marine Insurance Company*[1].

In my view the matters which the respondent Finlay was required to prove to maintain his action under s. 214(1) may be more accurately stated as follows:

(1) The motor vehicle liability policy;

(2) That he had recovered judgment against a person insured under the policy for a claim for which indemnity was provided by the policy.

Item (1) presents no problem, the policy was proved and filed and its issue and terms were admitted in the pleadings.

It could well be argued that the matters set out in item (2) were sufficiently admitted in the pleadings which have been quoted above, particularly in paragraph 5 and in the first sentence of clause (*b*) of paragraph 7 of the Statement of Defence in the Finlay action:

5. At the time of the said accident the said vehicle was being driven by one Ivan Layng and the Judgment referred to in the Statement of Claim was granted against him as well as against the said Margaret Jean Campbell in her capacity as Executrix of the last will and testament of Rosieta Martha Campbell, also known as Rheta Campbell.

* * *

(*b*) The liability imposed by the said judgment upon Margaret Jean Campbell arose by reason of the negligence of Ivan Layng while driving the vehicle described in the policy with the consent of the said Margaret Jean Campbell.

[1] [1947] O.R. 417 and [1949] O.R. 170.

However, I do not rest my judgment on this point on the precise form of the pleadings; in my opinion the plaintiffs made out a *prima facie* case in regard to the matters set out in item (2) by proving, as they did, the formal judgment of Stewart J., the record in the action of *Finlay et al. v. Layng and Campbell,* and the reasons for judgment of Stewart J., all of which were, in my view, rightly admitted in evidence by the learned trial judge.

In so far as the judgment of this Court in *Continental Casualty Co. v. Yorke, supra,* appears to decide anything to the contrary it is clearly distinguishable on the facts and also by reason of the substantial changes that have been made in the relevant statutory provisions that were then in force, particularly the replacement of what was then s. 85(1) of *The Insurance Act* by s. 214(1) and the enactment of s. 214(9). I have examined the complete record in that case. At the trial before Raney J. no oral evidence was given. Six exhibits were filed; (i) the formal judgment of Riddell J. in the action of *Jeanne Yorke v. Elizabeth Schwartz and A. C. Schwartz* directing that the plaintiff do recover from the defendants damages in the sum of $2,067.25 and costs, (ii) the formal judgment of the Court of Appeal for Ontario dismissing the defendants' appeal with costs, (iii) the certificate of the taxing officer, (iv) a letter from the Sheriff reporting that his return to a writ of execution issued pursuant to the judgment was *"nulla bona"*, (v) the insurance policy, and (vi) a birth certificate to shew the age of the defendant A. C. Schwartz.

It will be observed that there was nothing in any of these exhibits to indicate the nature of the claim on which the plaintiff's judgment was founded beyond the fact that it was a claim for damages. However, at the trial counsel for the insurance company admitted that the judgment was for damages claimed to have been caused by the negligent driving by A. C. Schwartz of the insured automobile which was owned by the other defendant Elizabeth Schwartz. Indeed, he made it clear that the only defence was one based on statutory condition 5 in the policy which read:

> 5. The insurer shall not be liable under this policy while the automobile, with the knowledge, consent or connivance of the insured is being driven by a person under the age limit fixed by law, or, in any event, under the age of sixteen years, or by an intoxicated person.

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It was admitted that A. C. Schwartz was driving the insured automobile, that he was under 18 years of age and that he did not have a permit to drive as required by statute for a person under that age; but counsel for the plaintiff made it quite clear that he did not admit that A. C. Schwartz was driving with the consent of Elizabeth Schwartz. Counsel for the defendant at first proposed to call Elizabeth Schwartz in an endeavour to prove the giving of consent but changed his mind and took the position that the giving of her consent was sufficiently proved by the judgment of Riddell J. which had already been filed. This was the only point which this Court was called upon to decide or did decide. Lamont J. who delivered the unanimous judgment of the Court rejected the argument that the consent of Elizabeth Schwartz must be presumed from the fact of judgment having been given against her; he said at page 188:

> Furthermore, I do not see anything in the Act (i.e. the Highway Traffic Act) that would prevent Mrs. Schwartz from being liable at common law for the damage caused by her son's negligence if it were shewn that he was in her employ and, at the time of the accident, in the course of his employment. It does not necessarily follow, therefore, that because judgment was given against her, Mrs. Schwartz had any knowledge that her son was driving her automobile, or that she consented thereto.

Lamont J. also pointed out that the pleadings in the action of *Yorke v. Schwartz* had not been put in evidence.

In the first *Dokuchia* case the plaintiff was given judgment at the trial against the insurer. The Court of Appeal examined the formal judgment and the pleadings in the action in which Dokuchia had recovered judgment against Domansch (the insured) for the purpose of ascertaining whether the claim which had become merged in the judgment was one covered by the policy. The action failed because it was impossible to determine from the record whether Dokuchia at the time he was injured was in the employ of Domansch and if he was so employed his claim was excluded from coverage by the terms of the policy. The Court of Appeal accordingly set aside the judgment against the insurer and directed a new trial.

At the new trial the whole record in the case of *Dokuchia v. Domansch*[1], was filed including the reasons for judgment of the Court of Appeal for affirming the trial judgment. Once

[1] [1944] O.W.N. 461; [1945] O.R. 141.

again, however, the claim of Dokuchia against the insurance company failed because in upholding his judgment against Domansch the Court of Appeal had decided that his injuries did not arise from the use or operation of the insured vehicle, and it was held as appears in [1949] O.R. at page 179, that this adjudication was binding upon Dokuchia in his action against the insurance company. In applying this decision it must be remembered that all the documents referred to were admitted in evidence by consent and that Dokuchia, who was held to be bound by the judgment, and the reasons therefor, given in his action against Domansch, had put that judgment and those reasons in evidence as part of his case. It is not necessarily decisive of the question whether the judgment and reasons would have been binding also on the insurance company, although there is nothing in the reasons to suggest the contrary.

Turning now to the facts of the case at bar it is my opinion that the best evidence by which a party bringing action under section 214(1) of *The Insurance Act* can establish the nature of the claim for which he has recovered judgment against an insured is to prove the formal judgment, the reasons therefor and the record, including of course the pleadings, in the action in which the judgment was recovered. All of these are admissible in evidence and nothing in the *Yorke* case or the *Dokuchia* cases decides, or indeed suggests, the contrary.

In the case at bar no attempt was made either in the appellant's pleadings or in the evidence to impeach any of the findings made in the action of *Finlay et al. v. Layng and Campbell* except the finding that at the time of the accident the insured automobile was owned by Margaret Jean Campbell in her capacity as executrix. It has already been pointed out that the learned trial judge heard evidence on that point and decided it adversely to the appellant and that this finding is not now questioned. This, in my opinion, is sufficient to dispose of the ground of appeal with which I am now dealing.

However, I wish to rest my judgment on this point also on the veiw that the learned trial judge was right in his conclusion that in the circumstances of this case the fact that at the time of the accident the insured automobile was

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owned by Margaret Jean Campbell in her capacity of executrix was sufficiently established by proof of the judgment of Stewart J., the record in the action of *Finlay et al. v. Layng and Campbell* and the reasons of Stewart J. and that it was unnecessary for counsel for the plaintiffs to call the further evidence which, as a matter of precaution, they did call.

So long as the judgment of Stewart J. stood (and it was proved that no appeal was taken from it and that the time for appealing had expired) it, read in the light of the pleadings, furnished the best evidence of the nature of the claim asserted against Margaret Jean Campbell in her capacity as executrix for which the judgment had been recovered; and the question whether or not that claim, which had become merged in the judgment, was covered became simply a question of the construction of the terms of the policy. I have already expressed my agreement with the view of the Court of Appeal that on the true construction of the policy the claim was covered.

In an action brought under s. 214(1) the question to be determined is whether the plaintiff has made against an insured a claim for which indemnity is provided by a motor vehicle policy and has recovered a judgment therefor; the question is not whether that judgment was correct.

The judgment of Stewart J. was a final judgment pronounced by a court of competent jurisdiction and constituted conclusive evidence against all the world of its existence, date and legal consequences; (vide Halsbury, 3rd ed., vol. 15, p. 395 and the cases there collected). The legal consequence of that judgment was to impose upon Margaret Jean Campbell in her capacity as executrix a liability arising from the ownership of the automobile described in the policy. That liability was clearly one imposed by law and fell within the terms of the insuring agreements set out in section A of the policy. I can find no support for the appellant's submission that it was necessary for the respondent to prove again in the action against the insurer under s. 214(1) the facts on which the judgment of Stewart J. was founded. To so hold would be to disregard the maxim, *interest reipublicae ut sit finis litium.*

For the above reasons I would dismiss both appeals with costs.

Appeals dismissed with costs.

Solicitors for the defendant, appellant: Mitchell Hockin & Dawson, London.

Solicitors for the plaintiff, respondent, Harold Finlay: Lerner, Lerner & Bitz, London.

Solicitors for the plaintiff, respondent, Ivan Layng: Wright, Poole, Bell & Porter, London.

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GLOBAL GENERAL INSURANCE CO. v. FINLAY AND LAYNG

Cartwright J.

LAKE ONTARIO PORTLAND CEMENT COMPANY LIMITED (*Defendant*) ..... APPELLANT;

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*Feb. 23, 24, 27
June 12

AND

JOHN A. GRONER (*Plaintiff*) .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Master and servant—Contract containing termination of employment clause—Contract altered by oral agreement—Terms of oral agreement subsequently set out in undated letter—Employee inserting false date—Whether termination clause consistent with altered contract—Dismissal justified by employee's deceitful conduct—Whether fees payable in Canadian or United States funds.

The plaintiff, a mechanical engineer, was employed in a substitute capacity to supervise construction of a cement manufacturing project. The contract contained a clause for termination of employment on ten days' notice. About three months after his engagement the plaintiff resigned, but following negotiations with the president of the defendant company he entered into an agreement on September 27, 1956, as a result of which he withdrew his resignation. In July 1957, an undated letter, setting out the terms of the oral agreement, was typed by the plaintiff and signed by the president. The plaintiff later filled in the date as October 15, 1956, without telling the president he was doing so, and in the course of the subsequent proceedings he perjured himself with respect to the circumstances under which this letter was written.

In September 1957, a new president advised the plaintiff that his services were no longer desired and gave him ten days' notice under the original contract. The plaintiff's claim for wrongful dismissal was dismissed at trial; his appeal was allowed by the Court of Appeal. The defendant appealed to this Court, and the plaintiff cross-appealed against the disallowance of his claim for the difference in exchange between Canadian dollars to which he claimed to be entitled and the American dollars with which he was paid for his services.

Held: The appeal should be allowed and the cross-appeal dismissed.

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*PRESENT: Locke, Fauteux, Martland, Judson and Ritchie JJ.

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The agreement evidenced by the letter dated October 15, 1956, was to be read with the original agreement because it was expressly stated to be supplementary thereto, and the nature of the work to which it related was described as being outlined in the earlier agreement. The ten-day termination clause was just as consistent with a contract engaging the plaintiff's services full time until the acceptance date of the plants as it was with the original contract which engaged them in substitution for those of the engineer in charge of construction "until the project . . . is completed and in production". Accordingly, the letter of dismissal written by the new president, giving ten days' notice, was effective to terminate the plaintiff's contract of employment.

Also, the defendant was justified in dismissing the plaintiff without notice by reason of his deceitful conduct with respect to the document dated October 15, 1956. The fact that the defendant did not know of the plaintiff's dishonest conduct at the time when he was dismissed, and that it was first pleaded by way of an amendment to its defence at the trial did not detract from its validity as a ground for dispensing with his services. *Federal Supply & Cold Storage Co. of South Africa v. Angehrn and Piel* (1910), 103 L.T. 150; *Aspinal v. Mid West Collieries,* [1926] 3 D.L.R. 362, referred to.

The plaintiff had agreed to an arrangement whereby his disbursements were to be paid in Canadian funds and his fees in United States funds. Accordingly, his claim for the equivalent of Canadian dollar value for his fees was disallowed. The plaintiff's claim for his car allowance was allowed.

APPEAL and cross-appeal from a judgment of the Court of Appeal for Ontario[1], allowing an appeal and allowing in part a cross-appeal from a judgment of McRuer C.J.O. Appeal allowed and cross-appeal dismissed.

W. B. Williston, Q.C. and *R. L. Shirriff,* for the defendant, appellant.

D. A. Keith, Q.C., and *D. H. Carruthers,* for the plaintiff, respondent.

The judgment of the Court was delivered by

RITCHIE J.:—This is an appeal from a judgment of the Court of Appeal of Ontario[1] allowing the appeal of the respondent from a judgment of Chief Justice McRuer and awarding him the sum of $15,000 as damages for wrongful dismissal in breach of his contract of employment with the appellant and $814.50 for out-of-pocket expenses in the use of his car. The respondent cross-appeals against the disallowance by the Court of Appeal of his claim for reimbursement for the difference in exchange between Canadian dollars to which he claims to be entitled and the American dollars with which he was paid for his services.

[1] [1960] O.W.N. 292, 23 D.L.R. (2d) 602.

The appellant company was incorporated in the spring of 1956 at the instance of the H. J. McFarland Construction Company Limited (an Ontario company) and Johnson, Drake and Piper, Incorporated (a Minnesota corporation) for the purpose of financing the construction of a cement manufacturing plant at Picton, Ontario, to be built by the last-named companies who became joint venturers in this undertaking under the name of "Cement Plant Constructors".

On May 4, 1956, a contract was entered into whereby Cement Plant Constructors agreed to build the necessary plant for the appellant company and arrangements were made by the appellant for public financing to defray the cost of construction.

Before any offering of shares was made to the public, Senator W. A. Fraser was secured as the president of the appellant company with H. J. McFarland and D. P. Jesson as vice-presidents representing the constituent companies of Cement Plant Constructors.

The respondent who is a mechanical engineer, although not a member of the Association of Professional Engineers of the Province of Ontario, was employed on this project by means of a letter from Cement Plant Constructors confirming an arrangement with him whereby he was "*engaged to render services as we designate until the project mentioned below is completed and in production in the absence of Mr. A. J. Anderson.*" (The italics are mine.) This letter which is hereafter set forth in full includes the following paragraphs:

> If at any time your services are no longer desired, this agreement may be terminated upon ten (10) days written notice by us.
>
> At any time, this agreement may be assigned by us to the owner of the above mentioned plants, written notice of the assignment to be given to you.
>
> It is assumed that inasmuch as you are acting in a substitute capacity for A. J. Anderson, that any decisions that have been made by him will not be altered unless definite mistakes are found, and then only after these have been called to our attention and approved for change by us.

A. J. Anderson, who was also a mechanical engineer, had been engaged to act as the *appellant's* engineer in charge of construction, but previous commitments prevented him from being on the job with any regularity, and the respondent's contract of employment which was duly assigned to

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the appellant on June 26, 1956, as I interpret it, constitutes an agreement engaging the respondent's services as a substitute for and in the absence of Mr. A. J. Anderson "until the project . . . is completed and in production . . . .".

About three months after his engagement, the respondent tendered his resignation in a letter to Senator Fraser in which he complained that the original agreement was not possible of fulfilment as he was not being given the necessary full responsibility and authority and, amongst other things, that everything was required to be approved by an engineering firm in the employ of Cement Plant Constructors so that responsibility was divided and his position made untenable.

Senator Fraser was greatly upset by this letter as he felt that in the interests of the shareholders it was necessary that an engineer should represent the appellant on the job, and he, accordingly, arranged to meet with the respondent in Toronto on September 27, 1956, for the purpose of inducing him to reconsider his resignation.

There is no doubt in my mind that the respondent and Senator Fraser reached an agreement at this time, as a result of which the respondent withdrew his resignation, but the nature and effect of the understanding arrived at between them is the subject of what can only be described as a bitter dispute between the respondent and the appellant. No memorandum of the terms of that agreement was made at the time by either Senator Fraser or the respondent, but in July 1957, at a time when his relations with many members of the board of directors had gravely deteriorated and his dismissal had been seriously considered, the respondent typed a letter addressed to himself on the appellant's notepaper, setting out what he now says those terms were, and including a provision whereby he was to be employed on a full-time basis instead of being a substitute for A. J. Anderson. Leaving this letter undated, he obtained Senator Fraser's signature to it and thereafter, without telling the Senator that he was doing so, he filled in the date as October 15, 1956. This underhand action was compounded by the respondent perjuring himself on more than one occasion in the course of these proceedings with respect to the circumstances under which the letter was written, and it must be borne in mind that in changing the date on the letter and

in lying on the witness stand the respondent was acting deliberately and for the purpose of furthering his own interest. It was not until after the respondent had given his evidence that the appellant's counsel felt in a position to apply for an amendment to his defence to set up the predating of the letter as a ground for dismissal. Leave to amend having been granted, the following paragraph was then added to the defence:

> The Defendant was justified in dismissing the Plaintiff from its employment by virtue of the misconduct of the Plaintiff in predating a letter purporting to amend his contract of employment dated June 1st, 1956 and thereafter concealing from and misrepresenting to the Defendant the fact of such predating in order to deceive the Defendant.

It is noteworthy that in the month of January 1957 the respondent conferred at length with two members of the board of directors and the appellant company's solicitor with a view to revising his terms of employment as set forth in the contract of June 1st. No conclusion was reached as a result of these conferences, but four separate proposals were drafted with the respondent's assistance, and the remarkable feature of the matter is that the respondent at no time during the course of these negotiations made any mention whatever of the agreement which he now claims to have been made between himself and Senator Fraser three months earlier.

Senator Fraser resigned from the board of directors on August 22, 1957, and on September 30 the new president, Mr. G. D. Wotherspoon, wrote to the respondent on behalf of the board referring to the initial contract of employment, saying:

> Your employment contract provides for termination on ten days' written notice and as your services are no longer desired by this Company we hereby, pursuant to your employment contract, give you ten days' written notice of termination of such services, effective October 12, 1957.

The respondent's case rests in large measure upon his interpretation of the agreement of September 27, 1956, as evidenced by the letter dated October 15, 1956. It is alleged on his behalf that it constituted a contract engaging his services on a full-time basis until he had accepted the plants on behalf of the appellant and that it had the effect of cancelling the provision for termination of his employment on ten days' notice which was invoked by Mr. Wotherspoon in his letter of dismissal.

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In rendering his decision at the trial of this action, Chief Justice McRuer found that the letter dated October 15, 1956, accurately recorded the terms of the contract of September 27 and that the ten-day termination clause was not intended to be in effect after this later agreement was concluded, but he held also that the fraudulent conduct of the respondent constituted just cause for his dismissal, even although the appellant did not know of it at the time when the notice of dismissal was given. The learned trial judge also held that the respondent was entitled to succeed in his claim for reimbursement for the difference in exchange between the United States funds in wihch he was paid and Canadian funds, and that his claim for out-of-pocket expenses for car allowance was made out.

In allowing the respondent's appeal, Mr. Justice Morden affirmed the decision of the Chief Justice to the effect that the letter dated October 15, 1956, correctly expressed the earlier oral agreement and found that the respondent's misconduct was not incompatible with the proper discharge of the duties for which he was employed and, therefore, did not afford justification for his dismissal. Mr. Justice LeBel who was alone in expressly affirming the finding of the Chief Justice to the effect that the understanding of September 27 cancelled the ten-day termination clause of the original contract was also of opinion that the respondent's fraud was unrelated to the business in which he was engaged and did not justify his dismissal.

In a dissenting opinion in the Court of Appeal, Gibson J.A. agreed with the reasons of the Chief Justice for dismissing the action.

The Court of Appeal was unanimous in dismissing the respondent's claim for reimbursement for loss on exchange between Canadian dollars and the American dollars with which he was paid. No costs were allowed with respect to the trial, but the costs of the appeal were awarded to the plaintiff and those of the cross-appeal to the defendant.

In my view, the disposition of the present appeal depends in large measure on the effect to be given to three letters:

(1) The letter of June 1, 1956, from Cement Plant Constructors containing the initial terms of the respondent's contract of employment;

(2) The respondent's letter of resignation dated September 17, 1956; and

(3) The letter dated October 15, 1956, which purports to record the agreement reached on September 27 of that year.

The letter of June 1, 1956, reads as follows:

In confirmation of our arrangement, you are engaged to render services as we designate until the project mentioned below is completed and in production in the absence of Mr. A. J. Anderson.

It is our understanding that you are to be our technical advisor and engineer in charge of the design and construction by us of a complete operating dry process Portland cement manufacturing plant and a complete operating commercial limestone aggregate production plant at Picton, Ontario as well as bulk storage docking and bagging facilities at Picton, Ontario, Toronto, Ontario and Rochester, New York. Your duties will include but not be limited to the following.

1) Supervise the design, preparation of specifications of all equipment and machinery, preparation of plot plan layout and machinery lay-out, preparation of flow diagram and the structural, mechanical and electrical layouts, details, and specifications.

2) Supervise the construction so that the plants are built in accordance with the plans and specifications.

3) Set up mechanical controls and organize operating personnel.

It is our understanding that you shall be paid $100 per day for your time actually spent in connection with the aforementioned duties, plus travel, subsistence and other proper expenses.

If at any time your services are no longer desired, this agreement may be terminated upon ten (10) days written notice by us.

At any time, this agreement may be assigned by us to the owner of the above mentioned plants, written notice of the assignment to be given to you.

It is assumed that inasmuch as you are acting in a substitute capacity for A. J. Anderson, that any decisions that have been made by him will not be altered unless definite mistakes are found, and then only after these have been called to our attention and approved for change by us.

If the foregoing is satisfactory to you, please sign, date and return the duplicate original of this letter whereby it will constitute the sole agreement between us.

As the vitally important agreement of September 27, 1956, was reached for the purpose of inducing the respondent to withdraw the resignation which he had tendered in his letter of September 17, it seems to me to be very relevant to consider the reasons which prompted the respondent to write that letter. That letter reads in part as follows:

It was my understanding that I was given full charge and responsibility with the backing of the Board of Directors at the meeting which I attended on July 30, 1956 in Picton. Such has not proven to be the case. It was recently pointed out to me that approval was *either* by the contractor *or* the owner's representative according to the agreement between the contractor and the engineers.

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This situation divides the responsibility thus completely nullifying our agreement . . .

The conditions which make impossible the fulfillment of my contract or agreement are as follows:

1. Schedule "F".
2. Approval required by Kennedy-Van Saun.
3. Agreement of May 4, 1956 between engineers and joint venturers. Page 9, Paragraph 6 which reads, in part, as follows:
   "All decisions and approval by *either* the Owner *or* Joint Venturers".
4. Cost estimate. Decisions are influenced and limited by said original cost estimates covering the entire project.

The above outlined conditions are part of the basic structure or contractural arrangement for the project which I do not believe can be altered to make my agreement workable.

Therefore, in conformity with my agreement to serve the Owners as engineer in charge only if I had full responsibility and authority as stipulated in the letter agreement dated June 1, 1956 quoted above and inasmuch as this agreement is not possible of fulfillment, I do hereby tender my resignation to be effective within a reasonable length of time.

The firm of Kennedy-Van Saun had been employed as engineers by the Cement Plant Constructors who are referred to as the "Joint Venturers" in the above letter, and Schedule "F", which had been prepared and was interpreted by Kennedy-Van Saun, was the document which controlled the construction of the project.

It is quite evident that it was the division of authority between himself and Kennedy-Van Saun which was the main source of the respondent's complaint, and that he was tendering his resignation because he did not have full responsibility and authority.

Further light is thrown on the agreement of September 27 by the respondent's own evidence as to his interpretation of the understanding existing between himself and Senator Fraser a few days before that agreement was reached. His words are:

The understanding at that point was that I was to continue as chief engineer, that Mr. Anderson would not replace me, and that he was coming back as general manager, and that, in order to protect the interests of the stockholders and the Senator's interest and reputation with the company I was to continue as adviser and owner's representative.

It is against this background that the terms of the agreement of September 27, as recorded in the disputed letter of October 15, must be read. These terms are:

First, you are to serve the Lake Ontario Portland Cement Co. Ltd. as the "Owners' Representative and Chief Engineer" *in complete and full charge* of design and construction of the plants being built at Picton,

Toronto, and Rochester, *all as outlined in your written agreement with Cement Plant Constructors dated June 1st, 1956,* which agreement was assigned to Lake Ontario Portland Cement Co. Ltd., on June 26th, 1956.

Secondly, you are to devote all the time possible to this work until you have completed your business on the West Coast and thereafter you are to devote full time to the Lake Ontario Portland Cement Co. Ltd., until the plants at Picton, Toronto and Rochester are completed and in full operation. *Your services are to continue until the plants are accepted by yourself in the name of the Lake Ontario Portland Cement Co. Ltd., from the contractors as being complete and fully satisfactory in every way.*

This agreement is supplementary to, but in no way limits or nullifies the agreement mentioned above other than to extend the length of your services to Lake Ontario Portland Cement Co. Ltd., to the acceptance date of the plants being built for us by the Cement Plant Constructors. (The italics are mine.)

In accepting this letter as a correct account of the earlier oral agreement, Chief Justice McRuer said:

> Both Mr. Groner and Senator Fraser say that that document correctly sets out the agreement that they had entered into on September 27th, and for the purposes of this case I am prepared to accept that statement.

This finding is endorsed by the Court of Appeal and should not, in my view, be disturbed in this Court.

The learned Chief Justice continues with respect to this letter:

> It is argued by Mr. Williston that this is to be read with the original agreement, and that one is to read into this the ten-day termination clause. I think that this is quite inconsistent with that ten-day termination clause being a part of this agreement, and if there is any ambiguity, the oral evidence clearly establishes that that was not so intended. Senator Fraser says that at that time he did not even know the termination clause existed. So what he was doing was making an agreement to terminate when the plant was accepted.

With the greatest respect, it seems to me that the agreement evidenced by the letter dated October 15 must be read with the original agreement of June 1 because it is expressly stated to be supplementary thereto, and the nature of the work to which it relates is described as being "outlined in your agreement with Cement Plant Constructors dated June 1, 1956."

The following oral evidence with respect to the question of whether or not the ten-day termination clause was discussed at the time of making the agreement of September 27 is given by the two people who made that agreement:

> Q. As of that time did you have any understanding with the Senator that you would not be given ten days' notice?

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Ritchie J.

A. That was discussed at the time that we made the agreement in the King Edward Hotel—

By His Lordship

Q. What was discussed at the King Edward Hotel?

A. The extension date of my contract.

Q. You say it was discussed; what was said?

A. Well, that the basic change in the contract was to extend my services to the completion and acceptance dates of the plant.

* * *

Q. You were asked something about the ten days' notice, and you said that was discussed at the King Edward Hotel, and I asked you what it was—was there anything said about the ten days' notice in the King Edward Hotel?

A. Yes, that that part of the contract was no longer in effect, and that the completion date of my contract was extended to the completion date of the plant.

On the same subject, Senator Fraser had this to say:

Q. Was there any specific talk about the ten-day termination clause?

A. I did not mention it. I did not even know it was there.

* * *

Q. There was no discussion with Mr. Groner about a ten-day termination clause?

A. No, I did not discuss it with him. I do not think I knew that it was there, and I was only interested in one thing—

Q. The real point was this—you wanted to get him to come back and work full time?

A. Yes.

I agree with the learned Chief Justice when he says in an earlier part of his decision, "I would not base a judgment on Mr. Groner's evidence unless it was very substantially corroborated", and in face of Senator Fraser's denial of any mention having been made of the ten-day termination clause, I conclude that the matter was never discussed at the meeting of September 27. Accordingly, if there be any inconsistency between the agreement reached on September 27 and the continued existence of the ten-day termination clause, it must be found in the context of the letter dated October 15 itself.

The first paragraph of that letter does little more than assure the respondent that he is "to be in complete and full charge of design and construction of the plants". This assurance would appear to have been necessary in order to persuade the respondent to withdraw his letter of resignation in which the main complaint was that he was not "in

complete and full charge". There is nothing in this paragraph which can, in my view, be construed as dispensing with the ten-day termination clause.

The second paragraph appears to me to have been drawn in accordance with the respondent's understanding that he would continue as chief engineer and that Mr. Anderson would not replace him. It changes the character of his employment from that of a substitute for Mr. Anderson to that of a full-time employee, but the only change in the *length of the respondent's services* is that while the earlier contract engaged his services "until the project . . . is completed and in production . . . ." this paragraph provides that they "are to continue until the plants are accepted by yourself . . . .".

By the third paragraph of this letter it is specified that the agreement which it evidences "in no way limits or nullifies the agreement" of June 1 "other than to extend the length" of Groner's "services . . . to the acceptance date of the plants . . . .", and it seems to me that the ten-day termination clause is one of the provisions which is preserved by this stipulation unless the extension of the length of service is found to be inconsistent with it.

In my view the ten-day termination clause is just as consistent with a contract engaging the respondent's services full time until the acceptance date of the plants as it was with the original contract which engaged them in substitution for those of Mr. Anderson "until the project . . . is completed and in production."

Having reached this conclusion, I am of opinion that the letter of dismissal written by Mr. Wotherspoon in his capacity as president of the appellant company on September 30, 1957, was effective to terminate the respondent's contract of employment on October 12, 1957, but I am also of opinion, as was the learned Chief Justice, that the appellant was justified in dismissing the respondent without notice by reason of the fraudulent manner in which he dealt with the document dated October 15, 1956.

The fact that the appellant did not know of the respondent's dishonest conduct at the time when he was dismissed, and that it was first pleaded by way of an amendment to its defence at the trial does not, in my opinion, detract from its

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validity as a ground for dispensing with his services. The law in this regard is accurately summarized in Halsbury's Laws of England, 2nd ed., vol. 22, p. 155, where it is said:

> It is not necessary that the master, dismissing a servant for good cause, should state the ground for such dismissal; and, provided good ground existed in fact, it is immaterial whether or not it was known to the employer at the time of the dismissal. Justification of dismissal can accordingly be shown by proof of facts ascertained subsequently to the dismissal, or on grounds differing from those alleged at the time.

It may be, as Mr. Justice Morden says in the course of his judgment in the Court of Appeal, that the respondent's misconduct "was not incompatible with the proper discharge of the duties for which he was employed", but in my view it is not so much the misconduct itself as the fact that he was capable of it which justifies the respondent's dismissal. The respondent's own evidence disclosed to the directors that they, on behalf of the shareholders, had been depending for their technical information respecting the progress of the construction of this expensive project on the reports of a man who turned out to be capable of deliberately putting a false date on a document after it had been signed by the company's president and who was afterwards prepared to lie about his actions under oath. As was said by Lord Atkinson in *Federal Supply & Cold Storage Company of South Africa v. Angehrn and Piel*[1], "it is the revelation of character which justifies the dismissal".

Aspinall v. Mid West Collieries[2], was a case which had many factors in common with the present one. In that case a mine manager had obtained from his employers an extension of his holiday for the express purpose of taking his family for a boat trip to Skagway. Having stayed away for the extra period without taking the trip at all, he wrote a letter to the secretary-treasurer of the company which employed him, saying, "Got back the other day from my trip and I am glad to say that Mrs. A. is much improved by the sea voyage. . . . ." This deception was not discovered until the trial when the pleadings were amended to set it up as one of the causes for his dismissal. Speaking on behalf of the Court of Appeal for Alberta, Harvey C.J.A. said:

> We thus have 3 cases of misconduct on the part of the plaintiff, the one respecting the coal, his absence at the time of his dismissal and the matter of the Alaska trip. Whether any one of these alone would be sufficient to justify his dismissal need not be considered because no one of them

[1] (1910), 103 L.T. 150 at 151, 80 L.J.P.C. 1.

[2] [1926] 2 W.W.R. 456, 3 D.L.R. 362.

was alone and, though the knowledge of the last was not obtained by the defendant until the trial, it is quite clear that it may be relied on to justify a dismissal for misconduct and the pleadings were amended, by leave, to set it up.

These instances of disobedience and deceit combined, emphasized as they are by the deliberate perjury of the plaintiff, establish clearly the untrustworthiness of the plaintiff and bring the case well within the principles enumerated in such cases as *Beattie v. Parmenter* (1889), 5 Times L.R. 396 and *Federal Supply & Cold Storage Co. of S. Africa v. Angehrn & Piel* (*supra*) . . . .

In my view the same considerations apply to the present circumstances.

In view of all the above, I have concluded that the respondent's contract of employment was terminated in accordance with its terms by the giving of ten days' written notice, and that, in any event, the deceitful conduct to which the respondent admitted on the witness stand would have justified the appellant in dismissing him even if no notice had been given.

As to the cross-appeal, the evidence satisfies me that the respondent had agreed to an arrangement whereby his disbursements were to be paid in Canadian funds and his fees in United States funds, and I, accordingly, agree with the Court of Appeal that his claim for the equivalent of Canadian dollar value for his fees should be disallowed. The cross-appeal should, therefore, be dismissed.

I am unable to see any answer to the respondent's claim for his car allowance at the rate of ten cents per mile, and would accordingly allow this item, but in all other respects I would allow the appeal.

The appellant should have its costs of the appeal and the cross-appeal in this Court and its costs of the appeal in the Court of Appeal, but I would not disturb the order of the learned Chief Justice with respect to the costs of the trial.

Appeal allowed, cross-appeal dismissed, with costs.

Solicitors for the defendant, appellant: Osler, Hoskin & Harcourt, Toronto.

Solicitors for the plaintiff, respondent: Keith, Ganong, Carruthers & Rose, Toronto.

1961

*Mar. 8, 9
June 26

REGAS LIMITED (*Defendant*) .....APPELLANT;

AND

LEON LOUIS PLOTKINS (*Plaintiff*) ....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Chose in action—Assignment in Alberta of debt created in Saskatchewan—Conflict of laws—Whether original creditor properly entitled to maintain action in Saskatchewan—Question of procedure governed by lex fori—The Judicature Act, R.S.A. 1955, c. 164, s. 34(15)—The Choses in Action Act, R.S.S. 1953, c. 360.

The liquidator of L. O. Ltd. brought an action to recover the balance owing on a general account for goods sold and delivered by L. O. Ltd. to the defendant in Saskatchewan. The debt owing by the defendant to L. O. Ltd. was the subject of five assignments, the parties to each of which were resident in Alberta. All the assignments were executed in that province. The action was dismissed at trial on the ground that the plaintiff's right to sue arose by virtue of an assignment governed by the law of Alberta, under which an action could not be maintained in the plaintiff's name, since no notice of the assignment to him had been given to the defendant. This decision was reversed by the Court of Appeal, where it was held that there was no contest here as between an assignor and an assignee of the debt; that the claim was for the enforcement of a debt locally situate in Saskatchewan; and that the law of that province would govern, under which the action was maintainable in the name of the plaintiff. The defendant appealed to this Court, contending that the law of Alberta should be applied, and further that even if the law of Saskatchewan applied, the plaintiff was not entitled to maintain the action.

Held: The appeal should be dismissed.

The plaintiff had a valid, equitable assignment under the laws of Alberta, but in order to obtain judgment in that jurisdiction he would have had to join, as a party, the person who held the legal right to the debt under *The Judicature Act*. *Republica de Guatemala v. Nunez* [1927] 1 K.B. 669; *In re Anziani,* [1930] 1 Ch. 407, distinguished; *Dawson v. Leach and Hazza,* [1935] 3 W.W.R. 547, referred to.

However, the plaintiff did not sue on the debt in Alberta, but in Saskatchewan, and the question whether he could maintain his action there in his own name fell to be determined by the *lex fori,* for the question, in the circumstances of the case, was one of procedure and not of substance. It was not a question of the validity of the assignment, or of the capacity of the parties to it, but as to the proper parties to the proceedings in Saskatchewan, which was a question of procedure to be governed by Saskatchewan law, as set out in *The Choses in Action Act,* under which the plaintiff was entitled to maintain the action.

The item of $10,911.30 charged by the plaintiff against the defendant's account related to a debt owing by the defendant to A.G.S. Ltd., which company assigned the debt to L.O. Ltd. The claim in this action was for the balance due upon a running account between the defendant and L.O. Ltd., which balance was substantially composed of those items

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

most recently sold to the defendant. Those items were sold by L.O. Ltd. subsequent to the date when the assignment of the debt from A.G.S. Ltd. occurred and after it had been paid by subsequent credits in favour of the defendant. The items in issue in this action did not, therefore, include that debt.

In the light of the evidence, the conclusion reached by the Court of Appeal that interest should be paid at 5 per cent on the balance owing after the account became static, was not erroneous.

APPEAL from a judgment of the Court of Appeal for Saskatchewan[1], allowing an appeal from a judgment of Hall C.J.Q.B. Appeal dismissed.

R. M. Balfour, Q.C., for the defendant, appellant.

A. W. Embury, for the plaintiff, respondent.

The judgment of the Court was delivered by

MARTLAND J.:—This is an appeal from a judgment of the Court of Appeal for Saskatchewan[1], which had allowed an appeal from the judgment at trial dismissing the respondent's claim against the appellant.

The respondent's claim was for the balance owing on a general account for goods sold and delivered by Lion Oils Ltd. to the appellant, in Saskatchewan, in the years 1949 and 1950, together with interest at the rate of 5 per cent per annum on the balance due. The appellant did not, on this appeal, question the amount which had been found to be owing by it in the Court below, save as to one item of $10,911.30 which had been charged against the appellant. The appellant did dispute the right to collect interest upon the balance owing.

Lion Oils Ltd., by a special resolution of its shareholders dated November 24, 1950, went into voluntary liquidation and the respondent, Leon Louis Plotkins, was appointed liquidator.

The debt owing by the appellant to Lion Oils Ltd. was the subject of five assignments, as follows:

1. 27 December, 1950, Leon Louis Plotkins, as liquidator of Lion Oils Ltd., to Leon O. Beauchemin.
2. 28 December, 1950, Leon O. Beauchemin to Lion Oils of Canada Limited.
3. 28 May, 1954, Stewart Petroleums Limited (formerly Lion Oils of Canada Limited) to Leon O. Beauchemin and Jackson Stewart.
4. 30 September, 1955, Leon O. Beauchemin and Jackson Stewart to Thomas W. Smith.
5. 30 September, 1955, Thomas W. Smith to Leon Louis Plotkins.

[1] (1959-60), 30 W.W.R. 14, 22 D.L.R. (2d) 169.

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Smith had been secretary and comptroller of Lion Oils Ltd. and, when it went into liquidation, was assistant to the liquidator.

Each of the individual parties to these assignments resided in Calgary and Stewart Petroleums Limited had its head office there. Each of the assignments was executed in that city. Notice of the first three assignments was given to the appellant by a letter dated February 2, 1955, although the letter, in referring to the third assignment, did not make any reference to Jackson Stewart.

The learned trial judge dismissed the action on the ground that the respondent's right to sue arose by virtue of an assignment governed by the law of Alberta, under which an action could not be maintained in the respondent's name, since no notice of the assignment to him had been given to the appellant.

This decision was reversed on appeal. Gordon J.A., who delivered the judgment of the Court of Appeal, held that in this case there was no contest as between an assignor and an assignee of the debt. The claim was for the enforcement of a debt locally situate in the Province of Saskatchewan and he held that the law of that Province would govern, under which the action was maintainable in the name of the respondent. He held also that the respondent was entitled to recover interest on the debt and that the item of $10,911.30 had properly been charged against the appellant.

The main question for consideration in this appeal is as to whether or not the respondent was properly entitled to maintain this action in the Province of Saskatchewan. The appellant contends that the law of Alberta should be applied and further argues that, even if the law of Saskatchewan applies, the respondent was not entitled to maintain the action.

The law relating to a legal assignment of a debt or chose in action in Alberta is stated in subs. (15) of s. 34 of *The Judicature Act*, R.S.A. 1955, c. 164, as follows:

> (15) Where a debt or other legal chose in action is assigned by an absolute assignment made in writing under the hand of the assignor and not purporting to be by way of charge only, if express notice in writing of the assignment has been given to the debtor, trustee or other person from

whom the assignor would have been entitled to receive or claim the debt or chose in action, the absolute assignment is effectual in law to pass and transfer

(a) the legal right to the debt or chose in action from the date of the notice of the assignment,

(b) all legal and other remedies for the debt or chose in action, and

(c) power to give a good discharge for the debt or chose in action without concurrence of the assignor,

and is subject to all equities that would have been entitled to priority over the right of the assignee if this subsection had not been enacted.

This provision is identical in its effect to the provision which first appeared in Alberta in 1907, by the enactment of s. 7 of c. 5 of the Alberta Statutes of that year, amending *The Judicature Ordinance of the Northwest Territories.* That amendment was clearly patterned on s. 25(6) of the English *Judicature Act,* which, after the fusion of the Courts of Common Law and Equity, introduced, for the first time, a statutory assignment of a legal chose in action which would take effect at law. Prior to that time a legal chose in action could only be assigned in equity and the action had to be brought in the name of the assignor.

The appellant contends that the identity of the legal owner of the debt must be determined by the proper law of the contract of assignment from which he derives his title, in this case, the law of Alberta. Under that law, he submits, the original creditor, who was the plaintiff in this action, had been deprived of his legal title to the debt and could not give an effectual discharge therefor. In support of his contention he relied upon two English decisions, one a judgment of the Court of Appeal, *Republica de Guatemala v. Nunez*[1], and *In re Anziani*[2].

The facts of the former case were as follows: In 1906 Cabrera, who was then the President of Guatemala, deposited a sum of money with a London bank. In July, 1919, while still President, he addressed a letter to the bankers requesting them to transfer this sum to Nunez, his illegitimate son. Cabrera was deposed and imprisoned in 1920. While imprisoned he assigned, under duress, the sum to the Republic, acknowledging that he had misappropriated it from the public funds. In an action brought by the Republic

[1] [1927] 1 K.B. 669, 96 L.J.K.B. 441.
[2] [1930] 1 Ch. 407, 99 L.J. Ch. 215.

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to recover the money, Nunez claimed ownership by virtue of the assignment of 1919. This assignment was valid by English law, but void by the law of Guatemala because (1) being unsupported by consideration, it should have been made on stamped paper and signed by Nunez before a notary, and (2) Nunez, being a minor, lacked capacity to accept a voluntary assignment.

It will be observed that English law was the *lex situs* of the debt and the proper law of the transaction out of which the debt arose, but that Guatemalan law was the *lex loci actus* and the proper law of the assignment and also the *lex domicilii* of the assignor and the assignee.

It was held, both at trial and by the Court of Appeal, that the validity of the assignment to Nunez must be determined by the law of Guatemala.

The judgment of Bankes L.J. in the Court of Appeal was upon the ground that, as both the Republic and Nunez were domiciled and resident in Guatemala at the date of their respective assignments, and as the English depositary claimed no interest in the fund, the question should be determined by the law of their domicile and residence.

Scrutton and Lawrence L.JJ. took the position that the question involved was that of the capacity of Nunez to take the assignment and that this question fell to be determined by the law of his domicile. Scrutton L.J. further held that the non-compliance with the formalities of the assignment to Nunez made the assignment void. Lawrence L.J. held that, as the contract of deposit was made in England and the money recoverable there, it was an English debt locally situated in England and accordingly the validity of the assignment, as distinct from the capacity of Nunez, would have been governed by English law.

In the *Anziani* case it was held that an assignment executed in a foreign jurisdiction, by a person there domiciled, of a chose in action locally situate in England is void if the assignment is void on grounds of substance according to the local law.

In my opinion the present action differs materially from these two cases. The question of the validity of the assignment to the respondent, or of the capacity of the assignor or of the assignee, does not here arise. Although the assignment to the respondent was not a legal assignment, within the

requirements of the Alberta *Judicature Act*, it was not, for that reason, ineffective. It did constitute, under the law of Alberta, a valid, equitable assignment of the debt.

That such an assignment can be properly made and enforced in Alberta is clearly stated by Harvey C.J.A. in *Dawson v. Leach and Hazza*[1], where he says at p. 549:

> The defendants argue that by virtue of sec. 37(*m*) of *The Judicature Act*, R.S.A., 1922, ch. 72, the assignee of a chose in action is the only person who can maintain an action in respect of the chose in action so assigned. The section provides that an absolute assignment upon notice being given "shall be effectual in law . . . to pass and transfer the legal right of such debt or chose in action from the date of such notice and all legal and other remedies for the same and power to give a good discharge for the same without the concurrence of the assignor." Without and before this enactment there could be an equitable assignment passing all equitable rights and this provision made the legal form conform to the equitable procedure. It is clear too that it is dealing with nothing but the legal right as between the assignor and assignee and there is nothing to suggest that while the assignee has all the legal rights and remedies of the assignor some one may not have equitable rights in the chose in action which becomes legally vested in the assignee. That being so the question arises whether he can maintain an action to enforce them.

Harvey C.J.A., after then citing from the judgment of Viscount Cave L.C. in *Performing Right Society v. London Theatre of Varieties*[2], continued his own judgment as follows:

> It would seem from that that it could not be said that this plaintiff has not a right to come into Court to enforce his equitable rights but that probably he could not obtain judgment without having the legal owner made a party to the action.

The position here is, therefore, that the respondent had a valid, equitable assignment under the laws of Alberta, but that in order to obtain judgment in that jurisdiction he would have had to join, as a party, the person who held the legal right to the debt under *The Judicature Act*.

However, the respondent did not sue on the debt in Alberta, but in Saskatchewan, where the debt had been incurred for goods sold and delivered in that Province to the debtor, who resided there. The question is whether he can maintain his action there in his own name and that question, in my opinion, falls to be determined by the *lex fori*, for the question, in the circumstances of this case, is one of procedure and not of substance. It is not a question

[1] [1935] 3 W.W.R. 547, [1936] 1 D.L.R. 31.
[2] [1924] A.C. 1 at 14, 93 L.J.K.B. 33.

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of the validity of the assignment, or of the capacity of the parties to it, but as to the proper parties to the proceedings in Saskatchewan, which is a question of procedure which should be governed by Saskatchewan law.

The Saskatchewan law on this point is set out in *The Choses in Action Act*, R.S.S. 1953, c. 360. The relevant provisions of that statute are as follows:

2. Every debt and every chose in action arising out of contract shall be assignable by any form of writing containing apt words in that behalf, but subject to such conditions and restrictions with respect to the right of transfer as may appertain to the original debt or as may be connected with or be contained in the original contract; and the assignee thereof may bring an action thereon in his own name as the party might to whom the debt was originally owing or to whom the right of action originally accrued, or he may proceed in respect of the same as though this Act had not been passed.

3. The word "assignee" in section 2 includes any person now being or hereafter becoming entitled by any first or subsequent assignment or transfer or any derivative title to a debt or chose in action and possessing at the time when the action is instituted the right to receive the subject or proceeds thereof and to give effectual discharge therefor.

4. The plaintiff in an action for the recovery of the subject of an assignment made in conformity with sections 2 and 3 shall in his statement of claim set forth briefly the chain of assignments showing how he claims title, but in all other respects the proceedings may be the same as if the action were brought in the name of the original creditor or of the person to whom the cause of action accrued.

* * *

6. If an assignment is made in conformity with this Act, and notice thereof is given to the debtor or person liable in respect of the subject of the assignment, the assignee shall have, hold and enjoy the same free of any claims, defences or equities which may arise subsequent to the notice by any act of the assignor or otherwise.

The respondent did not, in accordance with s. 4, set forth the chain of assignments previously mentioned. However, Plotkins, as liquidator of Lion Oils Ltd., was the original creditor.

Dealing with this point in the Court of Appeal, Gordon J.A. says:

There was considerable argument before us that even under the Saskatchewan Choses in Action Act the original creditor could not sue in his own name after the debt had been assigned and notice of the assignment given the debtor. In my view, the question was raised and decided by the Court en banc in the case of *Covert v. Janzen*, 9 W.L.R. 287, and as far as I know this decision has been followed ever since and I do not think that the law should now be disturbed by this Court. It was followed by this

Court in the case of *Krinke v. Schafter* [1919] 1 W.W.R. 990 and again in the case of *Kusch v. Peat* [1922] 2 W.W.R. 174. I am, therefore, of the opinion that if the Saskatchewan law applies, the action is maintainable.

The appellant contended that, by virtue of s. 6 of the Act, Beauchemin and Stewart, being the last assignees in respect of whose assignment notice had been given to the appellant, held the debt free of any claims, defences or equities which might arise subsequent to the date of the notice and that they were the only persons who could give an effectual discharge of the debt. However, s. 6 does not in any way preclude an assignee of a debt, who has given notice to the debtor, from himself assigning the debt to another assignee, who would thereafter enjoy the rights conferred by the statute. That is what did occur here and I would agree with Gordon J.A. that, in the light of the Saskatchewan authorities to which he refers, the original creditor may bring suit on the debt even though an assignment has been made.

The appellant further argues that the final assignment was made to Plotkins personally and not to him in his capacity as liquidator of Lion Oils Ltd. It is true that the assignment made by Smith on September 30, 1955, was made to Plotkins and does not refer to him as the liquidator of Lion Oils Ltd., but Plotkins himself testified that the assignment was taken by him in his role as liquidator and his evidence shows that the right to the debt was held by him in that capacity.

I am, therefore, in agreement with the conclusion reached by the Court of Appeal that the respondent was entitled to maintain the action in the Province of Saskatchewan.

With respect to the item of $10,911.30 charged by the respondent against the appellant's account, this sum related to a debt owing by the appellant to a company called Alberta Gas Services Ltd., which company assigned the debt to Lion Oils Ltd. The appellant's submission was not against the validity of the account, but that this item could not properly be claimed in an action which, by the pleadings, was one for goods sold and delivered by Lion Oils Ltd. to the appellant.

It appears, however, that the claim in this action is for the balance due upon a running account between the appellant and Lion Oils Ltd., which balance is substantially composed of those items most recently sold to the appellant.

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Those items were sold by Lion Oils Ltd. subsequent to the date when the assignment of the debt from Alberta Gas Services Ltd. occurred and after it had been paid by subsequent credits in favour of the appellant. The items in issue in this action did not, therefore, include that debt.

The last matter is the question of interest. The learned trial judge held that this claim had not been established because the evidence did not prove an agreement to pay interest or an amount upon which it should be calculated. The Court of Appeal held that interest should be paid at 5 per cent on the balance owing after the account became static. The conclusion reached by the learned trial judge does not appear to have been reached on the basis of the credibility of witnesses, but rather is an inference drawn from the evidence adduced, as is the case in respect of the conclusion reached by the Court of Appeal.

The evidence on this matter is that of Plotkins, who testifies that he and Harvey, the representative of the appellant, arranged with a bank for a $25,000 credit for the appellant. However, as the bank insisted on a guarantee of the appellant's indebtedness by Lion Oils Ltd., it was then agreed that the latter company would, itself, extend the credit of approximately the same amount, on condition that the appellant would pay to it 5 per cent interest on outstanding balances as at the end of each year. Harvey, who also testified, did not deny this arrangement, but said that he could not remember it. Interest was, in fact, paid on one occasion after this arrangement was alleged to have been made. In the light of this evidence I am not prepared to say that the conclusion reached by the Court of Appeal was erroneous.

For these reasons I am, therefore, of the opinion that the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the defendant, appellant: Balfour & Balfour, Regina.

Solicitors for the plaintiff, respondent: Noonan, Embury, Heald & Molisky, Regina.

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ARTHUR SURVEYER, EMILE NENNIGER AND GEORGE CHENEVERT (*Plaintiffs*) ..... APPELLANTS;

*May 25, 26
June 12

AND

H. G. ACRES & COMPANY LIMITED (*Defendant*) ..... RESPONDENT.

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

Procedure—Joinder of actions—Different parties—Code of Civil Procedure, arts. 291, 292.

Q Co. and L Co. claimed in two separate actions against the plaintiffs damages arising out of a forest fire allegedly due to the negligence of the plaintiffs' employees. A third action was taken by L Co. against the Quebec Hydro-Electric Commission for damages arising out of the same cause of action, and these three actions were ordered to be tried at the same time and on the same evidence.

The present action for indemnification, based on a contractual relationship, was taken by the plaintiffs against the defendant. The trial judge granted the plaintiffs' motion to have these four actions tried at the same time and decided upon the same evidence as far as the pleadings permitted. This judgment was reversed by a majority judgment in the Court of Queen's Bench. The plaintiffs were granted leave to appeal to this Court.

Held: The appeal should be dismissed.

It was not necessary to decide whether art. 292 of the *Code of Civil Procedure* was to be read as subject to the provisions of art. 291, because, even if a discretion was given under art. 292 to join such cases—as to which no opinion was expressed—the present action should not be ordered joined with the three damage actions.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], reversing a judgment of St. Germain J. Appeal dismissed.

François Mercier, Q.C., for the plaintiffs, appellants.

James E. Mitchell, Q.C., for the defendant, respondent.

The judgment of the Court was delivered by

ABBOTT J.:—This appeal, by leave under s. 41 of the *Supreme Court Act,* is from a majority judgment of the Court of Queen's Bench[1] reversing an interlocutory judgment of the Superior Court made under art. 292 of the *Code*

*PRESENT: Taschereau, Fauteux, Abbott, Martland and Ritchie JJ.

[1] [1961] Que. Q.B. 44.

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of Civil Procedure, which ordered that four actions then pending in the Superior Court be tried at the same time and decided on the same evidence in so far as the pleadings would permit.

In two of the said actions, appellants were the defendants and the plaintiffs were respectively the Quebec North Shore Paper Company and the Laurentian Forest Protective Association Limited, both claiming substantial damages arising from a forest fire allegedly due to negligence on the part of employees of appellants. A third action was taken by the said Laurentian Forest Protective Association Limited against the Quebec Hydro-Electric Commission, for damages arising out of the same cause of action. These three actions were ordered joined for trial by a previous judgment of the Superior Court.

Some eighteen months after the said three actions were taken, appellants instituted the present action against respondent, asking that by reason of a contractual arrangement alleged to subsist between the parties, appellants be indemnified by respondent in the manner set forth in their declaration.

Two questions arise on this appeal:

(1) Whether under art. 292 C.C.P. the court has any authority to join for trial actions in which the parties are not the same.

(2) If such authority exists, whether it should have been exercised.

On the first question the substance of appellants' argument, shortly stated, is that art. 292 C.C.P. must be read independently of art. 291 C.C.P. Respondent's argument is the opposite, namely that art. 292 C.C.P. must be read as subject to the provisions of art. 291. On this point there appear to have been conflicting opinions expressed in the Quebec courts, and Mr. Mercier in his able argument suggested to us that this Court should resolve those differences. For the purposes of this appeal, however, we do not find it necessary to resolve such a difficulty if it exists.

Even if a discretion is given under art. 292 C.C.P. to join such cases—as to which we express no opinion—after the full and helpful argument before us, we are all of the view that the present action should not be ordered joined with the three damage actions and that the court below was right in concluding that the motion to join should have been dismissed.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Attorneys for the plaintiffs, appellants: Brais, Campbell, Mercier, Leduc & Pepper, Montreal.

Attorneys for the defendant, respondent: Senecal, Turnbull, Mitchell, Stairs, Culver, Kierans & Claxton, Montreal.

HARRY COLES (*Plaintiff*) .....APPELLANT;

AND

THOMAS H. HIGGINSON (*Defendant*) ...RESPONDENT.

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*Feb. 16
Jun. 12

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

Partnership—Mining claims—Partner acquiring co-partner's interest and re-selling at a profit—Claim for share of price of partnership property —Allegation of fraud and misrepresentation.

The parties jointly owned 18 mining claims. The defendant bought the plaintiff's share and gave a cheque which bore the notation "in full payment for all . . . interest in 18 claims . . ." This cheque was later cashed by the plaintiff. The defendant then sold the claims to a mining company, of which he was the president. Some 15 months later the plaintiff instituted this action, claiming that he had not sold his interest in the claims to the defendant, but had been induced to consent to a sale to the mining company by the fraudulent representations of the defendant. The claim was for one-half of the purchase price. The trial judge dismissed the action and this judgment was affirmed by the Court of Queen's Bench. The plaintiff appealed to this Court.

Held: The appeal should be dismissed.

Per Curriam: The contention that this claim was for a share of the price of sale of partnership property was not open to the plaintiff on the pleadings, but even on the assumption that a partnership existed

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

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between the parties for the exploitation of the claims—which was doubtful—such a partnership would be dissolved upon one partner requiring all the interest of his co-partner in the assets of the partnership. It is true that during the continuation of a partnership one partner cannot profit from dealings with partnership assets at the expense of a co-partner. However, one partner is always free to purchase the interest of his co-partner with a view to re-selling at a profit, and under the law of Quebec no duty was imposed upon the purchasing partner to disclose to his co-partner such intention to re-sell. Such a sale was valid and put an end to the partnership in the absence of fraud or misrepresentation. The findings of the lower Courts should not be disturbed.

Per Martland J.: As the plaintiff failed to establish a fiduciary relationship at the time of the purchase by the defendant there was no obligation upon the defendant at that time to disclose his future intended dealings with the claims.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], affirming a judgment of Smith J. Appeal dismissed.

E. Lafontaine, for the plaintiff, appellant.

T. P. Slattery, Q.C., for the defendant, respondent.

The judgment of Kerwin C.J. and of Taschereau, Fauteux and Abbott JJ. was delivered by

ABBOTT J.:—Prior to December 15, 1954, appellant and respondent were the joint undivided owners of eighteen mining claims in the Sudbury district of Northern Ontario. The parties were apparently well known to each other, and some time in June or July of 1954, respondent had acquired from appellant a half interest in the said claims.

On December 15, 1954, respondent issued to appellant his cheque for $1500, which was cashed by the latter on December 20, 1954, and which bore on the back the following notation:

> In full payment for all of H. Coles interest in eighteen claims adjoining Zinc Lake Mines, Ltd. property to the west, in Shelley & Cnaping Townships, Sudbury District, Ontario.

Up to that time no extensive examination had been made of the said claims, but in the latter part of December 1954, after acquiring appellant's interest, respondent arranged to have a geophysical survey made, obtained certain other reports on the property, and in January 1955, through an intermediary, sold the said claims to West Malartic Mines

[1] [1960] Que. Q.B. 984.

Limited, a company of which he was then the president, for a price of $15,000 in cash and 150,000 fully paid up shares of the said West Malartic Mines Limited. It is a reasonable inference, in my opinion, that in acquiring appellant's interest in these claims, the respondent did so with a view to disposing of them at a profit to the mining company in question.

Some fifteen months later, in March 1956, appellant took the present action, claiming that he had not sold his interest in the said claims to respondent but had been induced to consent to a sale to West Malartic Mines Limited as a result of false and fraudulent representations made to him by respondent. He claimed from respondent one-half of the purchase price, less the $1500 already received by him. Appellant's cause of action is set forth by him in his declaration in the following terms:

> 3. During the latter part of the year 1954, Defendant represented to Plaintiff that he could sell the said mining claims to the WEST MALARTIC MINES LIMITED, a company of which he was the President, for the price of $3,000.00 in cash and 200,000 fully paid up shares of the said company, to which Plaintiff agreed.
>
> 4. The said representations were false and fraudulent and made by Defendant to Plaintiff in order to induce him to accept the said price, while the true transaction was a sale by Defendant to the said WEST MALARTIC MINES LIMITED, for the price of $15,000.00 in cash and 150,000 fully paid up shares of the Capital Stock of the said company.

Respondent's defence was that on or about December 15, 1954, appellant had sold and transferred to him all his right, title and interest in the said claims for the sum of $1500.

It was argued by counsel for appellant that appellant and respondent were in partnership in respect of the said mining claims and that, in effect, appellant's claim is one for a share of the price of sale of partnership property. I do not think such a contention is open to appellant on the pleadings, but even if it be assumed that a partnership did exist between the parties for the exploitation of the said claims—which I think is doubtful—such a partnership would be dissolved upon one partner acquiring all the interest of his co-partner in the assets of the partnership.

It is trite law of course, that during the continuation of a partnership one partner cannot profit from dealings with partnership assets at the expense of a co-partner.

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However, one partner is free at any time to purchase the interest of his co-partner in the assets of the partnership with a view to reselling those assets at a profit, and under the law of Quebec no duty is imposed upon the purchasing partner to disclose to his co-partner such intention to resell. In the absence of fraud or misrepresentation, such a sale is valid and puts an end to the partnership.

After a careful review of the respective contentions of the parties and of the evidence, the learned trial judge made the following findings:

> The proposition advanced on behalf of the Plaintiff to the effect that there was no contract of sale entered into between himself and the Defendant, but that he, the Plaintiff, was induced by fraud practised by the Defendant to consent to the sale of said claims to West Malartic by the Defendant, representing the partnership, is not only unsupported by the prof but is inconsistent with the terms endorsed on the reverse of the cheque accepted by Plaintiff in consideration of the transfer of his interest in the said mining claims. On the contrary, the Court is forced to conclude that on the 15th day of December 1954 the Plaintiff sold and transferred his interest in said claims to the Defendant thereby terminating any partnership which may have existed previously in respect of said claims, and that thereafter the Defendant was the sole owner of said claims with the right to deal with them as he might see fit.

Those findings were confirmed by the Court of Queen's Bench and appellant has failed to convince me that they should be disturbed.

The appeal should be dismissed with costs.

MARTLAND J.:—After reviewing all of the evidence in these proceedings I am not satisfied that the appellant has proved the facts necessary to establish a fiduciary relationship as between himself and the respondent at the time when the respondent purchased from him his remaining one-half interest in the mining claims. That being so, there was no obligation upon the respondent, at the time the purchase was made, to disclose to the appellant the respondent's intended dealings with the mining claims after the completion of the purchase.

With respect to those issues which were determined by the Courts below, I agree with my brother Abbott that their conclusions should not be disturbed.

In my opinion the appeal should be dismissed with costs.

Appeal dismissed with costs.

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Attorney for the plaintiff, appellant: E. Lafontaine, Montreal.

Attorneys for the defendant, respondent: Slattery, Bélanger & Fairbanks, Montreal.

ROGER BARMAN (*Plaintiff*) .....APPELLANT;

AND

JEAN VILLARD (*Defendant*) .....RESPONDENT.

1961
*May 15
Jun. 12

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

Damages—Plaintiff bitten by dog—Liability of owner—Dog not vicious—Accident caused by sudden movement of the plaintiff towards dog—Whether presumption of art. 1055 of the Civil Code rebutted.

The plaintiff was in charge as caretaker of a tourist home owned and operated by the defendant. The defendant owned a large dog of the Doberman Pinscher breed which was left in the plaintiff's care. On the day of the accident the plaintiff had just finished washing the kitchen floor and was about to go out with the defendant who was also in the kitchen with the dog. The plaintiff, who was fond of the dog, went up to shake it by the paw. As he did so, he lost his balance and fell suddenly towards the dog which, in alarm and without warning, bit the plaintiff in the face. The trial judge dismissed the action and this judgment was affirmed by the Court of Appeal. The plaintiff appealed to this Court.

Held: The appeal should be dismissed.

While the owner of an animal is presumed to be responsible whether it is under his own care or that of his servants, that presumption created by art. 1055 of the *Civil Code*, can be rebutted by establishing "force majeure", the action of a third party or the fault of the victim. In the present case no liability could be attached to the owner. The evidence was clear that the dog was not vicious and that the sole cause of the accident was the unintentional fall of the plaintiff.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], affirming a judgment of Côté J. Appeal dismissed.

*PRESENT: Taschereau, Locke, Fauteux, Martland and Ritchie JJ.

[1] [1958] Que. Q.B. 267.

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BARMAN
v.
VILLARD

M. Dumesnil, Y. Desloges and Miss M. Perreault, for the plaintiff, appellant.

G. Allison for the defendant, respondent.

The judgment of the Court was delivered by

TASCHEREAU J.:—Le défendeur-intimé est propriétaire d'un immeuble affecté à l'accommodation des touristes, et le demandeur-appelant en est le concierge. Ce dernier, originaire de Suisse, est venu au Canada en 1950 à la demande de l'intimé qui est son cousin. Barman habitait avec une demoiselle du nom de Schmidt le rez-de-chausée de l'immeuble en question, et l'intimé lui avait confié la garde de son chien, un Doberman Pinscher, de taille assez imposante. Durant une année environ, soit jusqu'au mois de juin 1951, le demandeur et le défendeur habitaient cette maison, mais à cette époque, Villard, le propriétaire, partit pour la campagne avec sa femme, et ils amenèrent le chien avec eux. Ils revinrent à Montréal au mois de septembre de la même année, et quelque temps après firent un voyage en Europe et ne furent de retour qu'au printemps de 1952. Durant ce temps, le chien resta sous la garde du demandeur-appelant, et il en fut ainsi jusqu'au 15 octobre 1952, car en revenant d'Europe, l'intimé et sa femme habitèrent un autre logement où ils ne pouvaient pas garder le chien.

A cette date du 15 octobre 1952, l'appelant venait de finir de laver le plancher de la cuisine, et se préparait à sortir avec l'intimé et mademoiselle Schmidt, quand il s'approcha du chien qu'il affectionnait, afin de lui demander sa patte. En faisant ce geste, il glissa sur le plancher humide vers le chien qui était couché, et ce dernier alarmé et épeuré par ce mouvement brusque qui semblait une menace, réagit violemment et mordit l'appelant à la figure lui infligeant de sérieuses blessures. Le demandeur réclama devant la Cour supérieure la somme de $25,000 pour incapacité partielle, défiguration, choc nerveux, soins médicaux, etc. etc. La Cour supérieure a rejeté cette action avec dépens, et la Cour du banc de la reine[1] a unanimement confirmé cet arrêt. Le demandeur appelle de ces décisions.

Il ne fait pas de doute qu'en vertu des dispositions de l'art. 1055 C.C., le propriétaire d'un animal est responsable du dommage que l'animal cause, soit qu'il fut sous sa garde

[1] [1958] Que. Q.B. 267.

ou sous celle de ses domestiques. Cet article du *Code Civil* crée donc une présomption de responsabilité contre le propriétaire, mais cette présomption peut évidemment être contredite. Elle n'est pas invincible, et elle peut être contredite par une preuve contraire. (1239 C.C.). Ainsi, dans un cas comme celui qui nous occupe, si le propriétaire de l'animal établit cas fortuit, force majeure, l'acte d'un tiers ou *faute de la victime,* il ne peut être recherché en dommages devant les tribunaux, car alors la présomption que l'art. 1055 attache au propriétaire de l'animal, ou à celui qui s'en sert, est repoussée. Vide: Mignault, vol. 5, pp. 339, 376, 377; Langelier, vol. 3, p. 482; Massé & Vergé sur Zachariae, para. 629; De Lorimier, vol. 8, p. 248; *Montreal Stockyards Co. v. Poulin*[1]; *Lafrance v. Paulhus*[2]; *Piquette v. Fréchette*[3]; *Gamache v. Grondin*[4]; *Fortin v. Fournier*[5]; *McSween v. Lapointe*[6].

La question de responsabilité présenterait plus de difficultés, s'il s'agissait d'un chien vicieux, mais ce point ne se présente pas ici, car l'appelant lui-même dans son témoignage nous dit:

> C'est un chien qui était doux, tranquille, plutôt nerveux, mais une parfaite bête, une bonne bête, pas méchante du tout, craintive plutôt.

Il me semble évident que la seule cause de cet accident soit la conduite de la victime elle-même. Il est certain que son acte n'a pas été intentionnel, mais il est aussi évident que la chute que le demandeur a faite a naturellement provoqué cette violente réaction de cette bête paisible, avec le résultat que l'on connaît. D'ailleurs, dans son témoignage l'appellant lui-même nous dit ceci:

> J'ai l'impression qu'il a été saisi de peur, c'est une bête qui était craintive. J'ai fait un mouvement brusque en tombant, il m'a mordu.

Et plus loin, voici ce que l'appelant affirme:

> Non, il n'était pas traître, on pouvait lui faire ce qu'on voulait à peu près. C'est une peur qu'il a eue. Il a mordu. Il s'est senti menacé peut-être. Qu'est-ce qui se passe dans la tête d'un chien? On ne peut pas savoir.

Il resort donc de toute la preuve que le chien de l'intimé était d'une nature douce et tranquille, qu'il s'est senti menacé, et que sa réaction subite et violente ne peut être

[1] (1940), 70 Que. K.B. 19 at 21, 23, 27.
[2] [1948] Que. K.B. 683.
[3] [1946] Que. S.C. 98.
[4] (1938), 76 Que. S.C. 257.
[5] [1946] Que. S.C. 450.
[6] [1956] Que. S.C. 384.

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attribuée qu'à la victime elle-même. C'est la conclusion à laquelle sont arrivées la Cour supérieure et la Cour du banc de la reine, et je crois que toutes deux ont bien jugé.

Taschereau J. L'appel doit être rejeté avec dépens.

Appeal dismissed with costs.

Attorney for the plaintiff, appellant: Mario Dumesnil, Montreal.

Attorneys for the defendant, respondent: Walker, Chauvin, Walker, Allison & Beaulieu, Montreal.

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*Feb. 9
Jun. 12

GREGORY & COMPANY INC. (*Petitioner*) APPELLANT;

AND

THE QUEBEC SECURITIES COMMISSION ET AL. (*Defendants*) .... } RESPONDENTS.

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

Securities—Broker—Investment counsel—Clients outside province—Office in province and business conducted therefrom—Revocation of registration—Continuation of business—Books and documents seized—Bank accounts frozen—Injunction—Jurisdiction of Securities Commission—B.N.A. Act, 1867. s. 96—Securities Act, 1954-55 (Que.). c. 11, ss. 1, 13, 16, 44.

The petitioner, whose head office was in Montreal, was registered as a broker with the Quebec Securities Commission. It was engaged in the promotion of four mining companies operating in the Province, and published a weekly bulletin promoting the sale of the shares of these companies, offering advice regarding other mining and oil companies, and listing quotations on a number of other securities of Canadian companies. All the business was directed from the head office. The persons with whom the petitioner dealt and to whom the bulletin was mailed were residing outside the province.

Its licence was cancelled but it continued to carry on business and to publish the bulletin. The Commission seized its books and documents and ordered the petitioner's bankers to seize its funds and securities.

Contending that its business activities were not subject to the jurisdiction of the Commission, the petitioner sought a peremptory writ of injunction. The trial judge dismissed the petition, and this judgment was

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

affirmed by the Court of Queen's Bench. The petitioner appealed to this Court, and there formally abandoned any submissions involving the validity of the provisions of *The Securities Act*.

Held: The appeal should be dismissed; the petitioner was subject to the jurisdiction and control of the Quebec Securities Commission.

On the facts of this case, the petitioner carried on the business of trading in securities and acted as investment counsel in the Province of Quebec within the meaning and for the purposes of the Act. The fact that the securities traded by the petitioner were for the account of customers outside of the province or that its bulletins were mailed to clients outside of the province did not alter that conclusion. The paramount object of the Act is to ensure that persons who, in the province, carry on the business of trading in securities or acting as investment counsel, shall be honest and of good repute and, in this way, to protect the public in the province or elsewhere from being defrauded as a result of certain activities initiated in the province by persons therein carrying on such a business.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], affirming a judgment of Deslaurier J. Appeal dismissed.

J. G. Ahern, Q.C., for the petitioner, appellant.

L. Tremblay, Q.C., for the defendant, respondent.

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

FAUTEUX J.:—For the consideration of the points raised in this appeal, it is sufficient to summarize as follows the facts leading to this litigation.

On the 6th of December, 1956, and for some time prior thereto, appellant had its head office and two branch offices in Montreal, where it was engaged in the promotion of four mining companies operating in the Province of Quebec, and it also published a weekly bulletin entitled "Gregory's Selected Securities". As required by s. 16 of the *Act Respecting Securities*, 3-4 Elizabeth II, c. 11, appellant was registered, as a broker, with the Quebec Securities Commission, the body constituted, under the said Act, for the supervision and control of trading in securities. On the 26th of October, 1956, appellant was ordered by the Commission to cease the publication of its weekly bulletins; but refused to do so. On the 6th of December, 1956, for reasons indicated in a letter addressed to appellant's solicitor by the president

[1] [1960] Que. Q.B. 856.

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of the Commission, its registration as a broker was cancelled. Appellant, notwithstanding the prohibition in s. 16, continued to carry on its business. The present appeal, however, was argued on the assumption that, as from December 6, 1956, if not prior thereto, appellant dealt only with clients residing outside the Province of Quebec and that its weekly bulletins, prepared and published in Montreal, were mailed only to persons residing outside the Province of Quebec.

In January 1957, the Commission, following an investigation of appellant's activities and acting under ss. 39 and 44(*a*) of the said Act, caused the books and documents of appellant to be seized and ordered the Imperial Bank of Canada to hold in trust, until revocation of the order, funds to the amount of $49,565.50 which the bank had on deposit, under its control or safe-keeping for appellant.

A few weeks later, appellant instituted the present proceedings against respondents, praying in its petition for injunction that they, their officers and employees be enjoined:

(*a*) from continuing to prevent your Petitioner from having the use of the sum of $49,565.50 in the hands of the Imperial Bank of Canada, and withheld from Petitioner by the said Bank upon orders of Respondent-corporation;

(*b*) to cease depriving Petitioner of access to its books and records, cheques, documents and other things its property, so that it may be able to carry on its business unhampered and freely;

(*c*) from further interference in any way with your Petitioner in the carrying out of its business, either by raids, seizures or supplying false and slanderous information concerning your Petitioner and the companies it has financed;

the whole with costs; appellant reserving its right for damages in the circumstances.

This petition for a peremptory writ of injunction was contested and, after a hearing on the merits, was dismissed by the Superior Court, and that decision was affirmed by a unanimous judgment of the Court of Appeal for the Province of Quebec[1]. Hence the appeal to this Court.

Doubts having been raised, at the beginning of the hearing, as to our jurisdiction to entertain the appeal, leave to appeal was granted upon the unopposed application of counsel for appellant.

[1] [1960] Que. Q.B. 856.

At this stage of the litigation, the validity of the motives prompting the Commission to act as it did is not questioned. Indeed, the only points submitted in support of the appeal are summarized in the three following propositions:

(i) Appellant company is not subject to the jurisdiction of the Quebec Securities Commission; it does not have to be registered with the Commission as a broker or investment counsel for it carries on, it is said, an interprovincial and international, but not an intra-provincial, trade.

(ii) Section 44(*a*) of the Act, under authority of which the order to the Imperial Bank was issued by the Commission, authorizes the freezing of funds on deposit with a bank. Under s. 91(15) of the *B.N.A. Act,* Parliament has exclusively the jurisdiction to legislate in relation to banks and banking; s. 44(*a*) of the *Act Respecting Securities* conflicts with s. 95 of the *Bank Act,* 2-3 Elizabeth II, c. 48, dealing with deposits with banks.

(iii) The order issued by the Commission under the authority of s. 44(*a*) is tantamount to an injunction or a writ of attachment, both of which were always, prior to Confederation, within the jurisdiction of the Superior Court to deal with. Section 44(*a*) offends s. 96 of the *B.N.A. Act.*

While counsel for appellant did not ask, in the conclusion of its petition, that s. 44(*a*) of the *Securities Act* be declared *ultra vires* of the Legislature, it is apparent that the last two propositions bring in question the validity of the section and require determination as to the matter even if, as declared by counsel for appellant, it is raised only in aid of construction of the section. The notice prescribed in like circumstances by r. 18 of the Rules of the Supreme Court of Canada was not given. This situation having been brought to his attention by this Court, counsel for appellant formally abandoned any submissions involving the validity of the provisions of the *Act Respecting Securities.*

Accordingly, there remains to be considered only the first proposition, i.e. whether, because of the character of its activities and the manner in which they were conducted, appellant is subject to the jurisdiction and control of the Quebec Securities Commission.

The fact that the securities traded by appellant would be for the account of customers outside of the province or that its weekly bulletins would be mailed to clients outside of

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the province, does not, as decided in the Courts below, support the submission that appellant was not trading in securities or acting as investment counsel, in the province, within the meaning and for the purposes of the Act Respecting Securities.

The paramount object of the Act is to ensure that persons who, in the province, carry on the business of trading in securities or acting as investment counsel, shall be honest and of good repute and, in this way, to protect the public, in the province or elsewhere, from being defrauded as a result of certain activities initiated in the province by persons therein carrying on such a business. For the attainment of this object, trading in securities is defined in s. 14; registration is provided for in s. 16 as a requisite to trade in securities and act as investment counsel particularly; investment counsel is defined in s. 1; the business is regulated and certain actions or omissions in its conduct constitute infractions subject to sanctions. Section 14 and the relevant parts of ss. 16 and 1 enact:

> 14. The following shall constitute trading in securities:
>
> (*a*) any alienation or disposal, for a valuable consideration, of a security or of an interest in or option on a security, any solicitation for or obtaining of a subscription to a security for such a consideration and any attempt to do any of the aforesaid acts;
>
> (*b*) any underwriting of all or part of an issue of securities;
>
> (*c*) any act, advertisement, conduct, negotiation other than preliminary or transaction for the purpose or having the effect of carrying out, directly or indirectly, any operation contemplated in subparagraphs *a* and *b* or defined by the regulations as constituting a trade in securities.
>
> * * *
>
> 16. No person shall:
>
> (*a*) trade in any security unless he is registered as a broker or security issuer or as salesman for a broker or security issuer registered as such;
>
> (*b*) .....
>
> .....
>
> (*c*) act as investment counsel without being registered as such;
>
> (*d*) .....
>
> .....
>
> Every person who does any of the things mentioned in this section without the required registration or when such registration is suspended commits an offence.
>
> * * *

1. In this act, the following terms mean or designate:

(1) .....

(2) .....

(3) "investment counsel"; any person or company other than a broker or a security issuer who informs or advises the public, directly or through bulletins or other publications, as to the state of the market for securities or for certain securities; or who gives advice, makes suggestions or expresses opinions as to the expediency of buying or selling securities; or who publishes or causes to be published reports respecting certain securities; or who makes a business of studying, supervising or managing the securities portfolios of particular customers, or of advising them as to the constitution and management of such portfolios and as to the investment of their funds;

The nature of the business in which appellant was engaged and its mode of operation are set forth in the reasons for judgment of Hyde J.A. In its weekly bulletin, prepared and printed in Montreal, and mailed therefrom to some ten thousand clients in the other provinces of Canada and in the United States, appellant promoted the sale of the shares of the companies in which it was interested; offered advice regarding other mining and oil companies; and listed quotations on a number of other securities of Canadian companies, traded in the Montreal and Toronto markets, listed and unlisted. In the bulletin, it states:—"We execute orders on all exchanges and will be pleased to have the privilege of handling your security transactions." Its post-office address and telephone number in Montreal are printed on the front page. Appellant's President, who owned all of its capital stock, testified that their ordinary way of selling securities was to "contact" the client by telephone from Montreal and make an offer which was either accepted or refused. Payment was made by cheque sent to the appellant to its head office in Montreal from where all the business was directed. The shares of the four mining companies, appellant was actively promoting, were transferable only in the Province of Quebec. Customers were invited to communicate with appellant at its head office in Montreal and orders for securities were solicited by telephone from Montreal and were received by telephone in Montreal where they were completed. The payments by customers were made to the appellant by mail directed to its office in Montreal and, presumably, any payments to them were made from there. A substantial bank account was maintained in Montreal by appellant.

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On these undisputed facts, one can only conclude that appellant, within the meaning and for the purposes of the *Act Respecting Securities,* did, in the Province of Quebec, (i) carry on the business of trading in securities and (ii) act as investment counsel.

This conclusion is not affected, even if, as contended for appellant, certain contracts, with respect to sales solicited by appellant, might, on the doctrine recognized and applied in the cases of *Magann v. Auger*[1] and *Charlebois v. Baril*[2], have been perfected outside the province. These cases are here irrelevant.

Nor is this conclusion affected by the decisions rendered in a group of cases referred to by counsel for appellant, where the incidence of export trade of farm products on the validity of certain provincial marketing acts was considered. *Lawson v. Interior Tree, Fruit and Vegetable Committee*[3]; *P.E.I. Potato Marketing Board v. Willis Inc.*[4]; *Reference re Farm Products Marketing Act*[5]. These decisions are also irrelevant. The *Act Respecting Securities,* 3-4 Elizabeth II, c. 11, is not marketing legislation within the meaning attending the legislation considered in these cases. In order to protect the public against fraud, it provides for the establishment and operation of a control and supervision over the conduct, in the Province of Quebec, of persons engaged, therein, in carrying on the business of trading in securities or acting as investment counsel.

The object of the Act, as shown by its provisions, is similar to that of the *Securities Fraud Prevention Act,* 1930, of Alberta, which was considered in *Lymburn and another v. Mayland* and Others[6] and where Lord Atkin, with reference to Part I entitled "Registration of brokers and salesmen", said at p. 324:

> There is no reason to doubt that the main object sought to be secured in this part of the Act is to secure that persons who carry on the business of dealing in securities shall be honest and of good repute, and in this way to protect the public from being defrauded.

[1] [1901] 31 S.C.R. 186.
[2] [1928] S.C.R. 88, [1927] 3 D.L.R. 762.
[3] [1931] S.C.R. 357, 2 D.L.R. 193.
[4] [1952] 2 S.C.R. 392, 4 D.L.R. 146.
[5] [1957] S.C.R. 198, 7 D.L.R.(2d) 257.
[6] [1932] A.C. 318, 2 D.L.R. 6, 57 C.C.C. 311.

Being of opinion that the Court of Appeal reached the right conclusion in the matter, I would dismiss the appeal with costs.

CARTWRIGHT J.:—The relevant facts and the course of this litigation are set out in the reasons of my brother Fauteux and in those delivered in the courts below.

In his factum and in his opening argument counsel for the appellant made, inter alia, submissions which may be summarized as follows:

(i) That the trade in securities carried on by the appellant is interprovincial and international, that consequently it does not fall within the jurisdiction of the Quebec Securities Commission and that if regulation of such trading is thought necessary its provision lies within the legislative sphere of Parliament;

(ii) That s. 44 of the *Quebec Securities Act,* 3-4 Elizabeth II, c. 11, hereinafter referred to as "the Act", is in conflict with s. 95 of *The Bank Act,* R.S.C. 1952, c. 12 and is consequently null and void;

(iii) That the order issued by the respondent Commission to the Imperial Bank of Canada and which reads as follows,

> In accordance with Section 44 of the Quebec Securities Act, we hereby order you to hold in trust, until such time as this order is revoked, in whole or in part, by this Commission, any funds or securities belonging to Gregory and Company, Inc. which you may have on deposit or under control, or for safekeeping.

is equivalent to an injunction and that the provincial legislature cannot confer the power to make such an order on a tribunal whose members are not appointed pursuant to s. 96 of the *British North America Act.*

(iv) That the provincial legislature has not the power to control the printing or dissemination of a circular which is to be distributed only to persons outside the province.

In the courts below the appellant did not give the notice to the Attorney-General required by art. 114 of the *Code of Civil Procedure,* and in this Court, he did not give the notices required by r. 18. At the hearing counsel made it clear that the failure to give these notices was the result of a considered decision which he did not wish to alter, and, as

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Cartwright J.

is pointed out in the reasons of my brother Fauteux, formally abandoned any submissions impugning the validity of the provisions of the Act.

In these circumstances, at the risk of repetition, I wish to make it clear that the judgment of this Court in this case does not by implication or otherwise decide anything as to the constitutional validity of the Act.

Although all arguments involving an attack on the validity of the Act are withdrawn I have difficulty in satisfying myself that on its true construction the Act authorizes the Securities Commission to regulate a business of the sort carried on by the appellant, but I am not prepared to dissent from the views on this point entertained by the other members of the Court and, consequently, I concur in the disposition of the appeal proposed by my brother Fauteux.

Appeal dismissed with costs.

Attorneys for the petitioner, appellant: Hyde & Ahern, Montreal.

Attorney for the defendants, respondents: L. Tremblay, Montreal.

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*Jun. 13
Jun. 26

LEWIS E. GORDON .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Sunday observance—Coin-operated automatic laundry open on Sunday—Owner and employees not in attendance—Whether "carrying on business of ordinary calling"—Lord's Day Act, R.S.C. 1952, c. 171, s. 4.

The accused was charged with carrying on business on Sunday contrary to s. 4 of the *Lord's Day Act*, R.S.C., 1952, c. 171. As the owner of an automatic laundry business, the accused operated two establishments which remained open and in use by the public on a Sunday. The premises in question contained automatic washing machines and dryers which customers could operate automatically by inserting a

*PRESENT: Kerwin C. J. and Taschereau, Locke, Cartwright, Fauteux, Abbott, Martland, Judson and Ritchie JJ.

coin in a slot. The soap and bleach were supplied by the customers but the water and electricity were furnished by the accused. On the Sunday in question the police found customers operating the machines at both premises. Neither the accused nor any of his servants or agents were present. There was a sign on the wall with instructions as to the operation of the machines and another sign giving telephone numbers to be called in case of emergency.

The accused was acquitted, but the Court of Appeal directed that a verdict of guilty be entered. The accused was granted leave to appeal to this Court.

Held (Cartwright J. dissenting): The accused was guilty of carrying on the business of his ordinary calling on Sunday within the meaning of s. 4 of the *Lord's Day Act*.

Per Kerwin C.J. and Taschereau, Fauteux, Abbott, Martland, Judson and Ritchie JJ.: The evidence adduced indicated that the business carried on by the accused on the Sunday in question was "of his ordinary calling". The words of s. 4 were very wide. Even in the absence of the accused or any of his servants or agents, he was carrying on business on the Sunday in question. What he did in the ordinary acceptance of the term was carrying on any business of his ordinary calling.

The question as to whether the accused was carrying on a work of necessity and mercy within the meaning of s. 11 of the *Lord's Day Act* was not raised before the County Court Judge, whose decision was appealed to the Court of Appeal, and in the absence of any evidence as to what was being washed or dried in the machines, the point could not be considered.

Per Locke, Martland, Judson and Ritchie JJ.: The conduct of the accused fell within the prohibition of s. 4. The presence of the proprietor or his servants was an irrelevant circumstance in the situation disclosed by the evidence in the present case. The uncontradicted evidence given before the County Court Judge was sufficient to establish that the business carried on by the accused was that of his ordinary calling.

If it were intended by the accused to contend that the operation fell within the exception of s. 11 of the Act, the onus was on him to prove it. The accused, however, called no evidence and there was none in the case for the prosecution upon which such a finding could conceivably be made.

Per Cartwright J., *dissenting*: On the facts found by the County Court Judge, the latter was right in law in holding that the accused was not carrying on the business of his ordinary calling on the day in question within the meaning of those words as used in s. 4. The Act is intended to prevent people from working on Sundays, and to come within the words "carry on business" there must be some act of a positive nature, the doing of something. The Act forbids actions, it does not forbid omissions. On its true construction s. 4 makes the doing of some act on Sunday an essential ingredient of an offence against the section. In the case at bar nothing was done by the accused or any of his employees in connection with the business.

APPEAL from a judgment of the Court of Appeal for Ontario[1] setting aside a verdict of acquittal. Appeal dismissed, Cartwright J. dissenting.

[1] [1960] O.W.N. 537, 128 C.C.C. 348.

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GORDON v. THE QUEEN

A. M. Ferriss, Q.C., for the appellant.

W. C. Bowman, Q.C., for the respondent.

The judgment of Kerwin C. J. and of Taschereau, Fauteux, Abbott, Martland, Judson and Ritchie JJ. was delivered by

THE CHIEF JUSTICE:—By leave of this Court Lewis E. Gordon appeals from an order of the Court of Appeal for Ontario[1] allowing appeals by the Attorney General for Ontario against the orders of His Honour Judge Carscallen on appeals before the latter by way of trials *de novo* from the acquittal by a magistrate of the appellant of charges based upon two informations. In one of these it was alleged that the appellant "did unlawfully carry on the business of his ordinary calling, to wit, washing clothes (Automatic Laundry) at 469 N. Christina Street, in the City of Sarnia, contrary to The Lord's Day Act, R.S.C. 1952, c. 171, s. 4"; in the other he was charged with the same offence but with reference to 102 East Street, in the City of Sarnia. The Court of Appeal allowed the appeals, set aside the verdict of acquittal on each charge and directed that a verdict of guilty be entered against the appellant and a fine of ten dollars on each charge and of the costs of the proceedings before the magistrate be imposed, and that, in default of such payment, the appellant be imprisoned for a period of five days.

Section 4 of the *Lord's Day Act* is as follows:

> 4. It is not lawful for any person on the Lord's Day, except as provided herein, or in any provincial Act or law now or hereafter in force, to sell or offer for sale or purchase any goods, chattels, or other personal property, or any real estate, or to carry on or transact any business of his ordinary calling, or in connection with such calling, or for gain to do, or employ any other person to do, on that day, any work, business, or labour.

There is in the record a licence, dated January 5, 1959, from the City of Sarnia, to "Econ-O-Wash, 469 N. Christina, per Lewis Gordon, to enable him to use and exercise the calling and business of keeper of a laundry until the 31st day of December, 1959". Evidence was given by the landloard of the premises at 102 East Street that he had rented them to the appellant and that the same type of business was carried on by the appellant at both addresses.

[1][1960] O.W.N. 537, 128 C.C.C. 348.

There is also in the record a certified copy of a declaration by the appellant, dated March 25, 1959, under *The Partnership Registration Act of Ontario,* that he has had carried on and intended to carry on a coin-operated laundry business at 469 N. Christina Street, in the City of Sarnia, under the name of "Econ-O-Wash"; that the business had subsisted since February 20, 1959, since which date he was the sole partner of the said business.

The premises at each address contained automatic washing machines and dryers. Customers supplied their own soap and bleach and by inserting a coin in a slot the articles they brought with them would be automatically washed or dried in the appropriate machines by the water and electricity furnished by the appellant. On Sunday, November 22, 1959, two policemen entered the premises at each of the above addresses of which the doors were unlocked. At one of the addresses at least there was a sign on a wall with instructions as to the operation of the machines and another sign reading: "This store designed and equipped by L. Gordon, 469 N. Christina Street, Sarnia" and there was also a pay telephone to which was attached a card with the information "Emergency No. Call Ed6-2201, Di4-0854". A number of persons were present at each of the premises and there were a number of automatic washers or a number of dryers in operation. Neither the appellant nor any of his servants or agents were present at either of the premises.

Leave to appeal was granted on the points mentioned in the notice of application therefore but the only important argument requiring consideration was that it was not possible to say, within the meaning of s. 4 of the *Lord's Day Act,* that the appellant was a person who carried on or transacted any business of his ordinary calling on Sunday. The learned County Court judge found that there was evidence that the appellant was the proprietor of both stores on the date in question. He defined the issue before him as being "if the evidence indicates that the accused was carrying on or transacting business on 22nd November, 1959". There is no suggestion in his judgment that if the appellant were carrying on business on that date that it was not "of his ordinary calling". The evidence adduced

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indicates that it was, and there is no evidence to the contrary. The words of s. 4 are very wide. The decisions in the Courts of the State of New York referred to on the argument and also the later judgment of the Court of Appeals in *People v. Welt*[1] are interesting but do not assist me in construing s. 4 of the *Lord's Day Act*. I have no difficulty in arriving at the conclusion that even in the absence of the appellant or any of his servants or agents he was carrying on business on the Sunday in question. Presuming that on Sunday he would not go or send someone to either establishment in order to collect the money that had been deposited in the slot machines and that he or his servant or agent would not go on a Sunday to repair any of the machines, what he did in the ordinary acceptance of the term was carrying on any business of his ordinary calling.

Counsel for the appellant referred us to a decision of the High Court of Australia in *Spence v. Ravenscroft*[2]. There, however, Spence was charged with an offence under a section of an Act that provided "whosoever trades or deals or keeps open any shop, store or other place for the purpose of trading or dealing on Sunday . . . shall be liable to a penalty". The majority of the Court held that "trades" was to be narrowly construed, saying at p. 352:

> We think that the word "trades" is not used in sec. 61 in the wide sense of keeping a place of business open for trading, which is dealt with by the succeeding words of the section, but is limited to personal acts done on Sunday in the nature of trading.

I can find no assistance in this decision in coming to a solution in the present case nor in the reasons for judgment of Laidlaw J.A., speaking for himself, in *Re Pszon*[3]. What was there in issue was the question as to whether a man was carrying on business within the meaning of the *Bankruptcy Act*,—a statute enacted for an entirely different purpose and any decision under it can have no relevancy to the matter now before us.

Counsel for the appellant stated that while before the magistrate the question arose as to whether the appellant was carrying on a work of necessity and mercy within the meaning of s. 11 of the *Lord's Day Act*, no such question was raised before the County Court judge and it was from

[1](1960), 204 N.Y.S. 2d. 189.
[2](1914), 18 C.L.R. 349.
[3][1946] O.R. 229, 2 D.L.R. 507.

the decisions of the latter that appeals were taken to the Court of Appeal. There is nothing in the evidence to show what was being washed or dried in the machines and in the absence of any such evidence the point cannot be considered. It is, therefore, unnecessary to express any opinion as to the decision of the District Court judge in *Regina v. Coin Launder-All Limited*[1].

The appeal should be dismissed.

The judgement of Locke, Martland, Judson and Ritchie JJ. was delivered by

LOCKE J.:—In the premises operated by the appellant at 102 East Street and 469 North Christina Street in Sarnia there were placed numbers of automatic washing machines and drying machines. Upon placing a sum of .20cts. in a slot the washing machine, using water supplied by the appellant, operated for 10 minutes, the motive power being electricity, also supplied by him. The drying machines operated for a similar period of time when .10cts. was placed in the slot. The public availing themselves of this service supplied their own soap or detergent. In return for the deposit of .05cts. in another slot machine the customer could purchase a supply of detergent for this purpose. In the premises there were signs instructing customers that, in case of emergency, they should call a given telephone number.

The carrying on of this business was thus entirely automatic. Whether either the appellant or anyone on his behalf were present on the premises during the week is not shown.

On the Sunday referred to in the charges, neither the appellant nor anyone on his behalf were there and the question to be determined is whether, by reason of this, the appellant was not carrying on or transacting any business of his ordinary calling or in connection therewith on the Lord's Day, within the meaning of s. 4 of the *Lord's Day Act*, R.S.C. 1952, c. 171.

The situation does not appear to me to differ in any respect from that which would arise if the proprietor of a self-service grocery store left his premises open and unattended on Sunday, thus inviting the public, to enter and

[1](1960), 32 W.W.R. 262.

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to purchase his goods at the marked price. It seems to me quite impossible to suggest that such conduct would not fall within the prohibition of s.4. The presence or absence of the proprietor or his servants is, in my opinion, an irrelevant circumstance in the situation disclosed by the evidence in the present case.

The learned County Court judge relied in acquitting the appellant upon a passage in a judgment of Laidlaw J.A. in *Re Pszon*[1], in which that learned judge expressed his opinion as to what constituted carrying on business within the meaning of the *Bankruptcy Act*. In the passage quoted it was said that a person who devoted no time or attention or labour to the working or conduct of the affairs of an enterprise does not carry on the business of that enterprise. But here the appellant actively carried on this business throughout every day of the week, merely absenting himself from the premises on Sunday. The passage quoted has, in my opinion, no application in these circumstances and does not bear the meaning sought to be assigned to it by the appellant. If it were treated as applicable, the operator of the self-service grocery store above mentioned would not be carrying on business.

Reliance is also placed upon the decision of the Divisional Court in *Willesden Urban District v. Morgan*[2]. The prosecution in that case was under the *Shops Act* 1912, which required that every shop should be closed for the serving of customers on the weekly half-holiday. The accused person had affixed to the door of his shop an automatic machine by which a supply of milk was offered to the public on the insertion of a penny in the slot provided for that purpose. The court considered that the language of the relevant section should be construed as a prohibition of the personal serving of customers and that the purpose of the Act was to provide a weekly half-holiday for shop assistants which was not interfered with. The language of the sections under consideration differed materially from that of s. 4 of the *Lord's Day Act* and the case affords no support for the appellant's contention, in my opinion.

[1] [1946] O.R. 229, 2 D.L.R. 507. [2] [1915] 1 K.B. 349.

We were also referred to three American cases: *the People v. Kaplan*[1]; *the People v. Welt*[2]; and *the People v. Andob Corporation*[3].

The section of the *Penal Law* considered in these three cases read:

> All trades, manufactures, agricultural or mechanical employments upon the first day of the week are prohibited, except that when the same are works of necessity they may be performed on that day in their usual and orderly manner, so as not to interfere with the repose and religious liberty of the community.

In *Kaplan's* case it was decided that to operate a self-service automatic coin laundry on a Sunday violated this section.

In *Welt's* case the Court arrived at a different conclusion without giving reasons.

In the *Andob Corporation* case, evidence was given by several witnesses that the use of the laundry on Sunday was a necessity for them and not a mere convenience within the meaning of the section and McCullough J. who wrote the judgment of the Court quoted with approval a passage from a judgment of a lower Court in *Welt's* case, saying that not all businesses are prohibited on Sunday but only those which are serious interruptions of the Sabbath. It is not clear as to whether this was the ground upon which the judgment proceeded.

The language of the section of the Penal Law differs so materially from s. 4 of the *Lord's Day Act* and the evidence given in the last two is of such a different nature to that in the present matter that I obtain no assistance from them.

In *Spence v. Ravenscroft*[4], the judgment of the majority written by Griffith C. J. appears to have proceeded on the view that the history of the legislation as to Sunday observance in New South Wales indicated that s. 61 of the *Police Offences Act 1901* should be construed as importing a personal act or omission of the person charged. Isaacs J. dissented in a carefully reasoned judgment and, with great respect, I agree with the opinion expressed by him. There is nothing in the history of the *Lord's Day Act* since it was

[1] (1959), 188 N.Y.S. 2d. 673.
[2] (1960), 204 N.Y.S. 2d. 189.
[3] (1960), 206 N.Y.S. 2d. 89.
[4] (1914), 18 C.L.R. 349.

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first enacted in 1906 to justify a conclusion similar to that reached by the majority in *Ravenscroft's* case and I think the case has no application.

The uncontradicted evidence given before the County Court judge, in my opinion, was sufficient to establish that the businesses carried on by the appellant were those of his ordinary calling and, while the learned County Court judge made no finding as to this, no issue was made of the matter before us.

It appears from the reasons for judgment delivered by the Court of Appeal that before that Court it was contended that the operation of the business, so far as the customers were concerned, was a work of necessity and, therefore, came within the exempting provisions of s. 11 of the *Lord's Day Act*. The question had not been considered either by the learned magistrate nor by the learned County Court judge and no evidence was adduced as to this at the hearing before the latter. Accordingly, the Court expressed no opinion on the point.

Section 11 provides an exception in the case of any work of necessity or mercy. If it were intended by the appellant to contend that the operation fell within this exception, the onus was on him to prove it by reason of the provisions of s. 702(2) of the *Criminal Code*. The appellant, however, elected to call no evidence and there is none in the case for the prosecution upon which a finding such as is suggested could conceivably be made.

I would dismiss these appeals.

CARTWRIGHT J. (*dissenting*):—This appeal is brought, pursuant to leave granted by this Court, from a judgment of the Court of Appeal for Ontario[1] pronounced on October 17, 1960, allowing appeals from orders of His Honour Judge Carscallen and directing that a verdict of guilty be entered against the appellant on each of two charges, that in each case a fine of $10.00 be imposed and that the appellant do pay the costs of the proceedings in the Magistrate's Court.

The first of these charges was as follows:

That on or about the 22nd day of November, 1959, at the City of Sarnia, Lewis E. Gordon, 469 Christina Street, Sarnia. Did unlawfully carry on the business of his ordinary calling, to wit, washing clothes

[1] [1960] O.W.N. 537, 128 C.C.C. 348.

(Automatic Laundry) at 102 East Street in the City of Sarnia, contrary to the Lord's Day Act, Revised Statutes of Canada 1952, Chapter 171, Section 4.

The second charge was in the same words as the first except that the words "at 102 East Street" were replaced by the words "at 469 North Christina Street".

The appellant was tried on both charges before His Worship Magistrate Dunlap and was acquitted. The informant appealed to the County Court of the County of Lambton. The appeals were heard separately by way of trials *de novo* by His Honour Judge Carscallen and were dismissed.

The informant served notice of an application for leave to appeal to the Court of Appeal against these orders of acquittal on the following ground:

1. The learned County Court Judge erred in law in the interpretation of the words 'to carry on or transact any business of his ordinary calling' as they appear in Section 4 of the Lord's Day Act, R.S.C. 1952, Chapter 123.

The jurisdiction of the Court of Appeal is conferred by s. 743 of the *Criminal Code* which provides *inter alia* that, with leave of that Court, an appeal may be taken on any ground that involves a question of law alone against a decision of a court in respect of an appeal under s. 727, which was the section pursuant to which the appeals to His Honour Judge Carscallen had been heard.

Up to a point, the relevant facts are not in dispute; they were summarized as follows by Schroeder J.A. who at the conclusion of the argument delivered orally the unanimous judgment of the Court of Appeal.

The premises referred to were either owned or controlled by the respondent and they contained automatic washing machines and dryers which customers could operate automatically by inserting a coin in a slot. The soap and bleach used in the cleaning operation were supplied by the customer, but the water and electricity were furnished by the accused, as owner of the establishment.

The evidence indicates that on Sunday, November 22nd, 1959, both places were visited by two members of the Sarnia Police force. They found five persons in attendance at 469 North Christina Street and twelve washers and two dryers were in operation. Neither the accused nor any of his servants or agents were present. There was a sign on the wall containing instructions as to how to operate the machines and another sign which read 'this store designed and equipped by L. Gordon, 469 North Christina Street, Sarnia'. Over the pay telephone in the premises there was a card bearing the words 'Emergency No. call Ed.6-2201. Di.4-0854.'

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At the East Street premises there were eight persons present and four dryers in operation. These premises were furnished in a manner similar to the North Christina Street premises and the same information as to operation of the machines was posted on the wall. Here again neither the accused nor his servants or agents or any of them were in attendance.

The reasons of the learned Justice of Appeal continue:

The learned trial Judge found, on the evidence, that the accused was the sole proprietor of the business in question and that the operation thereof was his ordinary calling.

The last quoted statement appears to be inaccurate; while the learned County Judge found that the appellant was the sole proprietor of the business at the two locations mentioned in the charges he made no express finding that the operation of those businesses was the ordinary calling of the appellant and, since he acquitted the appellant on both charges, no such finding can be said to be implicit in his reasons.

The appellant applied to this Court for leave to appeal from the judgment of the Court of Appeal on the following grounds:

(i) The learned Court of Appeal erred in law in holding that the appellant was carrying on or transacting any business of his ordinary calling within the meaning of the Lord's Day Act, R.S.C. 1952, Chapter 123.

(ii) The learned Court of Appeal erred in law in holding that the fact that neither the accused nor his servants or agents were on the premises to take part in or supervise the conduct of the automatic laundry, was irrelevant.

(iii) The learned Court of Appeal erred in holding on the evidence that the operation of a coin-operated automatic laundry was the ordinary calling carried on by the appellant, the evidence being silent on this question, and erred in believing that the learned County Court Judge has so found.

Leave was granted by this Court on November 14, 1960; the operative part of the order reads as follows:

This Court did Order and Adjudge that leave to Appeal from the said Judgment of the Court of Appeal for Ontario should be and the same was granted.

The main question arising on this appeal is whether on the facts found by the learned County Court Judge, which have been summarized above, he was right in law in holding that the accused was not carrying on the business of his

ordinary calling on the date stated within the meaning of those words as used in s. 4 of the *Lord's Day Act*. That section reads as follows:

> 4. It is not lawful for any person on the Lord's Day except as provided herein, or in any Provincial Act or law now or hereafter in force, to sell or offer for sale or purchase any goods, chattels or other personal property or any real estate or to carry on or transact any business of his ordinary calling or in connection with such calling or for gain to do or employ any other person to do on that day any work, business or labour.

In his reasons the learned County Judge, after stating that he had not been referred to and had not found any decided case dealing with the meaning of the phrase "carry on business" as used in s. 4 of the *Lord's Day Act*, considered the judgment of Laidlaw J.A. in *Re Pszon*[1]. In that case it was necessary to consider the meaning of the phrase "carrying on business" as used in the *Bankruptcy Act*. Laidlaw J.A., after stating that it involved at least three elements (i) the occupation of time, attention and labour; (ii) the incurring of liabilities to other persons; and, (iii) the purpose of a livelihood or profit, went on to say at page 234:

> A person who devotes no time or attention or labour, by himself or by servants or employees, to the working or conduct of the affairs of an enterprise does not carry on the business of such enterprise.

Having quoted from this judgment the learned County Court Judge continued:

> Applying the above to the facts in the instant cases, I cannot find that the accused was carrying on business on Sunday, November 22nd, 1959. He was not, either by himself or by his servants or employees, devoting any time, attention or labour to the business of washing clothes. The very nature of the machines used for that purpose rendered his time, attention or labour unnecessary on that day. He did not give attention or perform labour for the maintenance or furtherance of the undertaking nor devote time to the accomplishment of its objects.

I agree with the conclusion arrived at by the learned County Court Judge and I am in substantial agreement with his reasons and with those of the learned Magistrate, but in view of the importance of the question raised and the difference of opinion in the courts below and in this Court I propose to state my reasons in my own words.

[1] [1946] O.R. 229, 2 D.L.R. 507.

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In *Willesden Urban Council v. Morgan*[1], the Divisional Court had to consider, inter alia, whether vending milk by means of an automatic machine amounted to carrying on the retail trade or business of a dairyman. The statute there under consideration was the *Shops Act,* (1912) 2 Geo. V, c. 3, the wording of which differs considerably from that of the *Lord's Day Act* but the following observations in the judgments appear to me to be of assistance as indicating the proper approach to the problem of construction.

At p. 353, Ridley J. said:

> The *Shops Act,* 1912, was passed for the benefit of those who serve as shop assistants; but it is an Act whose provisions are enforced by the infliction of penalties, and we have therefore to be careful how we construe it. We have to be sure that while we give it a fair reading we do not give it too wide a construction. Being intended for the benefit of those serving in shops, the Act is not intended to prevent people buying goods so long as their doing so does not interfere with the object of the Act. I should not assent to any construction of the Act which would prevent shop assistants obtaining their weekly half-holiday; but I do not think that we should so construe it as to make it apply to the supply of articles by automatic machines unless the language of the Act compels us to do so. Sect. 4 is satisfied by reading the words 'for the serving of customers' as meaning 'for the personal serving of customers.'

At p. 354 Lush J. said:

> The case is one in which I think it is most necessary to apply that fundamental rule—a rule founded on good sense rather than on law—that where words in a statute are capable of two different meanings we must carefully consider, before determining which of the two meanings to attribute to them, what the mischief is which the Act was intended to obviate.

I do not think it necessary to review the history of legislation dealing with the observance of the Lord's Day. This has been recently done in the judgments delivered in this Court in *Henry Birks and Sons (Montreal) Ltd. et al. v. City of Montreal et al.*[2] and a more extensive review is to be found in Holmsted, The Sunday Law in Canada (1912). I think it safe to say that the origin of this sort of legislation in Christian countries is to be found in *Exodus* c. 20 verses 8 to 11, where the words of prohibition are "in it thou shalt not do any work".

[1] [1915] 1 K.B. 349.
[2] [1955] S.C.R. 799, 113 C.C.C. 135, 5 D.L.R. 321.

I agree with the submission of Mr. Ferriss that to come within the words "carry on business" in s. 4 of the *Lord's Day Act* there must be some act of a positive nature, the doing of something.

In the case at bar the evidence is that on the Sunday in question neither the accused nor any employee of his did anything at all in connection with the laundry business. There is no evidence that either of the telephone numbers listed on the notice in the shops to be called in case of emergency was that of the accused or of any employee of his; but that is of little importance for we do not have to consider what would have been the result if either the accused or an employee had been called and had responded; that did not happen.

I am in agreement with the judgment of the High Court of Australia in *Spence v. Ravenscroft*[1]. Griffith C.J. with the concurrence of Gavan Duffy and Rich JJ. says at page 352:

> *Prima facie* a law creating an offence imports a personal act or omission on the part of a human actor. If the day on which the act is done, or omission is made is material, it imports a personal act or omission on that day. A person may, of course, be responsible for the conduct of his agents. The subject-matter of the law or context of the enactment may require a larger construction. In this case there is no such context. *As to subject-matter the history of the legislation as to Sunday observance shows that it is all directed to personal conduct on that day.* The provision now in question is one dealing with that subject, and not with trade in general.

The reasoning in this passage and particularly the sentence I have italicized appears to me to be applicable to the question now before us. It is hardly necessary to observe that the *Lord's Day Act* forbids actions, it does not forbid omissions.

In the course of the argument reference was made to a number of cases decided in the courts of the State of New York dealing with the question whether the operation of a self-service automatic coin-operated laundry on Sunday was a breach of s. 2146 of the *Penal Law,* which provides that all trades, manufactures, agricultural or mechanical employments on the first day of the week are prohibited "except that when the same are works of necessity they may be

[1] (1914), 18 C.L.R. 349.

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performed on that day in their usual and orderly manner, so as not to interfere with the repose and religious liberty of the comunity". These decisions disclose a conflict of opinion as to whether a breach of the section is committed when the place in which the coin-operated laundry is located is left open to and used by members of the public on Sunday but neither the owner of the business nor any employee of his is present on that day.

That conflict appears to have been finally resolved in the State of New York by the judgment of the Court of Appeals in *People v. Welt*[1], delivered on July 8, 1960, in which the Court unanimously affirmed a judgment of the County Court of Nassau County reversing a conviction and dismissing the charge. The report is brief but the judgment is discussed by McCullough J. in the case of *People v. Andob Corporation*[2]. It appears from the last mentioned judgment that in *People v. Welt, supra,* the Court of Appeals had before it the judgment of the First Appellate Division in *People v. Kaplan*[3] and that the judgment of the majority in that case must be regarded as over-ruled. In *People v. Andob Corporation, supra,* the present state of the law in the State of New York is summed up as follows at page 93:

> It is, therefore, now the law in New York that it is not a violation of s. 2146 of the Penal Law to operate an automatic coin operated laundromat on Sunday where the owner or any employee is not present on such day.

It follows from my agreement with Mr. Ferriss' submission that on its true construction s. 4 of the *Lord's Day Act* makes the doing of some act on Sunday an essential ingredient of an offence against the section that I would allow the appeal and it becomes unnecessary to deal with other matters mentioned during the argument; but I do not wish to be understood as agreeing either (i) that it was within the power of the Court of Appeal to make the finding of fact, which the learned County Court Judge did not make, that "the operation of a coin-operated automatic laundromat and dryers is the business of his ordinary calling carried on by the accused", or (ii) that it was open to the Court of Appeal to substitute a verdict of guilty for that of acquittal without

[1](1960), 204 N.Y.S. 2d. 189. [2](1960), 206 N.Y.S. 2d. 89.
[3](1959), 188 N.Y.S. 2d. 673.

having reached a conclusion as to the applicability of s. 11 of the *Lord's Day Act* to the facts found by the learned County Court Judge. Assuming, contrary to the view which I have expressed, that the appellant did on the Sunday in question, within the meaning of section 4, "carry on the business of his ordinary calling, to wit, washing clothes (Automatic Laundry)", the question whether he was thereby doing a work of necessity or mercy within the meaning of s. 11 was put in issue by the plea of "not guilty". If on the facts as found by the learned County Court Judge it became a question of law whether the conduct which the Court of Appeal regarded as a breach of s. 4 fell within s. 11, the Court of Appeal should have dealt with that question; if on the other hand it was, as the Court of Appeal indicated, a mixed question of fact and law, that Court could not deal with it and should have remitted the cases to the learned County Court Judge. In making this observation I have not overlooked the provisions of s. 702 of the *Criminal Code,* placing upon the accused the burden of proving that an exception prescribed by law operates in his favour; in the case at bar, the evidence given on behalf of the prosecution proved everything necessary to be known as to the nature of what was done by the accused to enable the appropriate tribunal to determine whether or not it fell within s. 11. Until a finding on that point adverse to the accused has been made by a tribunal having jurisdiction to make it I am unable to see how a verdict of guilty can validly be entered against him. However, I do not pursue these questions further.

I would allow the appeal, set aside the judgment of the Court of Appeal and restore the judgments of the learned County Court Judge.

Appeal dismissed, CARTWRIGHT J. *dissenting.*

Solicitors for the appellant: Garvey, Ferriss & Murphy, Toronto.

Solicitor for the respondent: The Attorney-General for Ontario, Toronto.

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*Jun. 9
Jun. 26

GEOFFREY HIPKIN .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

JOHN FABIAN JACOBS .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Summary conviction—Careless driving—Whether grounds of appeal to County Court within requirements of s. 722(1)(a) of the Criminal Code—The Summary Convictions Act, R.S.O. 1950, c. 379, s. 3—The Criminal Code, 1953-54 (Can.) c. 51, ss. 719 to 739.

The two accused were convicted of careless driving contrary to s. 21(1) of *The Highway Traffic Act*. Both appealed to the County Court on the grounds, inter alia, that (i) the magistrate erroneously convicted the accused of the offence and (ii) the conviction was contrary to law, the evidence and the weight of evidence. The County Court dismissed the appeals on the preliminary objection that no proper grounds were set out in the notice of appeal. The Court of Appeal gave no reasons for its orders dismissing the appeals from these judgments. The accused were granted leave to appeal to this Court.

Held: The appeals should be allowed, and the cases remitted to the County Court judge to be heard by way of trial *de novo*.

Per Kerwin C.J. and Taschereau, Locke, Cartwright, Abbott, Martland, Judson and Ritchie JJ.: The grounds set forth in the notice of appeal were sufficient to clothe the County Court with jurisdiction to hear the appeals. Because the appeal under Part XXIV for which provision is made by s. 727 is by way of trial *de novo*, the grounds do not have to be stated with the same particularity as those required in a notice of appeal to the Court of Appeal in appeals from trials of indictable offences. It is enough that such a notice evidences the appellant's sincerity of purpose in asserting his appeal for the reason that he genuinely believes that he has been wrongly convicted and this excludes grounds which are obviously irrelevant, frivolous or irreconciliable with the plea in the Court below or with the other material before the Court. Under s. 727 the appellant is not to be confined by being required to designate in advance the specific issues to be raised at the second trial.

Per Fauteux J.: The ground that the "conviction was contrary to law, the evidence and the weight of evidence" met the requirements of s. 722(1)(a) of the *Criminal Code*.

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*PRESENT: Kerwin C.J. and Taschereau, Locke, Cartwright, Fauteux, Abbott, Martland, Judson and Ritchie JJ.

APPEALS from two judgments of the Court of Appeal for Ontario, dismissing the appeals from two judgments of the County Court for the County of Peel. Appeals allowed.

S. J. G. Lane, for the appellants.

W. C. Bowman, Q.C., for the respondent.

The judgment of Kerwin C.J. and of Taschereau, Locke, Cartwright, Abbott, Martland, Judson and Ritchie JJ. was delivered by

RITCHIE J.:—By order of this Court dated January 24, 1961, leave to appeal was granted to these two appellants from two judgments of the Court of Appeal of Ontario dismissing their appeals from the County Court for the County of Peel whereby it was decided that the grounds of appeal set forth in the appellants' notices of appeal from their respective convictions by different magistrates did not comply with the requirements of s. 722(1)(*a*) of the *Criminal Code*. Leave was also granted to file a single factum with respect to both appeals and the appeals were heard together.

Each of the appellants was convicted for unlawfully driving his automobile carelessly contrary to s. 21(1) of *The Highway Traffic Act,* and each appealed to the County Court of the County of Peel on the same ground, namely:

(1) That the magistrate erroneously convicted the appellant of the offence aforesaid;

(2) That the said conviction was contrary to law, the evidence and the weight of evidence;

(3) Upon such other grounds as counsel may be permitted to address the Court upon the hearing of the appeal.

In both cases preliminary objection was taken by counsel for the respondent before the County Court that no proper grounds were set out in the Notice of Appeal, and in dismissing the appeals for this reason the County Court judge appears to have followed the decision of the Court of Appeal of Ontario in the case of *Regina v. Souter*[1], as opposed to the decision of that Court in *Regina v. Kuusela*[2]. After referring to the fact that the Court of Appeal of Ontario had

[1][1959] O.W.N. 40, 29 C.R. 306, 123 C.C.C. 393.
[2][1959] O.W.N. 136, 30 C.R. 130, 123 C.C.C. 401.

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characterized the grounds of appeal set forth in the *Kuusela* case, *supra*, as "the bare minimum", the learned County Court judge goes on to say:

> The grounds set out in the case before me fall far short of this bare minimum, in that it simply states that the Magistrate erroneously convicted the Appellant of the offence. It does not refer to any of his findings that would lead to such a conviction and it provides little, if any, difference from the form of Notice set out in the Souter or Gillespie cases, and upon this ground I must dismiss the Appeal.

This decision was rendered in the case of Jacobs, but the Hipkin appeal was dismissed for the same reasons. The Court of Appeal gave no reasons for its orders dismissing the appeals from these judgments.

The applications for leave to appeal in these cases raise the following questions of law and jurisdiction:

> (1) Was the Court of Appeal for Ontario right in holding that there were not sufficient grounds set forth in the Notice of Appeal before His Honour, Judge R. Stewart Clark, to comply with Section 722 of the Criminal Code?
>
> (2) Was the Court of Appeal for Ontario right in holding that His Honour, Judge R. Stewart Clark, on appeal, had no jurisdiction to hear the said appeal by way of trial de novo?

By virtue of the provisions of s. 3 of the *Summary Convictions Act*, R.S.O. 1950, c. 379, these are cases to which Part XXIV of the *Criminal Code* applies, and the appeals to the County Court judge were, therefore, governed by ss. 719 to 739 of the *Criminal Code*.

The right of appeal from the magistrate to the County Court is accorded by s. 720, the relevant portions of which are as follows:

> 720. Except where otherwise provided by law,
>
> (*a*) the defendant in proceedings under this Part may appeal to the appeal court
>
> (i) from a conviction or order made against him, or
>
> (ii) against a sentence passed upon him; . . .

This right is limited only by the necessity of complying with the provisions of s. 722 wherein the requisite notice of appeal is described as:

> 722. (a) . . . a notice of appeal in writing setting forth
>
> (i) with reasonable certainty the conviction or order appealed from or the sentence appealed against, and
>
> (ii) the grounds of appeal; . . . .

As the setting forth of the grounds of appeal in such a notice forms a part of the foundation upon which the jurisdiction of the County Court rests, it follows that a notice which states no grounds at all cannot form the basis of an appeal, but because the appeal under Part XXIV for which provision is made by s. 727 is by way of trial *de novo* the grounds do not have to be stated with the same particularity as those required in a notice of appeal to the Court of Appeal in appeals from trials of indictable offences.

In the vast majority of appeals from trials of indictable offences the Court of Appeal is required to decide the issue before it on the sole basis of the record of the proceedings at a trial which has been concluded before the notice of appeal is prepared, whereas in appeals taken pursuant to s. 727 the trial upon which the Appeal Court must base its decision cannot commence until after the notice of appeal has been filed and served. It follows that in the former cases the errors at the trial which are alleged as grounds for the appeal must be specified in such manner as to inform the respondent of the issues to be met in the Court of Appeal, but in the latter case as the appeal is by way of a new hearing and the Appeal Court is not concerned with specific errors in the conduct of the first trial, the notice of appeal takes on an altogether different character. In my view it is enough that such a notice evidences the appellant's sincerity of purpose in asserting his appeal for the reason that he genuinely believes that he has been wrongly convicted and this requirement of necessity excludes notices of appeal in which the grounds are obviously irrelevant, frivolous or irreconcilable with the plea in the Court below or with the other material to be kept by the clerk of the Appeal Court with the records of the Court in accordance with s. 726(1). See *Regina v. Bamsey*[1].

In conformity with this view, I am of opinion that the grounds set forth in the present notices of appeal are sufficient to clothe the County Court with jurisdiction to hear these appeals.

In the case of *Regina v. Souter, supra,* the Court of Appeal of Ontario held that the allegation "that the conviction was contrary to law, the evidence and the weight of evidence" was not a ground of appeal at all within the

[1][1960] S.C.R. 294, 32 C.R. 218, 30 W.W.R. 552, 125 C.C.C. 329.

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meaning of s. 722 of the *Criminal Code,* and in so doing followed the decision of the County Court judge for Victoria County, British Columbia, in *Regina v. Gillespie*[1]. In the course of rendering the decision of the Court of Appeal of Ontario[2], Porter C.J.O. said of s. 722:

> I think that the section contemplated that grounds sufficiently definite to indicate the issues to be raised on the trial *de novo* should be set forth in the notice of appeal. Here there were no such grounds given.

With the greatest respect, it seems to me to be one of the characteristics of an appeal under s. 727 that many "issues to be raised on the trial *de novo*" must arise as the evidence develops in the course of that trial and that the appellant is not to be confined by being required to designate in advance the specific issues to be raised at the second trial.

In the case of *Regina v. Kuusela, supra,* which was decided by the Court of Appeal of Ontario after *Regina v. Souter, supra,* that Court held that the appellant had stated grounds which were "sufficient within the meaning of the statute" when he alleged that:

> The learned magistrate erred on the facts and law in finding that the said William Kuusela drove his motor vehicle while his ability to drive the same was impaired by the use of alcohol.

In the course of rendering the decision of the Court of Appeal in this case, Porter C.J.O. said at[3]:

> It may be that if it were intended to raise any questions such as the admissibility of certain evidence before the Magistrate or any technical matters that the notice should properly set forth such grounds specifically. Here, however, it would appear that the issues would be confined to the question of impairment while driving.

This passage, when read in conjunction with the decision in *Regina v. Souter, supra,* appears to me to indicate that the Court of Appeal of Ontario was of opinion that a "question as to the admissibility of certain evidence before the Magistrate" could be an issue at the trial *de novo,* whereas, with the greatest respect, I take the view that the only evidence upon which the Appeal Court judge can base his decision is the evidence introduced before him either directly or pursuant to s. 727(2), and the fact that evidence may have been wrongly admitted by the magistrate cannot be

[1] (1957), 29 C.R. 44, 26 W.W.R. 36, 119 C.C.C. 192.
[2] 123 C.C.C. 395.
[3] 123 C.C.C. at 402.

an issue at the trial *de novo* because the judge of the Appeal Court has control of what evidence is or is not to be admitted before him. See *Regina v. Dennis*[1]. No matter how grave or prejudicial the magistrate's errors may be in taking the evidence at the initial trial, they do not entitle an appellant to a favourable decision in the Appeal Court. Such errors afford good ground for the appellant believing that he was wrongly convicted but they form no part of the material upon which the appeal is to be decided.

In my view these considerations make it apparent that the main function of the notice of appeal required by s. 722 is to provide evidence of the appellant's sincerity of purpose in asserting his appeal rather than to indicate the specific issues to be raised at the second trial although when the appellant is seeking to change his plea or to raise pure questions of law apart from the evidence before the Appeal Court, it is desirable that the notice of appeal should be in such form as to make the respondent aware of the reasons to be urged in support of the change of plea or the nature of the legal points which are to be raised.

As I have indicated, I am of opinion that, subject to the limitations above referred to, it is quite legitimate in cases such as the present for the notice of appeal to confine itself to raising the broad issue of whether or not the accused has been wrongly convicted and that sufficient grounds were set forth in the notices of appeal before His Honour, Judge R. Stewart Clark, to comply with s. 722 of the *Criminal Code* and to clothe the said judge with jurisdiction to hear the said appeals by way of trial *de novo*.

I would accordingly allow the appeals, set aside the orders of the Court of Appeal and the County Court judge and remit the cases to the County Court judge to be heard by way of trial *de novo*.

FAUTEUX J.:—Being of opinion that the notice of appeal, to the County Court of the County of Peel, met the requirements of s. 722(1)(*a*) of the *Criminal Code* in setting as a ground of appeal in each case:

> That the said conviction was contrary to law, the evidence and the weight of evidence

[1] [1960] S.C.R. 286 at 291, 32 C.R. 210, 30 W.W.R. 545, 125 C.C.C. 321.

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I would dispose of the appeals to this Court as proposed by our brother Ritchie.

Appeals allowed.

Solicitors for the appellants: Jackson, Van Every, Watson, Gillespie & Lane, Port Credit.

Solicitor for the respondent: The Attorney-General for Ontario, Toronto.

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*Mar. 7, 8
June 26

AILEEN M. DREW (*Suppliant*) .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

AILEEN M. DREW (*Defendant*) .....APPELLANT;

AND

HER MAJESTY THE QUEEN on the information of the Deputy Attorney General of Canada (*Plaintiff*) ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Expropriation—Compensation—Alleged agreement with Crown not established—Principles respecting allowance for compulsory taking—Interest—Expropriation Act, R.S.C. 1952, c. 106.

Certain property belonging to the appellant was expropriated by the Crown on February 12, 1954. The appellant in an action by petition of right claimed the sum of $17,330 (and interest) as compensation for the land expropriated, to which she alleged she was entitled by virtue of an alleged agreement made between her and the Crown as a result of certain actions taken and statements made by P, who was a solicitor and a Member of Parliament. The petition of right was dismissed.

In an action commenced by information the Exchequer Court allowed $11,200 as the compensation to which the appellant was entitled, less $10,080 paid on account, together with interest on the difference between these two sums from the date of giving up possession. The appellant appealed from both judgments. In the proceedings commenced by information the points argued in this Court were the trial Judge's refusal to allow ten per cent for compulsory taking and the question of interest.

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*PRESENT: Kerwin C.J. and Taschereau, Locke, Cartwright, Fauteux, Abbott, Martland, Judson and Ritchie JJ.

Held: Both appeals should be dismissed.

Per Curiam: There was no such agreement as that claimed by the appellant that the Minister had authorized P to secure the services of a valuator and that the Minister and P had agreed that the amounts fixed by the valuator would be accepted by the several owners and by the Government. The evidence failed to show any holding out by the Minister of P as an agent. P had no ostensible authority to enter into an agreement on behalf of the Crown.

There was no basis for the claim that the appellant should be granted interest on the difference between the value of her land over and above its value as a farm even while she was in possession.

Per Kerwin C.J. and Taschereau J.: No decision of this Court had established that mere difficulty in arriving at the value to the owner of property expropriated, because of difference of opinion among the experts, would be sufficient to grant an allowance for compulsory taking. The ordinary rule is that the allowance is not to be made and that in order to justify it there must be special circumstances. Here there were no special circumstances.

Per Locke J.: No support for the proposition that an allowance for compulsory taking is made in circumstances presenting difficulty or uncertainty in appraising values was to be found in any of the reported cases in either the Exchequer Court or this Court. The reason for the allowance of a percentage of the value of the land as part of the compensation was to provide for the expense and inconvenience to the owner in moving elsewhere, the loss of benefits enjoyed by the owner due to the location of the property taken and, where a business is carried on which the owner proposes to continue elsewhere, the loss due to the dislocation of the business, the loss of profit in the interval before it can be established elsewhere, moving costs and other unavoidable expenses. Here it appeared that expenditures necessitated for moving and establishing a home elsewhere had been taken into consideration in estimating the value of the property to the appellant.

Per Cartwright, Fauteux, Abbott, Martland, Judson and Ritchie JJ.: The problem of allowance for compulsory taking was open for a reconsideration. It was possible to find at least three principles followed from time to time in this Court, (i) an allowance as a matter of course, (ii) no allowance where value to the owner had been ascertained and, (iii) an allowance in special circumstances.

There was no statutory basis for the allowance and no rule of law requiring it.

In fixing the amount of an award there are other factors, other than the market value of the property expropriated, which must be taken into account but which are not easily calculated. In such cases the tribunal of fact may decide that compensation for such factors can best be appraised in the form of a percentage of the market value. This is but a part of the process of determining value to the owner. Once that value has been assessed in accordance with the rule in *Woods Manufacturing Co. Ltd. v. R.*, [1951] S.C.R. 504, it represents full compensation and the owner is not entitled to an additional amount for compulsory taking.

Irving Oil Co. Ltd. v. R., [*1946*] *S.C.R. 551; Diggon-Hibben Ltd. v. R.*, [*1949*] *S.C.R. 712; R. v. Lavoie, unreported, considered; R. v. Hunting (1916), 32 D.L.R. 331; Dodge v. R. (1906), 38 S.C.R. 149; R. v. Hearn*

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(1917), 55 S.C.R. 562; R. v. Larivée (1918), 56 S.C.R. 376; St. Michael's College v. Toronto, [1926] S.C.R. 318; Canadian Provincial Power Co. Ltd. v. Nova Scotia Power Commission, [1928] S.C.R. 586; Re Watson and Toronto (1916), 32 D.L.R. 637; R. v. The Sisters of Charity of Providence, [1952] Ex. C.R. 113; Woods Manufacturing Co. Ltd. v. R., [1951] S.C.R. 504; Lake Erie and Northern Ry. Co. v. Brantford Golf and Country Club (1916), 32 D.L.R. 219, referred to.

APPEALS from two judgments of the President of the Exchequer Court of Canada in actions tried together. Appeals dismissed.

F. A. Brewin, Q.C., and *Ian G. Scott*, for the appellant.

D. S. Maxwell and *P. M. Troop*, for the respondent.

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

THE CHIEF JUSTICE:—These are appeals by Mrs. Aileen M. Drew from two judgments of the President of the Exchequer Court dated May 19, 1959. One was rendered in an action commenced June 12, 1956, by way of information to have the compensation determined for certain land belonging to Mrs. Drew, which had been expropriated on February 12, 1954, by the filing of a plan and description under s. 9 of the *Expropriation Act*, R.S.C. 1952, c. 106. The other judgment was rendered upon a petition of right filed December 23, 1958, on behalf of Mrs. Drew in which she claimed the sum of $17,330 (and interest) as compensation for the land expropriated to which she alleged she was entitled by virtue of an alleged agreement made between her and the Crown as a result of certain actions taken and statements made by Mr. John Pallett. The two actions were tried together and reasons for judgment were handed down on the same day. The petition of right was dismissed with costs. In the action commenced by information the judgment of the Exchequer Court declared (1) that the lands in question became vested in Her Majesty on February 12, 1954; (2) that the amount of the compensation money to which Mrs. Drew was entitled and all damages resulting from the expropriation were $11,200, less the sum of $10,080 paid on account, together with interest on the difference between these two sums, $1,120 at the rate of five per cent per annum from December 1, 1958, to the date of judgment, May 19, 1959. It was further declared that upon Mrs. Drew giving a valid and sufficient release

of all claims she was entitled to be paid the sum of $1,120 with interest as aforesaid. Mrs. Drew was given her costs of the action to be set off against the costs of the petition of right.

It will be convenient to deal first with the appeal in connection with the petition of right proceedings. The first point raised by counsel for the appellant relates to the following paragraph in the reasons for judgment of the President:—"Finally it must be kept in mind that the burden of proof of the alleged agreement lies on the suppliant. In my view of the evidence she has not discharged this burden and I so find". It is said that this finding is not justified. However, it must be read in conjunction with all of the President's reasons and particularly this immediately succeeding paragraph:—"And I am unable to find any support for the submission that the Minister clothed Mr. Pallett with authority to make an agreement that would be binding on both parties. He was never an agent of the Government and the Minister never held him out as such". Mr. Pallett was a solicitor and a Member of Parliament. He was acting as solicitor for Mrs. Drew and on September 14, 1956, his firm filed a defence to the Crown's information of June 12, 1956. A number of properties belonging to various owners had been expropriated, including that of Mrs. Drew, for the purpose of the Malton Airport in Ontario. Some of these owners had accepted the offers of the Government but there were about fifteen who were not satisfied. These latter, including Mrs. Drew, met at the home of Mrs. Murray, another claimant, in June or July 1957. In direct examination Mrs. Drew was asked: "Was there anyone there on that occasion representing the Government?", to which the reply was: "Yes. We had called in John Pallett as our Member of Parliament". At the meeting at Mrs. Murray's home Mr. Pallett proposed a plan which Mrs. Drew describes as follows: "It was that they get an independent evaluator, one that was approved by the Department of Transport and by George Hees, but that we were not told who it was, and we signed an agreement". (Mr. Hees was Minister of Transport). It is unnecessary to detail all the evidence, oral or written, as to what occurred between Mr. Pallett and Mr. Hees. It is contended that the Minister authorized Mr. Pallett to secure the

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services of a valuator and that the Minister and Mr. Pallett agreed that the amounts fixed by that person would be accepted by the several owners and by the Government. Reliance was placed upon a document dated October 1957 signed by Mrs. Drew and her husband, but that document is not an agreement, it is merely an offer, and, even if it were more, it does not purport to bind the Crown to pay whatever amounts the valuator should name. After a review of all the evidence and a consideration of the argument advanced by Mr. Brewin I find that there never was any such agreement. Certainly it was not accepted in writing and the record shows that it was not agreed to by the Minister. Even if the President had put the dismissal of the claim, so far as the question of fact is concerned, solely on the ground of onus, I find that the evidence goes much beyond that and that there was no such agreement as claimed.

The only other question raised on behalf of the appellant in connection with the petition of right is that in any event the Minister held out Mr. Pallett as an agent, i.e., that Mr. Pallett was clothed with ostensible authority by the Minister to enter into an agreement on behalf of the Crown and that the respondent is bound by an agreement which, it was argued, was made by Mr. Pallett. I agree with the last sentence in the second quotation from the reasons of the President that the evidence fails to show any such holding out. Some of the evidence is referred to by the President, but having considered all of it in the light of Mr. Brewin's submissions I have come to the conclusion that Mr. Pallett had no such ostensible authority. This conclusion renders it unnecessary to consider the various legal points raised by counsel on behalf of the Crown and referred to by the President. The appeal from the judgment as to the petition of right should therefore be dismissed.

In the proceedings commenced by information any objection to the allowance of $11,200 as the value of Mrs. Drew's land expropriated was abandoned and only two points were argued. The first is as to the President's refusal to allow ten per cent for compulsory taking. It is unnecessary to consider all the decisions in this Court and in the Exchequer Court dealing with this problem under the *Expropriation*

Act. The allowance was made in *Irving Oil Company Ltd. v. The King*[1]. While I was the only one who, with the concurrence of Chief Justice Rinfret, stated that the appellant was entitled to the allowance "under the circumstances of this case", undoubtedly it was the view of the majority, if not all, of the members who took part in the judgment that there were special considerations. That is borne out by the fact that Rand J., who had been a Member of the Court in the *Irving Oil* case, said in *Diggon-Hibben Limited v. The King*[2], with the concurrence of Taschereau J., at p. 713:

> In the case of *Irving Oil Company v. The King* it was held that while an allowance of 10 per cent for compulsory taking is not a matter of right, in circumstances presenting difficulty or uncertainty in appraising values, such as were found there, the practice of making that allowance applied. Similar circumstances are present here; in fact in the general character of the two situations there is no difference whatever. For that reason, I think the allowance should be made.

While at p. 719 of the *Diggon-Hibben* case Estey J. who had also been a Member of the Court in the *Irving Oil* case, referred to "the long established practice in the Courts", he had already remarked at p. 717: "The decision in *Irving Oil Company Ltd. v. The King* determines the issues in this case" and later, at p. 720, after referring to three decisions, he stated: "There are cases where, having regard to the circumstances, no allowance should be made, but, with great respect, the circumstances in this case do not distinguish it from these cases in which an amount for compulsory taking was allowed". In *The King v. Lavoie,* unreported, but referred to in the reasons for judgment of the President in the present case, Taschereau J. delivering the unanimous judgment of the Court said that the allowance should not be made in all cases but only where it is difficult because of uncertainty in fixing the amount of the compensation,—referring to the *Irving Oil* and *Diggon-Hibben* cases.

It was not laid down in the *Lavoie* decision or in any other decision of this Court that mere difficulty in arriving at the value to the owner of the property expropriated, because of difference of opinion among the experts, would be sufficient to grant the ten per cent. The fact that the

[1] [1946] S.C.R. 551, 4 D.L.R. 625. [2] [1949] S.C.R. 712, 4 D.L.R. 785.

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witnesses for the Crown and the witnesses for the owner differ as to the value is not a valid reason. In my view it is now settled that the ordinary rule is that the allowance is not to be made and that in order to justify it there must be special circumstances. Undoubtedly the facts in one case will differ from those in another but it is impossible to lay down the rule in any more express terms. Here there are no special circumstances.

The only remaining question to be dealt with is that of interest. It has been noted that Mrs. Drew has been allowed interest on the difference between the value of her land fixed by the President, $11,200 and the sum of $10,080 paid on account, from the date she gave up possession. It is argued that Mrs. Drew should be granted interest on the difference between the value of her land over and above its value as a farm even while she was in possession. There is no basis for any such claim. In examination-in-chief Mrs. Drew was asked the following questions and made the replies indicated:

Q. I was going to ask you about the improvements on the rest of the property. For what purpose did you use the balance of the property? A. We had about an acre of raspberry canes and an asparagus patch, and we grew our own vegetables. There was about an acre of lawn, flower beds and shrubbery.

Q. Did you do most of that work yourself, or get anyone else to do that for you—you and your husband? A. We did it ourselves. We did hire a farmer to work the garden land.

Reliance was placed upon the decision of the Court of Appeal for Ontario in *Re The Queen & Little*[1]. In that case in proceedings under *The Public Works Act,* R.S.O. 1950, c. 30, the Ontario Municipal Board had allowed interest at the rate of five per cent on the difference between the sum fixed by it as the total value and the value of the land as farm lands. Apparently there was no cross-appeal by the respondent before the Court of Appeal on that issue, but in any event, in the present case Mrs. Drew was using the property in the usual manner and there is no reason why she should be entitled, as put in the appellant's factum, to interest "on the difference between the value of the land as farm land and its total value, including development value,

[1] [1957] O.W.N. 301, 9 D.L.R. (2d) 296.

from the date of expropriation". In coming to his conclusion as to the value as of the date of expropriation the President fixed what he deemed was a proper amount and no objection is now taken to it. The appeal in the proceedings commenced by information should be dismissed.

In the result, therefore, both appeals should be dismissed with costs, but counsel fees as of one appeal only should be allowed.

LOCKE J.:—I agree with the reasons of the Chief Justice in these appeals, other than in respect of the claim for an allowance for compulsory taking.

I have had the advantage of reading the judgment proposed to be given by my brother Judson and, subject to the following comments, I agree with what is said by him regarding claims of this nature.

The cases of *Irving Oil Co. v. The King*[1], *Diggon-Hibben Ltd. v. The King*[2], and *The King v. Lavoie,* decided on December 19, 1950, in this Court and unreported, require, in my opinion, some more extended consideration than has been given to them in previous cases.

As the statement by Rand J. in the *Diggon-Hibben* case, that in circumstances presenting difficulty or uncertainty in appraising values the practice of making the allowance applies, was said by that learned judge to have been decided in the *Irving Oil* case, I will first consider that decision.

The judgment at the trial in the Exchequer Court before O'Connor J. is reported in [1945] Ex. C.R. 228. The property expropriated by the Crown was a lot in the City of St. John, N.B., for which the owner had paid $3,000 and upon which it had erected a building used as a service station at a cost of $3,947.58. Evidence was given that the replacement cost, less depreciation of the building, would be about $5,000 and that the cost of moving the equipment elsewhere would be $120, that it would depreciate in value by reason of the move to the extent of $300 and the cost of reinstalling the equipment elsewhere was estimated at $313. No evidence was given as to the fair market value of the property. The owner alleged that, because of the existing oil regulations, it could not get a permit to erect a new

[1] [1946] S.C.R. 551, 4 D.L.R. 625. [2] [1949] S.C.R. 712, 4 D.L.R. 785.

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station elsewhere and claimed as part of its loss its estimated profits for a period of five years. O'Connor J. disallowed the claim for loss of profit and found that the owner was entitled to compensation in the sum of $6,000. No mention is made in the reasons delivered of any claim for compulsory taking and none was allowed.

The appeal to this Court was heard by Rinfret C.J. and Kerwin, Hudson, Rand and Estey JJ. The judgment of the Chief Justice and of Kerwin J. was delivered by the latter. He considered that the amount allowed at the trial should be increased to $8,697.88, this amount including a sum of $701.33 for compulsory taking. The amount awarded also included an amount for loss of profit. The amount upon which the ten per cent was computed would appear to have been the estimate of the value of the land and its improvements, and not upon the amount allowed in respect of loss of profit or moving the equipment.

Hudson J., in dealing with this aspect of the matter, said (p. 558):

> I am not satisfied that a thorough examination of circumstances might not reduce this sum substantially but, on such evidence as there is, it would appear to be sufficient to provide a return which would justify a valuation of somewhat over $8,000, if there be included therewith the miscellaneous items such as costs of moving equipment, etc., and special allowance for compulsory taking included by the trial judge in his computation.

Rand J. agreed with the amount of the award, as shown at p. 564 of the report. In giving the details of the award, he included an item of $701.33 for forcible taking and did not refer otherwise to the matter. This was in addition to an amount of $500 which he considered should be allowed as "Damages through disturbance of business, etc."

Estey J., who agreed in the amount of the award, said that there should be an allowance for compulsory taking, without more, and agreed with the computation of the items of the judgment given in the judgment of Kerwin J.

As the above figures indicate, the property expropriated was of a comparatively small value and, unless it can be said that the question as to whether the amount allowed by Rand J. for the disturbance of the business should have been allowed as a loss of profit presented any difficulty, there was nothing in the case to distinguish it from countless other expropriations of small business properties which

had been considered by the courts of this country during the previous seventy-five years. As pointed out, nothing was said by any of the members of the Court to the effect that the ten per cent was allowed for compulsory taking, due to "difficulty or uncertainty in appraising values", or that there were any special circumstances justifying the allowance.

In the *Diggon-Hibben* case, judgments were written by Rand J. with whom Taschereau J. agreed, by Estey J. and by myself, the Chief Justice agreeing with my reasons. The statement quoted from the judgment of Rand J. was not the judgment of the Court since Estey J., while agreeing that there should be a sum of $10,000 allowed for compulsory taking, did so for different reasons. The Chief Justice and I were of the opinion that, as the reasons for judgment of the President showed that he had made what we considered a full allowance for the value to the owner of the lands and premises taken and a sum of $20,000 to cover the losses attendant on the removal of the old established business operated by the owner in Victoria to other premises in that city—which losses would necessarily result from the temporary dislocation of the business—the award compensated the owner to the full extent to which it was entitled and that, accordingly, no addition to that amount could be justified.

In my opinion, it is not clear whether the judgments delivered by the majority of the Court proceeded on the basis that the allowance made for the property and for what may be described as the dislocation of the business were insufficient or whether, contrary to the view of the minority of the Court, it was considered that the percentage might be allowed in addition to the full value to which the owner was entitled. If it were the latter, the result is inconsistent with the unanimous judgment subsequently delivered in *Woods Manufacturing Co. Ltd. v. The King*[1]. It may be pointed out further that the right of owners of property to compensation from the Crown for properties taken for its use is purely statutory and that there is nothing either in the *Expropriation Act* of Canada,

[1] [1951] S.C.R. 504, 2 D.L.R. 465.

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the *Railway Act* or any of the other statutes which authorize the expropriation of property which have been considered in this Court, which permit the award of compensation in excess of the value of the property to the owner, as that expression is interpreted in the *Woods Manufacturing* case at p. 508.

In *Lavoie's* case, the property expropriated by the Crown was situate within the limits of the City of Jonquiere in Quebec. The property in question had not theretofore been used other than for purposes of agriculture but the owner assigned a high value to it as building property and had planned to dispose of it as such and the learned trial judge had valued it on this basis. There was no claim that there was any loss by reason of the dislocation of any business being carried on upon the property, such as occurred in the *Irving Oil* and *Diggon-Hibben* cases. The Crown appealed from the award and the owner cross-appealed claiming an additional ten per cent. The reasons for judgment delivered in this Court disallowed the cross-appeal, saying:

> Ce montant additionnel de 10 p. cent n'est pas accordé dans tous les cas d'expropriation, et ce n'est que dans les causes où il est difficile par suite de certaines incertitudes dans l'appréciation du montant de la compensation, qu'il y a lieu de l'ajouter à l'indemnité.

citing as authority *Irving Oil Co. v. The King* and *Diggon-Hibben Ltd. v. The King*. This, with great respect, appears to me to have been error since in neither of the cases referred to had this Court declared the law in these terms. I am further of the opinion that in the circumstances, in the absence of any claim for disturbance or loss through the dislocation of a business or any other activity of the owner, there could have been no basis for such a claim. I wish to add that the passage from this judgment did not purport to declare any new principle, simply referring to decisions which, it was taken, had declared the law in the terms referred to.

I have considered with care all of the reported cases in the Exchequer Court and in this Court in which the question of an allowance for compulsory taking has been considered and I am unable to discover in any of them any support for the proposition that such an allowance is made in circumstances presenting difficulty or uncertainty in appraising values. An examination of the authorities and

the early works on compensation in England following the passing of the *Lands Clauses Consolidation Act* of 1845 does not make clear either the reason for the making of such an allowance or the value upon which the percentage is reckoned. I have searched and have been unable to find any cases prior to 1845 where any such allowance was made.

In the 2nd edition of Cripps on Compensation published in 1884 it is said at p. 98 that it was customary to add ten per cent to the *value* of lands taken under compulsory powers, but what value is not stated. In Lloyd on Compensation, 1895, p. 70, dealing with the practice under the *Lands Clauses Consolidation Act* and others of a like nature, the author says that when a leasehold is expropriated, ten per cent for compulsory sale is usually added to the total sum at which the value of the lease is assessed, and the ten per cent was considered sufficient compensation for compulsory sale, in addition to the assessed value of house property. In Browne and Allan on Compensation, 1903, p. 97, it is said that a percentage is regularly

> added to the market price and this is usually right for the sum to be ascertained is not the market price but the value of the land to the owner.

In *Dodge v. The King*[1], Idington J. at p. 156 said that there might be added to the market price a percentage to cover contingencies of many kinds.

In more recent years the practice where the allowance is made appears to have been to compute it on the value of the property to the owner, excluding therefrom any allowance made for disturbance, moving costs or loss of profits or business.

The principle applicable in determining compensation, stated in the *Woods Manufacturing* case, was not new. Thirty-four years earlier it had been stated in similar terms by Duff J. (as he then was) in *Lake Erie and Northern Ry. Co. v. Brantford Golf and Country Club*[2]. An element very often of great importance to be considered in determining what a prudent man would pay for the property rather than to be ejected from it is the expense and inconvenience of moving elsewhere, the loss of benefits enjoyed by the owner due to the location of the property taken and, where

[1] (1906), 38 S.C.R. 149. [2] (1916), 32 D.L.R. 219 at 229.

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a business is carried on which the owner proposes to continue elsewhere, the loss due to the dislocation of the business, the loss of profit in the interval before it can be established elsewhere, moving costs and other unavoidable expenses. The allowance made in respect of the dislocation of any business carried on and the loss of profit in the interval before it can be established elsewhere is, of necessity, in the nature of unliquidated damages and, except in very rare circumstances, cannot be determined with complete accuracy.

In my opinion, and despite the expression of opinions to the contrary by individual judges in some of the decided cases, I think the reason for the allowance of a percentage of the value of the land as part of the compensation was to provide for damage and expense of this nature.

There was nothing of this nature to consider in *Lavoie's* case. Since such an allowance cannot be determined with complete accuracy, I think that, while the method is perhaps not the most desirable way of determining the damages, it is permissible to estimate them as some percentage of the value of the property to the owner, other than that part of it to be attributed to such loss or damage. It was in this manner that the allowance was computed in *Diggon-Hibben Ltd. v. The King, Frei v. The Queen*[1], and in *Gagetown Lumber Co. Ltd. v. The Queen*[2].

The property expropriated is 4.36 acres in extent upon which there had been built in the year 1948 by the appellant and her husband a one-storey frame house containing five rooms. The expropriation was in the year 1954 but the appellant did not give up possession until December 1, 1958, without payment of any rent in the interval. At that time it was necessary for the appellant to move elsewhere, which, no doubt, necessitated expenditures for moving and establishing a home elsewhere.

In my opinion, in estimating the value of the property to the appellant this should properly be taken into consideration and, upon the record, it appears to me that this was done. Various attempts were made on behalf of the Crown to arrive at an amicable settlement of the appellant's claim and, as pointed out by the learned President,

[1] [1956] S.C.R. 462, 3 D.L.R. (2d) 305.
[2] [1957] S.C.R. 44, 6 D.L.R. (2d) 657.

the offer of $10,350 made on September 30, 1955, included an amount for forcible taking. This appears to have approximated $900. There is nothing in the evidence to suggest that the expenses incidental to moving elsewhere would aggregate any such amount. As the reasons at the trial indicate, the learned President was of the opinion that $10,000 was the full value of the property to the appellant but that, as an offer of $11,200 had been made and had not been withdrawn, the award was in this amount. In these circumstances, there is no ground for any further claim for the forcible dispossession.

I would dismiss both of these appeals with costs but counsel fees as of one appeal only should, in my opinion, be allowed.

The judgment of Cartwright, Fauteux, Abbott, Martland, Judson and Ritchie JJ. was delivered by

JUDSON J.:—I agree with the reasons of the Chief Justice in these appeals except that I would reject the claim for the allowance of 10 per cent for compulsory taking on different grounds.

There appears to be little doubt that *Diggon-Hibben Ltd. v. R.*[1], has been regarded as introducing a new principle as a basis for the award of 10 per cent for compulsory taking—"circumstances presenting difficulty or uncertainty in appraising values". This is far removed from the principle of the judgment of Fitzpatrick C.J. in *R. v. Hunting*[2], where it was said that it had "become so thoroughly established a rule from the innumerable cases both here and in England in which it has been awarded almost as a matter of course that I certainly should not be prepared to countenance its being questioned in any ordinary case". I will postpone examination of the cases to test whether the award ever was a matter of course in the Canadian courts and proceed immediately to an examination of the cases subsequent to *Diggon-Hibben* to see what has been the effect of the application of a rule based on difficulty or uncertainty in appraising values.

[1] [1949] S.C.R. 712, 4 D.L.R. 785. [2] (1916), 32 D.L.R. 331.

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Almost immediately in *R. v. Lavoie,* December 18, 1950 (unreported), the uncertainty rule was restated in slightly different language but the allowance was refused. Since then in all cases in the Supreme Court of Canada the 10 per cent has been allowed with little or no discussion.

In Ontario in thirteen reported cases since 1951 the award has been made in every case[a] except two[b]. In Quebec in all of the cases reported in the Court of Appeal since 1948 the allowance has been made in every case except in *Bellerose v. Talbot*[1]. In three recent Nova Scotia decisions[c] the allowance has been made at 5 per cent. The Manitoba Court of Appeal in its most recent decision has made the allowance[d].

With respect, there appears to be reason to question whether a rule based upon difficulty or uncertainty in valuation is working satisfactorily when it is found that the award is made in nearly every case. This may mean that, notwithstanding the form in which the rule is stated, what is really happening is that the old matter of course rule is being applied. Difficulty and uncertainty can be found in almost every assessment of damages no matter what the cause of action may be. But this affords no logical basis for the addition of 10 per cent. when the tribunal of fact, whether judge, jury or arbitrator, has given full consideration to a claim and made every allowance for the constituent elements that enter into the assessment. The course taken by the decisions may also indicate that the rule is being used as a formula to review an award on a question of quantum.

(a) *Hayden Warehouses and Storage Ltd. v. City of Toronto,* [1951] O.W.N. 466; *Assaf v. City of Toronto,* [1953] O.R. 595; *Townsend and Townsend v. Upper Thames River Conservation Authority,* [1953] O.W.N. 401; *Hill and Hill v. Upper Thames River Conservation Authority,* [1953] O.W.N. 471; *Hayden Warehouses and Storage Ltd. v. City of Toronto,* [1953] O.W.N. 792; *Pawson v. City of Sudbury,* [1953] O.R. 988; *Shields v. Board of Education for the Township of Etobicoke,* [1954] O.R. 831; *Thies v. The Board of Education for the City of London,* [1955] O.W.N. 714; *Steel v. Municipality of Metropolitan Toronto,* [1956] O.W.N. 511; *Walker v. Grimsby,* [1958] O.W.N. 269; *Ryan v. Ottawa P.S. Bd.,* [1960] O.W.N. 396.

(b) *O'Mara v. Board of Education of the City of St. Catherines,* [1954] O.W.N. 362; *Lowry, Richardson and Guaranty Trust Co. v. Metropolitan Toronto* (1960), 24 D.L.R. (2d) 374.

(c) *City of Halifax v. Paton* (1960), 25 D.L.R. (2d) 103; *City of Halifax v. Vaughan Construction Co. Ltd.* (1960), 25 D.L.R. (2d) 26; *City of Halifax v. Matter* (1960), 44 M.P.R. 197.

(d) *De Graaf v. City of Winnipeg* (1961), 26 D.L.R. (2d) 712.

[1] [1957] Que. Q.B. 637.

There is also reason to question whether the rule of difficulty or uncertainty followed as a consequence from the decision in *Irving Oil Co. v. The King*[1], and also whether it was even the majority opinion in *Diggon-Hibben*. Locke J. with Rinfret C.J. concurring said that the 10 per cent. could only be justified as part of the valuation. I take this to mean that it was not to be given as a bonus after value to the owner had been assessed and loss caused by disturbance taken into account. Estey J., while he did say the allowance for compulsory taking was founded on long established practice, also said that it was "a factor in the compensation separate and apart from what would be included as disturbance allowance". Long established practice, whether or not it existed in fact, seems to be a reference to the rule enunciated by Fitzpatrick C.J. in *Hunting* but in the second part of the statement it is difficult to understand the emphasis on the 10 per cent allowance being part of the compensation when at the same time it is distinguished from a disturbance allowance.

I now return to the statement of Fitzpatrick C.J. that the award had become a matter of course both here and in England. The practice in England came into being as a result of judicial decision subsequent to the enactment of the *Lands Clauses Consolidation Act,* 1845, although there was nothing in the legislation which authorized the allowance. When the case of *Hunting* was decided in 1916, the practice had only three years to go in England for it was abolished in 1919. The position is stated briefly in 10 Halsbury, 3rd ed., p. 95, in these words:

> It became customary under the Lands Clauses Acts to add to the value of the land a further ten per cent as compensation for the taking being compulsory. There has never been express statutory authority for this addition, but statutory recognition of the existence of the custom was given by its prohibition in cases to which the Acquisition of Land (Assessment of Compensation) Act, 1919 (9 & 10 Geo. 5, c. 57), applied. With the subsequent extension of the application of that Act the custom can rarely apply.

The question is whether any such practice ever grew up in this country to justify a statement that the allowance was a matter of course based upon long established practice. The matter was never considered in this Court until the year 1906. In the *Queen v. Paradis*[2], which restored the

[1] [1946] S.C.R. 551, 4 D.L.R. 625. [2] (1888), 16 S.C.R. 716.

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award of the official arbitrators after it had been increased in the Exchequer Court[1], there is no mention in either Court of the supposed practice notwithstanding a thorough review in the Exchequer Court of the cases up to 1887. The first mention of the subject in this Court is in *Dodge v. R.*[2], where it was said by Idington J. very briefly "there may be added as usually is added a percentage to cover contingencies of many kinds".

The next case is *R. v. Hunting*[3], where Fitzpatrick C.J. said that the 10 per cent. had become an established rule not to be questioned in ordinary cases. Idington J. said that the 10 per cent. should be added to the market value. He stated that there was no rule of law rendering it an invariable consequence of compulsory taking but that in the majority of cases it was no more than justice demanded. Duff J. gave no reasons for dismissing the appeal. Anglin J. stated that the 10 per cent allowance was "independent of and additional to any sum in excess of market value to which the owner may be entitled because of special adaptability of the expropriated premises to his purpose". This appears to be equivalent to saying that value to the owner is first ascertained and then 10 per cent. is added to that. Brodeur J. would have disallowed the 10 per cent. because the evidence disclosed no evidence to justify its allowance. He adopted the opinion expressed in Cripps on Compensation that it was given to cover various incidental costs and charges and that it was only justifiable as part of the valuation and not as an addition thereto. There is real conflict of opinion here on the principle of the 10 per cent. and I doubt whether any common *ratio decidendi* can be extracted from the conflict.

In *Rex v. Hearn*[4], Idington and Anglin JJ. both approved an allowance of 10 per cent. for compulsory taking.

In *Rex v. Larivée*[5], the 10 per cent. allowance made by the arbitrator was disallowed in this Court on the ground that the award was ample and that the 10 per cent. was not to be allowed as of right in all circumstances.

[1] (1887), 1 Ex. C.R. 191.
[2] (1906), 38 S.C.R. 149 at 156.
[3] (1916), 32 D.L.R. 331.
[4] (1917), 55 S.C.R. 562.
[5] (1918), 56 S.C.R. 376.

In *St. Michael's College v. City of Toronto*[1], fair compensation to the college was discussed in terms which indicate that the judgment clearly had in mind value to the owner of the lands taken and diminution in value of the property retained by reason of the severance. There was no mention of any 10 per cent. allowance in the unanimous judgment of the Court. Similarly, in *Canadian Provincial Power Co. Ltd. v. Nova Scotia Power Commission*[2], where the Court clearly had in mind the principle stated in the *Pastoral Finance*[3] case, there was no mention of any such allowance.

It is apparent that prior to *Hunting* there had been little consideration of this matter in this Court and that in *Hunting* itself the principles enunciated in the various judgments are shadowy in outline and difficult to reconcile one with another. *Hearn* and *Larivée* add nothing to the discussion to be found in *Hunting*. It does, however, seem significant that in the two cases where the Court clearly had in mind the concept of value to the owner—the *St. Michael's College* case and the *Provincial Power* case—there was no mention of the 10 per cent. and I cannot think that this was an oversight. It is therefore possible to find within the last fifty years that there have been at least three principles followed from time to time in this Court, first, an allowance as a matter of course, second, no allowance where value to the owner has been ascertained and, third, an allowance in special circumstances. It cannot be said that these principles have been satisfactory from the standpoint of logic, definition or application and in my opinion the door is wide open for a reconsideration of the whole problem, particularly when what was obviously the foundation of the rule—and a very insecure one—disappeared in the country of its origin over forty years ago.

The allowance of 10 per cent. has not escaped criticism. In *Re Watson and City of Toronto*[4], Meredith C.J.C.P. said:

> In regard to the adding of any arbitrary amount to any sum fixed by the arbitrator, it is impossible for me to think that any Judge has expressed the opinion that, after full compensation has been allowed, anything in the

[1] [1926] S.C.R. 318, 2 D.L.R. 244.
[2] [1928] S.C.R. 586, 4 D.L.R. 641.
[3] [1914] A.C. 1083.
[4] (1916), 32 D.L.R. 637 at 643.

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nature of a bonus addition is to be made to the sum of the full compensation. When power to take lands is given, it is usual for some one to contend and urge that something more than full compensation should be paid to the land-owner, whether 10, 20, 30, 40, or 50 per cent.: but invariably the Legislature has refused to sanction any such addition or to allow to the land-owner anything but compensation: therefore for the Courts to do so would be legislation, not adjudication, and legislation of a most flagrant character. Even if it could be that any Court should so decree, I cannot see how any juror-arbitrator, having regard for his oath of office, could give effect to it, could do otherwise than obey the statute, and let the Court take the responsibility of giving the bonus addition.

In the case upon this point to which the Chief Justice has directed our attention, I find nothing to warrant a contention that anything more than compensation should be awarded. In that case the arbitrator had added 10 per cent. to a sum estimated by him, not, as I understand it, as a bonus, but as part of the compensation, and a part not included in the estimated sum; that is to say, that, having taken into account certain more easily calculated amounts of compensation, for other things not easily calculated and not included in the calculated amount, 10 per cent. was added as a reasonable valuation of these things. In principle that is not wrong: whether right or wrong in that particular case as a matter of fact is unimportant in this case, for in that respect that case has no authoritative effect upon any other.

In this case full compensation has been awarded by the arbitrator; and so there could be no justification for adding a farthing to the amount awarded, unless taken off first for the pleasure of adding it again.

This is the forerunner of a more sustained criticism in the Exchequer Court. The judgment in *The Queen v. The Sisters of Charity of Providence*[1], contains a complete historical and critical survey of the application of the supposed rule of the allowance for compulsory taking both in England and Canada and I am content to adopt this survey as part of my reasons along with the criticism that there is no statutory basis for the allowance and no rule of law requiring it. With the restatement of the value to the owner rule in *Woods Manufacturing Co. Ltd. v. The King*[2], it seems to me that the anomalies have become more strongly emphasized. The rule is that

> . . . the owner at the moment of expropriation is to be deemed as without title, but all else remaining the same, and the question is what would he, as a prudent man, at that moment, pay for the property rather than be ejected from it.

In fixing the amount of an award there are often factors, other than the market value of the property expropriated, which must be taken into account but which are not easily

[1] [1952] Ex. C.R. 113, 3 D.L.R. 358.
[2] [1951] S.C.R. 504, 2 D.L.R. 465.

calculated. In such cases the tribunal of fact may decide that compensation for such factors can best be appraised in the form of a percentage of the market value. This is but a part of the process of determining value to the owner. Once that value has been assessed in accordance with the rule in the *Woods* case it represents full compensation and the owner is not entitled to an additional amount for compulsory taking.

Appeals dismissed with costs.

Solicitors for the appellant: Cameron, Weldon, Brewin, McCallum & Skells, Toronto.

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

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*Feb. 22
June 26

THE CITY OF OTTAWA PUBLIC SCHOOL BOARD (*Respondent*) ..... APPELLANT;

AND

ROBERT CAMPEAU (*Claimant*) ..... RESPONDENT.

THE CITY OF OTTAWA PUBLIC SCHOOL BOARD (*Respondent*) ..... APPELLANT;

AND

CAMPEAU CONSTRUCTION COMPANY LIMITED (*Claimant*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Expropriation—Compensation—Allowance for compulsory taking refused—Allowance of interest—The Schools Administration Act, 1954 (Ont.), c. 86, as amended.

Under *The Schools Administration Act* the appellant board expropriated two parcels of land, known as the Ryan parcel and the Arkell parcel. By leave of this Court the appellant appealed from two orders of the Court of Appeal varying the awards of the arbitrator fixing the

*PRESENT: Kerwin C.J. and Taschereau, Locke, Abbott and Judson JJ.

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amounts of compensation for the lands expropriated. The questions arising for determination in this Court were (1) whether the allowance of ten per cent for compulsory taking allowed by the Court of Appeal, but which had been refused by the arbitrator, should have been made, and (2) whether interest should have been allowed on the awards.

Held: The orders of the Court of Appeal should be set aside and the awards of the arbitrator varied.

Per Curiam: Interest should be allowed and calculated in the case of the Ryan parcel from the date that the respondents became entitled to possession to the date of payment, and in the case of the Arkell parcel, which lands were vacant at the date of expropriation, from the date of registration of a copy of the expropriation resolution to the date of payment. *In Re Cavanagh and the Canada Atlantic R.W. Co.* (1907), 14 O.L.R. 523, referred to.

Per Kerwin C.J. and Taschereau J.: As pointed out in *Drew v. The Queen*, *ante* p. 614 where the question of allowance for compulsory taking under the *Expropriation Act* was considered, mere differences of opinion among experts, concerning the valuation to be put upon lands, was not a sufficient reason to make the allowance. The ordinary rule is that there is no allowance to be made and that there must be special circumstances to justify it. The same rule applied to the present case under *The Schools Administration Act*. Here there were no special circumstances.

Per Locke and Abbott JJ.: In determining the question of what a person in possession would, as a prudent man, pay for the property rather than be ejected from it, there were to be taken into account, as part of the compensation payable, losses and expenses for the dislocation of any business being carried on by the owner of the property at the time of the expropriation, loss of profit, removal expenses and other matters of a like nature justifying the granting of an allowance for compulsory taking. There were no such matters in the present case nor was there any other circumstance entitling the owner to such an allowance. The amount allowed by the arbitrator represented the full value of the lands to the respondent and the statute under which the expropriation was made did not permit the payment of any further or other amount.

Per Judson J.: The claim for the allowance of ten per cent for compulsory taking should be rejected. *Drew v. The Queen*, *ante* p. 614.

APPEALS from two orders of the Court of Appeal for Ontario[1] varying the awards of McDougall C.C.J., fixing the amounts of compensation for lands expropriated. Orders set aside and awards varied.

K. E. Eaton, for the appellant.

J. D. Arnup, Q.C., and *J. J. Carthy,* for the respondent.

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

[1] [1960] O.W.N. 396.

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THE CHIEF JUSTICE:—By leave of this Court the City of Ottawa Public School Board appeals from two orders of the Court of Appeal for Ontario[1] varying the awards of His Honour Judge McDougall fixing the amounts of compensation for lands expropriated by the appellant under *The Schools Administration Act,* 1954 (Ont.), c. 86 and amendments. Under the powers conferred by s. 57 of the Act, the appellant expropriated certain parcels of land for school sites, one known as the Ryan parcel, on March 7, 1957, and the other known as the Arkell parcel, on May 16, 1957. The amounts fixed by Judge McDougall are not in dispute and only two questions arise for determination upon these appeals.

The first is as to the allowance of ten per cent for compulsory taking allowed by the Court of Appeal but which had been refused by the arbitrator. Reliance was placed by counsel for the respondent upon the statement in the reasons for judgment of His Honour that "the prices vary so much it is very hard to get any sense of uniformity in the values shown", but I take this to mean nothing more than what is referred to by Aylesworth J.A., delivering the reasons for judgment of the Court of Appeal, that the arbitrator "was confronted with widely varying opinions, tendered by some four experts, concerning the valuation to be put upon the lands, the basis for such valuations in each case being the value of the lands for development under plans for residential subdivisions. The valuations in some instances as tendered were double those tendered by others". In the recent appeal to this Court in *Drew v. The Queen, ante* p. 614, I had occasion to consider the question of this allowance under the *Expropriation Act,* R.S.C. 1952, c. 106, and I pointed out that mere differences of opinion among the experts is not a sufficient reason; that the ordinary rule is that there is no allowance to be made and that there must be special circumstances in order to justify it. The same rule applies to the present case under *The Schools Administration Act.* Particularly in view of the facts that Mr. Campeau agreed to purchase the Ryan parcel on May 11, 1956, and that Campeau Construction Company

[1] [1960] O.W.N. 396.

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Limited, agreed to purchase the Arkell parcel in 1955, I can find no special circumstances and the ten per cent award by the Court of Appeal is disallowed.

The second point is as to the question of interest. The respondent Robert Campeau had entered into an agreement of purchase of the Ryan parcel from Mr. Frank Ryan (the latter's wife joining to bar her dower) and had made substantial payments thereon but was not entitled to possession until February 1, 1959. Mr. and Mrs. Ryan were not appellants before the Court of Appeal and are not parties to this appeal. The Court of Appeal allowed no interest down to February 1, 1959, but did allow interest at the rate of five per cent per annum upon the whole amount of the award from that date until payment. As to the Arkell parcel, the Court of Appeal allowed interest at five per cent per annum from the date of registration in the Registry Office of a copy of the resolution of the Board expropriating the land.

Under s. 61 of the Act, where the owner and a board, such as the appellant, are unable to agree on the compensation to be paid to the owner, the amount is to be fixed and determined by the County Court Judge. By s. 62 "the judge shall determine what interest, if any, shall be paid to the owner". By s. 59 at any time after a board passes a resolution declaring that any land is required for a school site and that immediate possession thereof is required by it, the board, by leave of the County Court Judge and upon payment into the Supreme Court of a sum sufficient, in the opinion of the County Court Judge, to satisfy the compensation, may enter upon and take possession of the land. No such proceedings were taken and we were not informed as to when possession of either parcel was taken. There is no provision in the Act providing for the registration of the resolutions but a copy of the resolution dealing with the Ryan property was registered in the Registry Office on March 13, 1957, and a copy of the resolution relating to the Arkell property was registered on May 21, 1957.

So far as the Ryan property is concerned, it is argued on behalf of the respondent Campeau that since Ryan was in possession at the date of the arbitration and was entitled to remain in possession under his agreement with Campeau until February 1, 1959, it could not be said that Campeau

was in the same position as an owner who was permitted to remain in possession without payment of rent but with full use of the expropriated property. Aylesworth J.A. puts the matter thus:—"Ryan had remained in possession and had devoted that possession to precisely the same use that those lands were devoted to before expropriation proceedings". So far as the Arkell property is concerned, apparently nothing was done as to possession up to the time of the hearing of the arbitration, and it is argued on behalf of Campeau Construction Company Limited that in view of the provisions of s. 62 of the Act the Court of Appeal was justified in allowing interest from the date of registration of a copy of the expropriation resolution.

I agree that interest should be allowed. The result of not doing this is set forth by Riddell J. in *In Re Cavanagh and the Canada Atlantic R.W. Co.*[1], in an expropriation case under the *Railway Act* of Canada. Ryan was entitled to possession of the Ryan parcel down to February 1, 1959, and, as to the Arkell parcel, the lands were vacant at the date of expropriation. The respondents are therefore entitled to interest from the dates mentioned in the order of the Court of Appeal but, in view of the fact that I have disallowed the ten per cent, such interest will be calculated in the case of the Ryan parcel upon the sum of $40,000 from February 1, 1959, to the date of payment. In the case of the Arkell parcel, interest will be calculated on the sum of $21,630 at the rate of five per cent per annum from May 21, 1957, the date of registration of a copy of the expropriation resolution, to the date of payment.

The orders of the Court of Appeal are set aside and the awards of His Honour Judge McDougall are varied in accordance with the foregoing reasons. There will be no costs in this Court or in the Court of Appeal.

The judgment of Locke and Abbott JJ. was delivered by

LOCKE J.:—The lands expropriated in this matter were some 16 acres in extent and, prior to the taking, had been used for farming purposes only. The learned arbitrator, His Honour Judge McDougall, considered that the most profitable use to which this property could be put by the owner

[1] (1907), 14 O.L.R. 523 at 531, 6 C.R.C. 395.

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Locke J.

was for residential purposes and awarded compensation on that footing. There is no appeal from the amount of this award.

The judgment of the Court of Appeal has added ten per cent to these amounts for compulsory taking. As to this, I refer to the judgments to be delivered contemporaneously with this judgment in the appeals in *Drew v. The Queen, ante* p. 614 by my brother Judson and by myself, dealing with the circumstances in which such an allowance may properly be made.

In the present matter, no business activity of any nature was being carried on by the owner on the property at the time of the expropriation, so that there was no compensation necessary for the dislocation of any business, for loss of profit, removal expenses or other matters of a like nature justifying the granting of any such allowance. In determining the question of what a person in possession would, as a prudent man, pay for the property rather than be ejected from it, there is to be taken into account as part of the compensation payable losses and expenses of this nature, but there were none in the present case nor any other circumstance entitling the owner to such an allowance. The amount allowed by the arbitrator represented the full value of the lands to the respondent and the statute under which the expropriation was made does not permit the payment of any further or other amount.

I agree with the reasons of the Chief Justice dealing with the allowance of interest and with the form of the judgment and the order as to costs proposed by him.

JUDSON J.:—I agree with the reasons of the Chief Justice in these appeals except that I would reject the claim for the allowance of 10 per cent for compulsory taking for the reasons which I gave in *Drew v. The Queen, ante* p. 614.

Orders of the Court of Appeal set aside and awards varied.

Solicitors for the appellant: Gowling, MacTavish, Osborne & Henderson, Ottawa.

Solicitors for the respondents: Greenberg, Wright & Gorsky, Ottawa.

JOHN S. GALBRAITH (*Plaintiff*) .....APPELLANT;

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*Feb. 28
June 26

AND

THE MADAWASKA CLUB LIMITED (*Defendant*) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Companies—Restrictions on transfer of shares.

Real Property—Restrictive covenant—Assignee of servient land taking with notice—Essential requirements for enforcement of covenant lacking.

In an action against an incorporated club the claims of the plaintiff were: (1) on behalf of himself and all other shareholders of the company for a declaration that those provisions of the by-laws of the company which purported to restrain the transfer of its shares were void; (2) as one of two joint tenants in fee simple (the other being his wife) of part of an island for a declaration that these lands were not subject to specified restrictions. As to the first point the judgment at trial declared that the by-laws in question were invalid. As to the second point it declared that the lands were subject to certain covenants which it was held ran with the land as set forth in the company's by-laws and that save as aforesaid the said lands were free of the restrictive covenants set out in a deed of the part of the island in question from F (a grantee in fee simple from the company) to the plaintiff, including the by-laws of the company annexed thereto. This judgment having been set aside by the Court of Appeal, the plaintiff appealed to this Court asking that the judgment at trial be restored except in so far as it declared that the lands were subject to the covenant in the relevant part of by-law 19 which read: "Occupation of a dwelling or premises by persons who are not members of the Club shall be only by special permission of the Board of Directors".

Held: Appeal allowed. Judgment at trial restored with modifications.

Per Curiam: With respect to the first claim, the provisions of the company's charter governed. As the ground covered by the by-laws in question was already dealt with by the charter, the matter was disposed of. In so far as it extended beyond the terms of the charter, it was problematical if any situation would arise calling for the consideration or use of the by-laws and, therefore, no declaration as to the invalidity of any of them should be made.

Per Kerwin C.J. and Taschereau J.: As to the second point, in view of the admissions expressed in its statement of defence the defendant was not entitled to argue that the directors had exceeded their powers as defined in the company's by-laws. *The Tasmania,* 15 App. Cas. 223; *SS. Tordenskjold v. SS. Euphemia* (1909), 41 S.C.R. 154; *David Spencer Ltd. v. Field,* [1939] S.C.R. 36, referred to. By-law 17 authorized the directors to convey the islands by deed subject to the conditions set forth. The defendant admitted that a deed had been given to the intent, *i.e.,* with the intention, that the burden of the covenants

*PRESENT: Kerwin C.J. and Taschereau, Abbott, Judson and Ritchie JJ.

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should run with the land but not (i) that they did not bind the plaintiff, and (ii) that they were invalid. The lands in question were subject only to the restrictions contained in by-laws 18(a) and (b) and 28, but not those contained in by-law 19.

Per Curiam: If the plaintiff as assignee of the servient land taking with notice was to be bound by the covenant in by-law 19 certain essential requirements were to be satisfied: (i) the covenant must touch and concern the dominant land, (ii) the club as covenantee must retain land capable of being benefited by the covenant, and (iii) there must be express annexation of the covenant to the dominant land. All three requirements were lacking in this case. *Noble and Wolf v. Alley,* [1951] S.C.R. 64; *Canadian Construction Co. Ltd. v. Beaver Lumber Ltd.,* [1955] S.C.R. 682, followed; *Tulk v. Moxhay* (1848), 2 Ph. 774; *Rogers v. Hosegood,* [1900] 2 Ch. 388; *Zetland v. Driver,* [1939] Ch. 1, referred to.

APPEAL from a judgment of the Court of Appeal for Ontario[1], setting aside a judgment of Ferguson J. Appeal allowed. Judgment at trial restored with modifications.

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

R. F. Wilson, Q.C., and *M. J. Wheldrake,* for the defendant, respondent.

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

THE CHIEF JUSTICE:—This is an appeal by John S. Galbraith from a judgment of the Court of Appeal for Ontario[1] dismissing his action against The Madawaska Club Limited, hereinafter referred to as the Company. The claims of the plaintiff were two-fold: (1) on behalf of himself and all other shareholders of the Company for a declaration that those provisions of the by-laws of the Company which purport to restrain the transfer of its shares were void; (2) as one of two joint tenants in fee simple, (the other being his wife) of part of an island in Georgian Bay in Ontario known as No. 122 for a declaration that these lands were not subject to specified restrictions.

As to the first point the judgment at the trial declared that the by-laws of the Company nos. 2, 5, 6, 9 and 30 were invalid. As to the second point it declared that the lands

[1] (1960), 23 D.L.R. (2d) 6

were subject to the following covenants which it was held ran with the land as set forth in the Company's by-laws nos. 18, 19 and 28:

18. (a) The decision on all matters pertaining to the delimitation and allotment of sites shall rest with the Board of Directors. In all cases of dispute between members as to the limits and boundaries of lots, or the location of buildings, wharves, etc., the Board of Directors shall have full power to make final decision.

(b) No building or structure shall be erected on any site unless the plan and location thereof shall have been approved by the Board of Directors. The Board of Directors may, after due notification, order or cause to be removed any building or structure, which, after December 1, 1904, may be erected without such approval having previously been secured.

19. (In Part) Occupation of a dwelling or premises by persons who are not members of the Club shall be only by special permission of the Board of Directors.

28. Not more than one dwelling house shall be erected on any member's holding, nor shall any building on such holding, allotted to a member, be used for the purpose of keeping boarders or paying guests.

and that save as aforesaid the said lands were free of the restrictive covenants set out in a deed of the part of island No. 122 in question from Ella R. Firth to the plaintiff, dated January 24, 1947, including the by-laws of the defendant Company annexed thereto. With these exceptions the judgment dismissed the action without costs.

The plaintiff appealed to the Court of Appeal only with respect to the declaration that the property was subject to that part of by-law 19 set forth above. The defendant cross-appealed on the ground that the restrictions on the transfer of shares were authorized by its letters patent, that the provisions of the by-laws affecting land were binding in equity and that, in any event, the trial judge improperly exercised his discretion in making any declaration. The Court of Appeal dismissed the plaintiff's appeal, allowed the defendant's cross-appeal and, setting aside the judgment at the trial, dismissed the action with costs and ordered the plaintiff to pay the defendant its costs of the appeal and of the cross-appeal. On the appeal to this Court the plaintiff asks that the judgment at the trial be restored except in so far as it declared that the lands were subject to the covenant in the relevant part of by-law 19.

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On July 12, 1898, the defendant was incorporated under *The Ontario Companies Act*, R.S.O. 1897, c. 191, by letters patent containing the following provisions:

> AND WE DIRECT that the right to acquire and hold shares in the said Club shall be limited to the persons mentioned in this Our Charter and to any Graduate or Under-Graduate of the University of Toronto or of the School of Practical Science or any official connected with either the said The University of Toronto or the said The School of Practical Science.
>
> AND WE FURTHER DIRECT that the capital stock of the Club shall be deemed to be incapable of being assigned or transferred to any body corporate whatever or to any individual (other than those specified in this Our Charter) who is not a graduate or under-graduate of the said The University of Toronto or of the said The School of Practical Science or who is not an official connected with either the said The University of Toronto or the said The School of Practical Science AND WE HEREBY EXPRESSLY EXCLUDE all other persons from the right to acquire and hold a share or shares in the said Club.

The Company was incorporated "for the purpose and objects following that is to say (a) SUBJECT to the provisions of the laws respecting the protection of Fish and Game TO protect preserve and propagate fish and game and to pursue hunt capture and take the same in over and upon the lands waters and property of the Club and (b) TO conduct experimental work in Forestry Biology and other branches of Natural Science." The share capital was $2,000 divided into eighty shares of $25 each. We are not concerned with designated free grant lands mentioned in the letters patent as about to be acquired by the Company from the Province of Ontario. Under various Ontario statutes the Company had power to acquire by purchase and to hold and sell other lands and on October 12, 1911, the Department of Indian Affairs of Canada granted to the Company a number of islands in Georgian Bay, of which No. 122 is one. The Company still owns a number of these islands or parts thereof.

While the plaintiff applied for membership in the Company on November 21, 1952, his testimony shows that nothing occurred as a result thereof and Exhibit-1 is Share Certificate No. 288 in his name for two fully-paid-up shares in the Company and dated as recently as November 29, 1952. There is in the record a certificate for two fully-paid-up shares of the Company of $25 each in the name of Ella R. Firth, dated January 18, 1947, on the back of which certificate is an assignment by her to the plaintiff dated January 24, 1947. A witness for the respondent testified that it

was on the basis of this assignment that the plaintiff became a shareholder and the plaintiff gave evidence that he became a shareholder only about the time of the conveyance to him by Ella R. Firth of January 24, 1947, of part of island No. 122.

On October 17, 1945, the Company conveyed the said part of island No. 122 to Ella R. Firth, her heirs and assigns for her sole and their sole and only use forever

.....

Subject nevertheless to the reservations, limitations, provisoes and conditions expressed in the original grant thereof from the Crown; To the intent that the burden of these covenants may run with the lands aforesaid during the Corporate existence of The Madawaska Club, Limited, the said Grantee for herself, her heirs, executors, administrators and assigns, DOTH COVENANT AND AGREE WITH THE said Grantor its successors and assigns as follows: that she the said Grantee, her heirs, executors, administrators and assigns

(*a*) Will not or will any of them transfer said land by Deed of Ownership or any similar agreement to any person not a member of the Club, and that any such sale, lease or transfer to any person not a member of the Club, or attempted alienation of the said land to take it out of the control of the by-laws of the Club shall be null and void;

.....

(*d*) Will observe and carry out the by-laws of The Madawaska Club, Limited, annexed hereto marked "A" and will hold the said land subject to the terms herein contained and subject to the terms and conditions imposed upon the said land by the said by-laws.

The deed signed by the grantee contained a covenant on her part to observe the Company's by-laws, a copy of which was annexed to and made part of the deed. Ella R. Firth conveyed the same lands to the plaintiff by grant dated January 24, 1947, the same date that she assigned the two shares to him. The plaintiff signed the conveyance, covenanted with the grantor in the same terms set forth above in the conveyance to her and also covenanted with the grantor to observe and carry out the by-laws of the Company, a copy of which was annexed to and made part of the document. On February 21, 1951, the plaintiff conveyed the lands to himself and his wife as joint tenants,—the deed containing none of the covenants included in the conveyance to Ella R. Firth or in that from her to the plaintiff.

As to the first claim of the plaintiff in this appeal the provisions of the Charter govern. It is argued on his behalf that ss. 17 and 39 of *The Corporations Act*, 1953 (Ont.), c. 19, are applicable. These sections are in Part II of the

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Act and by s. 17 that Part applies "(c) to every company incorporated by or under a general or special Act of the Legislature",—which includes the defendant Company. By subs. (2) of s. 39, "subject to subs. (3) (which is not relevant) no by-law shall be passed that in any way restricts the right of a holder of fully-paid shares to transfer them but by-laws may be passed regulating the method of transfer thereof". Section 39(2) was in substance first enacted in 1912 by 2 Geo. V, c. 31, s. 54(2), which was subsequent to the date of the Company's Charter. This subs. (2) looks to the future and in any event the provisions of the Charter are explicit.

The trial judge held by-laws 2, 5, 6, 9 and 30 to be invalid. These read:

2. The membership shall be limited to 120, and shall consist of charter members, and of graduates and undergraduates of the University of Toronto or of the School of Practical Science, and of any officials connected therewith.

.....

5. Election of new members shall take place at the annual meeting only. All applications for membership shall be made in writing to the Board of Directors at least three weeks before the annual meeting, on a form to be approved by the Board of Directors, and the Board of Directors shall cause the names of such applicants as are eligible under the charter to be inserted in the notice calling the annual meeting.

6. The election of new members shall be by ballot, each member present in person or by proxy being entitled to cast one vote, and any applicant receiving six adverse votes shall be rejected.

.....

9. No member shall at any time hold more than ten shares of the capital stock of the Club.

.....

30. An undivided holding and the shares attached may be devised and bequeathed by will to a single devisee and legatee, provided that the devisee or legatee is eligible for membership under the By-laws; and the said devisee or legatee shall become a member of the Madawaska Club without election, by submitting proper documentary proof of the devise or legacy to the Board of Directors, and shall be entitled to acquire possession of the property so devised or bequeathed on paying the entrance fee required from new members; and shall thereafter hold said property subject to the terms of the By-laws of the Club.

According to Exhibit-3 all of these, except 30, were "adopted May 18, 1932, as amended, 194?" However, Exhibit-21 shows that the by-laws were first passed December 12, 1904, that is prior to s. 54(2) of 2 Geo. V, c. 31, including the first four of those mentioned (with a slight variation as to 6).

In so far as the ground covered by these by-laws is already dealt with by the Charter, the matter is disposed of and this includes by-law 30 as the Charter directs "that the right to acquire and hold shares in the said Club shall be limited to the persons mentioned in this Our Charter and to any Graduate or Under-Graduate of the University of Toronto or of the School of Practical Science or any official connected with either the said The University of Toronto or the said The School of Practical Science". In so far as it extends beyond the terms of the Charter, I agree with the Court of Appeal that it is problematical if any situation will arise calling for the consideration or use of the by-laws and that, therefore, no declaration as to the invalidity of any of them should be made.

In connection with the second point it should first be stated that the circumstance that Mrs. Firth or her representatives were not parties was never alluded to even when counsel were asked to argue certain additional points before the Court of Appeal, but, in any event, it cannot affect the matter as it does not appear that she or they have any interest in any other part of island No. 122 or any part of any other island in Georgian Bay. Next, it should be noted that irrespective of the date when the plaintiff actually became a shareholder, he is, under *The Registry Act* of Ontario, charged with notice of the covenants including those in the by-laws which appear in and are attached to the deed from the Company to Ella R. Firth and that, furthermore, he signed the deed from her to him even though "under protest". It is now necessary to examine the pleadings. Paragraphs 7A and 7B of the amended statement of claim were as follows:

> 7A. By deed of grant dated October 17th, 1945, and registered in the Registry Office at Bracebridge, Ontario, for the Registry Division of Muskoka as number 393 for the Township of Gibson, the Defendant granted to Ella R. Firth, widow, that part of island number 122 in the Georgian Bay hereinafter more particularly described.
>
> 7B. By the said deed of grant the said Ella R. Firth for herself, her heirs, executors, administrators and assigns, to the intent that the burden of the covenants hereinafter referred to might run with the lands, covenanted as follows:
>
> (*a*) That she would not nor would any of them transfer the said lands to any person not a member of the Club and that any such sale, lease or transfer to any person not a member of the Club or attempted alienation of the said lands to take it out of the control of the By-Laws of the Club shall be null and void.

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(*b*) That she would continue to be liable for and will pay all taxes, dues and charges imposed upon her as holder of the said land under the By-Laws of the Club dealing with the holding of sites which are in force at the time of the purchase of the said property save only that the payments under By-Law 15, Section (*b*) subsection (1) shall cease from this date and that the regular payments of all annual dues, taxes and charges save as aforesaid shall be a condition of the transfer and sale of the said lands.

(*c*) That she would pay her due share of all Municipal and Parliamentary or other taxes, which may at any time be levied upon the property owned or leased by the Club, such share to be determined by resolution of a general meeting of the shareholders.

(*d*) That she would observe and carry out the By-Laws of The Madawaska Club Limited annexed to the said deed of grant and would hold the said land subject to the terms therein contained and subject to the terms and conditions imposed upon the said lands by the said By-Laws.

These paragraphs are expressly admitted by para. 1 of the statement of defence. This was a trial and not a motion as in *Noble and Wolf v. Alley*[1]; the rule expressed in *The Tasmania*[2], *SS. Tordenskjold v. SS. Euphemia*[3] and *David Spencer Limited v. Field*[4], applies and the Company was not entitled to argue in the Court of Appeal and may not argue in this Court that the directors exceeded their powers as defined by the Company's by-laws. The Chief Justice of Ontario refers to a number of by-laws which, in his view, demonstrated that the directors had no power under the by-laws to grant land acquired from the Indian Department in fee simple, but he does not in my view give sufficient weight to by-law 17 which provides, as well in the by-laws adopted December 12, 1904, as in the by-laws adopted May 18, 1932, as amended, (the underlining has been added):

17. Any member to whom a site has or shall have been allotted and who desires to own the said site instead of leasing it from the Club, may do so, subject (in the case of sites upon the mainland) to the provisions of the charter and patent granted by the Ontario Government, and (in the case of sites upon the islands) to the provisions of the agreement with the Dominion Government; and such ownership shall be further subject to the following conditions:

(1) Such member shall pay to the Treasurer of the Club the amount at which the Dominion Government values the land in question, or (in the case of sites upon the mainland) the amount of $2 per acre. He shall also pay all the costs, charges and expenses of the transfer of the said property.

[1] [1951] S.C.R. 64, 1 D.L.R. 321. [2] 15 App. Cas. 223 at 225.
[3] (1909), 41 S.C.R. 154 at 164. [4] [1939] S.C.R. 36, 1 D.L.R. 129.

(2) Such member shall continue to be liable to all dues, taxes and charges imposed upon the holders and lessees of sites by the by-laws dealing with the holding of sites which may be in force at the time he purchases the said property; save only that the payments under By-law 15, section (*b*), sub-sections (1) and (2) shall cease from the time of such purchase. The regular payment of all such annual dues, taxes and charges shall be a condition of the transfer and sale of the property in question, and shall be so expressed in the deed; and the said purchaser shall execute the deed in the terms of the said conditions, and the covenant containing such conditions shall run with the land.

(3) It shall also be stipulated and provided in the deed as a condition of the transfer of said property, that it shall not subsequently be transferred by deed of ownership or lease, or any similar agreement to any person not a member of the Club, and that any such sale, lease, transfer or alienation of the property in question as shall take it out of the control of the by-laws of the Club, shall be null and void.

The by-law therefore authorizes the directors to convey the islands by deed subject to the conditions set forth. The defendant admitted that a deed had been given to the intent, *i.e.*, with the intention, that the burden of the covenants should run with the land but not (1) that they did not bind the plaintiff, and (2) that they were invalid.

In this Court the main argument was in connection with part of by-law 19 which, for convenience, is again reproduced:

19. Occupation of a dwelling or premises by persons who are not members of the Club shall be only by special permission of the Board of Directors,

as counsel for the plaintiff admitted that the trial judgment was correct in holding that by-laws 18(*a*) and (*b*) and 19 ran with the land. However by the wide terms of that judgment, it was declared that, with the exceptions mentioned, the lands were free not only of the restrictive covenants set out in the deed from Ella R. Firth to the plaintiff but also free of all restrictive covenants in the Company's by-laws and the plaintiff asks for the restoration of the trial judgment except as to by-law 19. The by-laws were not referred to before us in detail but a careful examination of them in order to ascertain which ones except 19 might have any relation to the matter under discussion indicates that

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only 17, 21, 22, 24 and 30 need be considered, all of which are referred to by Chief Justice Porter except 24. These read as follows:

17. Any member to whom a site has or shall have been allotted and who desires to own the said site instead of leasing it from the Club, may do so, subject (in the case of sites upon the mainland) to the provisions of the charter and patent granted by the Ontario Government, and (in the case of sites upon the islands) to the provisions of the agreement with the Dominion Government; and such ownership shall be further subject to the following conditions:

(1) Such member shall pay to the Treasurer of the Club the amount at which the Dominion Government values the land in question, or (in the case of sites upon the mainland) the amount of $2 per acre. He shall also pay all the costs, charges and expenses of the transfer of the said property.

(2) Such member shall continue to be liable to all dues, taxes and charges imposed upon the holders and lessees of sites by the by-laws dealing with the holding of sites which may be in force at the time he purchases the said property; save only that the payments under By-law 15, section (*b*), subsections (1) and (2) shall cease from the time of such purchase. The regular payment of all such annual dues, taxes and charges shall be a condition of the transfer and sale of the property in question, and shall be so expressed in the deed; and the said purchaser shall execute the deed in the terms of the said conditions, and the covenant containing such conditions shall run with the land.

(3) It shall also be stipulated and provided in the deed as a condition of the transfer of said property, that it shall not subsequently be transferred by deed of ownership or lease, or any similar agreement to any person not a member of the Club, and that any such sale, lease, transfer or alienation of the property in question as shall take it out of the control of the by-laws of the Club, shall be null and void.

.....

21. In the case of the death of any member of the Club holding a site by lease or purchase according to the by-laws, then, upon the regular annual payment of all dues, taxes and charges prescribed for such member by the by-laws, his immediate family may continue to occupy the premises formerly held by the deceased, for a period of two years, and thereafter from year to year, upon the annual permission of the Board of Directors. During the period of occupancy the legal representative of the estate of the deceased member may dispose of the said member's interest in the said premises to any member of the Club, subject to the by-laws of the Club.

22. (*a*) In case the premises formerly held by a deceased member are not disposed of as provided in By-law 21, then upon six months' notice being given in writing, either by the legal representative of the estate of the deceased member, or by the Board of Directors, of the discontinuance of occupancy, an allowance may be made to the estate of the deceased for the interest in the site held by the deceased, for such buildings as may have been on the said site at the date of the passing of this by-law, and such buildings as may thereafter be erected thereon by permission of the Board of Directors, and for such improvements as may have been made on the said site.

(*b*) The amount of such compensation shall be determined conjointly by a representative of the estate and a representative chosen by the Board of Directors from among themselves; in case of non-agreement between these two arbitrators, a third arbitrator shall be chosen by the aforesaid arbitrators, and the Board of Arbitration so constituted shall finally determine the amount of compensation to be allowed.

(*c*) The Board of Directors may elect to take over the interests of the deceased member at the valuation fixed by the said Board of Arbitration, and if they fail to make such election within six months after the decision of the Board of Arbitration has been received by the Board of Directors, the legal representative of the estate of the deceased member may dispose of the said member's interest in the said site, and the buildings and improvements upon the said site, to any person whomsoever, subject to the conditions under which the Club holds the land in question from the Ontario or Dominion Government; and subject also to the terms under which the deceased member held the site in question, with such modifications or alterations as may be approved by the Board of Directors; and such person shall execute the assignment of the lease, or deed, as the case may be, and covenant with the Club to observe and perform all the terms, covenants and conditions therein contained, with such modifications or alterations as may have been approved by the Board of Directors.

.....

24. The use of fire-arms shall be prohibited from the first day of June to the thirty-first day of August, inclusive, except by special permission of the Board of Directors; and the use of rifles shall be prohibited at all times.

.....

30. An undivided holding and the shares attached may be devised and bequeathed by will to a single devisee and legatee, provided that the devisee or legatee is eligible for membership under the By-laws; and the said devisee or legatee shall become a member of the Madawaska Club without election, by submitting proper documentary proof of the devise or legacy to the Board of Directors, and shall be entitled to acquire possession of the property so devised or bequeathed on paying the entrance fee required from new members; and shall thereafter hold said property subject to the terms of the By-laws of the Club.

I agree with Judson J. that for the reasons given by him the lands in question of the plaintiff John S. Galbraith are subject only to the restrictions contained in by-laws 18(*a*) and (*b*) and 28, but not to those contained in by-law 19.

The appeal should be allowed and the judgment of the Court of Appeal set aside. The judgment at the trial should be restored except that Paragraph 1 should be amended by striking out the declaration that the lands of the plaintiff John S. Galbraith are bound by by-law 19 and by striking out Paragraph 2 thereof. The order as to costs at the trial should stand; there should be no costs in the Court of Appeal, but the appellant should have one-half of his costs in this Court.

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GALBRAITH v. MADAWASKA CLUB LTD.

Judson J.

The judgment of Taschereau, Abbott, Judson and Ritchie JJ. was delivered by

JUDSON J.:—I agree with the reasons of the Chief Justice on the first branch of the case that the appellant fails in his claim for a declaration concerning the restrictions on the transfer of shares. I also agree that the appellant and his wife are joint tenants in fee simple of the land and not licensees as the Court of Appeal held. In my opinion the result of this litigation is that the plaintiff is bound only by the restrictions contained in by-laws 18(*a*) and (*b*) and 28 but not by by-law 19 and to this extent I would modify the judgment of the learned trial judge.

After a trial in which he was largely successful, Galbraith appealed to the Court of Appeal on one point only—whether he was bound by by-law 19. He was, of course, a purchaser with notice. By-law 19, so far as it is applicable, reads:

> Occupation of a dwelling or premises by persons who are not members of the Club shall only be by special permission of the Board of Directors.

The Club cross-appealed on all points. The Court of Appeal held, as a result of a point raised before them for the first time in the litigation, that Galbraith was a licensee of the land and not an owner in fee simple and consequently subject to all the restrictions. On appeal to this Court, he seeks to have the judgment at trial restored with the above mentioned modification as to not being bound by the restrictive covenant contained in by-law 19. He has never appealed against the declaration that he is bound by by-laws 18(*a*) and (*b*) and 28.

The chain of title in this case is short. The Club acquired the fee simple to the land in question by grant from the Dominion of Canada. I mention this because other club lands were acquired by grant from the Province of Ontario. The provincial grant contains special conditions limiting the persons who may become interested in the lands and nothing that I say in these reasons has any application to the lands contained in the provincial grant. In 1945 the Club granted in fee simple to Ella R. Firth part of island 122. The grantee covenanted in the following terms:

> to the intent that the burden of these covenants may run with the lands aforesaid during the Corporate existence of The Madawaska Club Limited, the said Grantee for herself, her heirs, executors, administrators and

assigns, DOTH COVENANT AND AGREE with the said Grantor its successors and assigns as follows: that she the said Grantee, her heirs, executors, administrators and assigns

(*a*) Will not nor will any of them transfer said land by Deed of Ownership or any similar agreement to any person *not a member of the Club,* and that any such sale, lease or transfer to any person not a member of the Club, or attempted alienation of the said land to take it out of the control of the by-laws of the Club shall be null and void;

.....

(*d*) Will observe and carry out the by-laws of The Madawaska Club Limited, annexed hereto marked "A" and will hold the said land subject to the terms herein contained and subject to the terms and conditions imposed upon the said land by the said by-laws.

By-law 19, which was the main subject-matter of argument on this branch of the appeal, is thus introduced by way of covenant (*d*) contained in the deed.

In 1947 Mrs. Firth conveyed in fee to Galbraith and took from him the same covenants. In 1951 Galbraith conveyed to himself and his wife as joint tenants and this deed did not contain the covenants. Thus, notwithstanding the fact that the action is one brought by Galbraith for a declaratory judgment, the dispute is really one between the Club as the original covenantee and a subsequent purchaser of the restricted land who takes with notice but claims to be free of the covenant.

If Galbraith, as assignee of the servient land taking with notice, is to be bound by this covenant, certain essential requirements must be satisfied. I will take it that the covenant is negative in substance, if not form, for the negative implication is very clear. The requirements are that this covenant must touch and concern the dominant land, that the Club as covenantee must retain land capable of being benefited by the covenant and that there must be express annexation of the covenant to the dominant land. In my opinion all three requirements are lacking in this case.

The juridical basis for the enforcement of these covenants has undergone a marked change since *Tulk v. Moxhay*[1]. The doctrine of notice was the decisive factor in that case. The presently developed theory of enforceability is that expressed by Rand J. in *Noble and Wolf v. Alley*[2]:

Covenants enforceable under the rule of *Tulk v. Moxhay* (1848) 11 Beav. 571; 50 E.R. 937, are properly conceived as running with the land in equity and, by reason of their enforceability, as constituting an equitable

[1] (1848), 2 Ph. 774.
[2] [1951] S.C.R. 64 at 69, 1 D.L.R. 321.

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servitude or burden on the servient land. The essence of such an incident is that it should touch or concern the land as contradistinguished from a collateral effect. In that sense, it is a relation between parcels, annexed to them and, subject to the equitable rule of notice, passing with them both as to benefit and burden in transmissions by operation of law as well as by act of the parties.

Assuming for the moment that there has been an annexation of this covenant to some land of the Club capable of being benefited at the time of the conveyance to Mrs. Firth, does this covenant relating to occupation of the servient land touch or concern the dominant land for it is that land which must be "touched or concerned" (*Rogers v. Hosegood*[1])? There is no privity of contract between Galbraith, as owner of the restricted land, and the Club. The Club has parted with the fee simple. If the Club is to enforce the covenant against Galbraith, it must be done for the benefit of land retained by the Club at the date of the covenant. It is this protected land which must be touched and concerned by the covenant, within the classic definition of Farwell J. in *Rogers v. Hosegood, supra,* p. 395:

> The covenant must either affect the land as regards mode of occupation or it must be such as per se, and not merely from collateral circumstances, affects the value of the land.

The covenant in question here gives the Club the right to choose the persons who shall occupy the servient land, if the owner wishes to go outside the club membership. This has nothing to do with the use to which the land may be put, but relates only to the kind of person who may be given occupation. It is imposed by the vendor for its own benefit as a club. It does not touch or concern the land, as being imposed for the benefit of or to enhance the value of land retained by the Club. It calls into being the exercise of an unfettered personal discretion by the club management and its plain purpose is to preserve the amenities of the Club. That such a covenant does not touch or concern the dominant land is concluded in this Court by the decision in *Noble and Wolf v. Alley, supra.* The covenant in that case covered occupation as well as alienation in the following terms:

> The lands and premises herein described shall never be sold, assigned, transferred, lease, rented or in any manner whatsoever alienated to, and shall never be occupied or used in any manner whatsoever by any person of the Jewish, Hebrew, Semitic, Negro or coloured race or blood, it being

[1] [1900] 2 Ch. 388 at 404, 69 L.J. Ch. 652.

the intention and purpose of the Grantor, to restrict the ownership, use, occupation and enjoyment of the said recreational development, including the lands and premises herein described, to persons of the white or Caucasian race not excluded by this clause.

It was held that this was not a covenant touching or concerning the land and I can see no possible ground for any distinction between a covenant restricting alienation and one restricting occupation.

There is nothing in the conveyance from the Club to Mrs. Firth which attempts to annex the benefit of the covenant to any land retained by the Club. Further, there is no evidence anywhere in the record to indicate whether the Club had any such land capable of being benefited. The grantee simply covenants for herself, her heirs, executors, administrators and assigns, with the grantor, its successors and assigns, to the intent that the burden of the covenants should run with the lands during the corporate existence of the Club but nothing is said about any other lands. This fails to meet what I think must be regarded as the minimum requirements that the deed itself must so define the land to be benefited as to make it easily ascertainable (*Zetland v. Driver*[1]).

There was exactly the same situation in *Canadian Construction Company Limited v. Beaver Lumber Limited*[2]. In that case Beaver Lumber was the owner of two parcels of land, A and B. It conveyed parcel A in 1944 and took a covenant that the grantee would not, for a period of 25 years, carry on a lumber business on the lands. The lands eventually came into the hands of Canadian Construction Company with notice of the covenant. There was nothing in the agreement containing the covenant which annexed its benefit to parcel B on which Beaver Lumber Limited was carrying on a lumber business. The inference drawn by the learned trial judge was that the covenant was intended by the parties to be personal to the covenantee and not for the benefit of parcel B. The Court of Appeal reversed the finding of the trial judge but the judgment at trial was restored in this Court. The majority of the Court did not find it necessary to consider the extent of the admissibility of evidence of surrounding circumstances, for the purpose

[1] [1939] Ch. 1 at 8, 107 L.J. Ch. 316.
[2] [1955] S.C.R. 682, 3 D.L.R. 502.

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of indicating the existence or situation of other land of the covenantee intended to be benefited. However, the plain implication in the judgment of this Court in affirming the trial judgment was that a restrictive covenant contained in an agreement which omits all reference to any dominant land, although it sets out the restrictions placed upon the servient land, is unenforceable by the covenantee against a successor in title of the covenantor, since such an agreement expresses no intention that any other lands should be benefited by the covenant. A covenant running with the land cannot be created in this manner and in the absence of any attempted annexation of the benefit to some particular land of the covenantee, the covenant is personal and collateral to the conveyance as being for the benefit of the covenantee alone.

I would allow the appeal and set aside the judgment of the Court of Appeal which dismissed the action with costs. I would restore the judgment at trial with these modifications:

(a) Paragraph 1 should be amended by striking out the declaration that the plaintiff is bound by by-law 19;

(b) Paragraph 2, declaring by-laws 2, 5, 6, 9 and 30 to be invalid insofar as they restrict or purport to restrict the transfer of shares, should be struck out.

The order as to costs at trial should stand. As success was divided in the Court of Appeal there should be no order as to costs. In this Court I would allow the appellant one-half his costs. For him an appeal was necessary to establish that he was an owner in fee simple and that he was not bound by by-law 19. On these points he succeeded. He failed on the issue relating to the shares.

Appeal allowed.

Solicitors for the plaintiff, appellant: Johnston, Sheard & Johnston, Toronto.

Solicitors for the defendant, respondent: Day, Wilson, Kelly, Martin & Campbell, Toronto.

LEON CARDIN (*Plaintiff*) .....APPELLANT;

AND

LA CITE DE MONTREAL *ET AL.* (*Defendants*) ..... RESPONDENTS.

1961
*May 30
Jun. 26

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

Physicians and surgeons—Municipal clinic—Damages—Negligence—Doctor giving injection to child—Broken needle—Child's arm paralysed for a time and permanently scarred—Standard of care—Burden of proof—Liability of doctor and municipality—Civil Code, arts. 1053, 1054.

The plaintiff's son, who was 5½ years old, was taken to the City Health Clinic to be vaccinated. As he became frightened after the first vaccination, the mother asked the doctor not to proceed with the second vaccination, which was to be given by means of a hypodermic needle. The doctor nevertheless proceeded to vaccinate the boy. The child resisted and despite the fact that he was held, he suddenly jerked his arm and the needle broke inside his arm. The broken fragment of steel could not be removed and the arm was paralysed for some time. Three operations to remove the fragment were unsuccessful, leaving permanent scars on the boy's arm. The City and the doctor were held jointly and severally liable by the trial judge. The Court of Appeal, by a majority judgment, dismissed the action. The plaintiff appealed to this Court.

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

It is true that doctors could not be held liable for unforseeable accidents, but where it is shown that the patient's injury was due to the doctor's failure to exercise the required degree of care, the burden of proving that the injury was brought on by some unforseen cause, shifts to the doctor. In the present case, it is not the movement of the arm, as claimed by the doctor, that cause the accident. The doctor knew that the boy was nervous and should not have vaccinated him at that time. Having decided to proceed, the doctor was negligent when he failed to take the necessary precaution of having the boy's arm completely immobilized. The scars were the direct result of this negligence.

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

Jean Goulet, for the plaintiff, appellant.

Philippe Beauregard, Q.C., for the defendants, respondents.

The judgment of the Court was delivered by

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

[1] [1960] Que. Q.B. 1205.

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TASCHEREAU J.:—Il s'agit dans la présente cause d'un appel d'un jugement rendu par la Cour du banc de la reine[1], siégeant à Montréal, qui a infirmé un arrêt de la Cour supérieure et rejeté l'action du demandeur es-qual. avec dépens.

Dans le cours du mois d'août 1955, madame Léon Cardin, l'épouse du demandeur es-qual., conduisit son jeune fils Caroll, âgé de 5½ ans, à la clinique du Service de Santé de la Cité de Montréal, afin de lui faire administrer par égratignures un vaccin dit de rappel. Après avoir administré ce premier vaccin, le Dr Huard, préposé à la clinique de la Cité de Montréal, jugea à propos de procéder à l'injection d'un autre vaccin avec une aiguille hypodermique. Il arriva que cette aiguille se brisa dans le bras du jeune enfant, avec le résultat que durant plusieurs mois, il eut le bras droit paralysé et que les interventions chirurgicales infructueuses qui ont été pratiquées ont laissé sur le bras des cicatrices disgracieuses d'un caractère permanent.

Le demandeur es-qual. a réclamé la somme de $40,000 du Dr Huard et de la Cité de Montréal. Ont aussi été poursuivis conjointement et solidairement, l'Hôpital Ste-Justine où l'enfant a été subséquemment conduit pour y subir une intervention, et le Dr Rivard de cet hôpital qui a pratiqué l'opération. Le demandeur es-qual. s'est désisté sans frais de son action contre l'Hôpital Ste-Justine, et sa réclamation contre le Dr Rivard a été rejetée sans frais. Quant au défendeur Huard et la Cité de Montréal, ils ont été condamnés conjointement et solidairement à payer au demandeur es-qual. la somme de $3,000 avec dépens. La Cour du banc de la reine a maintenu l'appel et rejeté l'action, MM. les Juges Choquette et Lizotte dissidents.

Il ne fait pas de doute que le jeune Cardin réagit très mal après le premier vaccin par égratignures. Il manifesta une grande nervosité, était très agité, et tous ceux présents, y compris le médecin, ont constaté l'état dans lequel se trouvait l'enfant. «Il se débattait» dit la mère. «Les bras, les jambes, tout son corps. Je le retenais tout ce que je pouvais». Le médecin insista cependant pour procéder à l'injection, malgré les protestations de la mère qui voulait revenir un autre jour, alors que l'enfant serait plus calme et que les risques d'accident seraient évidemment moindres.

[1] [1960] Que. Q.B. 1205.

Il décida de procéder quand même, dit à la mère que cela ne serait pas long, lui dit de tenir l'enfant, sans lui expliquer de quelle façon, et introduisit son aiguille dans le bras du jeune Caroll. Sous le coup de cette piqûre, et déjà surexcité par la réception du vaccin précédent, l'enfant devint agité davantage, avec le résultat que l'aiguille se brisa à l'intérieur des chairs. Une parcelle pointue se logea entre l'os principal et le nerf radial, la pointe tournée vers l'os. Le médecin explique dans son témoignage que contrairement à ce qu'il s'attendait, l'enfant a fait un geste de son bras de haut en bas, au lieu de bas en haut.

Immédiatement après, le Dr Huard conseilla à madame Cardin de retourner chez-elle avec son enfant, lui dit que malgré que l'aiguille fut cassée et était demeurée dans le bras de son fils, de ne pas s'énerver, que ce n'était pas un accident grave, et l'avisa de mettre des pansements humides chauds sur le bras. Ce traitement devait, selon lui, en quelques jours provoquer la sortie de ce corps étranger. Il a ajouté qu'il allait s'occuper personnellement de ce cas.

Plus tard, dans l'après-midi, une garde-malade de la clinique se rendit à la résidence de l'appelant, constata l'état de l'enfant, puis retourna à la clinique pour en informer le médecin. Celui-ci se rendit immédiatement chercher l'enfant pour le conduire à l'Hôpital Ste-Justine. Là, il subit trois opérations. La première fut pratiquée le même jour par le Dr Collin, en présence du Dr Huard, mais on ne réussit pas à enlever cette aiguille. Le lendemain matin, on fit une nouvelle intervention sans plus de succès. Enfin, le 23 août, le Dr Rivard de Ste-Justine fit une troisième tentative qui donna encore des résultats négatifs.

Après ces infructueuses visites à la clinique et à l'hôpital pour recevoir des vaccins contre les maladies infectieuses, le jeune Cardin en est sorti, avec un bras paralysé durant plusieurs mois, une aiguille dans le bras qui peut lui causer dans l'avenir de sérieux inconvénients, et une cicatrice dont il portera les marques toute sa vie.

Le demandeur es-qual. s'est désisté de sa réclamation contre l'Hôpital Ste-Justine, et l'action contre le Dr Rivard a été rejetée sans frais. Il ne reste donc que la réclamation contre la Cité de Montréal et le Dr Huard, le préposé de la Ville.

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Taschereau J.

Je suis clairement d'opinion que cet appel doit réussir, et que toute la responsabilité doit reposer sur la Cité et le médecin qui a injecté les vaccins. Le fait brutal demeure que le jeune Cardin est entré à l'hôpital plein de santé, et qu'il en est sorti infirme. Certainement, les médecins ne doivent pas être tenus responsables d'accidents imprévisibles qui peuvent se produire dans le cours normal de l'exercice de leur profession. Il arrive nécessairement des cas où, malgré l'exercice de la plus grande vigilance, des accidents surviennent et dont personne ne doit être tenu responsable. Le médecin n'est pas un garant de l'opération qu'il fait ou des soins qu'il procure. S'il déploie une science normale, s'il donne les soins médicaux que donnerait un médecin compétent dans des conditions identiques, s'il prépare son patient avant l'intervention suivant les règles de l'art, il sera difficilement recherché en dommages, si par hasard un accident se produit. Pas plus pour le médecin que pour les autres professionnels, avocats, ingénieurs, architectes, etc., le standard de perfection est l'exigence de la loi. Il faut nécessairement tenir compte des accidents, des impondérables, de tout ce qui est prévisible et de tout ce qui ne l'est pas.

Dans son livre intitulé "Malpractice Liability of Doctors and Hospitals" Meredith s'exprime ainsi aux pages 62 et 63:

> A doctor is responsible for injury to a patient if it can be shown that it resulted from a lack of the standard of professional proficiency which it is reasonable to presume he should possess. Whether the services were rendered gratuitously or for reward is immaterial.
>
> * * *
>
> The standard of proficiency required by law has been defined as that of "the ordinary competent medical practitioner."
>
> * * *
>
> Proof of proficiency, however, is no defence to a malpractice suit if it is shown that the patient's injury was due to the doctor's failure to exercise the required degree of care.

Vide également sur la responsabilité des médecins: *Elder v. King*[1]; *Nesbitt v. Holt*[2]; *The Sisters of St. Joseph of London v. Fleming*[3]; *X v. Mellen*[4]; *G. v. C.*[5]; *Wilson v. Swanson*[6].

[1] [1957] Que. Q.B. 87.
[2] [1953] 1 S.C.R. 143, 1 D.L.R. 671.
[3] [1938] S.C.R. 172, 2 D.L.R. 417.
[4] [1957] Que. Q.B. 389, R.L. 210.
[5] [1960] Que. Q.B. 161.
[6] [1956] S.C.R. 804, 5 D.L.R. (2d) 113.

Ce sont ces principes reconnus et souvent réaffirmés par les auteurs et la jurisprudence, qui doivent nous guider dans la détermination de cette cause. De plus, il est essentiel de ne pas oublier, comme cette Cour l'a rappelé dans *Parent v. Lapointe*[1], que quand dans le cours normal des choses un événement ne doit pas se produire, mais arrive tout de même, et cause un dommage à autrui, et quand il est évident qu'il ne serait pas arrivé s'il n'y avait pas eu négligence, alors, c'est à l'auteur de ce fait à démontrer qu'il y a eu une cause étrangère dont il ne peut être tenu responsable, et qui est la source de ce dommage. C'est sur lui que repose le fardeau de la preuve.

Normalement, l'accident pour lequel réclame le demandeur es-qual. ne devait pas se produire. Pour obtenir le bénéfice de l'exonération, le médecin intimé soutient que l'enfant a fait un faux mouvement, et que c'est là qu'il faut chercher la cause unique et déterminante de cet accident. Je ne puis admettre cette prétention.

L'enfant, après avoir reçu un premier vaccin par égratignures contre la vérole, devint très agité, très excité, fit des gestes des bras et des jambes, et il me semble évident qu'il n'était pas dans l'état de stabilité nécessaire pour recevoir dans le bras la piqûre qu'on lui a donnée. Le médecin aurait dû laisser le patient se calmer, revenir du choc du premier vaccin. Il aurait pu également suivre le conseil de la mère qui, voyant le danger probable, suggéra de remettre à un autre jour cette injection, mais il décida de procéder en vitesse après avoir tenté, avec le secours de la mère, d'immobiliser l'enfant, ce qui, évidemment a été fait de façon imparfaite. L'immobilisation complète du bras, était la précaution qui s'imposait pour prévenir le danger qui s'est réalisé. Le défaut d'assurer cette immobilisation constitue la faute du médecin.

Il eut été plus sage et plus prudent d'agir de la sorte, et d'attendre un moment plus propice pour procéder à cette injection qui pouvait certainement être remise à plus tard. Je crois que ce jeune patient n'a pas été préparé de façon satisfaisante, étant donné son extrême état de surexcitation, et que le résultat qui est arrivé était sûrement prévisible. Le médecin a choisi de prendre un risque dont la mère elle-même prévoyait les conséquences, et je suis alors d'opinion

[1] [1952] 1 S.C.R. 376, 3 D.L.R. 18.

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qu'il a été imprudent, et que sa responsabilité est engagée. Il y a eu, à mon sens, une absence de soin et de précaution qu'un homme prudent n'omettrait pas dans des conditions semblables.

Taschereau J.

Je suis peu impressionné par l'argument que la mère aurait dû ramener son fils chez-elle, si véritablement elle croyait que l'injection ne devait pas être faite. Evidemment, dominée par l'ascendant du médecin qu'elle était allée voir en toute confiance, il lui était difficile de s'affranchir de son autorité, et on ne peut lui reprocher, malgré qu'elle ait fait une première suggestion, de ne pas avoir insisté davantage.

On a aussi soutenu que le véritable dommage est le résultat des trois opérations à l'Hôpital Ste-Justine, où l'on n'a pu réussir à enlever la parcelle de l'aiguille demeurée dans le bras du jeune Cardin. Je suis au contraire d'opinion que la cause déterminante du préjudice subi est l'injection donnée à la clinique de façon imprudente et maladroite, et que tout le reste n'est que la conséquence de cette première intervention.

L'appel doit être maintenu, le jugement du juge au procès rétabli avec dépens devant cette Cour, et la Cour du Banc de la Reine.

Appeal allowed with costs.

Attorneys for the plaintiff, appellant: Lefrançois, Goulet & Lalonde, Montreal.

Attorneys for the defendants, respondents: Berthiaume & MacDonald, Montreal.

1961

*June 13
June 26

WILLIS McKENNA .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Wilful obstruction of lawful use of property—Statements of accused made voluntarily—Jury properly instructed as to "wilfully" to prove specific intent—Sufficient evidence for jury to convict.

*PRESENT: Kerwin C.J. and Taschereau, Fauteux, Judson and Ritchie JJ.

The accused drove his motor car onto a railway right-of-way and left it on the tracks where a train crashed into it. Police officers found the accused at the home of one D and on being asked where his car was he replied that it was parked on the railway track, that he did not think trains travelled on that track, that he had taken the keys and turned off the lights and that he had walked four miles for help. When told of the collision he repeated the story but said the car was stuck rather than parked. He could walk without assistance but staggered and appeared to be intoxicated. He was indicted on two counts: (1) that he wilfully obstructed the lawful use of property and (2) that he drove a motor vehicle while intoxicated. The jury found the accused guilty on the first charge and not guilty on the second. His appeal to the Court of Appeal was dismissed. Leave to appeal was given by this Court on certain questions of law.

Held: The appeal should be dismissed.

(1) The statements of the appellant were made voluntarily; no threats or promises had been held out by the police officers.

(2) The trial judge instructed the jury properly and adequately as to what was necessary for them to find that the appellant wilfully obstructed the lawful use of property.

(3) There was evidence upon which the jury could have convicted and the trial judge should not have directed the jury to acquit.

APPEAL from a judgment of the Court of Appeal for Ontario, affirming the accused's conviction on a charge of wilfully obstructing the lawful use of property. Appeal dismissed.

C. R. Thomson, for the appellant.

W. C. Bowman, Q.C., for the respondent.

The judgment of the Court was delivered by

THE CHIEF JUSTICE:—By leave of this Court Willis McKenna appeals from a judgment of the Court of Appeal for Ontario dismissing his appeal against his conviction after a trial before His Honour Judge Willmott and a jury. He had been indicted on two counts: (1) that on or about the 10th day of February, A.D. 1960, he did wilfully obstruct the lawful use of property, to wit: The Canadian Pacific Railway right-of-way at Dixie Road; (2) that on or about the 10th day of February, A.D. 1960, while intoxicated he did drive motor vehicle bearing Ontario licence number N 4151,—both contrary to the *Criminal Code.* The jury found the appellant guilty on the first charge and not guilty on the second.

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McKENNA v. THE QUEEN

Kerwin C.J.

Leave to appeal to this Court was given on the following questions of law:

1. Did the Trial Judge err in admitting the statements of the accused made to the police or to the Canadian Pacific Railway investigating Officer?
2. Did the Trial Judge err in failing to instruct the jury adequately as to "wilfully" and as to the burden of the Crown to prove a specific intent?
3. Was there any evidence upon which the jury could have convicted or should the Trial Judge have directed the jury to acquit?

I have gone over the entire record and I adopt as correct the following statement of facts contained in the respondent's factum. The evidence discloses that some time prior to 10.17 p.m. on the evening of February 10, 1960, the appellant turned his motor car off the travelled portion of the highway at a level crossing and proceded a short distance along the railway tracks. At 10.17 p.m. a train crashed into the car and carried it over a 1,000 foot-long bridge before coming to a stop. The engineer saw no lights on the car before the impact. The motor had been shut off and the keys were missing. At 10.30 p.m. the appellant called at the house of the witness Ogden, which was about 1,000 yards away from the railway crossing, and asked him to call a taxi. He left before the taxi came. Ogden described him as being drunk. At 11.45 p.m. two police officers, Bodley and Cooper, found the appellant at the home of one Delany, two or three doors from Ogden's. They asked where his car was and he replied that it was parked on the railway track, that he did not think trains travelled on that track, that he had taken the keys and turned off the lights and that he had walked four miles for help. He produced the keys. When told of the collision he repeated the story but said the car was stuck rather than parked. The appellant could walk without assistance but staggered and appeared to be intoxicated. He was placed under arrest and taken to Ogden's house which he identified as the place from which he had tried to make a telephone call. He identified Ogden as the man to whom he had spoken.

As to the first question of law it is necessary to refer only to the evidence of the police officers, Bodley and Cooper.

The County Court judge carefully considered their testimony and the arguments presented by counsel and decided that notwithstanding the evidence of drunkenness on the part of the appellant the latter knew what he was saying. It is not a case where a trial judge considered that the words used by an accused did not, because of his condition, amount to his statement. After having admitted the statements in evidence the judge then left it to the jury to assess what weight should be attached to them. I have no doubt that the statements were made voluntarily and that no threats or promises had been held out by the police officers.

As to the second question of law, after having read and considered the charge of the trial judge several times, I have no difficulty in concluding that he instructed the jury properly and adequately as to what was necessary for them to find that the appellant wilfully obstructed the lawful use of property.

Finally, as to the third question, there was evidence upon which the jury could have convicted and the trial judge should not have directed the jury to acquit. It was argued that the finding by the jury that the appellant was not guilty of the second charge showed that the jury were perverse in finding the appellant guilty on the first charge. It is impossible to agree with this contention as quite likely the jury decided that having found the appellant guilty on the first charge they would be merciful in dealing with the second charge.

The appeal should be dismissed.

Appeal dismissed.

Solicitor for the appellant: Malcolm Robb, Toronto.

Solicitor for the respondent: Attorney-General for the Province of Ontario, Toronto.

1961
*Feb. 15, 16
Jun. 12

DAME VIRGINIE BEAUCHAMP (*Plaintiff*) ..... APPELLANT;

AND

CONSOLIDATED PAPER CORPORATION LIMITED (*Defendant*) ..... RESPONDENT.

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

Motor vehicles—Dangerous bridge—Car falling off bridge—Fatal accident—Bridge on private road—Warning signs—Duty to warn driver of unusual danger—Damages.

When the plaintiff's husband and three sons were sent by the Unemployment Insurance Commission to seek work with the defendant company, they drove to the company's camp to apply for work as lumbermen. After driving some distance on the main highway, they took a road which was built and maintained by the company. A sign read: "Private road, Consolidated Paper Corp. Ltd., at your own risk, speed 20 miles". At a gate on that road, where there was another warning sign, the men were issued badges and were told where to drive in order to apply for work. After driving for some ten miles, they reached the top of a slope which led down to a bridge across a river. There was a hand-rail and a ramp 4 inches high on each side of the bridge. Light snow and ice covered the bridge. The driver of the car drove down the slope in second gear, at about 10 miles per hour. When the car reached the middle of the bridge, it broke through the guard rails and fell into the river. The plaintiff's husband and one son were drowned.

The trial judge held that the danger presented by the slippery condition of the road required that the three passengers should have stepped out of the car to guide it across. He also held that the defendant company should have warned them since it knew of the danger and that the four men had never travelled on the road before. The driver was therefore held liable to the extent of 20% and the company to the extent of 80%. The Court of Appeal, by a majority judgment, dismissed the action and held that the company had no obligation to warn the men of the danger. The plaintiff appealed to this Court.

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

The men were invited to take the dangerous road. They were entitled to presume that if they drove carefully they would reach their destination without having to take the unusual precautions required of them by the trial judge. No doubt the presence of the guard rails gave them a sense of false security. The defendant was negligent in not warning the four men.

The signs denying liability were not clear enough to afford a good defence. They could be interpreted to apply only to the general public, but not to the company's invitees.

*PRESENT: Taschereau, Fauteux, Abbott, Martland and Ritchie JJ.

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

J. Dugas, for the plaintiff, appellant.

J. de Grandpré, Q.C., for the defendant, respondent.

The judgment of the Court was delivered by

FAUTEUX J.:—Le 18 novembre 1955, l'époux de l'appelante et leurs fils, Maurice, Réal et Jean-Guy, tous quatre en quête d'emploi, furent dirigés, par la Commission d'Assurance-Chômage à St-Jérôme, aux chantiers des opérations forestières de la compagnie intimée à St-Michel-des-Saints, où des bûcherons étaient en demande. Trois jours plus tard, au début de la matinée, ils quittaient St-Jérôme, en automobile, pour se rendre à cet endroit qui leur était inconnu. Après avoir parcouru plusieurs milles sur la voie publique, ils s'engagèrent dans un chemin, construit et maintenu par l'intimée, à l'entrée duquel une affiche indiquait:

CHEMIN — PRIVE
CONSOLIDATED PAPER CORPN LTD

A VOS RISQUES
VITESSE 20 MILLES

Vers dix heures et demie de l'avant-midi, ils arrivaient à une barrière érigée par l'intimée en travers du chemin pour permettre à ses préposés de contrôler l'accès à sa réserve forestière. Sur une affiche placée à cet endroit, apparaissait cet avis:

AVIS — NOTICE

CHEMIN PRIVE POUR EXPLOITATIONS FORESTIERES — DEFENSE DE PASSER SANS PERMIS — DEGAGEONS RESPONSABILITE POUR TOUTE PERSONNE ET VEHICULE FAISANT USAGE DE CE CHEMIN.

PRIVATE ROAD FOR FOREST OPERATIONS FORBIDDEN TO PASS WITHOUT PERMISSION PERSONS USING THIS ROAD DO SO AT THEIR OWN RISK.

Par Ordre By Order
CONSOLIDATED PAPER CORPORATION LIMITED

[1] [1960] Que. Q.B. 668.

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Les Tassé s'adressèrent au bureau du préposé de l'intimée. Celui-ci, ayant été informé de la raison de leur venue et pris connaissance des documents qui leur avaient été fournis par la Commission d'Assurance-Chômage, remit à chacun une plaque (badge) portant un numéro matricule, et une formule imprimée sur laquelle il avait inscrit des détails propres au récipiendaire. Sur la plaque, on trouve l'inscription suivante:

Consolidated Paper Corporation
Limited

UPPER MATTAWIN
No. 3956

L'année commençant avril 1955

POUR TRAVAIL SEULEMENT

Reproduite à titre d'exemple, la formule remise à Maurice Tassé,—sur laquelle j'ai souligné les détails ajoutés—se lit comme suit:

F. N. 719 *GEO GOUIN*

CONSOLIDATED PAPER CORPORATION LIMITED
FEUILLE D'IDENTITE

(Sur Opérations avec Entrepreneurs Seulement)

DISTRICT: *Upper Mattawin* DATE *Nov 21 1955*

M. *Maurice Tassé*
De: *Côte d'Alousie, St-Jérôme, Que*
Ayant le Numéro d'Assurance Chômage: *I-22-472*
S'est présenté à notre bureau pour un emploi comme:
Bûcheron

Et s'engage à signer un contrat d'engagement quand il arrivera au camp.

Numéro d'Insigne Remise *3956* *T.*
Commis

NOTE: Ceci ne doit pas être considéré comme un engagement.

S'étant assuré que les Tassé avaient leur voiture, le préposé de l'intimée leur donna instructions de se rendre au camp de l'entrepreneur, Georges Gouin,—dont le nom apparaît au document précité,—leur indiqua la route à suivre à ces fins et termina l'entrevue en leur disant: «On vous attend».

Après avoir parcouru, en automobile, quelque dix milles en forêt, sur un chemin devenu glissant par suite des conditions atmosphériques de la nuit précédente et de la matinée, les Tassé arrivèrent au sommet d'une pente en bas de laquelle se trouvait un pont permettant la traversée de la rivière Mattawin.

Ce pont a une longueur de 140 pieds, ou 210 pieds avec les approches, et une largeur de 12 pieds. Deux poutres d'acier reposant sur les piliers en supportent le tablier constitué de billots sciés sur deux faces et placés sur le travers de ces poutres. Par-dessus ces billots, deux lisières de madriers disposées parallèlement en centre et sur la longueur du pont à une distance de six pieds l'une de l'autre, constituent la partie du tablier sur laquelle roulent les voitures. Ces madriers ont trois pouces d'épaisseur et chaque lisière a 2 pieds de largeur. Pour la sécurité des voyageurs, il y a, de chaque côté, un garde-fou et, fixée au tablier, une rampe de bois. Cette rampe devait, d'après le plan livré au constructeur du pont, avoir 12 pouces de hauteur; en fait, elle n'en avait que quatre.

Par suite d'une pluie tombée la nuit précédente, le pont était couvert d'une couche de glace, elle-même recouverte par une neige fine tombée au cours de la matinée. Suivant certains témoignages, cette neige voilait partiellement, sinon totalement, la présence et délimitation de ces lisières de madriers. Le pont était si glissant qu'on ne pouvait s'y tenir debout sans difficulté.

Le conducteur de la voiture, Jean-Guy Tassé, entreprit, en seconde vitesse, la descente de la pente et la traversée du pont, allant à peine à dix milles à l'heure. La voiture avait atteint à peu près la moitié du pont lorsque, soudainement, les roues d'arrière dérapant vers la droite et celles d'avant vers la gauche, elle passa à travers le garde-fou fixé sur le côté du pont et, dans un mouvement de bascule, tomba dans la rivière avec tous les passagers. Tassé père et son fils Jean-Guy s'y noyèrent.

L'appelante, tant personnellement qu'en sa qualité de tutrice à huit enfants mineurs issus de son mariage avec feu Edmond Tassé, poursuivit l'intimée en dommages pour lui réclamer la somme de $39,252.50 à titre personnel, et $10,161.53 en sa qualité de tutrice.

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La Cour supérieure considéra que la traversée de ce pont présentait un danger extrême nécessitant un degré correspondant de prudence; que ce degré de prudence, aux vues de la Cour, pouvait exiger que trois des occupants de la voiture en descendissent pour la guider de l'extérieur et la soutenir au besoin; qu'en raison de la condition du chemin déjà parcouru, les voyageurs ne pouvaient, cependant, ignorer l'état glissant de ce pont; que s'il n'y avait pas lieu, sous toutes les circonstances, de leur reprocher de ne pas avoir rebroussé chemin, il était juste, nonobstant toute la prudence avec laquelle le conducteur de la voiture avait entrepris la traversée du pont, d'imputer à ce dernier une part de responsabilité, soit 20 pour cent. La Cour trouva, d'autre part, que l'intimée connaissait parfaitement la gravité de tous les risques auxquels allaient s'exposer les Tassé qui, à sa connaissance, n'étaient jamais allés sur cette route et ce pont; qu'on ne pouvait retenir comme faute le fait qu'elle n'avait pas encore complété les opérations de sablage qu'elle avait jugé nécessaire d'entreprendre le matin pour éliminer le danger, mais que son préposé à la barrière aurait dû, au lieu de se contenter d'indiquer aux voyageurs la route à suivre pour se rendre au camp Gouin et de les inviter à s'y engager, les avertir clairement des risques auxquels ils s'exposaient et, ce qui aurait été préférable et même impératif, les empêcher de s'aventurer sur la route. La Cour attribua 80 pour cent de responsabilité à l'intimée et, sur cette base, la condamna à payer à la demanderesse personnellement $11,849 et, en sa qualité de tutrice, $6,677.04.

Seule l'intimée appela de ce jugement; de sorte qu'il n'y a pas à revenir sur la faute attribuée au conducteur de la voiture; sur le point, il y a chose jugée.

Le jugement de la Cour supérieure fut infirmé en Cour d'Appel[1] par une décision majoritaire. En substance, les Juges de la majorité considérèrent que l'intimée n'avait aucune obligation d'avertir les Tassé de dangers qui, dans l'opinion de ces Juges, étaient apparents, et que, de toutes façons, un avertissement n'aurait été d'aucune utilité à ces voyageurs. On déclara incidemment qu'en raison du droit du public d'utiliser les chemins établis sur des limites

[1] [1960] Que. Q.B 668.

forestières, *Loi des Terres et Forêts*, S.R.Q. 1941, c. 93, art. 103, l'intimée ne pouvait empêcher les Tassé de s'y engager, ainsi que l'avait suggéré, comme mesure impérative de prudence, le Juge de première instance.

D'autre part, les Juges de la minorité ont jugé qu'un homme prudent et diligent, agissant comme préposé de l'intimée à la barrière, aurait cherché à dissuader ces voyageurs de s'aventurer sur le chemin ou, tout au moins, les aurait-il clairement prévenus des dangers, et qu'en omettant de ce faire, le commis à la barrière a fait une faute d'omission engageant la responsabilité de l'intimée. D'où l'appel à cette Cour.

Les montants accordés pour dommages ne sont pas en question; le seul point à considérer est celui du principe de la responsabilité de l'intimée.

Rien dans la preuve ne permet d'inférer que ce dérapage soudain soit attribuable à une fausse manœuvre du conducteur de la voiture. L'unique explication qu'on y trouve apparaît au témoignage non contredit de l'un des occupants, Maurice Tassé. Ce dernier a rapporté qu'étant remonté sur le pont après l'accident, il a constaté, en suivant les traces laissées sur la neige par les roues de la voiture, que ce dérapage fatal s'était produit au point même où les roues d'arrière avaient quitté les lisières de madriers pour tomber de trois pouces sur les billots placés en travers du pont, provoquant ainsi l'embardée qui se produisit.

Que la possibilité d'un tel dérapage ait pu être anticipée et conjurée par ceux qui connaissaient ce pont,—ce qui fut le cas particulièrement, ce matin-là, pour l'agent de district de l'intimée qui le traversa bien avant que les Tassé n'arrivent à la barrière,—il ne s'ensuit pas qu'elle devait l'être par ces derniers qui y passaient pour la première fois, alors surtout que la neige voilait partiellement, sinon totalement, la délimitation des madriers. Invités, à la barrière, à s'engager sur cette route établie, maintenue et contrôlée par l'intimée, aux fins mêmes des opérations forestières auxquelles on venait de leur faire prendre l'obligation de s'employer, les Tassé étaient en droit d'assumer en toute confiance que nonobstant l'état glissant de la route, ils pouvaient, en conduisant prudemment sur ce pont, comme ils l'avaient fait sur les dix milles de chemin déjà parcourus,

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se rendre à destination sans avoir à prendre, sur ce pont, des précautions aussi inusitées que celles indiquées par le Juge de première instance. La présence du garde-fou et de la rampe fixée au tablier offrait raisonnablement à leur vue un facteur de sécurité contre la possibilité de ce danger qui, par la suite, est devenu une réalité. A la vérité, il n'y avait là qu'une apparence de protection et non une protection véritable. Dans *Letang v. Ottawa Electric Railway Co.*[1], on relève, à la page 731, un passage ayant une singulière pertinence en la présente cause:

> It is clear from his evidence that he knew there was some danger, but the contention on behalf of the defendants, that this circumstance is sufficient to entitle them to succeed, entirely gives the go-by to the observations of Lord Esher M.R. in *Yarmouth v. France.* (1887) 19 Q.B.D. 647, 657. ..... In the present case the plaintiff may well have misapprehended the extent of the difficulty and danger which he would encounter in descending the steps; . . .

Dans cette cause de *Letang v. Ottawa Electric Railwcy Co., supra,* on jugea, comme l'on sait, que la maxime *Volenti non fit injuria* n'offre aucune défense à une action en dommages pour blessure corporelle due aux conditions dangereuses de l'endroit auquel la victime a été invitée par affaires, à moins qu'il ne soit établi qu'elle ait librement et volontairement, en pleine connaissance de la nature et de l'étendue du risque encouru, expressément ou implicitement consenti de l'encourir. La vigilance des Tassé a été trompée par cette invitation, aussi bien que par l'omission des préposés de l'intimée de leur signaler la gravité des risques attenant à la traversée du pont. On aurait dû les inviter à différer leur départ jusqu'au parachèvement des opérations de sablage. Ces mesures de sécurité s'imposaient; les préposés de l'intimée avaient, envers les Tassé, le devoir, et d'ailleurs toutes les facilités, d'y satisfaire. Leur conduite, dans les circonstances, constitue une faute dont l'accident fut la suite directe, naturelle et immédiate, et cette faute engage la responsabilité de l'intimée.

Le fait qu'en vertu de la *Loi des Terres et Forêts, supra,* les Tassé, tout comme le public, pouvaient avoir le droit de passer sur ce chemin est, à mon avis, étranger à la considération, en l'espèce, des devoirs et responsabilités de l'intimée à leur égard.

[1] [1926] A.C. 725, 3 W.W.R. 88.

L'intimée a soumis que les affiches placées sur le chemin comportent une stipulation de non responsabilité et partant une défense absolue à l'action de l'appelante. Les règles relatives aux stipulations de non responsabilité, à leur interprétation et à leur opération, ont été résumées par le Comité Judiciaire du Conseil Privé dans *Canada Steamship Lines Limited v. The King*[1]. A la page 208 du rapport, il apparaît clairement que l'opération de ces clauses est fondamentalement conditionnée à un texte très explicite. Le texte de ces affiches ne rencontre pas cette condition. L'avis qui y est donné peut raisonnablement être interprété comme s'adressant généralement au public qui, pour diverses fins, pouvait utiliser la route, mais non aux personnes qui, comme les Tassé, étaient invitées par l'intimée à s'en servir pour ses opérations forestières.

Pour ces motifs qui sont, en substance, ceux des Juges de la minorité en Cour d'Appel et du Juge de la Cour supérieure, je maintiendrais l'appel, rétablirais le jugement de première instance, le tout avec dépens de toutes les Cours.

Appeal allowed with costs.

Attorneys for the plaintiff, appellant: Dugas, Dugas & Dugas, Joliette.

Attorneys for the defendant, respondent: Tansey, de Grandpré, de Grandpré, Bergeron & Monet, Montreal.

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*Mar. 14
Jun. 26

LA SOCIETE COOPERATIVE AGRICOLE DU CANTON DE GRANBY } APPELLANT;

AND

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Deductions—Co-operative association—Interest paid to holders of certificates called "certificates for preferred shares"—Whether deductible as interest paid on borrowed money or non-deductible as

*PRESENT: Kerwin C.J. and Cartwright, Fauteux, Martland and Ritchie JJ.

[1] [1952] A.C. 192, 1 All E.R. 305, 2 D.L.R. 786, 5 W.W.R. (N.S.) 609.

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dividends to holders of preferred shares—Cooperative Agricultural Associations Act, R.S.Q. 1941, c. 120—Income War Tax Act, R.S.C. 1927, c. 97, s. 5(1)(b)—Income Tax Act, 1948, (Can.), c. 52, s. 11(1)(c)—Income Tax Act, R.S.C. 1952, c. 148, s. 11(1)(c).

The appellant, a cooperative agricultural association incorporated under the *Cooperative Agricultural Associations Act*, R.S.Q. 1941, c. 120, decided to borrow the additional funds it required to permit it to extend its activities. In 1946, it entered into a contract with a notary whereby the latter undertook to find the money required and in exchange for the money it received the appellant issued certificates called "certificates for preferred shares" and which contained an endorsement on the back providing for the unconditional payment of interest semi-annually at the rate of 5 per cent. The appellant deducted from its income for the years 1947 to 1953 the interest paid in respect of these certificates on the grounds that the sums paid represented interest on borrowed money, deductible from income by virtue of s. 5(1)(*b*) of the *Income War Tax Act* and s. 11(1)(*c*) of the *Income Tax Act*, and that the certificates conferred a creditor's rights on the owners thereof but not the rights of a shareholder. The Minister claimed that the sums paid out by the appellant were dividends to preferred shareholders and as such not deductible. The Income Tax Appeal Board reversed the Minister's decision, but on appeal to the Exchequer Court the deductions were disallowed.

Held: The appellant was entitled to the deductions. The semi-annual payments made to the holders of the certificates were amounts paid pursuant to a legal obligation to pay interest on money borrowed by the appellant, and as such were deductible as interest on money borrowed for the purpose of earning income.

The provisions of the certificates and of the loan contract with the notary were entirely inappropriate to describe the rights of a holder of preferred shares; they were an unequivocal and unconditional promise to pay the principal amount received from the holder at maturity and to pay interest thereon semi-annually until the principal had been paid. The governing intention of the parties, as expressed in these documents, was to create the relationship of borrower and lender, rather than that of company and shareholder. Those parts of the documents which referred to the issue of preferred shares should be rejected or ignored as mere mistaken nomenclature. The conduct of the appellant in making the payments was consistent throughout with that view and quite inconsistent with the view that it was that of company and shareholder; no dividend on the shares was ever declared; the interest which the appellant had bound itself to pay was disbursed semi-annually as a matter of routine.

APPEAL from a judgment of Fournier J. of the Exchequer Court of Canada[1], reversing a decision of the Income Tax Appeal Board. Appeal allowed.

A. Bissonnette and *J. Monet*, for the appellant.

[1] [1959] Ex. C.R. 139, [1959] C.T.C. 119, 59 D.T.C. 1061.

P. Boivin, Q.C., and *P. M. Ollivier*, for the respondent.

The judgment of the Court was delivered by

CARTWRIGHT J.:—This is an appeal from a judgment of Fournier J. pronounced on February 2, 1959, in an appeal from a decision of the Income Tax Appeal Board, dated July 9, 1957, whereby an appeal of the appellant in respect of re-assessments made for the taxation years 1947 to 1953 inclusive had been allowed in part.

By the decision of the Income Tax Appeal Board it was directed that the respondent should deduct from the income of the appellant the amounts of $14,806.60, $17,633.53, $18,068.03, $22,823.97, $13,176.52, $10,742.92 and $8,913.52 for the taxation years 1947, 1948, 1949, 1950, 1951, 1952 and 1953 respectively. By the decision of the Exchequer Court all of these deductions were disallowed.

On the appeal to this Court the appellant asks that the decision of the Income Tax Appeal Board be restored except that for the taxation year 1950 the amount of the deduction claimed is reduced from $22,823.97 to $15,585.87.

There is no dispute as to these amounts having been disbursed by the appellant in the years in question to holders of certificates in the form of Exhibit "A 6", to be referred to later. The sole question is whether these were payments of dividends to holders of preferred shares of the capital stock of the appellant or were payments of interest on money borrowed by the appellant.

The appellant is a cooperative agricultural association incorporated under the provisions of the *Cooperative Agricultural Associations Act*, R.S.Q. 1941, c. 120. It has its principal place of business in the City of Granby in the province of Quebec, and commenced operations in 1938. The first of the taxation years under appeal, namely the year 1947, was also the first taxation year of the appellant, as in prior years cooperatives were not taxable under the provisions of the *Income War Tax Act*.

The capital required for the operations of the appellant was initially raised by the issue to its members of common shares. Later further capital was raised by the issue of preferred shares; the form of preferred share certificate issued to subscribing members was produced as Exhibit

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"A-1". No question arises on this appeal as to the deductibility of payments made by the appellant during the taxation years under appeal to holders of certificates in the form of Exhibit "A-1". At the hearing before the Income Tax Appeal Board it was admitted by counsel for the appellant that it was not entitled to deduct these payments.

Still later, in 1944, as the affairs of the appellant prospered, it decided to extend its activities and undertake the manufacture of powdered milk; this necessitated the building of a factory and the installation of special machinery; to pay the costs of these and to discharge certain debts a sum of $275,000 was required. The appellant first endeavoured to raise this sum from its own members but without success; subsequently another attempt was made to raise the money from the members by retaining an amount of 10 cents on every 100 lbs. of milk sold for the members, which retention was to take the form of preferred share capital, but this method also proved unsuccessful. The appellant then approached investment dealers and various financial institutions with a view to borrowing the money required, but these attempts to borrow failed for the reason that under the law governing co-operatives at that time the appellant could not hypothecate its immoveable property.

Following these unsuccessful attempts the appellant approached a notary of the City of Granby who undertook to find the money required. The arrangements between the appellant and the notary were set forth in a contract dated May 10, 1946, which was approved by a resolution of the Board of Directors of the appellant of the same date. Detailed reference will be made to these documents hereafter.

The mandate given to the notary by the officers of the appellant was to raise $275,000 by way of loan. The notary's recommendation to the appellant was that the loan be made by way of the issue of preferred shares. He explained in his evidence that he had not had much experience at that time and was unaware of the contradiction in terms involved in this recommendation and in the contract of May 10, 1946, which he prepared.

The notary was successful in obtaining somewhat more than the $275,000 required; each person from whom money going to make up this total was obtained received a certificate in the form of Exhibit "A-6".

There appears to be no disagreement between the parties as to the facts stated above; but throughout the hearing before the Income Tax Appeal Board counsel for the respondent objected to any testimony being given to vary the terms of the written documents.

The contract dated May 10, 1946, is as follows:

CONVENTIONS SOUS SEING PRIVÉ ENTRE LA SOCIÉTÉ COOPÉRATIVE AGRICOLE DU CANTON DE GRANBY ET Me JACQUES NOISEUX, NOTAIRE À GRANBY.

L'AN MIL NEUF CENT QUARANTE-SIX, le dix mai, sont intervenues aux présentes:

I—LA SOCIÉTÉ COOPÉRATIVE AGRICOLE DU CANTON DE GRANBY, corporation dûment constituée en vertu de La Loi des Sociétés Coopératives de la Province de Québec, S.R.Q. (1941) chap. 120, ici représentée par MM. Omer Deslauriers, son président, et Rolland Beaudry, son secrétaire, suivant une résolution passée à cet effet par le bureau de direction de ladite société en date de ce jour et dont copie certifiée est ci-annexée après avoir été signée par les mandataires de ladite corporation et l'autre partie aux présentes; ci-après nommée LA PARTIE DE PREMIÈRE PART; et

II—Me JACQUES NOISEUX, notaire à Granby, ci-après nommé LA PARTIE DE DEUXIÈME PART.

LESQUELS font les conventions suivantes:

A)—LA PARTIE DE PREMIÈRE PART s'engage à emprunter la somme capitale de DEUX CENT SOIXANTE-QUINZE MILLE dollars ($275,000.00) par voie d'émission d'actions privilégiées aux taux et conditions ci-après spécifiés;

B)—Le but de cet emprunt est de consolider une dette d'environ soixante-cinq mille dollars ($65,000.00) et de parachever certaines constructions déjà commencées;

C)—Pour prélever ladite somme de $275,000.00, LA PARTIE DE PREMIÈRE PART s'oblige d'utiliser les services de LA PARTIE DE DEUXIÈME PART exclusivement aux conditions ci-après apposées;

CES FAITS ÉTANT ÉTABLIS, les parties aux présentes les précisent de la façon suivante:

CONDITIONS DU PRÊT.

1°—*MONTANT:* DEUX CENT SOIXANTE-QUINZE MILLE dollars ($275,000.00);

2°—*DURÉE:* DIX ANS (10) à compter du quinze juillet prochain mil neuf cent quarante-six;

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3°—*TAUX:* CINQ POUR CENT L'AN (5%) payable semi-annuellement les quinzièmes jours de janvier et de juillet de chaque année, le premier versement d'intérêt devenant dû le quinze juillet de l'an prochain et ensuite semi-annuellement comme susdit; l'intérêt sera payable au domicile du souscripteur de l'action;

4°—*REMBOURSEMENT:*—VINGT-SEPT MILLE CINQ CENTS dollars ($27,500.00) au minimum annuellement par voie de tirage au sort à une période laissée au choix de LA PARTIE DE PREMIÈRE PART; Les remboursements sur le capital s'effectueront au bureau principal de LA PARTIE DE PREMIÈRE PART et il devra être donné aux détenteurs immatriculés de telles actions un avis de soixante jours les informant que une ou toutes leurs actions leur seront payées. L'intérêt sur toutes les actions privilégiées émise en exécution des présentes courront à compter du jour de leur souscription jusqu'au jour de leur remboursement. La partie de première part se réserve le droit de racheter la présente émission de capital privilégié en tout temps au cours de la durée du prêt et jusqu'à concurrence de n'importe quel montant.

OBLIGATIONS DE LA PARTIE DE PREMIÈRE PART.

1°—N'engager aucun autre vendeur que LA PARTIE DE DEUXIÈME PART;

2°—Permettre que la partie de deuxième part engage qui elle voudra pour l'aider dans la vente de ladite émission d'actions privilégiées;

3°—Payer à LA PARTIE DE DEUXIÈME PART, à titre d'honoraires, une commission de trois pour cent (3%) sur toute ladite somme empruntée de $275,000.00 si LA PARTIE DE DEUXIÈME PART atteint cet objectif dans six mois à compter du premier juin prochain (1946); en acompte sur les honoraires de LA PARTIE DE DEUXIÈME PART, LA PARTIE DE PREMIÈRE PART promet de payer le ou avant le premier juin, date du lancement officiel de cet emprunt, la somme de mille dollars ($1,000.00); quant à la balance des honoraires dus à LA PARTIE DE DEUXIÈME PART, ils seront payés à cette dernière dès qu'elle aura atteint l'objectif, si elle le fait avant le premier décembre prochain (1946); si LA PARTIE DE DEUXIÈME PART n'atteint pas ledit objectif de ($275,000.00) dans ce délai de six mois, elle n'aura droit qu'à un honoraire de un et demi pour cent (1½%) sur toute la somme qu'elle aura prélevée dans ce délai.

4°—FOURNIR à LA PARTIE DE DEUXIÈME PART une liste de tous les coopérateurs avec leur adresse, leur bilan approximatif et tous les détails demandés concernant les coopérateurs ou la coopérative;

5°—Porter à elle seule toute la responsabilité découlant du présent emprunt;

6°—Payer tous les frais de publicité, impression que les parties auront convenu de faire ou autres découlant directement ou non du présent emprunt, LA PARTIE DE DEUXIÈME PART s'engageant de son côté à assumer les frais de déplacement qu'elle encourra elle-même pour la vente des actions;

7°—Maintenir toutes les bâtisses, machineries et accessoires constamment assurés contre l'incendie sous peine de payer six mois d'intérêt en plus à chacun des actionnaires;

8°—Permettre au mandataire de travailler à autre chose qu'à la négociation du présent emprunt;

9°—Donner à LA PARTIE DE DEUXIÈME PART tous les pouvoirs ordinaires et extraordinaires nécessaires à la vente des présentes actions;

10°—Ne pas destituer LA PARTIE DE DEUXIÈME PART si cette dernière remplit bien et fidèlement ses devoirs;

OBLIGATIONS DE LA PARTIE DE DEUXIÈME PART.

LA PARTIE DE DEUXIÈME PART s'oblige, dans la négociation de cet emprunt à agir en bon père de famille et à ne jamais défigurer la réalité pour faciliter la présente vente sous peine de payer à LA PARTIE DE PREMIÈRE PART, à titre de dommages-intérêts liquidés la somme de cinq cents dollars ($500.00). Elle sera aussi sujette à toutes les obligations d'un mandataire telles quelles sont stipulées au titre du MANDAT dans le Code civil de la Province de Québec, sauf les dérogations apportées au présent contrat.

EN FOI DE QUOI les parties ont signé.

The resolution of the Board of Directors of the appellant adopting this contract was passed on May 10, 1946. After setting out the names of those present the minutes read:

But de l'assemblée étude du contrat avec le notaire M. Jacques Noiseux.

B-967 Il est proposé par M. Origénes secondé par Isidore Martin et adopté unanimement que le contrat ci-annexé soit signé par M. Omer Deslauriers Prés. et Rolland Beaudry, secrétaire.

The face of certificate "A 6" reads as follows:

Certificate	*ACTIONS*	*2 ACTIONS*
No. B-61	*PRIVILÉGIÉES*	*Entièrement acquittées*

SOCIÉTÉ COOPÉRATIVE AGRICOLE DU CANTON DE GRANBY.

Constituée en vertu de la loi des Sociétés Coopératives Agricoles. S.R.Q. 1941, Chapitre 120

Montant de chaque action $50.00

Echéance —.—.—.

Intérêt 5% Payable le 15 juillet et le

15 janvier

LE PRESENT CERTIFICAT ATTESTE QUE M. *Celia Chouinard* est le détenteur de deux (2) actions privilégiées entièrement libérées du capital de ladite Société Coopérative Agricole, d'une valeur nominale de cinquante dollars chacune, transférables dans les livres de la Société par une déclaration écrite signée par le détenteur immatriculé ou par son fondé de pouvoirs, mention de cette immatriculation étant faite sur ledit certificat par le gérant de la Société.

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Lesdites actions privilégiées sont émises conformément à une résolution du Bureau de Direction en date du 10 mai 1946, et sont sujettes aux dispositions énoncées au verso du présent certificat.

EN FOI DE QUOI, les officiers dûment autorisés de la Société ont signé le présent certificat à Granby ce dixième jour de juin mil neuf cent quarante-six

(Sgd.) Rolland Beaudry
Secrétaire

(Sgd.) Omer Deslauriers
Président.

On the reverse this certificate is entitled "Certificat d'actions privilégiées"; a transfer form is printed and the following conditions appear:

Le présent certificat est assujetti aux conditions suivantes:

La SOCIÉTÉ COOPÉRATIVE AGRICOLE du Canton de Granby payera, pour valeur reçue, au détenteur immatriculé la somme de cent dollars à échéance—.—.—. et payera sur les actions privilégiées à partir du 10 juin 1946 19..... et par la suite semestriellement, le quinzième jour de juillet et le quinzième jour de janvier, un intérêt au taux de 5% l'an jusqu'à date d'échéance desdites actions. Les actions du présent certificat sont payables aux bureaux de la Société Coopérative Agricole du Canton de Granby, 10 rue Laval, Granby, P.Q. L'intérêt est payable par chèque semestriellement au détenteur immatriculé. Les actions et l'intérêt du présent certificat sont payables en monnaie légale du Canada.

Les certificats d'actions privilégiées sont assujettis au remboursement total ou partiel par voie de tirage, au choix du bureau de direction de la Société, au lieu de paiement mentionné dans le présent certificat, du capital dudit certificat, avec l'intérêt couru sur le capital, en tout temps sur un avis de soixante jours. Le préavis de remboursement sera signifié par lettre au détenteur immatriculé du certificat. L'intérêt du certificat cessera de courir après la date de remboursement spécifié dans ledit avis.

Conformément aux dispositions du 2e paragraphe de l'article 5 de la loi des sociétés coopératives agricoles, les actions privilégiées ne confèrent pas à leurs détenteurs le droit d'assister et de voter aux assemblées générales.

The only difference of substance between the front of Certificate "A 6" and that of Certificate "A-1" is that in the latter the date of the resolution of the Board of Directors is given as July 8, 1943. There are, however, striking differences between the conditions on the reverse of the two certificates; those on certificate "A-1" are as follows:

Lesdites actions privilégiées ont les privilèges, droits, priorités et sont sujettes aux restrictions, limitations, et dispositions qui suivent, savoir:

1. Le détenteur d'actions privilégiées aura droit de recevoir, à même les profits nets de la Société, un dividende préférentiel, non cumulatif, au taux de 5% l'an.

2. Le détenteur d'actions privilégiées aura droit dans toute liquidation, dissolution ou autre distribution de l'actif de la société entre ses actionnaires (autrement que par voie de ristourne à même les surplus) au remboursement du montant capital versé sur ses actions, avec tous dividendes déclarés et impayés, s'il y en a.

3. Le détenteur d'actions privilégiées n'aura droit à aucune participation dans les bénéfices ou l'actif de la société autre que celle prévue par les paragraphes 1 et 2 qui précèdent.

4. La société aura droit de racheter en tout temps quand il en aura été ainsi décidé par résolution de son Bureau de Direction, la totalité des actions privilégiées, ou telle partie desdites actions, selon qu'elle jugera à propos d'en décider ainsi.

5. Les détenteurs d'actions privilégiées désignés pour rachat devront présenter leurs certificats au bureau de la société au jour fixé dans l'avis de rachat et les remettre sur paiement du prix de rachat. Ces certificats seront ensuite annulés. Le droit aux dividendes sur lesdites actions privilégiées ainsi rachetées cessera automatiquement à la date fixée pour le rachat et les porteurs desdites actions ainsi rachetées n'auront plus dans la suite aucun droit quelconque contre ou dans la société, sauf celui de recevoir le paiement du prix de rachat.

6. Conformément aux dispositions du 2e paragraphe de l'article 5 de la Loi des sociétés coopératives agricoles, les actions privilégiées ne confèrent pas à leurs détenteurs le droit d'assister et de voter aux assemblées générales.

The principal of all the monies received by the appellant from the holders of certificates in the form of Exhibit "A 6" was repaid in full by July 15, 1956. Interest was paid half-yearly, in accordance with the undertaking contained in the certificates, to the holders of all of these certificates outstanding from time to time. The payments of interest were made by the officers of the company without the passing of any resolution by the Board of Directors to authorize such payments other than that of May 10, 1946, quoted above.

The right of the appellant to deduct the amounts claimed was governed for the years 1947 and 1948 by the provisions of s. 5(1)(*b*) of the *Income War Tax Act* and for the years 1949 to 1953 inclusive by those of s. 11(1)(*c*) of the *Income Tax Act*. For the purposes of the question which we have to decide there is no significant difference between these provisions.

The question is whether the semi-annual payments made to the holders of certificates in the form "A 6" were amounts paid pursuant to a legal obligation to pay interest on money borrowed by the appellant. It is not disputed that the

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money obtained from the holders of the certificates was used by the appellant for the purpose of earning income from its business. The contention of the respondent is that such money was not borrowed but formed part of the paid-up capital of the appellant having been received from subscribers to its preferred shares.

The solution of this question depends primarily on the construction of the terms of the certificate in the form of Exhibit "A 6" which was the document received by each of the persons who provided the money. The wording on the face of the certificate would indicate that its holder was a purchaser of preferred shares subject to the provisions stated on the back of the certificate. These provisions are however entirely inappropriate to describe the rights of a holder of preferred shares; they are an unequivocal and unconditional promise to pay the principal amount received from the holder at maturity and to pay interest thereon at 5 per cent per annum half-yearly on July 15, and January 15, until the principal has been paid. The date of maturity is not fixed in the certificate and it becomes necessary to refer to the resolution of May 10, 1946, according to which it is stated on its face to have been issued; this resolution in turn refers to the contract of the same date. It appears from paragraphs 2 and 4 of the contract under the heading "Conditions du prêt" that the whole of the principal is to be repaid in ten years from July 15, 1946, and that meanwhile at least $27,500 is to be paid annually on account of principal, the certificates upon which such annual payments are made being selected by lot.

The contract exhibits the same inconsistencies as the certificate. The appellant agrees to *borrow* $275,000 but *by means of an issue of preferred shares;* the term of the *loan* is to be ten years with annual repayments but such repayments are to be made *to the holders of shares* selected by lot; the right of prepayment reserved by the appellant is expressed as the right *to redeem the present issue of preferred capital.*

The task of construing documents containing such inconsistencies is not easy, as is evidenced by the difference of opinion between the Income Tax Appeal Board and the Exchequer Court; but I have reached the conclusion that the governing intention of the parties, as expressed in the

documents, was to create between the appellant and those who paid over their money in exchange for certificates in form "A 6" the relationship of borrower and lender rather than that of company and shareholder.

The appellant had power to borrow money and also power to issue preferred shares so that no question arises as to either of such courses being *ultra vires*. If, however, the appellant in fact chose the course of issuing preferred shares it did not have power to bind itself unconditionally to pay interest regardless of whether or not there were profits available for that purpose and it did so bind itself in clear words. This circumstance distinguishes the case at bar from that of *Minister of National Revenue v. Société Coopérative Agricole du Comté de Châteauguay*[1], a decision of Saint-Pierre D.J., which was affirmed without recorded reasons by this Court on April 8, 1954.

In the case at bar, in my opinion, the governing intention to create the relationship of borrower and lender appears with sufficient certainty from the relevant documents, and those parts of the documents which refer to the issue of preferred shares should be rejected or ignored as mere mistaken nomenclature by the application of the maxim *falsa demonstratio non nocet*.

The course of conduct of the appellant in making payment was consistent throughout with the view that the true relationship between it and the holder of the certificates was that of borrower and lender and quite inconsistent with the view that it was that of company and shareholder; no dividend on the "shares" was ever declared; the interest which the appellant had bound itself to pay was disbursed semi-annually as a matter of routine.

The appellant appears to have prospered and to have made sufficient profits to defray the instalments of interest as they fell due, but this could not be foreseen with certainty and it is clear that the position of those who paid their money in exchange for the certificates in form "A 6" would be better if they were held to be lenders, and therefore creditors, than if they were held to be holders of preferred shares and so postponed to the claims of creditors. The relevant documents were prepared by or for the appellant

[1] [1952] Ex. C.R. 366, [1952] C.T.C. 245, 52 D.T.C. 1129.

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and if their terms were ambiguous the holders of the certificates could have relied on the maxim *verba chartarum fortius accipiuntur contra proferentem.*

I do not find it necessary to decide whether we are free to consider the evidence given at the hearing, under reserve of objections made by counsel for the respondent, as to what the notary represented to the lenders, ninety per cent of whom he dealt with personally, or the evidence as to the representations in the advertisements of "the loan" which were widely circulated. Were we free to consider this evidence it would strengthen the case of the appellant but I do not rely upon it.

For the above reasons I would allow the appeal and order that the matter be referred back to the Minister with a direction to deduct from the income of the appellant the amounts of $13,301.09, $15,046.61, $13,670.67, $15,585.87, $13,176.52, $10,742.92 and $8,913.52 for the taxation years 1947, 1948, 1949, 1950, 1951, 1952 and 1953 respectively. The appellant is entitled to its costs throughout.

Appeal allowed with costs.

Solicitors for the appellant: Stikeman & Elliot, Montreal.

Solicitor for the respondent: A. A. McGrory, Ottawa.

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*Feb. 10
*Apr. 26
Jun. 26

SEAFARER'S INTERNATIONAL UNION OF NORTH AMERICA (CANADIAN DISTRICT) (*Defendant*) ..... APPELLANT;

AND

JOSEPH STERN (*Plaintiff*) ..... RESPONDENT.

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

Trade unions—Expulsion from union—Union member violating boycott of third party—Refusal to surrender membership card—Suspension and fine—Whether union empowered to order and enforce boycott—Action for reinstatement and damages.

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

Mandamus—Trade unions—Whether mandamus available against unincorporated union for reinstatement of illegally suspended member—Code of Civil Procedure, arts. 81a, 81b, 992(2), (5).

Following the refusal of a hotel in Montreal to rent rooms to members of the defendant union, the union adopted a resolution declaring the hotel "unfair" and threatened to "place on charge" any members having dealings with the hotel. Shortly afterwards, the plaintiff was found patronizing the hotel beverage room. He was told that he was placed on charge and was requested to surrender his membership card. This he refused to do and was subsequently found guilty of violating the order of boycott and failing to surrender his card. He was suspended for a year and fined $200. The plaintiff applied for an order of mandamus to have the penalties imposed upon him set aside and to be reinstated. He also claimed damages. The trial Judge ordered the reinstatement of the plaintiff and awarded damages. This judgment was affirmed by the Court of Appeal.

Held: The appeal should be dismissed.

There was nothing in the union's constitution to suggest that the freedom, possessed by a member of the union like any other member of the public, to patronize a commercial establishment, as was done in this case, was one of the matters within the jurisdiction of the union to attend and regulate. Having therefore no power to order and enforce such a boycott, the union had no right to impose any penalties in respect thereof. The plaintiff was consequently entitled to an order setting aside as null and void all proceedings taken by the union, and to compensation.

Furthermore, even if the union had such a power under its constitution, it was *doubtful* that a trade union could attribute to itself the power to coerce its members, by threats of suspension of the right to obtain work, to boycott third parties for the reasons and in the circumstances such as were present in this case.

Mandamus could obtain in this case to compel reinstatement. It could not lie under art. 992(2), which deals with the reinstatement by a corporation of such of its members as have been removed without lawful cause, since a voluntary association, such as the defendant union, is not a legal entity and is not made so by the provisions of art. 81a of the *Code of Civil Procedure*. However, under art. 992(5) mandamus is authorized in all other cases in which is required the performance of any act or duty which is not of a merely private nature. The duty required of the defendant was to restore to the plaintiff his right to all union membership privileges, which are essential to earn a living in cases of closed shop and virtually so in nearly all of the other cases. This right and corresponding duty could not be of a merely private nature. The plaintiff was therefore entitled to the order of reinstatement.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], affirming a judgment of Smith J. Appeal dismissed.

[1] [1960] Que. Q.B. 901.

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J. G. Ahern, Q.C., for the defendant, appellant.

J. M. Schlesinger, for the plaintiff, respondent.

The judgment of the Court was delivered by

FAUTEUX J.:—During the month of July 1957, appellant union, referred to as SIU, ordered its members to refrain from patronizing the York Hotel in Montreal and threatened to prefer union charges against any one failing to comply with this injunction. The resolution adopted in this respect at a "Headquarters' meeting", held in Montreal, on July 17, 1957, reads as follows:

It was moved by Brother Hunter, H.82, and seconded by E. Gaudreau, G.176, that in view of the fact that the York Hotel had refused to rent rooms to SIU members, that this membership go on record to declare this hotel unfair and to place on charge any SIU member dealing with this hotel.

The policy implemented by this resolution had been forecast in "The Canadian Sailor", a newspaper published by appellant. As it appears in the relevant extract of the newspaper, all trade unionists, as well as SIU members, were requested to boycott the York Hotel:

YORK HOTEL IN MONTREAL UNFAIR

SIU members, and trade unionists from all unions, are advised that the York Hotel on Notre Dame Street in Montreal is unfair.

This hotel refuses to rent rooms to union seamen and other union marine workers on the grounds that a man's occupation shall determine who shall be permitted by the York Hotel to stay at the York Hotel.

All labour unionists and SIU members are requested not to patronize the York Hotel, and to patronize its bar-rooms, cocktail lounges, restaurant, cigarette counters, nor any avenue of revenue operated by this anti-union concern.

Violation of this notice by SIU members shall constitute full and proper reason for regular union charges to be preferred against the member concerned.

Some fifteen days after the date of this resolution, respondent, a member in good standing of the union, was seen by an officer thereof, one Baxter, in the beverage room of the York Hotel consuming beer with other fellow members of the union. Baxter approached him, told him that he was violating the order, that he was placed under charge and requested him to surrender his membership certificate. With this request, respondent did not immediately comply.

He was thereafter formally charged, tried and found guilty by a "trial committee" to have (i) violated the order of boycott and (ii) failed to surrender his membership cer-

tificate, when requested to do so. The committee recommended that respondent be suspended from all union privileges for a period of one year and that he be required to pay a fine of $200 before again shipping out on an SIU vessel. These findings and recommendations were subsequently approved at a headquarters' meeting. Respondent sought to appeal and, for that purpose, gave the appropriate notice. His appeal was not heard by the officers of the union who contended they never received the notice of appeal although the latter was given in the prescribed manner.

Respondent then took action against appellant in which he asked the Court (i) to set aside, as irregular, null and void, all the proceedings and decisions of appellant; (ii) to order appellant to reinstate him in all his union privileges, and (iii) to condemn it to pay him $2,000 as compensation for illegal suspension and loss of earnings resulting therefrom.

The Superior Court found that appellant had no power, expressed or implied, to order and enforce such a boycott; that there was no right or power to impose the penalties purported to have been imposed and that although respondent was entitled, upon surrender of his membership certificate, to an identification card permitting him to obtain work until the final disposal of the charges, such a card had not been issued to him; and that, as a result of appellant's action, respondent had been deprived of all membership privileges, denied entry to union headquarters and to employment, from the date of confiscation of his union certificate to that of the service of the action. The Court ordered appellant to reinstate respondent in all his privileges, condemned it to pay the compensation prayed for, and reserved to respondent such other rights and recourses as may appertain.

The union appeal from this judgment was dismissed by a unanimous decision of the Court of Queen's Bench[1], the Court concurring in the view that appellant had acted beyond its constitutional powers in making this order of boycott and in imposing on respondent the above sanctions for his failure to comply with it.

The present appeal is from that decision.

[1] [1960] Que. Q.B. 901.

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The primary question is whether the appellant could validly order a boycott of such a nature for, if it could not, all which it did in pursuance of its resolution is null and void.

While described in the writ of summons as being "a body politic incorporate and duly incorporated under the law", appellant is, as it was conceded and as it appears by its constitution filed in the record, a voluntary association of persons having, as a group, no legal entity. Thus the question really is twofold, to wit, whether appellant did have, according to its constitution, the power to order such a boycott and, if it did, whether it could, under the law, attribute to itself such a power.

With respect to the first point, appellant relies on Article I of the constitution and, specifically, on the part thereof which is here italicized:

ARTICLE I

NAME AND POWERS

This Union shall be known as the Seafarers' International Union of North America, Canadian District, affiliated with the Canadian Labour Congress, and the American Federation of Labour and Congress of Industrial Organizations. *Its powers shall be legislative, judicial and executive. It is a grant of powers from the members and the Union shall not exercise any power unless specifically granted, or implied and needed in the exercise of power directly granted.* The Seafarers' International Union of North America, Canadian District, shall be an industrial form of Union, composed of seamen in the Marine Industry.

This article, which *prima facie* purports to give to the union unlimited legislative, executive and judicial powers, must be read, however, with the opening statement of the constitution where are enumerated the principles for the promotion of which the union is established by the constitution. Inaccurately entitled "Preamble", this opening statement must, for the determination of the point under consideration, be here recited at length:

PREAMBLE

We, the Seafarers' International Union of North America, Canadian District, realizing the value and necessity of an organization of seamen, have determined to form one Union, the Seafarers' International Union of North America, Canadian District, affiliated with the A.F. of L., based on the following principles:

Whatever right belongs to one member belongs to all members alike, as long as they remain in good standing in the Union.

First of these rights is the right of the Canadian seamen to receive their employment through their own Union Halls without interference from Government controlled bureaus or other detrimental groups.

That it is the right of each member to receive fair and just remuneration for his labour and to gain sufficient leisure for mental cultivation and physical recreation.

Further we consider it is our right to receive healthful and sufficient food and properly appointed forecastles in which to rest.

Next, is the right to be treated in a decent and respectful manner by those in command.

To assist other bona fide labour organizations whenever possible in the attainment of their just demands.

Recognizing the foregoing as our inalienable rights, we are conscious of corresponding duties to those in command, our employers, our craft and our country.

Based upon these principles, it is among our objectives to use our influence individually for the purpose of maintaining and developing skill in seamanship and effecting a change in the law governing the activities of the seamen in Canada, the Canada Shipping Act and the Merchant Seamen's Compensation Act, so as to render both these acts more equitable and to make them an aid to the development of a Merchant Marine and a body of Canadian Seamen.

To support a journal which shall voice the sentiments of the seafaring class and through its columns seek to maintain the knowledge of and interest in maritime affairs.

To regulate our conduct as a Union and as individuals so as to make seamanship what it rightly is—an honourable and useful calling. And, bearing in mind that we are migratory, that our work takes us away in different directions from any place, where the majority might otherwise meet to act, that meetings can be attended by only a fraction of the membership, that the absent members who cannot be present, must have their interest guarded from what might be the results of excitement and passions aroused by persons or conditions and that those who are present may act for and in the interest of all, we have adopted this constitution.

Manifesting the true object of the association, this opening statement is effective to reduce to its proper and, indeed, its intended dimensions, the otherwise unlimited scope of the legislative, executive and judicial powers given in Article I. The declared object of the association is to attend such matters as relationship between members, between them and their employers, between the union and other labour organizations, labour conditions, promotion of skill and seamanship, betterment of legislation concerning seamen. There is nothing, however, in this declaratory part of the constitution suggesting that the freedom, possessed by a member of the union like any other member of the public, to patronize a commercial establishment as did respondent

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in the present case, is one of the matters within the jurisdiction of the association to attend and regulate. Between the union or its members and York Hotel, there was, in the circumstances, no connection whatever related to any of these matters. In joining the union, respondent did contract with the other members thereof to abide, not to any order, but only to those for the making of which there was authority. I agree with the Courts below that appellant had no power, expressed or implied, to order and enforce such a boycott.

On the second point. It is doubtful that a trade union could attribute to itself the power to coerce, by threats of suspension of the right to obtain work, its present or future members—who are virtually forced to maintain union membership in order to obtain employment—, to boycott third parties in the exercise of their calling, for reasons and in circumstances such as are present in this case. Boycotting may, in certain circumstances, become a form of oppressive combination which the law condemns. *Pratt et al. v. British Medical Association et al.*[1] The criminal law has been amended to grant immunity to trade unions from prosecution for agreements in restraint of trade. This is a qualified immunity which flows from a policy designed to promote legitimate endeavours of the working classes. It does not follow that this special immunity will operate in cases of combinations absolutely foreign to such endeavours and of which the end or the means are unlawful. It is unnecessary, however, to pursue the matter, the opinion reached as to the first point being decisive of the question.

Respondent was therefore entitled to the order setting aside, as being null and void, all the proceedings taken by respondent in pursuance of its resolution of July 17, 1957, and to the compensation granted for loss and damage sustained up to the issuance of the writ.

There remains to consider the order compelling appellant to reinstate respondent in all his privileges as a member of the union, which raises the question whether mandamus proceedings could obtain in this case. Article 992 of the *Code of Civil Procedure* reads:

> 992. If there is no other remedy equally convenient, beneficial and effectual, a mandamus lies to enforce the performance of an act or duty in the following cases:

[1] [1919] 1 K.B. 244.

1. Whenever any corporation or public body omits, neglects or refuses to perform any act or duty incumbent upon it by law;
2. Whenever any corporation omits, neglects or refuses to make any election which by law it is bound to make, or to recognize such of its members as have been legally chosen or elected, or to reinstate such of its members as have been removed without lawful cause;
3. Whenever any public officer, or any person holding any office in any corporation, public body, or court of inferior jurisdiction, omits, neglects or refuses to perform any duty belonging to such office, or any act which by law he is bound to perform;
4. Whenever any heir or representative of a public officer omits, refuses or neglects to do any act which, as such heir or representative, he is by law obliged to do;
5. In all other cases in which the plaintiff is interested in requiring the performance of any act or duty which is not of a merely private nature.

Relying on the opening part of the article, appellant contended that the claim for damages constituted a remedy barring mandamus proceedings. As it appears in the second Report of the Commission charged with the Revision and Amendment of the *Code of Civil Procedure* of 1867, the words "equally convenient, beneficial and effectual", which, at the suggestion of the Commissioners, were inserted in the opening paragraph of art. 992 of the 1897 *Code of Civil Procedure,* are designed to check an extreme tendency of the Courts to refuse mandamus whenever there is another legal remedy, although such remedy is not so advantageous or effectual. *Seriatim* issuance of actions to claim damages is a doubtful method of earning a living and can hardly be regarded as a remedy equally convenient, beneficial and effectual as the remedy of mandamus. Appellant's submission cannot be entertained.

A substantial question, however, is whether mandamus proceedings can be taken against a voluntary association such as is appellant union. In *Comtois v. L'Union locale 1552 des Lambrisseurs de Navires*[1], the Court of Appeal, relying on 1938 (Que.), 2 Geo. VI, c. 96, reproduced in R.S.Q. 1941, c. 342, as ss. 28 and 29, affirmatively answered the question. The point is dealt with by Mr. Justice Casey, at page 679, and his opinion in the matter is concurred in by Chief Justice Galipeault, Barclay and St-Germain, JJ.,

[1] [1948] Que. K.B. 671.

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the latter after much hesitation. The Report makes no mention of the view of Mr. Justice Pratte. The statute relied on allows a group of persons, like appellant union, which, as a group, has no collective civil personality recognized by law, to be sued in the name of one of the officers thereof, at the ordinary or recognized office of the group, or collectively under the name by which they are commonly designated or known. Having referred to ss. 28 and 29 of the statute, Mr. Justice Casey said:

> It cannot be denied therefore, that the statute gave to such groups generally, an existence separate and distinct from that of its individual members.
>
> This legal existence and this availability of assets evidence the intention of the Legislature that these groups should be as amenable to the Courts as any other artificial person, should one seek to exercise against them "any recourse provided by the laws of the Province". This in my opinion is sufficient to make such a group subject to par. 2 of art. 992 C.P., and to expose it to the sanction of art. 1001 of the same Code.

This, in effect, is to say that these groups are thus given a status equal to that of a corporation, with the consequence that a voluntary unincorporated trade union is to be treated, as if it were, for all legal purposes, a corporation subject to the restraints and disabilities imposed by law upon artificial persons.

With deference, however, this view is in conflict with that expressed in this Court by Rinfret J., as he then was, with the concurrence of Crockett, Kerwin, Hudson and Taschereau JJ., in *International Ladies Garment Workers Union v. Rothman*[1], a decision which does not appear to have been brought to the attention of the Court of Appeal when it dealt with the *Comtois* case, *supra*. Chief Justice Rinfret said, at page 393:

> The statute does not purport to incorporate the groups or persons therein described, nor does it purport to confer upon them a collective legal personality. It does exclusively what is therein stated: It allows persons who have claims against them to summon them in the name of one of the officers thereof, at the ordinary or recognized office of the group, or collectively under the name by which they are commonly designated or known.

The decision of the Court of Appeal in the *Comtois* case, *supra*, does not appear to have settled the question, in the Provincial Courts, as is shown particularly by the subsequent decision of the Superior Court in *Dupont v. Steam-*

[1] [1941] S.C.R. 388, 3 D.L.R. 434.

ship Checkers et al.[1] Indeed the point is still debated, as may be seen in "Les conflits de droit dans les rapports collectifs du travail", Marie-Louis Beaulieu, pp. 132 *et seq.* and 288 *et seq.*

In this Court, the matter has been finally disposed of by what was said in *International Ladies Garment Workers Union v. Rothman, supra.*

In 1960, the provisions of the 1938 statute have been incorporated in the *Code of Civil Procedure,* as s. 81a by 8-9 Elizabeth II, c. 99. Also added to the Code, on the same occasion, was s. 81b. The latter gives the right to such group of persons, which constitutes an association of employees within the meaning of the *Labour Relations Act,* to act as plaintiff in judicial proceedings. Nothing in s. 81b can affect the conclusion reached in this Court, with respect to s. 81a, in *International Ladies Garment Workers Union v. Rothman, supra.* These amendments to the general law are inapt to give to these groups a legal entity separate from that of their members. The object of these amendments is to allow them to sue or to be sued, and permit that judgments, which might be rendered against them, be executory against all the moveable and immoveable property of the group. To this extent only was the general law altered. The following comments, which are found in Maxwell, "On Interpretation of Statutes", 10th ed., at page 81, find here their application:

> There are presumptions against implicit alteration of the law. One of these presumptions is that the Legislature does not intend to make any substantial alteration in the law beyond what it explicitly declares, either in express terms or by clear implication or, in other words, beyond the immediate scope and object of the statute.

Hence, with deference, mandamus proceedings against appellant union cannot be justified on the basis of the provisions of s. 2 of art. 992.

One must consider, however, s. 5 of that article, which authorizes mandamus "in all other cases in which the plaintiff is interested in requiring the performance of any act or duty which is not of a merely private nature." The nature of the act or duty, of which the performance by appellant is here sought by respondent, may be determined by the nature of the right of which the latter is seeking active recognition. This right is the right to be reinstated in all

[1] [1954] Que. S.C. 309.

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union membership privileges. Union mark for members of the working classes is now a requisite to obtain work. This requisite is clearly essential in cases of closed shop and virtually so in nearly all of the other cases. In the words of Mr. Justice Rand in *Orchard et al. v. Tunney*[1]:

> Membership is the badge of admission and continuance and, vis-à-vis the employer, to remove the badge is directly and immediately to defeat the right.

These are facts that are now given effective recognition in labour and industrial laws where labour relations, labour conditions, collective agreements and industrial peace are, amongst other matters, dealt with. The right here involved is the right which respondent shares with any other member of the working classes to maintain himself in a position to obtain work and, for all practical purposes, it is the right to earn his living. And those who exercise a control over union membership hold, towards the working classes, a position which the law effectively raises above the level of a merely private nature.

Under like conditions, the right claimed by respondent and the duty required to be performed by appellant cannot be of a merely private nature. On these views mandamus can obtain under s. 5 of art. 992 and respondent was entitled to the order of reinstatement made in the Superior Court and affirmed in the Court of Appeal.

For all these reasons, I would dismiss the appeal with costs.

Appeal dismissed with costs.

Attorneys for the defendant, appellant: Hyde & Ahern, Montreal.

Attorney for the plaintiff, respondent: J. M. Schlesinger, Montreal.

[1] [1957] S.C.R. 436 at 446, 8 D.L.R. (2d) 273.

ALFRED A. DUPLAIN (*Plaintiff*) .....APPELLANT;

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*May 3, 4
Oct. 3

AND

WALTER W. CAMERON, LEO J. BEAUDRY AND JOHN HOLGATE (*Defendants*) ..... RESPONDENTS;

AND

THE ATTORNEY GENERAL FOR SASKATCHEWAN (*Added Defendant*) ..... INTERVENANT.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Constitutional law—Business of securing loans on security of promissory notes to acquire equities in real property—Order of Securities Commission—Whether sections of securities statute dealing with promissory notes ultra vires the Legislature—The Securities Act, 1954, (Sask.), c. 89, s. 20(2)(f), (3).

The plaintiff brought an action for a declaratory judgment that those sections of the Saskatchewan *Securities Act, 1954,* c. 89, dealing with promissory notes were *ultra vires* the Legislature, being legislation in relation to head 18 of s. 91 of the *B.N.A. Act*. The plaintiff carried on a business whereby he secured loans from various people, giving in return therefor promissory notes in the form of documents entitled "Promissory Note and Collateral Covenants", each of which was payable in less than one year from the date of issue. The funds borrowed were used to acquire equities in real property which were put in the hands of trustees as security for the repayment of the funds so acquired. The plaintiff's action followed an order of the Securities Commission made under the provisions of s. 20(3) of the Act, whereby the plaintiff was deprived of the exemption from registration under s. 20(2)(*f*). The order further stated that the registration of the plaintiff as a salesman was cancelled. An application by the plaintiff for an interim injunction was by agreement turned into a motion for judgment. The Court of Appeal by a majority dismissed the action and granted leave to appeal to this Court.

Held (Locke J. dissenting): The appeal should be dismissed.

Per Kerwin C.J. and Taschereau, Fauteux and Judson JJ.: *The Securities Act* is not one relating to promissory notes; its pith and substance is the regulation of trading in securities. *Lymburn v. Mayland,* [1932] A.C. 318, applied; *Attorney General for Alberta and Winstanley v. Atlas Lumber Co. Ltd.,* [1941] S.C.R. 87; *Attorney General for Alberta v. Attorney General of Canada,* [1943] A.C. 356, distinguished.

*PRESENT: Kerwin C.J. and Taschereau, Locke, Cartwright, Fauteux, Judson and Ritchie JJ.

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Per Cartwright J.: The main object of *The Securities Act* is to secure that persons who carry on, in the province, the business of dealing in securities shall do so honestly and in this way to protect the public from being defrauded. Such legislation is within the power of the provincial legislature. *Lymburn v. Mayland, supra*; *Smith v. The Queen*, [1960] S.C.R. 776, referred to.

The statute restricts the right of a person trading in securities to issue promissory notes, but it does not purport to alter or affect the character of promissory notes issued in contravention of its provisions, nor does it destroy their negotiability. It followed that the impugned sections are not legislation in relation to the matter of promissory notes; they form part of a valid scheme of provincial legislation for regulating the raising of money for business ventures in the province in such manner as to prevent the practice of fraud.

R. E. Jones Limited v. Waring and Gillow Limited, [1926] A.C. 670; *Lewis v. Clay* (1897), 67 L.J. Q.B. 224, referred to.

Per Ritchie J.: The legal nature and effect of promissory notes has been exhaustively dealt with by Parliament in the *Bills of Exchange Act*, but this in no way prevents the provincial legislature from regulating the conduct of persons who issue such documents as the plaintiff's "Promissory Note and Collateral Covenants" within the province. The fact that Parliament has enacted the law governing promissory notes does not preclude the provincial legislature from imposing registration requirements on individuals seeking to issue them. The sections of *The Securities Act* under attack neither relate to nor purport to deal with the law of bills and notes; the legislation is a valid exercise of provincial power. *Attorney General for Alberta and Winstanley v. Atlas Lumber Co. Ltd., supra*, distinguished.

Per Locke J., *dissenting*: It was implicit in the terms of the *Bills of Exchange Act*, as first enacted in 1890 and as it now reads, that all persons throughout Canada may freely contract by bills of exchange, promissory notes and cheques and that such instruments, created by promissors, should be freely negotiable in the manner prescribed by the Act, and that when thus placed in circulation they could be transferred in the manner provided and vest in the transferees the rights indicated. The Act did not exhaustively deal with all of the rights given to persons desiring to contract in this manner or to holders of these instruments under the law merchant. These rights were reserved to the holders of such instruments by s. 10. It was a common law right of the subject prior to the Act of 1890 in this country to freely negotiate bills of exchange and promissory notes and that right was preserved by s. 10.

The portions of *The Securities Act* complained of constitute a direct infringement of the rights of all persons wishing to contract in this manner in the Province of Saskatchewan and are invalid. *Lymburn v. Mayland, supra; Attorney General for Alberta and Winstanley v. Atlas Lumber Co. Ltd., supra*, referred to.

APPEAL from a judgment of the Court of Appeal for Saskatchewan[1], dismissing an appeal from dismissal of an application for an injunction and application to the Court

[1] (1960-61), 33 W.W.R. 289, (1961), 25 D.L.R. (2d) 624.

of Appeal for an interim injunction which was turned into a motion for judgment. Appeal dismissed, Locke J. dissenting.

M. C. Shumiatcher, Q.C., and *B. Goldstein,* for the plaintiff, appellant.

E. C. Leslie, Q.C., and *B. L. Strayer,* for the defendants, respondents, and for the Attorney General of Saskatchewan.

N. A. Chalmers, for the Attorney General of Canada.

E. R. Pepper, Q.C., for the Attorney-General of Ontario.

E. H. Coleman, Q.C., for the Attorney-General of Manitoba.

J. J. Frawley, Q.C., for the Attorney General of Alberta.

The judgment of Kerwin C.J. and of Taschereau, Fauteux and Judson JJ. was delivered by

THE CHIEF JUSTICE:—By leave of the Court of Appeal for Saskatchewan Alfred A. Duplain appeals from a judgment of that Court[1]. We are not concerned with all the steps taken by the appellant in the Courts of Saskatchewan in connection with his claims that he and the business carried on by him were not covered by the provisions of *The Securities Act* of that Province, 1954 (Sask.), c. 89 and amendments thereto, or that certain sections thereof were *ultra vires* the Legislature. It suffices to commence with the action brought by him in the Court of Queen's Bench against the Chairman, Vice-Chairman and the third member of the Saskatchewan Securities Commission in which the statement of claim asks:

(*a*) A declaration that those sections of *The Securities Act* 1954 and amendments thereto, which relate to and purport to deal with promissory notes, are *ultra vires* the Legislature of the Province of Saskatchewan being legislation in relation to Head 18 of Section 91 of *The British North America Act,* 1867.

(*b*) A declaration that the Order of the Chairman of the Saskatchewan Securities Commission dated the 24th day of May 1960 and purportedly made pursuant to Section 20(3) of *The Securities Act,* 1954 is a nullity and *ultra vires* the power of the Saskatchewan Securities Commission insofar as it relates to promissory notes, for the reasons stated in paragraph (*a*) hereof;

[1] (1960-61), 33 W.W.R. 289, (1961), 25 D.L.R. (2d) 624.

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(c) An injunction restraining the Defendants and each of them and any and all of their officers, agents, employees, investigators and persons acting under their authority or instructions:

(i) from taking any proceedings, making any orders, issuing any notices or doing any other act under the purported authority of *The Securities Act,* 1954, and amendments thereto in respect of the business operations of the Applicant, Alfred A. Duplain and that of his sole proprietorship, Western Diversified Mortgage Company, and

(ii) from investigating or inquiring into the affairs of the Plaintiff, Alfred A. Duplain, and of persons to whom the Plaintiff has given promissory notes or with whom the Plaintiff has entered into negotiations for the borrowing of money.

The appellant secured an *ex parte* injunction in that action but his motion to continue it until the trial was dismissed. A notice of appeal to the Court of Appeal from that dismissal was filed and served and an application to that Court having been made for an interim injunction in terms similar to the injunction dissolved, the parties, at the suggestion of the Court, entered into an agreement as to the facts and as to the substantive questions which the Court would be required to adjudicate upon in the action, and in accordance therewith the Attorney General of the Province was added as an intervenant and was deemed to have received all necessary notices in the action as required under the provisions of *The Constitutional Questions Act,* R.S.S. 1953, c. 78. This agreement was filed with the Registrar and was thereupon deemed to be enforceable as an order of the Court of Appeal. The application by the plaintiff for an interim injunction having thus been turned into a motion for judgment, the Court of Appeal after considering the arguments rendered judgment dismissing the action with costs, Chief Justice Martin and McNiven J.A. dissenting. It is from that judgment that the present appeal is taken. Pursuant to Rule 18 of this Court, a copy of the notice of appeal and of a statement of the issues arising for determination was served upon the Attorney General of Canada and the Attorney General of each Province. The Attorney General of Canada filed a factum and was represented by counsel at the hearing. So far as the Provinces are concerned, only the Attorney-General for Ontario, the Attorney-General of Manitoba and the Attorney-General of Alberta filed factums and appeared by counsel and they

adopted the submissions of counsel for the Attorney General for Saskatchewan who also represented the original defendants in the action.

It is not without significance that *The Securities Act* is intituled "An Act for the Prevention of Fraud in Connection with the Sale of Securities". Provision is made by s. 3 for the appointment of a Securities Commission consisting of a chairman, vice-chairman and a third member, and by s. 4 the chairman may execute the powers and duties vested in or imposed upon the Commission by the Act or the regulations, and by s. 5 a Registrar may be appointed. By subs. (1) of s. 6

> No person or company shall:
>
> (*a*) trade in any security unless such person or company is registered as a broker, investment dealer, broker-dealer, security issuer or as a salesman of a registered broker, investment dealer, broker-dealer or security issuer;
>
> .....
>
> and such registration has been made in accordance with the provisions of this Act and the regulations. . . .

By subs. (2) of s. 20

> Subject to the regulations, registration shall not be required to trade in the following securities
>
> .....
>
> (*f*) negotiable promissory notes or commercial paper maturing not more than a year from the date of issue;

but by subs. (3) of s. 20

> Where a person or company has been guilty of acts or conduct which, in the opinion of the commission would warrant the commission refusing to grant registration to him or it under this Act, the commission may rule that subsections (1) and (2) shall not apply to him or it.

Section 8 enacts:

The commission shall suspend or cancel any registration where in its opinion such action is in the public interest.

By s. 2,

> In this Act.....
>
> .....
>
> 19. "security" includes:
>
> (*a*) any document, instrument or writing commonly known as a security;

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(*b*) any document constituting evidence of title to or interest in the capital, assets, property, profits, earnings or royalties of any person or company;

.....

(*e*) any bond, debenture, share, stock, note, unit, unit certificate, participation certificate, certificate of share or interest, pre-organization certificate or subscription;

.....

21. "trade" or "trading" includes:

(*a*) any solicitation for or obtaining of a subscription to, disposition of or trade in or option upon a security for valuable consideration whether the terms of payment be upon margin, instalment or otherwise;

The agreement between the parties shows that the plaintiff, who resides in Saskatoon, registered on February 9, 1960, under *The Partnership Act*, certifying his intention to carry on business as a sole proprietorship under the name Western Diversified Mortgage Company. He had stationery and other appropriate forms printed and established an office in Saskatoon. He intended to acquire equities in real property with the proceeds of money which he might acquire by way of loan and to place such equities in the hands of trustees who would then hold them to secure the repayment of the funds so acquired, and for this purpose a firm of solicitors agreed to act as such trustees under the terms of a deed of trust made between Western Diversified Mortgage Company of the first part and the solicitors of the second part.

After the execution of the trust agreement the plaintiff and his representatives secured loans from various people giving temporary receipts therefor. Ultimately a document called "Promissory Note and Collateral Covenants" was issued to each lender in the following form:

W

D WESTERN DIVERSIFIED MORTGAGE COMPANY

M Saskatoon, Sask.

$ _____ _____ _____ 196

Face Value Series & Number Date of Maturity

PROMISSORY NOTE AND COLLATERAL COVENANTS

Twelve calendar months after the.....day of.....A.D. 196 for value received, WESTERN DIVERSIFIED MORTGAGE COMPANY PROMISES TO PAY TO.....or Order at THE CANADIAN BANK OF COMMERCE, MAIN BRANCH, SASKATOON, SASKATCHEWAN, the sum of.....($.....) Dollars in lawful money of Canada, together with interest therein at the rate of.....(%) percentum per annum.

WESTERN DIVERSIFIED MORTGAGE COMPANY further covenants that it has deposited on assignment with the TRUSTEES, Messrs. NEWSHAM & DUNBAR, Barristers and Solicitors, Saskatoon, Saskatchewan, certain mortgages and agreements for sale, the balance of monies receivable thereon being in excess of the face value of this and all other notes issued in the series above set out and of the accrued interest thereon, AND that the said TRUSTEES are authorized under a TRUST DEED dated the 17th day of February, 1960, to hold the aforesaid instruments as collateral security for the performance of the obligations set out in the note herein and all other notes of the said Series heretofore issued by the said Company AND are authorized upon the non-performance at maturity of the covenants set out in the said note or notes, to sell a part or the whole of the aforesaid instruments, either at public or at private sale, and to apply the proceeds or as much as may be necessary thereof to the satisfaction of the covenants thereunder not theretofore satisfied, and all necessary charges and expenses, the said Company holding itself responsible for the deficiencies if any in the satisfaction thereof.

WESTERN DIVERSIFIED MORTGAGE COMPANY further covenants that under the provisions of the said TRUST DEED, the aforesaid instruments and other papers relating thereto may be examined by any person or persons on demand of the PAYEE or a HOLDER in due course of the note herein, at the offices of the TRUSTEES, 203 Glengarry Building, Saskatoon, Saskatchewan, during the normal open office hours of the said TRUSTEES.

WESTERN DIVERSIFIED MORTGAGE COMPANY further covenants at the option of the PAYEE or a HOLDER in due course of the note herein, and on deferment of the maturity date herein for a further period of twelve calendar months, to extend the covenants herein for the said further period.

SIGNED, SEALED AND DELIVERED at the City of Saskatoon, in the Province of Saskatchewan, this..... day of.....A.D. 196...

(SPACE) FOR (SEAL) WESTERN DIVERSIFIED MORTGAGE COMPANY

.....
General Manager

Following interviews between the plaintiff and his advisers and representatives of the Commission an order was made by the Commission reading as follows:

IN THE MATTER OF THE SECURITIES ACT, 1954
AND
IN THE MATTER OF ALFRED A. DUPLAIN and WESTERN DIVERSIFIED MORTGAGE COMPANY

1. PURSUANT TO subsection 3 of section 20 of The Securities Act, 1954 the Commission rules that, whereas Alfred A. Duplain has been guilty of acts or conduct which, in the opinion of the Commission, would warrant

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the Commission refusing to grant registration to him under The Securities Act, 1954, clause (*f*) of subsection 2 of section 20 of The Securities Act, 1954, shall not apply to the said Alfred A. Duplain.

2. PURSUANT TO section 8 of The Securities Act, 1954 registration of Alfred A. Duplain as a salesman is hereby cancelled.

DATED at Regina this 24th day of May A.D. 1960.

SASKATCHEWAN SECURITIES COMMISSION

"W. W. Cameron"

Chairman

The effect of this order was to bring the notes obtained by the plaintiff, which were for twelve months, into the category of promissory notes maturing after one year.

The parties agreed that the word "note" in the definition section of the Act, 2(19)(e), includes "promissory note" and that the negotiation of promissory notes is "trading" in them within the meaning of that term as defined in the Act. However, the Act is not one relating to promissory notes. Its pith and substance is the regulation of trading in securities. Although the appellant took steps in an endeavour to protect those who loaned him money on the strength of the promissory notes and covenants, a second charge of land in Saskatchewan, as Gordon J.A. points out, is not a first class security and there would not be a return within a year sufficient to pay the notes as they fell due. The case falls clearly within the decision of the Privy Council in *Lymburn v. Mayland*[1] and as in *Smith v. The Queen*[2], the words of Lord Atkin in the *Lymburn* case are particularly apt:

> There was no reason to doubt that the main object sought to be secured in this part of the Act is to secure that persons who carry on the business of dealing in securities shall be honest and of good repute, and in this way to protect the public from being defrauded.

The appellant relied upon the decision of this Court in *Attorney General for Alberta and Winstanley v. Atlas Lumber Co. Ltd.*[3] However, there it was held that the fact that no permit had been issued to the plaintiff by the Debt Adjustment Board of Alberta was no defence because a certain section of the Act there in question took away a right given to a holder of a promissory note by the *Bills of*

[1] [1932] A.C. 318, 101 L.J.P.C. 89.
[2] [1960] S.C.R. 776, 25 D.L.R. (2d) 225.
[3] [1941] S.C.R. 87, 1 D.L.R. 625.

Exchange Act, namely, the right to sue and recover judgment upon it against the maker. In the present case there is nothing to prevent the holder of a Promissory Note and Collateral Covenants from suing upon the document. In *Attorney General for Alberta v. Attorney General of Canada*[1], it was held that *The Debt Adjustment Act* of Alberta was *ultra vires in toto* as being legislation in relation to bankruptcy and insolvency but no such question arises here.

The appeal is dismissed with costs to be paid by the appellant to the respondents and intervenants. There will be no costs to or against the Attorney General of Canada or the Attorney General of any of the other Provinces.

LOCKE J. (*dissenting*):—The terms of the instruments negotiated by the appellant are stated in other reasons to be delivered in this matter. It is conceded that they are notes, within the meaning of that word in s. 2(19)(*e*) of *The Securities Act, 1954,* and that they are promissory notes, within the meaning of s. 176 of the *Bills of Exchange Act,* R.S.C. 1952, c. 15.

The question to be determined is whether the sections of *The Securities Act,* which purport to render it necessary for a person wishing to negotiate such notes in the ordinary course of his business to register as a "security issuer" or a salesman, as required by s. 6 of the Act and the regulations, and receive written notice of such registration from the registrar are *ultra vires* the Provincial Legislature. It is upon this ground alone that the dissenting judgment of Martin C.J.S. proceeded, a judgment concurred in by the late Mr. Justice McNiven. The constitutional validity of the Act as a whole is not attacked and need not be considered.

This question is not dealt with in the judgment of the Judicial Committee in *Lymburn v. Mayland*[2]. In the sense that *The Securities Act* does not in terms deny access to the courts to the promissee or subsequent holder of such a note, the case differs from the issues dealt with in the judgments delivered in this Court in *Attorney-General for Alberta and Winstanley v. Atlas Lumber Co. Ltd.*[3] The cases, however, have this similarity that the question arose in each as to whether a person may be deprived of rights given to him

[1] [1943] A.C. 356 affirming [1942] S.C.R. 31.
[2] [1932] A.C. 318, 101 L.J.P.C. 89. [3] [1941] S.C.R. 87, 1 D.L.R. 625.

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by the *Bills of Exchange Act* by provincial legislation. It is only upon this aspect of the matter that the case was treated as relevant in the judgment of the Chief Justice.

The facts, in so far as it is necessary to refer to them are as follows:—Duplain, desiring to negotiate these promissory notes to obtain loans and to invest the moneys borrowed in securities (using that term in its commonly accepted sense) of the nature referred to in the instrument, registered under the provisions of the Saskatchewan *Partnership Act* and obtained a certificate declaring his intention to carry on business as a sole proprietorship under the name of Western Diversified Mortgage Company. Thereafter he borrowed considerable sums of money from various Saskatchewan residents, giving to each a promissory note in the form mentioned, each of which was payable in less than one year from the date of issue. Promissory notes so maturing might be negotiated by persons other than those registered under the provisions of s. 6 by reason of the terms of s. 20(2)(*f*) of the Act. After notes in a total amount in excess of $115,000 had been negotiated, the Saskatchewan Securities Commission after conducting an investigation made an order which recited that Duplain had been guilty of conduct which, in the opinion of the Commission, would warrant it in refusing him registration under *The Securities Act* and, invoking the provisions of subs. (3) of s. 20 of the Act, declared that clause (*f*) of subs. (2) of s. 20 above mentioned should not apply to Duplain. The order further stated that the registration of Duplain as a salesman was cancelled. The record contains no particulars of the conduct complained of.

In the result, the further negotiation of these notes by the appellant could be done only at the risk of prosecution under the provisions of the Act and the action followed.

Section 91 of the *British North America Act* declares, *inter alia,* that notwithstanding anything in that Act the exclusive legislative authority of the Parliament of Canada extends to bills of exchange and promissory notes and that any matter coming within any of the classes of subjects enumerated in the section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects assigned exclusively to the legislatures of the provinces.

The *Bills of Exchange Act* of 1890 was, with some modifications, in the same terms as the *Bills of Exchange Act* of 1882 passed by the British Parliament. That statute was the first statute codifying any branch of the English common law. With certain changes it codified in part the rules of the common law, including the law merchant, under which bills of exchange and promissory notes payable to bearer passed freely by delivery only and, when payable to order, by endorsement and delivery. These instruments in this respect differed materially from agreements containing covenants which passed by assignment and had further distinct characteristics, such as that which enabled persons to become holders in due course freed from any equities attaching to them in the hands of the holder in described circumstances. These were then, as they now are, the conditions defined in s. 56 of the *Bills of Exchange Act*.

The *Bills of Exchange Act* does not merely define the form in which such instruments may be negotiated. Section 47 provides that capacity to incur liability as a party to a bill is co-extensive with the capacity to contract. Section 56 defines a holder in due course and the rights of a holder, whether for value or not who derives his title through a holder in due course, are declared by s. 57. Sections 60 to 73 provide the manner in which a bill may be negotiated and some of the consequences of such negotiation, and s. 74 (which was considered by Duff C.J. in *Winstanley's* case) the rights of the holder of a bill, a section which applies equally to the holder of a promissory note.

It has been for centuries the right of all persons in England, and for a lengthy, though lesser, time in Canada, to negotiate such bills of exchange or promissory notes freely in the conduct of their business and to vest in the promissee or endorsee of such instrument the rights given to them at common law, and since 1890 by the Canadian statute.

The question is, assuming that the negotiation of a promissory note by the maker is a trade in a security within the meaning of s. 6 of *The Securities Act,* whether the exercise of the right of negotiation may by provincial legislation be made contingent upon obtaining the permission of the Saskatchewan Securities Commission.

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The subject matter of the present *Securities Act* was first dealt with by the Saskatchewan Legislature by the *Security Frauds Prevention Act, 1930* (c. 74). In that Act the definition of the word "security" (s. 2(8)) did not in terms include promissory notes. Section 3(*j*), however, excepted notes or commercial paper maturing in less than one year, as does the present Act, which may have indicated an intention to control the negotiation of notes maturing after a longer period.

The title of this Act was changed by c. 90 of the statutes of 1950 to *The Securities Act* and, by that name, it appeared as c. 361 of R.S.S. 1953. The definition of the word "security" was in the terms of the original Act. The present Act repealed c. 361 and by subs. (19) of s. 2 the definition of "security" was extended to include, *inter alia,* a note. The definition of the term "trade" or "trading" was materially extended, but the portion relevant in the present matter, contained in para. (*a*) of subs. (21) of s. 2, was not materially altered and reads:

> "Trade" or "trading" includes:
>
> (*a*) any solicitation for or obtaining of a subscription to, disposition of or trade in or option upon a security for valuable consideration whether the terms of payment be upon margin, instalment or otherwise.

The Act as drawn in 1930 appears to have been directed primarily to the prevention of frauds in connection with the sale of shares of stock, debentures and bonds of corporations and certain other miscellaneous interests such as units in a syndicate, commonly designated in the business world as securities. In the present statute s. 37 provides the means whereby members of a prospecting syndicate may file an agreement with the Commission containing certain defined provisions and limit the liability of the members to the extent provided. Such interests are treated as securities and may not be traded in by any person registered in trading in securities under the Act.

Subsection (5) of s. 37 deals with an unrelated matter and reads:

> No person or company registered for trading in securities under this Act shall trade in a security issued by a person, other than a prospecting syndicate, either as agent for such person or as principal unless:
>
> (*a*) written permission, upon such terms as the commission may require, has been obtained from the commission; and

(*b*) information satisfactory to the commission relating to such person and such security has been accepted for filing by the commission.

This would apply to the negotiation of a promissory note when it was not an isolated "trade" within the meaning of s. 20(1)(*b*), as amended by c. 31 of the statutes of 1959.

Sections 38, 39 and 40 require the filing of a prospectus by mining, industrial and investment companies respectively and prohibit the trading in the securities of such companies until the required information has been received and accepted by the commission as sufficient.

Subsection 5 of s. 37 appeared for the first time in the Act of 1954. According to the notice given by the chairman of the Commission to the appellant on May 24, 1960, he had been registered as a salesman under the Act and that registration was thereby cancelled. Clause (*f*) of subs. (2) declared that registration to trade was not necessary in the case of negotiable promissory notes or commercial paper maturing not more than a year from the date of issue and the effect of the order, if it was validly made, was to require registration by the appellant as a condition precedent to the negotiation of the notes, even though they matured in less than a year from the date of issue.

While, in my opinion, there is grave doubt that the negotiation of a promissory note in the manner permitted and provided for by the *Bills of Exchange Act* is a trading within the meaning of the definition above mentioned, we were informed by counsel that it had been agreed on the argument before the Court of Appeal that such negotiation fell within the definition and the matter has been dealt with by that court on this footing. In the circumstances, I think we should deal with the matter in the same manner in this Court.

The grounds upon which the Saskatchewan Securities Commission acted in rescinding the registration of the appellant are not part of the record. In the absence of any suggestion of misconduct on the part of the appellant, it is perhaps fair to assume that the real reason for the order was the fact that the Commission did not consider the collateral security for the payment of the note, consisting, as we are informed by the agreed statements of facts, of mortgages and agreements for sale available for purchase at a discount, was satisfactory.

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As Mr. Justice Procter has pointed out, this is an irrelevant consideration where the question to be determined is as to the constitutional powers of the province.

In the result, since *The Securities Act* requires registration by a person proposing to negotiate his own promissory notes in other than isolated transactions of the nature referred to in s. 20(1)(*b*), the effect of the order of the Commission is to prohibit the appellant from negotiating notes in this manner.

For the respondent it is said that *The Securities Act* is in pith and substance an Act to regulate trading in securities in the province and that its validity is established by the decision of the Judicial Committee in *Lymburn v. Mayland,* above referred to. This, however, does not answer the appellant's case which is that those portions of the statute which assumed to vest in the Securities Commission the power at its discretion to prohibit the negotiation of promissory notes in the province is beyond the powers of the legislature. A provincial legislature may not extend its own jurisdiction, so as to trench upon the exclusive jurisdiction vested in Parliament by one of the heads of s. 91, by annexing to legislation within its power provisions which trespass upon such a field.

In *Union Colliery v. Bryden*[1], it was not suggested that the *Coal Mines Regulation Act, 1890,* of British Columbia was in its entirety *ultra vires,* but merely that s. 4 which prohibited Chinese of full age from employment in underground coal workings was beyond the powers of the legislature, and it was that section alone which, it was held, exceeded such powers. In *Lymburn's* case the requirement of registration as a condition precedent to the right of a public company to sell its shares was held to be a valid exercise of the powers conferred upon the legislature by head 13 of s. 92. No question arose as to the right of a province to limit or prohibit the negotiation of bills of exchange or promissory notes or other instruments, as to which exclusive jurisdiction was vested in Parliament under head 18 of s. 91.

Section 10 of the *Bills of Exchange Act* reads:

> The rules of the common law of England, including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, apply to bills of exchange, promissory notes and cheques.

[1] [1899] A.C. 580, 68 L.J.P.C. 118.

This section reproduced subs. (2) of s. 97 of the *Imperial Act* of 1882.

It is, in my opinion, apart altogether from s. 10, implicit in the terms of the *Bills of Exchange Act*, as first enacted in 1890 and as it now reads, that all persons throughout Canada may freely contract in this manner and that such instruments, created by promissors, should be freely negotiable in the manner prescribed by the Act and that when thus placed in circulation they could be transferred in the manner provided and vest in the transferees the rights indicated. It was, no doubt, for the reason that the free use of such instruments was considered essential in carrying on business throughout the country and that it was a matter of national importance that the law throughout Canada upon the subject should be uniform that the exclusive jurisdiction was vested in Parliament.

The Act, while intended as a code, did not exhaustively deal with all of the rights given to persons desiring to contract in this manner or to the holders of these instruments under that branch of the common law referred to as the law merchant. These rights were reserved by s. 97(2) and are reserved to the holders of such instruments by s. 10. An illustration of this is to be found in *Re Gillespie, Ex parte Robarts*[1], where Cave J. held that the right to recover the expenses of re-exchange of a dishonoured bill, which existed prior to the Act of 1882, was preserved in the circumstances by subs. (2) of s. 97. On appeal, that judgment was upheld by the judgment of the Court of Appeal delivered by Lindley L.J. It was a common law right of the subject prior to the Act of 1890 in this country to freely negotiate bills of exchange and promissory notes and that right is, in my opinion, preserved by s. 10.

I consider that the portions of this legislation complained of constitute a direct infringement of the rights of all persons wishing to contract in this manner in the Province of Saskatchewan and are invalid.

It is quite correct, as has been pointed out, that in *Winstanley's* case the judgment of Duff C.J., with whom the present Chief Justice of this Court agreed, and of Rinfret J.

[1] (1885), 16 Q.B.D. 702, affirmed (1886), 18 Q.B.D. 286.

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(as he then was) proceeded on the ground that the legislation was invalid since it prevented the holder of the promissory note from enforcing in the courts the right of action given by the *Bills of Exchange Act*. That differs from the present case in this respect that, while there the right to sue upon such an instrument without the consent of the Debt Adjustment Board was prohibited, here the legislation goes farther and prohibits the negotiation of promissory notes, except to the limited extent mentioned, unless a permit to do so is obtained from the Saskatchewan Securities Commission.

I would allow this appeal and declare that the sections of the Saskatchewan *Securities Act* which prohibit or authorize the prohibition of the negotiation of promissory notes, whatever their date of maturity, by any person in the province, and the requirement that persons desiring to negotiate such notes must be registered under the Act are *ultra vires*.

I would allow the appellant his costs throughout.

CARTWRIGHT J.:—The relevant facts and statutory provisions and the questions in issue in this appeal are stated in the reasons of other members of the Court.

I agree with the reasons and conclusion of my brother Ritchie but in view of the differences of opinion in the Court of Appeal and in this Court I propose to state my reasons in my own words as briefly as possible.

It is clear that the main object of *The Securities Act, 1954* of Saskatchewan is to secure that persons who carry on, in the province, the business of dealing in securities shall do so honestly and in this way to protect the public from being defrauded. For authority that legislation of this sort is within the powers of the Provincial Legislature it is sufficient to refer to the judgment of the Judicial Committee in *Lymburn v. Mayland*[1] and that of this Court in *Smith v. The Queen*[2].

The appellant does not contend that the Act as a whole is *ultra vires* but argues that certain sections constitute legislation in relation to the subject of Bills of Exchange and Promissory Notes to which the exclusive legislative authority of Parliament extends.

[1] [1932] A.C. 318, 101 L.J.P.C. 89.
[2] [1960] S.C.R. 776, 25 D.L.R. (2d) 225.

In dealing with this argument it is first necessary to determine what effect, if any, the impugned sections have upon the law in relation to bills and notes or, in the words used by my brother Ritchie, the "law of bills and notes in the strict sense". This is a matter of construction and the rule is well settled that, if the words used permit, the statute must be construed in accordance with the presumption which imputes to the legislature the intention of limiting the operation of its enactments to matters within its allotted sphere.

So construed the statute does, in my opinion, restrict the right of a person trading in securities to issue promissory notes; he is prohibited from so doing unless he has complied with the provisions of the Act as to registration and the Securities Commission may refuse registration or may revoke a registration which it has allowed. A person who disregards this prohibition is liable to prosecution but the statute does not purport to alter or affect the character of a promissory note which is in fact issued in breach of the statute. The rights of the holder of such a note are not impaired; he is free to enforce payment of the note, to negotiate it or to deal with it in any manner in accordance with the law of bills and notes.

If this view as to the construction of the statute is correct it follows, in my opinion, that the impugned sections are not legislation in relation to the matter of promissory notes; they form part of a valid scheme of provincial legislation for regulating the raising of money for business ventures in the province in such a manner as to prevent the practice of fraud. Persons who obtain money from members of the public in violation of the regulations imposed by the statute are rendered liable to prosecution regardless of the form of instrument issued to the persons from whom the money is obtained; if, as in the case at bar, that instrument is in the form of a promissory note the person violating the regulations does not thereby escape liability to prosecution but the rights of the holders of the notes are in no way affected.

If, contrary to the view that I have expressed, the statute had the effect of altering the character of promissory notes issued in contravention of its provisions, and particularly if it destroyed their negotiability, I would share the view

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of my brother Locke that its provisions are *pro tanto* invalid. I am in complete agreement with his statement that a provincial legislature may not extend its own jurisdiction, so as to trench upon the exclusive jurisdiction vested in Parliament by one of the heads of s. 91, by annexing to legislation within its power provisions which trespass upon such a field.

To conditionally prohibit the issue of promissory notes (in common with the other securities set out in the Act) for the purpose of raising money for business ventures in the province, the condition being that the issuer must first comply with regulations designed to protect the public from being defrauded, is not, in my opinion, to forbid the negotiation of promissory notes. If A makes a promissory note payable to B, he does not negotiate the note by delivering it to B. Negotiation, in the law of bills and notes, involves the transfer of the instrument from one holder to another. The meaning given to the word "negotiate" in the Dictionary of English Law by Earl Jowitt accords with that in all the legal dictionaries that I have consulted:

> To negotiate a bill of exchange, promissory note, cheque or other negotiable instrument for the payment of money is to transfer it for value by delivery or endorsement.

This appears to be in accordance with the views expressed in the House of Lords in *Jones (R. E.) Limited v. Waring and Gillow Limited*[1], particularly at pages 680, 687 and 695. While in that case the instrument in question was a cheque, the judgment of Lord Russell in *Lewis v. Clay*[2] was expressly approved. The last mentioned case was that of a promissory note; at p. 226 Lord Russell said:

> Further an examination of sections 20, 21, 29, 30 and 38 relating expressly to bills, and sections 83, 84, 88 and 89, relating to promissory notes, will make it quite clear that "a holder in due course" is a person to whom, after its completion by and as between the immediate parties, the bill or note has been negotiated. In the present case the plaintiff is named as payee on the face of the promissory note, and therefore is one of the immediate parties. The promissory notes have, in fact, never been negotiated within the meaning of the Act.

I would dispose of the appeal as proposed by the Chief Justice.

[1] [1926] A.C. 670, 95 L.J.K.B. 913.
[2] (1897), 67 L.J.Q.B. 224, 77 L.T. 653.

RITCHIE J.:—The somewhat unusual procedural background of this case is fully described in the reasons for judgment of the Chief Justice with whose disposition of this appeal I am in full agreement.

The agreement as to facts upon which the appeal is founded discloses that in January 1960, while the appellant was in the process of organizing a business designed to acquire mortgages and other interests in land with money which he proposed to borrow from the public, he formed the opinion that "the proposed business venture would have to be organized in such manner as to be outside the scope of The Securities Act, 1954" of Saskatchewan.

In order to achieve this end, the appellant evolved a scheme whereby he registered under the Saskatchewan *Partnership Act* as the sole proprietor of a firm which he called the "Western Diversified Mortgage Company" and caused documents to be printed bearing the name of this firm and entitled "Promissory Note and Collateral Covenants". These documents, the wording of which is reproduced in the reasons of the Chief Justice, were printed on coloured paper and so designed in format and general appearance as to bear a superficial resemblance to share certificates.

It is to be noted that the promissory note embodied in these documents is made payable *12 months after date* and that the last covenant provides for deferment of the maturity date for a further period of 12 months and for an extension of the covenants for that further period.

Promissory notes are "securities" within the meaning of *The Securities Act,* and the combined effect of ss. 6(1), 65(*e*) and 66(1) of that Act is to make it an offence punishable at the discretion of the provincial secretary for any person to trade in securities without being registered as therein provided, but by virtue of s. 20(2)(*f*) registration is not required to trade in "negotiable promissory notes . . . maturing not more than a year from the date of issue".

It seems to me to be obvious that in preparing his "Promissory Note and Collateral Covenants" the appellant phrased his firm's main undertaking to pay in the form of a promissory note "maturing not more than one year after the date of issue" for the express purpose of bringing the documents within the exception described in s. 20(2)(*f*) and

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thus being enabled to trade without registration in a security for trading in which registration would otherwise have been required.

This design was, however, thwarted by the Saskatchewan Securities Commission which exercised the powers conferred on it by s. 20(3) of the Act and ruled that the provisions of s. 20(2)(*f*) were not to apply to the appellant whose registration as a salesman was accordingly cancelled.

It is against this background that the appellant now seeks to have s. 20(3) and certain other sections of *The Securities Act* declared *ultra vires* as being legislation relating to "Bills of Exchange and Promissory Notes", a matter allocated to the exclusive legislative authority of the Parliament of Canada by s. 91(18) of the *British North America Act*.

It is not contended on behalf of the appellant that *The Securities Act* as a whole is invalid, the attack being limited to those sections which, in the appellant's submission, "relate to and purport to deal with promissory notes".

As the Chief Justice has said, the language used by Lord Atkin, speaking of *The Security Frauds Prevention Act* of Alberta in *Lymburn v. Mayland*[1], applies to the statute here in question as it was found to apply to *The Securities Act* of Ontario in *Smith v. The Queen*[2].

There can, in my view, be no doubt that the main object of *The Securities Act* of Saskatchewan is the regulation of trading in securities within that province but, as I understand the matter, this does not entirely dispose of the appellant's contention which involves the proposition that certain specific sections of *The Securities Act* are in conflict with and repugnant to the provisions of the *Bills of Exchange Act*, R.S.C. 1952, c. 15.

The latter argument appears to have found favour with Martin C.J.S. who said in the course of his dissenting opinion in the Court of Appeal with which McNiven J.A. concurred:

> Counsel for the plaintiff in his factum called attention to some of the sections of The Securities Act which could affect promissory notes when they were not protected by clause (*f*) of Section 20(2). Reference was made to section 6(1), which prohibits "trading" in securities (which includes

[1] [1932] A.C. 318 at 324, 101 L.J.P.C. 89.
[2] [1960] S.C.R. 776, 25 D.L.R. (2d) 225.

promissory notes), unless the person or company trading is registered with the Commission. Under sections 7, 8, and 15, the Commission has complete discretion to refuse registration and under Section 2(21)(*b*), "trading" includes dealing in or disposing of promissory notes. By Section 50 of The Securities Act the Commission has authority to declare any contract unreasonable and it is then no longer binding upon a person acquiring a security. Section 37(4) prohibits a person or company registered for "trading" under the Act from trading in a security of a prospecting syndicate; a person or company not registered may not so trade because of the provisions of section 6(1) referred to above. Counsel also referred to Section 32 of the Act which authorizes the Commission to impose a sequestration order as a result of which all trading in securities by the person or company affected is prohibited. The Bills of Exchange Act, Chapter 15, R.S.C. 1952, provides, in Section 47(1), that capacity to incur liability as a party to a bill is co-extensive with capacity to contract; and Section 10 of the Act provides that the rules of the common law of England, including the "law merchant" except insofar as they are inconsistent with the express provisions of this Act, apply to bills of exchange, promissory notes and cheques.

It would appear that some of the provisions of The Securities Act affect promissory notes which are not protected by clause (*f*) of Section 20(2) and also the class which is protected by clause (*f*) when the protection is removed by order of the Commission under the provisions of Section 20(3). Insofar as the provisions affect promissory notes, they are ultra vires the province.

The Securities Act, therefore, is an Act in relation, inter alia, to promissory notes, and is, therefore, an Act in relation to a subject which, under Section 91 of the British North America Act, has been assigned exclusively to the Parliament of Canada.

Counsel for the appellant in this appeal presented an elaborate argument in support of the contention that certain sections of *The Securities Act* were in conflict with the common law of England applicable to promissory notes and, therefore, repugnant to s. 10 of the *Bills of Exchange Act* which reads as follows:

> 10. The rules of the common law of England, including the "law merchant" except in so far as they are inconsistent with the express provisions of this Act, apply to bills of exchange, promissory notes and cheques.

The true effect of this provision is, in my opinion, most succinctly and accurately stated by Dean Falconbridge in his work on "Banking and Bills of Exchange", 6th ed., at p. 46 where he says:

> The effect of s. 10 would appear to be that the background of law applicable to transactions in which bills, notes or cheques play a part may be either (1) the common law of England, so far as that background consists of rules of the law of bills and notes, in the strict sense, or (2) the commercial law of a particular province, outside of the limits of the law

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of bills and notes in the strict sense. It is submitted that the law of bills and notes in the strict sense includes the essential elements of that law as such, and that legislation defining those elements is necessarily legislation in relation to a matter coming within item 18 of s. 91 of the B.N.A. Act, and therefore that, even in the absence of further federal legislation, provincial legislation would be ineffective to change the rules of the common law of England made applicable by s. 10 of the Bills of Exchange Act. On the other hand, outside of the limits of the law of bills and notes in the strict sense, as regards transactions more or less involving the use of bills or notes, the applicable law may be the law of a particular province, and not the common law of England, and in this field provincial legislation may be valid, so far as it is legislation in relation to a matter, or for a purpose, coming within any of the classes of subjects assigned to the provincial legislatures by s. 92 of the B.N.A. Act and so far as it is not inconsistent with valid federal legislation.

In the case of *Attorney General for Alberta and Winstanley v. Atlas Lumber Co. Ltd.*[1], which was strongly relied on by the appellant, it was found that s. 8 of *The Debt Adjustment Act* of Alberta had the effect of placing a limitation on the unqualified right of the holder of a promissory note to sue, a right which, as Rinfret J. (as he then was) said in that case at p. 101, "is of the very essence of bills of exchange". In the present case, on the contrary, in my view none of the sections of *The Securities Act* of Saskatchewan which are now under attack has any effect on the form, content, validity or enforceability of promissory notes or is otherwise concerned with the "law of bills and notes in the strict sense". "Issue" is defined by s. 2(*j*) of the *Bills of Exchange Act* as meaning, "The first delivery of a bill or note complete in form to a person who takes it as holder". Issue without registration may expose the issuer to proceedings under the Act if the provincial secretary consents to such proceedings being instituted (see s. 66), but failure to register has no bearing on the law governing the note itself.

The legal nature and effect of promissory notes has been exhaustively dealt with by Parliament in the *Bills of Exchange Act,* but in my opinion this in no way prevents the provincial legislature from regulating the conduct of persons who issue such documents as the appellant's "Promissory Note and Collateral Covenants" within the province. The fact that Parliament has enacted the law governing promissory notes does not preclude the provincial legislature from

[1] [1941] S.C.R. 87, 1 D.L.R. 625.

imposing registration requirements on individuals seeking to issue them. With the greatest respect to those who may hold a different view, I am of opinion that these sections neither relate to nor purport to deal with the law of bills and notes and that the legislation is a valid exercise of provincial power.

As I indicated at the outset, I would dispose of this matter as proposed by the Chief Justice.

Appeal dismissed with costs.

Solicitors for the plaintiff, appellant: Schumiatcher, Moss & Lavery, Regina.

Solicitor for the defendants, respondent and the intervenant: Roy S. Meldrum, Regina.

THE CITY OF HALIFAX .....APPELLANT;

AND

VAUGHAN CONSTRUCTION COMPANY LIMITED and HER MAJESTY THE QUEEN IN THE RIGHT OF THE PROVINCE OF NOVA SCOTIA .....RESPONDENTS.

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*May 9, 10
Oct. 3

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA IN BANCO

Expropriation—Land—Covenant to reconvey if grantee of fee simple determined not to build—Equitable interest of grantor—Owners of both interests entitled to share compensation award—Expropriation Act, R.S.N.S. 1954, c. 91, s. 1(f).

Following the expropriation by the Province of Nova Scotia of certain property in the City of Halifax and the subsequent making of an award by an arbitrator, who did not attempt to apportion the award between the conflicting claimants, the city commenced an action against Vaughan Construction Co. Ltd. for the purpose of determining the respective rights of the parties to the compensation. The city had conveyed the property to Maritime Telegraph and Telephone Co. for a cash consideration of $87,520 and certain covenants on the part of that company obliging it to construct a building or buildings on the land or to reconvey for the cash consideration if it determined not to build. With the consent of the city, the telephone company arranged

*PRESENT: Kerwin C.J. and Locke, Cartwright, Judson and Ritchie JJ.

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to transfer the property to Vaughan Construction in exchange for other property and the execution by the transferee company of covenants in favour of the city similar to those already executed.

The trial judge held that the city was entitled to the whole of the compensation with the exception of $87,520. On appeal, it was held that it was for the arbitrator to determine both the amount and the apportionment of the compensation. On appeal from the award which followed, whereby the arbitrator fixed compensation for both claimants, the Supreme Court *in banco* held, with one member dissenting, that Vaughan Construction was entitled to the whole of the compensation on the ground that the city was not an owner of the property as defined by the *Expropriation Act*, R.S.N.S. 1954, c. 91. The city appealed to this Court.

Held: The appeal should be allowed.

When Vaughan acquired the fee simple, it did so subject to an equitable interest in the land held by the city as a result of the covenant to reconvey in certain defined circumstances. This right to reconveyance was not distinguishable from a right of pre-emption, a right which will be specifically enforced and its violation restrained by injunction. The rights of the city were superior to those held by one who has merely a right of pre-emption because the respondent company had no uncontrolled right to determine whether or not it would reconvey. Unless it complied with the building covenants within a reasonable time, the city could have enforced a reconveyance. *Birmingham Canal Co. v. Cartwright* (1879), 11 Ch. D. 421, referred to; *London & South Western Railway Co. v. Gomm* (1882), 20 Ch. D. 562, applied; *Manchester Ship Canal Co. v. Manchester Racecourse Co.*, [1901] 2 Ch. 37, explained; *Frobisher v. Canadian Pipelines & Petroleums Ltd.*, [1960] S.C.R. 126, followed.

The interests of Vaughan and of the city in the land were destroyed by the expropriation and the owners of these interests were both entitled to share in the compensation. The $87,520, being the equivalent of the land which Vaughan had transferred to the telephone company in order to acquire the property, should first be deducted from the compensation money. The balance should then be divided equally between Vaughan and the city, disallowing any allowance for compulsory taking but allowing interest as proposed.

APPEAL from a judgment of the Supreme Court of Nova Scotia *in banco*[1], denying the appellant's right to share in a compensation award on expropriation of certain land. Appeal allowed.

F. P. Varcoe, Q.C., R. M. Fielding, Q.C., and *I. Goldsmith,* for the appellant.

A. G. Cooper, Q.C., for the respondent, Vaughan Construction Co. Ltd.

[1] (1960), 44 M.P.R. 220, (1961), 25 D.L.R. (2d) 26.

M. C. H. Jones, for the respondent, Her Majesty the Queen.

The judgment of Kerwin C.J. and of Cartwright, Judson and Ritchie JJ. was delivered by

JUDSON J.:—The City of Halifax appeals from the judgment of the Supreme Court of Nova Scotia *in banco*[1], which denied its right to share in a compensation award on the ground that the city had no interest in the property expropriated. In my opinion the city had an interest in the property and the appeal should be allowed.

The city acquired the property in 1947 by grant from the Government of Canada. It was valuable land on which the city wished to see erected a modern tax producing building. Consequently, in 1951, the city conveyed the property to Maritime Telegraph and Telephone Company for a modest cash consideration of $87,520 and certain covenants on the part of the telephone company obligating it to build or to reconvey for the cash consideration paid if it determined not to build.

The telephone company decided that the land was unsuitable for its purposes and it arranged, with the consent of the city, to transfer the property to Vaughan Construction Company Limited in exchange for other property and the execution by the transferee company of covenants in favour of the city similar to those already executed.

The covenants are that Vaughan Construction Company Limited, its successors or assigns

1. Will construct upon the lands hereinbefore described a building or buildings of the type described as "first-class buildings" in the Halifax City Charter;
2. That one at least of such buildings shall be an office building;
3. That the construction of such building or buildings shall commence as soon as practicably may be after delivery of These Presents;
4. That prior to the commencement of the actual construction thereof it will submit to the City of Halifax the general plans of any building proposed to be erected, together with a plan showing the location upon the said lands of such buildings;
5. That a first-class building to be erected on the said lands shall be subject to taxation under the provisions of the Halifax City Charter as real property assessable in the name of the owner thereof;

[1] (1960), 44 M.P.R. 220, (1961), 25 D.L.R. (2d) 26.

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6. That if, after the delivery of These Presents to the City of Halifax, Vaughan Construction Company Limited, its successors or assigns, shall determine not to proceed with the construction of a building or buildings upon the lands hereinbefore described, as hereinbefore provided, Vaughan Construction Company Limited, its successors or assigns, at the request of the City of Halifax will reconvey the said lands to the City of Halifax for the cash consideration of Eighty-seven Thousand Five Hundred and Twenty Dollars ($87,520.00).

The deed further provided:

> It is intended by the parties hereto that the burden of the foregoing covenants shall run with the lands hereinbefore described until such building or buildings shall have been constructed and no longer; and that upon the construction of such building or buildings in compliance with the foregoing covenants the burden of the foregoing covenants shall no longer run with the lands; and this Deed of Covenants is accepted by the City of Halifax and the said consideration paid upon such intent and understanding.

Except for the substitution of the new contracting party, covenants 1, 2, 3, 4 and 6 are the same as those entered into by the telephone company. The fifth covenant is new.

This transaction was completed in November of 1954. Within three months Vaughan Construction, without the knowledge of the city, was negotiating for the sale of the property with the Government of the Province of Nova Scotia and with other possible purchasers. The province expropriated the property on August 4, 1955. The city, on receiving notice of this event, filed a claim for compensation. The arbitrator made an award of $280,000 together with interest from June 18, 1956 at 5 per cent per annum and an allowance of 5 per cent for compulsory taking. He did not, however, attempt to apportion the award between the conflicting claimants.

In January of 1957 the city commenced an action against Vaughan Construction for the purpose of determining the respective rights of the parties to the compensation. In June of that year Mr. Justice Doull held that the city was entitled to the whole of the compensation with the exception of the sum of $87,520, which is the sum stated in the sixth covenant. On appeal from this judgment, the Supreme Court of Nova Scotia *in banco* held that it was for the arbitrator to determine both the amount of the compensation and its apportionment between the conflicting interests. Consequently, in April 1959, the arbitrator decided that of

the total award of $280,000 the city was entitled to $50,000, together with interest on this sum and a 5 per cent allowance for compulsory taking. On appeal from the arbitrator's award, the Supreme Court of Nova Scotia *in banco,* with Doull J. dissenting, held that Vaughan Construction was entitled to the whole of the compensation on the ground that the city was not an owner of the property as defined by the Nova Scotia *Expropriation Act,* R.S.N.S. 1954, c. 91. It is from this judgment that the city appeals and, in my opinion, it is entitled to succeed on the ground that the covenant to reconvey in certain defined circumstances, gave the city an interest in the land.

The first 5 covenants are self-explanatory. The city had valuable vacant land which it was ready to sell to a suitable purchaser in order to produce tax revenue. The first 4 covenants are positive covenants. They could not be the subject-matter of an action for specific performance and their breach would give rise only to an action in damages.

They do, however, impose an obligation on Vaughan Construction to commence construction as soon as it was practicable, which means within a reasonable time. The company could not postpone its determination not to proceed with construction within the terms of covenant 6 for an indefinite time. It acquired the property on November 6, 1954. The province expropriated on August 4, 1955. If the province had not done this, I would have said that the time was approaching when the city, in a properly constituted action, would have been in a position to claim a reconveyance on payment of $87,520 on the ground that the company, after the lapse of a reasonable time, had determined not to build. During a period of 9 months' ownership the company had demolished the old buildings. It had been looking for possible purchasers but it had made no effort to comply with the first five covenants.

I do not, however, rest my judgment on the probability that such a finding of fact might have been made. My opinion is that when Vaughan acquired the fee simple, it did so subject to an equitable interest in the land held by the city as a result of covenant 6. If before expropriation Vaughan had contracted to sell these lands, without the consent of the city, the sale could have been restrained and

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the right to a reconveyance enforced. Why then should it be held that Vaughan is entitled to all the compensation award for a forcible taking?

The majority opinion of the Supreme Court of Nova Scotia *in banco* held that the rights of the city were solely contractual and that covenant No. 6 did not confer an interest in land on the city. In my respectful opinion, there is error in this finding. It is true that the city was not the holder of an option which it could exercise at any time. On the other hand, Vaughan could not prevent the exercise of the city's right under covenant 6 by doing nothing and asserting at the same time that it had made no determination. Vaughan had to build within a reasonable time and only by compliance with covenants 1 to 5 could it defeat the city's right to the reconveyance under covenant 6.

What is the juridical nature of this right to reconveyance? I do not think that it is distinguishable from what has been called a right of pre-emption or a right of first refusal. An owner of land contracts that if he decides to sell he will give X the first right to buy at a stated price or at a price to be determined according to a *bona fide* offer made by another. The owner may decide never to sell and X cannot compel him to sell. Nevertheless, X has an equitable interest in the land. The rights of the city in this case are superior to those held by one who has merely a right of pre-emption because Vaughan had no uncontrolled right to determine whether or not it would reconvey. Unless it complied with the building covenants within a reasonable time, the city could have enforced a reconveyance. The rule is that a right of pre-emption will be specifically enforced and its violation restrained by injunction. (Fry, Specific Performance, 6th ed., 24; *Birmingham Canal Co. v. Cartwright*[1].)

The decision in the *Birmingham Canal* case was that the covenant containing the right of pre-emption was not obnoxious to the rule against perpetuities. But I do not take the reasoning to be that the matter sounds in contract and not in property. This is quite clear when Fry J. said:

> I think that wherever a right or interest is presently vested in A or his heirs, although the right may not arise until the happening of some contingency which may not take effect within the period limited by the rule against perpetuities, such right or interest is not obnoxious to that rule and for this reason.

[1] (1879), 11 Ch. D. 421, 48 L.J. Ch. 552.

The reason given is that the total interest in the land is divided between covenantor and covenantee, who together can alienate the land absolutely. It was this theory of destructibility of interest as preventing an infraction of the rule that was rejected in *London & South Western Railway Company v. Gomm*[1], both at the hearing and on appeal.

In *Gomm,* however, where the covenant was to reconvey should the land at any time be required for railway purposes, Kay J. was of the opinion that such a covenant did not create an interest in land. In that finding, he was expressly over-ruled by the Court of Appeal on the ground that the right to call for a conveyance is an equitable interest or equitable estate. It should be noted that in *Gomm* the right was contingent in this sense that it did not arise until the land was required for railway purposes. In the present case the right to the conveyance does not arise until there is default under the building covenants indicating a determination not to proceed or an express declaration to that effect but in my opinion there is no difference between *Gomm* and the present case except that the interest created by the covenant in *Gomm* offended the rule against perpetuities and this one does not.

The Court of Appeal, in *Gomm,* agreed with Kay J. up to and including his consideration of the *Birmingham Canal* case. The rejection of the *Birmingham Canal* case in the reasons of Jessel M.R. was based on his rejection of the theory of Fry J. that a limitation does not offend the rule against perpetuities when it may be terminated by the agreement of all interested parties and not upon any theory that a covenant to reconvey did not create an interest in land.

The law on this subject is stated in 29 Halsbury, 3rd ed., 298, in these terms:

> An option to arise on any intended sale or other particular kind of alienation by the owner, for example, a right of pre-emption or first refusal, is subject to the rule against perpetuities, and to bind the land or property must comply with it, unless the right is conferred by statute.

The case of *Manchester Ship Canal Company v. Manchester Racecourse Company*[2], raises a certain difficulty. The racecourse company agreed with the canal company

[1] (1882), 20 Ch. D. 562, 51 L.J. Ch. 530.
[2] [1900] 2 Ch. 352; affirmed, [1901] 2 Ch. 37.

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that if it should be at any time proposed to use their racecourse for dock purposes, the racecourse company would give the canal company the right of first refusal. Farwell J. held at the trial, on the authority of *Gomm*, that this right of first refusal created an interest in land and could be enforced against an intending purchaser with notice. He also held that even if the right did not create an interest in land, the intending purchaser with notice of the prior contract could be restrained from carrying out the purchase. His ratio on the first point is contained in the following paragraph:

> Now, having regard to the way in which *London and South Western Ry. Co. v. Gomm* (20 Ch. D. 562) was decided, it is plain, I think that the words used in clause 3, although inartistic, may give an interest in the land in the sense that they may be construed so as to limit a use to arise on an event in the future very similar to the use suggested to be raised in *Gomm's Case*. *Gomm's Case* was also a case of an option of pre-emption, in that case at a price named. In this case the price is ascertainable by the fact that it is to be the same as that offered by any other company or person.

The Court of Appeal affirmed the judgment of Farwell J. but on different grounds. They held that the clause did not create an interest in the land but they did hold that the canal company was entitled to enforce their right as against the racecourse company and the intending purchaser on the ground that the contract to give the canal company the first refusal involved a negative contract not to part with the racecourse to anyone else without giving them that first refusal. The case was held to be within the principle of *Lumley v. Wagner*[1]. The previous decision in *Gomm* was not mentioned in the Court of Appeal.

I can understand the difficulties of construction of the covenant in the *Manchester Ship Canal* case. The clause in question was part of an agreement which had received statutory confirmation. A good part of the reasons of Farwell J. was concerned with the problem of uncertainty—whether he could assign any meaning to the clause at all. At p. 360 he said:

> There is of course a greater difficulty here, because, although the legislature has declared the contract intelligible, that does not necessarily enable me to comprehend it.

He then proceeded to work out the rights and obligations of the parties in a context where the racecourse company was purporting to comply with its obligation to give a right

[1] (1852), 1 DeG. M. & G. 604, 42 E.R. 687.

of first refusal by making an offer to the canal company at a price far in excess of what it was prepared to take from a third party. An injunction was granted restraining the racecourse company from selling the racecourse to any person without first offering it to the canal company at the same cash price which the intending purchaser was offering.

The Court of Appeal in affirming Farwell J. held that an opportunity of exercising the right of first refusal had not in fact been given. But in dealing with the right of action against the intending purchaser they founded their judgment on the principle of *Lumley v. Wagner, supra,* rather than upon the finding of Farwell J. that the right of first refusal created an equitable interest in land which would be binding upon a purchaser with notice. They did not think that the clause in question did create an interest in land and in view of the uncertainties inherent in the clause their finding may be supportable on that ground. But I do not take it that they were enunciating any general principle or that they intended to ignore the principle enunciated in *Gomm.* On this point, which has already been considered in this Court, I wish to adopt the statement of principle of Cartwright J. in *Frobisher v. Canadian Pipelines & Petroleums Ltd.*[1]:

> An expression of opinion by the learned Lords Justices who composed the Court in the *Manchester* case is, of course, entitled to great weight but if they had intended to negative the principle enunciated in *Gomm* it seems to me that they would have stated their reason for so doing. Be this as it may, in so far as the two cases are in conflict I prefer the decision in *Gomm* on the point with which we are concerned and think that we should follow it.

My conclusion is that at the time of expropriation both Vaughan and the city had an interest in this land. Vaughan held the fee simple subject to the equitable interest of the city to enforce a reconveyance in certain defined events. Both these interests were destroyed by the expropriation and the owners of these interests are both entitled to share in the compensation. I do not know how the arbitrator came to award $50,000 as compensation for the city's interest. It appears to be a purely arbitrary figure. If at the moment of expropriation Vaughan had come to the city with an offer to purchase, the completion of that offer would have required the agreement of both Vaughan and the city.

[1] [1960] S.C.R. 126 at 146, 21 D.L.R. (2d) 497.

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Neither could have imposed terms on the other. Vaughan could, however, have destroyed the city's interest by complying with its covenants. In the circumstances, I would first deduct from the compensation money the $87,520, being the equivalent of the land which Vaughan had transferred to the telephone company in order to acquire the property, and then divide the balance equally between Vaughan and the city, disallowing any 5 per cent allowance for compulsory taking but allowing the interest as provided in the judgment of the Court of Appeal.

The appeal should be allowed with costs both here and in the Supreme Court *in banco* against Vaughan Construction Company Limited. There should be no costs to or against Her Majesty the Queen in the right of the Province of Nova Scotia. The order for costs made by Judge Pottier on June 19, 1959 should stand. Out of the compensation award of $280,000 Vaughan Construction Company Limited is entitled to $183,760 and the City of Halifax to $96,240, both sums bearing interest at 5 per cent per annum from June 18, 1956.

LOCKE J.:—I have had the advantage of reading the reasons for judgment to be delivered in this matter by my brother Judson and I agree with his opinion that at the date of the expropriation the City of Halifax had an interest in the land within the meaning of that term in s. 1 of the *Expropriation Act*, R.S.N.S. 1954, c. 91. This appears to me to follow from the decision of this Court in *Frobisher v. Canadian Pipelines & Petroleums Ltd.*[1], which approved the judgment of the Court of Appeal in *London and South Western Railway v. Gomm*[2].

I would allow the appeal and direct that judgment be entered in the terms proposed.

Appeal allowed with costs.

Solicitor for the appellant: T. C. Doyle, Halifax.

Solicitor for the respondent, Vaughan Construction Co. Ltd.: Donald McInnes, Halifax.

Solicitor for the respondent, Her Majesty the Queen in the Right of the Province of Nova Scotia: John A. Y. MacDonald, Halifax.

[1] [1960] S.C.R. 126, 21 D.L.R. (2d) 497.
[2] (1882), 20 Ch. D. 562, 51 L.J. Ch. 530.

SHELL OIL COMPANY, SHELL OIL COMPANY OF CANADA LTD., DEVON-PALMER OILS LTD. AND TEXAS GULF SULPHUR COMPANY (*Defendants*) .....APPELLANTS;

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*May 2, 3
Oct. 3

AND

WILLIAM CHARLES GIBBARD (*Plaintiff*) ..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Real property—Petroleum and natural gas lease—Continuation clause—Necessity for pooling or combining leased lands to conform with regulations not shown—True construction of lease.

The plaintiff granted a petroleum and natural gas lease for a term of ten years on a quarter section to G, whose interests subsequently became vested in the defendant companies in varying proportions. The plaintiff brought an action for a declaration that the lease terminated at the expiry of the said period, *i.e.* September 16, 1959. The lease contained a clause giving the lessee the right and power at any time to pool or combine the leased lands with other adjoining lands (any one such pool or unit not to exceed one drilling unit) when such pooling or combining was necessary to conform with any government regulations or orders. Drilling operations on, or production of leased substances from, any land included in such unit were to have the same effect in continuing the lease as if such operations or production were upon the leased land.

The defendant S acquired leases of the oil and gas rights on the three other quarters of the same section, on one of which a gas well was completed in 1952. As there was no market for the gas at that time the well was shut in and so remained until July 1959. In May 1959 a market was available and, as it was necessary under the regulations to obtain a permit to produce the well and to establish a spacing unit, an application was made to the Petroleum and Natural Gas Conservation Board for an order to establish a special spacing unit, to consist of the north half and the southwest quarter of the section. Such an order was made to come into force on July 1, 1959. The defendants contended that the lease was in full force and effect at all times, that a pooling notice given to the plaintiff in 1955 was necessary in order to conform with government regulations and, in the alternative, pleaded that if the pooling notice of 1955 was ineffective then the pooling was accomplished when the special spacing unit was prescribed in 1959.

The trial judge held that the lease terminated on September 16, 1959. An appeal from that judgment was dismissed by the Appellate Division and the defendants then appealed to this Court.

Held: The appeal should be dismissed.

*PRESENT: Locke, Cartwright, Abbott, Judson and Ritchie JJ.

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There were no regulations in existence which affirmatively required the pooling of the plaintiff's land with the adjoining lands, and it was inconceivable that the Board would, of its own motion or on the application of either party, direct such pooling when the parties had themselves agreed upon the terms upon which such pooling should be brought about. The language of the pooling clause of the lease was to be construed literally in accordance with the plain meaning of the language employed and, as the defendants had not shown that in the circumstances pooling was necessary to conform to the regulations, the appeal consequently failed.

APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division[1], dismissing an appeal from a judgment of Primrose J. Appeal dismissed.

J. H. Laycraft, for the defendants, appellants.

J. M. Robertson, Q.C., for the plaintiff, respondent.

The judgment of Locke, Abbott, Judson and Ritchie JJ. was delivered by

LOCKE J.:—This is an appeal from a judgment of the Appellate Division of the Supreme Court of Alberta[1] dismissing the appeal of the present appellants, the defendants in the action, from the judgment at the trial delivered by Primrose J.

By a lease in writing dated September 16, 1949, the respondent leased to Wilbur L. Griffith all the petroleum and natural gas and related hydrocarbons, except coal and valuable stone, within, upon or under the southwest quarter of section thirteen in township 21, range 29, west of the 4th meridian in Alberta, for a term of ten years from the date of the instrument. The lessee's interest subsequently, by assignments, became vested in the appellant companies in varying proportions.

The action was brought for a declaration that the lease terminated at the expiry of the said period. The appellants contend that it was continued in full force and effect by reason of the matters to be now stated.

By the terms of the lease the lessee was entitled to enter upon the said lands for the purpose, *inter alia,* of drilling for oil and gas and it was provided that, if operations for the drilling of a well were not commenced within one year from the date of the lease, it should terminate unless the lessee should have paid to the lessor $160 as annual acreage

[1] (1961), 34 W.W.R. 117, 26 D.L.R. (2d) 400.

rental, such payment to confer the privilege of deferring the commencement of drilling operations for a period of one year, and in like manner and upon like payments the commencement of drilling operations should be further deferred for like periods successively.

Paragraph 9 reads as follows:

> The Lessee is hereby given the right and power at any time and from time to time to pool or combine the said lands, or any portion thereof, with other lands adjoining the said lands, but so that any one such pool or unit (herein referred to as a "unit") shall not exceed one drilling unit as hereinbefore defined, when such pooling, or combining is necessary in order to conform with any regulations or orders of the Government of the Province of Alberta or any other authoritative body, which are now or may hereafter be in force in relation thereto. In the event of such pooling or combining, the Lessor shall, in lieu of the royalties elsewhere herein specified, receive on production of leased substances from the said unit, only such portion of the royalties stipulated herein as the area of the said lands placed in the unit bears to the total area of lands in such unit. Drilling operations on, or production of leased substances from, any land included in such unit shall have the same effect in continuing this Lease in force and effect during the term hereby granted, or any extension thereof, as to all the said lands, as if such operation or production were upon or from the said lands, or some portion thereof.

The expression "drilling unit" was defined in para. 1 as follows:

> "Drilling unit" shall mean a section, legal sub-division or other unit of land representing the minimum area in which any well may be drilled on or in the vicinity of the said lands as defined or prescribed by or under any law of the Province of Alberta now or hereafter in effect governing the spacing of petroleum and/or natural gas wells.

The payment of royalties referred to in para. 9 was provided for by para. 2. If gas or oil were produced from the leased lands the lessor was to receive in effect one eighth of its market value, such royalty to be paid monthly.

The appellant Shell Oil Company acquired leases of the oil and gas rights on the three other quarter sections in section 13 and drilled a well on the northeast quarter, which was spudded in on July 4, 1952 and completed as a gas well on November 4, 1952. Natural gas was produced from the well for test purposes in varying periods in the years 1952, 1954, 1958 and from April 20 to April 25, 1959. When, however, the well was completed there was no available market for the gas and the well was shut in.

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On August 2, 1955, the appellant Shell Oil Company, which at that time held by assignment from Griffith the entire lessee's interest, gave a written notice to the lessor in the following terms:

> Take notice that Shell Oil Company as Lessee by assignment from Wilbur L. Griffith named as Lessee in a Petroleum and Natural Gas Lease, dated the 16th day of September, A.D. 1949, granted by you and covering all the petroleum and natural gas and related hydrocarbons except coal and valuable stone, within, upon or under the SW¼ of Section 13 in Township 21, Range 29, West of the 4th Meridian, in the Province of Alberta, hereby pools and combines the said SW¼ of Section 13 in Township 21, Range 29, West of the 4th Meridian with the NE¼, the NW¼ and the SE¼ of the said Section 13, so as to form a drilling unit as defined in the said lease and as prescribed by regulations of the Government of the Province of Alberta.

There was no production from the gas well on the northeast quarter at the time this notice was given. No well was drilled at any time upon the respondent's lands.

The said appellant gave a similar notice under the terms of a lease of the southeast quarter, expressed in similar terms, granted by Herbert Morris on July 19, 1950. Morris had died and the notice was given to E. M. Gunderson, the executor of his estate. That lease was for a five year term and, in an action between the Shell Oil Company and the executor decided at a time when there was no production of gas from the northeast quarter, it was held that the lease had expired by effluxion of time.

The decision at the trial of this action was sustained by the Appellate Division on appeal and that judgment was affirmed by the judgment of this Court[1].

In May 1959 a market for gas was available. The well on the northeast quarter had been shut in for nearly seven years and it was necessary under the regulations to obtain a permit to produce the well and to establish a spacing unit. On May 21, 1959, Devon-Palmers Oils Ltd. applied to the Board for an order to establish a special spacing unit, to consist of the north half and the southwest quarter of section 13, and such an order was made dated June 24, 1959, to come into force on July 1, 1959. It was a term of the order that in the event it was not rescinded before October 31, 1959, the Board should review it and might call a public

[1] [1960] S.C.R. 424, 23 D.L.R. (2d) 81.

hearing during the month of November 1959 for that purpose. The order was not varied in any manner material to the issues in this action and continued in effect at the time this action was commenced.

On July 27, 1959, Devon-Palmer Oils Ltd. sent to the respondent a copy of the order of the Board and informed him that a cheque for his royalty for the month of July would be forwarded to him on the 20th of August, and cheques were sent for such royalty for that month and for the month of August. The statements enclosed with these payments stated that the royalty was payable pursuant to the pooling notice dated August 2, 1955. The respondent returned the cheques and the company informed him on December 7, 1959, that it would thereafter hold the royalties to which he was entitled in trust for his account.

Under the provisions of *The Oil and Gas Resources Conservation Act,* R.S.A. 1942, c. 66, as amended, which was in force when the lease was made and the provisions of *The Oil and Gas Resources Conservation Act, 1950,* and the regulations made thereunder, which were in force when the well was drilled on the northeast quarter, a person desiring to drill a well was required to obtain a license from the Petroleum and Natural Gas Conservation Board set up under these statutes, permitting this to be done.

The expression "spacing unit", which did not appear in the earlier statute, was defined to mean the area allocated to a well for the purpose of drilling for and producing oil and gas. Section 20 provided that no person shall apply for a license to drill a well within a spacing unit unless he is entitled, or is the authorized representative of the person who is entitled, to all the drilling and producing rights for the oil and gas for the recovery of which the well is to be drilled.

The appellant Shell Oil Company, as stated, had acquired all such rights for the four quarter sections comprising section 13. No evidence was given at the trial as to the terms of the license obtained in advance of drilling the well on the northeast quarter and no spacing unit appears to have been established prior to June 24, 1959.

The extensive powers vested in the Board included the power to determine the area of the spacing unit for every well in the province, and the regulations in force at the time

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the well was drilled provided that, subject to the provisions of the regulations, the spacing unit for an oil well should be approximately 40 acres and for a gas well approximately 640 acres. The regulations provided, however, that the Board might, in a case where in its opinion it was proper to do so, prescribe a spacing unit of any size or shape or with any boundaries, and evidence was given by the witness Brant that in some gas fields such units were four sections in extent, whereas others were as little as one quarter section.

As pleaded, the respondent's case was that the pooling notice given on August 2, 1955, was ineffective since the appellant at that time had no interest in the southeast quarter by reason of the expiry of the Morris lease and, further, that when that notice was given the pooling or combining was not necessary "in order to conform with any regulations or orders of the Government of the Province of Alberta or any other authoritative body which were then in force in relation thereto." This referred to the provisions of the first sentence of para. 9 of the agreement.

The statement of defence alleged that the lease from the respondent was in full force and effect at all times, that the pooling notice referred to was necessary in order to conform with the regulations and, in the alternative, pleaded that if the pooling notice of 1955 was ineffective then the pooling was accomplished when the special spacing unit was prescribed by the Board, effective July 1, 1959.

The defendants also counterclaimed for a declaration that the lease was in full force and effect. The plaintiff did not file any reply to the statement of defence and simply repeated the statement of claim by way of defence to the counterclaim.

The lease in question is upon a printed form, the names of the parties, the description of the land and other formal provisions being typewritten. According to the respondent, the document in this form was handed to him by Griffith and returned by the former signed some days later. Shortly thereafter the lease was assigned by Griffith to the Shell Oil Company.

At the time the lease was made, the regulations of the Board approved by order in council under the statute of 1942, as amended on December 2, 1947, provided that,

subject to the other provisions of the regulations, well spacing should be one well to every 40 acres, and in surveyed territory one well to every legal subdivision, provided that the Board might prescribe surface locations at which wells may be drilled and well spacing other than one well to every 40 acres. It was not until the adoption of the regulations under the Act of 1950 that the normal areas of the spacing units differed as between gas and oil wells. This fact renders obscure the meaning to be attributed to para. 1(*b*) defining drilling unit as meaning a section, legal subdivision or other unit of land representing the minimum area on which any well may be drilled. Had the lease been made after the 1950 regulations were passed, it might properly be inferred, in my opinion, that the reference to a unit one section in extent was intended to apply if gas were discovered, but no such inference is permissible in this situation.

The difficult question to determine is whether, in the circumstances in this case, pooling or combining was necessary in 1959 to conform with the regulations. While the statement of claim merely alleged that it was not necessary when the notice was given on August 2, 1955, the defence put in issue the question as to whether it was necessary at any time during the term of the lease and this must be determined. The lease, as stated, was proposed in its present form by Griffith and, in my opinion, if there were ambiguity in the language employed and doubt raised as to the meaning of such language, it should, if need be, be construed in accordance with the maxim *verba chartarum fortius accipiuntur contra proferentem* (Leake: 8th ed., p. 158).

This rule of construction is to be applied only where other rules of construction fail. In the present matter I find it difficult to understand in what circumstances it could have been contemplated that it was necessary to pool the respondent's land with the adjoining lands to conform with the regulations. There were no regulations in existence which affirmatively required any such pooling and it seems to me inconceivable that the Board would, of its own motion or on the application of either party, direct such pooling when the parties had themselves agreed upon the terms upon which such pooling should be brought about. If, as I think to be the case, what the proposed lessee intended to

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provide for was a provision for pooling when it was necessary to include the leased land with other lands in order to obtain the approval of the Board to a spacing unit and to obtain a permit, if one were required, to produce gas or oil discovered on any part of the proposed unit, unfortunately the language employed is quite insufficient for such purpose. To assign any such meaning to the clause would be to read into it words that are not to be found in the clause as drafted.

In my view, this portion of the language of para. 9 is to be construed literally in accordance with the plain meaning of the language employed and, as the appellants have not shown that in the circumstances pooling was necessary to conform to the regulations, the appeal must fail.

I would add that, with great respect, I am unable to agree with the opinion of Mr. Justice Johnson that any formal written notice of the election of the lessees to exercise the option to pool was necessary. That the lessees had elected to exercise the option was, in my opinion, sufficiently indicated by the application to the Board to fix the special spacing unit in May 1959 and the letters directed to the respondent enclosing the royalties to which he would have been entitled had the pooling been effective.

I come to the conclusion that this appeal should fail with regret as I am by no means satisfied that the result accords with the intention of the parties to the instrument. However, since it is not sought to impeach the instrument or to suggest that through mutual mistake it fails to express the real agreement, the matter must be determined upon what I consider to be the clear meaning of the language employed.

I would dismiss this appeal with costs.

CARTWRIGHT J.:—I agree with the conclusion of my brother Locke and also, subject only to one reservation, with his reasons.

I do not find it necessary to form an opinion as to whether the lessee in the lease made by the respondent, dated September 16, 1949, intended that that document should include a provision for pooling if it became necessary to include the leased land with other lands in order to obtain

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the approval of the Board to a spacing unit and to obtain a permit, if one were required, to produce gas or oil discovered on any part of the proposed unit. I agree that the lease, on its true construction, does not so provide.

I would dispose of the appeal as proposed by my brother Locke.

Cartwright J.

Appeal dismissed with costs.

Solicitors for the defendants, appellants: Chambers, Might, Saucier, Peacock, Jones, Black & Gain, Calgary.

Solicitors for the plaintiff, respondent: Fenerty, Fenerty, McGillivray, Robertson, Prowse, Brennan & Fraser, Calgary.

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*June 8
Oct. 3

THE MUNICIPALITY OF METROPOLITAN TORONTO (*Contestant*) APPELLANT;

AND

A. LOWRY, A. RICHARDSON and GUARANTY TRUST COMPANY OF CANADA, Trustees of the Estate of LYDIA J. FLEMING, Deceased (*Claimants*) .....RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Expropriation—Previous sale of parcels adjoining expropriated strip—Purchasers agreeing to purchase portions of strip at a higher price under option clause—Proper valuation—Allowance for compulsory taking denied.

The appellant municipality expropriated part of the respondents' farm for a parkway, the expropriated lands forming a strip which bisected the said farm from south to north approximately at its centre. The respondents had previously entered into agreements of sale of the west and east parcels of the farm, but had reserved from sale the parkway lands and a small additional strip. Each of the agreements contained a provision under which the respective purchasers were to purchase one-half of the parkway lands lying between their respective purchases at $15,000 per acre, if called upon by the respondents to do so at any time within three years.

The appellant's offer, following expropriation, was refused and the parties went to arbitration. The resulting award was appealed on two grounds: (1) that the arbitrator had erred in taking into account the option

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

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provisions in the agreements of sale in arriving at the amount of compensation to be awarded and (2) that he erred in awarding any allowance for compulsory taking. The Court of Appeal unanimously allowed the appeal with respect to the second ground but the majority dismissed the appeal with respect to the first ground.

Held (Kerwin C.J. dissenting): The appeal should be allowed.

It was undisputed that the respondents were entitled to receive from the expropriating authority the value to them of the parkway lands at the date of expropriation. On the uncontradicted evidence it also could not be disputed that—except for the effect of the agreements of sale—the highest value to the respondents of those lands was $12,500 per acre. The form of words used in the agreements could therefore have no other purpose than to assure to respondents a total price worked out on the basis of $12,800 per acre for all their lands.

While the respondents were free to make any bargain the purchasers were willing to agree to, they could not by attributing a higher value to the strip to be expropriated and a correspondingly lesser value to the balance of their property, thereby throw upon the expropriating authority the obligation to pay out of public funds more than the expropriated lands were in truth worth to the respondents as owners.

Per Kerwin C.J., *dissenting*: The arbitrator was correct in finding that the value to the owners was not less than the amount at which they could have sold the expropriated lands under valid enforceable contracts at any time within three years from the restrictive dates of purchase of the parcels which had been sold. As found by the Courts below, the agreements were *bona fide*.

Per Curiam: A motion that the amount of the award should be varied by the addition of 10 per cent for compulsory taking was dismissed in view of the judgment in *Drew v. The Queen*, [1961] S.C.R. 614.

APPEAL from a majority judgment of the Court of Appeal for Ontario[1], dismissing in part an appeal from an award of compensation by Forsyth C.C.J for certain lands expropriated by the appellant. Appeal allowed, Kerwin C.J. dissenting.

Hon. R. L. Kellock, Q.C., and *A. P. G. Joy, Q.C.*, for the appellant.

J. D. Arnup, Q.C., and *J. J. Carthy*, for the respondents.

THE CHIEF JUSTICE (*dissenting*):—Although counsel for the appellant studiously avoided describing the agreement between the Fleming estate and responsible purchasers as fraudulent, it appears impossible to allow the appeal unless one comes to the conclusion that the parties thereto and their advisers conspired to concoct a scheme which was a sham and which was entered into for the express purpose

[1] [1960] O.W.N. 373, 24 D.L.R. (2d) 374.

of forcing the appellant to pay at the rate of $15,000, instead of $12,500 per acre. It was suggested that if the parties could agree upon the figure of $15,000, they might have agreed to twice that sum, but I am satisfied that, even if one could imagine the parties entering into any such pact, the Courts would be able to deal with that sort of contrivance. There is nothing in the record to indicate that the arrangement was not arrived at between parties dealing at arm's length. In fact, no attempt was made by the municipality to suggest that this was not the case.

The arbitrator was correct in finding that the value to the owners was not less than the amount at which they could have sold the lands under valid enforceable contracts at any time within three years from the restrictive dates of purchase of the parcels which the estate had sold. The Court of Appeal had no difficulty in determining that the agreements were *bona fide* and affirmed the order of the arbitrator. Not only has no good reason been shown to set aside the concurrent findings of the Courts below, but upon a review of the evidence I have come to the same conclusion.

The appeal should be dismissed with costs. The respondents served notice that they would contend that the amount of the award should be varied by the addition of an allowance of ten per cent for compulsory taking. In view of the judgment of this Court in *Drew v. The Queen*[1], this motion must be dismissed but without costs.

The judgment of Cartwright, Fauteux, Abbott and Judson JJ. was delivered by

ABBOTT J.:—This appeal is from a majority judgment of the Court of Appeal for Ontario[2], dismissing in part an appeal from an award made by His Honour Judge Forsyth of the County Court of the County of York fixing the compensation payable to respondents for certain lands expropriated by appellant for the Don Valley Parkway pursuant to by-law 902 of the Council of the appellant municipality passed on February 10, 1959.

The lands expropriated (hereinafter referred to as the parkway lands) consisted of 29.33 acres of raw farm lands forming part of a farm of the respondents of approximately

[1] [1961] S.C.R. 614, 29 D.L.R. (2d) 114.
[2] [1960] O.W.N. 373, 24 D.L.R. (2d) 374.

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241.08 acres, bounded on the south by Eglinton Avenue East in the appellant municipality, and running north to the Canadian Pacific Railway, the Don Mills Road forming its westerly boundary and the Canadian National Railways its easterly boundary.

Generally speaking the parkway lands consist of a narrow strip some 2,000 feet in length and 200 feet in width, which bisects the said farm from south to north approximately at its centre, the said strip widening slightly at its northerly end and more so at its southerly end to allow for a clover leaf at Eglinton Avenue. A parcel composed of approximately 97 acres of the farm lies to the west of the parkway lands and a parcel of approximately 111.26 acres lies to the east.

On September 22 and October 7, 1958 respectively, the respondents entered into agreements of sale of these two parcels but retained from sale the parkway lands and a small additional strip along part of the west limit of the parkway lands of 2.995 acres, the reason given for the retention of the additional strip being the possibility in the minds of the respondents that it might also be required for the parkway.

The sale of each of the two easterly and westerly parcels was at a price of $12,500 per acre, except for the extreme easterly part of the easterly parcel which was subject to a zoning restriction for residential purposes. The agreement of sale of this parcel, however, provided that if this zoning could be changed so as to permit of the construction of apartment houses, the price of the lands subject to the said restriction would be increased by $6,250 per acre, bringing the price up to the $12,500 per acre figure. The purchaser undertook to apply for such rezoning.

Each of the agreements for sale contained a somewhat unusual provision under which the respective purchasers were to purchase one-half of the parkway lands lying between their respective purchases at $15,000 per acre, if called upon by the respondents to do so at any time within three years. This option was not exercised by the respondents with respect to either purchaser.

On February 10, 1959, by-law 902 of the appellant municipality was passed expropriating the parkway lands. On October 15, 1959, the appellant offered to pay the respondents for the lands taken for the parkway at the rate of $12,500 per acre, but that offer was refused and the parties went to arbitration.

The learned arbitrator awarded the respondents compensation in the amount of $439,150, being at the rate of $15,000 per acre plus 5 per cent for compulsory taking, with interest at 5 per cent from the date of by-law 902, and in so doing based himself upon the option provisions contained in the said agreements. He held that apart from these provisions the value of the lands taken for the parkway, for the highest and best use to which they could be put, was $12,500 per acre.

Appeal was taken to the Court of Appeal on two grounds—(1) that the arbitrator erred in taking into account the option provisions in the agreements of sale above referred to in arriving at the amount of compensation to be awarded, and (2) that he erred in awarding any allowance for compulsory taking.

The Court of Appeal unanimously allowed the appeal with respect to the second ground but the majority dismissed the appeal with respect to the first ground. LeBel, J.A. dissenting, would have allowed the appeal with respect to that ground as well.

There are concurrent findings of fact as follows.

(i) That the best use to which the lands in question could be put was industrial development.

(ii) That their market value for this purpose was $12,500 per acre.

(iii) That the agreements entered into by the respondents under which they had a right exercisable within three years to compel the purchasers to purchase the lands which have now been expropriated at $15,000 per acre were *bona fide* and enforceable agreements.

Moreover the following further matters appear to be clear on the evidence and indeed were not seriously disputed.

(i) That before the agreements in question were entered into the respondents' advisers knew what part of the land was going to be expropriated.

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(ii) That it was of course possible but extremely improbable that there would be any change in the proposal to expropriate.

(iii) That the commercial value per acre of the lands to be expropriated was certainly not more than the average per acre of the whole block of land owned by the respondents.
(iv) That the purchasers under the agreements were willing, if necessary, to pay a total price equivalent to an average of $12,800 per acre for all the land owned by respondents.
(v) That the clauses in the agreements under which the purchasers could be compelled to pay $15,000 per acre for the parkway lands were designed with the imminent expropriation in mind and for the purpose of fixing a "floor price" which would be payable by the expropriating authority.

No evidence was called to show the reason why the purchasers agreed to this unusual term, but it was obviously a matter of indifference to them how the total price which they were willing to pay if necessary, was calculated.

Shortly stated, the respondents' contention is that the value of the parkway lands to them could not be less than $15,000 per acre, the amount which they were entitled to receive under the agreements, and that contention was accepted by the learned arbitrator and by the majority in the Court below.

It is undisputed that the respondents are entitled to receive from the expropriating authority the value of the land to them at the date of expropriation. On the uncontradicted evidence it also cannot be disputed that—except for the effect of the agreements in question—the highest value to respondents of the lands in question was $12,500 per acre.

The form of words used in the agreements could therefore have no other purpose than to assure to respondents a total price worked out on the basis of $12,800 per acre for all their lands.

While the respondents were free to make any bargain the purchasers were willing to agree to, in my opinion they could not by attributing a higher value to the strip to be expropriated and a correspondingly lesser value to the

balance of their property, thereby throw upon the expropriating authority the obligation to pay out of public funds more than the expropriated lands were in truth worth to the respondents as owners.

I would allow the appeal and vary the award of the learned arbitrator by fixing compensation at the sum of $375,424, being at the rate of $12,800 per acre on 29.33 acres with interest at 5 per cent per annum from February 10, 1959. The respondents served notice that they would contend that the amount of the award should be varied by the addition of an allowance of 10 per cent for compulsory taking. In view of the judgment of this Court in *Drew v. The Queen*[1] this motion must be dismissed, but without costs.

The appellant is entitled to its costs here and in the Court below.

Appeal allowed with costs, KERWIN C.J. *dissenting.*

Solicitor for the appellant: C. Frank Moore, Toronto.

Solicitors for the respondents: Wegenast & Hyndman, Toronto.

1961
*June 12
Oct. 3

THE CORPORATION OF THE CITY OF SAULT STE. MARIE AND M. G. E. DANBY (*Defendants*) .... APPELLANTS;

AND

ALGOMA STEEL CORPORATION LIMITED (*Plaintiff*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Taxation—Assessment of railway tracks—Exemption claimed—System used primarily for transportation of company property within plant area—Meaning of "transportation system"—The Assessment Act, R.S.O. 1950, c. 24, s. 37.

The plaintiff company, a manufacturer of iron and steel, in an action asked for a declaration that its rails were not liable to assessment by the defendant municipality. It was claimed that the combined effect of

*PRESENT: Kerwin C.J. and Locke, Cartwright, Martland and Judson JJ.

[1] [1961] S.C.R. 614, 29 D.L.R. (2d) 114.

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ss. 37 and 44 of *The Assessment Act*, R.S.O. 1950, c. 24, precluded the assessment of such rails, because they were part of a transportation system operated by the plaintiff. The primary function of the system was the transportation within the company's plant area of the company's own property, as an incident of its manufacturing operations. The trial judge and the Court of Appeal having held for the plaintiff, the defendants appealed to this Court.

Held: The appeal should be allowed.

As the result of an amendment to *The Assessment Act* in 1944 (Ont.), c. 7, the composite term "transportation system" replaced in the predecessor of s. 37 the words "tramways, street railways and electric railways" in subs. (1) and "electric railway" in subs. (4). Those words were not apt to describe a transportation system such as that operated by the plaintiff. They did describe those kinds of transportation systems which would be expected to operate on public highways.

The amendment did not have the effect of extending the scope of s. 37(4) so as to make it apply to an entirely different kind of transportation system. "Extraneous light" was cast upon the meaning of the words "transportation system" as used in that subsection, not only by the previous history of the subsection, but by the context in which the words were used in s. 37 as a whole. The words had a limited meaning and referred to a system which was operated to provide transportation as a service to the public, and not one which was operated, almost entirely, for the transportation by a company, on its own premises, of its own goods, as part of its manufacturing business.

Union of South Africa (Minister of Railways and Harbours) v. Simmer and Jack Proprietary Mines, [1918] A.C. 591; *Hurlbatt v. Barnett & Co.*, [1893] 1 Q.B. 77, referred to.

APPEAL from a judgment of the Court of Appeal for Ontario[1], affirming a judgment of Hughes J. Appeal allowed.

H. E. Manning, Q.C., for the defendants, appellants.

P. B. C. Pepper, Q.C., and *W. R. Herridge*, for the plaintiff, respondent.

The judgment of the Court was delivered by

MARTLAND J.:—This is an appeal from a judgment of the Court of Appeal for Ontario[1], which dismissed the appeal of the appellants from the judgment at the trial. In the action, the respondent, as plaintiff, asked for a declaration that its rails were not liable to assessment by the appellant Corporation. The respondent claimed that an ingredient of $1,721,280 in its real property assessment and $1,032,768 in its business assessment were illegally inserted in the assessment roll for the year 1959, because those figures represented the value of railway tracks, constructed within

[1] [1960] O.R. 334, 24 D.L.R. (2d) 176.

the premises of the respondent, which were exempt from assessment because they were part of a transportation system operated by the respondent. The respondent claimed that the combined effect of ss. 37 and 44 of *The Assessment Act*, R.S.O. 1950, c. 24, precluded the assessment of such rails.

The respondent carries on the business of manufacturing iron and steel at its plant at Sault Ste. Marie. For the purpose of transferring materials from one part of its plant to another, and as part of its arrangement for receiving incoming ores and materials and dispatching finished products, the respondent has within its property, situated within the boundaries of Sault Ste. Marie, something over 49 miles of standard gauge railway track which connect with the tracks of the Algoma Central and Hudson's Bay Railway Company (a corporation which is a completely distinct entity from the respondent).

In addition, the respondent owns 1.3 miles of narrow gauge track not connected with the Algoma Central system and $1\frac{1}{3}$ miles of electrified track used for the transportation of coal in self-propelled cars. The electrified line has not been assessed.

The respondent owns and operates 14 standard gauge diesel locomotives, 2 small steam locomotives and some 570 freight cars, including hot metal ladles, slag cars, gondola cars, hopper and butt cars and from time to time hires additional cars for use in its plant. The respondent's tracks also serve the plants of Mannesmann Tube Company, Ltd., Dominion Tar and Chemical Limited and Algoma Contractors Limited, which companies are tenants of the respondent. The respondent's equipment is operated by a separate department presided over by a superintendent of transportation and staffed by a large and varying number of employees consisting of foremen, yard masters, locomotive engineers, switch men and personnel devoted to the maintenance and repair of rolling stock.

In order to facilitate the considerable traffic within the area, there are two marshalling yards within the respondent's premises and immediately outside those premises there is a marshalling and interchange yard of the Algoma Central and Hudson's Bay Railway Company. Rail traffic from and to the respondent's plant is handled over the lines of the

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Algoma Central Company. The locomotives and rolling stock of the respondent are not used for the delivery of materials from or the shipment of goods to the outside world. The respondent's cars, with the exception of tank cars, are used to carry materials around its yards and to and from one building to another. The tank cars are used mainly to remove sludge from the coke plant to a waste dump.

A relatively small amount of traffic passes over the respondent's tracks to the premises of the three tenants previously mentioned.

The Letters Patent of the respondent authorized it "to carry on the business of the transportation of passengers, goods, wares, merchandise, timber or coal, steel and iron, upon land and water".

The learned trial judge and the Court of Appeal, on the basis of this evidence presented by the respondent, no evidence being adduced by the appellants, held that the respondent did operate a transportation system, in fact, within the ordinary meaning of that expression, and further went on to hold that this was a transportation system within the meaning of the relevant provisions of *The Assessment Act*, R.S.O. 1950, c. 24.

The provisions of that statute on which the respondent relies are s. 37(4) and s. 44(2)(*a*) and (3).

Section 37 reads as follows:

37. (1) The property by subclause v of clause i of section 1 declared to be "land" which is owned by companies or persons supplying water, heat, light and power to municipalities and the inhabitants thereof, and companies and persons operating transportation systems and companies or persons distributing by pipe line natural gas, manufactured gas or liquefied petroleum gas or any mixture of any of them shall, in a municipality divided into wards, be assessed in the ward in which the head office of the company or person is situate, if the head office is situated in the municipality, but if the head office of the company or person is not in the municipality, then the assessment may be in any ward thereof.

(1a) This section does not apply to a pipe line as defined in section 37a.

(2) Where the property of any such company or person extends through two or more municipalities, the portion thereof in each municipality shall be separately assessed therein at its value as an integral part of the whole property.

(3) In assessing such property, whether situate or not situate upon a highway, street, road, lane or other public place, the same shall when and so long as in actual use be assessed at its actual value in accordance with section 33.

(4) Notwithstanding anything in this or any other section of this Act, the structures, substructures, superstructures, rails, ties, poles and wires of such a transportation system shall be liable to assessment and taxation in the same manner and to the same extent as those of a steam railway are under the provisions of section 44 and not otherwise.

Section 44 is the section which deals with the assessment of steam railways. Subsection (1) prescribes the information which a steam railway must transmit annually respecting its property. The relevant portions of subss. (2) and (3) provide as follows:

44. (2) The assessor shall assess the land and property aforesaid as follows,

(*a*) the roadway or right-of-way at the actual value thereof according to the average value of land in the locality; but not including the structures, substructures and superstructures, rails, ties, poles and other property thereon;

.....

(3) Notwithstanding anything in this Act, the structures, substructures, superstructures, rails, ties, poles, wires and other property on railway lands and used exclusively for railway purposes or incidental thereto (except stations, freight sheds, offices, warehouses, elevators, hotels, roundhouses and machine, repair and other shops) shall not be assessed.

There is no suggestion that the respondent is a steam railway company within the meaning of s. 44 of the Act and so the question in issue in this appeal is as to whether it operated a "transportation system" within the meaning of s. 37(4), so as to be entitled to the exemption from assessment of its rails, situated on its own lands, as provided in respect of steam railway companies in s. 44(2)(*a*) and (3).

The words "transportation system" are not defined in the interpretation section of the Act. They are used in certain sections of the Act in addition to those already cited. They first appear in s. 1(i)(v) in the definition of the word "land".

1. In this Act,

.....

(i) "land", "real property" and "real estate" include,

.....

(v) all structures and fixtures erected or placed upon, in, over, under or affixed to any highway, lane, or other public communication or water, but not the rolling stock of any *transportation system;*

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They appear next in para. 17 of s. 4, the section which recites the exemptions to the general proposition that all real property in Ontario shall be liable to assessment for taxation. The exemption mentioned in para. 17 is as follows:

> 17. All machinery and equipment used for manufacturing or farming purposes, including the foundations on which the same rest, but not including machinery and equipment to the extent that it is used, intended or required for lighting, heating or other building purposes or for producing power for sale, or machinery owned, operated or used by a *transportation system* or by a person having the right, authority or permission to construct, maintain or operate within Ontario in, under, above, on or through any highway, lane or other public communication, public place or public water, any structure or other thing, for the purposes of a bridge or *transportation system,* or for the purpose of conducting steam, heat, water, gas, oil, electricity or any property, substance or product capable of transportation, transmission or conveyance for the supply of water, light, heat, power or other service.

Section 6 of the Act deals with business assessments and reference is made to a "transportation system" in subs. (1)(*k*) and subs. 1*b*, both enacted in 1957 (Ont.), c. 2, which read as follows:

> 6. (1)(*k*) Every person carrying on the business of,
>
> (i) a telegraph or telephone company, or
>
> (ii) a *transportation system,* other than one for the transportation or transmission or distribution by pipe line of crude oil or liquid or gaseous hydrocarbons or any product or by-product thereof or natural or manufactured gas or liquefied petroleum gas or any mixture or combination of the foregoing, or
>
> (iii) the transmission of water or of steam, heat or electricity for the purposes of light, heat or power,
>
> for a sum equal to 25 per cent of the assessed value of the land (not being a highway, lane or other public communication or public place or water or private right-of-way), occupied or used by such person, exclusive of the value of any machinery, plant or appliances erected or placed upon, in, over, under or affixed to such land.
>
> (1*b*) Where a manufacturer also carries on the business of a *transportation system* for the transportation or transmission or distribution by pipe line of crude oil or liquid or gaseous hydrocarbons or any product or by-product thereof or natural or manufactured gas or any mixture or combination of the foregoing, he shall not be assessed for business assessment as a manufacturer in respect of such transportation system.

There is some lack of precision in the use of the words "transportation system" in these various sections. In para. 17 of s. 4 and in s. 37(1) there is a suggested distinction between a transportation system and a system for

the transmission or distribution of oil or gas. On the other hand, the quoted subsections of s. 6 indicate that there is no such distinction. However, in s. 6(1)(*k*), perhaps out of abundance of precaution, a pipe line is specifically excluded from being considered as a transportation system in that subclause. Section 6(1*b*) deals exclusively with the transportation or transmission or distribution of oil or gas by pipe line. It does not appear that in any of the sections in which the words are used by themselves, without qualification, that they are intended to include a pipe line.

The words were first introduced into *The Assessment Act* in 1944 (Ont.), c. 7, and were used in an amendment to s. 44 of the Act, which was the predecessor of s. 37. In subs. (1) they replaced the words "tramways, street railways and electric railways". In subs. (4) they replaced the words "electric railway".

Prior to the amendment, those subsections of s. 44 read as follows:

> 44. (1) The property, by paragraph 5 of clause i of section 1, declared to be "land" which is owned by companies or persons supplying water, heat, light and power to municipalities and the inhabitants thereof, and companies and persons operating tramways, street railways and electric railways, and companies or persons transmitting oil or gas by pipe line, shall, in a municipality divided into wards, be assessed in the ward in which the head office of such company or person is situate, if such head office is situated in such municipality, but if the head office of such company or person is not in such municipality, then the assessment may be in any ward thereof.
>
> (4) Notwithstanding anything contained in this section or any other section of this Act, the structures, substructures, superstructures, rails, ties, poles and wires of such an electric railway shall be liable to assessment and taxation in the same manner and to the same extent as those of a steam railway are under the provisions of section 50 and not otherwise.

In 1946 (Ont.), c. 3, the predecessor of s. 6(1)(*k*), which had contained the words:

> Every person carrying on the business of a telegraph or telephone company, of an electric railway, other than an electric railway owned or operated by or for a municipal corporation, tramway, street railway or incline railway. . . .

was replaced by a new clause, which commenced:

> Every person carrying on the business of a telegraph or telephone company, or of a transportation system, other than a transportation system owned or operated by or for a municipal corporation. . . .

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In 1947 (Ont.), c. 3, in para. 17 of s. 4, the words "transportation system" where they first appear in that paragraph, as previously quoted, replaced the words "railway company" and where they next appear, replaced the words "tramway or street railway".

In the same year the words "transportation system" replaced, in s. 1(i)(*v*), the words "railway, electric railway, tramway or street railway".

As was pointed out in the judgment of the Court of Appeal, the submissions advanced by counsel as to the rules of interpretation to be applied to amending provisions, are summarized in Halsbury, 2nd ed., vol. 31, p. 493, para. 626, as follows:

> 626. Mere amending provisions should not be interpreted so as to alter completely the character of the principal law, unless clear language is found indicating such an intention, and where a statute of limited operation is repealed by one which re-enacts its provisions in an amended form, it need not be presumed that its operation was to be extended to classes of persons hitherto not subject to them. Where, however, expressions of larger meaning are used in an amending statute than in the principal Act, it must be taken that they are used intentionally.

It is the contention of the appellants that the transportation systems contemplated by *The Assessment Act* are systems having to do with providing transportation for passengers (and possibly of commodities) as a service to persons other than the operator of the system. This, it is said, is manifested by the wording of the provisions of the Act and by the previous history of the sections in question. The appellants submit that the amendments, which introduced the words "transportation system" into the Act, should not be interpreted so as to alter completely the character of the law as it existed previously.

The respondent submits that the amendment of s. 37 involved the use of an expression of larger meaning and was made with the intention of enlarging the scope of the exemption conferred by that section. This view was accepted in the Courts below, which held that, in the absence of any statutory definition, and because of the obscurity of the meaning of the phrase, resort must be had

to recognized canons of construction. In this connection, the statement of Lord Haldane in *Lumsden v. Inland Revenue Commissioners*[1], was cited:

> The duty of a court of construction in such cases is not to speculate on what was likely to have been said if those who framed the statute had thought of the point which has arisen; but, recognizing that the words leave the intention obscure, to construe them as they stand, with only such extraneous light as is reflected from within the four corners of the statute itself, read as a whole.

They concluded that the words in question here should be given their literal meaning, and that, on that basis, the respondent did operate a transportation system within the meaning of s. 37(4).

The brief summary of the amendments, as a result of which the words "transportation system" appeared in *The Assessment Act*, shows that this composite term was used, in various sections, in replacement of the words "tramway", "street railway", "electric railway", "incline railway", "railway" and "railway company". In the section with which we are concerned, s. 37, they replaced the words "tramways, street railways and electric railways" in subs. (1) and "electric railway" in subs. (4). Those words were not apt to describe a transportation system such as that operated by the respondent. They did describe those kinds of transportation systems which would be expected to operate on public highways.

The question then is, did the amendment which has resulted in the words "transportation system" appearing in s. 37 have the effect of extending the scope of subs. (4) so as to make it apply to an entirely different kind of a transportation system?

With respect, I do not think that the amendment did have that effect. I have reached the conclusion that "extraneous light" is cast on the meaning of the words "transportation system" as used in subs. (4) not only by the previous history of that subsection, but by the context in which the words are used in s. 37 as a whole.

In subs. (4) the words used are "such a transportation system". In order to determine the kind of transportation system referred to in that subsection it is necessary to refer back to the previous subsections.

[1] [1914] A.C. 877 at 887, 84 L.J.K.B. 45.

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Subsection (1) deals with the place in which a certain kind of land is to be assessed. The subject-matter of such assessment is "the property by subclause v of clause i of section 1 declared to be 'land' ". The kind of property mentioned is, therefore, "structures and fixtures erected or placed upon, in, over, under or affixed to any highway, lane, or other public communication or water".

Subsection (1) of s. 37 therefore deals with fixtures on public highways and communications, and it deals with property of that kind owned by certain classes of companies or persons; namely, those who

1. Supply water, heat, light and power to municipalities and the inhabitants thereof.
2. Operate transportation systems.
3. Distribute by pipe line natural gas, manufactured gas or liquefied petroleum gas or any mixture of any of them.

Classes 1 and 3 are clearly public utility operations which make use of highways for their pipes, poles, electric wires or electric conduits. In my opinion the kind of transportation system which would be making use of highways for its rails would be of like character; namely, a utility rendering service to the public.

Subsection (2) of s. 37 contemplates the kind of company which might have its properties extending through two or more municipalities, and its reference to "such company or person" relates back to the kind mentioned in subs. (1).

Similarly, when subs. (4) mentions "such transportation system" it means one which is operated by the kind of person or company referred to in subs. (1).

In my opinion, therefore, the words "transportation system", as used in subs. (4) of s. 37, have a limited meaning and refer to a system which is operated to provide transportation as a service to the public, and not one which is operated, almost entirely, for the transportation by a company, on its own premises, of its own goods, as a part of its manufacturing business.

In *Union of South Africa (Minister of Railways and Harbours) v. Simmer and Jack Proprietary Mines*[1], Lord Sumner, at p. 596, said:

> In the opinion of their Lordships, it is not a legitimate interpretation of mere amending provisions to hold that they completely alter the character of the principal laws, unless clear language is found indicating such an intention.

The interpretation which the respondent seeks to place on the amendment made in 1944 does involve a complete alteration of the character of the section, and, for the reasons already stated, I do not find clear language indicating such an intention.

The foregoing statement by Lord Sumner is the basis for the first portion of the principle enunciated in Halsbury, previously cited. The last sentence in Halsbury's statement, that "where expressions of larger meaning are used in an amending statute than in the principal Act, it must be taken that they are used intentionally", is founded on the words of Lord Esher, M.R., in *Hurlbatt v. Barnett & Co.*[2] In that case the change in wording in the amending statute clearly manifested an intention to extend the jurisdiction of the Court in respect of references to the official referee.

In the present case I agree that the words "transportation system" were used intentionally in s. 37. A composite term was used in subs. (1) to replace "tramways, street railways and electric railways". The application of subs. (4) had previously been limited to "electric railways" only. The amendment made it clear that the exemption in subs. (4) was not limited to that type of a transportation system. But, for the reasons already outlined, I do not find an intention to broaden the application of the section to the extent that the respondent contends.

It has already been noted that the respondent had the corporate power to carry on the business of the transportation of passengers or goods. This, however, does not assist in determining whether the transportation system which the respondent did operate fell within s. 37(4). For the reasons previously given I do not think that it did because of the fact that, complex as that system undoubtedly was,

[1] [1918] A.C. 591, 87 L.J.P.C. 117.
[2] [1893] 1 Q.B. 77 at 79, 62 L.J.Q.B. 1.

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its primary function was the transportation within the respondent's plant area of the respondent's own property, as an incident of its manufacturing operations. The respondent did not operate a transportation system for the provision of a service to the public.

In my opinion, therefore, the appeal should be allowed, the judgment at the trial should be set aside and the respondent's action should be dismissed, with costs to the appellants throughout.

Appeal allowed with costs.

Solicitors for the defendants, appellants: Wishart, Noble & Nori, Sault Ste. Marie.

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

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*April 26, 27, 28
May 1
Oct. 3

THE CROW'S NEST PASS COAL COMPANY (LIMITED) (*Suppliant*) } APPELLANT;

AND

THE QUEEN, THE CALIFORNIA STANDARD COMPANY, CANADIAN GULF OIL COMPANY AND THE BRITISH AMERICAN OIL COMPANY LIMITED ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Mines and Minerals—Crown grant—Reservation of "minerals, precious or base (other than coal)"—Whether petroleum and natural gas included—British Columbia Southern Railway Aid Amendment Act, 1896 (B.C.), c. 4, s. 3—An Act to Extend the Rights of the Crown to Prospect for Minerals on Railway Lands to all Free Miners, 1899 (B.C.), c. 58, s. 1.

By a petition of right the suppliant company asked, *inter alia*, for a declaration that it was the owner of the petroleum and natural gas in and underlying certain lands granted by the Crown to the suppliant's predecessor in title, the British Columbia Southern Railway Company, and further asked, by an amendment made at the trial, for an order rectifying the reservation in respect to minerals by striking out the words "any minerals, precious or base (other than coal)" and substituting therefor the words "any minerals as defined in the

*PRESENT: Kerwin C.J. and Taschereau, Locke, Cartwright, Fauteux, Abbott, Martland, Judson and Ritchie JJ.

Mineral Act, 1896, cap. 34, Statutes of British Columbia, 1896". The trial judge dismissed the action and this judgment was affirmed by a majority in the Court of Appeal. The suppliant appealed to this Court.

Held: The appeal should be dismissed.

The word "minerals" standing alone in the grant should be construed as meaning mineral substances and, as the authorities and references referred to indicated, petroleum and natural gas were prior to and at the time the grants were made and now are regarded as such. *Ontario Natural Gas Co. v. Gosfield* (1890), 19 O.R. 591 and (affirmed) (1891), 18 O.A.R. 626; *Dome Oil Co. v. Alberta Drilling Co.* (1916), 52 S.C.R. 561; *Creighton v. United Oils Ltd.,* [1927] 2 W.W.R. 458; *Stuart v. Calgary & Edmonton Ry. Co.,* [1927] 3 W.W.R. 678; *Knight Sugar Co. v. Alberta Railway Co.,* [1938] 1 All E.R. 266; *District Registrar v. Canadian Superior Oil of California Ltd.,* [1954] S.C.R. 321, referred to.

The contention that the words "precious or base (other than coal)" which followed the word "minerals" in the grants limited the meaning to metallic substances was rejected.

The contention that the terms of s. 3 of the *British Columbia Southern Railway Aid Amendment Act, 1896,* indicated that it was the intention of the legislature that only such rights as free miners might acquire under the *Mineral Act, 1896* (which rights were restricted to minerals as defined in that Act) should be reserved to the Crown, and accordingly the words of the grant should be so construed, also failed. The rights of free miners at the time of the grants were not limited to searching for minerals as defined by the *Mineral Act, 1896.* Before the grants were made, by an *Act to Extend the Rights of the Crown to Prospect for Minerals on Railway Lands to all Free Miners* passed on February 27, 1899 (c. 58), it was declared that every free miner within the meaning of the *Mineral Act* should be entitled to exercise on his own behalf all the rights of the Crown to prospect for minerals over all lands in British Columbia, whether owned by railway companies or otherwise. This applied to the lands in question granted later that year to the railway company and the definition in the *Mineral Act* did not apply to the word "minerals".

The words "minerals precious or base" meant all mineral substances other than coal and in their context were free from ambiguity.

The amendment asking for rectification, for which claim no facts were pleaded, was made some 59 years after the grants were issued and accepted by the grantee. Prior to the time of the grants the parties had expressly directed their attention to petroleum as well as to coal, and during the period of 59 years the appellant had acted upon the said grants and sold portions of the lands subject to the exceptions contained in them.

If, as was suggested, there was a duty to convey the lands to the railway company subject only to the rights of the Crown to precious metals and to those of free miners, the right of action for the reformation of the grants would presumably be against the Crown either on a contract to be implied from the fact that upon the faith of the promised grants the railway was built, or upon the footing that there was a statutory duty to convey the lands subject only to the above exceptions. No such contract was pleaded and the decision in *A.-G. for British Columbia v. Esquimalt & Nanaimo Ry. Co.* [1950] A.C. 87,

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would apparently bar such a claim if made. If there were any such right of action it would be vested in the British Columbia Southern Railway Company and, as there was no allegation that any such right had been assigned to the appellant, that company would be a necessary party to the proceedings.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], dismissing an appeal from the judgment of Whittaker J. at the trial dismissing the action. Appeal dismissed.

J. J. Robinette, Q.C., J. L. Farris, Q.C., and *J. A. McAlpine,* for the suppliant, appellant.

M. M. McFarlane, Q.C., and *A. W. Hobbs,* for the respondents.

The judgment of the Court was delivered by

LOCKE J.:—This is an appeal from a judgment of the Court of Appeal for British Columbia[1] which dismissed an appeal of the present appellant from the judgment of Whittaker J. at the trial dismissing the action. DesBrisay C.J.B.C. dissented and would have allowed the appeal.

The appellant is the successor in title of the British Columbia Southern Railway Company to large tracts of land described as portions of Lots 4588 and 4589 in the District of Kootenay in the Province of British Columbia. These lands together with certain additional areas, were conveyed by deeds dated December 1, 1904, duly registered in the Nelson Land Registry Office at that time. The terms of the conveyances were made subject to the reservations, limitations, provisos, conditions and exceptions expressed in the original grant from the Crown.

There were two grants from the Crown to the railway company of the lands in question dated August 18, 1899, the terms of which, save as to the description of the property conveyed, were identical. The operative portions of the grants read:

> Know Ye that We do by these presents, for Us, Our Heirs and Successors, in consideration of the fulfilment of the provisions of the Railway Aid Act, 1890 and amending Acts, give and grant unto the British Columbia Southern Railway Company, its successors and assigns all that parcel or lot of land (describing it) . . . .

[1] (1960), 32 W.W.R. 529, (1961), 25 D.L.R. (2d) 110.

The further term of the grants that has given rise to the present litigation read:

> PROVIDED also that it shall at all times be lawful for US, OUR HEIRS AND SUCCESSORS or for any person or persons acting under OUR or their authority to enter into and upon any part of said lands and to raise and get thereout any minerals, precious or base (other than coal) which may be thereupon or thereunder and to use and enjoy any and every part of the said land and the easements and privileges thereto belonging for the purpose of such raising and getting and every other purpose connected therewith.

By the petition of right the appellant asserted that it was entitled to the petroleum and natural gas to be found under such lands, that the Crown had issued permits to the Canadian Gulf Oil Company and the California Standard Company to do exploratory drilling for petroleum and natural gas on such lands, that these permits had been assigned to the British American Oil Company Limited and asked damages for trespass against the Crown and these companies and an injunction restraining them from entering upon the said lands. This aspect of the claim for relief was abandoned at the trial and does not require consideration. The petitioner asked further for a declaration that it was the owner of the petroleum and natural gas in and underlying the said lands, and, by an amendment made at the trial, an order rectifying the reservation in respect to minerals by striking out the words "any minerals, precious or base (other than coal)" and substituting therefor the words "any minerals as defined in the *Mineral Act, 1896,* cap. 34, Statutes of British Columbia, 1896".

These two claims for relief are to be considered separately. While in dealing with the first of these the question to be determined is the proper interpretation of the words "minerals, precious or base" in the grants from the Crown, the circumstances leading up to the making of such grants are matters to be considered.

The British Columbia Southern Railway Company was incorporated under the name of The Crow's Nest and Kootenay Lake Railway Company by c. 44 of the Statutes of 1888 and given authority to construct and operate a line of railway in the Kootenay District in the province. The name of this company was changed to the present name by c. 56 of the Statutes of 1891.

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By the *Railway Aid Act, 1890,* c. 40, s. 1, the Lieutenant-Governor in Council was authorized to grant 20,000 acres of public land for each one mile of railway completed throughout its entire length upon compliance by the company with certain terms which were defined. By s. 14 it was provided that the provisions of the *British Columbia Railway Act,* passed at the same session, should apply to the enterprise. Section 18, to which as amended much importance is assigned by the appellant, reads:

> Nothing in this Act contained shall prejudice the rights of free miners to search for, get and win the precious metals and to use timber for mining purposes, subject to the mineral and land laws of the province and to the provisions of this Act.

Between the years 1890 and 1896 various statutes extended the time for the completion of the railway. In 1896 by c. 4 entitled *The British Columbia Southern Railway Aid Amendment Act* it was enacted that it should be a sufficient compliance with the provisions of the *Railway Aid Act, 1890,* as amended, to entitle the railway company to the grant authorized that the company should construct and equip the several sections of its line of railway within the times fixed by an Act passed at that session. Section 3 of this Act reads:

> Nothing in this Act and no grant to be made hereunder shall be construed to interfere with free miners entering upon and searching for minerals and acquiring claims in accordance with the mining laws of the province.

The railway line was completed and the company applied for a grant of the subsidy lands.

By a report dated August 17, 1899, made by the Minister of Finance to the Lieutenant-Governor in Council, it was recommended that a block of land be laid out and Crown grants be issued, subject *inter alia* to the proviso above quoted. The Crown grants were made upon the authority of an Order in Council of the same date.

As originally drafted, the contention of the petitioner was that upon the true construction of the original grants the rights to the petroleum and natural gas in the lands were conveyed to the railway company. The amendment made at the trial some 59 years after the grants were issued and accepted by the grantee asking for rectification as above mentioned did not specify the basis for the claim as is

usual in asking for relief of this nature. No contract between the Crown and the railway company was pleaded though this question was argued at the trial and dealt with in the judgment of the learned trial judge.

It was contended by the petitioner at the trial that the words "minerals, precious or base (other than coal)" in the grant should be construed as that word was defined in the *Mineral Act* of 1896. That this was the proper construction was supported, it was said, by the reservation of the rights of free miners under the mining laws of the province, by the *Railway Aid Act* as amended, rights which it is contended were restricted to searching for minerals of a metallic nature.

The *Mineral Act* of 1896, by s. 2 under a sub-heading "Interpretation", reads in part:

> In the construction of this Act, the following expressions shall have the following meanings respectively, unless inconsistent with the context:—
>
> "Mineral" shall mean all valuable deposits of gold, silver, platinum, iridium, or any of the platinum group of metals, mercury, lead, copper, iron, tin, zinc, nickel, aluminum, antimony, arsenic, barium, bismuth, boron, bromine, cadmium, chromium, cobalt, iodine, magnesium, manganese, molybdenum, phosphorus, plumbago, potassium, sodium, strontium, sulphur (or any combination of the aforementioned elements with themselves or with any other elements), asbestos, emery, mica, and mineral pigments.

In *Lord Provost and Magistrates of Glasgow v. Farie*[1], where the question was as to whether the word "minerals" in the context "mines of coal, ironstone, slate or other minerals" in *The Waterworks Clauses Act, 1847,* included common clay forming the surface or subsoil of the land, Halsbury L.C. said that the question to be decided was a question of fact as to "what these words meant in the vernacular of the mining world, the commercial world, and land owners" at the time they were used in the conveyance. This statement of the law was adopted by the Judicial Committee in *Borys v. C.P.R. and Imperial Oil Ltd.*[2]

The appellant called three witnesses in an attempt to establish that, applying this test, the word "minerals" alone or with the words "precious or base" added did not in the

[1] (1888), 13 App. Cas. 657.
[2] [1953] A.C. 217 at 227, 1 All E.R. 451.

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vernacular include petroleum or natural gas in 1896 when the definition referred to appeared in the *Mineral Act* or when the grants were made or, indeed, at the present time.

Mr. R. M. Thompson, a professor in the Department of Geology in the University of British Columbia, was permitted to say that, in his opinion, neither petroleum or natural gass fell within the definition of minerals in the Act of 1896. He said that since these substances were not products of an inorganic nature they "cannot be thought of as minerals". The witness said further that the words "minerals, precious or base (other than coal)" in the reservation from the Crown did not in his opinion include petroleum or natural gas. To this he added that they would not bear this meaning to a scientist. In general mining parlance, he considered base minerals meant such metals as lead and zinc. Cross-examined, he said that petroleum and natural gas were hydrocarbons but that to a scientist they were not minerals because "they are not created by a process of inorganic activity".

Mr. L. G. N. Crouch, a mining engineer and professor of mining at the same university with considerable practical experience in Canada and elsewhere, considered that in 1896 "the definition of minerals in the *Mineral Act* of 1896 in common parlance" would not include petroleum or natural gas nor would they today. He also said that in his opinion the words of the grant "any minerals, precious or base (other than coal)" in common mining parlance in 1896 would not include them. His reason for this opinion was that among mining men minerals were thought of as solid materials and that to a mining engineer the words "precious or base" were applied only to metals in 1896 and at the present time. Cross-examined, he said that to a mining engineer natural gas and petroleum are not included in the expression "minerals" and believed that they had not been so in 1896. He said that he had been assisted in reaching this conclusion by reading reports of the Minister of Mines, journals of the period 1896 to 1900, and examining some of the provincial mining statutes.

Mr. W. H. Matthews, a professor of petroleum geology in the same university and a mining engineer, said that the origin of petroleum and natural gas was "plant and animal

material laid down in ancient seas" and that "from a scientific point of view" they were not minerals. He said he based this opinion on the fact that they were of organic origin and "the fact that they are of mixed composition not individual species"; minerals he considered were of inorganic origin and accordingly coal was not a mineral since it was of organic origin and of mixed composition meaning mixtures of materials rather than pure substances. He was asked and permitted to say that petroleum and natural gas did not fall within the definition of minerals in the Act of 1896 nor within the language of the exception from the grant. He said that petroleum is not "regarded scientifically as a mineral" and considered that this was also the case in 1896. In common parlance in the mining world in British Columbia he said "any minerals precious or base other than coal" would not include petroleum or natural gas. He was of opinion that minerals precious or base referred to metallic minerals which would not include petroleum.

These three witnesses were all born after 1899 and so had no personal knowledge as to the accepted meaning of these terms at the time of the enactment of the *Mineral Act, 1896,* nor at the date of the grants.

The Crown did not call any witnesses.

The learned trial judge, Whittaker J., was of the opinion that it had been established by the authorities that the word "mineral" when used in a legal document or act of Parliament included petroleum and natural gas unless the context or the circumstances indicated a contrary intention. He considered that "any" minerals in the words of the grant meant "all" minerals. The word "base" as applied to minerals he held meant all minerals other than those classed as precious. As to the evidence of the three witnesses, he considered that it was insufficient to prove the meaning of these terms in the vernacular in 1896, according to the test proposed by Lord Halsbury in the *Farie* case.

In the Court of Appeal the late Sidney Smith J.A. said that he was in substantial agreement with the reasons of the learned trial judge.

Davey J. A. agreed with Whittaker J. that the words of the grant "any minerals precious or base (other than coal)" included petroleum and natural gas and adopted his reasons for that conclusion. Referring to the evidence, he said that

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it was largely argumentative and did not touch the question of how conveyancers, land owners and commercial men would have understood the words. He did not consider the words "precious or base", in their context, words of limitation but that they applied to minerals generally, including substances of organic origin as well as metals. With these conclusions, I agree.

The learned Chief Justice of British Columbia reviewed the statutes which authorized the grants and was of the opinion that the railway company was entitled as of right under their provisions to a conveyance of the lands, less only precious metals or minerals and coal without the reservation of base minerals contained in the grants. He would in consequence have allowed the appeal.

The question as to whether petroleum and natural gas are mineral substances within the meaning of the term in various statutes has been considered in several cases to which the learned trial judge referred. In the more recent cases it would appear that the fact that they are mineral substances has been conceded.

In *Ontario Natural Gas Company v. Gosfield*[1], the question to be decided was whether natural gas was a mineral within the meaning of s. 565 of *The Municipal Act,* R.S.O. 1887, c. 184, which read, in part, "the corporation of any township or county wherever minerals are found may sell or lease . . . the right to take minerals, etc." Street J. held that it was. After referring to the meaning assigned to the word "mineral" in several dictionaries and among other authorities to the decision in *Lord Provost v. Farie,* he adopted the statement of Lord Macnaghten at p. 690 of the report of that case which was followed by the learned trial judge in the present matter.

The appeal from this judgment was dismissed[2]. Hagarty C.J.O. considered that it was impossible to hold that natural gas was not a mineral and that there was nothing in the section limiting its ordinary meaning. Osler J.A. agreed with Street J. saying that the word was to be given its widest signification. MacLennan J.A. agreed that natural gas was a mineral within the meaning of the statute and said that at the time the Act was passed (1887) gas was a well-known mineral substance.

[1] (1890), 19 O.R. 591.

[2] (1891), 18 O.A.R. 626.

In *Dome Oil Co. v. Alberta Drilling Co.*[1] the appellant contended that oil was not a mineral within the meaning of s. 63A of *The Companies Ordinance* of the North-West Territories which authorized the company "to dig for . . . minerals . . . whether belonging to the company or not". As to this, Anglin J. said, in part (p. 582) "rock oil is admittedly a mineral within definitions of that word well established and generally accepted. It was something well-known as a mineral when the legislation under consideration was passed". That was 1901. He continued "the word 'minerals' in a statute bears its widest signification unless the context or the nature of the case requires it to be given a restricted meaning". Brodeur J. said, in part (p. 586), "rock oil in its popular and scientific meaning is a mineral substance. Mineral bodies occur in three physical conditions, solid, liquid and gas, and although the term 'mineral' is more frequently applied to substances containing metals, rock oil and petroleum are embraced in that term" and referred to *Ontario Natural Gas v. Gosfield.* The dissenting judgments of Idington and Duff JJ. were upon another issue in the case.

In *Creighton v. United Oils Ltd.*[2], Walsh J. said, in part, "it is admitted and it is established as a scientific fact that petroleum and natural gas are minerals within the ordinary meaning of that word and were so regarded long before this legislation (the *Dominion Lands Act,* R.S.C. 1886, c. 54) was passed."

In *Stuart v. Calgary & Edmonton Ry. Co.*[3], Hyndman J.A. stated that it was well settled that gas and oil are minerals in a judgment concurred in by all of the members of the Appellate Division.

In *Knight Sugar Co. v. Alberta Railway Co.*[4], where the reservation in the transfer was of "all coal and other minerals" it was admitted that petroleum and natural gas were minerals (p. 269).

In the case of *District Registrar v. Canadian Superior Oil of California Ltd.*[5], it was apparently taken for granted that such substances were minerals within the meaning of s. 21

[1] (1916), 52 S.C.R. 561, 28 D.L.R. 93.
[2] [1927] 2 W.W.R. 458.
[3] [1927] 3 W.W.R. 678, 23 Alta. L.R. 205.
[4] [1938] 1 All E.R. 266.
[5] [1954] S.C.R. 321, 3 D.L.R. 705.

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of the Manitoba *Provincial Lands Act, 1887,* where the reservation was of "gold or silver mines or any other mineral". The only mention of this aspect of the matter was in the judgment of our late brother Estey who said that petroleum and natural gas were admittedly base minerals. The contrary of this was not apparently considered to be fairly arguable.

The grants in question were made in the year 1899. It is not alleged in the pleadings and I find nothing in the evidence to indicate that these words at that time bore any other meaning than they did at the time of the trial.

The word "petroleum" is derived from the Latin—"petra", rock, and "oleum", oil. Dictionaries in use at the time the grants were made and at the time of the trial may be referred to in determining the commonly accepted meaning of the term. Murray's New English Dictionary, publication of which commenced in 1893, defines "petroleum" as a mineral oil occurring in rocks or on the surface of the water in various parts of the globe. The current New Oxford Dictionary defines "mineral oil" as a general name for petroleum and the various oils distilled from it. Webster's New International Dictionary describes "mineral oil" as any oil of mineral origin such as petroleum. In Soule's Dictionary of Synonyms, petroleum, rock oil, and mineral oil are said to be synonyms.

That the word "minerals" was considered by the legislature to include petroleum in the year 1892 is shown by s. 2 of the *Coal Mines Amendment Act,* c. 31, of that year to which the learned trial judge has referred. This Act apparently contained the first reference to petroleum by name in the statutes and authorized the issue of prospecting licences for coal or petroleum. So far as relevant the section reads:

> Any person desirous of prospecting for coal or petroleum, and acquiring a lease of any lands held by the Crown for the benefit of the province, under which coal measures or petroleum are believed to exist, or wishing to procure a licence for the purpose of prospecting for coal or petroleum upon lands under lease from the Crown in which the mines and minerals, and power to work, carry away, and dispose of the same, is excepted or reserved . . . .

The reservation of minerals was thus assumed to reserve petroleum.

The word "minerals" standing alone in the grant should, in my opinion, be construed as meaning mineral substances and, as these authorities and references indicate, petroleum and natural gas were prior to and at the time the grants were made and now are regarded as such.

The witnesses called by the appellant appear to treat the word "mineral" as being synonymous with "metallic" even without the added words "precious or base". This position is, in my opinion, untenable. All metals are minerals but all minerals are not metals. In *Barnard-Argue-Roth-Stearns Oil and Gas Co. Ltd. v. Farquharson*[1], Lord Atkinson, delivering the judgment of the Judicial Committee, said, in part (p. 869), "in one sense natural gas is as rock oil is, a mineral, in that it is not an animal or a vegetable product and all substances found on, in, or under the earth must be in one or the other of these categories of animal, vegetable or mineral substances". If natural gas is not a mineral substance, how is it to be classified? I find no answer to that question in the oral evidence in this case.

The appellant contends, however, that the words "precious or base (other than coal)" which followed the word "minerals" in the grants limit the meaning to metallic substances.

These words appeared in the *Mineral Acts* of 1884 and 1891 in the following context:

> Minerals shall include all minerals precious or base (other than coal) found in veins, lodes or rock in place and whether such minerals are found separately or in combination with each other."

They were omitted from the definition of the term in the Act of 1896 above quoted for obvious reasons.

Apart from the fact that the words following the word "coal" in the above quoted definition do not appear in the grants, the interpretation clauses of each of these statutes are limited in their application to the construction of the Act in which the expressions appear. If it be permissible to refer to similar language in the earlier mining statutes as an aid to interpretation, it may be noted that the term "all the baser metals and minerals" first appeared in the mining ordinance of the Colony of British Columbia in 1869. In the

[1] [1912] A.C. 864.

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Mineral Act of 1884 this expression was replaced by the words "all minerals precious or base". Standing alone the expressions, so far as the latter relates to base minerals, seem to be synonymous. That "all the baser metals and minerals" included both metallic and non-metallic substances is perfectly clear.

It is, however, contended that the terms of s. 3 of the *British Columbia Southern Railway Aid Amendment Act, 1896,* hereinbefore quoted, indicate that it was the intention of the legislature that only such rights as free miners might acquire under the *Mineral Act, 1896* should be reserved to the Crown. Those rights were restricted to minerals as defined in that Act. Accordingly, it is argued that the words of the grant should be so construed.

In the interest of accuracy it should be pointed out that the grants were not made under the authority given to the Lieutenant-Governor in Council by the Act of 1896 but by the *Railway Aid Act* of 1890. Section 3 reads: "Nothing in this Act and no grant to be made *hereunder.*" The *Amendment Act* of 1896 did not purport to repeal s. 18 of the *Railway Aid Act* and in strictness it is the terms of that section which are applicable. In view, however, of the course of the argument, I have considered the question on the basis that s. 3 applied, as was done at the trial.

I am unable to agree that the section, if applicable to these grants, should be so construed. It should be pointed out that it is inaccurate to say that the rights of free miners at the time of the grant were limited to searching for minerals as defined by the *Mineral Act, 1896.* Before the grants were made, by an *Act to Extend the Rights of the Crown to Prospect for Minerals on Railway Lands to all Free Miners* passed on February 27, 1899 (c. 58), it was declared that every free miner within the meaning of the *Mineral Act* should be entitled to exercise on his own behalf all the rights of the Crown to prospect for minerals over all lands in British Columbia, whether owned by railway companies or otherwise. This applied to the lands in question granted later that year to the railway company and the definition in the *Mineral Act* did not apply to the word "minerals".

While I consider that the definition in the statute has no application to the words of the grant, if I were of a contrary opinion I would have difficulty in accepting the evidence of the witnesses so far as it was admissible that petroleum and natural gas were not within its terms. While the great majority of the materials mentioned are metallic, the list includes sulphur, phosphorus, boron, bromine and iodine, all of which are described in the New Oxford Dictionary as non-metallic elements. That portion of the definition reading "or any combination with the aforementioned elements and themselves or with any other elements" was not discussed in the evidence. To deal with one alone of these last mentioned substances, it is a matter of common knowledge in Western Canada that sulphur in considerable quantities is found in some petroleums and that there is a large industry in Alberta today devoted to extracting sulphur from the natural gas found in various parts of that province. This would appear to bring the substance within the definition. The matter was not explored in the cross-examination, no doubt for the reason that it was rightly considered that the definition had no application to the words of the grant.

The fact that the rights of free miners were preserved, assuming s. 3 applied, did not in the opinion of the learned trial judge prevent the Lieutenant-Governor in Council from reserving the rights of the Crown and those claiming under the Crown to minerals, precious or base, if that were considered to be in the public interest. It was his opinion that there was no legal obligation upon the Crown or upon the Lieutenant-Governor in Council to make the grants, the statute merely conferring a discretionary power upon the Lieutenant-Governor in Council. With these conclusions the majority of the members of the Court of Appeal expressed their agreement.

It was upon this last mentioned aspect of the case that the learned Chief Justice differed from the trial judge and the other members of the Court. It was his opinion that upon the true construction of the various statutes the railway company had become entitled to a conveyance of the lands subject only to the rights of the Crown to precious metals and to those of free miners. That being so, and the

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words of the grant being, in his opinion, ambiguous, he considered that they should be so construed as conveying the fee simple with those exceptions only.

The opinion that this conclusion might be invoked as an aid in construing the language of the grants proceeds upon the basis that the words "minerals precious or base" are ambiguous. With the greatest respect, I disagree. For the reasons I have stated I consider that the words mean all mineral substances other than coal and in their context are free from ambiguity.

The conclusion that there was a duty resting upon the Crown or upon the Lieutenant-Governor in Council to convey the lands subject only to these exceptions might in certain circumstances justify a claim by the grantee to reform the grants. That aspect of the claim made by the amendment to the petition of right was not argued before us and is not mentioned in the judgments at the trial or in the Court of Appeal. It was not, however, abandoned.

The amendment which asked for the reformation of the grant appeared in para. 18 of the petition, and reads:

> In the alternative an order rectifying the reservation in respect to minerals contained in the third proviso of the Crown grants of Lots 4588 and 4589 by striking out the words "any minerals precious or base other than coal" and substituting therefor the words "any minerals as defined in the Mineral Act 1896 cap. 34, Statutes of B.C. 1896."

As I have stated, no facts are pleaded such as mutual mistake as the basis for this claim. The evidence contains no suggestion that the grants issued in 1899 were not accepted without question by the railway company. It is also of significance that, as pointed out by Davey J.A., on April 15, 1891, the president of the railway company wrote to the Premier saying that the company expected to commence work on the line in the near future and that it was anxious to prospect for coal and coal oil by boring on a block of 400,000 acres which the Crown might grant to the company under the *Railway Aid Act* and requested that a Minute of Council be passed designating the areas to be thereafter granted. Such a Minute was passed. The parties having expressly directed their attention to petroleum as well as to coal, Davey J.A. considered that the exclusion of coal alone

in the grants indicated clearly that it was not the intention of the parties that the company should also get the petroleum.

There is this further to be added. So far as the record shows, no question was ever raised by the grantee that the title conveyed by the grants was not that to which it was entitled or by its successor in title, the present appellant, until 1958. During this period of 59 years it is admitted that the appellants have acted upon the grants and sold portions of the lands subject to the exceptions contained in them.

If there was such a duty resting upon the Crown or the Lieutenant-Governor in Council, as is suggested, the right of action for the reformation of the grants would presumably be against the Crown either on a contract to be implied from the fact that upon the faith of the promised grants the railway was built or upon the footing that there was a statutory duty to convey the lands subject only to these exceptions.

No such contract is pleaded and the decision of the Judicial Committee in *Attorney-General for British Columbia v. Esquimalt and Nanaimo Railway Company*[1], would apparently bar such a claim if made. Whether the cause of action be one or the other it would vest in the British Columbia Southern Railway Company and that company would be a necessary party to the proceedings since there is no allegation that any such right of action was transferred by that company to the appellant.

It is unnecessary in the construction of these grants to consider the question argued before us that in case of ambiguity they should be construed most strictly against the Crown since it is said that there was valuable consideration for the making of the grant. I consider that there is no ambiguity.

I also refrain from expressing any opinion upon the question as to the application of the various Land Acts of the province upon which the respondent relies since I consider it unnecessary for the disposition of the appeal.

[1] [1950] A.C. 87.

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I would dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitors for the suppliant, appellant: Farris, Stultz, Bull & Farris, Vancouver.

Solicitors for the respondent, Attorney-General of British Columbia: Lawrence, Shaw, McFarlane & Stewart, Vancouver.

Solicitor for the respondent, The California Standard Company: D. A. Lawson, Vancouver.

Solicitor for the respondents, Canadian Gulf Oil Company and The British American Oil Company Limited: J. D. Forin, Vancouver.

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*May 25
Oct. 3

UNION INSURANCE SOCIETY OF CANTON LIMITED (*Defendant in Warranty*) ..... APPELLANT;

AND

ANDRE ARSENAULT (*Plaintiff in Warranty*) ..... RESPONDENT.

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

Insurance—Automobile—Collision with rear of preceding vehicle—Negligence—Refusal of insurer to defend—Alleged breach of condition of policy—Impaired driving—Extra-judicial admission of offence—Whether incapable of controlling vehicle—Evidence—Credibility—Action in warranty—Criminal Code, 1953-54 (Can.), c. 51, s. 223.

When the plaintiff was involved in an automobile accident, his insurance company refused to defend the action on the ground that he had violated a condition of the policy by driving while his ability to control the vehicle was impaired by alcohol. The evidence as to this was contradictory, but he was charged with having driven an automobile while his faculties were impaired by alcohol, contrary to s. 223 of the *Criminal Code*, and he pleaded guilty to this charge. He explained the plea on the ground that his brother and a police officer had advised him to do so and that he had not been represented by a lawyer. The action for damages against him was allowed and he brought an action

*PRESENT: Taschereau, Fauteux, Abbott, Martland and Ritchie JJ.

in warranty against the insurer. This action was dismissed by the trial judge, but maintained by a majority judgment in the Court of Appeal.

Held (Abbott and Ritchie JJ. dissenting): The appeal should be allowed and the action dismissed.

Per Taschereau, Fauteux and Martland JJ.: The decision of the trial judge regarding the condition of the plaintiff at the time of the accident was a finding of fact and there was evidence on which such a finding could be made. His judgment, therefore, should not have been reversed on appeal. While it may be that impairment of the ability to drive as a result of the consumption of alcohol does not necessarily mean that a driver is incapable of the proper control of his vehicle, none the less an admission of impairment is at least some evidence of such incapacity. There were other additional circumstances which, in the opinion of the trial judge, were sufficient to establish a breach of the condition: there were the quantity of liquor admittedly consumed, the conclusions reached by the police following the accident, and the circumstances of the accident itself.

Per Abbott and Ritchie JJ., dissenting: By raising the defence of a breach of the policy, the insurer had assumed the burden of proving affirmatively that the condition had been violated. The insurer has failed to discharge this burden of proving by a preponderance of evidence that the condition had been violated.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], reversing a judgment of Tellier J. Appeal allowed, Abbott and Ritchie JJ. dissenting.

L. P. de Grandpré, Q.C., for the defendant, appellant.

François Mercier, Q.C., for the plaintiff, respondent.

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

MARTLAND J.:—The matter in issue in this appeal is as to the liability of the appellant to the respondent under the provisions of an automobile insurance policy, issued by the appellant, which insured the respondent's 1956 Meteor Coach for the period from March 5, 1956, to March 5, 1957. The respondent was involved in an accident on April 28, 1956, shortly after 3 p.m., when the insured vehicle collided with another vehicle on Highway 11, a few miles south of St. Jerome. As a result of the accident the respondent was sued by and held responsible to one André Lanoue for damages in the amount of $9,370.21. The respondent's liability to Lanoue is not in issue. The issue is as to whether

[1] [1961] Que. Q.B. 59.

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the respondent had been in breach of Condition no. 5 of the policy so as to justify the appellant's refusal to pay under the policy.

Condition no. 5 provides as follows:

> 5. L'assureur n'encourra aucune responsabilité en vertu de la police:
> 1) si l'assuré se sert de ou conduit l'automobile:
> a) lorsqu'il est sous l'influence de boissons enivrantes ou de drogues au point d'être, pour le moment, incapable de manœuvrer convenablement l'automobile; . . . .

The learned trial judge held that the respondent had been in breach of that condition. The Court of Queen's Bench[1], by a majority of three to two, reversed the trial judgment.

The facts, as found by the learned trial judge, are briefly as follows: The respondent admitted having consumed, prior to the accident, at least two glasses of beer and two glasses of rye whisky of two and one-half to three ounces each. The second of these glasses of whisky had been consumed by the respondent shortly before he commenced to drive his car.

The respondent's car collided with the rear end of Lanoue's vehicle, which was proceeding in the same direction, at a speed of 30 to 40 miles an hour, along a straight, paved highway. The weather was clear and the visibility was good. At the place where the collision occurred the highway consisted of three lanes and the centre passing lane was not occupied at the time. The impact was such that Lanoue's vehicle was practically demolished and was thrown into a field. The respondent's stopping distance was some 300 feet.

Following the accident two police constables arrived. The respondent was arrested and charged with having driven an automobile while his faculties were impaired by alcohol, contrary to s. 223 of the *Criminal Code*. Subsequently the respondent pleaded guilty to this charge.

For the respondent it was contended that the consumption of liquor had been over a period of time overall extending from 10 a.m. to 3 p.m. and that during that time the respondent had consumed a steak dinner.

Two witnesses gave evidence to the effect that after the accident the respondent appeared to them to be normal.

[1] [1961] Que. Q.B. 59.

It was pointed out that the evidence given by the police constables was not very satisfactory, one of them in particular not having a memory of the details of the occasion and relying entirely upon the report which had been made of the accident.

The plea of guilty to the charge, under s. 223 of the *Criminal Code,* was explained on the ground that the respondent's brother and a police officer had advised him to do so and that he had not been represented by a lawyer.

In my view the decision made by the learned trial judge regarding the condition of the respondent at the time of the accident was a finding of fact, made after hearing the evidence of the witnesses, and there was evidence on which he could make such a finding. This being so, I do not think that his judgment should be reversed on appeal. *Prudential Trust Company Limited v. Forseth*[1].

He pointed out that the proof of the actual quantity of liquor consumed by the respondent was difficult to make, but he clearly had doubts as to the truth of the story told by the respondent; i.e., as to whether the amounts admitted represented the quantity which had actually been consumed.

He preferred the evidence of the police constables to that of the other witnesses regarding the condition of the respondent after the accident.

He also felt that the circumstances of the accident itself, involving as they did a manœuvre by the respondent which was otherwise inexplicable, constituted evidence that the respondent was under the influence of liquor to an extent which rendered him incapable of the proper control of his vehicle.

The learned trial judge did place some reliance upon the plea of guilty made by the respondent to the charge, under s. 223 of the *Criminal Code.* He pointed out that this plea, while not binding the Court in the present case, constituted an admission of certain facts, which required consideration.

The relevant portion of s. 223 reads as follows:

> 223. Every one who, while his ability to drive a motor vehicle is impaired by alcohol or a drug, drives a motor vehicle or has the care or control of a motor vehicle, whether it is in motion or not, is guilty of an indictable offence or an offence punishable on summary conviction . . . .

[1] [1960] S.C.R. 210, 30 W.W.R. 241, 21 D.L.R. (2d) 587.

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The learned trial judge referred to the similarity between the words describing this offence and the wording of Condition no. 5 of the policy and said that impairment by alcohol of the ability to drive is virtually synonymous with incapability of proper control of the vehicle while under the influence of intoxicating liquor.

While it may be that impairment of ability to drive as a result of the consumption of alcohol does not necessarily mean, in all cases, that a driver is incapable of the proper control of his vehicle, none the less an admission of impairment of ability is at least some evidence of such incapacity. The circumstances in which the admission was made, in this case, affect only the weight to be attached to it. The learned trial judge did not rely solely upon the admission in reaching his conclusion. There were other additional circumstances which, even apart from the admission, were, in his opinion, sufficient to establish a breach of Condition no. 5. Those may be summarized as follows:

1. The quantity of liquor admittedly consumed by the respondent, coupled with the doubt, after hearing the evidence of the respondent and his brother, that they had told the whole truth on this subject.
2. The conclusions reached by the police, after seeing the respondent's condition following the accident, which led to his immediate arrest.
3. The circumstances of the accident itself.

In view of this evidence I do not think that the finding of fact made by the learned trial judge, that the respondent was incapable of the proper management of his vehicle as a result of alcohol, ought properly to have been disturbed on appeal.

In my opinion the appeal should be allowed, the trial judgment restored and the appellant should be entitled to its costs throughout.

The judgment of Abbott and Ritchie JJ. was delivered by

RITCHIE J. (*dissenting*):—This is an appeal from a judgment of the majority of the Court of Queen's Bench of the Province of Quebec[1] allowing an appeal from a judgment of Tellier J. of the Superior Court of the District of Terrebonne whereby he dismissed the respondent's action in warranty

[1] [1961] Que. Q.B. 59.

arising out of the appellant's refusal to defend an action brought against the respondent for damages sustained by one André Lanoue when his Pontiac car was struck in the rear by a Meteor owned and operated by the respondent and insured by the appellant.

The appellant denied liability on the ground that the respondent was in breach of Condition no. 5 of the conditions which form a part of the insurance policy in question. This condition reads as follows:

> 5. L'assureur n'encourra aucune responsabilité en vertu de la police: Quant à l'assuré—1. Si l'assuré se sert de ou conduit l'automobile (a) Lorsqu'il est sous l'influence de boissons enivrantes ou de drogues au point d'être, pour le moment, incapable de manœuvrer convenablement l'automobile;

The equivalent of this provision is to be found in the following statutory condition which is in force in the common law provinces of Canada:

> The insurer shall not drive or operate the automobile whilst under the influence of intoxicating liquor or drugs to such an extent as to be for the time being incapable of the proper control of the automobile.

By raising this defence the appellant assumed the burden of proving that at the time of the accident the respondent was under the influence of intoxicating liquor or drugs "au point d'être, pour le moment, *incapable de manœuvrer convenablement l'automobile*". (The italics are mine.)

The evidence given by the respondent and his brother as to the amount of liquor consumed by the respondent did not impress the trial judge who said:

> Evidemment la preuve contraire de la quantité d'alcool réellement consommée était difficile à rencontrer, mais les témoignages des deux frères Arsenault démontrent des contradictions, des hésitations qui laissent planer certains doutes à ce sujet;

As the learned trial judge had the opportunity of seeing and hearing the witnesses, his finding in this regard cannot, in my opinion, be safely disturbed, and the evidence of the two witnesses who testified in the respondent's favour as to his sobriety after the accident was far from impressive so that if the respondent had had the burden of proving that he was not under the influence of intoxicating liquor to the point of being incapable of properly operating his automobile he could not be said to have discharged it.

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It was, however, for the appellant to prove affirmatively that Condition no. 5 had been violated and, apart from the unsatisfactory evidence of drinking given by the Arsenault brothers themselves, the evidence of the respondent's condition at the time of the accident is limited to the circumstances of the accident itself, the fact that the respondent had pleaded guilty to driving while his ability to drive was impaired by alcohol and the evidence of the police officers Tassé and Calvé.

In direct examination Tassé says of the respondent: "Il n'était pas dans un état de conduire une automobile." It is quite apparent, however, from his cross-examination that he remembered nothing of the incident and was basing his evidence entirely on a report which he had made at the time. The following excerpt from his evidence is significant:

> Q. Comment marchait-il?
>
> R. Je ne peux pas dire, je ne m'en souviens pas du tout. Je me base sur le rapport, je ne me souviens pas ce qui a été fait dans le temps.
>
> Q. Vous n'êtes pas en état de vous souvenir ce qui est arrivé?
>
> R. Du tout.

Officer Calvé's description of the respondent is: ". . . je me suis aperçu que monsieur, malheureusement, avait les facultés affaiblies par l'alcool". It is noteworthy that Officer Calvé used the phrase "affaiblies par l'alcool" to describe the condition of the respondent, thus employing the language of the *Criminal Code* (s. 223) in respect of which the respondent had pleaded guilty. Section 223 reads as follows:

> 223. Quiconque, à un moment où sa capacité de conduire un véhicule à moteur est affaiblie par l'effet de l'alcool ou d'une drogue, conduit un véhicule à moteur ou en a la garde ou le contrôle, que ce véhicule soit en mouvement ou non, est coupable d'un acte criminel ou d'une infraction punissable sur déclaration sommaire de culpabilité . . . .

It is particularly significant in this connection to note that the learned trial judge treated the offence described in this section and to which the respondent pleaded guilty as being synonymous with the conduct described in Condition no. 5 of the policy. In this regard he says:

> Le demandeur n'a pas contesté la dénonciation portée contre lui, il a plaidé coupable à l'accusation. Il a reconnu que le 28 avril 1956, il avait conduit une automobile alors que sa capacité de conduire était affectée par l'alcool. Ce sont presque les mêmes termes que nous rencontrons dans

l'exception prévue par la condition n° 5 de la police. La capacité de conduire une automobile alors que cette capacité est affectée par l'alcool est pour ainsi dire synonyme à l'incapacité de conduire convenablement une automobile alors que l'on est sous l'influence de boissons enivrantes.

These observations make it apparent that the learned trial judge proceeded on the assumption that the condition of being "incapable de manœuvrer convenablement l'automobile" was the same thing as having the ability to drive a motor vehicle "affaiblie par l'effet de l'alcool" and in my view this misconception of the nature and effect of the fifth condition of the policy governed his whole approach to the question before him.

Section 223 of the *Criminal Code* is designed for the protection of the public, whereas the fifth condition of the policy is definitive of circumstances which relieve the insurer from liability. The word "impaired" or "affaiblie" as used in s. 223 must be construed in contradistinction to the provisions of s. 222 of the *Criminal Code* which provide that:

> Every one who, while intoxicated or under the influence of a narcotic drug, drives a motor vehicle or has the care or control of a motor vehicle, whether it is in motion or not, is guilty of an indictable offence . . . .

The phrase describing a driver as having "sa capacité de conduire un véhicule à moteur . . . affaiblie par l'effet de l'alcool" or "his ability to drive a motor vehicle . . . impaired by alcohol" connotes to me a condition in which the driver is a potential danger to the other users of the highway because he is more likely to drive his motor vehicle improperly than he would be if he had not consumed so much alcool. In my view there is a wide difference between being likely to drive improperly and being *incapable* of driving properly. Every driver who is under the influence of liquor to the point of being *incapable* of proper control is certainly impaired, but in my opinion it does not follow that every impaired driver is necessarily *incapable* of proper control. The danger to the public which is involved in driving an automobile while the ability to drive is impaired is recognized by the language of s. 223 of the *Criminal Code,* but the terms of Condition no. 5 do not serve to relieve an insurer from liability unless and until it has been proved by a preponderance of evidence that the insured was under the influence of intoxicating liquor to the point of being incapable of the proper control of the automobile.

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I agree with the majority of the Court of Queen's Bench that the respondent's plea of guilty was an extra-judicial admission which was satisfactorily explained by his evidence to the effect that he had been persuaded to make such a plea by his brother and a police officer and that he had no legal advice, but in any event, as I have indicated, it is my view that the admission that he was "affaibli" within the meaning of s. 223 was not an admission that he was "incapable" and had, therefore, violated Condition no. 5 of the policy.

In conformity with the above, I am of opinion that the evidence of the Arsenault brothers is of no assistance in determining the respondent's condition at the time of the accident, that the evidence of the police officers does not establish that the respondent was incapable of properly operating his automobile, and that even if the respondent's plea of guilty had not been satisfactorily explained it could not amount to anything more than an admission that the respondent was "affaibli" at the time of the accident and would, therefore, not serve to relieve the appellant from liability.

It is true that the circumstances of the accident itself were consistent with the respondent being under the influence of intoxicating liquor so as to be, for the time being, incapable of properly operating his automobile, but they were equally consistent with negligence for which indemnity is provided in the insurance policy.

Condition no. 5 of the policy is not designed to relieve the insurer of liability by reason of the manner in which the automobile is operated, but is exclusively concerned with the question of whether or not the insured was driving whilst under the influence of intoxicating liquor or drugs to a point when he was incapable of properly operating his automobile. It is the condition of the insured and not the nature of the accident which relieves the insurer from liability, and although the nature of the accident may be a circumstance to be taken into consideration in determining the condition of the insured it does not of itself constitute proof that the policy condition has been violated.

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Ritchie J.

Like the majority of the Court of Queen's Bench, it is not without much hesitation that I have concluded that the learned trial judge was in error, but the advantage which he had of seeing and hearing the witnesses was, in my opinion, counterbalanced by the fact that he treated Condition no. 5 of the policy as relieving the insurer from liability in cases where the insured's ability to drive is impaired by alcohol instead of limiting its application to cases where it can be proved that the insured was incapable of properly operating his automobile.

In my view the appellant has failed to discharge the burden which it assumed by its pleading of proving by a preponderance of evidence that the respondent violated Condition no. 5 of the policy.

I would dismiss this appeal with costs.

Appeal allowed with costs, ABBOTT *and* RITCHIE JJ. *dissenting.*

Attorneys for the defendant, appellant: Tansey, de Grandpré, de Grandpré, Bergeron & Monet, Montreal.

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

THE ATTORNEY GENERAL OF CANADA (*Defendant*) ..... APPELLANT;

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*May 29, 30 Oct. 3

AND

THE READER'S DIGEST ASSOCIATION (CANADA) LTD., SELECTION DU READER'S DIGEST (CANADA) LTEE. (*Plaintiff*) ... RESPONDENT.

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

Taxation—Excise tax—Tax on special editions of non-Canadian periodicals—Validity—Admissibility of extrinsic evidence—Interlocutory decisions—Excise Tax Act, R.S.C. 1952, c. 100, as amended by 1956 (Can.), c. 37, s. 3 [repealed in 1958].

*PRESENT: Kerwin C.J. and Taschereau, Locke, Cartwright, Fauteux, Abbott, Martland, Judson and Ritchie JJ.

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ATTY. GEN. OF CANADA v. READER'S DIGEST ASSOC. (CANADA) LTD., SÉLECTION DU READER'S DIGEST (CANADA) LTÉE.

In an action attacking the constitutionality of a 1956 amendment to the *Excise Tax Act*, (1956 (Can.), c. 37, s. 3), imposing a tax on special editions of non-Canadian periodicals, it was alleged by the plaintiff that the true object or intent of the legislation was to benefit one segment of the Canadian publishing industry at the expense of another segment of the same industry, and that in pith and substance the legislation was in relation to property and civil rights reserved exclusively to provincial jurisdiction. At the trial, the plaintiff attempted to prove these allegations by introducing evidence by reference to the budget speech made by the Minister of Finance in the House of Commons. He submitted twenty-four questions to be asked the Minister and others. The Crown objected to such evidence and the trial judge sustained the objections. The Court of Queen's Bench, in a majority judgment, ruled that the evidence was admissible. The Crown obtained leave from this Court to appeal.

Held: The extrinsic evidence sought to be introduced by the plaintiff was inadmissible.

Dictum of Locke J. in *Texada Mines v. Attorney General of British Columbia*, [1960] S.C.R. 713 at 720, referring to certain statements purporting to have been made by the Premier of British Columbia and the Minister of Mines that had the evidence been tendered it would have been rejected as inadmissible declared to be a correct statement of the law.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], reversing interlocutory decisions of Scott C.J. Appeal allowed.

François Mercier, Q.C., for the defendant, appellant.

J. L. O'Brien, Q.C., E. E. Saunders and *C. K. Irving*, for the plaintiff, respondent.

The judgment of Kerwin C.J. and of Taschereau, Abbott and Judson JJ. was delivered by

THE CHIEF JUSTICE:—By leave of this Court the Attorney General of Canada appeals from a judgment of the Court of Queen's Bench (Appeal Side) for the Province of Quebec[1], maintaining an appeal from twenty-four interlocutory judgments rendered during the trial of this action by the Honourable W. B. Scott, at that time Associate Chief Justice of the Superior Court. The plaintiff-respondent, Reader's Digest Association (Canada) Ltd., Sélection du Reader's Digest (Canada) Ltée, having its head office and principal place of business in Montreal, asks for a declaration that Part II of the *Excise Tax Act*, comprising ss. 8, 9, 10 and 11, as enacted by s. 3 of c. 37 of the Statutes of

[1] [1961] Que. Q.B. 118, [1961] C.T.C. 343, 61 D.T.C. 1189.

Canada, 1956, and the Regulations made pursuant thereto, are *ultra vires*. For the purposes of this appeal it is sufficient to state that in substance the respondent alleges that the impugned legislation and regulations have the intent of benefiting one part of the publishing industry at the expense of another and that the legislation and regulations in pith and substance are in relation to property and civil rights in the Province of Quebec and that therefore they are outside of the legislative competence of the Parliament of Canada.

In para. 15 of its declaration the respondent sets out what is alleged to be a speech made in the House of Commons by the then Minister of Finance, the Honourable Walter E. Harris. At the hearing the respondent attempted to adduce evidence by Mr. Harris, the Honourable Donald Fleming (the present Minister of Finance), Mr. David Sim (Deputy Minister of National Revenue), Mr. Léon Raymond (Clerk of the House of Commons) and Mr. Alan Donnelly (a Press Gallery correspondent). The objections to this evidence by the appellant were allowed by the presiding judge. The relevant questions and the rulings made thereon are as follows:

1. Mr. Harris

"Mr. Harris, I don't suppose there is anything privileged in the fact that the Minister of Finance, when he makes his budget report and presents his budget report, is speaking for the Government?"

Judgment:—

"Objection maintained."

2. Mr. Harris

"Mr. Harris, as Minister of Finance, when you were Minister of Finance, in 1956, did you authorize the distribution to the Press, to Radio, and to Television, in advance of your budget address, the text of the address, to be given to the public?"

Judgment:—

"Objection maintained."

and later:—

"The objection to this question is maintained."

3. Mr. Harris

"Mr. Harris, did you, as Minister of Finance, make a statement as to the true purpose and intent of the legislation herein?"

Judgment (To the witness):—

"Don't answer that question. I ruled that question is illegal."

4. Mr. Harris

"Mr. Harris, did you give to representatives of the press, television and radio a statement of the government's purpose in promoting this legislation before Parliament?"

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Judgment:—

"(Objection) maintained."

5. Mr. Harris

"Did you state, Mr. Harris, that the purpose of the impugned legislation was to equalize competition between the two segments of the publishing industry?"

Judgment:—

"(Objection) maintained."

6. Mr. Harris

"Mr. Harris, when you spoke as Minister of Finance, is it necessary in advance to have your budget report and address approved by Cabinet?"

Judgment:—

"(Objection) maintained."

7. Mr. Harris

"Mr. Harris, when presenting this legislation, the impugned legislation to Parliament, did you speak on behalf of the then government?"

Judgment:—

"(Objection) maintained."

8. Mr. Harris

"Mr. Harris, did you find that after you had proposed this legislation to Parliament that your statement as to the purpose of the legislation was given wide publicity throughout the Dominion of Canada?"

Judgment:—

"(Objection) maintained."

9. Mr. Sim

"Mr. Sim, it was part of your duties as head of the Department of National Revenue to look to the administration of Part Two of the Excise Tax Act as enacted in 1956?"

Judgment:—

"Do not answer that."

Questioned by the Court:—

"Q. Are your duties laid down by an Act of Parliament as Deputy Minister? A. Yes, sir.

Q. By Statute? A. Yes, sir."

"By Me O'Brien:—

With respect, My Lord, I think that in the absence of an objection from my friends that the question should be allowed.

By the Court:—

The Court has some discretion.

By Me OBrien:—

I do not think so, My Lord, with respect.

By the Court:—

You can take an exception.

By Me OBrien:—

I so do, My Lord.

By the Court:—

I think that is the best evidence.

By Me OBrien:—

I think the best evidence would probably be an Order in Council.

By the Court:—

He is the Deputy Minister of National Revenue. I maintain my ruling as to that."

10. Mr. Donnelly

"Will you tell the Court what was done by the government in releasing to the press the statement of the Minister of Finance concerning his budget address and, more particularly, concerning the resolution he was introducing in respect of the legislation here impugned?"

Judgment:—

"Objection maintained."

11. Mr. Donnelly

"Did you actually see the text of the budget address outside the limits of the House of Commons before it was delivered on March 20th, 1956?"

Judgment:—

"(Objection) maintained."

12. Mr. Donnelly

"Now, will you state to the Court to how many newspapers in Canada you forwarded the text of the budget address?"

Judgment:—

"(Objection) maintained."

13. Mr. Donnelly

"Will you state, Mr. Donnelly, whether you have read in newspapers in Canada a reproduction of the statement given by the Minister of Finance to the Press, television and radio outside of the limits of the House of Commons?"

Judgment:—

"(Objection) maintained."

14. Mr. Donnelly

"Mr. Donnelly, when despatches that are sent by Canadian Press are published in newspapers, do they usually have some indication in the first line of the despatch as to the source of the news?"

Judgment:—

"(Objection) maintained."

15. Mr. Donnelly

"I show you a copy, Mr. Donnelly, of the Montreal Gazette dated March 21st, 1956. It is the text of the Minister's statement given to the press."

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Judgment:—

"I am not going to allow that to be put in. That is disallowed. I am not going to allow it. I am not going to allow that newspaper to be put in, the Montreal Gazette of the 21st of March, 1956."

16. Mr. Donnelly

"Just to save the time of the Court I would call attention to the fact that I wish to ask this witness if the Globe and Mail of Toronto for March 21st, 1956, the Winnipeg Free Press for March 21st, 1956, 'La Presse' of Montreal for March 21st, 1956, the Halifax Chronicle Herald for March 21st, 1956, and the Vancouver Sun for March 21st, 1956, did not all contain despatches sent by Canadian Press in which there was a statement of the avowed purpose and intent of the government to promote the impugned legislation in this case, before Parliament."

Judgment:—

"(Objection) maintained."

17. Mr. Donnelly

"To how many papers did you forward your despatches of the budget address?"

Judgment:—

"(Objection) maintained."

18. Mr. Raymond

"As Clerk of the House of Commons subject to the jurisdiction of Parliament, of course, and of the Speaker, have you the custody of the records of the House of Commons?"

Judgment:—

"By the Court:—

What is the purpose of this question?

By Me O'Brien:—

I am going to introduce the Journal of the House of Commons for the 7th of August 1956 to show that on that date the resolution introduced by the government in respect of the impugned legislation was adopted; that the bill then presented to put into effect the legislation, was given first, second and third reading at the same session; was passed without amendment and without a recorded vote.

By the Court:—

Is this the appeal?

By Me O'Brien:—

No, My Lord, this was enacted legislation.

By the Court:—

How could that be relevant?

By Me O'Brien:—

I think . . . .

By the Court:—

The question is disallowed."

19. Mr. Raymond

"Mr. Raymond, there is an official report of the statements made in the House of Commons published each day, is there not?"

Judgment (after discussion):—

"Anyway there is no relevancy whatever to this and it does not need to be answered."

20. Mr. Raymond

"Mr. Raymond, will you produce for the Court the record of Hansard for March 20, 1956 and August 7th . . . ."

Judgment:—

"(Objection) maintained."

21. Mr. Fleming

"Now, Mr. Fleming, in connection with the annual financial report which the Minister of Finance makes to Parliament which is commonly called the Budget Address, would you state to the Court whether in advance of the presentation of that address to the House of Commons it is approved by Cabinet?"

Judgment:—

"(Objection) maintained. That could have no possible bearing on this case."

22. Mr. Fleming

"Now, Mr. Fleming, I understand that there is a procedure under which the secrecy of the budget address is maintained but in order to—let me say—make it more facile for the communication industries, the press, radio and television, the body of the representatives of those industries are segregated in a certain room and outside of the House of Commons. The content of the Budget Address is given to them but they are not allowed to disclose it until after it is delivered in Parliament? Is that correct?"

Judgment:—

"It has no bearing on the case, Mtre O'Brien. The question is disallowed."

23. Mr. Fleming

"Mr. Fleming, I am not going to ask you about any part you have played in the House of Commons in respect of this legislation but you were fully aware of the fact that it was being introduced and of the publicity given to it throughout Canada."

Judgment:—

"(Objection) maintained."

24. Mr. Fleming

"Mr. Fleming, who speaks on behalf of the government of Canada in respect of financial matters, the question of taxation, the public debt, etc.?"

Judgment:—

"Objection maintained."

It is conceded by counsel on behalf of the respondent that the majority, if not all, of the questions set out above would not ordinarily be proper but it is argued that the well known

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rule in that respect does not apply when the constitutional validity of a statute is in question in Canada. In *Home Oil Distributors Ltd. v. Attorney General of British Columbia*[1], I, with the concurrence of Rinfret J., as he then was, took into consideration a report of a commission under the circumstances there existing, but only for the purpose of showing what was present to the mind of Parliament. The same course had been adopted by the Privy Council in *Attorney General for British Columbia v. Attorney General for Canada*[2] and *Ladore v. Bennett*[3]. In the 1937 A.C. case the Committee said at p. 376:

> It probably would not be contended that the statement of the Minister in the order of reference that the section was enacted to give effect to the recommendations of the Royal Commission bound the Province or must necessarily be treated as conclusive by the Board. But when the suggestion is made that the legislation was not in truth criminal legislation, but was in substance merely an encroachment on the Provincial field, the existence of the Report appears to be a material circumstance.

Here the argument is that the legislation is not what it appears to be. In the 1939 A.C. case the Report of a commission was objected to in the Courts in Canada but before the Judicial Committee the objection was withdrawn and by consent the Report was placed before Their Lordships. As to this Report it was said at p. 477:

> Their Lordships do not cite this report as evidence of the facts there found, but as indicating the materials which the Government of the Province had before them before promoting in the Legislature the statute now impugned.

We are not concerned in this appeal with the Report of a commission and it is therefore unnecessary to pass upon the point. The dictum of Locke J., speaking for all the Members of this Court, in *Texada Mines v. Attorney General of British Columbia*[4], referring to certain statements purporting to have been made by the Premier of British Columbia and the Minister of Mines, that had the evidence been tendered it would have been rejected as inadmissible, should now be declared to be a correct statement of the law. This conclusion is sufficient to dispose of the matter.

[1] [1940] S.C.R. 444, 2 D.L.R. 609.
[2] [1937] A.C. 368, 1 W.W.R. 317, 1 D.L.R. 688, 67 C.C.C. 193.
[3] [1939] A.C. 468, 2 W.W.R. 566, 3 D.L.R. 1.
[4] [1960] S.C.R. 713 at 720, 32 W.W.R. 37, 24 D.L.R. (2d) 81.

The appeal should be allowed, the judgment of the Court of Queen's Bench (Appeal Side) set aside and the rulings of the Superior Court restored and the record returned to that Court. The respondent must pay the appellant his costs in this Court and in the Court of Queen's Bench.

The judgment of Locke and Cartwright JJ. was delivered by

CARTWRIGHT J.:—This is an appeal, brought pursuant to leave granted by this Court, from a judgment of the Court of Queen's Bench[1] allowing an appeal from a number of interlocutory decisions of Scott C.J. and returning the record to the Superior Court.

By section 3 of chapter 37 of the Statutes of Canada, 1956, 4-5 Elizabeth II, Parliament amended the *Excise Tax Act* by adding thereto Part II.

By the terms of this Part there was levied a tax of 20% on the value of advertising material contained in periodicals printed in or outside Canada for publication in Canada, if the periodical

(1) contained editorial material (which is defined as any printed material other than advertising) at least 25% of which was the same or substantially the same as editorial material contained in one or more copies of a particular non-Canadian periodical, whether in the same or in some other language; and

(2) contained any advertising material that was not contained in such non-Canadian periodical.

The effect of this Statute was to levy on the respondent a tax of 20% on the value of advertising material in its two publications which were printed and published in Canada, namely, "The Reader's Digest" and "Sélection du Reader's Digest". The tax, under the terms of the Statute, was to become applicable on January 1, 1957.

The respondent alleges that duly authorized representatives of the Government of Canada called upon respondent to make payment of a tax of $35,225.32, in respect of advertising contained in respondent's two said magazines, which were printed, issued and delivered to the public in Canada in the month of January 1957.

[1] [1961] Que. Q.B. 118, [1961] C.T.C. 343, 61 D.T.C. 1189.

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The respondent commenced an action in the Superior Court of the Province of Quebec, on April 17, 1957, asking "that it be adjudged that Part II of the *Excise Tax Act*, Sections 8, 9, 10 and 11 as enacted by Section 3 of Chapter 37 of the Statutes of Canada, 1956, and the Regulations made pursuant thereto, are outside the competence and *ultra vires* of the Parliament of Canada, and unconstitutional, and null and void and non-existent; that plaintiff's said two magazines "The Reader's Digest" and "Sélection du Reader's Digest" are not periodicals as defined by Part II of the *Excise Tax Act;* and that plaintiff is not liable for payment of the said sum of $35,225.32 nor required to take out a licence and post a bond for the payment of taxes under Part II of the *Excise Tax Act.*"

The grounds on which the claim for this relief is asserted, so far as they are relevant to this appeal, are set out in the declaration as follows, (i) that Part II of the *Excise Tax Act* "was avowedly enacted for the sole purpose of benefiting one segment of the publishing industry at the expense of another segment thereof", (ii) that Part II and the regulations made thereunder are *ultra vires* "as being legislation dealing with classes of subjects in relation to which the Parliament of Canada has no jurisdiction," and (iii) that in pith and substance Part II and the regulations made thereunder are "related to the property and civil rights of the plaintiff".

The appellant in his plea denied each of the paragraphs in the declaration in which the grounds summarized above were alleged and in paragraph 12 pleaded:

> That Part II of the Excise Tax Act sections 8, 9, 10, 11 as enacted by section 3 of chapter 37 of the Statutes of Canada 1956 and the regulations made pursuant thereto by the Minister of National Revenue published on November 14th, 1956 in The Canada Gazette, vol. 90, Part II, page 441, were enacted and made within the competence, the jurisdiction and the legislative powers of the Parliament of Canada;

The issue so raised is the only one relevant to the question of admissibility of evidence with which we are concerned on this appeal.

The main ground on which the respondent attacks the constitutional validity of Part II of the *Excise Tax Act* is stated in its factum as follows:

> The principal basis of Respondent's action is that the impugned statute, while in form a taxing statute, was not intended for the raising of money, but that the true object or intent of the statute was to benefit one segment

of the publishing industry in Canada at the expense of another. Respondent takes the position that if the true object and intent of the statute were achieved its success would be measured inversely by the revenue which it yields.

We are not concerned, on this appeal, with the soundness of this contention or with the merits of the action. The only question before us is as to the admissibility of certain evidence tendered at the trial on behalf of the respondent and rejected by the learned trial judge.

It is not necessary to set out in detail the items of evidence tendered and rejected at the trial for the questions raised are accurately summarized in the respondent's factum as follows:

> The only real questions in issue in the present appeal are:—
>
> (1) whether Respondent could introduce evidence of the pronouncement made on behalf of the Government by the Minister of Finance concerning the intent of the legislation in order to show the material that was before Parliament when the legislation was being promoted; and
>
> (2) whether Respondent could prove that the legislation so introduced and promoted was given first, second and third readings on the same day without amendment, and was enacted by the Senate in the form in which it was introduced without amendment.

Counsel for the respondent concedes that if no question were raised as to the constitutional validity of the statute the evidence in question would be inadmissible in aid of the interpretation of any ambiguous provision thereof. That this is so was laid down as long ago as 1769 when in *Millar v. Taylor*[1], Willes J. said:

> The sense and meaning of an Act of Parliament must be collected from what it says when *passed* into a law; and *not* from the history of changes it underwent in the house where it took its rise. That history is not known to the other house or to the sovereign.

The general rule in this regard, where the question is one of interpretation, is accurately stated in Halsbury, 2nd ed., vol. 31, p. 490, as follows:

> 621. Light may be thrown on the scope of a statute by looking at what Parliament was doing contemporaneously, and at the history of the statute; but even when words in a statute are so ambiguous that they may be construed in more than one sense, regard may not be had to the Bill by which it was introduced nor to the fate of amendments dealt with in committee of either House, nor to what has been said in Parliament or elsewhere, nor to the recommendations of a Royal Commission which shortly preceded the statute under consideration.

[1] (1769), 4 Burr. 2303 at 2332, 98 E.R. 201.

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Accepting the above as a correct statement of the law where the question is one of the interpretation of an admittedly valid statue, Mr. O'Brien argues that the rule is otherwise when the question is whether a legislature, possessing not an absolute jurisdiction but a law-making authority of a limited or qualified character, has exceeded its powers and under the guise of legislating in relation to a subject-matter committed to it has in reality legislated in relation to a subject-matter assigned exclusively to another body.

Both counsel informed us that they had been unable to find any reported case in which the question presented in this appeal has been decided although there is a dictum in a recent decision of this Court, to be mentioned later, which deals with the matter.

In support of the admissibility of the evidence in question Mr. O'Brien puts forward the following argument:— To aid in interpreting a statute the report of a Royal Commission which shortly preceded the passing of the statute is inadmissible. It was so held by the House of Lords in *Assam Railways and Trading Co. v. Commissioners of Inland Revenue*[1]. Lord Wright, with whom all the other law lords agreed on this point, said at p. 458:

> It is clear that the language of a Minister of the Crown in proposing in Parliament a measure which eventually becomes law is inadmissible and the report of Commissioners is even more removed from value as evidence of intention, because it does not follow that their recommendations were accepted.

This language indicates that the statement of a Minister of the Crown in introducing a bill in Parliament would be more readily admitted than the report of a commission; but in determining questions arising under the *British North America Act* as to whether Parliament or a provincial legislature by the use of a colourable device has invaded the legislative field reserved to the other the Judicial Committee and this Court have from time to time admitted in evidence and made use of the reports of commissions as appears from the judgments in *Ladore v. Bennett*[2]; *Attorney-General for B.C. v. Attorney-General for Canada*[3]; *Proprietary Articles*

[1] [1935] A.C. 445.
[2] [1939] A.C. 468, 2 W.W.R. 566, 3 D.L.R. 1.
[3] [1937] A.C. 368, 1 W.W.R. 317, 1 D.L.R. 688, 67 C.C.C. 193.

Trade Association v. Attorney-General for Canada[1] and *Home Oil Distributors Ltd. v. Attorney-General of B.C.*[2]; therefore *a fortiori* in determining such questions the statement of a Minister of the Crown in introducing a bill in Parliament is admissible in evidence.

The above brief summary scarcely does justice to Mr. O'Brien's logical and persuasive argument but it indicates its substance. In considering this argument it is necessary to examine the four cases last mentioned above.

In *Ladore v. Bennett, supra,* a Royal Commission had made a report in April 1935 disclosing the existence of a serious financial position in the City of Windsor and three adjoining municipalities. With the materials in that report before them the Government of the Province of Ontario promoted in the legislature an Act to amalgamate the four municipalities and containing, *inter alia,* provisions for refunding the debts of those municipalities. The Act was attacked, in an action, as being *ultra vires* of the legislature on the ground that it invaded the field of the Dominion as to (i) Bankruptcy and Insolvency and (ii) Interest and on the further ground that it affected private rights outside the province. In the courts in Canada the report when tendered in evidence was objected to and the objection was upheld, but before the Judicial Committee the objection was withdrawn and by consent of both parties the report was placed before their Lordships. Lord Atkin, who delivered the judgment of the Board, after setting out in some detail the serious financial position disclosed by the report said, at p. 477:

> Their Lordships do not cite this report as evidence of the facts there found, but as indicating the materials which the Government of the Province had before them before promoting in the Legislature the statute now impugned.

The manner in which the report had been dealt with in the courts below appears in the reasons of Henderson J.A., who delivered the unanimous judgment of the Court of Appeal[3]:

> This Commission in due course made a report which was tendered in evidence and received by the learned trial judge (Hogg J.) subject to objection. Subsequently he sustained the objection and ruled that the report is not evidence, with which conclusion I agree.

[1] [1931] A.C. 310, 1 W.W.R. 552, 2 D.L.R. 1, 55 C.C.C. 241.
[2] [1940] S.C.R. 444, 2 D.L.R. 609.
[3] [1938] O.R. 324 at 353, 3 D.L.R. 212.

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Attorney-General for B.C. v. Attorney-General for Canada, supra, was an appeal from a judgment of this Court on a reference by the Governor-General in Council raising the question whether s. 498A of the *Criminal Code,* introduced by s. 9 of 25 and 26 Geo. V, c. 56, was *ultra vires* of Parliament. It appears from the report in this Court[1], that the order of reference contained the following statement:

> The Minister observes that the said section 498A was enacted for the purpose of giving effect to certain recommendations contained in the Report of the Royal Commission on Price Spreads but that doubts exist or are entertained as to whether the Parliament of Canada had legislative jurisdiction to enact this section in whole or in part.

The reasons delivered in this Court make no reference to this Report of the Royal Commission. The only mention made of it in the judgment of the Judicial Committee is in the following passage at p. 376:

> In the present case there seems to be no reason for supposing that the Dominion are using the criminal law as a pretence or pretext, or that the legislature is in pith and substance only interfering with civil rights in the Province. Counsel for New Brunswick called the attention of the Board to the Report of the Royal Commission on Price Spreads, which is referred to in the order of reference. It probably would not be contended that the statement of the Minister in the order of reference that the section was enacted to give effect to the recommendations of the Royal Commission bound the Provinces or must necessarily be treated as conclusive by the Board. But when the suggestion is made that the legislation was not in truth criminal legislation, but was in substance merely an encroachment on the Provincial field, the existence of the report appears to be a material circumstance.

Proprietary Articles Trade Association v. Attorney-General for Canada, supra, was an appeal from a judgment of this Court on a reference by the Governor-in-Council. The only mention of any report in the judgment of the Judicial Committee is of a report by a select committee of the House of Commons made in 1888 which preceded the enactment in 1889 of 52 Victoria, c. 41, an Act for the prevention and suppression of combinations formed in restraint of trade. This is referred to (at p. 318) as part of "the history of the Act and the section of the Code so far as it has been laid before their Lordships." The report was printed as part of the factum of the Attorney-General for Canada in this Court. It was not referred to in any of the reasons delivered

[1] [1936] S.C.R. 363 at 364, 3 D.L.R. 593, 66 C.C.C. 161.

in this Court and there is no discussion as to whether it would have been admissible had objection been taken to its introduction in evidence.

It will be observed that none of these three cases decides that, in an action *inter partes* raising the question of the validity of a statute, a report of a Royal Commission is admissible in evidence if objected to. In civil cases the rules of evidence may be relaxed by consent of parties and this was done in *Ladore v. Bennett*. There is nothing in the judgment of the Judicial Committee in that case to suggest that in the view of the Board the decision of the Court of Appeal affirming the rejection of the report by Hogg J. was wrong in law. It is scarcely necessary to say that the statement that the rules of evidence may, in civil cases, be relaxed by the consent of parties does not mean that the parties can empower the Court to found its decision on matters which are not, as a matter of law, germane to the issue which it is called upon to decide; it means rather that proof of matters which are germane may be made in such manner as the parties agree and not necessarily in strict compliance with the technical rules as to admissibility.

In *Home Oil Distributors Ltd. v. Attorney-General of B.C., supra,* an action was brought for a declaration that the *Coal and Petroleum Products Control Board Act,* 1937 (B.C.), c. 8, was *ultra vires* of the legislature and for other relief. Manson J., at the trial, held that certain sections of the Act were *ultra vires* and granted an injunction. The Court of Appeal unanimously reversed his decision on the merits and their decision was upheld by this Court. The plaintiff tendered in evidence a report made by a commission on the petroleum industry. Its admission was objected to but Manson J. over-ruled the objection. On appeal this ruling was upheld by a majority of the Court of Appeal, Martin C.J.B.C. and Sloan J.A.; McQuarrie J.A. dissenting was of opinion that the report was inadmissible. The report consisted of three volumes only the first two of which were in existence when the impugned Act was passed.

On an interlocutory appeal Martin C.J.B.C. dealt with the point as follows[1]:

> It is submitted by appellants' counsel that this report cannot be admitted to supply facts to support an attempt to show what was in the mind of the Legislature in passing a statute valid *ex facie,* and the objection

[1] (1938), 53 B.C.R. 355 at 359, 360.

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is one of primary importance because it is conceded by respondents' counsel that, if the report cannot be resorted to, then there are no facts before us to support an attack upon the validity of the Act. But it is submitted by respondents' counsel that the report should be admitted as being that of a commission finding facts not yet contradicted going to show that the real purpose and effect of the Act is an attempt to regulate the international oil industry and to foster our native coal industry at the expense of that of foreign petroleum. Many cases were cited, *pro* and *con*, which have received careful consideration with the result that we think the report should be admitted in evidence in so far only as it finds facts which are relevant to the ascertainment of the said alleged purpose and the effect of the enactment.

Sloan J.A. agreed while McQuarrie J.A. dissented.

In giving judgment on the main appeal Sloan J.A., with whom Martin C.J.B.C. agreed, said[1]:

> In leaving this appeal I would make short reference to the admissibility in evidence of the report of the Commissioner on the Petroleum Industry. It comprises three volumes two of which we held on an interlocutory appeal in this case to be admissible in evidence "in so far only as it (the report) finds facts which are relevant to the ascertainment of the . . . purpose and the effect of the enactment:" (1938) 53 B.C., 355 at 360. I see no reason to depart from the conclusion therein reached and include Vol. III within that ruling."

McQuarrie J.A., as mentioned, dissented as to this ruling.

If the matter rested here, I would have no hesitation in preferring the conclusion of McQuarrie J.A. on this point to that of the majority in the Court of Appeal, but it is necessary to consider whether a contrary view was expressed in the judgment of this Court. The appeal to this Court was heard by six members. They were unanimous in holding that the appeal was governed by the judgment of the Judicial Committee in *Shannon's* case[2], and should be dismissed. Duff C.J., Crocket J. and Hudson J. made no mention of the report of their reasons. Kerwin J. (as he then was), with whom Rinfret J. (as he then was) agreed, after holding that the *Shannon* case was decisive of the appeal, ended his reasons as follows, at pp. 447 and 448:

> In coming to this conclusion I have taken the report of a commissioner appointed by the Lieutenant-Governor in Council as being a recital of what was present to the mind of the legislature, in enacting the principal Act, as to what was the existing law, the evil to be abated and the suggested remedy (*Heydon's* Case, (1584) 2 Coke's Rep. 18.). There can, I think, be no objection in principle to the use of the report for that pur-

[1] (1939), 54 B.C.R. 48 at 71, 2 W.W.R. 418, 3 D.L.R. 397.
[2] [1938] A.C. 708, 2 W.W.R. 604, 4 D.L.R. 81.

pose, and Lord Halsbury's dictum in *Eastern Photographic Machine Company v. Comptroller General of Patents* (1898) A.C. 571, at 575, is to the same effect. It was argued by counsel for the appellants that the statements in the report were to be taken as facts admitted or proved, but that this cannot be done is quite clear from the authorities, the most recent of which is *Assam Railways and Traders Company v. The Commissioners of Inland Revenue* (1935) A.C. 445.

I have not considered the provisions of the amending Act which are objected to, and make no comment as to those provisions.

Davis J. deals at some length with the question of the admissibility and possible effect of the report. He refers to the *Assam* case, *supra,* and the dictum of Lord Halsbury in the *Eastman Photographic* case[1], states that the furthest the Courts have gone recently is in *Ladore v. Bennett, supra,* points out that in that case the report was put before their Lordships by consent and continues, at p. 453:

> A rule somewhat wider than the general rule may well be necessary in considering the constitutionality of legislation under a federal system where legislative authority is divided between the central and the local legislative bodies. But even if that be so, the legislation here in question is expressly confined and limited to the sale of the products of the particular industry in, and for use in, the province and must, upon the well settled authorities, be held to be valid legislation.

On a careful reading of all that he said on the subject it would appear to me that Davis J. expressed no final opinion on the admissibility of the report.

I have reached the conclusion that there is no decision which requires us to hold that a report of a Royal Commission made prior to the passing of a statute and relating to the subject-matter with which the statute deals, but not referred to in the statute, is admissible in evidence in an action seeking to impugn the validity of that statute. In my opinion the general rule is that if objected to it should be excluded.

If I am right in this conclusion the basis of Mr. O'Brien's argument, which I endeavoured to summarize above, disappears, and it becomes unnecessary to consider whether if it were held that in a case such as the present a report of a royal commission would be legally admissible, although objected to, it would follow that the statement alleged in the pleadings to have been made by the Minister who

[1] [1898] A.C. 571.

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introduced the bill was also admissible. It may, however, be well to recall the statement of Lord Halsbury in *Quinn v. Leathem*[1]:

> . . . a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it.

In my opinion the learned Chief Justice of the Superior Court was right in rejecting the evidence which is the subject-matter of this appeal. It was conceded and is clear on the authorities that the statement of the Minister in introducing the bill would be inadmissible in aid of the interpretation of the statute as finally passed into a law. I can discern no difference in principle to afford a sufficient reason for holding it to be admissible where, the words of the statute being plain, it is sought to show that Parliament was encroaching upon a field committed exclusively to the provincial legislature.

The nature of the task which confronts the Court when such a claim is put forward has been dealt with in many judgments of the Judicial Committee and of this Court. Nowhere, I think, is it more accurately and succinctly stated than by Duff C.J. in *Reference re Alberta Statutes*[2]. After stating that the question to be determined in relation to the Act respecting the Taxation of Banks was whether it was an enactment in exercise of the provincial power to raise a revenue for provincial purposes by direct taxation or was legislation which in its true character related to the Incorporation of Banks and Banking, he said, at p. 127:

> The judgment of the Judicial Committee in *Union Colliery of B.C. Ltd. v. Bryden* (1899) A.C. 580, is sufficient authority for the proposition that the answer to this question is to be found by ascertaining the effect of the legislation in the known circumstances to which it is to be applied.

This statement was adopted by my brother Locke in giving the unanimous judgment of this Court in *Texada Mines Ltd. v. Attorney-General of B.C.*[3].

In the case at bar it will be open to the parties to lead evidence to show the circumstances to which the impugned sections are to be applied but it must be evidence in a form

[1] [1901] A.C. 495 at 506.
[2] [1938] S.C.R. 100, 2 D.L.R. 81.
[3] [1960] S.C.R. 713 at 722, 32 W.W.R. 37, 24 D.L.R. (2d) 81.

that is legally admissible and the statement of the Minister, alleged in the plaintiff's declaration to have been made, is not in my opinion legally admissible.

As was said by Viscount Sumner in delivering the judgment of the Judicial Committee in *Attorney-General for Manitoba v. Attorney-General for Canada*[1]:

> The matter (i.e. the question of the validity of the statute) depends upon the effect of the legislation not upon its purpose.

Something was said in argument as to the necessity of ascertaining the true intention of Parliament in enacting the impugned sections. But Parliament is an entity which from its nature cannot be said to have any motive or intention other than that which is given expression in its formal acts. While he was speaking of an incorporated company, the words of Lord Sumner in *Inland Revenue Commissioners v. Fisher's Executors*[2], appear to me to apply with even greater force to Parliament, consisting as it does of the Sovereign, the Senate and the House of Commons. At p. 411 Lord Sumner said:

> In any case desires and intentions are things of which a company is incapable. These are the mental operations of its shareholders and officers. The only intention that the company has is such as is expressed in or necessarily follows from its proceedings. It is hardly a paradox to say that the form of a company's resolutions and instruments is their substance.

While I have reached the conclusion that the evidence in question in this appeal is inadmissible as a matter of law under the authorities and on principle and not from a consideration of the inconvenience that would result from a contrary view, it may be pointed out that if it were held that the Minister's statement should be admitted there would appear to be no ground on which anything said in either House between the introduction of the bill and its final passing into a law could be excluded.

I am fortified in the conclusion at which I have arrived by the dictum of my brother Locke in the *Texada* case, *supra,* at p. 720:

> At the trial of this action Sullivan J. considered the earlier legislation in arriving at the conclusion that the statute itself was invalid as being an attempt, under the guise of imposing a direct tax upon an interest in land, to regulate or restrain the export of ore and concentrates from the province. While that learned judge, in the course of his judgment, referred to

[1] [1929] A.C. 260 at 268, 1 W.W.R. 136, 1 D.L.R. 369.
[2] [1926] A.C. 395, 95 L.J.K.B. 487, 10 Tax. Cas. 302.

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certain statements purporting to have been made by the Premier of the Province and the Minister of Mines to the effect that the legislation was designed to discourage the export of iron ore so that eventually an integrated steel industry could be established in the province, he made it clear that he came to his conclusion without reference to this. That such statement had been made was not proven at the trial *and had the evidence been tendered it would, no doubt, have been rejected as inadmissible.*

I realize that the words I have italicized were not necessary to the decision of that appeal but they were concurred in by every member of the full Court. In my opinion they correctly state the law.

For the above reasons I would allow the appeal, set aside the judgment of the Court of Queen's Bench, restore the rulings of the Superior Court on the objections to evidence and direct that the record be returned to the Superior Court.

The appellant is entitled to his costs in this Court and in the Court of Queen's Bench.

FAUTEUX J.:—For the reasons given by the Chief Justice, I agree that the Appeal should be allowed, the judgment of the Court of Queen's Bench (Appeal Side) set aside, the rulings of the Superior Court restored and the record returned to that Court; the whole with costs against the respondent, in this Court and in the Court of Queen's Bench.

It may be pertinent to add the following comment. The Judges of the majority, in the Court of Appeal, relied particularly on the decision of this Court in *Henry Birks and Sons Ltd. and others v. City of Montreal and A.G. of Quebec*[1]. On their interpretation of the reasons given in that case, this Court would have considered, as evidence admissible for the purpose of establishing the true object and nature of the municipal by-law giving rise to the litigation, two letters addressed to the members of the Municipal Council prior to the adoption of the by-law.

With deference, the validity of the statute, under the authority of which the by-law was adopted, to wit: *An Act to amend the Early Closing Act,* 1949, 13 Geo. VI, c. 61, was the sole subject-matter of the debate and of the judgment in this Court. Indeed, having reached the view that the Act under consideration was *ultra vires* of the Legislature, this Court did not and did not have to concern itself with the by-law, or any matters related to its adoption.

[1] [1955] S.C.R. 799, 5 D.L.R. 321, 113 C.C.C. 135.

The evidence relevant to the issue and considered in the *Birks* case did not include these letters nor was it evidence of a character similar to that which is objected to in the present case.

The judgment of Martland and Ritchie JJ. was delivered by

RITCHIE J.:—The circumstances giving rise to this appeal have been fully outlined in reasons for judgment to be delivered by other members of the Court and it would be superfluous for me to repeat them. I agree that this appeal should be allowed, but wish to add the following observations concerning the argument of counsel for the respondent which has been referred to by my brother Cartwright.

In support of his contention that the statements by Ministers of the Crown sought to be introduced in this case, which would not ordinarily be admissible, should be admitted on the ground that the statute here in question is being attacked as a colourable attempt to encroach on a forbidden field of legislation, counsel for the respondent cited certain observations made by Lord Wright in *Assam Railways and Trading Company v. Commissioners of Inland Revenue*[1], as authority for the following statement contained in his factum:

> The Report of a Commission is of less evidentiary value than the statement of a Minister of the Crown in proposing in Parliament a measure which eventually becomes law.

Based upon this premise, it was contended that because the Reports of Royal Commissions have on occasion been considered by this Court and the Privy Council in cases in which the constitutional validity of a statute was in question, it should, therefore, follow that statements of Ministers made in the course of proposing the legislation are to be admitted in such cases.

It is to be noted that the opening words of the passage from Lord Wright's decision on which the respondent's counsel relies so heavily are:

> It is clear that the language of a Minister of the Crown in proposing in Parliament a measure which eventually becomes law is *inadmissible* . . . . (The italics are mine.)

[1] [1935] A.C. 445 at 458.

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This is an unqualified statement, and when Lord Wright goes on to say, "the Report of Commissioners is even more removed from value as *evidence of intention* . . . ." (the italics are mine), he seems to me to be limiting his observations to *direct evidence of intention.* In my view this interpretation of the passage in question is borne out by the language employed later in the same paragraph which indicates that Lord Wright was not prepared to question Lord Halsbury's admission of such a report in *Eastman Photographic Materials Company v. Comptroller-General of Patents, Designs, and Trade-Marks*[1], which he explained as follows:

> . . . Lord Halsbury refers to the Report *not directly to ascertain the intention* of the words used in the Act, but because, as he says, "no more accurate source of information as to what was the evil or defect which the Act of Parliament now under construction was intended to remedy could be imagined than the report of that commission." Lord Halsbury, it is clear, was treating the Report as extraneous matter to show what were the surrounding circumstances with reference to which the words were used . . . . (The italics are mine.)

While I do not find it necessary in this case to pass upon the admissibility of the Report of a Royal Commission, it does seem to me to be important to note that when such reports have been referred to by this Court and the Privy Council in cases involving the constitutional validity of a statute, they have been referred to *otherwise than as direct evidence of intention,* and, accordingly, a consideration of these cases in conjunction with Lord Wright's statement to the effect that a Report of Commissioners is less valuable *as direct evidence of intention* than statements made by Ministers in proposing legislation, cannot afford any basis for the conclusion that the rule excluding such statements by Ministers should be relaxed in the present case.

I would dispose of this appeal as proposed by the Chief Justice and Mr. Justice Cartwright.

Appeal allowed.

Attorney for the defendant, appellant: François Mercier, Montreal.

Attorneys for the plaintiff, respondent: O'Brien, Home, Hall & Nolan, Montreal.

[1] [1898] A.C. 571.

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