1935

CANADA LAW REPORTS

Supreme Court of Canada

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S. EDWARD BOLTON, K.C.

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1936

JUDGES

OF THE

SUPREME COURT OF CANADA

DURING THE PERIOD OF THESE REPORTS

The Right Hon. LYMAN POORE DUFF C.J., P.C., G.C.M.G.
" THIBAUDEAU RINFRET J.
" JOHN HENDERSON LAMONT J.
" LAWRENCE ARTHUR CANNON J.
" OSWALD SMITH CROCKET J.
" FRANK JOSEPH HUGHES J.
" HENRY HAGUE DAVIS J.
" PATRICK KERWIN J.

ATTORNEYS-GENERAL FOR THE DOMINION OF CANADA:

The Hon. HUGH GUTHRIE K.C.
The Hon. ERNEST LAPOINTE K.C.

SOLICITOR-GENERAL FOR THE DOMINION OF CANADA:

The Hon. MAURICE DUPRÉ K.C.

8064—1½

MEMORANDA

On the thirty-first day of January, 1935, the Honourable Henry Hague Davis, a Justice of the Court of Appeal for Ontario, was appointed a Puisne Judge of the Supreme Court of Canada.

On the thirteenth day of February, 1935, the Honourable Frank Joseph Hughes, Puisne Judge of the Supreme Court of Canada, resigned from the bench.

On the twentieth day of July, 1935, the Honourable Patrick Kerwin, a Judge of the High Court of Justice for Ontario, was appointed a Puisne Judge of the Supreme Court of Canada.

ERRATA

Page 157, at the 26th line, November 1st, should be May 1st.

Page 202, the 12th line should read: estate. *Cock* v. *Cooke*, L.R. 1 Pro. & Div. 241, at 243; *In the Goods of*

Page 239, foot-note should be omitted.

Page 243, at the 11th line, "under the law of the country" should be "under the law of their country."

MEMORANDA RESPECTING APPEALS FROM JUDGMENTS OF THE SUPREME COURT OF CANADA TO THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL NOTED SINCE THE ISSUE OF THE PREVIOUS VOLUME OF THE SUPREME COURT REPORTS.

Begley v. *Imperial Bank of Canada.* ([1935] S.C.R. 89). Leave to appeal granted on terms, 12th April, 1935.

Canadian Pacific Ry. Co. v. *Can. Nat. Ry.* Co. ([1934] S.C.R. 305). Appeal dismissed with costs, 25th June, 1935.

Dozois v. *Pure Spring Co. Ltd.* ([1935] S.C.R. 319). Leave to appeal refused, 3rd July, 1935.

General Dairies Ltd. v. *Maritime Electric Co. Ltd.* ([1935] S.C.R. 519). Leave to appeal granted, 6th December, 1935.

Reference re Operation of Canada Temperance Act in Counties of Perth, Huron and Peel in the province of Ontario. ([1935] S.C.R. 494). Leave to appeal granted, 5th December, 1935.

Reference re Refund of Dues paid under section 47 (f) of Timber Regulations. ([1933] S.C.R. 616). Appeal dismissed, 17th January, 1935.

Royal Trust Company v. *Toronto Transportation Commission.* ([1935] S.C.R. 671). Leave to appeal refused, 26th July, 1935.

Waterous v. *The Minister of National Revenue.* ([1933] S.C.R. 408). Special leave to appeal refused, 22nd March, 1935.

Winnipeg Electric Co. v. *City of Winnipeg.* ([1934] S.C.R. 173). Appeal dismissed, no costs, 4th November, 1935.

A TABLE

OF THE

NAMES OF THE CASES REPORTED

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D. K. ELLIOTT (PLAINTIFF).....APPELLANT; 1934

AND *Oct. 15
*Dec. 12

CANADIAN CREDIT MEN'S TRUST ASSOCIATION, LIMITED (DEFENDANT) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Bankruptcy—Trusts and trustees—Real Property—Person becoming registered owner of land, and making mortgage thereon (with covenant for payment), for benefit of company—Transfer from him to company made but not registered—Authorized assignment by company under Dominion Bankruptcy Act—Indemnity claimed by registered owner (as trustee) against company's trustee in bankruptcy (as cestui que trust) against liabilities in connection with land and mortgage.

W. Co. purchased lands in Winnipeg in the province of Manitoba, and title was taken in appellant's name. Appellant made a mortgage, for W. Co.'s benefit, on part of the lands, with the usual covenant for payment. Appellant delivered to W. Co. transfers of the lands. These were not registered. In 1931 W. Co. made an authorized assignment under the Dominion *Bankruptcy Act*, and respondent was appointed trustee, and became possessed of the said transfers and of certain documents of title. The assignment was duly registered against the lands in the land titles office. On instructions from respondent's clerk (not authorized by the inspectors of the estate) to get title in respondent's name, respondent's solicitor (who did not then know that part of these lands was mortgaged) prepared a transfer direct (to save expense) from appellant to respondent, which was executed but was found objectionable in certain respects in the land titles office and was not registered, and respondent did not pursue this further. It offered to return the transfer. Respondent took over the management of the lands, collected rents, and paid thereout certain interest, taxes and insurance premiums. Appellant claimed that respondent had assumed the relation to appellant of *cestui que trust* and was bound to indemnify him against liabilities in connection with the trust property, including liability under appellant's mortgage covenant.

Held: The claim for indemnity failed. In view of respondent's position under the *Bankruptcy Act* (provisions of which were considered and

*PRESENT:—Duff C.J. and Cannon, Crocket, Hughes and Maclean (*ad hoc*) JJ.

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discussed in this regard), the equitable rule as to a trustee's right to indemnity from a beneficial owner was not applicable to the case. *Graham* v. *Edge*, 20 Q.B.D. 683, cited. *Hardoon* v. *Belilios*, [1901] A.C. 118, and *Castellan* v. *Hobson*, L.R. 10 Eq. 47, distinguished.

Judgment of the Court of Appeal for Manitoba, 42 Man. R. 69, affirmed.

APPEAL by the plaintiff from the judgment of the Court of Appeal for Manitoba (1) dismissing (Robson J.A. dissenting) his appeal from the judgment of Donovan J. (2) dismissing his action; in which action he claimed that he, as trustee, was entitled to be indemnified by the defendant, as *cestui que trust*, against liabilities to which the plaintiff was or might be subject in connection with certain lands, and particularly against his liability under a covenant in a certain mortgage which he had made on part of the said lands. The material facts of the case are sufficiently stated in the judgment of Hughes J. now reported, and are indicated in the above headnote. The appeal was dismissed with costs.

J. B. Coyne K.C. for the appellant.

W. A. T. Sweatman K.C. for the respondent.

DUFF C.J.—The general principle of equity is well known that a trustee is entitled to indemnity in respect of all expenses properly incurred in the execution of his trust. This right may always be enforced against the trust estate in respect of which he has incurred a debt or liability and in certain circumstances against the *cestui que trust* personally. It is only with this last mentioned right that we are concerned in this appeal.

The right to be indemnified by the creator of the trust, or by a third person, may arise either by the operation of the general equitable principle or from contract express or implied. The general principle is that when a trustee holds property in trust for an absolute beneficial owner, who is *sui juris*, the *cestui que trust* is bound to indemnify the trustee personally in respect of liabilities which arise from the mere fact of legal ownership. It is not material that the beneficiary did not create the trust or did not request the trustee to incur the liability.

(1) 42 Man. R. 69; [1934] 1 W.W.R. 801; [1934] 3 D.L.R. 129; 15 C.B.R. 392.

(2) 41 Man. R. 398; [1933] 2 W.W.R. 11; 14 C.B.R. 350.

The question before us is whether these principles are applicable when the *cestui que trust* becomes bankrupt and his property passes by force of the statute to the trustee in bankruptcy.

We are not concerned with any question as to a charge upon the trust property for the amount of the debt or liability incurred or as to the right of the trustee to enforce his claim against the bankrupt estate as a creditor. The contention raised is that the trustee in bankruptcy is personally responsible just as any individual would be who had accepted a transfer of the trust property as purchaser from the *cestui que trust*.

The result of the bankruptcy is that the trustee's personal remedy against the bankrupt is suspended and he may lose it altogether. That involves a hardship, no doubt; but then, bankruptcy and insolvency usually do involve such hardships.

After carefully considering Mr. Coyne's able and elaborate argument, my conclusion is that, the property of the bankrupt, vesting, as it does, by operation of law in the trustee in bankruptcy in his official capacity (who is declared by the statute to be " in the same position as if he were a receiver of the property, appointed by the court," with the duty primarily of applying and distributing the property for the benefit of the bankrupt's creditors (pursuant to the statutory scheme)), effect cannot be given to the principle of equity in the manner contended for unless there is something in the statute expressly or impliedly requiring it. I find nothing having that effect.

I think the reasoning of Lord Esher in *Graham* v. *Edge* (1) is in point.

These considerations apply *mutatis mutandis* to the contention that the trustee in bankruptcy is under a personal obligation to indemnify the appellant as transferee of the mortgaged property.

The appeal should be dismissed with costs.

The judgment of Cannon, Crocket, Hughes and Maclean (*ad hoc*) JJ. was delivered by

HUGHES J.—In the year 1906 R. J. Whitla & Company, Limited, purchased lands in the city of Winnipeg. Title

(1) (1888) 20 Q.B.D. 683.

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was taken in the name of the appellant who was the president and an important shareholder in the company. On April 3, 1907, $25,000 was borrowed to erect a building on part of the lands and a mortgage with the usual covenant for payment was made by the appellant. On September 18, 1912, the appellant delivered to R. J. Whitla & Company, Limited, a transfer of the encumbered property and, on July 15, 1913, a transfer of the unencumbered property; and these transfers and a certified copy of the certificate of title to the encumbered property and a certificate of title to the unencumbered property were in the possession of R. J. Whitla & Company, Limited, at the time of the authorized assignment hereinafter discussed and were turned over to the respondent. No payments of principal were made on the mortgage.

On February 16, 1931, the company made an authorized assignment under the *Bankruptcy Act* and on March 9, 1931, the respondent was appointed trustee. The assignment was duly registered against the real properties in the Land Titles Office. The respondent took over the management of the properties and paid certain interest, taxes and insurance premiums out of the rents as received. Shortly after the assignment a clerk of the respondent wrote the respondent's solicitors enclosing the above transfers, certificate of title and certified copy of certificate of title respectively, with instructions to put the titles in the name of the respondent, or, in the event of objection by the Land Titles Office, in the name of the respondent as trustee for R. J. Whitla & Company, Limited. The inspectors of the estate did not authorize these instructions. Mr. Richards, now the Honourable Mr. Justice Richards of the Court of Appeal of Manitoba, was then head of the firm of solicitors acting for the respondent. He did not notice that the letter of instructions contained a certified copy only of one of the certificates of title and assumed that each property was clear of encumbrance. To save expense, Mr. Richards prepared a transfer covering both properties from the appellant directly to the respondent and did not register the transfers to R. J. Whitla & Company, Limited. The new transfer was then sent to the appellant's solicitor for execution and was returned duly executed. The Land Titles Office rejected the transfer because one parcel was encumbered, and because of some objection about the way in

which the transferee was described. Mr. Richards then first knew that there was a mortgage on one of these properties. The respondent offered to return this transfer to the appellant. The trustee, of course, knew from the time of its appointment as trustee on or about March 9, 1931, that the appellant had executed the transfers to R. J. Whitla & Company, Limited, that the transfers had not been registered and that one parcel comprising the west halves of lots three and four in block K on plan 16 was subject to a mortgage for $25,000 and interest. At the time of the trial the respondent had on hand from these properties $1,390 without deducting its collection charges.

The appellant brought this action against the respondent both in its personal and in its representative capacity for indemnity in full against all liabilities by reason of his alleged trusteeship for the respondent including his liability on the covenants of the mortgage on part of the lands.

The action was tried by the Honourable Mr. Justice Donovan and dismissed. The appellant appealed to the Court of Appeal for Manitoba and the appeal was dismissed, the Honourable Mr. Justice Robson dissenting. From this judgment the appellant now appeals to this Court.

The appellant contends that, since the right and obligation of indemnity go with the relationship of trustee and *cestui que trust* and are part of it, when a trustee under the *Bankruptcy Act* succeeds as *cestui que trust*, his position is not different from that of any other *cestui que trust;* and that, if there is a difference, the burden falls on the *cestuis que trustent* of the trustee, namely, the estate. The appellant further contends that the respondent had an option whether it would or would not assume the relationship, but it assumed it by taking over the property and is bound by estoppel personally to indemnify the appellant.

The general principles of such indemnity are discussed in *Hardoon v. Belilios* (1). The question raised on that appeal was whether the plaintiff, who was the registered holder of fifty shares in a banking company which was being wound up, was entitled to be indemnified by the defendant, who was the beneficial owner of the shares,

(1) [1901] A.C. 118.

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against calls made upon the plaintiff in the winding-up of the banking company. The shares in question had been placed in the plaintiff's name by his employers, Benjamin & Kelly, who were share-brokers. The plaintiff never had any beneficial interest in the shares; but he was registered as their holder on April 3, 1891. A provisional certificate of his ownership was made out, and he signed a blank transfer of the shares, and the two documents were held by Benjamin & Kelly. The certificate and transfer afterwards came into the hands of one Coxon, who acted on behalf of a syndicate formed to speculate in the shares of another company. The defendant financed the syndicate and the provisional certificate and blank transfer of the shares were, with other securities, pledged by Coxon with the defendant as security for advances. In October, 1891, the plaintiff's provisional certificate was exchanged for an ordinary certificate which the defendant had in his possession at the commencement of the action. In March, 1892, dividends were paid on the shares. The defendant demanded and received these. The syndicate lost money and, in October, 1892, the defendant became the absolute owner of the shares. The judgment of the Judicial Committee of the Privy Council was delivered by Lord Lindley. Their Lordships point out that the parties stood to one another in the position of trustee and *cestui que trust* and that the fact that the parties never stood in the relation of vendor and purchaser is immaterial. All that is necessary to establish the relation of trustee and *cestui que trust* is to prove that the legal title was in the plaintiff and the equitable title in the defendant. Justice requires that the *cestui que trust,* who gets all the benefit of the property, should bear its burden unless he can shew some good reason why his trustee should bear it himself. The obligation is equitable and not legal, and the legal decisions negativing it, unless there is some contract or custom imposing the obligation, are irrelevant. Where the only *cestui que trust* is a person *sui juris,* the right of the trustee to indemnity against liabilities incurred by him by his retention of the trust property has never been limited to the trust property; it extends further and imposes upon the *cestui que trust* a personal obligation enforceable in equity to indemnify his trustee. In the above case, their Lordships refer with

approval to *Balsh* v. *Hyham* (1). In that case, the trustee sought indemnity in equity, not against a liability incidental to the ownership of the trust property, but against a liability incurred by him by borrowing money at the request of and for the benefit of his *cestui que trust*. The court decided that the plaintiff was entitled to relief on the ground "that a *cestui que trust* ought to save his trustee harmless as to all damages relating to the trust." Lord Lindley points out in the *Hardoon* case (2) that this language, although open to criticism if applied to *cestuis que trustent* who are not *sui juris* and also sole beneficial owners, shews plainly enough that it was taken for granted as well settled that, speaking generally, absolute beneficial owners of property must in equity bear the burden incidental to its ownership. Their Lordships also refer with approval to *In re The German Mining Co.; Ex parte Chippendale* (3), a case where the shareholders of a mining company were held liable personally to indemnify the directors against payments made by the latter in discharge of debts contracted by them but which payments created no legal obligation on the company enforceable at law, and could not be recovered by the directors from the company by an action at common law. The fact that the defendant in *Hardoon* v. *Belilios* (2) *supra*, did not create the trust on which the plaintiff held the shares when they were first placed in his name affords no defence to the defendant. Although the defendant did not create the trust, he accepted a transfer of the beneficial ownership of the shares, first as mortgagee and afterwards as sole beneficial owner, with full knowledge of the fact that they were registered in the plaintiff's name as trustee for the original purchasers. By the acceptance, the defendant became the plaintiff's *cestui que trust*. In the *Hardoon* case (2), the Judicial Committee approve the language of James V.C. in *Castellan* v. *Hobson* (4). In that case H had bought shares on the stock exchange. The name of B, who had consented to hold the shares was given as transferee. C, the original vendor, executed a transfer to B but, owing to the circumstances of the company, B could not be registered. It was held that H was liable to indemnify C for calls. James V.C. states

(1) (1728) 2 P. Wms. 453; 2 Eq Ca. Ab. 741, fol. 8.
(2) [1901] A.C. 118.
(3) (1853) 4 D.M.&G. 19.
(4) [1870] L.R. 10 Eq. 47.

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that it is not a question of vendor and purchaser but a question of trustee and *cestui que trust,* and that the trustee was entitled to indemnify from the "real equitable owner."

In *Wise* v. *Perpetual Trustee Company* (1), the Judicial Committee considered an appeal from the Supreme Court of New South Wales in which the point involved was whether trustees of a club who had incurred liability under onerous covenants in a lease were entitled to indemnity not only out of the club property to which their lien as trustees extended, but also against the appellant as a member of the club who with the other members, through the committee of management and otherwise, had so far assented to what had been done as to have become *cestuis que trustent* of the lessees. Their Lordships were satisfied that the relation of trustee and *cestui que trust* had been created. They refer, in their judgment, to the *Hardoon* case (2), and again point out that although the right of trustees to indemnity is recognized as well established in the simple case of a trustee and an adult *cestui que trust,* the principle by no means applies to all trusts, and it cannot be applied to cases in which the nature of the transaction excludes it. The appeal was, accordingly, allowed.

It is clear that when on the 9th day of November, 1906, the appellant, at the request of R. J. Whitla & Company, Limited, took title to the lands in question in his name, the relationship of trustee and *cestui que trust* existed between the appellant and R. J. Whitla & Company, Limited, and that, when he executed the mortgage for $25,000, he became entitled to indemnity in respect of the mortgage obligations from R. J. Whitla & Company, Limited. It is also clear that the relationship of trustee and *cestui que trust* existed between the appellant and R. J. Whitla & Company, Limited, at least down to September 18, 1912, in respect to the mortgaged parcel and to July 15, 1913, in respect to the unencumbered parcel, at which dates the appellant delivered transfers respectively to R. J. Whitla & Company, Limited. By these transfers the appellant purported to convey to the company all his estate and interest in the lands in question. After that, his position is not so clear. The appellant maintains that this transfer did not change the relationship and that the

(1) [1903] A.C. 139. (2) [1901] A.C. 118.

appellant still remained a trustee for the company, and refers us to the *Real Property Act*, R.S.M. 1913, ch. 171. Section 88 provides that every transfer, when registered, shall operate as an absolute transfer of all such right and title as the transferor had; but nothing contained in the section shall preclude any transfer from operating by way of estoppel. Section 97 provides that in every instrument transferring an estate or interest in land subject to mortgage under that system, there shall be implied a covenant by the transferee indemnifying the transferor against liability under the mortgage. Section 98 provides that a transfer shall, until registered, be deemed to confer on the person intended to take title a right or claim to registration.

It is now convenient to consider some of the provisions of the *Bankruptcy Act*. Section 9 provides for a voluntary assignment by a debtor. Section 9, subsection 6, provides that upon the appointment of a trustee by the creditors, the Official Receiver shall complete the assignment by inserting as grantee the name of such trustee and that thereupon the assignment shall, subject to the claims of secured creditors, vest in the trustee all the property of the debtor. Section 9, subsection 7, provides that every assignment of property other than an authorized assignment made by an insolvent debtor for the general benefit of his creditors shall be null and void. Section 39 provides that the trustee shall in relation to acquiring and retaining possession of the property of the debtor be in the same position as if he were a receiver of the property appointed by the court. Section 40 provides that the trustee shall, on the making of a receiving order or an authorized assignment, forthwith insure and keep insured in his official name all the insurable property of the debtor. Section 43 provides that the trustee may, with the permission in writing of the inspectors, (*a*) sell, (*aa*) lease, * * * (*k*) elect to retain for the whole or part of its unexpired term, or to assign or disclaim, any lease of or other temporary interest in any property forming part of the estate of the debtor. Section 104 provides that demands in the nature of unliquidated damages arising otherwise than by reason of a contract, promise or breach of trust, shall not be provable in bankruptcy; but, save as aforesaid, all debts and liabilities to which the debtor is subject at the date of the making of the authorized assignment shall be deemed to be debts provable in bankruptcy.

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The court shall value all contingent claims and after, but not before, such valuation, every such claim shall be deemed a proved debt to the amount of its valuation. Section 106 provides that if a secured creditor realizes his security, he may prove for the balance due to him after deducting the net amount realized. If he surrenders his security to the trustee, he may prove for his whole debt. Section 107 provides that a secured creditor who does not either realize or surrender his security may value his security and claim a dividend on the balance; and that the trustee may redeem the security at the assessed value. Section 113 provides that, subject to the provisions of section 107, no creditor shall receive more than one hundred cents on the dollar and interest. Section 120 provides that a creditor may prove for a debt not payable at the date of the authorized assignment as if it were payable presently and may receive dividends equally with the other creditors, deducting only an allowance for interest. Section 121 provides for priorities of claims. Section 123 provides that all ordinary debts shall be paid *pari passu*. Section 127 provides for the disallowance of claims by the trustee and for appeals to the court from such disallowances. Section 151 provides that where the debts of the bankrupt are paid in full, the court may annul the adjudication of bankruptcy and that, in such event, all acts of the trustee shall be valid, but the property of the debtor who was adjudged bankrupt shall vest in such person as the court may appoint or, in default of such appointment, revert to the debtor for all his estate or interest therein on such terms and subject to such conditions, if any, as the court may declare by order; and that, for the purposes of the section any debt disputed by a debtor shall be considered as paid in full if the debtor enters into a bond with approved securities to pay any amount recovered with costs. In view of the above provisions, it seems clear that the position of the respondent in the case at bar is somewhat analogous to the position of the official liquidators in *Graham* v. *Edge* (1). In that case, an order having been made for the winding-up of an unregistered company under the *Companies Act*, 1862, the court directed under section 203 of the Act that certain land, vested in trustees for the company subject to a rent

(1) (1888) 20 Q.B.D. 683.

charge, should vest in the official liquidators appointed for the purposes of the winding-up. The plaintiffs were the owners of the rent charge upon the land. They sued the liquidators in their personal capacity to recover arrears of the rent charge from them as terre-tenants. It was held by the Court of Appeal that the action ought to be stayed as being manifestly groundless. In that case the liquidators held possession for five years and it was contended, as in the case at bar, that they had elected and were personally liable. Lord Esher points out that the power to appoint the official liquidators was given by section 92 of the Act which provided that the liquidators were appointed "for the purpose of conducting the proceedings in winding up a company and assisting the Court therein," and that section 203 provided that the court might direct that all property, real and personal, belonging to or vested in the company or to or in any person in trust for the company should vest in the official liquidators by his or their official name or names. Lord Esher then proceeds to say that the meaning is that the property shall vest in the official liquidator, not in his personal capacity, but in his official capacity as official liquidator appointed by the court to assist in the winding-up of the company. The contention of the plaintiff is dealt with that the position of the official liquidators was the same as that of a trustee in bankruptcy under the English statute, who had a power to disclaim onerous property. No such power existed in the official liquidators who, therefore, could not be personally liable on the ground of election. Lord Justice Bowen was of the same opinion. He said that it could not really be suggested that the defendants had done anything but submit to the operation of section 203 by which the property was vested in them in their official name; and that they were not clothed with the property in any capacity other than that of official liquidators, subject to the directions of the court, and that there was no colour for suggesting that they were personally liable.

I have endeavoured to indicate the sections of the *Bankruptcy Act* which may be relevant to this case but, at the risk of repetition, I again point out that the respondent had by section 43 (*k*) a power to disclaim a lease but that nowhere was there power in the trustee to disclaim this property. I am of opinion that this is not a case for the

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application of the equitable rule of indemnity as in the *Hardoon* case (1) where the defendant *cestui que trust* was the beneficial owner of the shares. The respondent in the circumstances of this case does not come within the words "sole beneficial owner" or "absolute beneficial owner," *Hardoon* v. *Belilios* (1), *supra,* or within the words "real equitable owner," as used by James, V.C., in *Castellan* v. *Hobson* (2), *supra;* or within the more common words expressing the same legal concept, namely, "beneficial owner." In this connection, at the risk of another repetition, I refer back to section 151 of the *Bankruptcy Act.* A case similar to the case at bar may very easily be visualized where the debts are paid in full without selling the property held in trust for the debtor at all and where, under that section, the property may revert to the former debtor.

I should also add that if between November 9, 1906, and September 18, 1912, and possibly up to the assignment in bankruptcy, the appellant had paid off the mortgage and had recovered a judgment for indemnity against the company, he would have had to prove his claim as a secured or ordinary creditor. In this action, without payment, he asks for indemnity in full. To this he is not entitled.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *J. B. Coyne.*

Solicitors for the respondent: *Sweatman, Fillmore, Riley & Watson.*

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(1) [1901] A.C. 118. (2) (1870) L.R. 10 Eq. 47.

GILLESPIE GRAIN COMPANY LIMITED (DEFENDANT) ..... APPELLANT;

1934
*Oct. 9, 10.
*Nov. 20.

AND

ALBINA KUPROSKI (PLAINTIFF)..... RESPONDENT;

AND

NORTH STAR OIL LIMITED, R. L. M. HART, GEORGE COLBY AND ALEX WILKIE (DEFENDANTS).

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

Negligence—Master and servant—Motor vehicles—Servant disobeying orders in allowing another person to drive car—Duty of servant to keep proper look-out and exercise control over person driving for him—Collision—Liability of master—Quantum of damages.

The respondent's action arose out of a collision between two motor vehicles on a public highway running easterly from the city of Edmonton through Mundare and Vegreville. The collision occurred about five and one-half miles west of Mundare at a place distant about 72 feet from the common crest of an incline of the highway going westerly and a shorter and steeper incline going easterly. A spreader had gone over the road sometime before the collision and had pushed considerable loose gravel to the northerly half of the road. Apparently both eastbound and westbound traffic had been using the southerly half of the road considerably, and on this half there were two well defined wheel tracks, the southerly one of which was 2½ or 3 feet from the southerly edge of the travelled part of the highway. The appellant company had in its employ as driver the defendant Colby. Sometime before the day of the collision, Colby had, contrary to the instructions of his employer, arranged with the defendant Wilkie, a licensed driver of many years experience and of good record, to come on the truck with him and to help by occasional driving and other work, Colby paying Wilkie from time to time small sums for these services. Both Colby and Wilkie drove alternately from Edmonton, through Mundare, to Vegreville and back to Mundare; and Wilkie drove westerly towards Edmonton after leaving Mundare, the wife of Wilkie also occupying the driving seat. As the truck came towards the incline on which the collision occurred, it was proceeding on the southerly half of the road in the wheel tracks, and after passing a horse drawn vehicle, continued up the hill in the southerly wheel tracks. Wilkie testified that, when his truck was approximately 65 feet from the place of the collision, he saw an eastbound car coming very fast and decided to swing the wheels towards the north ditch and had the right front wheel at the north edge of the road and the truck pointing northwesterly when it was struck at the left front by the eastbound motor vehicle which

*PRESENT:—Duff C.J. and Cannon, Crocket and Hughes JJ. and Maclean J. *ad hoc*.

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was heading northeasterly and out of control. Colby, in his evidence, stated that it was only when Wilkie pulled the truck towards the ditch at the north side that he, Colby, had the first intimation that a motor vehicle was approaching from the west and that he then shouted to Wilkie to "look out." The eastbound car was owned by the defendant North Star Oil Company and driven by the defendant Hart; in it was one Kuproski as a passenger, who was killed by the force of the collision. The action was brought by the widow of Kuproski against both employers and drivers and against Colby as employee in charge. The trial judge gave judgment against all the defendants in favour of the respondent and her three children for a total sum of $24,100, which judgment was affirmed by the Appellate Division. The appellant company was the only defendant who appealed to this Court.

Held, affirming the judgment of the Appellate Division ([1934] 2 W.W.R. 7), that the appellant company was liable. The defendant Colby, in his capacity of employee of the appellant, was present in the front seat of the cab of the motor truck while the defendant Wilkie was driving. It was within the scope of his employment and it was his plain duty to see that the truck was driven with reasonable care; to that end to keep a proper look out and to exercise such control as might be necessary for the purpose of preventing mistakes or faults on the part of Wilkie. His failure to do so constituted negligence in his capacity of servant of the appellant, negligence for which the appellant company is therefore responsible.

Per Cannon and Hughes JJ. and Maclean J. *ad hoc.*—As to the contention of the appellant that, assuming there was negligence on the part of Wilkie, it should have been held that Colby's act in permitting Wilkie to drive was outside the scope of Colby's employment, an unauthorized act to effect a purpose of Colby for which the appellant employer was not liable, *held* that Colby was in charge and in legal control of the truck although the actual driving had been temporarily turned over to Wilkie, and that Colby continued to have, within the scope of his employment, a duty to keep a proper look out and a duty to see that the truck was in the proper side of the road, considering the rights of other traffic; Colby, when he gave the actual driving to Wilkie, did not divest himself of the above duties, which were not outside the scope of his authority merely because it was outside the scope of his authority to permit Wilkie to drive the motor truck.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1) affirming the judgment of the trial judge, Ewing J. and maintaining the respondent's action for damages.

The material facts of the case and the questions at issue are fully stated in the above headnote and in the judgments now reported.

(1) [1934] 2 W.W.R. 7.

Thomas N. Phelan K.C. and *Sydney Wood* for the appellant.

N. D. Maclean K.C. for the respondent Kuproski.

A. M. Sinclair K.C. for the North Star Oil Company.

The judgment of Duff C.J. and Crocket J. was delivered by

DUFF C.J.—I concur with my brother Hughes. I prefer to rest my concurrence on the ground upon which Mr. Maclean based his argument on behalf of the respondent Albina Kuproski.

Colby was present in the front seat of the cab of the motor truck while Wilkie was driving. He was there in his capacity of employee of the appellant. It was within the scope of his employment and it was his plain duty to see that the truck was driven with reasonable care; to that end to keep a proper look-out and to exercise such control as might be necessary for the purpose of preventing mistakes or faults on the part of Wilkie. His failure to do so constituted negligence in his capacity of servant of the appellant; negligence for which it is, therefore, responsible. That he failed to keep a look-out, that he failed to exercise anything like proper control over the driving is plain from his own evidence, and it was, moreover, so found by Mr. Justice Ewing, the trial judge; who also found in effect that this negligence was a direct cause of the collision.

I quote textually from the judgment of the learned judge:

> In the case at bar Colby not only permitted Wilkie to drive but he sat in the front seat of the cab with Wilkie and Mrs. Wilkie without making any effort to see that Wilkie drove properly. Wilkie approached the crest of the hill on the wrong side of the road, but Colby apparently not only did not interfere but he did not even keep any lookout to see that driving in this manner did not result in a collision. His own evidence is that he did not see the approaching car until the impact owing to the fact that he was looking at Mrs. Wilkie and the driver. Had Colby been looking he could have seen the approaching car in time to have so directed Wilkie that the collision would have been avoided.

This finding, with which the Appellate Division concurred, and with which I fully agree, is conclusive upon the issue in dispute between the appellant and the respondent Albina Kuproski.

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Duff C.J.

The following observations by Lord Justice Pickford in the course of his judgment in *Ricketts* v. *Thos. Tilling, Ltd.* (1) are precisely in point:

> It was admitted that the driver of this motor omnibus was alongside the man who was driving, and it is admitted that he was negligent. I entirely accept, of course, the proposition that, in order to make the owner liable, there must be negligence on the part of the person for whose acts the owner is responsible—his servant, either regularly or for that occasion only. * * * In this case I say it is admitted that the driving was negligent. It is admitted that the driver was sitting by the man who was driving and he could see all that was going on—he could control what was going on. It seems to me that the fact that he allowed somebody else to drive does not divest him of the responsibility and duty he has towards his masters to see that the omnibus is carefully, and not negligently, driven.

As to the matter of damages, I have nothing to add to what has been said by the judges of the Appellate Division and by my brother Hughes.

The judgment of Cannon and Hughes J.J. and Maclean J. *ad hoc* was delivered by

HUGHES J.—This action arose out of a collision between two motor vehicles which occurred on the afternoon of July 25, 1933, on a public highway running easterly from the city of Edmonton through Mundare and Vegreville. The collision occurred about five and one-half miles west of Mundare at a place distant about 72 feet from the common crest of an incline of the highway going westerly and a shorter and steeper incline going easterly. A spreader had gone over the road some time before the collision and had pushed considerable loose gravel to the northerly half of the road. Apparently both eastbound and westbound traffic had been using the southerly half of the road considerably, and on this half there were two well defined wheel tracks, the southerly one of which was 2½ or 3 feet from the southerly edge of the travelled part of the highway.

The appellant Gillespie Grain Company Limited had in its employ as a driver the defendant George Colby. Sometime before the day of the collision, Colby had, contrary to the instructions of his employer, arranged with the defendant George Wilkie to come on the truck with him and to help by occasional driving and other work.

(1) [1915] 1 K.B. 644, at 650.

Colby paid Wilkie from time to time small sums for these services. The reason underlying the arrangement was that Colby drank considerably and was out frequently late at night and as a result was, with his advancing years, at times too tired to do the work alone. On several occasions, Mrs. Wilkie also went along.

On the morning of the accident, Colby drove the truck from the appellant's warehouse at Edmonton and picked up Wilkie and Mrs. Wilkie at their home. Colby drove from Edmonton to Mundare where each person had a glass of beer. Wilkie testified that he drove from Mundare to the Vegreville elevator of the company. Each person had one or two glasses of beer at Vegreville. Colby testified that he drove back to Mundare but Wilkie said that he drove. At Mundare each person had another glass of beer. It should here be mentioned that Wilkie was a licensed driver of ten or twelve years' experience who owned a motor vehicle and who had had, according to the evidence, no motor vehicle accident previous to the one in question in this action. Wilkie drove the truck westerly towards Edmonton after leaving Mundare. All three occupied the driving seat on which there were two cushions. Wilkie sat behind the wheel at the left and occupied one cushion. Mrs. Wilkie and Colby, according to Colby, sat on the other cushion. As the truck came towards the incline on which the collision occurred, it was proceeding on the southerly half of the road in the wheel tracks. I am not at all suggesting that Wilkie was not entitled, where the vision ahead was clear, to use the southerly half of the road as long as he did not interfere with the rights of other traffic. Some distance east of the place of the collision, the truck turned farther to the south, passed a horse-drawn vehicle and then turned into the wheel tracks again. The truck continued up the hill on the southerly half of the road. Colby said that the crest would then be "only two hundred and fifty feet or so away." Colby said that he was "kind of sitting sideways," "sort of talking to Mrs. Wilkie with one eye on her and one on Alex." He said: "I was kind of sitting sideways, looking at them. I wasn't watching ahead." He added in another place in the record that he was "looking with kind of one eye out," that the truck moved over to the north side of the road and that later Wilkie pulled the truck towards the ditch on the

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north side, shouted "Look out, George," and that this was the first intimation that he, Colby, had that a motor vehicle was approaching from the west. Wilkie said that after he passed the horse-drawn vehicle, he swung the truck back to the wheel tracks, continued up the incline and began gradually to edge over to the right side of the road. He noticed a "dust cloud a long way off" and turned a little more to his right. Then he noticed the top of a motor vehicle dip out of sight on the west side of the crest and he pulled over to his right side. Then the car came into sight again. At this time the truck was, according to Wilkie, on the north side of the road. The truck was then approximately 65 feet from the place of the collision. He saw that the eastbound car was coming very fast; he decided to swing the wheels towards the north ditch and had the right front wheel at the north edge of the road and the truck pointing northwesterly when it was struck at the left front by the eastbound motor vehicle which was heading northeasterly and out of control.

The eastbound car was owned by North Star Oil Company Limited, driven by the defendant Ronald L. M. Hart, and in it the late Anton J. Kuproski was a passenger. The latter was killed by the force of the collision. The driver, L. M. Hart, suffered a loss of memory as a result of concussion and was not able to testify as to the happenings immediately before the collision.

The action was brought by the administratrix of the estate of the deceased against the employer and driver of the eastbound car and against the employer and driver of the truck and against Colby, as employee in charge.

The action was tried before Mr. Justice Ewing without a jury. The learned trial judge gave judgment against all the defendants. He found that Hart, an employee of North Star Oil Limited, was negligent in approaching the crest of the hill at a very high rate of speed "to the extent at least that his car was not under reasonable control"; and further that he was negligent in not keeping a proper look-out. He found that Wilkie was negligent in approaching the top of the hill on the "wrong" side of the road and in not keeping a look-out for approaching vehicles "to the extent that it was possible to see vehicles." He found as a fact that Wilkie continued on the south side of the road without materially slackening speed until the truck

was within 60 feet of the scene of the accident. Speaking of Colby, the learned trial judge said:

> Colby not only permitted Wilkie to drive but he sat in the front seat of the cab with Wilkie without making any effort to see that Wilkie drove properly. Wilkie approached the crest of the hill on the wrong side of the road, but Colby apparently not only did not interfere but he did not even keep any look-out to see that driving in this manner did not result in a collision. * * * Had Colby been looking he could have seen the approaching car in time to have so directed Wilkie that the collision would have been avoided.
>
> I think that Colby's negligence in permitting Wilkie to drive and taking no steps to see that he drove properly was an effective cause of the accident.

The learned trial judge fixed the damages as follows:

To the plaintiff in her own right	$13,000
To the plaintiff in the right of Ernest Kuproski	1,800
To the plaintiff in the right of Bernard Kuproski	3,800
To the plaintiff in the right of Gladys Kuproski	5,500

All defendants appealed to the Appellate Division of the Supreme Court of Alberta, both as to liability and as to quantum of damages. The appeals were dismissed with costs.

From the judgment of the Appellate Division, Gillespie Grain Company Limited, now appeals to this Court.

The appellant contended before us that the judgment of the learned trial judge as affirmed by the Appellate Division was erroneous in the following respects.

(1) It should have been held that the sole cause of the collision was the negligence of Hart.

(2) It should have been held that there was no negligence on the part of Wilkie.

(3) It should not have been held that Colby was negligent or that his negligence was an effective cause of the collision.

(4) Assuming there was negligence on the part of Wilkie, it should have been held that Colby's act in permitting Wilkie to drive was outside the scope of Colby's employment, an unauthorized act, to effect a purpose of Colby for which the appellant employer was not liable.

(5) The assessment of damages was unreasonable and extravagant.

It will be convenient to discuss these contentions in the above order, taking the first two contentions together. During the course of the argument before us, counsel were

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advised that this Court could not in view of the evidence interfere with the findings of the learned trial judge, affirmed by the Appellate Division, that both drivers Hart and Wilkie were negligent. It is true that the Chief Justice, in whose judgment Mr. Justice Mitchell concurred, was of opinion that the onus was not on the plaintiff to prove negligence, he having apparently overlooked the fact that the case was one of collision; but the remaining three judges in appeal confirmed the findings of negligence made by the trial judge and it does not appear that in any of these judgments in appeal or in the judgment of the learned trial judge, there was any misplacing of the onus of proof.

We now proceed to consider the contention of the appellant that Colby was not negligent. It was argued by the appellant that the negligence found against Colby by the learned trial judge was founded upon the fusion of two essential and indispensable elements, the one being the permitting of Wilkie to drive, and the other being the failure of Colby to take steps to see that he drove properly; and that accordingly the whole finding must fall if either of the essential elements failed. The appellant then proceeded to argue that it was not negligence on the part of Colby to permit Wilkie to drive as Wilkie was to the knowledge of Colby an experienced, licensed driver of good record and that therefore the finding of negligence against Colby could not be supported because of the failure of one of the essential elements. It is not necessary to decide whether it was or was not, in the circumstances of this case, negligence on the part of Colby in permitting Wilkie to drive contrary to the instructions of his employer, and whether such act, if negligent, was an effective cause of the collision, because we are of opinion that we must look at all that the learned trial judge had to say about Colby's conduct and not confine ourselves to the more specific finding urged by the appellant. In addition to the latter finding, the learned trial judge said, as above stated, that as the truck approached the crest of the hill on the "wrong" side of the road, Colby did not keep any look-out to see that driving in this manner did not result in a collision and that, if Colby had been looking, he could have seen the approaching car in time to have so directed Wilkie that the collision would have been avoided. The conclusions of the

learned trial judge as to the negligence of Colby were affirmed by at least three judges of the Appellate Division and, in our opinion, there was ample evidence to support them.

We now come to the fourth contention of the appellant that, assuming there was negligence on the part of Wilkie, it should have been held that Colby's act in permitting Wilkie to drive was outside the scope of Colby's employment, an unauthorized act, to effect a purpose of Colby for which the appellant employer was not liable. It should here be mentioned that in the province of Alberta there was not any statutory liability for damages imposed on the owner of the truck qua owner. Rupert Settle, an officer of the appellant, testified at the trial that one condition of Colby's employment was that he should see that nobody else should have "anything to do with that truck," that Colby was to be the sole driver and that Colby understood that clearly. Colby testified at the trial that he was in charge of the truck and Wilkie testified that every time they came back to the elevator, Colby resumed the actual driving. It must be clear, therefore, that Colby was in charge and in legal control of the truck although the actual manipulations of the steering wheel and the gears had been temporarily turned over to Wilkie. It cannot be said that Colby had thereby freed himself, as employee of the appellant, of his ordinary duties of keeping a proper look-out, or seeing that the truck was on the proper side of the road, considering the rights of other traffic, although it may very well be that when Wilkie assumed the driving, he also assumed duties of keeping a proper look-out and keeping the truck on the proper side of the road, considering the rights of other traffic. In other words, it may be said that as the truck approached the place of the collision, Wilkie had a duty to keep a proper look-out also and a duty to drive the truck on the proper side of the road, considering the rights of other traffic; and that Colby continued to have, within the scope of his employment, a duty to keep a proper look-out and a duty to see that the truck was on the proper side of the road, considering the rights of other traffic. We are not of opinion that Colby when he gave over the actual driving to Wilkie divested himself of the above duties or that the above duties were outside of Colby's authority merely because it was outside the scope

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of his authority to permit Wilkie to drive at all. Now the learned trial judge said that Wilkie approached the crest of the hill on the "wrong" side of the road and that Colby not only did not interfere but he did not even keep any look-out to see that driving in this manner did not result in a collision. Earlier in his judgment the learned trial judge found that the truck continued on the left side of the road until within 60 feet of the scene of the accident, which would be within 132 feet of the crest of the hill. On this finding, Colby had had ample time and opportunity, as the person in charge of the truck, to have directed Wilkie earlier and farther back on the hill or, if necessary, before he reached the hill, to get the truck to the north side of the road.

Many cases were cited by counsel for the appellant in support of the appellant's contention that the instructions of the employer to Colby not to permit any other person to drive the truck constituted a delimitation of the employee's authority, and that the employee was acting wholly outside the scope of his authority at the time of the collision. Counsel for the respondent contended on the other hand (*a*) that Colby's conduct was merely improper conduct within the scope of his employment or (*b*) that Colby was in charge of the truck at all times and retained a duty to keep a proper look-out and to see that the truck was on the proper side of the road, considering other traffic.

Beard v. *London General Omnibus Company* (1). The facts in this case were that at the end of a journey the conductor of an omnibus belonging to the defendants, in the absence of the driver and apparently with the purpose of turning the omnibus in the right direction for the next journey, drove it through some side streets, and while so doing negligently ran down the plaintiff. At the trial the plaintiff gave no evidence that the conductor was authorized by the defendants to drive the omnibus in the absence of the driver. At the close of the plaintiff's case judgment was entered for the defendants. In the Court of Appeal, judgment in favour of the defendants was affirmed.

Reichardt v. *Shard* (2). The defendant was the owner of a motor car which was being driven by his son. The defendant was not in the car, but his driver was sitting

(1) (1900) 2 Q.B.D. 530. (2) 31 T.L.R. 24.

beside the son. A collision occurred between the defendant's car and a car belonging to the plaintiff, owing to the negligent driving of the defendant's son. In an action for damages caused by the collision, the defendant stated that he allowed the son to use the car, but never allowed him to go out with it without the driver. A County Court judge, after a verdict of a jury, gave judgment against the defendant. The defendant appealed to the Divisional Court, which dismissed the appeal. The Court of Appeal likewise dismissed an appeal to it. Lord Justice Buckley, with whose conclusion Lord Justice Phillimore and Lord Justice Pickford agreed, said that it appeared to him to be a reasonable view to take that the learned County Court judge was entitled to say that, having regard to the person who accompanied the son, there was no evidence to go to the jury that the defendant had given up control of the car.

Ricketts v. *Thos. Tilling, Ltd.* (1). The facts, shortly, in this case were that at the end of a journey, the conductor on an omnibus belonging to the defendants, in the presence of the driver, who was seated beside him, for the purpose of turning the omnibus in the right direction for the next journey, drove it through some side streets so negligently that it ran down the plaintiff. At the trial the judge, upon what he considered the authority of *Beard* v. *London General Omnibus Co.* (2), held that there was no evidence that the conductor had authority from the defendants to drive the omnibus and entered judgment for the defendants. It was held in the Court of Appeal that there was evidence of negligence on the part of the driver in allowing the omnibus to be negligently driven by the conductor and that there should be a new trial. The case was unlike the case at bar in that the conductor was an inexperienced driver, but the case was like the case at bar in that the proper driver was also sitting on the box. Buckley, Lord Justice, page 646, said:

> It seems to me that the driver, who was authorized to drive, had the duty to prevent another person from driving, or, if he allowed another person to drive, to see that he drove properly. He was sitting beside the conductor and the driving by the conductor was conducted in his presence. He could not delegate his authority. It is a question for the jury whether the effective cause of the accident was that the driver committed a breach

(1) [1915] 1 K.B. 644. (2) (1900) 2 Q.B.D. 530.

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of his duty (which was either to prevent another person from driving or, if he allowed him to drive, to see that he drove properly), or whether the driver had discharged that duty.

He distinguished *Gwilliam* v. *Twist* (1), and stated that the question in the latter case was not the question in *Ricketts* v. *Thos. Tilling Ltd.* (2) and added,

> It is not here said that there is a liability in the master because the driver delegated to the conductor. The question is whether the driver had properly discharged his duty of not letting that other person drive while he sat by, or, if he did let him drive while he sat by, then of seeing that he drove properly. It was a question for the jury whether the accident arose from a breach by the driver of the duty which he owed to his master as driver.

Phillimore L.J. stated, page 649, that the questions really were whether the driver was still in charge of the omnibus and whether the accident happened because he neglected his duty. Pickford L.J. also wrote a judgment and some of his words are so applicable to the present case that it is proper that they should be quoted verbatim:

> It is admitted that the driver was sitting by the man who was driving and he could see all that was going on—he could control what was going on. It seems to me that the fact that he allowed somebody else to drive does not divest him of the responsibility and duty he has towards his masters to see that the omnibus is carefully, and not negligently, driven. But it seems to me that, where a man is entrusted with the duty of driving and controlling the driving of a motor omnibus, and is sitting alongside a person who is wrongfully driving and the motor omnibus is negligently driven and thereby an accident happens, there is evidence at any rate of negligence on the part of that driver in having allowed that negligent driving. I do not at all say that on an investigation of the facts it might not appear that the act of negligence was so sudden and unexpected that he had no reason to see it; and therefore it would come back to the question of whether he was responsible for allowing the other man to drive. It seems to me at any rate that there is evidence of negligence on his part, he being there and still having the duty of the controlling and the driving of the omnibus, in allowing the omnibus to be negligently driven whereby the accident happened.

Of course, the actual driver may oust and keep ousted the regular driver from charge or control by fraud, force or duress, and the employer may not be liable although the regular driver is sitting beside the actual driver and the car is operated so negligently that an accident occurs. *Kuhmo* v. *Laakso* (3).

Coogan v. *Dublin Motor Co.* (4). The facts in this case were that the defendants had hired a motor car to T. The chauffeur in charge of the car, in violation of his

(1) (1895) 2 Q.B.D. 84.
(2) [1915] 1 K.B. 644.
(3) [1931] O.R. 630.
(4) 49 Ir. L.T. 24.

instructions, permitted T. to drive. While T. was driving, the plaintiff was run down and injured. The chauffeur stated that he was forbidden to allow passengers to drive, that when passing along Monk street he saw the plaintiff step out in front of a tram, that he told T. to pass the tram on the right hand and that he put on the emergency brake, but he was too late to avoid a collision. It was held by the Divisional Court that in allowing T. to drive the chauffeur was acting outside the scope of his authority, and that the defendants were not liable. Gibson J. said that the owner of the car gave control to an expert, who had no power to abandon his trust. Kenny J. concurred with Gibson J. This case is not very helpful to us as the report does not indicate that the regular driver, as in the case at bar, failed to keep a proper look-out or to direct the actual driver where to go. In fact it rather indicates the contrary.

We are therefore of opinion that the appellant is liable.

We now come to the fifth point, namely the quantum of damages. The learned trial judge in his reasons for judgment referred to the life expectancy of the deceased as 39·072 years instead of the correct figures, 31·072, but Mr. Justice McGillivray stated in his reasons that the learned trial judge had on request informed the Appellate Division that in fact he had used the correct figures of 31·072 in arriving at his conclusions. It was pointed out by counsel for the appellant that the learned trial judge had not before him the figures for joint expectancies and that, moreover, he had made excessive use of the life expectancy figures and had allowed in the aggregate sums exceeding the present value over the life expectancy period of $100 per month the largest sum which the widow said the deceased had been giving to the family shortly before his death. *Rowley* v. *London and North Western Railway Co.* (1); *Phillips* v. *London and Southern Railway Co.* (2). There was, however, considerable evidence that the deceased was a good salesman and that in more normal times he had earned much larger sums than he was earning just before his death and we cannot say that the trial judge did not take these facts also into consideration or that he was not entitled so to do. There is no doubt that the amount awarded by

(1) (1873) L.R. 8 Ex. 241.

(2) (1879) 4 Q.B.D. 406; 5 Q.B.D. 78.

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the learned trial judge was generous, to say the least, but the amount has been affirmed by the Appellate Division. Under all the circumstances, it is not a case in which we can properly interfere. *Cossette* v. *Dunn* (3), *Smith* v. *C.N.R.* (4). An appeal from the latter judgment was dismissed by this Court on May 15, 1924.

The present appeal must, therefore, be dismissed with costs to the respondent, Albina Kuproski.

North Star Oil, Limited, which was added as a party respondent by Order dated September 11, 1934, is not entitled to costs either of that Order or on this appeal. This defendant appealed to the Appellate Division of the Supreme Court of Alberta, but did not appeal to this Court, and was not entitled to intervene under Supreme Court Rule 60.

Appeal dismissed with costs.

Solicitors for the appellant: *Wood, Buchanan & Macdonald.*

Solicitors for the respondent: *Maclean, Short & Kane.*

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*Oct. 29
*Nov. 26

I. SIMCOVITCH AND H. SIMCOVITCH...APPELLANTS;

AND

HIS MAJESTY THE KING.....RESPONDENT.

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

Criminal law—Bankruptcy—Concealing or removing property of bankrupt—Offences enacted by section 191 of the Bankruptcy Act, R.S.C. [1927] c. 11—Persons other than bankrupt convicted—Conviction valid—Criminal Code R.S.C. [1927], c. 36, s. 69—Interpretation Act, R.S.C. [1927], c. 1, s. 28.

The appellants, one being the manager and the other an employee of a bankrupt company, were convicted for having concealed and fraudulently removed goods belonging to the bankrupt, contrary to section 191 (d and e) of the *Bankruptcy Act*. The ground of appeal was that no other person than the bankrupt could be indicted for any offence under that section.

Held, affirming that conviction, that the offences created by section 191 of the *Bankruptcy Act* were offences within section 69 of the *Criminal Code*; or, to put it alternatively, by force of section 69, or, by force of the enactments of section 28 of the *Interpretation Act*, sec-

*PRESENT:—Duff C.J. and Cannon, Crocket and Hughes JJ. and St.-Germain J. *ad hoc*.

(3) (1890) 18 S.C.R. 222.

(4) [1924] 1 D.L.R. 1140.

tion 69 is to be read as if the offences created by section 191 were specifically named therein.—In other words, section 191 must be read and construed on the footing that the provisions of the *Criminal Code* should apply to offences created by that section, as there is nothing in the provisions of that section necessarily or reasonably implying the exclusion of section 69 of the *Criminal Code*. Crocket J. dissenting.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec, sustaining the conviction of the appellants, on their trial before Cusson J., president of the Court of Sessions of the Peace, on charges of having concealed and removed property of a bankrupt, under s. 191 of the *Bankruptcy Act*. The ground of appeal, and the material facts of the case bearing on the point dealt with by the Court are stated in the judgments now reported. The appeal was dismissed; and the conviction was affirmed.

Phillippe Monette K.C. for the appellant.

Ernest Bertrand K.C. for the respondent.

DUFF C.J.—This appeal raises a question as to the sufficiency of an indictment in these terms:

Irving Simcovitch et Harry Simcovitch, en la cité de Montréal, en rapport avec la compagnie "Paris Shoe Shoppe", magasin de chaussures dont Cecilia Simcovitch était propriétaire, et dont le dit Irving Simcovitch était le gérant et l'autre dit accusé était l'employé et complice avant le fait, la dite compagnie ayant été déclarée en faillite, le ou vers le 7 décembre, mil-neuf-cent-trente-deux, ont commis les actes criminels de faillite suivants:

(*d*) Dans les six mois qui ont précédé la dite faillite ou après ils ont caché une partie des biens de la dite faillite pour une valeur au delà $50 et ils ont caché des comptes recevables de la dite faillite;

(*e*) Durant la même période de temps, ils ont frauduleusement enlevé une partie des biens de la dite faillite pour une valeur d'au delà $50, à savoir; pour une valeur de $5,000.

S.R.C. *Loi des faillites*, c. 11, art. 191, d et e.

The sole point in controversy before this court is a point raised by the dissenting judgment of Mr. Justice St. Jacques, which is stated in the formal judgment of the Court of King's Bench in these words,

* * * because, according to section 191 of the *Bankruptcy Act*, no other than the bankrupt can be indicted for an offence under that article.

The argument presented is substantially as follows: Section 191 declares that any person who has been adjudged a bankrupt, or in respect of whose estate a receiving order has been made, or who has made an authorized assignment

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under this Act, shall in each of the cases following be guilty of an indictable offence.

Neither of the appellants falls within the description of the classes of persons to whom, in the circumstances mentioned in the subsections, the indictable offences created by the section are imputed by the statute. It follows, it is said, that the appellants cannot be convicted of such an offence.

The validity of this contention turns upon the proper answer to the question whether the offences created by section 191 are offences within section 69 of the *Criminal Code;* or, to put it alternatively, whether, by force of section 69, or, by force of the enactments of the *Interpretation Act,* section 69 is to be read as if the offences created by section 191 were specifically named therein.

The *Interpretation Act* (R.S.C. 1927, c. 1, s. 28) enacts that,

> Every Act shall be read and construed as if any offence for which the offender may be
>
> (*a*) prosecuted by indictment, howsoever such offence may be therein described or referred to, were described or referred to as an indictable offence
>
> * * *
>
> and all provisions of the *Criminal Code* relating to indictable offences, or offences as the case may be, shall apply to every such offence.

The language of this enactment is quite plain and unqualified.

I have no doubt that it applies to offences created by section 191. First of all, there is nothing in section 28 which is (in the words of section 2) "inconsistent with the object or scope of" the *Bankruptcy Act;* or, which (in the words of that section) "could give any word, expression or clause," in section 191, "an interpretation inconsistent with its context." The circumstance that the acts enumerated in section 191 are limited to acts committed by the classes of persons described in that section is in no way inconsistent with the proposition that the offences defined by the section are indictable offences, as section 28 declares, or that to them, as indictable offences, the provisions of the *Criminal Code* apply. With great respect, I cannot give my adherence to the view that in sections 191 to 201 of the *Bankruptcy Act* there is sufficient evidence that these sections were intended to constitute a code, having an operation which excludes the *Criminal Code.* True it is, section 28 lays down a rule of interpretation, and neces-

sarily, therefore, the provisions of the *Criminal Code* must give way to the enactments of the statute to be interpreted, to the extent to which, by express words, or by necessary or reasonable implication, such statute evinces an intention to exclude those provisions. But, subject to this qualification, section 191 must be read and construed on the footing that the provisions of the *Criminal Code* apply to the offences created by it, and, in particular, that the provisions of section 69 are to be construed as if such offences were specifically nominated in that section.

Now, the effect of section 69 in this view, is simply this: persons aiding or abetting the bankrupt or other person, whose acts are embraced within the enactment, are guilty of the offences created by the enactment. I see nothing here inconsistent with section 191 read by itself alone. The bankrupt himself is not affected by this reading of the provisions of section 69; as regards him, section 191 takes full and complete effect according to its terms. On this construction of section 69, we have a substantive enactment, co-ordinate with section 191, by which, persons aiding, abetting, counselling or procuring, are put upon the same plane as the bankrupt, and become indictable and punishable for the offence in relation to which they have so acted.

There is, therefore, nothing in the provisions of section 191 necessarily or reasonably implying the exclusion of section 69.

Section 201 cannot, I think, be properly read as evidencing an intention on the part of the legislature to exclude the operation of section 69. It is limited to the case of offences committed by incorporated companies, and it may well be that the framers of the Act desired to provide against difficulties that might conceivably arise where the bankrupt is a corporation. See *King* v. *Daily Mirror* (1).

On the other hand, I am unable to agree with the argument advanced on behalf of the Crown, that section 198 affords an answer to the contention of the appellants. Section 198 assumes that persons other than the bankrupt may be guilty of an offence under the Act (for example, a creditor or person claiming to be a creditor who has committed an offence under section 194). Section 198 does

(1) [1922] 2 K.B. 530.

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not indicate that any person other than the classes of persons enumerated in section 191 can be guilty of an offence created by that section.

The appeal should be dismissed.

CANNON J.—The appellants were convicted under the following indictment:

Irving Simcovitch et Harry Simcovitch, en la cité de Montréal, en rapport avec la compagnie "Paris Shoe Shoppe", magasin de chaussures dont Cecilia Simcovitch était propriétaire, et dont le dit Irving Simcovitch était le gérant et l'autre dit accusé était l'employé et complice avant le fait, la dite compagnie ayant été déclarée en faillite, le ou vers le 7 faillite suivants:

(*d*) Dans les six mois qui ont précédé la dite faillite ou après ils ont caché une partie des biens de la dite faillite pour une valeur au delà $50 et ils ont caché des comptes recevables de la dite faillite;

(*e*) Durant la même période de temps, ils ont frauduleusement enlevé une partie des biens de la dite faillite pour une valeur d'au delà $50, à savoir: pour une valeur de $5,000.

S.R.C. Loi des faillites, c. 11, art. 191, d et e.

The appeal to the Court of King's Bench on the facts and on points of law was dismissed, Mr. Justice St-Jacques dissenting on a point of law which is now submitted to our consideration.

According to the formal judgment of the Court of King's Bench, the learned justice would have quashed the conviction

because, according to 191 of *Bankruptcy Act*, no other than the bankrupt can be indicted for an offence under that article; and because the trustee, by himself or by a representative, cannot lodge a complaint against another than the bankrupt, for a bankruptcy offence, unless he follows the enactment of 195 and 198 of the Act; and this procedure was not followed.

As the second reason of the dissenting judge was not mentioned amongst the grounds of appeal, the appellants very properly state in their factum that they cannot now support it before this court. We, therefore, have to decide only whether or not none but the bankrupt can be indicted for an offence under 191 of the *Bankruptcy Act*.

The learned dissenting judge says in his reasons for judgment:

La question se pose comme suit:

Les offenses, ou les séries d'offenses, que l'article 191 de la *Loi de faillite* édicte, peuvent-elles être mises à la charge d'autres personnes que du failli lui-même? Et subsidiairement, peut-on recourir à l'article 69 de la *Loi criminelle* pour compléter l'article 191 de la *Loi de faillite*, et par application de cet article 69 du *Code criminel*, mettre en accusation d'autres personnes que le failli lui-même pour la commission de quel-

qu'une ou de quelques-unes des offenses édictées par l'article 191 de la *Loi de faillite*?

Il me paraît certain que le parlement fédéral dans l'exercice des pouvoirs que lui donne la constitution de notre pays, a voulu, en légiférant au sujet des faillites, créer un mécanisme complet, tant au point de vue de la procédure civile que de la procédure criminelle.

Il a défini, entre autres, dans les articles 191, 195, 198 et 201, quels sont les actes qui, sans être criminels en eux-mêmes, le deviennent eu égard à la faillite et s'ils sont commis dans les délais et les conditions posés par la *Loi de faillite*. Par exemple, si un commerçant enlève de son établissement de commerce une certaine quantité de marchandises pour la porter ailleurs, cet acte n'est pas en soi un crime; mais cet enlèvement devient une offense criminelle punissable, si l'enlèvement est fait dans les six mois qui précèdent la faillite ou après la présentation d'une requête de faillite avec l'intention de causer du préjudice aux créanciers, c'est-à-dire avec une intention frauduleuse.

Cette offense créée par le statut des faillites est punissable par une amende n'excédant pas $1,000, ou un terme d'emprisonnement n'excédant pas deux années, ou, en même temps, l'amende et l'emprisonnement.

L'article dit que "toute personne (any person) qui a été déclarée en faillite" etc, sera, dans chacun des cas énumérés à l'article, coupable d'une offense "indictable" etc.

On sait que l'expression "personne" employée dans cette loi de faillite s'applique aussi bien aux corporations qu'aux individus.

Et pourtant, afin de donner une sanction efficace à la loi de faillite, le législateur a disposé dans l'article 201 que lorsqu'une offense, prévue par la loi de faillite, a été commise par une compagnie incorporée, chaque officier, directeur ou agent de la compagnie qui a participé dans la commission de l'offense, sera passible de la même pénalité que la compagnie elle-même et tout comme s'il avait commis cette offense personnellement.

A première vue, il semblerait étrange que les termes généraux employés dans l'article 191 eussent été trouvés insuffisants par le législateur pour permettre d'atteindre toute personne, autre que le failli, qui aurait commis une offense de faillite.

Je crois que l'article 191 vise le failli lui-même et nul autre.

Si le failli a commis l'une queconque des offenses édictées par cet article, il peut être recherché en justice criminelle et condamné à la punition prévue par la loi.

Dans le cas actuel, Cécilia Simcovitch déclarée en faillite et ayant refusé de signer le bilan préparé par les syndics, il y a contre elle de fortes présomptions qu'elle n'ignorait pas les actes frauduleux commis par son gérant, à la veille même de la faillite. Elle aurait pu, je crois, être atteinte par les dispositions de l'article 191.

Le législateur n'a pas voulu, toutefois, que les personnes qui ont pu participer, soit directement, soit indirectement, à la fraude ou aux actes frauduleux que la loi de faillite punit, échappent à la justice.

En vertu de l'article 195, la cour des faillites peut ordonner la poursuite de telle personne pour de telles offenses.

The Crown contends that section 191 of the *Bankruptcy Act* created an indictable offence for any person who has been adjudged bankrupt, or in respect of whom a receiving order has been made, in each of the cases therein enumer-

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ated. Once this offence has been committed, the *Interpretation Act* (R.S.C., 1927, c. 1, s. 28) applies. It reads as follows:

Every Act (of the Parliament of Canada) *shall be read and construed* as if any offence for which the offender may be,—

(*a*) prosecuted by indictment, howsoever such offence may be therein described or referred were described or referred to as an indictable offence; and

(*b*) punishable on summary conviction, were described or referred to as an offence; and,

all provisions of the *Criminal Code relating to indictable offences,* or offences, as the case may be, *shall apply to every such offence.*

Therefore, says the Crown, the *Bankurptcy Act* not excluding this rule of interpretation, the provisions of the *Criminal Code,* including section 69, apply to this particular offence.

The Crown further contends that the appellants, having aided and abetted the bankrupt Cecilia Simcovitch in the commission of this indictable offence, were liable to arrest and conviction, as they have been in this case. Cecilia Simcovitch, the bankrupt, could have have been prosecuted together with her brothers and could even to-day be prosecuted for the said offence.

First of all, it must be noticed that, as pointed out by Mr. Justice Walsh in the majority judgment of the Court of King's Bench, the legislators provided in section 198 of the *Bankruptcy Act* that

where there is ground to believe that the bankrupt *or any other person* has been guilty of any offence under this Act, the Court may commit the bankrupt *or such other person* for trial.

This section is designed to enable the court to commit the bankrupt or any other person for trial without the necessity of a preliminary inquiry before a magistrate; but it does not exclude the ordinary procedure which has been adopted in the present case. The facts show clearly that the offence was committed with the aid of the appellants. Can they escape punishment on the technical ground that the goods that were concealed and carried away were not their goods, but those of their bankrupt sister?

A somewhat similar question was raised in the case of *The King v. Kehr* (No. 3) (1), in which

it was urged on behalf of defendant that the facts did not disclose an offence by the defendant, nor a lending by the company, of whose branch office he was in charge as manager; that the offence declared by the *Money Lenders Act* being purely statutory and its prohibition not being

(1) (1910) 18 Can. Cr. Cas. 202.

general as to all persons, but limited to the class specially named therein, i.e. "money lenders," there could be no conviction for aiding and abetting, (with the possible exception of another money lender); that the class limitation of the statute excluded the operation of sec. 69 of the *Criminal Code* (1906), under ss. 2 and 28 of the *Interpretation Act*, R.S.C. (1906), c. 1.

The judgment of the Court of Appeal of Ontario was delivered by Meredith J., who said in part:

I am also unable to see why one who is not a money lender, within the meaning of the Act, may not be an aider and abettor of one who is, in an infraction of its provisions.

It does not follow, from the fact that the person who aids in the commission of a crime is, by the *Criminal Code*, declared to be a party to and guilty of the offence, that one who could not alone have committed it, cannot be convicted. One may be physically incapable of committing a crime and yet guilty of it, through the act of another who is capable and whose act is the act of both; and why not equally so where there is legal incapacity?

That which the accused did would have been none the more harmful, none the more against the object of the enactment, if the accused, as well as his employer, had been a money lender.

Under section 69 of the Criminal Code,

Every one *is a party to* and guilty of an offence who

(*a*) actually commits it;

(*b*) does or omits an act for the purpose of aiding any person to commit the offence;

(*c*) abets any person in commission of the offence; or

(*d*) counsels or procures any person to commit the offence.

This has always been given this meaning: If a person assists another in the commission of an offence, he is responsible as though he had committed it himself. By aiding or abetting in the commission of an offence, he becomes a party to and guilty of an offence. He does become a party principal and there appears to be no reason why he should not be indicted or charged as principal under the Code.

See: *Rémillard* v. *The King* (1) and *Rex* v. *Daily Mirror* (2).

I, therefore, reach the conclusion that the rather technical point raised before us cannot prevail in face of the provisions which are intimately connected of the *Bankruptcy Act*, the *Interpretation Act* and the *Criminal Code*. The evident intention of Parliament was that these three statutes should complete and aid one another in order to bring to justice those who aided or abetted a bankrupt to commit offences to defraud his creditors.

I would, therefore, dismiss the appeal.

(1) (1912) 62 Can. S.C.R. 21. (2) [1922] 2 K.B. 530, at 542.

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CROCKET J. (dissenting): There is no doubt that the acts, with which the appellants were charged as offences against clauses (*d*) and (*e*) of s. 191 of the *Bankruptcy Act*, are declared to be offences by that section only when committed by a person, who has been adjudged bankrupt or in respect of whose estate a receiving order has been made or who has made an authorized assignment under that Act. The learned counsel for the Crown conceded that the conviction could not be maintained against either appellant under that section alone, inasmuch as neither was a person answering the specific description stated in its opening words. Seeking for other provisions with which s. 191 might be read to extend its application to any person, whether the bankrupt or not, he argued in the first place that s. 198 of the *Bankruptcy Act* itself had this effect. This argument, however, is not admissible for the reason pointed out in the judgment of the learned Chief Justice, viz: that the language relied upon in the latter section comprehends not only the offences described in s. 191 but other offences described in other sections of the Act as well, which might be committed by other persons than the bankrupt himself.

The real, substantial contention which has been advanced in support of the conviction is that s. 191 of the *Bankruptcy Act* must be read together with s. 69 of the *Criminal Code* in virtue of the provisions of s. 28 of the general *Interpretation Act*, R.S.C., 1927, c. 1, and that s. 69 of the *Criminal Code* makes any one, who abets the bankrupt in the commission of the offence, or who does or omits an act for the purpose of aiding the bankrupt to commit the offence, liable to prosecution for committing the offence described in s. 191 of the Bankruptcy Act as well as the bankrupt himself.

Singularly enough, therefore, there is no difficulty in the interpretation of s. 191 of the *Bankruptcy Act* itself—the enactment which creates and defines the alleged offence of which the appellants have been convicted. Its language is as unequivocal as any language could well be. The difficulty is encountered in the interpretation of s. 28 of the *Interpretation Act*, through which it is sought to read s. 69 of the *Criminal Code* into the *Bankruptcy Act* for the purpose of reaching the appellants, not as offenders who could themselves have committed the described offence, but as

offenders, who might nevertheless be convicted of that offence as accessories.

I regret that after much anxious reflection I find myself quite unable to adopt the view of the majority of the judges of the Court of King's Bench of the province of Quebec and of my brethren in this Court, that s. 28 of the *Interpretation Act* brings into operation, as regards the particular offences created by s. 191 of the *Bankruptcy Act*, the provisions of s. 69 of the Criminal Code, so as to render a person liable to prosecution and punishment therefor, who could not himself be guilty of the offence as created and defined in the particular Act.

As I read s. 28 of the *Interpretation Act*, it does not purport to do any more than to enact that whenever any statute of the Parliament of Canada creates an offence, for which any person may be prosecuted by indictment or liable to punishment on summary conviction, all the provisions of the *Criminal Code* relating to indictable offences, or offences, as the case may be, shall apply to *such* offence. This section itself prescribes a limitation to the words " any offence " in the same way as s. 191 of the *Bankruptcy Act* prescribes a limitation to the words " any person." It qualifies the words " any offence " by the immediate addition of the words " for which the offender may be prosecuted by indictment " or is " punishable on summary conviction," as s. 191 of the *Bankruptcy Act* qualifies the words " any person " by the words " who has been adjudged bankrupt," etc.

It is in my judgment only to an offence, which has been created or defined by the particular statute, to which the designated provisions of the *Criminal Code* are intended to be applied, not to an act, which itself has not been declared by the statute to be an offence at all, and that offence must be one, for which *the offender* within the contemplation of the particular statute may be prosecuted by indictment or is liable to punishment on summary conviction.

Once you have an offence created by the *Bankruptcy Act* or any other Act of the Parliament of Canada, of which any person, whether adjudged a bankrupt or not, *can* be guilty and for which any person *can* be prosecuted by indictment or is liable to punishment on summary conviction, then I have no doubt that s. 28 of the *Interpretation Act*

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would operate to apply all the provisions of the *Criminal Code* relating to indictable offences, or offences, to such an offence in the same manner and with the same effect as they would apply to all offences defined by the *Criminal Code* itself. These provisions of the *Criminal Code* would then apply to such an offence without in any manner altering the effect of the special enactment by which the offence is created.

If, however, s. 28 of the *Interpretation Act* is construed in the sense contended for by the Crown we are at once confronted by two contradictory enactments: one—the special enactment, providing that only a person who answers a specific description, can commit the offence, which it has created; and the other, s. 69 of the *Criminal Code,* providing that anybody, whether he answers the specific description or not, can commit it. If no one but the bankrupt is indictable for any of the offences described in the special enactment, when that enactment is read by itself, as the Crown concedes, and anybody is indictable for any of them, whether he be the bankrupt or not, if the provisions of s. 28 of the *Interpretation Act* and s. 69 of the *Criminal Code* are read together with it, as the Crown contends they ought to be, it necessarily follows, not only that the intendment of the one enactment is radically different from that of the other, but that s. 69 of the *Criminal Code* is the governing enactment. Yet s. 2 of the *Interpretation Act* itself, the controlling section of that statute, clearly recognizes that it is the intention of the particular enactment which must always prevail in the event of there being any inconsistency or repugnance between the particular enactment and any provision of the *Interpretation Act.* S. 2 reads as follows:

> Every provision of this Act shall extend and apply to every Act of the Parliament of Canada, now or hereafter passed, except in so far as any such provision,—
>
> (*a*) is inconsistent with the intent or object of such Act; or
>
> (*b*) would give to any word, expression or clause of any such Act an interpretation inconsistent with the context; or
>
> (*c*) is in any such Act declared not applicable thereto.

In my opinion s. 28 of the *Interpretation Act* and s. 69 of the *Criminal Code* can be read into s. 191 of the *Bankruptcy Act* only in so far as their provisions can consistently be read with those of s. 191. If its language is clear and free from all ambiguity in constituting any of the acts

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described in its various clauses as indictable offences only when they are committed by a person who answers the specific description stated in its opening and governing words, and there is no other provision in the *Bankruptcy Act* to the contrary, it seems to me that it must be taken that it was not intended to incorporate in the Act any provision of the *Interpretation Act,* or of the *Criminal Code,* which would give to that enactment any other effect than that which its own language so clearly connotes.

With all deference to those who have reached an opposite conclusion, I think the ground of Mr. Justice St. Jacques' dissent in the Court of King's Bench was well taken. I would adopt his judgment, allow the appeal to this Court and quash the conviction as one which discloses no offence against s. 191 of the *Bankruptcy Act.*

HUGHES J.—The appellants were tried and convicted in the Sessions of the Peace at Montreal on an indictment the material parts of which are as follows:

Irving Simcovitch et Harry Simcovitch, en la cité de Montréal, en rapport avec la compagnie "Paris Shoe Shoppe", magasin de chaussures dont Cecilia Simcovitch était propriétaire, et dont le dit Irving Simcovitch était le gérant et l'autre dit accusé était l'employé et complice avant le fait, la dite compagnie ayant été déclarée en faillite, le ou vers le sept décembre, mil-neuf-cent-trente-deux, ont commis les actes criminels de faillite suivants:

(*d*) Dans les six mois qui ont précédé la dite faillite ou après ils ont caché une partie des biens de la dite faillite pour une valeur au delà $50 et ils ont caché des comptes recevables de la dite faillite;

(*e*) Durant le même période de temps, ils ont frauduleusement enlevé une partie des biens de la dite faillite pour une valeur d'au delà $50, à savoir: pour une valeur de $5,000.

S.R.C. *Loi des faillites,* c. 11, art. 191, d et e.

The accused appealed to the Court of King's Bench, appeal side, and the appeal was dismissed with costs, Mr. Justice St. Jacques dissenting. The grounds of dissent of the learned judge are set forth in the formal judgment of the Court of King's Bench, appeal side, as follows:

The Honourable Mr. Justice St. Jacques dissenting, because, according to 191 of *Bankruptcy Act,* no other than the bankrupt can be indicted for an offence under that article; and because the trustee, by himself or by a representative, cannot lodge a complaint against another than the bankrupt, for a bankruptcy offence, unless he follows the enactments of 195 and 198 of the Act; and this procedure was not followed.

The appellants concede that the second reason for dissent of Mr. Justice St. Jacques was not mentioned in the notice of appeal as a ground of appeal and that it cannot now be urged before this Court.

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In his notes Mr. Justice St. Jacques said:—

Je crois que l'article 191 vise le failli lui-même et nul autre.

The Crown, however, submits that section 69 of the *Criminal Code* is made applicable by the *Interpretation Act*, R.S.C. 1927, c. 1, s. 28, which reads as follows:

28. Every Act shall be read and construed as if any offence for which the offender may be

(*a*) prosecuted by indictment, howsoever such offence may be therein described or referred to, were described or referred to as an indictable offence;

(*b*) punishable on summary conviction, were described or referred to as an offence; and

all provisions of the *Criminal Code* relating to indictable offences, or or offences, as the case may be, shall apply to every such offence.

I am of opinion that section 69 of the *Criminal Code* is applicable.

The appeal should be dismissed.

ST. GERMAIN J. (*ad hoc*): I concur in the dismissal of the appeal.

Appeal dismissed.

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*May 14
*Nov. 26

J. B. ARTHUR ANGRIGNON (DEFENDANT) ..... } APPELLANT;

AND

J. ARSENE BONNIER (PLAINTIFF).....RESPONDENT;

AND

THE CITY OF MONTREAL (MISE-EN-CAUSE).

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

Municipal corporation—Quo warranto—Disqualification of alderman—Property owned by alderman, sold to his daughter and leased to the city—Whether alderman "directly or indirectly interested"—Paragraph (g) of s. 25 of the charter of the city of Montreal, 11 Geo. V, c. 112.

In the year 1931, the appellant held the office of alderman of the city of Montreal and was re-elected in 1932. Previous to his election he owned lots on Allard street, and, in 1931, he built a three-storey house thereon. Some time in the early part of 1931 the appellant suggested to the chief of police that this house would be suitable for a police substation, alleged to be needed; and, after examination of the premises and reports by officials of the city, on the 23rd of April,

*PRESENT:—Duff C.J. and Rinfret, Cannon, Crocket and Hughes JJ.

1931, the city's notary received instructions to prepare a lease of the property at $125 per month. On the 27th of April, the appellant transferred his property to his daughter for a sum of $9,500, payable in five years, nothing being paid on account, the appellant reserving his *privilège de bailleur de fonds* and an hypothec on the property for the full amount. On the 6th of June, 1931, a lease was signed between the city and the appellant's daughter for a term of ten years at $125 for the first five years and $150 for the other five years. The city of Montreal paid these rents by cheques to the order of the appellant's daughter; all the cheques down to the 15th of April, 1932, with only one exception, were endorsed and delivered by her to the appellant, and the latter deposited them in his banking account and gave credit for same amounts on the purchase price of the property. On the 15th of April, 1932, the respondent filed a petition for a writ of *quo warranto* asking the disqualification of the appellant as alderman, alleging that the deed of sale from the appellant to his daughter was simulated and that the property in reality still belonged to the appellant, or that, alternatively, the latter had an indirect pecuniary interest in the contract ostensibly between his daughter and the city of Montreal. Paragraph (*g*) of section 25 of the charter of the city of Montreal enacts that "No person may be nominated for the office of mayor or alderman nor be elected to nor fill such office: (*g*) If he is directly or indirectly a party to any contract or directly or indirectly interested in a contract with the city, whatever may be the object of such contract."

Held that the appellant was disqualified as alderman of the city of Montreal, as, according to the facts of the case, he was "directly or indirectly interested" in the lease to which, by its terms, his daughter and the city were the parties.

Per Duff C.J. and Rinfret, Crocket and Hughes JJ.—The existence of a common intention and expectation concerning the disposition of the rents, which was acted upon, by the transfer of cheques for rent to the father by the daughter shews that the appellant was interested in the lease within the purview of the statute.

Per Cannon J.—The appellant, before and after his election as alderman, had a pecuniary interest in the property leased to the city, and consequently in a contract with the city, contrary to the charter.

Per Duff C.J. and Rinfret, Crocket and Hughes JJ.—The language of the statute is not the language of lawyers; the phrase "interested in" has no technical signification; effect must be given to it according to the common usage of men.

Per Cannon J.—The nature and the extent of such "interest" must be established by the facts in each case; and whenever an alderman finds himself in such a position that he must choose between the interest of the city in a contract and his own, he is instantly disqualified.

Per Duff C.J. and Rinfret, Crocket and Hughes JJ.—In this case, there is "concert," within the meaning of the Lord Chancellor's judgment in *Norton* v. *Taylor*, [1906] A.C. 378, between the appellant, as alderman, and his daughter, as a contractor with the city, by which moneys paid by the city under the contract were to be, and in fact were, transferred to the alderman in payment of a debt owing to him by the contractor.

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ANGRIGNON v. BONNIER.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec, reversing the judgment of the trial judge, Surveyer J. and maintaining a petition for a writ of *quo warranto* issued against the appellant, asking for his disqualification as alderman of the city of Montreal.

The material facts of the case are fully stated in the head-note and in the judgments now reported.

L. E. Beaulieu K.C. for the appellant.

John Ahern K.C. for the respondent.

The judgment of Duff C.J. and Rinfret, Crocket and Hughes J.J. was delivered by

DUFF C.J.—This appeal arises out of a proceeding alleging the disqualification of the appellant to hold the office of an alderman for the city of Montreal.

In the year 1931 the appellant held the office of alderman and was re-elected in April, 1932. Previous to his election he owned lots on Allard street and, in 1931, he built a three-storey house thereon. Some time in the early part of the year 1931 he suggested to the chief of police that this house would be suitable for a police substation. The chief of police caused the property to be examined. The appellant, who was then an alderman, accompanied the inspector who conducted the examination. The inspector reported that the creation of such a substation would provide increased protection. The superintendent of police reported that the appellant had told him there was an understanding that the city would rent the property at $125 per month.

After inspector Kavanagh's visit to the property, the appellant again discussed the matter with the chief of police and was told by him that the place would be suitable for a substation. On the 21st of April, 1931, the chief of police recommended to the director of services of the city of Montreal the establishment of a substation there, citing in support of his recommendation the opinion of inspector Kavanagh and his approval of the proposal.

Later, the appellant saw Mr. Bray, the president of the executive committee of the city of Montreal, and provisionally arranged for a lease by the city at $125 per month.

On the 23rd of April the director of services wrote to the city's notary giving instructions to prepare a lease of the property, and, on the 27th of April, all arrangements for the lease having been completed, the appellant transferred the property to his daughter Mrs. April for the sum of $9,500, payable in five years, nothing being paid on account.

On the 27th of May, 1931, the executive committee submitted to the council a draft of a lease by Mrs. April to the city, and this report was adopted on motion by another alderman which was seconded by the appellant. On the 6th of June, 1931, the lease between the city and Mrs. April was signed; it was a lease for a term of ten years at a rental of $125 per month for the first five years, and $150 per month for the last five years. The city of Montreal paid the rent of $125 per month, by cheque to the order of Mrs. April; and all the cheques down to the 15th of April, 1932, when the present proceedings were instituted, were endorsed and delivered by Mrs. April to the appellant, with the exception of the cheque for December, 1931, which was used by the daughter for exceptional family expenses. All the cheques delivered to the appellant by Mrs. April were deposited in his banking account and credited on the purchase price of the property.

In July, 1931, the chief of police reported to the director of services that he had been induced by error to assent to the establishment of a substation and that no substation was required on Allard street, and that the lease ought to be cancelled. In October, 1931, the police inspector for the division where the property was situated reported that the property was not in a sanitary condition; that the heating system was insufficient; that the building was not finished; and that there was water at all times in the basement. Nevertheless, the city took possession of the property in January, 1932. Rent has been paid by the city at the contract rate from the 1st of May, 1931; and on the 4th of April, 1932, the date of the appellant's re-election as alderman, the lease was a subsisting lease.

The question for our determination is whether or not the appellant was disqualified, by force of paragraph (*g*) of section 25 of the charter of the city of Montreal, which enactment is in these terms:

No person may be nominated for the office of mayor or alderman or be elected to nor fill such office: (*g*) If he is directly or indirectly a

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party to any contract, or directly or indirectly interested in a contract with the city, whatever may be the object of such contract.

The precise question is whether, while holding the office of alderman, the appellant was "directly or indirectly interested" in the lease, to which, by its terms, his daughter and the city were the parties.

It was argued by the respondent that the whole transaction was simulated, and that the daughter was, in respect of the ownership of the property, as well as in respect of the lease, a mere *prête-nom* for her father, the appellant. The trial judge, on this issue, found against the respondent, as well as four judges of the Court of King's Bench. These learned judges held that the sale to the daughter was a real sale and that the daughter was the real party to the lease to the city. Their view was that the activities of the appellant, in respect of which he received no remuneration, in superintending the building of the house, were naturally explained by the parental relationship; and that this relationship accounted, at least in large measure, for his efforts in procuring the letting of the property to the city.

We perceive no satisfactory ground for doubting that this is substantially in accord with the actual facts. On the other hand, this view, that these transactions were real transactions, establishing legal relations between the father and the daughter, and between the city and the daughter, necessarily involve the proposition that the ostensible obligation on the part of the daughter to pay the purchase money was a legal obligation which the daughter was expected to fulfil.

The majority of the judges in Quebec have fully accepted the contention that the house was built for the daughter, but that she was to pay the purchase price of it, the amount which corresponded at least approximately to the aggregate of the sums expended by the appellant; as well as additional sums expended by him, for example, in connection with heating arrangements. But there seems to be no room for doubt, and, indeed, it is not disputed, that (since the daughter was without resources, and had no other means for providing for the payment of these obligations to her father) it was contemplated by all parties that the daughter would be enabled to discharge these obligations

out of the moneys received by her as rents, and that the rents would be devoted to that purpose.

One of the sisters who was called by the respondent gives this evidence:

Q. Quand il avait été question que M. Angrignon donnerait à madame April une propriété, qu'il lui ferait construire une propriété, madame April avait-elle de l'argent pour faire un payment en acompte? R. Du tout, aucun argent.

Q. Il était entendu que madame April n'avait pas d'argent pour acheter ou payer une propriété?—R. Non, du tout.

Q. Comment devait-elle payer cette propriété-là?—R. Quand la maison était finie, avec les loyers qu'elle recevait.

Q. Elle devait payer avec les loyers?—R. Oui.

Q. C'était cela qui été convenu?—R. C'était la décision.

This testimony must not be given an extreme construction. It ought not to be read as establishing that there was an explicit contract between the father and daughter as to the application of the rents; and we are not disposed to hold that there was a legally enforceable duty resting upon the daughter to apply the rents in pursuance of the expectation and intention of the family who seem to have been fully conversant with the arrangements. In this sense we think the finding of the trial judge, in which Mr. Justice Letourneau concurred, that the daughter was free to dispose of the rents, can be sustained.

Nevertheless, we do not think it can be seriously disputed that the appellant, his daughter, as well as the family generally, counted upon the disbursements made by the father in the construction of the building, that is to say, the amount of the purchase price, which constituted debt from the daughter to the father, being reimbursed and paid to the father by the application of the rents to that purpose.

At the conclusion of the argument I was disposed to think that, since the facts in evidence did not point to a legally enforceable arrangement between the father and the daughter touching the application of the rents, the case was not within the statute. On further reflection, I have reached the conclusion that the existence of a common intention and expectation concerning the disposition of the rents, which was acted upon by the transfer of cheques for rent to the father by the daughter, as already explained, down to the commencement of the proceedings in *quo warranto,* shews that the father was "interested in the lease" within the purview of the statute.

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It should be observed that the cheques were transferred by the daughter and received by the father as a matter of course. He says she was entitled to retain them. But she had, as already observed, no other means of paying him. The appellant, when asked to explain why, after commencement of the proceedings, he had left the rent in the hands of Madame April, gives this answer:

Q. Voulez-vous dire pourquoi après cela les chèques sont allés au compte de votre fille?—R. Parce que mon gendre a perdu sa position et que ma fille était malade, elle est gravement malade, elle est aux incurables, peut-être pour ne pas en sortir. Je voudrais bien qu'elle reviendrait, je prends tous les moyens. Je lui ai dit: "Prends tout ton argent et soigne-toi". Son mari, il faut qu'il mange, il n'a rien à faire.

His answer by the appellant who insists, throughout his evidence, that the rents were the property of Madame April, rather implies that the retention of the rents by her in the special circumstances was a concession by him.

Again, this passage in his evidence is not without significance:

R. C'était ma fille qui recevait cela pour moi, je les endossais après ma fille. Elle les endossait, ils étaient faits à son nom, les chèques n'étaient pas faits à mon nom.

Q. Vous les endossiez et vous les déposiez à votre compte?—R. Après qu'ils avaient été endossés par ma fille.

Q. Vous les déposiez à votre compte?—R. Oui.

Q. Alors, la ville payait votre propriété? (Me L. E. Beaulieu C.R., avocat de l'intimé, s'oppose à cette question comme illégale).

Q. C'est bien l'argent de la ville qui allait dans votre compte en paiement de votre propriété? (Me L. E. Beaulieu C.R., avocat de l'intimé, s'oppose à cette question comme illégale).

Turning now to the effect of the statute. The courts have had to consider similar provisions on various occasions during the past century. I refer to some of the judgments which have been delivered in cases involving the construction of similar words, not as authorities governing us in the construction of the Quebec statute, but as indicating, as I think they do, the point of view from which the consideration of the enactment before us is to be approached.

In *Towsey* v. *White* (1) Bayley J. said,

The great object of the Legislature was to prevent any bargaining between the trustees and the contractors, so as to give the former an interest adverse to their duty.

In *Nutton* v. *Wilson* (2) Lindley L.J. said,

To interpret words of this kind, which have no very definite meaning, and which perhaps were purposely employed for that very reason, we must look at the object to be attained. The object obviously was to

(1) (1826) 5 B. & C. 125 at 131. (2) (1889) 22 Q.B.D. at 744, 748.

prevent the conflict between interest and duty that might otherwise inevitably arise.

In *Norton* v. *Taylor* (1), Lord Loreburn, L.C., construing a statute of New South Wales, by which any person holding civic office was penalized, where he "becomes directly or indirectly * * * knowingly engaged or interested in any contract * * * with or on behalf of the council," said,

> There are many ways in which a person holding a civic office might be brought within the Act 2 Edw. 7, No. 35, as for instance if he had a share in the original contract, or if he were employed by way of subcontract to execute the original contract or part of it; or it might be perceived by the Court that an arrangement had been made under which he was to be the person to supply the materials for the original contract. In those cases, whether it was done directly or indirectly, he might be liable, and no device to conceal the real nature of the transaction would prevail. But their Lordships do not think that he is liable merely for supplying materials to the contractor who chooses to buy them from him without any sort of understanding or arrangement that he should do so. Courts of justice in such cases would be vigilant to observe evidence of any concert to enable a civic officer to derive benefit from a contract.

We think the indicia adverted to in this passage, and in the observations of Lindley L.J., afford the most satisfactory tests in the circumstances of this case. The language of the statute is not the language of lawyers. The phrase "interested in" has no technical signification; effect must be given to it according to the common usage of men.

Sufficient has been said to support the conclusion that here we have "concert," within the meaning of the Lord Chancellor's judgment, between an alderman and a contractor with the municipality, by which moneys paid by the city under the contract were to be, and in fact were, transferred to the alderman in payment of a debt owing to him by the contractor. No doubt, as has already been said, the appellant, throughout, had his daughter's welfare at heart. In negotiating the lease, we may assume that he was actuated by his concern in seeing her comfortably provided for; but it is impossible to escape the conclusion that he had in view the employment of the moneys paid by the city to reimburse his expenditures in constructing and equipping the building. Nor is there any doubt that in all this his daughter's view and intentions, in this respect, coincided with his own.

(1) [1906] A.C. 378, at 380.

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The appellant was, we repeat, by "concert" between himself and the lessee "interested in the lease" in the pertinent sense.

The appeal will be dismissed. But, since the respondent can only succeed upon a construction of the statute not advanced by him at any stage, we think he should be subjected to the terms that there shall be no costs of this appeal or of the proceedings in the courts of Quebec.

CANNON J.—La Cour du Banc du Roi de la province de Québec a accordé permission spéciale de nous soumettre son jugement du 28 octobre 1933 renversant, avec le dissentiment de l'honorable juge-en-chef Tellier et de l'honorable juge Létourneau, le jugement de la Cour Supérieure (Surveyer, J.) et déclarant l'appelant dépossédé et exclu de son siège comme échevin. L'article 25, par. (*g*), de la charte de Montréal se lit comme suit:

> Nul ne peut être mis en nomination pour la charge de maire ou d'échevin, ni être élu à cette charge, ni l'exercer:
>
> (*g*) S'il est directement ou indirectement partie à un contrat, ou directement ou indirectement intéressé dans un contrat avec la cité, quelque soit l'objet de ce contrat.

Comme le dit le jugement permettant l'appel, cet article ne fait que confirmer un principe de droit public élémentaire, à savoir que personne occupant une position de confiance, comme celle d'échevin, ne doit continuer dans l'exercise de ses fonctions si son intérêt particulier vient en conflit avec son devoir officiel.

Pour résoudre la question posée, il est bon de faire l'historique de cette disposition de la charte de la cité de Montréal.

En 1890, dans la cause de *Stephens* v. *Hurteau* (1), il a été jugé qu'un échevin qui s'engage à fournir des matériaux requis par un entrepreneur pour l'exécution d'un contrat avec la cité de Montréal a un intérêt dans tel contrat qui tombe sous la prohibition du statut 37 Vict. (Q.) c. 51, s. 22, et le rend incapable d'occuper son siège comme échevin. A la page 157, le juge-en-chef Johnson nous dit:

> First, what is the law? The Act of 1874 (37 V. c. 51, sec. 22) lays down at sec. 22, among other things, that any person holding the office of mayor or alderman, who shall directly or indirectly become a party to, or security for, any contract or agreement to which the corporation of the said city is a party, or shall derive any interest, profit or advan-

(1) (1890) M.L.R. 6 S.C. 148.

tage from such contract or agreement, shall immediately become disqualified and cease to hold his office.

Then came the Act of 1889 (52 Vic. c. 79), a consolidation of the Act constituting the charter of the city—which never repealed the Act of 1874; but on the contrary enacted by its 284th section, that only Acts inconsistent with the Act of 1889 were repealed; and even in that case the repeal was not to affect anything done under the Acts repealed. Well, this Act of 1889, by its 25th section, reproduced the provisions of sec. 22 of the Act of 1874, as far as disqualification resulting from directly or indirectly becoming a party to, or security for, any contract or agreement with the city; but when it came to disqualification as resulting from deriving any interest, profit or advantage from such contract or agreement, the later Act added the words, to the extent of $100.

Cette section 25, telle qu'interprétée dans cette cause de *Stephens* v. *Hurteau* (1), fut remplacée par 55-56 V. c. 49, s. 26, par la suivante:

25. If any person, holding the office of mayor or alderman * * * directly or indirectly becomes a party to, or security for, any contract or agreement with the city *for the performance of any work or duty,* or derives any interest, profit or advantage from such contract or agreement, to the extent of one hundred dollars, * * * then, and in every such case, such person shall thereupon immediately become disqualified, etc.

La charte fut revisée et consolidée en 1899, par 62 Vict. c. 58. La clause 37 déqualifie toute personne qui *directly or indirectly becomes a party to* or security for any contract or agreement with the city, *for the performance of any work or duty or for goods to be supplied to it, or directly or indirectly has any interest in, or derives any profit or advantage from, such contract or agreement, or is a party to or directly or indirectly interested in any claim or in any suit or legal process or in any expropriation or other case in which the city,* if condemned, will have to disburse any moneys, or is the attorney for the claimant or for the plaintiff in any *such process, suit or case, or is a member* of a firm acting as attorneys or one of the members whereof acts as attorney as aforesaid, etc.

Cet article 37 de 62 Vict. c. 58, fut, à son tour, amendé par 9 Ed. VII, c. 81, sec. 3, et remplacé par 4 Geo. V, c. 73, sec. 4, modifié par 8 Geo. V, c. 84, s. 16, et abrogé par 11 Geo. V, c. 112, s. 18 (1921).

Cette même loi de 1921 (cédule B, s. 10) art. 10, nous donna l'article 25 comme suit:

25. No person may be nominated for the office of mayor or alderman nor be elected to nor fill such office; * * *

g. if he is directly or indirectly a party to any contract, or directly or indirectly interested in a contract with the city, whatever may be the object of such contract;

h. if, as an advocate, he conducts or if the firm to which he belongs, or any of its members, conducts any case against the city before a court of justice, or in connection with an expropriation;

(1) (1890) M.L.R. 6 S.C. 148.

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i. if he is a party or interested directly or indirectly in any case, prosecution or claim against the city;

C'est là le texte qu'il s'agit d'interpréter.

Il serait assez difficile de donner une définition exacte et précise de l'intérêt en question. Il est évident qu'il ne s'agit pas seulement de l'intérêt requis pour avoir un droit d'action contre la cité; car, dans ce cas, la deuxième partie de la prohibition serait inutile. Il s'agit d'établir par les faits de chaque cause la nature et l'étendue de l'intérêt; et chaque fois qu'on arrive à la conclusion que l'échevin se trouve à avoir à choisir entre l'intérêt de la cité dans un contrat et le sien, il est immédiatement déqualifié.

Même si, en fait, l'acte de vente de la propriété louée à la cité de Montréal consenti par l'appelant à sa fille est réel et non simulé, cela aurait simplement pour effet d'éliminer la première prohibition du sous-paragraphe g, celle qui l'empêche d'être *partie* directement ou indirectement à un contrat avec la cité. Mais pourquoi avoir retardé jusqu'au 24 avril 1931 pour passer l'acte authentique de cette vente que l'on veut faire remonter jusqu'à l'été de 1930? Le rapport favorable de Kavanagh est du 8 avril 1931. Le rapport du directeur de police porte la date du 21 avril, celui du directeur des services fut signé le 23 avril demandant au notaire Beaudoin de préparer le bail. Dès lors, l'affaire pouvait être considérée comme bâclée par l'appelant; et il semble raisonnable de déduire de ces circonstances la conclusion que ce n'est qu'alors, le 27 avril 1931, qu'il s'est cru suffisamment garanti pour pouvoir vendre par acte authentique à sa fille qui était devenue, grâce à ses démarches comme échevin, capable de lui payer le prix de vente à même les loyers qu'elle retirerait chaque mois pendant dix ans de la cité de Montréal.

Je ne puis me convaincre que l'appelant, créancier hypothécaire pour la pleine valeur de cette propriété, n'était pas, dès lors, au moins indirectement, intéressé à ce que la ville de Montréal paie à sa fille cent vingt-cinq dollars ($125) par mois pendant cinq ans, et cent cinquante dollars ($150) par mois pendant les cinq années suivantes, si réellement sa fille, qui était absolument sans moyens, devait lui rembourser le prix de cet immeuble. La charte de Montréal est plus rigoureuse sous ce rapport que le code municipal ou la *Loi des cités et villes*. La législature avait

sans doute ses raisons pour mettre les échevins de Montréal à l'abri de toute tentation. Même s'il n'avait pas encore comme créancier hypothécaire un *jus in re* dans cet immeuble, il n'en aurait pas été moins intéressé, comme promettant vendeur, à obtenir, par ses démarches, du chef de police et des autres officiers les recommandations voulues pour l'établissement d'un nouveau poste de police dans la maison de rapport en question. Je suis fortement d'avis qu'il ne peut y avoir de doute que, lorsqu'il s'est agi d'autoriser l'adoption du rapport de l'exécutif par le conseil de ville, le 27 mai 1931, l'échevin Angrignon a fait preuve d'une ignorance de la loi, ou d'une indélicatesse peu ordinaire, en secondant audacieusement la motion de l'échevin Biggar adoptant le rapport qui assurait la location de cette propriété par la cité pour dix ans à un prix qui, pour le moins, était rémunérateur et lui fournissait un moyen presque certain de se faire payer les déboursés qu'il prétend avoir faits pour installer sa fille et que cette dernière, d'après l'acte de vente, devait lui rembourser—bien qu'elle fût sans moyens de le faire autrement,—que par ce que cet immeuble pouvait rapporter. Et, de fait, l'appelant a admis que chaque chèque de $125, depuis juin 1931, sauf celui de décembre, est allé, jusqu'à avril 1932, date des procédures, avec l'endossement de sa fille, au crédit de l'appelant à la banque, en déduction du prix de la propriété louée.

Comme je l'ai dit plus haut, la charte de la cité est plus sévère aujourd'hui qu'elle ne l'était en 1890, lors de l'affaire de *Stephens* v. *Hurteau* (1). Ce dernier a été déqualifié parce qu'il aurait vendu du bois pour le pavage de la rue Craig à un entrepreneur de la cité de Montréal, dont il était ainsi devenu le créancier. La loi, à cette époque, prohibait tout intérêt, profit ou avantage de l'échevin dans un contrat. Plus tard, on a spécifié qu'il s'agissait d'un contrat " for the performance of any work or duty." Puis on a ajouté " for goods to be supplied to the city." Et enfin, nous avons le texte actuel qui ne spécifie rien mais parle de n'importe quel contrat " quelque soit l'objet de ce contrat". La disposition actuelle, en retranchant les mots " profit " et " avantage ", qui, jusqu'à un certain point, délimitaient le sens du mot " intérêt ", me paraît plus compréhensive. *Avoir* un intérêt dans une affaire n'est pas *prendre l'intérêt* de quelqu'un par simple bienveillance,

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sentiment qui fait que l'on désire et poursuit le bien de quelqu'un, que l'on prend part à ce qui lui arrive d'agréable ou de fâcheux—mais sans désir égoiste d'un profit, d'un avantage personnel, sans considération pour son bien propre et exclusif. Pour moi, l'appelant, dans cette affaire de bail à la cité de Montréal, n'a pas agi par simple bienveillance pour sa fille, à laquelle il pouvait légitimement s'intéresser; mais il s'était auparavant assuré un droit éventuel à un bénéfice personnel à même les loyers provenant de la cité—dont il avait juré de protéger les intérêts. De plus, il s'était réservé par l'acte de vente une "hypothèque sur l'immeuble loué en outre du privilège de droit". Il avait donc, avant, lors et après son élection comme échevin, un intérêt pécuniaire dans la propriété louée à la cité—et, par conséquent, dans un contrat avec la cité; que cet intérêt soit direct ou indirect, peu importe, dit la charte de Montréal.

Cette disposition est de droit public et les autorités anglaises recueillies dans Biggar, Municipal Manual, édition de 1900, pp. 109 et 110, sont à consulter.

Dans *Stephens* v. *Hurteau* (1), le juge-en-chef Johnson réfère (p. 163) à *City of Toronto* v. *Bowes* (2). Je trouve dans le rapport de cette cause un citation tirée de *Governor and Company of York Building Society* v. *Mackenzie* (3), qui pose, je crois, le principe qui trouve son expression dans l'article de la charte de Montréal qui nous est soumis:

> The office imports a natural disability, which, *ex vi termini*, imports the highest quality of legal disability. A law which flows from nature, and is founded on the reason and nature of the thing, is paramount to all positive law. This is not an arbitrary or local regulation; it is the constitution of nature itself, and is as old as the formation of society, and of course it must be universal. It proceeds from nature, and is silently received, recognized, and made effectual, whereever any well regulated system of civil jurisprudence is known.
>
> The ground on which the disability or disqualification rests is no other than that principle which dictates that a person cannot be both judge and party. "No man can serve two masters." He that is entrusted with the interest of others cannot be allowed to make the business an object of interest to himself; because, from the frailty of human nature, one who has the power, will be too readily seized with the inclination, to use the opportunity for serving his own interest at the expense of those for whom he is entrusted. The danger of temptation, from the facility and advantages of doing wrong which a particular situation afford, does, out of the mere necessity of the case, create a disqualifi-

(1) (1890) M.L.R. 6 S.E. 148; M.L.R. 5 S.E. 1.

(2) (1854) 4 Grant's Ch. Rep. 489.

(3) 1795 8 Bro. P.C. 42.

cation; nothing less than incapacity being able to shut the door against temptation, when the danger is imminent and the security against discovery great, as it must be when the difficulty of prevention or remedy is inherent in the very situation which creates the danger. *The wise policy of the law has therefore put the sting of a disability into the temptation as a defensive weapon against the strength of the danger which lies in the situation. * * * This conflict of interest is the rock, for shunning which the disability under consideration has obtained its force, by making the person who has one post entrusted to him incapable of acting on the other side, that he may not be seduced by temptation and opportunity from the duty of his trust.*

Pour ces raisons, je crois que l'appel devrait être renvoyé et le dispositif du jugement *a quo* confirmé.

Appeal dismissed, no costs.

Solicitors for the appellant: *Beaulieu, Gouin, Mercier & Tellier.*

Solicitors for the respondent: *Hyde, Ahern, Perron, Puddicombe & Smith.*

TORONTO GENERAL TRUSTS CORPORATION ..... APPLICANT;

AND

THE CITY OF OTTAWA ..... RESPONDENT.

1934
*Nov. 14.
*Dec. 12.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Appeal—Jurisdiction—Granting of special leave to appeal—Supreme Court Act (R.S.C. 1927, c. 35), s. 41 (c).

The applicant, having received, as executor of an estate left by a person resident in Ontario, income on behalf of and payable to persons resident out of Ontario, and being assessed by respondent city in respect of same under the Ontario *Assessment Act*, claimed an exemption of $1,500 in respect of the income received by it in 1932 on behalf of and payable to each such person. The Court of Appeal for Ontario held against the claim for exemption; and refused special leave to appeal to this Court. The applicant then applied to this Court for special leave to appeal.

Held, This Court has jurisdiction to grant such leave, under s. 41 (*c*) of the *Supreme Court Act* (R.S.C. 1927, c. 35); and, in all the circumstances, leave should be granted.

MOTION for special leave to appeal to this Court from the judgment of the Court of Appeal for Ontario (1) allowing an appeal (taken by way of stated case) by the City of

*PRESENT:—Duff C.J. and Rinfret, Cannon, Crocket and Hughes JJ.

(1) [1934] Ont. W.N. 269.

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TORONTO GENERAL TRUSTS CORPORATION v. CITY OF OTTAWA.

Ottawa, the present respondent, from the decision of Daly, Co.C.J., affirming the decision of the Court of Revision which, on assessment under the Ontario *Assessment Act* in respect of income received in 1932 by the present applicant as executor or trustee of each of several estates left by persons resident in Ontario, allowed an exemption of $1,500 in respect of the income payable to each beneficiary resident out of Ontario.

W. Schroeder for the applicant.

F. B. Proctor K.C. for the respondent.

The judgment of the court was delivered by

HUGHES J.—This is a motion by the Toronto General Trusts Corporation for special leave to appeal to this Court from a judgment of the Court of Appeal for Ontario, dated April 3, 1934. Special leave to appeal was refused by the Court of Appeal on May 8, 1934.

The matter in controversy between the parties is whether an executor and trustee of an estate in which part of the annual income is payable to persons residing out of Ontario is entitled to an exemption of $1,500 in respect of the income received by it on behalf of and payable to each beneficiary resident out of Ontario.

Les Ecclésiastiques de St. Sulpice de Montréal v. *City of Montreal* (1), was an exemption case. In it the jurisdiction of this Court was questioned on an appeal from a judgment of the Court of Queen's Bench for Lower Canada, Appeal Side, in an action brought to recover $361.90, the amount of a special assessment for a drain along the property of the appellants. The respondent moved to quash on the ground that the matter in controversy was less than $2,000 and did not come within any of the exceptions of section 29 of the *Supreme and Exchequer Courts Act*. Section 29 (*b*) of the Act read as follows:—

29. No appeal shall lie under this Act from any judgment rendered in the province of Quebec in any action, suit, cause, matter or other judicial proceeding, wherein the matter in controversy does not amount to the sum or value of two thousand dollars, unless such matter, if less than that amount,—

* * * * * * * * * * * * *

(*b*) Relates to any fee of office, duty, rent, revenue or any sum of money payable to Her Majesty, or to any title to lands or tenements,

(1) (1889) 16 Can. S.C.R. 399.

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annual rents or such like matters or things where the rights in future might be bound.

It was held *Per Curiam:*

The case is appealable as coming within the words "such like matters or things where the rights in future might be bound" in paragraph 6 of section 29 of the Supreme and Exchequer Courts Act—If the rate struck was found to be insufficient and another rate imposed, the parties would be bound by the judgment in this case.

The figure 6 in the report is obviously a clerical error. It should be the letter (*b*). There was no paragraph 6 in section 29. On the merits it was held that the appellants came within a statutory exemption and the appeal was allowed.

We think this case falls within subsection (*c*) of section 41 of the present *Supreme Court Act.*

There remains the question whether, there being jurisdiction, special leave should be granted. We are of opinion that, in all the circumstances, it should be granted.

The costs of this application will be costs in the cause in the appeal.

Motion granted.

Solicitors for the applicant: *MacCraken, Fleming & Schroeder.*

Solicitor for the respondent: *F. B. Proctor.*

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*Oct. 29
*Nov. 26

BEATRICE BERNARD CHAPDELAINE..APPELLANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

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

Criminal law—Murder—Poisoning—Jury trial—Misdirections by trial judge—Evidence—Admissibility—Declarations by deceased—Res gestae—Ante mortem—Testimony by brother of accused, an accomplice—Warning given to jury—Illegal comments by trial judge in his charge—Whether "substantial wrong or miscarriage of justice"—New trial—Section 1014 (2) Cr. C.

The appellant was tried for the murder of her husband, convicted and sentenced to death, the indictment charging her with the administering of poison (arsenic). The conviction was affirmed by the appellate court, two judges dissenting. The grounds of dissent were based on misdirections by the trial judge in his charge to the jury on the

*PRESENT:—Duff C.J. and Cannon, Crocket and Hughes JJ. and St. Germain J. *ad hoc.*

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two following matters. First: the Crown brought witnesses who testified to declarations made by the deceased, in the presence of the accused, four or five days before his death and nearly two weeks after the date of the alleged offence, such declarations being to the effect that he was dying from poison given to him by the accused. Counsel for the accused having objected to the admissibility of such evidence, the trial judge held that it could not be admitted "as being a deposition *ante mortem*," but he allowed it "as being a declaration made by the victim in presence of the accused." But, in his charge to the jury, the trial judge did not restrict himself to instruct the jury accordingly, and, treating these declarations by the deceased as being an important part of the evidence, he proceeded to make an analysis of same and emphasized the statement made by the deceased that he was going to die, and so to give more weight to the truthfulness of the latter's declarations that he had been poisoned by his wife. Secondly: the principal witness for the Crown was one Gédéon Bernard, brother of the accused. At the time of the trial he was serving a sentence of five years' imprisonment following a verdict of manslaughter on an indictment for the murder. He testified that the appellant came to his house and asked him if he had any poison, as she wanted to get rid of her husband, that she agreed to pay him $200; that he gave her some poison; that the appellant, seeing her husband ill but not yet dead, asked him for more poison and he gave it. At the request of counsel for the accused, the trial judge warned the jury of the danger of convicting on the uncorroborated evidence of an accomplice, although it was within their legal province so to do; but he added (translation): "* * * to tell you to take the evidence of Gédéon Bernard as that of an accomplice, I am bound, at the request of the defence, to tell you that he was the aider and not the principal. To be an accomplice, it is necessary that there should be a principal, that another should have committed the crime. If it is absolutely desired that I say to the jurors to regard Gédéon Bernard as an accomplice in the present case, it would be necessary that the principal should be the accused. It is not possible to be the accomplice of one who does not exist. * * * He is not an ordinary accomplice. If he be the accomplice, he is the brother of the accused."

Held that the trial judge misdirected the jury upon each of the two grounds of appeal above mentioned and that those material misdirections were so grave as to necessitate a new trial, the Crown having failed to shew that no substantial wrong or miscarriage of justice did not occur owing to such misdirections. Section 1014 (2) Cr. C.

Held, also, that the declarations made by the deceased that he had been poisoned by his wife were not admissible as forming part of the *res gestae*. These declarations were made at the hospital nearly two weeks after the date of the alleged offence and four or five days before his death: therefore they were too much separated by time and circumstance from the actual commission of the alleged criminal act. These declarations should have been alluded to only in connection with the attitude of the accused.

Held, further (St. Germain J. *ad hoc* expressing no opinion), that the trial judge misdirected the jury in his remarks concerning the evidence of the brother of the accused, if considered as an accomplice. The trial judge after having set out to warn the jury of the danger of convicting on the uncorroborated evidence of an accomplice,

destroyed in effect by his subsequent remarks the warning given; some jurors may have in view of those remarks considered that the request of the defence was tantamount to an admission of guilt.

Per Duff C.J. and Crocket J.—The observations of the trial judge fall within the description "matters which ought not to have been submitted" to the jury for consideration by them "in aiming at their verdict." *Makin* v. *A. G. for N.S.W.* ([1894] A.C. 70).

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec, sustaining the conviction of the appellant, on her trial before Louis Cousineau J. and a jury, on a charge of murder. The grounds of appeal, and the material facts of the case bearing on the points dealt with by this Court, are sufficiently stated in the above head-note and in the judgments now reported. The appeal was allowed; the conviction was quashed, and a new trial ordered.

Antoine Rivard K.C. and *Césaire Gervais K.C.* for the appellant.

Wilfrid Lazure K.C. for the respondent.

The judgment of Duff C.J. and Crockett J. was delivered by

DUFF C.J.—I concur with the conclusion of my brother Hughes and of Mr. Justice St. Germain. I agree with my brother Hughes that the learned trial judge misdirected the jury in the matter of the evidence of Gédéon Bernard, and that this misdirection in itself was so grave as to necessitate a new trial. I agree, moreover, with Mr. Justice St. Germain in what he says as to the statements alleged to have been made by the unfortunate deceased, Ludger Chapdelaine, in the presence of the accused.

The rule as to the admissibility of statements made in the presence of the accused is stated by Lord Atkinson in *Rex* v. *Christie* (1) in these words:

> As to the second ground, the rule of law undoubtedly is that a statement made in the presence of an accused person, even upon an occasion which should be expected reasonably to call for some explanation or denial from him, is not evidence against him of the facts stated save so far as he accepts the statement, so as to make it, in effect, his own. If he accepts the statement in part only, then to that extent alone does it become his statement. He may accept the statement by word or conduct, action or demeanour, and it is the function of the jury which tries the case to determine whether his words, actions, conduct, or demeanour at the time when a statement was made amounts to an acceptance of it in whole or in part. * * *

(1) [1914] A.C. 545 at 554.

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Of course, if at the end of the case the presiding judge should be of opinion that no evidence has been given upon which the jury could reasonably find that the accused had accepted the statement so as to make it in whole or in part his own, the judge can instruct the jury to disregard the statement entirely. It is said that, despite this direction, grave injustice might be done to the accused, inasmuch as the jury, having once heard the statement, could not, or would not, rid their mind of it. It is, therefore, in the application of the rule that the difficulty arises. The question then is this: Is it to be taken as a rule of law that such a statement is not to be admitted in evidence until a foundation has been laid for its admission by proof of facts from which, in the opinion of the presiding judge, a jury might reasonably draw the inference that the accused had so accepted the statement as to make it in whole or in part his own, or is it to be laid down that the prosecutor is entitled to give the statement in evidence in the first instance, leaving it to the presiding judge, in case no such evidence as the above mentioned should be ultimately produced, to tell the jury to disregard the statement altogether?

In my view the former is not a rule of law, but it is, I think, a rule which, in the interest of justice, it might be most prudent and proper to follow as a rule of practice.

The practice indicated in the judgment of Pickford J. in *Rex* v. *Norton* (1) which Lord Atkinson says

* * * where workable, would be quite unobjectionable in itself as a rule of practice, and equally effective for the protection of the accused,

is explained by Mr. Justice Pickford in these words:

The fact of a statement having been made in the prisoner's presence may be given in evidence, but not the contents, and the question asked, what the prisoner said or did on such a statement being made. If his answer, given either by words or conduct, be such as to be evidence from which an acknowledgment may be inferred, then the contents of the statement may be given and the question of admission or not in fact left to the jury; if it be not evidence from which such an acknowledgment may be inferred, then the contents of the statement should be excluded. To allow the contents of such statements to be given before it is ascertained that there is evidence of their being acknowledged to be true must be most prejudicial to the prisoner, as, whatever directions be given to the jury, it is almost impossible for them to dismiss such evidence entirely from their minds. It is perhaps too wide to say that in no case can the statements be given in evidence when they are denied by the prisoner, as it is possible that a denial may be given under such circumstances and in such a manner as to constitute evidence from which an acknowledgment may be inferred, but, as above stated, we think they should be rejected unless there is some evidence of an acknowledgment of the truth. Where they are admitted we think the following is the proper direction to be given to the jury:—That if they come to the conclusion that the prisoner had acknowledged the truth of the whole or any part of the facts stated they might take the statement, or so much of it as was acknowledged to be true (but no more), into consideration as evidence in the case generally, not because the statement standing alone afforded any evidence of the matter contained in it, but solely because of the prisoner's acknowledgment of its truth; but unless they found as a fact that there was such an acknowledgment they ought to disregard the statement altogether.

(1) [1910] 2 K.B. 496, at 500.

It is desirable to emphasize what Lord Atkinson says. These observations cannot, except in so far as they relate to the direction to the jury, now be regarded as laying down the law, but they may properly be regarded as outlining a practice which "where workable" is "unobjectionable" and may prove "effective for the protection of the accused."

To these observations it may be useful to add the following extract from the judgment of Lord Moulton at p. 559 of the same case (1):

> There remains the second ground, namely, that it is evidence of a statement made in the presence of the accused, and of his behaviour on that occasion. Now, in a civil action evidence may always be given of any statement or communication made to the opposite party, provided it is relevant to the issues. The same is true of any act or behaviour of the party. The sole limitation is that the matter thus given in evidence must be relevant. I am of opinion that, as a strict matter of law, there is no difference in this respect between the rules of evidence in our civil and in our criminal procedure. But there is a great difference in the practice. The law is so much on its guard against the accused being prejudiced by evidence which, though admissible, would probably have a prejudicial influence on the minds of the jury which would be out of proportion to its true evidential value, that there has grown up a practice of a very salutary nature, under which the judge intimates to the counsel for the prosecution that he should not press for the admission of evidence which would be open to this objection, and such an intimation from the tribunal trying the case is usually sufficient to prevent the evidence being pressed in all cases where the scruples of the tribunal in this respect are reasonable * * *
> * * * The evidential value of the occurrence depends entirely on the behaviour of the prisoner, for the fact that some one makes a statement to him subsequently to the commission of the crime cannot in itself have any value as evidence for or against him.

It is not seriously open to dispute that the learned trial judge's charge was calculated to convey to the jury the belief that they were entitled to weigh the evidential value of the statement as if the statement were evidence of the facts stated, apart from the behaviour of the prisoner. This was done, moreover, in a manner calculated to influence weightily the judgment of the jury in arriving at a verdict.

I find myself quite unable to accept the contention made on behalf of the Crown that the appeal ought to be dismissed on the ground that there has been no substantial wrong or miscarriage of justice. To quote the language of the Lord Chancellor in delivering the judgment of the Judicial Committee in *Makin* v. *A.G. for N.S.W.* (2).

> Their Lordships do not think it can properly be said that there has been no substantial wrong or miscarriage of justice, where on a point

(1) [1910] 2 K.B. 496. (2) [1894] A.C. 57 at 70.

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material to the guilt or innocence of the accused the jury have, notwithstanding objection, been invited by the judge to consider in arriving at their verdict matters which ought not to have been submitted to them.

The matters discussed by the learned trial judge, already referred to, in dealing with the statements of the accused, plainly fall within the description "matters which ought not to have been submitted" to the jury for consideration by them "in arriving at their verdict." This applies also to the observations of the learned trial judge upon the evidence of Gédéon Bernard.

It is not within the province of this court to substitute itself for the jury in such cases.

It is, I think, desirable, since there is to be a new trial, that something should be said as to the principle governing the admissibility of dying declarations. Whether the conditions of admissibility are fulfilled is a question for the judge, and it is his duty to pass upon that question before admitting evidence of the statement alleged to have been made.

First of all, he must determine the question whether or not the declarant at the time of the declaration entertained a settled, hopeless expectation that he was about to die almost immediately. Then, he must consider whether or not the statement would be evidence if the person making it were a witness. If it would not be so, it cannot properly be admitted as a dying declaration. Therefore, a declaration which is a mere accusation against the accused, or a mere expression of opinion, not founded on personal knowledge, as distinguished from a statement of fact, cannot be received.

In *Rex* v. *Sellers*, a decision pronounced in 1796, reported in 1828 in the third edition of Carrington's Supplement to the Criminal Law, it was laid down that,

> Nothing can be evidence in a declaration *in articulo mortis* that would not be so if the party were sworn. Therefore, anything the murdered person, *in articulo mortis*, says as to facts, is receivable, but not what he says as matter of opinion.

That this statement of the law governs the practice to-day is evidenced by the fact that it is found in the leading current textbooks on criminal law, Russell on Crimes, 8th ed., p. 1930; Archbold, Criminal Evidence, 28th ed., 392; Roscoe, Criminal Evidence, 15th ed., 31; Wills, Evidence, 2nd ed., 197.

In the section of Lord Hailsham's edition of Lord Halsbury's Laws of England devoted to the criminal law (9 Hals. 452) it is reproduced almost *ipsissimis verbis*. The authors of that section are Mr. Justice Avory, Sir Archibald Bodkin and Mr. R. E. Ross.

If alleged *ante mortem* declarations of Ludger Chapdelaine are tendered as such during the course of the new trial, it will be the duty of the judge to consider and decide, before permetting evidence of them to go before the jury, whether or not these conditions have been satisfied.

The appeal should be allowed and a new trial should be ordered.

CANNON J.—I agree with my Lord the Chief Justice that the learned trial judge erred in matters of substance with respect to the declarations of the deceased in the hospital, in the presence of the accused, and also in his presentation to the jury of the appellant's position if Gédéon Bouchard's evidence was to be considered as that of an accomplice. But I have pondered with grave anxiety over paragraph 2 of article 1014 of the Criminal Code which would allow this court to dismiss the appeal and avoid a third trial if, notwithstanding our opinion on the above grounds, we were also of opinion that no substantial wrong or miscarriage of justice has actually occurred. I cannot, however, reach the conviction, to use the language of Lord Hewart, C.J. *re Jones alias Wright* (1), that, *without* these irregularities in the trial, the jury *must inevitably* have reached the same verdict of guilty against the accused.

It is impossible for us to enter into a speculation about what the jury might, could, would or should have done, and as we do not feel able to say that they must "inevitably" have come to the conclusion to which they did come, in the absence of the material improperly admitted,

the conviction must be quashed and a new trial ordered.

HUGHES J.—The appellant was tried before Mr. Justice Louis Cousineau and a jury at Sherbrooke, Quebec, January, 1934, on the following indictment:—

A East Angus, dans le district de St. François, dame Béatrice Bernard a assassiné son mari, Ludger Chapdelaine, dans les circonstances suivantes, savoir: en faisant prendre, le ou vers 1e 15ème jour de février 1932, au dit Ludger Chapdelaine, malicieusement et dans le but de l'empoisonner, un poison violent, savoir de l'arsenic, qu'elle mêla à son breuvage, lors de son repas, le tout à l'insu du dit Ludger Chapdelaine, et

(1) (1922) 16 Cr. App. Rep. 124, at 128.

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ce dernier mourut le 6 mars 1932, à Sherbrooke, dit district, des suites du dit empoisonnement, la dite dame Béatrice Bernard commettant par là un meurtre.

The accused was convicted and sentenced to death.

The accused appealed to the Court of King's Bench, appeal side. The appeal was dismissed by a majority judgment, Chief Justice Sir Mathias Tellier and Mr. Justice St. Jacques dissenting.

From the judgment of the Court of King's Bench, appeal side, the accused now appeals to this Court.

The grounds of dissent as set out in the formal judgment of the Court of King's Bench, appeal side, are as follows:

Sir Mathias Tellier et M. le Juge St-Jacques sont dissidents, parce que, suivant eux, le verdict est vicié par suite de la preuve illégale admise au dossier, comme celle des déclarations du défunt Ludger Chapdelaine et par suite de la direction illégale et injuste donnée au jury, et que, dans ces conditions, il est impossible de dire que, sans ces illégalités, le verdict du jury aurait été le même.

The notes of the Chief Justice and those of Mr. Justice St. Jacques both shewed that the misdirection above referred to concerned the declarations of the deceased and also concerned the evidence, as an accomplice, of Gédéon Bernard, a brother of the appellant.

The declarations of the deceased, both as to admissibility and direction, may first be taken up. It is not in dispute that the deceased, on or about February 17, 1932, felt ill about two hours after he had eaten some tomato soup prepared by the appellant, the remains of a can opened by the deceased the day before. At first he thought it was indigestion and had the doctor treat him. On February 23, the patient was removed by the doctor to St. Vincent de Paul Hospital at Sherbrooke. He died there on Sunday, March 6, 1932.

When, at the trial, Josephine Chapdelaine Brault, sister of the deceased, was testifying to a statement made by the deceased in the presence of the appellant the Tuesday or Wednesday before his death, the Crown counsel endeavoured to lay a foundation for the admission of the evidence as an *ante mortem* statement. The defence counsel objected, and the learned trial judge said:—

Je ne l'accepterai pas comme une déposition *ante mortem*, mais comme une déclaration ordinaire formant partie du *res gestae* en présence de l'accusée.

The learned judge added:—

Je ne permets pas la preuve comme étant une déposition *ante mortem*, mais je la permets comme étant une déclaration faite par la victime en présence de l'accusée.

The witness had, before the objection, testified that the deceased had said, in his wife's presence: "C'est toi qui m'as empoisonné; tu le sais." After the learned judge's ruling, the witness added that the deceased had also said that the appellant would appear in court and would be hanged for it. The witness further testified that the appellant appeared indifferent and did not reply at all. In cross-examination the witness said the deceased had not spoken that way previously. The witness said to the deceased that she should not say such things, but the deceased replied: "Oui, ma tante, c'est elle qui m'a empoisonné." He further said:

Je pense que je vais mourir parce que je suis empoisonné; c'est de la soupe que j'ai mangée * * * Oui, ma tante, c'est elle qui m'a empoisonné avec la soupe qu'elle m'a donnée.

Napoléon Brault, a cousin of the deceased, testified that he had been at the hospital to see the deceased the Sunday before he died and also on the Wednesday or Thursday before his death. He was asked by the Crown counsel if the deceased had spoken in the presence of the appellant of what had happened to him. The defence counsel objected to the admission of the statement of the deceased as a dying declaration. The learned trial judge then ruled::—

Je suis de votre opinion. Mais je ne la prends pas comme ça. Je la prends comme une déclaration faite en présence de l'accusée et comme faisant partie du *res gestae,* et je la permets.

The witness then testified that on the Wednesday or Thursday the accused had said in the appellant's presence: "C'est elle qui m'a empoisonné". The appellant did not say anything in reply.

Elie Chapdelaine, a brother of the deceased, testified that he had gone to the hospital five or six times to see the deceased and that he had met the appellant there on almost every occasion. The Crown counsel asked the witness whether the deceased, during the last days, had spoken of his dying condition, and what he had said. The defence counsel objected to the admissibility of the evidence as a dying declaration. The learned trial judge then ruled as follows:

Je suis de cette opinion là. Mais je ne la prends pas comme telle. C'est la déclaration de la victime qu'il faut interpréter et non pas l'opinion du témoin; ce n'est pas une déclaration *ante mortem,* mais ça fait partie du *res gestae.* Ensuite ça ne regarde pas l'opinion du témoin, ça regarde la déclaration de la victime elle même et elle fait partie du *res gestae.* Je permets la preuve.

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The defence counsel then objected to the admission of the evidence as part of the *res gestae*. On this objection the learned trial judge ruled as follows:

Je rends toujours le même décision et pour les mêmes raisons.

The witness then testified that the deceased had, on the Wednesday or Thursday before his death, said, in his wife's presence: "Je suis empoisonné, je vais mourrir; c'est elle Béatrice qui m'a empoisonné." The witness was asked what attitude the appellant had taken to this statement and replied that the appellant had smiled and, to change the subject, had said to the witness: "Ta femme est bien?" Previously the deceased had always told the witness that he was ill of indigestion from eating soup which the appellant had prepared from the balance of a can opened by the deceased the day before his first illness.

Raoul Gosselin, also a Crown witness, testified that he was a hospital attendant. He was asked by the Crown counsel if he had heard what the deceased had said to the appellant about his illness and about poison. He replied that he had heard it on two occasions. The defence counsel objected to the admission of the evidence as a dying declaration or as part of the *res gestae*. The learned trial judge ruled:

L'objection est renvoyée parce que toute déclaration ainsi faite ne serait pas prise comme déclaration *ante mortem* faite par la victime, mais comme déclaration de la victime en présence de l'accusée faisant partie du *res gestae*.

The witness then testified that the deceased had said in the presence of the appellant:

Tu peux sortir ma maudite hypocrite, c'est toi qui m'a empoisonné, et tu viens ici m'en faire acroire.

The witness did not remember any reply by the appellant. The witness added that the deceased had been delirious almost continually for three or four days before he died. From the arrival of the deceased at the hospital he had been delirious at times.

Dealing with the declarations of the deceased the learned trial judge charged the jury as follows:

Maintenant, il y a pour moi la partie la plus importante, quoiqu'on en dise. Ce sont les déclarations de la victime à l'hôpital. Voici un homme qui dit à tout le monde qu'il va mourir, qu'il est empoisonné, en présence de l'accusée; elle est là, elle est là tout le temps. Il ne dit rien les premiers jours.

* * *

Dans les premiers jours il ne dit rien; il ne sait pas encore; mais c'est quand il est rendu à hôpital et puis que sa maladie augmente tout

le temps qu'il parle. C'est à vous autres à vous demander:—Est-ce que c'est en pleine santé, se voyant disparaître tout à coup, sachant qu'il est empoisonné, et qu'il est empoisonné, d'après sa conviction, par sa femme, croyez-vous qu'il est bien naturel qu'il ne se soit pas tu alors? Tous les médecins de l'hôpital disent qu'il délirait par moment; tous ceux qui l'ont vu disent qu'en les voyant entrer il les reconnaissait. Même ceux qui disent, du côté de la défense, qu'ils y sont allés et qu'il a jamais parlé de rien, qu'ils ont jamais crû qu'il était empoisonné, ne disent pas qu'il délirait dans ce temps là. Il avait toute sa connaissance et souffrait. Maintenant quel intérêt avait-il d'affirmer, de venir dire ça? Quel intérêt aurait cette dame Brault, sa tante. Elle a rendu un témoignage, si je pouvais me servir d'une expression connue, de sainte femme, sans aucune malice, au contraire. Et quand le savant procureur de la défense lui demande si l'accusée a protesté contre les accusations du mari, elle dit:—Non, elle n'a pas protesté; c'est moi qui ai dit:—Ne parle donc pas comme ça.—Et elle dit sa réponse à lui:—C'est vrai ma tante, c'est vrai ma tante.—Il déclare qu'elle l'a empoisonné; et puis même il demande à son ami de la sortir et il la traite d'hypocrite. Tous ces témoignages ont été entendus. C'était le mercredi ou le jeudi; c'était quatre ou cinq jours avant sa mort, il n'était pas encore entré dans le coma. Alors voici des déclarations excessivement sérieuses d'un homme, quand même ça ne serait pas une déposition *ante mortem,* mais qui déclare qu'il sait qu'il va mourir. Vous aurez à vous demander: quel intérêt Ludger Chapdelaine avait-il d'accuser sa femme, puisque la défense reconnaît qu'ils vivaient bien et étaient heureux tous les deux. Si encore on avait prouvé une animosité; s'ils étaient déjà séparés, détestés. S'il y a eu une preuve de faite c'a été contre l'accusée, qu'elle n'aimait pas son mari. Toute la défense a démontré que c'était un ménage modèle, c'est son expression, elle a démontré qu'il n'y avait aucun conflit entre les deux.

Vous devez vous demander si un homme qui a son bon sens,—d'après tous les témoins,—l'infirmier a dit:—Pour moi il était absolument normal,—et les réponses qu'il a données à sa tante au moment où elle a dit:—Ne parle pas comme ça.—C'est vrai ma tante, ce n'est pas une réponse d'un homme qui délire. Vous êtes obligés de vous demander, dans vos délibérations, quel intérêt avait-il d'accuser sa femme plutôt qu'un autre? pourquoi? Enfin il disait qu'il croyait qu'il était empoisonné, qu'il était pour mourir.—Je vais mourir, je meurs empoisonné; sortez moi cette hypocrite; je ne veux pas la voir; elle essaie de m'en faire accroire.—Il disait qu'il allait mourrir et de fait il est mort.

It is clear that the declarations of the deceased above referred to were not admissible as forming part of the *res gestae.* They were made at the hospital within a week or thereabouts of the death of the deceased and consequently long after the commencement of the illness of the deceased. They were, as Lord Atkinson said, in *Rex* v. *Christie* (1), so separated by time and circumstance from the actual commission of the alleged criminal act that they were not admissible as part of the *res gestae.* The Crown contended, however, that, if not admissible as part of the *res gestae,* the declarations were admissible statements made in the

(1) [1914] A.C. 545.

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presence and hearing of the accused under such circumstances that she might reasonably have been expected to have made some answer or done something in repudiation thereof. *Gilbert* v. *The King* (1). *Hubin* v. *The King* (2). The appellant, on the other hand, contended that the statements were mere opinions and therefore inadmissible, but, assuming that the declarations were admissible as the Crown contended, the learned trial judge did not explain to the jury that the statements made in the presence of the appellant, even upon an occasion which should be expected reasonably to call for some explanation or denial from her, were not evidence against her of the facts, if any, stated save so far as she accepted the statements or part thereof, so as to make them or part thereof, in effect, her own, and that the evidential value of the statements depended on her behaviour in response thereto. *The King* v. *Christie* (3).

The Crown further contended that the declarations were admissible as dying declarations in any event and that the learned trial judge sufficiently charged the jury. But the learned trial judge refused to admit them as dying declarations and, in view of the disposition that I think must be made of this appeal on the next ground, it is not necessary to discuss them here in that light.

We now come to the evidence of Gédéon Bernard. This witness, at the trial, testified that he was then serving a sentence of five years' imprisonment at St. Vincent de Paul Penitentiary following a verdict of manslaughter on an indictment for the murder of the same deceased, Ludger Chapdelaine. He testified that during the winter of 1932, he lived at Bishop Crossing, seven or seven and one-half miles from East Angus where the deceased and the appellant lived. On " Samedi gras " the latter came to his house and asked him if he had any poison for the purpose of poisoning her husband, as she wanted to be rid of him. She told him that she would pay him $100. He asked $300 and she said that she would give $200. He set out for East Angus on the evening train. On Sunday morning he returned home. On Monday he went back to East Angus. That evening he gave her some poison which he had brought in an envelope and which he had taken from a

(1) (1907) 38 S.C.R. 284, at 300. (2) [1927] S.C.R. 442.
(3) [1914] A.C. 545, at 554, 560.

little bottle in his own barn. He had purchased it for his horses. Before that the appellant had written him a letter asking for poison but the witness had thrown it in the stove. On February 21, he received another letter, containing one dollar, which he took home and which his wife read. The letter was as follows: "Tu viendras à East Angus. Tu sais pourquoi." That evening he went to East Angus. Ludger Chapdelaine was ill. The appellant said to the witness:

Je lui en ai donné, je pensais qu'il était pour mourir et il n'est pas mort. Tu vas m'en donner encore.

The deceased was complaining of sickness at the stomach and said he was going to die. The following morning, the appellant said to the witness: "Tu vas m'en envoyer, tu m'en enverras, j'en ai plus." That evening she put in his pocket an envelope addressed to her at East Angus. In the morning when he arrived home, he put the balance of the poison from the bottle into the letter and sent it to her. After the death he asked her twice for the hundred dollars she had promised him. The Crown counsel then asked the witness:

Monsieur Bernard, le vingt-deux, lorsque vous avez répondu à sa lettre et que vous êtes allé à East Angus, qu'est-ce qui s'est passé entre vous et elle?

To the question the defence counsel objected. The learned trial judge ruled, "Je permets la question." The Crown counsel then asked the witness if he had talked with the appellant and the witness answered,

Oui, j'ai causé avec elle quand je suis allé chez elle; j'ai causé avec elle et j'ai eu des relations avec elle une fois. C'est ça que vous voulez savoir, je vais vous le dire.

The Crown counsel then asked if that occurred on the trip of the 6th or on the trip of the 21st, and the witness answered that it was on February 8. In cross-examination the witness was asked about a statement in writing previously made by him in which he had said that his wife had heard the appellant say that she wanted poison to get rid of her husband, and that his wife had said to make her pay dearly, to ask two hundred dollars. To this question, he answered: "Je peux assermenter que non." The witness also in cross-examination was asked the following questions and made the following answers:

Et puis, qu'un nommé Gagné le savait lui aussi; votre homme engagé, Oliva Gagné? Je vous demandais, Monsieur Bernard, à la prison, avant votre procès, si ce que vous aviez dit aux détectives, les déclarations aux

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détectives si c'était vrai, et vous avez dit que c'était tout de travers, que l'arsenic, vous n'en aviez pas donné à votre sœur, que vous aviez tout donné à vos chevaux, et que Oliva Gagné savait ça?—R. Monsieur Gagné a travaillé pour moi dans l'été.

Q. Je vous demande si vous m'avez dit ça déjà?—R. Oui, je vous l'ai déjà dit.

Introducing and speaking of the evidence of this witness, the learned trial judge charged the jury as follows:

Maintenant, venons en aux faits. C'est là dessus que je dois traiter de la question du complice.

S'il n'y avait que les symptômes trouvés par les médecins tant durant la maladie de Chapdelaine que les symptômes trouvés après sa mort, je dirais que la Couronne n'a pas tenté de faire la preuve complète de l'accusation portée contre l'accusée. Mais il y a d'autres preuves et la Couronne a essayé de démontrer, a lié, par des faits antérieurs, la maladie soufferte par Chapdelaine qui a amené sa mort.

Le principal témoin c'est Gédéon Bernard. C'est un complice * * * Vous devez prendre le témoignage d'un complice, pour me servir d'une expression assez connue, avec un grain de sel. Vous devez le prendre avec beaucoup de précaution, malgré que vous ayez le droit de considérer ce témoignage, celui du complice, sans corroboration. Vous avez droit de le croire, mais il doit être supporté, d'après moi, pour que, dans une accusation aussi sérieuse que celle-ci, vous deviez le prendre en considération * * *

Dans les circonstances je ne crois pas que vous ayez de doute que Gédéon Bernard était un complice, parce qu'il a subi son procès sur la même offense et a été condamné à cinq ans de pénitencier, qu'il purge à l'heure actuelle. Mais la question présente un côté assez sérieux au point de vue des précautions que vous devez prendre, avant de prendre son témoignage, surtout dans la présente cause. Il y a un caractère absolument particulier qui se présente dans cette cause spécialement, qui n'est pas dans une autre cause. Pour que Gédéon Bernard soit complice, soit l'aide de quelqu'un qui a commis un meurtre ou un crime, il faut qu'il y ait un crime. La défense me demande de vous dire de prendre le témoignage de Gédéon Bernard avec beaucoup de précaution parce qu'il est complice dans la mort de Ludger Chapdelaine; on me dit de vous demander de prendre son témoignage avec beaucoup de précaution, parce que si on a tué par le poison, l'arsenic, Ludger Chapdelaine, Gédéon Bernard y a participé.

Donc, pour que je vous dise de prendre le témoignage de Gédéon Bernard comme complice, je suis obligé, à la demande de la défense, de vous dire qu'il a été l'aide et n'a pas été le principal auteur. Pour être le complice de quelqu'un il faut un auteur, il faut qu'un autre commette le crime. Si on veut absolument que je dise aux jurés de reconnaître Gédéon Bernard comme complice dans la présente cause, il faudrait que le principal acteur soit l'accusée. Il ne peut pas être le complice de quelqu'un qui n'existe pas. Il faut que le meurtre ait existé pour que je vous demande de le considérer comme complice, et dans ce cas, prenez son témoignage avec beaucoup de précaution. Mais s'il est vrai, d'après les prétentions de la défense, qu'il n'y a pas eu de meurtre, que Ludger Chapdelaine est mort de mort naturelle et non de mort violente par arsénic, il n'est plus le complice; c'est un témoignage indépendant qui n'aurait aucun défaut, et que vous seriez obligés de prendre en entier. L'un ou l'autre, ou il est le complice ou il ne l'est pas. S'il est complice

il est complice de l'accusée et le meurtre a été commis. S'il n'est pas le complice, c'est un témoin absolument impartial et vous devez le prendre en entier. Je ne sais pas si je m'exprime assez clairement pour vous démontrer dans quelle position assez embarrassante au point de vue de l'interprétation du complice vous êtes. Alors, s'il est le complice, prenez le avec précaution. En dehors de ça je suis obligé de vous dire: ce n'est pas un complice ordinaire, s'il est le complice, c'est le frère de l'accusée.

Il est en preuve qu'il n'y a jamais eu aucune animosité entre l'accusée et Gédéon Bernard; il est en preuve qu'ils se visitaient. Ce n'était pas rien qu'un frère, c'était un ami, et un ami très intime. C'est en preuve. On n'a pas amené dans cette cause qu'il y avait une rancune quelconque existant entre les deux. Gédéon Bernard est condamné à cinq ans de pénitencier; il ne peut pas être touché de nouveau sur la même accusation. Il a été trouvé coupable et c'est fini. Quand même on découvrirait aujourd'hui qu'il est l'acteur principal, on ne peut pas le mettre en accusation. Quel intérêt le complice aurait-il à venir rendre témoignage? Quel intérêt avait-il? Vous pouvez vous demander ça. La vengeance? Ca n'a pas été prouvé. Au contraire, c'est de l'amitié qu'on vous a démontrée entre les deux. Ils ont eu un intérêt commun, à un moment donné, au point de vue du meurtre, mais aujourd'hui il n'y en a plus; il n'y a aucun danger pour lui de parler. Quant aux promesses qu'il aurait pu recevoir pour rendre son témoignage, où en est la preuve? Aucune * * * vous devez vous demander toutes ces questions. C'est en analysant toutes les attitudes de Gédéon Bernard depuis le commencement jusqu'à aujourd'hui que vous aurez la véritable interprétation de son témoignage.

In *Vigeant* v. *The King* (1), a new trial was ordered by this Court where the trial judge had omitted to instruct the jury on what was an accomplice in law and to warn them of the danger of convicting on the uncorroborated evidence of an accomplice although it was within their legal province so to do. This rule applies whether there is or is not corroborative evidence of the testimony of the accomplice. *Boulianne* v. *The King* (2). In the case at bar the learned trial judge appeared to have set out to warn the jury of the danger of convicting on the uncorroborated evidence of Gédéon Bernard, but he destroyed, in effect, by the subsequent remarks, particularly those beginning with the words " Mais la question * * * " and ending with the words " * * * de l'accusée," the warning given. Some jurors may have, in view of those remarks, considered that the request of the defence was tantamount to an admission of guilt.

But the Crown alleges that, if there was misdirection, in respect of the declarations of the deceased or in respect of the evidence of Gédéon Bernard or both, no substantial wrong or miscarriage of justice actually occurred and that

(1) [1930] S.C.R. 396.
(2) [1931] S.C.R. 621, at 623.

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there should not be a new trial, Criminal Code, section 1014 (2), particularly as there was ample other evidence of guilt. *Boulianne* v. *The King* (1). It is not possible in the case at bar to say to what extent the jury or some of the jurors were materially prejudiced against the appellant by the misdirection concerning the evidence of Gédéon Bernard alone, but it is clear that there was material misdirection. *Allen* v. *The King* (2). Where the jury has been misdirected on a material matter, the onus is upon the Crown to shew that the jury, charged as they should have been, could not, as reasonable men, have given on the evidence a verdict other than one of guilt. *Brooks* v. *The King* (3). The Crown has failed to shew this.

The appeal should be allowed and a new trial ordered.

ST-GERMAIN J. *ad hoc*: Regarding the admission of the declarations made by Ludger Chapdelaine, at the hospital, and narrated by some of the Crown witnesses, as evidence in the case, I am of the opinion that these declarations were rightly rejected by the learned trial judge as "dying declarations." In making these declarations, Chapdelaine was merely expressing the opinion that he had been poisoned by his wife and was not asserting a statement of fact. Had Chapdelaine been able to testify himself at the trial, such declarations would not have been allowed. In a case of *Rex* v. *Sellers,* reported in Carrington's Treatises on the Criminal Law, p. 233, it was decided that:

> Nothing can be evidence in a declaration *in articulo mortis* that would not be so if the party were sworn. Therefore, anything the murdered person, *in articulo mortis,* says as to facts, is receivable, but not what he says as matter of opinion.

These declarations, however, though rejected as "dying declarations," were admitted as *res gestae.* Here again I must come to the conclusion that said declarations should have also, as such, been rejected, first, for the very same reason above mentioned as to "dying declarations," and, secondly, for the further reason that, having been made several days after the date on which the appellant was accused of having given poison to her husband, said declarations did not "*constitute or accompany and explain,* the fact or transaction in issue" and therefore were

(1) [1931] Can. S.C.R. 621, at 629. (2) (1911) 44 Can. S.C.R. 331.
(3) [1927] Can. S.C.R. 633.

not admissible "as forming parts of the *res gesta*"; (Phipson, 7th Ed., p. 54).

These declarations could only have been admitted to prove the accused's attitude or answers and, thereby, allow the jurors to draw their own conclusions as to such attitude and answers of the accused. Unfortunately, the learned trial judge in his charge did not restrict himself to instruct the jury accordingly; on the contrary, treating said declarations as the most important part of the evidence, he proceeded to make an analysis of same and emphasized the statement made by Ludger Chapdelaine that he was going to die, and so to give more weight to the truthfulness of the latter's declarations that he had been poisoned by his wife.

Maintenant, il y a pour moi la partie la plus importante, quoiqu'on en dise. Ce sont les déclarations de la victime à l'hôpital. Voici un homme qui dit à tout le monde qu'il va mourir, qu'il est empoisonné, en présence de l'accusée; * * *

Est-ce que c'est bien naturel pour un homme de trente ans encore en pleine santé, se voyant disparaître tout à coup, sachant qu'il est empoisonné, et qu'il est empoisonné, d'après sa conviction, par sa femme, croyez-vous qu'il est bien naturel qu'il ne se soit pas tu alors? * * *

Maintenant quel intérêt avait-il d'affirmer, de venir dire ça? * * *

Alors voici des déclarations excessivement sérieuses d'un homme, quand même ça ne serait pas une déposition *ante mortem,* mais qui déclare qu'il sait qu'il va mourir. Vous aurez à vous demander: Quel intérêt Ludger Chapdelaine avait-il d'accuser sa femme, puisque la défense reconnaît qu'ils vivaient bien et étaient heureux tous les deux * * *

Thus by his remarks the learned trial judge invites the jurors to consider as the most important part of the evidence the declarations of the deceased, while they should have been alluded to only in connection with the attitude of the accused. These declarations as commented were surely illegal evidence submitted to the jury.

Having reached that conclusion, even after the reading of the whole evidence, in view of the decisions of *Allen* v. *The King* (1), and *Gouin* v. *The King* (2), I cannot but conclude that the appeal must be allowed, the conviction quashed and a new trial directed.

Seeing my conclusion on the first ground raised by the appellant, I need not express any opinion with regard to the second ground as to the comments of the learned trial judge concerning the accomplice.

Appeal allowed, new trial ordered.

(1) (1911) 44 Can. S.C.R. 331. (2) [1926] S.C.R. 529.

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*Oct. 2, 3, 4.
*Nov. 20.

HIS MAJESTY THE KING, ON THE PROSECUTION OF THE PIONEER GOLD MINES OF BRITISH COLUMBIA LIMITED.. } APPELLANT;

AND

THE MINISTER OF FINANCE.....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Taxation—Income tax—Taxation of mining companies—Allowance for depletion—Acquisition costs—Determination of—Appeal taken under s. 6 (4) of Income Tax Act, B.C. 1932 c. 53—Finality of decision of Lieutenant-Governor in Council—Mandamus—Taxation Act, R.S.B.C. 1924, c. 254, s. 44, ss. 4, as amended.

In 1924, the Pioneer Gold Mines Limited gave an option to one Sloan for its mining property for $100,000. In 1928, the Pioneer Gold Mines of B.C. Limited was incorporated with a capital stock of $2,500,000 divided into 2,500,000 shares of $1 each. On March 30, 1928, Sloan assigned to the new company his option for 1,600,000 shares in that company. The *Income Tax Act* of British Columbia (Statutes of 1932, c. 53, s. 6) enables the Commissioner of Income Tax to make certain deductions from a mine owner's income on account of depletion of the mines, thus involving the fixing of the costs to the taxpayer of the acquisition of the mines. The Commissioner of Income Tax fixed the acquisition costs to the new company at $100,000. The new company appealed to the Lieutenant-Governor in Council under section 44, subsection 4, of the *Taxation Act* (R.S.B.C., 1924, c. 254) as amended, from the decision of the Minister of Finance, under clause (*p*) of subs. 1 and and clause (*a*) of subs. 3 of section 44, fixing the acquisition costs "at too low figure of $100,000 instead of $2,500,000 for the purpose of assessment of the company's income for the year ending March 31, 1931." The appeal was disposed of by an Order in Council, increasing the amount from $100,000 to $200,000. The new company, being still dissatisfied, obtained a writ of *mandamus* from D. A. McDonald, J., commanding the Minister of Finance to ascertain and take into consideration the acquisition costs to the new company of the properties acquired by it under the above agreement of March 30, 1928. Subsection 4 of section 6 of the *Income Tax Act* provides that "an appeal from any decision of the Minister (of Finance) * * * may be taken to the Lieutenant-Governor in Council, who after hearing the parties interested, may either confirm or amend the decision of the Minister and the decision of the Lieutenant-Governor in Council shall be final." The Court of Appeal reversed the judgment of McDonald, J.

Held, affirming the judgment appealed from (48 B.C. Rep. 412), that *mandamus* did not lie in this case. Under section 6 (4) of the *Income Tax Act,* the decision by the Minister of Finance was appealable; a competent appeal was taken from it; the appeal was considered by the Lieutenant-Governor in Council in the exercise of his statutory jurisdiction and powers, who pronounced a decision upon the matters

*PRESENT:—Duff, C.J. and Rinfret, Cannon, Crockett and Hughes, JJ.

in dispute which the Act declares to be final. Such decision was binding upon the Minister of Finance as well as upon the appellant company; and a *mandamus* requiring him to reconsider questions settled by the Order in Council would have been a *mandamus* requiring him several months after he became *functus officio,* to commit a breach of the law and to perform an act which, by force of the statute, must necessarily be inoperative.

APPEAL from a judgment of the Court of Appeal for British Columbia (1), reversing the judgment of D. A. McDonald J. granting an order absolute for *mandamus.*

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

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

C. W. Craig K.C. and *E. Pepler* for the respondent.

The judgment of Duff C.J. and Rinfret J. was delivered by

DUFF C.J.—Thanks to the complete and accurate statement of the facts contained in the judgment of my brother Hughes, I shall be able to state, without undue length, the grounds on which I think this appeal should be decided. On the 22nd of January, 1932, the appellant served notice of appeal to the Lieutenant-Governor in Council under section 44, subsection 4, of the *Taxation Act,* from the decision or determination of the Minister of Finance under clause (*p*) of subsection 1, and clause (*a*) of subsection 3 of section 6 (as the section is now numbered) of the *Taxation Act,* which notice is in these terms:

Pioneer Gold Mines of B.C. Limited (N.P.L.), a body corporate, having its head office at 605 Rogers building, Vancouver, B.C. hereby appeals to the Lieutenant-Governor in Council under section 44, subsection 4 of the *Taxation Act,* from the decision or determination of the Minister of Finance under clause (*p*) of subsection 1, and clause (*a*) of subsection 3 of section 44 of the *Taxation Act, fixing the cost to this company of its mine and mining property at the too low figure of $100,000 instead of $2,500,000* for the purpose of assessment of the company's income for the year ending 31st March, 1931, as set out in notice of assessment by the assessor of Vancouver district mailed 30th December, 1931, and *failing to make a sufficient allowance for depletion or exhaustion of the mine* to be deducted from the income from the mine *for the year ending* 31st March, 1931.

The above mentioned appeal to be heard at such time and place as the Lieutenant-Governor in Council shall appoint.

Dated at Vancouver, B.C., this 22nd day of January, 1932.

(1) (1934) 48 B.C. Rep. 412; [1934] 2 W.W.R. 501.

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A second notice of appeal was served on the 9th August, 1932, by which, for the figure of $2,500,000 in the notice of January, there was substituted that of $2,378,120.09.

The appeal was disposed of by an order in council dated the 28th July, 1933, by increasing the amount determined as the total cost of the mine from $100,000 to $200,000, and increasing the allowance for depletion or exhaustion accordingly. The order in council is as follows:

Approved and ordered this 28th day of July, A.D. 1933.

In the matter of an appeal by Pioneer Gold Mines of B.C. Limited (non personal liability) to the Lieutenant-Governor in Council under section 44(4) of the *Taxation Act*.

The undersigned has the honour to report

That an assessment for income tax was made against the above mentioned company under the *Taxation Act* in respect of the income of the company for its fiscal year ending the 31st day of March, 1931, in the sum of $3,556.23, and notice of assessment thereof was mailed to the company on the 30th day of December, 1931.

And that in arriving at the said assessment the undersigned as Minister of Finance allowed the company the sum of $14,665.87 for depletion or exhaustion of the mine pursuant to clause (*p*) of subsection (1) of section 44 of the *Taxation Act*, and that this sum was based on a total cost of the mine of $100,000 as determined by the Minister of Finance pursuant to subsection (3) of said section 44.

And that, with the exception of this sum of $14,665.87, the total cost so determined by the Minister had already been allowed as a deduction from the income of preceding years, and accordingly no further allowance by way of depletion remained to be made during the balance of the anticipated life of the mine subsequent to the company's fiscal year ended March 31, 1931.

And that the company appealed to the Lieutenant-Governor in Council from the decision of the Minister of Finance by notice of appeal dated the 22nd day of January, 1932, on the grounds that the cost to the company of its mine and mining property was fixed at the too low figure of $100,000 instead of $2,500,000, and that a sufficient allowance for depletion or exhaustion of the mine was not made in the said assessment.

And that on the 9th day of August, 1932, the company filed a further notice of appeal to the Lieutenant-Governor in Council from the decision of the Minister as aforesaid on the same grounds as set forth in the previous notice except that it was stated therein the cost to the company for the purposes of the said assessment should have been fixed at $2,378,120.09 instead of $100,000.

And that the appeal came on for hearing on various days and dates in the months of April and May, 1933, and that the case for the company was fully presented by J. A. Clark, Esq., K.C., counsel on behalf of the company and the case for the Government by the departmental solicitor and the Commissioner of Income Tax, and the appeal was stood over for decision.

The undersigned has therefore the honour to recommend:—

1. That under the authority of subsection (4) of section 44 of the *Taxation Act* the appeal of the company be allowed in part, and that

the *total cost of the mine* as determined by the Minister at $100,000, be increased to the sum of $200,000, of which, after deducting the sum of $85,334.13 already allowed as a deduction from income of preceding years, a balance of $114,665.87 remains to be allowed as a deduction from the income derived from the mine during ensuing years, commencing with the fiscal year of the company which ended on the 31st day of March, 1931.

And that, having regard to the anticipated life of the mine as indicated by the total ore reserves and annual ore extraction disclosed in the return filed by the company for the said fiscal year, and to the allowance of $14,665.87 made in assessing the income for the year ended March 31st, 1931, be approved, and that subject as aforesaid the said assessment be confirmed.

2. That a certified copy of this minute, if approved and ordered, be forwarded to the company and the Commissioner of Income Tax.

Dated this 28th day of July, A.D. 1933.

J. W. Jones
Minister of Finance.

Approved this 28th day of July, A.D. 1933.

R. H. Pooley
Presiding member of the
Executive Council.

The statute, section 6 (1, o), authorized the Minister, in determining expenses in the production of income to make an allowance for depletion or exhaustion of a mine; an allowance to be deducted from the income of the mine in any year in the discretion of the Minister. The Minister must have regard to the anticipated life of the mine and the "total cost of the mine" as determined by him. By section 6 (3a), in determining this last mentioned cost, the Minister shall take into consideration (*inter alia*) "acquisition costs incurred prior to April 1, 1928."

The appeal taken by the company from the Minister to the Lieutenant-Governor in Council was authorized by section 44 (4) of the *Taxation Act*, which invests the Lieutenant-Governor in Council with jurisdiction upon such an appeal, after hearing the parties interested, either to confirm or amend the decision of the Minister; and the statute declares that "the decision of the Lieutenant-Governor in Council shall be final."

It was argued on behalf of the appellants that this right of appeal does not extend to a determination of acquisition costs under subsection 3a, but relates only to an allowance for depletion under subsection 1o. No doubt the appeal is given from the allowance by the Minister for depletion or exhaustion, but the appeal is given in the most general

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terms, and seems clearly to include every appeal intended to assert a complaint against the action of the Minister in respect of the allowance upon any ground on which he may have acted; including his determination of acquisition costs and other matters, which is only a step in the process of fixing the allowance. The order fixing the allowance is the definite order. I have no doubt that the right of appeal is comprehensive in its nature; that, given a determination by the Minister of an allowance for depletion or exhaustion, then the complainant has a right to present his complaint by way of appeal in respect of any matter of fact or law which he may conceive to have affected the decision of the Minister adversely to his interests, or by reason of which he may desire to contend that the decision of the Minister was erroneous.

The appellants, by their appeal, it will be observed, complained that the Minister had fixed "the cost to this company of its mine and mining property at the too low figure of $100,000 instead of $2,500,000" (amended to read $2,378,120.09); and that he had failed to make sufficient allowance for the depletion or exhaustion of the mine.

The notice of motion originating the proceedings claimed a writ of mandamus; and the judgment of the judge of first instance, which the appellants now ask be restored, ordered the issue of such a writ directed to the Minister of Finance, requiring him "to ascertain and take into consideration the acquisition costs of the Pioneer Gold Mines, Ltd. of the properties acquired by them under an indenture" of 30th March, 1928.

The bringing of the appeal invests the Lieutenant-Governor in Council with jurisdiction to deal with the allowance complained of, and necessarily to review all matters that the statute requires to be considered for the purpose of reaching a determination upon that subject. The decision of the Lieutenant-Governor upon such matters, whether they be matters of fact or matters of law, is final. One may suppose, of course, that there might be cases in which the Lieutenant-Governor in Council, in passing upon the matters arising upon the appeal, had so radically violated the conditions of his jurisdiction as to require a court to hold that his determination was a determination *ultra vires*. It is also, of course, conceivable that an appeal might be

taken in respect of something which is not, under the statutory provisions, an appealable matter at all.

In the present case it could not seriously be, and in fact is not, disputed that an allowance was fixed by the Minister of Finance, who professed, in doing so, to exercise his powers under subsection 1o. There was, therefore, an appealable matter.

Nor can I perceive any ground for affirming that the Lieutenant-Governor in Council violated any fundamental condition of his jurisdiction. His position, in exercising such a statutory authority to pass upon disputed questions affecting the rights and property of individuals, was discussed in *Wilson* v. *Esquimault Nanaimo Railway Co.* (1). In that case the Judicial Committee of the Privy Council had to consider the function of the Lieutenant-Governor of British Columbia who had been invested with statutory authority to issue Crown grants of property, which the Board had previously held to be vested in the Railway Company, upon "reasonable proof" of certain facts. It was held that his function was in that case judicial, but that he was not bound to follow the rules regulating proceedings in a court of justice, or the rules of evidence, and that, if there was before him something which he might properly regard as proof of the necessary facts, it was within his discretion to determine whether or not such proof constituted "reasonable proof" within the meaning of the statute.

The Board there proceeded upon principles laid down in *Arlidge's* case (2). The judgment of Lord Haldane in that case contains a passage which explicitly points out that when Parliament entrusts a government department (such, for example, as the Local Government Board) with judicial duties, Parliament must be taken, in the absence of any declaration to the contrary, to have intended it to follow the procedure which is its own, and may be necessary if it is to be capable of doing its work efficiently.

The Minister, as the head of the Board, it was said, is directly responsible to Parliament like other Ministers. He is responsible, not only for what he himself does, but for all that is done in his department. The volume of work

(1) [1922] 1 A.C. 202, at 211, 214.

(2) [1915] A.C. 120

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entrusted to him is very great and he cannot do the great bulk of it himself. He is expected to obtain his materials vicariously through his officials, and he has discharged his duty if he sees that they obtain these materials for him properly.

An observation somewhat to the same effect is to be found in *Wilson's* case (1). The passage in Lord Haldane's judgment in full is as follows:

> My Lords, when the duty of deciding an appeal is imposed, those whose duty it is to decide it must act judicially. They must deal with the question referred to them without bias, and they must give to each of the parties the opportunity of adequately presenting the case made. The decision must be come to in the spirit and with the sense of responsibility of a tribunal whose duty it is to mete out justice. But it does not follow that the procedure of every such tribunal must be the same. In the case of a Court of law tradition in this country has prescribed certain principles to which in the main the procedure must conform. But what the procedure is to be in detail must depend on the nature of the tribunal. In modern times it has become increasingly common for Parliament to give an appeal in matters which really pertain to administration, rather than to the exercise of the judicial functions of an ordinary Court, to authorities whose functions are administrative and not in the ordinary sense judicial. Such a body as the Local Government Board has the duty of enforcing obligations on the individual which are imposed in the interests of the community. Its character is that of an organization with executive functions. In this it resembles other great departments of the State. When, therefore, Parliament entrusts it with judicial duties, Parliament must be taken, in the absence of any declaration to the contrary, to have intended it to follow the procedure which is its own, and is necessary if it is to be capable of doing its work efficiently. I agree with the view expressed in an analogous case by my noble and learned friend Lord Loreburn. In *Board of Education* v. *Rice* (2) he laid down that, in disposing of a question which was the subject of an appeal to it, the Board of Education was under a duty to act in good faith, and to listen fairly to both sides, inasmuch as that was a duty which lay on every one who decided anything. But he went on to say that he did not think it was bound to treat such a question as though it were a trial. * * * It could, he thought, obtain information in any way it thought best, always giving a fair opportunity to those who were parties in the controversy to correct or contradict any relevant statement prejudicial to their view. If the Board failed in this duty, its order might be the subject of certiorari and it must itself be the subject of mandamus.
>
> My Lords, I concur in this view of the position of an administrative body to which the decision of a question in dispute between parties has been entrusted. The result of its inquiry must, as I have said, be taken, in the absence of directions in the statute to the contrary, to be intended to be reached by its ordinary procedure. In the case of the Local Government Board it is not doubtful what this procedure is. The Minister at the head of the Board is directly responsible to Parliament

(1) [1911] A.C. 179. (2) [1922] 1 A.C. 202, 213, 214.

like other Ministers. He is responsible not only for what he himself does but for all that is done in his department. The volume of work entrusted to him is very great and he cannot do the great bulk of it himself. He is expected to obtain his materials vicariously through his officials, and he has discharged his duty if he sees that they obtain these materials for him properly. To try to extend his duty beyond this and to insist that he and other members of the Board should do everything personally would be to impair his efficiency. Unlike a judge in a Court he is not only at liberty but is compelled to rely on the assistance of his staff. When, therefore, the Board is directed to dispose of an appeal, that does not mean that any particular official of the Board is to dispose of it. This point is not, in my opinion, touched by s. 5 of 33 and 34 Vict., c. 70, the Act constituting the Local Government Board to which I have already referred. Provided the work is done judicially and fairly in the sense indicated by Lord Loreburn, the only authority that can review what has been done is the Parliament to which the Minister in charge is responsible.

Now, the materials in the appeal book, including the Order in Council in which the determination of the Lieutenant-Governor in Council is expressed, abundantly show that the Lieutenant-Governor in Council did apply himself to the matters which it was his duty to consider in the circumstances by virtue of the provisions of subsections 1o and 3a; and, moreover, that the appellants were given the fullest opportunity to present their views. He determined in the most explicit way "the total cost of the mine" as required by subsection 1o, already quoted, and "having regard," as the statute required, to the amount so ascertained, and the anticipated life of the mine, he fixed the allowance. I can find no evidence that he disregarded any statutory rule or statutory direction, or that there was any substantial departure from the mandatory provisions to which he was subject.

It was argued before us with a great deal of vigour—and this is the sole ground of complaint—that he erred in holding that the shares allotted by the appellants to the members of the syndicate had no value for certain reasons which were advanced. It does not appear that he did so, but, even if he did, and if, in doing so, he was wrong, that was not a matter going to his jurisdiction. It was simply a mistaken ruling and, apparently, a mistake of fact. It is desirable, however, to point out that, in substance, he passed upon this matter.

The issue with which the parties were practically concerned was the deduction to be allowed in respect of income by way of allowance for depletion or exhaustion. The

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duty of the Lieutenant-Governor in Council was, in fixing this, to have regard to the " total cost of the mine " to the appellants; and in ascertaining this cost to take into consideration (*inter alia*) the " acquisition costs incurred prior to the 1st April, 1928." The Lieutenant-Governor in Council had before him the agreement of April, 1930, the various documents and, no doubt, other facts affecting the value of any rights acquired under that agreement; the transfer of which was the consideration for the purchase of the shares (1,600,000) allotted to the promoters. The appellants contended that the value of these rights was the amount of the total nominal share capital, $2,500,000. Later they argued that the value of the shares was fixed by the agreement at $1,600,000. Plainly, the Lieutenant-Governor in Council was not bound to take this view. He was entitled to hold that the actual value of the shares ought to be measured by the value of the rights transferred. He may have been satisfied that no title to any of the property passed under the agreement. He may have had facts before him leading him to the conclusion that the agreements, purporting to be transferred, were not, *strictissimi juris,* enforceable. In any event, even from the point of view of the appellants, which is that it was his duty to value the shares, he was entitled to hold that this value did not exceed $200,000 (less the sums still owing under the agreements), the amount he fixed as the value of " the mine " for the purpose in hand. There is not the slightest ground for imputing to him any departure in point of substance from the directions of the statute. As regards all these matters his decision is not open to review.

The Lieutenant-Governor in Council having in July, in the exercise of his statutory jurisdiction, passed upon the matters which it was his duty to decide under the statute, it is quite obvious that the Minister of Finance became *functus officio*. The determination of the Lieutenant-Governor in Council, let me repeat, is, by the most explicit terms of the statute, final. It is binding upon the Minister of Finance as well as upon the appellants. The Minister would, after the decision, have been committing a breach of the law if he had attempted to exercise his powers in respect of allowance for depletion or exhaustion otherwise than in conformity with that decision. A mandamus requiring him to reconsider questions which had been

settled by the Order in Council would, therefore, have been a mandamus requiring him to commit a breach of the law; to perform an act which, by force of the statute, must necessarily be inoperative.

In this view, no question arises as to the legality or propriety of the acts of the Minister of Finance. It is sufficient for the purposes of this appeal that there was an appealable decision by the Minister; that a competent appeal was taken from it; that the appeal was considered by the Lieutenant-Governor in Council in the exercise of his statutory jurisdiction and powers, and that he pronounced a decision upon the matters in dispute which the statute declares to be final.

The appeal should be dismissed with costs.

The judgment of Cannon, Crocket and Hughes JJ. was delivered by

HUGHES J.—This is an appeal from the Court of Appeal of British Columbia which allowed an appeal, Mr. Justice McQuarrie dissenting, from a judgment of Mr. Justice D. A. McDonald ordering the issue of a writ of mandamus directed to the Minister of Finance of British Columbia commanding the Minister to ascertain and take into consideration the acquisition costs to Pioneer Gold Mines of B.C. Limited of the properties acquired by the company under an indenture of agreement dated March 30, 1928, between one David Sloan and the company as provided by the *Income Tax Act,* section 6, chapter 53, Statutes of British Columbia, 1932.

The relevant portions of section 6 are as follows:—

6. (1) In ascertaining the net income for the purposes of taxation, no deduction by way of expenses shall be made for:—

(*a*) not material;

(*b*) not material;

(*c*) not material;

nor shall the following be allowed in any case as expenses incurred in the production of income:—

(*d*) to (*n*) not material.

(*c*) Any allowance for depletion or exhaustion of a mine, except such proportional amount as may in the discretion of the Minister be allowed to be deducted from the income from the mine in any year, having regard to the anticipated life of the mine and to the total cost of the mine as determined by the Minister pursuant to the provisions of subsection (3) * * *

(2) Not material.

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(3) In determining the cost to any taxpayer of any mine in respect of which he claims an allowance for depletion or exhaustion under clause (*o*) of subsection (1), upon which cost any such allowance is to be computed, the Minister shall take into consideration the following expenditures, whether incurred by the taxpayer or by any predecessor in title to the mine:—

(*a*) Acquisition costs incurred prior to the first day of April, 1928, together with all expenditures subsequent to the date of acquisition for exploration and development costs and any other expenses which the Minister may consider as directly related to and forming part of the costs of the mine, subject, in the case of any mine which was in active production prior to the first day of January, 1915, to a deduction therefrom of an amount to be determined by the Minister as representing the amount of depletion or exhaustion (if any) actually sustained prior to the first day of January, 1915 * * *

(4) An appeal from any decision of the Minister under clause * * * (*o*)* * * of subsection (1) may be taken to the Lieutenant-Governor in Council, who, after hearing the parties interested, may either confirm or amend the decision of the Minister, and the decision of the Lieutenant-Governor in Council shall be final.

By an agreement in writing dated July 16, 1924, a company known as Pioneer Gold Mines Limited granted to David Sloan or his assignee the right to take possession of, use, work, mine and develop mining property in the Lillooet mining division in the province of British Columbia certain claims known as the Pioneer group together with buildings, plant, machinery and equipment during the performance by the purchaser of the conditions and stipulations in the agreement. The purchaser agreed to provide and deposit to his credit $16,000 or such lesser amount as should be sufficient to finance and pay for certain mining work and development described in the agreement at the following times: $4,000 on or before August 1, 1924; $4,000 on or before the first days of September, October and November, 1924. The agreement further provided that the proceeds of ore shipped or milled on the property should be deposited and 85 per centum credited to the purchaser's trust account and 15 per centum credited to the company for rent or use of its property. The purchaser was also given an option to purchase the property up to August 1, 1929, for $100,000 less any amounts paid to the company through the 15 per centum allowance on the proceeds of ore taken from the property. This agreement was referred to on the argument and may hereafter be referred to as the option. Sloan and his associates duly deposited $8,000, being two sums of $4,000 each, and also deposited $45,000

to the credit of the vendor, representing 15 per centum allowances on the proceeds of ore taken out. The remaining 85 per centum of the proceeds, amounting to $255,000, was put back by Sloan and his associates in improvements.

In the year 1927, Victor Spencer purchased for $40,000 a quarter interest in the agreement, subject to the payment by the syndicate of the option price. The money paid by Victor Spencer went to those members of the syndicate who had sold the quarter interest to him. On March 29, 1928, a private company was incorporated under the name of Pioneer Gold Mines of B.C. Limited, and on March 30, 1928, Sloan, on behalf of himself and all the other members of the syndicate, entered into an agreement with the new company whereby Sloan granted, assigned and transferred to the company the option and all his rights and interests to the mineral claims and property and the buildings, plant, machinery and stock in trade used in connection with the said mining business and operations. The agreement recited that the assignor had agreed to assign the option "and other premises" to the company, but the agreement in fact transferred to the company only the option and the interests of Sloan in the mineral claims and real and personal property therein described. The consideration was set out as $1,600,000 to be satisfied by the allotment to the assignor and his nominees of 1,600,000 shares of $1 each of the capital stock of the company. On the same day Sloan transferred two mining claims and shortly thereafter five additional mining claims to the company. Previous to the above assignment and transfers from Sloan, commencing on March 30, 1928, the new company had not any assets.

On May 20, 1928, an agreement for sale of 50,000 shares of the capital stock of the new company was entered into with Stobie, Furlong & Company. The consideration was $75,000. To effect this sale, the new company was converted from a private company into a public company.

In the years 1929 and 1930, the new company, which I shall hereafter refer to as the Company, was assessed on a basis of acquisition costs of $100,000. I merely mention this to give the history. I do not consider that these assessments are important in considering the present appeal as the appellant's evidence was that these assessments were

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the subject of an arrangement or agreement. In 1931, the appellant was again assessed on a basis of $100,000 for acquisition costs.

On January 22, 1932, the appellant company served a notice of appeal to the Lieutenant-Governor in Council under section 44, subsection 4, of the *Taxation Act*, R.S.B.C. 1924, chapter 254, as amended, from the decision of the Minister of Finance under clause (*p*) of subsection 1 and clause (*a*) of subsection 3 of section 44, fixing the acquisition costs

at too low figure of $100,000 instead of $2,500,000 for the purpose of assessment of the company's income for the year ending March 31, 1931.

The relevant portions of section 44 of the former *Taxation Act*, being R.S.B.C. 1924, chapter 254, as amended by the 1925 statutes of British Columbia, chapter 54, section 8, as amended by 1928 statutes of British Columbia, chapter 47, section 6, are:—

44. (1) The net income of every person shall be ascertained for the purpose of taxation by deducting from his gross income the exemptions provided in section 42, and all expenses incurred in the production of that part of his income which is liable to taxation and the income tax thereof payable to the Crown in right of the Dominion; but no deduction by way of expenses shall be made for

(*a*) not material.

(*b*) not material.

(*c*) not material.

and the following shall not in any case be allowed as expenses incurred in the production of income.

(*d*) (*e*) (*f*) (*g*) (*h*) (*i*) (*j*) (*k*) (*m*) (*n*) (*o*) not material.

(*p*) Any allowance for depletion or exhaustion of a mine except such proportional amount as may in the discretion of the Minister be allowed to be deducted from the income from the mine in any year, having regard to the anticipated life of the mine and to the total cost of the mine as determined by the Minister pursuant to the provisions of subsection (3).

(2) not material.

(3) In determining the cost to any taxpayer of any mine in respect of which he claims an allowance for depletion or exhaustion under clause (*p*) of subsection (1), upon which cost any such allowance is to be computed, the Minister shall take into consideration the following expenditures, whether incurred by the taxpayer or by any predecessor in title to the mine:—

(*a*) Acquisition costs incurred prior to the first day of April, 1928, together with all expenditures subsequent to the date of acquisition for exploration and development costs and any other expenses which the Minister may consider as directly related to and forming part of the cost of the mine, subject, in the case of any mine which was in active production prior to the first day of January, 1915, to a deduction therefrom of an amount to be determined by the Minister as representing the amount

of depletion or exhaustion, (if any) actually sustained prior to the first day of January, 1915 * * *

(4) An appeal from any decision of the Minister under clause (*n*) (*o*) (*p*) * * * of subsection 1 may be taken to the Lieutenant-Governor in Council, who, after hearing the parties interested, may either confirm or amend the decision of the Minister, and the decision of the Lieutenant-Governor in Council shall be final.

Notwithstanding the appeal, the company urged the Minister in conference and in correspondence to change his decision. On June 21, 1932, the company secretary wrote at length setting out a history of the dealings with the property from the year 1915. On July 27, 1932, the secretary again wrote the Minister referring to the sale of shares made to Stobie, Furlong & Company and urged that the net acquisition costs were $2,378,129.09, and that the company had nothing whatever to do with the amount that the property had cost Sloan and his associates. On July 27, 1932, the Minister wrote the secretary that he had thoroughly investigated the matter. On July 28, the Minister again wrote the secretary stating that 1,600,000 shares were issued to members of the syndicate and that the shares only represented declarations of interest and that the syndicate members had merely changed into shares their interests in an agreement to purchase the property for $100,000. On August 9, 1932, the company served a new notice of appeal to the Lieutenant-Governor in Council substituting a figure of $2,378,120.09 for the sum of $2,500,000 set out in the notice of appeal of January 22, 1932. Early in October, 1932, the secretary and Victor Spencer interviewed the Minister at Victoria and submitted to the Minister that the shares were issued as consideration not only for the eight claims set out in the option but also for fourteen additional claims, and that the value of the property at the time it was transferred to the company had increased to the value of $2,378,129.09 by reason of the development work and money spent on it.

On January 10, February 9 and May 16, 1933, the appeal to the Lieutenant-Governor in Council was heard. While the appeal was pending there were some conferences and some correspondence between the Attorney-General and the solicitor of the company concerning the possibility of a submission to the courts of the matters at issue under the provisions of section 3 of the *Constitutional Questions De-*

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termination Act, chapter 46, R.S.B.C. 1924. Nothing definite, however, resulted from these negotiations.

The company continued its interviews and correspondence with the Minister in the month of June, 1933.

On July 28, 1933, an order in council was passed whereby the appeal of the company was allowed in part and "the total cost of the mine as determined by the Minister at $100,000" was increased to the sum of $200,000.

Months afterwards, namely, on November 13, 1933, the company applied to Mr. Justice D. A. McDonald of the Supreme Court of British Columbia and secured a peremptory writ of mandamus directed to the Minister of Finance commanding him forthwith to ascertain and take into consideration the acquisition costs to the company of the properties acquired by it under the agreement of March 30, 1928, as provided by the *Income Tax Act,* section 6, chapter 53, statutes of British Columbia, 1932. The Minister was cross-examined on an affidavit made by him and filed on the mandamus motion. In the course of his cross-examination, the Minister testified that he took into consideration the section of the Act which stated that he must consider acquisition costs only, that no cash consideration had been given for the shares, that there was simply the transfer of the interests of a syndicate into 1,600,000 shares and that to justify his conclusions he had had interviews with three representatives of the company and all his departmental chiefs. The Minister further testified that he always listened and gave every possible consideration to the requests and arguments of the company. On November 14, 1933, the Minister made answer to the writ, and in his answer stated that he had in accordance with the instructions and command in the writ ascertained from the evidence before him that, although the consideration expressed in the agreement for the transfer to the Company was $1,600,000, the agreement stated that the consideration was to be paid and satisfied by the allotment of 1,600,000 fully paid ordinary shares of the capital stock of the Company of $1 each; that he had ascertained that the Company on the 30th day of March, 1928, the date of the agreement, had no assets whatever and its shares were therefore of no actual value before the acquisition of the rights of Sloan in the option and in the properties and had no market value prior to such acquisition and that, therefore, there were no

acquisition costs to the Company, in that transaction, in money or money's worth. He further stated that, on the appeal taken from his decision as Minister, it was decided by the Lieutenant-Governor in Council on July 28, 1933, that his decision fixing the acquisition costs at $100,000 should be amended by increasing the amount to $200,000 and that in compliance with the writ, he determined the acquisition costs at the said sum of $200,000. He further stated that if, in deference to what he believed to be the reasons of Mr. Justice D. A. McDonald for granting the writ, the basis for determining the acquisition costs were not a matter for his personal judgment, and that if he were legally bound to rule that the acquisition costs consisted of the value which the shares acquired after the Company had received title to the properties, he would find that the acquisition costs were $1,600,000.

In *The King* v. *The Board of Education* (1), it was held by the Court of Appeal that a local education authority had no power under the *Education Act,* 1902, to differentiate, in the matter of teachers equally qualified and teaching the same subjects, between the salaries paid in provided and non-provided schools as such. The Board of Education had decided that there had been no failure by the local education authority to maintain, and keep efficient, a school. The Court of Appeal held that the decision of the Board must be quashed on the ground that it did not answer the question submitted, and that a mandamus must be isssued directing the Board to determine the question according to law. The decision of the Court or Appeal affirming the decision of the Divisional Court that mandamus should issue, was affirmed in the House of Lords, sub. nom. *Board of Education and Rice* (2). The following statement is from the judgment of Lord Loreburn, Lord Chancellor, page 182:

> Comparatively recent statutes have extended, if they have not originated, the practice of imposing upon departments or officers of State the duty of deciding or determining questions of various kinds. In the present instance, as in many others, what comes for determination is sometimes a matter to be settled by discretion, involving no law. It will, I suppose, usually be of an administrative kind; but sometimes it will involve matter of law as well as matter of fact, or even depend upon matter of law alone. In such cases the Board of Education will have to ascertain the law and also to ascertain the facts. I need not add that in doing

(1) [1910] 2 K.B. 165. (2) [1911] A.C. 179.

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either they must act in good faith and fairly listen to both sides, for that is a duty lying upon every one who who decides anything * * * The board is in the nature of the arbitral tribunal, and a Court of law has no jurisdiction to hear appeals from the determination either upon law or upon fact. But if the Court is satisfied either that the Board have not acted judicially in the way I have described, or have not determined the question which they are required by the Act to determine, then there is a remedy by mandamus and certiorari.

In determining the acquisition costs in the case at bar, the Minister was bound to give the company full opportunity of presenting their arguments and to listen to them with a proper feeling of responsibility and conscientiously to apply his mind to the determination of the acquisition costs as required by the statute; but he was entitled to supplement the material before him vicariously through the officials of his department. *Wilson* v. *Esquimault and Nanaimo Railway Company* (1). There are of course, many cases to the effect that mandamus will not lie if, as in *The King* v. *Port of London Authority* (2), there is as convenient, beneficial and effectual a remedy by way of appeal; but, as Lord Wright points out in his opinion in the *Mayor, Alderman and Councillors of Stepney and John Walker and Sons Limited* (3), the Court will weigh the character and competence of the alternative remedy, to ascertain if it is sufficient and convenient in the true legal sense of the words.

Now it was argued by the appellant (*a*) that there was not any right of appeal from the decision of the Minister on the statute before us and that the alleged appeal to the Lieutenant-Governor in Council was therefore a nullity, and (*b*) that, if there was an appeal, the remedy of appeal was not a sufficient remedy since by the scheme of the Act the acquisition costs had to be first determined by the Minister, that this was a condition precedent to a valid appeal, that the Minister had not applied his mind or exercised his discretion on the proper questions and that he had not, therefore, determined the acquisition costs as required by the Act.

These points may be considered in the above order.

(*a*) Subsection 4 of section 44 of the 1928 Act expressly provided in the widest terms for an appeal from any decision of the Minister under clause (*p*) of subsection 1,

(1) [1922] 1 A.C. 202. (2) [1919] 1 K.B. 176.
(3) [1934] A.C. 365, at 400.

and subsection 4 of section 6 of the 1932 Act, if that is relevant, expressly provided in the widest terms for an appeal from any decision of the Minister under clause (*o*) of subsection 1. *Merrill Ring, Wilson Ltd.*, v. *Workman's Compensation Board* (1).

(*b*) It was argued by the appellant that there had been no pretence on the part of the Minister to determine the acquisition costs and that the Minister had deliberately refused to do so. The record, however, does not support these contentions. Some of the statements of the Minister on his cross-examination on the affidavit filed by him and on the return to the writ are not easy to reconcile, but it is clear that he fairly listened to the representatives of the company, examined the records and correspondence, consulted his principal departmental officers and bona fide came to the conclusion that acquisition costs of $1,600,000 were not established by the issue of 1,600,000 shares of a par value of $1 each any more than acquisition costs of $5,000,000 or $50,000 would have been established by the issue of 5,000,000 or 50,000 shares, respectively, of a par value of $1 each. In all cases, the shares would have reflected the value of the rights and interests assigned by Sloan to the company.

The case book shows that many claims were transferred to the company after the assignment from Sloan and before the sale to Stobie, Furlong & Company, which was an isolated sale at $1.50 per share. Clearly, the Minister was not bound to accept that figure. The record, as a whole, shows that the points in issue were constantly impressed upon the Minister by the company in conferences and correspondence and it is difficult to think that he did not apply his mind to the consideration required by the statute, particularly when, in point of fact, the representatives of the company were very properly tireless in urging these considerations upon him, and the Minister was always patient in listening to them. An examination of one letter alone, namely the letter from A. E. Bull to the Minister dated June 21, will disclose the most complete exposition of the points at issue. The following is a short quotation from that letter:

> While I have given you a history of the property before the incorporation of the company, the facts and figures therein mentioned do not

(1) (1933) 102 L.J. P.C. 185 at 189.

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affect the question being dealt with, which is under sec. 44, ss. 3, clause (a) of the *Taxation Act* the "acquisition cost" of the property to the company (the present tax bearer), prior to the 1st of April, 1928, and this acquisition cost is clearly the value of the shares at the time issued for the property, which was $2,400,000 and, as you know, the share capital of the company is a liability of the company and has to be returned to the shareholders and not encroached upon for dividends or profits, and is a real consideration and has to remain intact until the ultimate winding up of the company. The cost to some of the vendors who sold to the company four years before incorporation has nothing whatever to do with the acquistion cost to the company in March, 1928.

The Minister quite properly found that the shares reflected the value of the rights and interests transferred by Sloan. He then proceeded to determine the value of those rights and interests and, after consultations with departmental officers, he fixed the value at $100,000 and determined that the acquisition costs were that sum.

But there was an appeal by the statute to the Lieutenant-Governor in Council. This appeal was actually taken by the Company and the decision of the Minister was varied to $200,000, and there is no doubt whatever that the Lieutenant-Governor in Council acted judicially. *Wilson* v. *Esquimault & Nanaimo Railway Company* (1). The statute provided that this appeal should be final. The effect of the mandamus order was to direct the Minister, several months after he became *functus officio,* to act in disregard of the appeal from his decision, which appeal, I repeat, the statute declared to be final.

The appeal, therefore, should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *J. A. Clark.*

Solicitors for the respondent: *Lucas & Lucas.*

(1) [1922] 1 A.C. 202.

MARY VICTORIA BEGLEY (PLAINTIFF) .. APPELLANT;

AND

IMPERIAL BANK OF CANADA (DEFENDANT) ..... RESPONDENT.

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*Oct. 11
*Dec. 21

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

Principal and agent—Banks and banking—Power of attorney—Exercise of for agent's own benefit—Agent paying his own debt to bank with cheque drawn on principal's account— Estoppel—Acquiescence—Ratification—Conduct of principal.

The appellant, a widow, who had a savings account with the respondent bank, gave a power of attorney to one M. authorizing him "for me and in my name to draw and sign cheques on the said bank * * *" M. was indebted to the respondent bank and on being pressed for payment told the respondent's local manager that he "could borrow it from Mrs. Begley", the appellant. Shortly thereafter, after the appellant had left on a visit to Ontario, M. told the bank's accountant, who was aware of what had been said previously between M. and the manager, that he, M., wished to pay off his debt. Under M.'s instructions, the accountant made out a promissory note payable to the appellant on demand which M. signed for the amount of his debt to the bank. M. thereupon gave the bank a cheque on the appellant's account, signed by him as her attorney. The cheque was charged up against the appellant's account and M.'s indebtedness to the bank was cancelled, the note was left with the bank. The note was renewed twice by M. on July 31st, 1931, and in September, 1932. Alleging that she had not given M. authority to borrow or use her money for his own use, the appellant sued the bank respondent on December 29th, 1932. The trial judge maintained the action; but the Appellate Division reversed his judgment on the ground that the appellant's subsequent conduct in dealing with M. and her silence towards the bank constituted a complete estoppel.

Held, in accord with the judgment of the Appellate Division ([1934] 1 W.W.R. 689) and the trial judge, that the respondent bank had no right as against the appellant to retain the monies so paid over to it by M.; but

Held, reversing the judgment of the Appellate Division, Cannon J. dissenting, that, according to the facts and circumstances of this case, the appellant's conduct did not constitute estoppel or ratification.

Per Cannon J. (dissenting):—Both on the ground of ratification and of estoppel, the respondent bank's defense is well founded, according to the facts of the case.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1), reversing the judgment of the trial judge, Boyle J., and dismissing the appellant's action.

*PRESENT:—Duff C.J. and Cannon, Crocket and Hughes, JJ. and Maclean J. *ad hoc*.

(1) [1934] 1 W.W.R. 689.

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

H. G. Nolan for the appellant.

E. K. Williams K.C. for the respondent.

The judgment of Duff C.J. and Crocket and Hughes JJ. and of Maclean J. *ad hoc* was delivered by

DUFF C.J.—This appeal involves a controversy concerning the rights of the appellant against the respondent bank in respect of certain moneys of the appellant paid to the bank by one McElroy, who at the time held a power of attorney from the appellant, in liquidation of his debt to the bank.

The payment was made on the 29th of June, 1929. The appellant had been a depositor and had had a savings account with the bank since 1918. At the time of the transaction we have to consider, she was a widow, her husband having died in the previous December. She had been told by her husband, just before his last illness, that in matters of business, she should seek the assistance of McElroy. They both recognized that she would require assistance, because she was ill, suffering, as she afterwards learned, from an "inward goitre." Accordingly, in January, McElroy was appointed administrator of the husband's estate, and one Moyer, McElroy's solicitor, acted as solicitor in the business of administration.

On the 21st of June, 1929, the appellant, McElroy and Moyer were in the bank, saw the manager and on that occasion, the sum of $13,000, which had been realized from the estate, was transferred from the administrator's account to the personal savings account of the appellant.

McElroy was a customer of the bank and for some years his indebtedness to the bank had been heavy; it appears that from 1924 to 1929 his "direct liability" fluctuated from fourteen to eighteen thousand dollars, while he was under an "indirect liability" for something like fifteen thousand dollars, arising out of a mortgage held by the bank as collateral security.

Weaver, the local manager of the bank of Calgary, who was called as a witness at the trial, states that, since early in 1925, he, as manager of the branch, had been trying to

get McElroy to discharge his liability. In December 1928, his indirect liability was $14,800 and his direct liability $18,690.

Some of the letters which passed between Weaver and the western head office at Winnipeg, and the head office at Toronto, are in evidence. On the 20th of December, 1927, the assistant general manager at Winnipeg, writing to Weaver, says that he is concerned about McElroy's account, and comments sharply upon a remark of McElroy's, reported by Weaver, about a " purchase of May wheat," as indicating that McElroy was gambling in wheat. This, Weaver was informed, was a very serious matter and he was directed " to get at the situation at once."

On the 23rd of November, 1928, the assistant general manager at Toronto writes to the western superintendent at Winnipeg expressing his dissatisfaction with the information in his possession respecting McElroy's account, which showed a " direct " indebtedness at that time, apparently, of over $15,000. He complains that a suggestion that McElroy was going " to place a mortgage " in order to repay the bank was vague and appeared " to be drifting."

Towards the end of December, McElroy succeeded in raising a loan of $13,000 odd, by mortgage upon his lands, reducing his direct liability to the bank to $5,289. On the 8th of January, the assistant general manager writes:

> You do not tell us how McElroy is going to pay the $5,289. Has he got sufficient money from the sale of grain and cattle to provide for it?

Weaver replies on the 15th of January informing the assistant general manager that McElroy has not sufficient grain and cattle to pay the balance owing the bank, but that he has decided " to sell out " and is negotiating with one Herron for that purpose.

McElroy's direct liability was increased to $7,296 by the 25th of March, 1929. On the following day a deposit was made reducing it to $3,423. On the 29th of June it had been increased to $8,518. By moneys transferred from the appellant's account to McElroy's account, it was paid in full on that day—the first time for at least five years when McElroy was free of debt to the bank.

In the meantime, Weaver, stimulated by the head office, had been pressing McElroy for the payment of his indebtedness. Weaver states that at the end of April, 1929, McElroy told him that

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if the deal with Herron did not materialize, he could borrow the money from Mrs. Begley.

Again, on the 7th of June, Weaver says, he asked McElroy "in regard to paying the loan," and McElroy, he avers, told him that Mrs. Begley "had not yet got back from the states," and that "he would make arrangements with her when she came back."

The bank adduced this testimony by Chambers, the assistant manager:

Q. Prior to the 29th of June had you any reason to anticipate the withdrawal of any of the funds from Mrs. Begley's savings account and the same to be applied in satisfaction of McElroy's indebtedness to the bank.—A. Yes.

Q. Where did you get your information from?—A. From the correspondence between the branch manager and head office.

Q. Have you any duty in connection with that correspondence.—A. I have to read every letter that goes out of the office the day that it goes out.

Q. So you knew some time I take it before, or tell me whether you knew before the 29th of June that some transaction of the kind contemplated was going to take place.—A. Yes, I knew it on, I believe the date is May 14th.

Q. In May some time.—A. Yes.

The appellant, who had gone in January to stay with her sister in Spokane, returned to Calgary on the 19th of June. On the 21st, with McElroy and Moyer, she visited the bank and had a short conversation with Weaver, and, apparently, on this occasion, $13,000, the sum realized from the husband's estate, was transferred to her personal account. She visited the bank again on the 24th of June, and still again on the 25th, when she arranged with the assistant manager Chambers for the transfer of some money in Hamilton, Ontario, where she was about to pay a visit, intending to leave Calgary, as she did, on the following day, the 26th. It was three days after her departure that McElroy, purporting to act under a power of attorney in the bank's printed form, transferred from the appellant's savings account to his own account, a sum equal to his debt to the bank for the purpose of paying that debt which was so applied.

McElroy was not called as a witness, and the only direct evidence as to what occurred on the 29th of June, 1929, is that of the assistant manager, Chambers. In examination-in-chief he says:

Q. Now will you narrate in your own language, Mr. Chambers, the exact transaction as you recall it.—A. On June 29th, which was Saturday, just at the closing of the bank, Mr. McElroy came in.

Q. That would be at 12 o'clock I suppose?—A. Yes.

Q. The bank closes on Saturdays at 12?—A. Yes. He came to me and said * * *

Mr. Shaw: You have no objection to these conversations, just a moment please.

Mr. Nolan: All right, Mr. Shaw.

Q. Mr. Shaw: Well now, Mr. Chambers?—A. He said, "I wish to pay off my liability to the bank, will you please figure up how much it is I owe you." I then figured up his liability which amounted to $8,518.78. He then said I am going to borrow sufficient money from Mrs. Begley's account to pay this liability. Will you kindly make me out a note payable to Mrs. Begley. I said, "How long, when will the note be payable?" and he said, "On demand."

Q. The Court: What is that?—A. The note would be payable on demand. I asked him at what rate of interest was to be added to the note and he said, "Seven per cent." I made out this note and handed it to him and he signed it. He then said, "Will you please make me out a cheque" which I did, a cheque payable to J. W. McElroy for $8,500 which he signed "Victoria Begley per J. W. McElroy, Attorney."

Q. Is the handwriting of the note and the cheque yours excepting the signature?—A. Yes.

* * *

Q. Then what happened?—A. He then said, "I will have to put this cheque to my credit." I said, "I will make out a deposit slip," and I made out this deposit slip for, put on the $8,500 and I said, "This will not be sufficient to clean up your liability in full and he gave a further cheque for $18.78 which I added to the $8,500 deposit, made out the deposit for his account

Q. What did you do? All these documents were turned over to you, that is you had the cheque—A. I gave them all to Mr. McElroy to sign and when they were all made out and signed by him he handed them back to me.

Q. Yes, what did you do with them?—A. I took the cheque and the note, the cheque and the deposit slip and gave them to the paying teller. I put them in the paying tellers slide.

Q. That would be, your office is at the inner entrance to the bank? —A. Yes.

Q. So you simply walked down behind the counter I suppose?—A. Behind the counter and put them into the paying teller's slide. The note I put in my basket.

Before commenting upon this proceeding, it will be convenient to turn to the meeting which took place at Moyer's office between the appellant, McElroy and Moyer on the 24th of June. On that occasion the appellant executed the power of attorney, in the printed form furnished by the bank, upon which the bank relies in this litigation. The appellant remembers nothing about the power of attorney, and Moyer says it was not read over to her or explained to her. It was understood by all three, the appellant and Moyer agree, that the appellant's object in going to Moyer's office with McElroy, who accompanied her, was to make arrangements for the investment of the money in her

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savings account; which, as already mentioned, she had received from her husband's estate. She says that she then "appointed McElroy" as her agent to invest her money, and it was arranged, she says, and with this Moyer agrees, and there is no dispute about it, that McElroy was to try to get investments at a higher rate of interest than the ordinary bank rate on deposits; and that, in the meantime, her money was to be invested in government bonds. It was agreed that any other investments were to be subject to Moyer's approval. Moyer says this:

Q. Did you read this document exhibit "4" over to Mrs. Begley?—A. No.

Q. Did you explain it to her?—A. No.

Q. Why didn't you?—A. Well, I cannot say, Mr. Nolan. She understood that the power of attorney was being given on the bank account and it was in keeping with the instructions she had given to vest authority in McElroy to operate the account for the purpose of investments she had sanctioned or agreed to.

Q. All right then, are you saying to me that finally instructions were given that for the time being at least the investment was to be in Government bonds?—A. Yes.

Q. Until such time as selected securities could be obtained, to which your approval must be given?—A. That is right, and subject to the retention of some reasonable amount in the account.

Q. For current expenses?—A. That is right.

The appellant declares most explicitly that at no time did she agree to lend money to McElroy. But the evidence goes further, and, as it is important, it will be better, perhaps, to quote a passage from it verbatim. The incident mentioned in the passage was on the occasion to which we have referred, on the 24th of June; when, as Moyer says, the final instructions were that "for the time being at least the investment was to be in government bonds." The appellant says:

* * * Mr. McElroy asked me in an undertone voice if I would not let him have some money where he would pay me seven per cent interest, where if I put it out in Government Bonds, as I asked him, he said I would only get four or four and a half or something and I ignored it, I never let on I heard him say it at all. I said I wanted my money put out in Government bonds.

Q. That was on Monday the 24th, was it, of June. Was it, Mrs. Begley.—A. Yes.

Five days after this meeting, at which Moyer deposes, the appellant declared "she trusted" McElroy and himself "to do the right thing, and she was not going to worry about it at all"—five days after this interview at which these instructions were given, McElroy entering the Imperial Bank, declared to the assistant manager, according to

the evidence of the latter, that he was going to pay off his debt to the bank; that, in order to do so, he was going to borrow from Mrs. Begley, and the assistant manager having drawn a cheque upon the appellant's account payable to McElroy's order, he forthwith attached the signature "Victoria Begley per J. W. McElroy, attorney."

In addition to the sum thus withdrawn on the 29th of June, McElroy, within the succeeding four months and a half withdrew something like $3,000, professing to act under his power of attorney, of which $2,500 seems to have been applied for his own purposes, and without Moyer's knowledge; the remaining $500 was advanced to Moyer personally as a loan.

The majority of the Appellate Division seem to have thought that the evidence left some doubt upon the point of the fraudulent character of McElroy's conduct. I regret to say I am unable to share, what I cannot help regarding, if I may say so with the greatest respect, as the somewhat indulgent view, which the learned judges consider to be admissible, of the effect of the evidence. It seems to have been thought that the appellant's attitude, in ignoring, to use her own expression, McElroy's request, might have been interpreted by McElroy as "silence" importing "consent."

The evidence of Moyer and the appellant is quite unmistakable that the power of attorney was to be used for the purpose of investing the appellant's money in accordance with her instructions. McElroy could not possibly have misconstrued those instructions in the sense suggested. If he had done so, that is to say, if he had really believed that the appellant was acceding to his request, and agreeing to give him a loan, the matter would not have been allowed to rest there; he would have had the loan effected and the business closed before the appellant left Calgary on her visit to Ontario. McElroy was a man of experience in business, and could not have failed to realize that if he delayed the matter until after the appellant's departure, and then made use of his power of attorney in order to effect a loan to himself, without further communication of any sort with the appellant, he must expose himself to the gravest risk of misunderstanding and suspicion. No honest intelligent man of business experience would have behaved so.

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The judges of the Appellate Division, as well as the trial judge, have concurred in the view that the bank had no right, as against the appellant, to retain the moneys paid over by McElroy on the 29th of June. They all agree that if the appellant had, on becoming aware of what had occurred, demanded repayment, the bank could not have successfully resisted her demand. They agreed that the transaction in its character and in the circumstances attending it, was so far outside the ordinary course of business as to put the bank upon enquiry, and that the bank, having acted without the slightest investigation, not even so much as a question addressed to McElroy, could not, if such a demand had been made, have been permitted to keep the money.

The majority of the Appellate Division hold that the appellant is now estopped by her conduct from asserting her claim, and think, with some hesitation, that she had ratified McElroy's act in withdrawing the money from her account as a loan to himself; and that this involved a ratification also of his act in employing the proceeds to pay his debt to the bank.

With the greatest respect, I have been unable to satisfy myself that the bank has established these defences; but before considering them it is worth while, I think, to make one or two observations upon the transaction of the 29th of June.

As the trial judge observes, none knew better than the officials of the bank the financial pressure to which McElroy was subject. Apparently, he had unsuccessfully essayed every expedient, save resort to the appellant, for the purpose of providing himself with funds in order to satisfy the just and urgent demand of the bank.

On behalf of the bank, it is said, and the evidence already mentioned was offered in support of it, that they had been looking forward to payment by McElroy out of the proceeds of a loan which he expected to obtain from the appellant. He seems, as we have seen, to have informed the manager in April that he could borrow from the appellant. Then, as we have also seen, on the 7th of June, again, the manager tells us, he said that on the appellant's return "he would make arrangements with her."

It must be assumed that the local officials of the bank had more than an ordinary interest in these expectations

communicated to them by McElroy; information regarding them had, apparently, been communicated to the head office. McElroy's account, as administrator of the estate of the appellant's husband, seems to have been kept in the bank. Indeed, the evidence suggests that, during her absence in Spokane, the manager had been permitting the appellant to draw upon the moneys of the estate or upon the bank on the security of her interest in the estate.

It may properly be inferred that before the appellant returned to Calgary on the 19th of June, the officials of the bank were fully cognisant of the amount of the funds which would pass into her possession from the estate. They must have realized that to give a loan of $8,500 to a man in McElroy's circumstances without security, out of a savings account deposit of $13,000, could be no light thing for a woman circumstanced as the appellant was. It is idle to suggest that their minds did not advert to such matters. The payment of McElroy's loan was a matter of no slight moment to them. It would require an unusual degree of credulity to accept the hypothesis that the probabilities of McElroy succeeding in obtaining such a loan, and as incidental thereto the financial situation of the appellant, were not of interest and concern to them. Such being the circumstances, it is impossible to suppose that they did not look forward to receiving some information from McElroy after the appellant's return, touching the result of his endeavours to obtain the assistance of the appellant in relieving him from his embarrasments.

I cannot think it could have entered their minds antecedently that McElroy would endeavour to get rid of his difficulties by making use of a general authority under a power of attorney in the bank form without the specific consent of the appellant to a loan; but when McElroy proposed (after the appellant had returned to Calgary, and having remained there a week, going in and out of the bank, and had gone away for a lengthy visit in Ontario, and no communication had been received by the bank touching the success of his endeavours to arrange the loan he had been expecting to secure) that he should employ the power of attorney lodged by the appellant with the bank in order to effect an unsecured loan to himself of $8,500, out of the appellant's balance of $13,000, I am un-

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able to resist the conclusion that the suspicion of any sensible person in the situation of the bank officials, with all the knowledge they possessed, and interested as they were, must have been aroused. Neither the manager nor the assistant manager says he believed a loan had been obtained, or that he did not regard the circumstances as suspicious. The manager, indeed, puts his point of view very clearly. In direct examination he says:

Q. Mr. Weaver, you have suggested that the cheque, the $8,500 cheque, first came to your attention in January, 1929, and at the time of the bank inspection, you observed the form of it at that particular time, did you? —A. Yes, that it was 30.

Q. Yes, 1930?—A. Yes.

Q. Now what did you do following that?—A. When I found it was signed under power of attorney, I inspected the power of attorney which was on file in the office and had it filed away again, that is all I did.

Q. You just investigated to find out whether or not there was a power of attorney?—A. Yes, and the power of attorney, so far as I knew, was in proper form.

Q. Had you known anything about this transaction previously, I am talking now about the cheque, the $8,500 cheque and the note?—A. Will you please be a little more clear?

Q. Here you see, Mr. Weaver, a cheque signed by, under power of attorney, now what did you do in connection with that, that put you on your inquiry did it?—A. I only inquired at the time if there was a power of attorney and if that power of attorney was in order and properly recorded and that is all I did, I did not consider there was anything further necessary.

Q. No, the Court will not allow that conversation, but what I want to know is, did you have any other source of information other than Chambers with respect to this matter?—A. I may be very stupid in this question but I do not understand exactly what you wish to get from me. I can only explain that Mr. Chambers told me about the transaction at the time it went through and when this cheque was taken out in 1930 I took the transaction up by myself and found that cheque had been signed under a power of attorney and I saw nothing to take exception to in it. Whoever the cheque was payable to, so far as I was concerned, I thought it was all right. The power of attorney was there and expressed as such the cheque would be signed in that way and I did nothing further with respect to it.

* * *

Q. Now when this money represented by this cheque which is exhibit "5" in this case, the $8,500 cheque, was credited to the account of J. W. McElroy and it was on the 29th of June?—A. Yes.

Q. Where did the money come from that went into Mr. McElroy's account?—A. He borrowed it.

Q. No, no.

The Court: No.

Mr. Shaw: You must take his answer surely.

Q. The Court: No.

Q. The Court: Whose money was it that went into his account?—A. Mr. McElroy's.

Q. Where did he get it?—A. He borrowed it from Mrs. Begley.

Mr. Shaw: My learned friend must take the answer he gets.

Mr. Nolan: I am saying this to you, Mr. Weaver, the money which went into Mr. McElroy's account that day came out of the account of Mrs. Mary Victoria Begley, that is right, is it not?—A. It may have come from the Bank of England but the fact is that so far as we are concerned it was his money. It was his money, he had borrowed it elsewhere.

The Court: That is not what you were asked, you know what you were asked, you are an intelligent man?—A. Yes, my Lord.

Q. You were asked where that money came from that paid off your bank?—A. Well, my Lord, it came from Mr. McElroy so far as we are concerned, if Mr. * * *

Q. The evidence before us now is that it came from a cheque drawn by Mr. McElroy on Mrs. Begley's account?—A. That is correct, my Lord.

Q. Is that so?—A. Yes.

The Court: Well why don't you say so frankly?

That is the manager's account of his attitude; but I find it difficult to ascribe to him or the assistant manager the degree of simplicity necessarily involved in the supposition that either of them believed McElroy's plan of obtaining a specific loan from the appellant had succeeded, or that the extraordinary method adopted by McElroy in getting possession of funds to pay the bank was not the result of something that required or called for explanation.

The legal result is plain. The relation of principal and agent does not necessarily involve the existence of a fiduciary bond between them, but it is beyond controversy that, superadded to the legal relation between the appellant and McElroy, there was another relation in virtue of which McElroy owed a fiduciary obligation to the appellant in respect of the funds entrusted to him (*Burdick* v. *Garrick* (1); *Gray* v. *Bateman* (2); *Makepeace* v. *Rogers* (3); *John* v. *Dodwell* (4); *Reckitt* v. *Barnett* (5).

In the circumstances of the present case, the burden of the fiduciary obligation to which McElroy was subject was transmitted to the bank. If McElroy had withdrawn the sum of $8,500 in cash, and paid it to the bank in discharge of his debt, the bank, in the absence of knowledge or suspicion that, in doing so, McElroy was violating a fiduciary obligation to the appellant, would have been protected. But the existence of the suspicion which, for the reasons I have given, must be imputed to the local officials

(1) (1876) 5 Ch. App. 233.
(2) (1872) 21 W.R. 137.
(3) (1865) 4 DeG. J. and Sm. 649.
(4) [1918] A.C. 563, at 569.
(5) [1928] 2 K.B. 244, at 276.

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of the bank, is a complete answer to any defence by the bank resting upon the hypothesis that they were bona fide transferees. The cheque in McElroy's hands was held by him under this fiduciary burden and the bank cannot in the circumstances retain the proceeds of it (*John* v. *Dodwell*) (1).

I am assuming for the moment that under the power of attorney, McElroy had authority to bind the appellant in his application of the moneys in her account in such a way that she could not question his notes as against persons dealing with him bona fide; and in particular that a payment of his debt, bona fide received by the bank, would not be open to such question. I shall discuss the power of attorney later. Whatever the scope of his powers under that instrument, those powers were conferred upon him for a specified purpose—the investment of the appellant's money. Any moneys in his hands drawn from her account would be subject to the trust for investment; and in the circumstances of this case, the slightest knowledge or suspicion on the part of the bankers that McElroy was not, in paying his debt to the bank, acting loyally in the performance of his fiduciary duty to his principal would be sufficient, in the absence of enquiry, to make the bank accountable to the principal. (*Foxton* v. *Manchester* (2); *Coleman* v. *Union Bank* (3); *A. G.* v. *De Winton* (4); *John* v. *Dodwell* (1); *B. A. Elevator Co.* v. *Bank B.N.A.* (5).

I turn now to the substantive defences. And first, as to estoppel. The estoppel set up is almost entirely grounded upon acquiescence. Acquiescence strictly imports a standing by in silence while, and with knowledge that a violation of one's right is in progress by somebody who is ignorant of the right. There is nothing of that sort here. The violation of the appellant's rights was a completed act before she became aware of it, and the sole question is whether she has lost her remedy. The remedy of one who has been deprived of his property by the fraud of another who had possession or control of it under a fiduciary obligation to him is, as a rule, twofold. He has a personal remedy, and he has a proprietary remedy; that is to say,

(1) [1918] A.C. 563.
(2) [1881] 44 L.T. n.s. 406.
(3) [1897] 2 Ch. 243.
(4) [1906] 2 Ch. 106.
(5) [1919] A.C. 658.

he is entitled, under certain conditions, to follow, and require restitution of, his property. It is this latter remedy which the appellant prays, and, as I have said, her right to it, if it had been claimed without delay, is not denied.

Apart from one alleged conversation between the appellant and Chambers, the assistant manager of the bank, the basis of the bank's contention under this head is the fact that the appellant, after learning that McElroy had used the money drawn from her account to pay the bank, did not, for two years, inform the bank of McElroy's fraud.

Silence is effective as creating an estoppel only where there is a duty to speak. Was there any duty to speak arising out of what McElroy told the appellant in June, 1930? Her account of it is that McElroy, having informed her he had taken her money to pay the bank, she asked him why he had done so, and his answer was that

> Weaver told him to take it, he said I would be back and I was a widow, and I would want to marry him and he told him to take my money and pay it back.

I shall have something to say about this evidence later. I mention it here because the majority of the Court of Appeal attach some weight to it in this connection.

If the appellant believed McElroy, then the whole basis of the defence of estoppel by silence disappears, because, if Weaver had instigated McElroy's fraud, there could be no duty upon the appellant to give him information about what he already, *ex hypothesi,* knew too well.

Furthermore, it is quite plain that the bank did not act upon any supposed representation arising out of the appellant's conduct. Neither the manager nor assistant manager suggests that the bank was influenced by the appellant's silence.

I have already quoted passages from the evidence of Weaver in which he leaves us in no doubt as to the position of the bank. He had the power of attorney and the cheque, and since he considered the cheque was within the authority given, he concerned himself about nothing else. If the appellant had made a claim she would have been confronted with the power of attorney.

But the weakness of the bank's case, in so far as it rests upon estoppel by acquiescence, lies deeper. The remedy the appellant seeks to enforce is, as I have said, the pro-

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prietary remedy. In a proceeding in a court of equity, the appellant, having, as the Alberta courts have unanimously held, established her equitable title to the moneys, cannot be denied her remedy on the ground of acquiescence unless with a full knowledge of her rights and with independent advice, she has confirmed the impeachable transaction (*De Busshe* v. *Alt* (1); *Moxon* v. *Payne* (2)).

It is quite plain, I think, from the whole of the evidence that she had no knowledge of her rights and she expressly says she did not know that the bank had done anything wrong. She knew, no doubt, that she had executed a power of attorney, and knowledge of the effect of that cannot be imputed to her in the absence of advice upon it. Moyer, to whom she took McElroy's promissory note in 1931 with the hope of getting some settlement from him, never suggested to her that she might have some remedy against the bank. Indeed, it seems probable that Moyer knew nothing about the transaction with the bank.

Chambers, the assistant manager of the bank, from whom she learned of McElroy's unauthorized withdrawals, explained the transaction to her as a loan to McElroy. Not a word was said to her by him about the purpose for which the money had been used. Down to the very eve of the present proceedings, she appears to have had no suspicion whatever that the bank was in any way accountable to her. Indeed, to me, it sems in the highest degree improbable that it would have occurred to a woman in her position, with her lack of experience in business, that the conduct of the bank could be affected by any inactivity on her part. She would, beyond question, assume, if she thought about it at all, that the bank had taken, and would take, all the necessary measures for its own protection. In this respect, the case bears no sort of analogy to such cases as *Ewing* v. *Dominion Bank* (3) where a man of business experience is informed by a bank that his signature is attached to a commercial paper, takes no steps to disabuse his informant, who, he must know, will probably act on faith of the signature. Nor has it any sort of resemblance to *Greenwood* v. *Martin's Bank* (4) where the House of

(1) (1877) 47 L.J. Ch. 381, at 389.
(2) (1873) 43 L.J. Ch. 240, at 243.
(3) (1904) 35 Can. S.C.R. 133.
(4) [1933] A.C. 51.

Lords had to consider a case in which the silence upon which the estoppel was founded was, to quote the words of Lord Tomlin (at p. 58),

> deliberate and intended to produce the effect which it in fact produced, viz., the leaving of the respondents in ignorance of the true facts so that no action might be taken by them against the appellants's wife.
>
> * * *
>
> The course of conduct relied upon (Lord Tomlin says at p. 59) as founding the estoppel was adopted in order to leave the respondents in the condition of ignorance in which the appellant knew they were. It was the duty of the appellant to remove that condition however caused. It is the existence of this duty, coupled with the appellant's deliberate intention to maintain the respondents in their condition of ignorance, that gives its significance to the appellant's silence.

At p. 57, Lord Tomlin states the essential factors of an estoppel where it is alleged that a failure to disclose facts has deprived one of the parties of this opportunity to take proceedings against a third person. The first two of these factors are:

1. A representation or conduct amounting to a representation intended to induce a course of conduct on the part of the person to whom the representation is made.

2. An act or commission resulting from the representation, whether actual or by conduct, by the person to which the representation is made.

It seems little less than fantastic to ascribe to the appellant an intention to induce by her silence the course of conduct which was followed by the bank; and equally so to suggest that from her point of view, her silence was calculated to induce that course, or any other course of conduct by the bank; and once again, equally so, to say that anything the bank did was the result of an interpretation of the appellant's conduct by them as amounting to a representation of any description whatever.

Then as to ratification. It is important here to recall that there was a fiduciary bond between McElroy and the appellant as well as the legal relation of principal and agent. It is also most important to observe that the transaction was, by McElroy and the bank, given a form in which it consisted of two separable and separate acts; first, a loan by the appellant to McElroy through McElroy, her attorney; and then a payment by McElroy personally to the bank in liquidation of his debt.

I have quoted the evidence of the bank manager in which he makes it clear that the bank's interpretation of

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the transaction was that the payment by McElroy to the bank was not an act done in his representative capacity, but a personal payment made on his own behalf out of his own moneys. The cheque was made payable to McElroy and, notwithstanding the fact that the sole purpose of drawing the cheque was to put McElroy in funds to pay the bank, the fair interpretation of what occurred is that both McElroy and the bank treated the transaction throughout as possessing the character I have indicated.

It is not entirely without relevancy to notice that in their communications with the appellant, the bank's officials admittedly presented the transaction to her as a loan to McElroy, making no reference to the application of the proceeds of the loan; implying clearly that the only phase of the transaction in which she was concerned was the first phase.

That could not, of course, in the least degree, militate against the right of the appellant to treat the moneys in McElroy's hands as funds held by him in trust for her, or against her right to enforce the trust against the bank, in the circumstances in which the fund was in fact transferred. Nevertheless, McElroy was not professing to act as her agent in paying the bank, and the bank was not receiving the money from anybody acting as the appellant's agent. This is a most important consideration because it follows that, as McElroy did not profess to represent the appellant in paying the bank, his act in doing so was not one which the appellant could validly make her own by ratification.

In this view, the issue of ratification is not of much importance because we are only concerned on this appeal, as I have already said, with the appellant's proprietary remedy against the bank. Nevertheless, it is desirable, I think, to call attention to the difficulty of holding that ratification has been established, even as between the appellant and McElroy. The acts relied upon as constituting ratification consist principally of three:

(1) Delay in taking proceedings to call McElroy to account after she became aware in June, 1930, of McElroy's withdrawals;

(2) Steps taken by her through Moyer to procure some kind of settlement from McElroy;

(3) An agreement in the autumn of 1931 to renew the note signed by McElroy on the 29th of June, and to accept security from McElroy in the form of an assignment of his rights under that agreement. Ratification must consist of words or conduct recognizing clearly the authorized act as the act of the ratifying principal. Now, I should have much difficulty in holding that the appellant really intended to recognize McElroy's withdrawal of her money from the bank as her act, or as an act rightfully done by him. Of course, a person may be bound, whatever his actual state of mind may be, by acts unequivocally evincing a recognition as his own of an unauthorized act; but I am far from satisfied, when the circumstances and the relations of the parties are all considered, that (apart from the point of knowledge of the nature of the transaction which I am about to discuss) what the appellant did falls within this category. When she was first informed of McElroy's withdrawals, it is quite evident that the information came to her as a blow. She was quite ill at the time and shortly afterwards underwent an operation for goitre. It was during her stay in the hospital, and while still ill and suffering, that she told Moyer McElroy owed her money, and that she heard from McElroy that her money had been used to pay his debt to the bank. For something like a year after this, the note signed by McElroy remained in possession of the bank. Then having for the first time had it in her hand, she handed it to Moyer. Moyer says that later she consented to accept a "renewal" of this note accompanied by a transfer of some agreement as security; but she herself says she never so agreed; and Moyer's evidence is not at all clear as to what actually took place. He says, it is true, that she assented to the proposed arrangement; but he says, also, that a day or two afterwards she revoked her assent. His instructions, I gather, were revoked before McElroy had actually executed anything. McElroy appears at all times to have been holding out promises of restitution. I repeat, it is not established to my entire satisfaction that, when all the circumstances are considered (including the relations of the parties), there was an unequivocal recognition of McElroy's misappropriation as her own act.

However that may be, the bank has not, in my judgment, established that the appellant was in possession of that

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knowledge of the nature of the transaction and of the material incidents of it, the existence of which would be an essential condition of a binding ratification. There is nothing to indicate that she knew the actual form of the transaction. There is nothing to indicate that she was acquainted with the facts which, as I have explained, convince me that, by reason of the conduct of its local officials, to use the phrase of Mr. Justice McGillivray, the bank cannot be treated as an "innocent party." She actually knew nothing of this conduct; and, although the loan was treated by the parties as separate from the transfer to the bank, I do not think you can disregard that conduct, as immaterial, within the meaning of the rule which makes full knowledge an essential condition.

I am, of course, not overlooking the communication which she says McElroy made to her in the hospital touching Weaver's part in securing the repayment of the loan to McElroy. I think that may be put aside because the learned trial judge evidently did not think the appellant had treated the communication seriously; otherwise, he could hardly have used the language he did in discussing and rejecting the application to dismiss the action at the conclusion of the plaintiff's case. The learned trial judge, in his view of this passage in the evidence, would be much influenced by the manner in which the story was told. My impression is that nobody at the trial was disposed to treat the commuication very seriously. The manager, as might have been expected, contradicted McElroy's statement emphatically.

The bank relies upon an interview between the assistant manager Chambers and the appellant which, according to the evidence of the appellant, took place in June, 1930. Chambers says that at this interview he noticed the appellant expressed her surprise at the amount of McElroy's withdrawals saying she had not expected him to borrow so much. He also says that the appellant told him that she was confused and could not remember the arrangement she made with McElroy on her departure for Ontario. This evidence was obviously offered for the purpose of supporting a suggestion that the appellant had assented to the use of the money by McElroy. The learned trial judge, as I have already mentioned, held that she gave no such assent,

adding that counsel for the defendant did not contend that she had done so. I agree with Mr. Justice McGillivray that this evidence is of little assistance.

I should add that, in my judgment, the evidence is quite sufficient to support the findings of fact necessary to sustain the conclusion of the learned trial judge on the issues of estoppel and ratification.

I have one further observation to make upon ratification. Such acts as those relied upon by the bank as constituting ratification could, in my judgment, afford no answer in any case to the appellant's claim against the bank to recover the money as a trust fund (*John* v. *Dodwell*) (1).

I come now to the power of attorney. It is in these words:

> Know all men by these presents that I, Mary Victoria Begley, of the city of Calgary, in the province of Alberta, have made and appointed and by these presents do make and appoint James Wesley McElroy of the city of Calgary in the province of Alberta or any substitute appointed by him in writing, my true and lawful attorney to enter into, manage and carry out for me and in my name any and every financial transaction with the Imperial Bank of Canada, and particularly, but not so as to restrict the generality of the foregoing, to make all arrangements for credits, discounts and advances and the carrying of my account with the said bank, and to carry out the said arrangements, with power to vary, modify or rescind the same and to make new arrangements, and for me and in my name to draw and sign cheques, including those creating an overdraft, on the said bank or any other bank or banker, and receive the moneys thereon; to state and settle accounts; to endorse all cheques in which I am interested; to make and endorse in my name promissory notes; to draw, accept and endorse drafts and bills of exchange; to waive presentment, protest and notice of dishonour of negotiable instruments; to sign and endorse warehouse receipts; to endorse bills of lading; to pledge securities and negotiable instruments; to assign mortgages, policies of insurance, choses in action and book accounts and all moneys payable in respect thereof; to transfer shares in any company or corporation; to mortgage lands and securities upon lands or chattels; to give and agree to give security upon goods, wares, merchandise and other products and things upon which a bank may lawfully take security; and otherwise to pay or secure the payment to the Imperial Bank of Canada of any and all sums of moneys for which I may be from time to time liable to the said bank, whether directly or indirectly, with full power from time to time to make any agreement with reference to all or any of the said securities; to substitute other securities in the place of any securities relinquished by the bank; to confirm all or any securities held by the bank, and to release to the bank any right of redeeming the same or any of them, or any other right with reference thereto; and generally for me to do and transact any business in my name with the said Imperial Bank of Canada which I could transact in person, and in my name to

(1) [1918] A.C. 563.

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bind me on any and all deeds, conveyances, assurances, convenants, contracts, assignments, transfers, agreements and guarantees in the same manner as I could do in person; I hereby ratifying whatever my said attorney shall do.

And I further covenant and agree with the said bank, in consideration of the said bank accepting the acts done under this power, that I will ratify and confirm all acts, deeds, conveyances, assurances, contracts, covenants, assignments, transfers, agreements, guarantees and other matters and things which my said attorney may make, do, sign, execute or enter into with the said bank, and will repay all moneys my said attorney or any substitute may borrow or receive from the said bank whilst acting or assuming to act under this power, and that without regard to whether the transaction in question is or is not within the scope of the authority given herein.

This power of attorney may be exercised in the names of my heirs, devisees, executors or administrators, and shall continue in force as well after as before my death, and shall be revocable only after written notice of revocation signed by me or my executors or administrators has been served upon the manager of the said bank at Calgary, Alberta, and has been acknowledged by him in writing.

And I do declare that my said attorney shall have the power from time to time to appoint any substitute or substitutes for any or all of the purposes aforesaid, and every such substitution at pleasure to revoke by notice in writing served upon the manager before mentioned.

The primary purpose of this instrument obviously is to confer upon McElroy authority to transact businness with the Imperial Bank of Canada as the agent of the appellant. Some of the phrases in the instrument are very sweeping, but it has long been settled that powers of attorney are to be construed strictly; and it was laid down by the Privy Council in *Bryant* v. *La Banque du Peuple* (1) that

> where authority to do an act purporting to be done under a power of attorney is challenged, it is necessary to show that on a fair construction of the whole instrument the authority in question is to be found within the four corners of the instrument either in express terms or by necessary implication;

and powers given in the widest terms have been held not to extend, for example, to the making of presents, or to the granting away of the principle's property without consideration.

In *Reckitt* v. *Barnett* (2) Mr. Justice Russell (as he then was) says:

> The primary object of a power of attorney is to enable the attorney to act in the management of his principal's affairs.

It would require, he says, in a power of attorney,

> words unambiguous and irrestible to justify the attribution to the instrument of "a meaning and intention" to enable the attorney to do what

(1) [1893] A.C. 170, at 177. (2) [1928] 2 K.B. 244, at 268.

he liked with the plaintiff's moneys, even to the extent of applying them in payment of his own personal debts.

Mr. Justice Russell refers to, and in part rests his judgment upon, the decision of the Court of Chancery Appeals in *In re Bowles* (1) in which that court had to construe a power of attorney that enabled the attorney

to act on his behalf in all matters relating to his property, and to the affairs of the company, and to mortgage, charge, or otherwise incumber all or any part of his freehold and leasehold estates, stocks, shares and effects in England, and to lease the same for any term of years, and absolutely to sell all his said estates and effects.

Purporting to act under this instrument, the attorney executed a mortgage in favour of the company, of which he was the secretary and of which the principal was a shareholder, to secure a past debt. Lord Justice James, in delivering judgment, said,

* * * the mortgage was of no value. Whatever might be the legal effect of the power of attorney under which the mortgage was executed, it was clear that it could not authorize the donee of the power to execute a deed as a voluntary gift. But this was a voluntary mortgage in consideration of a past debt, executed under a power of attorney given by a shareholder of the company in whose favour the mortgage was made. The mortgage was clearly invalid, and the Vice-Chancellor was right in dismissing the petition.

In this judgment, Lord Justice Mellish concurred. The decision is a decision of the Court of Chancery Appeals; but, in addition to that, the decision and the judgment have the weight which attaches to all the pronouncements of the two eminent judges who exercised the powers of the court on that occasion.

The power of attorney with which we are concerned does not, in express terms, or by necessary implication, authorize the making of gifts; nor do I think it authorizes the attorney to make any disposition he likes to make of the appellant's money and property, to apply such money, for example, in the payment of his own debts. While the general clauses are very sweeping, there is a specific clause which deals with the subject of the payment of debts due to the bank and the giving of security for such debts and the dealing with such securities. These provisions are very elaborate and very sweeping except as to one point; that is to say, that the liabilities to the bank which the attorney is authorized to discharge and secure, are limited to liabilities of the principal. There is, of course, the specific de-

(1) [1874] 31 L.T. 365.

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claration that the generality of the general power to transact business with the bank is not to be limited by the particulars which follow, but I do not think it is a fair construction of this power of attorney to hold that these words are sufficient to sweep away the conditions and qualifications expressed in the sentences which deal with the paying and securing of liabilities to the bank. The point, I need hardly say, is by no means free from difficulty, and I have come to this conclusion after a good deal of hesitation, but I think, on the whole, it is the right view of the effect of this instrument; and, if so, obviously, the withdrawal of the money for the sole purpose of applying it in a manner not authorized by the power of attorney was an abuse of the power of which the bank had full knowledge and, consequently, as between, not only McElroy and the bank, but also as between the bank and the appellant, an act not binding on the appellant.

In any case, it is very clear to me that this power of attorney does not invest the attorney with authority to release himself from his fiduciary obligation to the principal in respect of property of the principal's which has come into his hands, or to release the transferee of such property from transmitted fiduciary obligations. Any such a transaction would be entirely outside the contemplation of the instrument.

The appellant is, therefore, entitled to restitution of the sum of $8,500 with interest from the 29th of June, 1929. I have been unable, however, to reach the conclusion that, as regards the later cheques, the bank is responsible.

The judgment of the Appellate Division should, therefore, be set aside and the judgment of the trial judge varied by striking out the third paragraph. There should be no costs of the appeal to the Appellate Division but the appellant should have the costs of the appeal to this court.

CANNON J. (dissenting)—This is an appeal from the Appellate Division of the Supreme Court of Alberta, reversing (McGillivray J. dissenting) the judgment rendered by the trial judge in favour of plaintiff for $11,000 with interest, amount of alleged unauthorized withdrawals of her funds with the connivance of the bank.

The plaintiff is a widow. Her husband having died in December, 1928, one James Wesley McElroy, their neigh-

bour and friend, administered the estate and got his discharge as administrator on or about June 21, 1929; he then deposited the estate's money in the savings department of the defendant bank, at Calgary, to the plaintiff's personal account which had been in operation for several years past.

On June 24, 1929, the plaintiff executed a power of attorney in the office of her solicitor and lodged it with the defendant bank. This was on one of the bank's forms and authorized McElroy, *inter alia*, "for her and in her name to draw and sign cheques * * * and receive the moneys thereon."

On the 26th June, 1929, after having told the defendant that she was going east and having a portion of her money transferred to Hamilton, the plaintiff left Calgary for a visit to Ontario.

Mr. McElroy had been farming on a rather large scale in the neighbourhood of Calgary for some years; and he had been indebted to the defendant bank on both direct and indirect liabilities for comparatively large amounts varying from time to time.

On June 29th, 1929, the bank held a third mortgage on a considerable portion of his farm, which security was surrendered or destroyed when he paid the amount of his direct liability on that date. His account was not closed and it was not carried on and further advances were made to him subsequent thereto. On that 29th day of June, 1929, a Saturday, a few minutes bewore closing hour, McElroy told Mr. Chambers, the accountant of the bank, that he intended to pay off his debt of $8,518.78, which amount he was going to borrow from Mrs. Begley's funds for that purpose. He signed a note for $8,500 in her favour. He also drew as attorney a cheque against plaintiff's account for $8,500 which he deposited, with $18.78, to his own credit and thereby balanced his personal account and his direct liability. Subsequently McElroy drew other cheques as plaintiff's attorney against her account in the defendant bank, to the order of third parties, which were paid.

The plaintiff returned to Calgary about the middle of December, 1929. She had several interviews with McElroy, was in the bank and had her passbook marked up.

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Subsequently thereto, on the 2nd of January, 1930, she issued a cheque to McElroy through the respondent bank for $1,400 by way of loan.

Thereafter she was often in the bank and had her pass-book written up and was also shown the $8,500 note and all the cheques that had been issued by McElroy against her account. The plaintiff said in her evidence that while she was in the hospital, in June, 1930, McElroy told her that he had paid the bank with her money. He promised to pay it back in the Fall. He had 1,600 acres in crop. While in the hospital, plaintiff told her then solicitor Moyer that McElroy had her money and changed her will leaving ing him out as executor.

Now, what was appellant's behaviour after she knew of McElroy's use of her money to pay his debt to the bank?

On July 9th, 1930, the plaintiff was in the bank, but never spoke to Chambers, the accountant, or to the manager, Weaver, about this transaction or of the transfer of her funds to McElroy's credit.

On the 10th July, 1930, the plaintiff left by motor for Spokane, driving with McElroy who remained in Spokane three days. They seemed to have been on the best of terms, although they quarrelled about these matters, but made up before he left. She was told that he would pay the bank the money that Fall.

After remaining in Spokane about a month, plaintiff returned to Calgary and was in the bank at least four times before the end of October, and never gave a hint that she disapproved of what had been done; she even took possession of and withdrew the $8,500 note from the custody of the defendant bank and took it to the Bank of Montreal.

On the 31st of July, 1931, she got the first note from the Bank of Montreal and secured from McElroy a new note dated the 1st of August, 1931, for $9,419.11, payable in one year, and stipulated an interest of 6 per cent. She then went to the Bank of Montreal and put this note in her deposit box. It was understood that McElroy would pay as much as possible out of the crop that year.

On the 24th July, 1932, plaintiff writes to McElroy referring to

Mr. McElroy's note will soon be due which he put off on an ignorant woman who was in love.

From the 1st to the 3rd September, 1932, plaintiff accepted a renewal note for $10,224, and arranged for security at the office of her solicitor Moyer who had been trying to secure protection for her claim against McElroy. The papers were prepared and signed by McElroy; but she afterwards countermanded her instructions and, having consulted with Mr. Taylor, started the present proceedings against the bank to recover the amounts of several cheques drawn by McElroy as her attorney.

The parties and the courts below seem to concur in the view that the respondent could have been compelled to reimburse the $8,500 at the moment when, in December, 1929, or January or June, 1930, the appellant first heard of what had been done, if she had, as a matter of fact, never agreed to loan to McElroy the amount in question.

The bank was certainly, to say the least, negligent at the outset. But the defendant has pleaded that the plaintiff not only authorized the issue by McElroy of the cheque but also, on the 2nd of January, 1930, and on the occasion of each and every renewal of the note, ratified the act of the said McElroy in issuing the cheque and the use thereof. The defendant also sets up that the plaintiff by her conduct has elected to waive the wrong, if any, in connection with the $8,500 cheque and to treat the transaction from the beginning as a duly authorized loan of money by her to McElroy. The defendant alleges that by reason of the authority given by the plaintiff to McElroy, and her knowledge, acts, omissions and conduct and by reason of the financial position of McElroy and the security and opportunity that have been lost to the defendant, the plaintiff is estopped and should not be heard to allege or prove the facts set forth in the statement of claim.

The learned Chief Justice of Alberta has dealt with these aspects of the case with much care; and there is hardly anything to add to his remarks. But it would be useful to insert here some abstracts from the evidence of the appellant to show the extent of her knowledge of what had taken place and her determination to accept McElroy as her debtor and shield him as against the bank:

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Q. But McElroy did tell you that the money had, that he had paid the money to the Imperial Bank?—A. He told me that when I was in the hospital.

Q. I think it was at this particular time that McElroy told you that you did not need to worry about the amount, that he was going to pay it that Fall?—A. Yes.

Q. You were quite satisfied with that, were you, I mean you thought he would pay it?—A. I do not know as I was just satisfied. Well I thought he would.

Q. I asked you two questions. But you did think he would pay it that Fall?—A. Yes.

Q. You knew that that particular year he had some 1,600 acres in wheat?—A. Yes.

Q. And of course, the prospects at that particular time were favourable, I mean the crop prospects were favourable?—A. Yes.

Q. This conversation that you had with McElroy I believe, Mrs. Begley, was some four or five days before you left for Spokane, of course, you told me you had one in the hospital but you had another one four or five days before you left for Spokane?—A. I have forgotten.

Q. In any event you know at that time that McElroy had taken your money or some of your money?—A. Yes.

Q. There is no manner of question about that at all is there?—A. No.

* * *

Q Now as a result of the information which you got you knew that McElroy had taken some of your money and used it to pay his debt to the bank, didn't you?—A. Yes.

Q. You knew that before you took this trip to Spokane with Mr. McElroy?—A. Yes.

Q. Now you knew, of course, at that time that that was a very wrong thing for Mr. McElroy to do, didn't you?—A. For to take the money?

Q. Yes?—A. Yes.

Q. You knew at that time, of course, it was a very wrong thing for the bank to have used the money in that particular way didn't you? —A. I did not know that they should not, I did not know about that.

Q. You did not know about that?—A. No.

Q. Didn't you think it was improper for them at that time to have taken the money without any instructions from you to McElroy and used it for paying his indebtedness to the bank?—A. Well I do not remember just what I did think about it.

Q. You would have thought there was something wrong about it anyway, put it that way?—A. Yes.

Q. Didn't you?—A. Yes.

Q. In any event regardless of what you thought about it you were satisfied from the conditions generally that McElroy would pay it back? —A. I thought he would.

Q. And that he would pay it back that Fall?—A. He said so.

Q. Well you must have been satisfied weren't you that he would do it? —A. I thought he would all right.

Q. And so you were prepared to wait until the crop season was over? —A. Yes.

* * *

Q. As a matter of fact you got a renewal note for this indebtedness on the 1st of August, 1930, didn't you?—A. Yes.

Q. Have you got that note?—A. Mr. Taylor has it.

Q. What is this document, Mrs. Begley?—A. Well that is Mr. McElroy's note.

Q. That is the note and what is the date of it?—A. August 1st.

Q. 1931?—A. Yes.

* * *

Q. The Court: What did you say about renewing the note, how did you come to meet Mr. McElroy?—A. Mr. McElroy was to be in at ten o'clock Saturday morning to have the note fixed up and he did not come until just about a quarter to 12 and we had to rush then to get down to get it into the bank. I did not take time to look at it until I was putting it in the deposit box and I noticed then it was Nine thousand dollars and something.

Q. Mr. Shaw: Yes, now you had told McElroy before this that you wanted to get this note renewed hadn't you, it was your suggestion that you should get a renewal of this note?—A. Yes.

Q. And so he came up and the amount was figured out in your apartment, he gave you this new note which is now exhibit 23 to you and you gave him back the $8,500 note, is that not right?—A. Yes.

Q. And then he drove you down to the bank so that you could put in the bank the $9,400 note which you had, which he had just given to you?—A. Yes.

Q. I notice that the original note for $8,500 was with interest at seven per cent. I believe there was an arrangement by which that was to be reduced to six per cent?—A. Yes, he asked me, he said you are only getting six per cent from others why do I have to pay you seven? I said, "You pay me up in September and you can have it for six too."

Q. The understanding was that he was to pay, although the note was taken for a year, he was to pay as much as he could or all of it if possible within, or all of it out of that year's crop?—A. Yes.

Q. Or from any other source I suppose?—A. Yes.

* * *

Q. Did you after that date (1st of August, 1931) at any time suggest to or discuss with any of the defendant bank officers, the matter of this wrongful taking by McElroy?—A. No, I just showed that note to the manager, that was all, and he told me to go to my solicitor.

Q. You are speaking of the Bank of Montreal?—A. Yes.

Q. I am speaking about the Imperial Bank?—A. I never was in there after.

Q. You never discussed with Chambers or Weaver or Mackie—A. After I got these notes from Mr. McElroy I was never in.

Q. It would be obviously clear in your mind that you never suggested the wrongful taking by McElroy?—A. No.

Q. And I assume from the evidence we already have had that you have never discussed it with any of the officers of the bank previously either?—A. Before that?

Q. Yes.—A. About the $8,500?

Q. I mean about the wrongful taking by McElroy without your authority?—A. No.

Q. That would be a correct statement I take it, Mrs. Begley?—A. Yes.

Q. And I suppose, Mrs. Begley, that it would be fair to say your first complaint to the bank would be through your solicitor, Mr. Taylor, that would be correct would it not?—A. My complaint to the bank, about the bank, yes.

Q. Or to the bank?—A. Yes.

* * *

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Mr. Shaw: And that I believe must have been about October, 1932? —A. Yes.

It is said that

it seems little less than fantastic to ascribe to the appellant an intention to induce by her silence the course of conduct which was followed by the bank towards her friend McElroy.

With due respect, I cannot ignore her own letter of January 13, 1931, and her admission that she was telling lies in order to shield the latter.

Mrs. Begley, I show you this document, what is that, is that your signature?—A. Yes.

Q. That is a letter written by you to McElroy is it not?—A. Yes.

Q. Dated Calgary, January, 13th, 1931?—A. Yes.

Q. Mr. Shaw: I am going to ask to have this letter put in. (Document in question was then marked exhibit "24" and was read to the jury by Mr. Shaw).

Q. Now in connection with that communication in your examination for discovery I asked you at question 1383

"1383. Q. So you were telling these lies for the purpose of shielding McElroy, is that what you meant by that.—A. Well, it looks that way."

You still agree with that?—A. Yes, it was not just meant in those ways but I could not just explain how it was.

In *Scott* v. *Bank of New Brunswick* (1) this court held:

If payment is obtained from a debtor by one who falsely represents that he is an agent of the creditor, upon whom a fraud is thereby committed, if the creditor ratifies and confirms the payment he adopts the agency of the person receiving the money and makes the payment equivalent to one to an authorized agent.

The payment may be ratified and the agency adopted, even though the person receiving the money has, by his false representations, committed an indictable offence.

In this case also, the doctrine of ratification is invoked, to use the words of Chief Justice Strong, in the above case, at page 283,

for the purpose of fixing a party, by reason of his adoption of it, with the legal consequences of an act which, whatever may have been the circumstances which attended it and brought it about has a *de facto* existence.

The payment made to the bank with appellant's money is a substantial act susceptible of ratification; and for two years after she heard what McElroy had done with the $8,500 cheque she never complained or advised the bank of her intention to deny the loan to McElroy; and, moreover, she repeatedly, by renewing the notes and exacting interest, adopted and ratified the alleged loan of her money by McElroy in order to pay the bank. It would be difficult to conceive stronger acts of ratification than those in evi-

(1) (1894) 23 S.C.R. 277.

dence in this case. Surely, to paraphrase the late Chief Justice Strong, if an agent, after converting to his own use moneys received from the principal's debtor, undertakes to pay to the principal money to the same amount that which he has received from the principal's debtor in assumed discharge of the debt, the principal could not afterwards, while retaining the money, compel the debtor to pay a second time. In such a case, the receipt of the money from the fraudulent agent would be such a recognition of the agency as to place the debtor in the same position as if the pretended agent had had full authority to keep the money at the time he received payment from the debtor. What difference, in principle, can there be between actual receipt of money and accepting notes bearing interest, as appellant did in this case? Having secured from McElroy these notes for the amount of the supposed loan, the appellant cannot keep those notes and, at the same time, ask her debtor, the respondent, to pay her a second time the amount paid to McElroy under the power of attorney, even if the latter at first did more than what he was authorized to do as her agent. These facts reveal a conduct that is only consistent with a waiver of her complaint against the bank. In this case, to hold that appellant has not waived the alleged lack of authority of McElroy would be to allow her to take up the inconsistent position of at once "approbating and reprobating."

Lord Blackburn, in the case of *McKenzie* v. *The British Linen Co.* (1), says:

> It is quite immaterial whether this ratification was made to the person who seeks to avail himself of it or to another.

Chief Justice Strong, in the same case of *Scott* v. *The Bank of New Brunswick* (2), said that the distinction between ratification and estoppel is well pointed out in a case of *Forsyth* v. *Day* (3), where it is said:

> The distinction between a contract intentionally assented to or ratified in fact and an estoppel to deny the validity of the contract is very wide. In the former case the party is bound because he intended to be; in the latter he is bound, notwithstanding there was no such intention, because the other party will be prejudiced and defrauded by his conduct unless the law treat him as legally bound. In one case the party is bound because the contract contains the necessary ingredients to bind him including a consideration. In the other he is not bound for these reasons but because he has permitted the other party to act to his prejudice under

(1) (1881) 6 App. Cas. 82, at 99. (2) (1894) 23 Can. S.C.R. 277.
(3) (1858) 46 Me. 176, at 196.

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such circumstances that he must have known or be presumed to have known that such party was acting on the faith of his conduct and acts being what they purported to be without apprising him to the contrary.

Does justice require, as between the parties before us, that their rights and liabilities should be determined, so far as this particular transaction, the subject of our investigation, is concerned, on the assumption that a certain fact, or state of facts is true, whether in fact it be so or not? Can the bank exact from the appellant an admission that the loan to McElroy actually took place, or was at least confirmed and ratified? Was the appellant legally in duty bound, when she discovered the alleged fraud of McElroy, to tell the truth to the bank immediately? By reason of such breach of duty towards the bank, has the latter sustained damages? If so, has the bank, however negligent it may have been at the outset, been misled afterwards to believe that McElroy's representation that the money was being loaned to him by the appellant was true? In other words, are the respondents, in the circumstances of this case, entitled to set up an estoppel?

According to the plaintiff, she became aware, in June 1930, of the fact that McElroy paid his own debt to the bank with moneys drawn from her account under the power of attorney. There is no doubt that at that time she was, either from friendship or love, disposed to help and shield McElroy and did not want, by disclosing the true facts, to bring trouble between him and the bank. She deliberately refrained from speaking to the bank and did not and would not have the latter debit McElroy's account with the amount which might have been reinstated to her credit. She made a loan of $1,400 to McElroy, to the bank's knowledge. She also accepted and withdrew from the bank the promissory note which was given by McElroy as an acknowledgment of the alleged loan. Her conduct amounts, in my opinion, to a representation intended to induce the bank to believe that McElroy was truly authorized by his principal to act as he did on the 29th of June 1929 and that his debt to the bank was definitely, well and truly paid, and that, therefore, the bank had no more reason to protect their interest against McElroy.

The bank, as a result of this conduct amounting to representation, refrained from pressing McElroy and missed at least during two crop years to collect from him any claim

that they might have revived against him if the payment made out of the appellant's funds had to be set aside. The act of the bank in crediting this amount to McElroy and giving up the security they held, and their omission from that date to take any action to collect their advances to him, would, if the plaintiff could now recover against the bank, evidently cause detriment to the letter.

I find here the essential factors giving rise to an estoppel as propounded by the House of Lords in the recent case of *Greenwood* v. *Martin's Bank* (1). At page 58 Lord Tomlin says:

> I do not think that it is any answer to say that if the respondents had not been negligent initially the detriment would not have occurred. The course of conduct relied upon as founding the estoppel was adopted in order to leave the respondents in the condition of ignorance in which the appellant knew they were. It was the duty of the appellant to remove that condition however caused. It is the existence of this duty, coupled with the appellant's deliberate intention to maintain the respondents in their condition of ignorance, that gives its significance to the appellant's silence. What difference can it make that the condition of ignorance was primarily induced by the respondent's own negligence? In my judgment it can make none. For the purposes of the estoppel, which is a procedural matter, the cause of the ignorance is an irrelevant consideration.

The above remarks apply aptly to this case. The bank may have had more or less good reasons to believe McElroy's statement that he had procured a loan from the appellant; if the latter did not loan the money, she, by her conduct, induced the bank to believe that she had actually loaned the money, or, if she had not really done so before the 29th of June, 1929, that she had ratified the transaction.

I would therefore, both on the ground of ratification and of estoppel, find in favour of the bank.

As far as the subsequent cheques totalling $2,500 are concerned, the authority of *Bryant* v. *Quebec Bank* (2), is amply sufficient to justify the payments by the respondent and we must agree with the unanimous findings of the Appellate Division.

The appeal should, therefore, be dismissed with costs.

Appeal allowed with costs.

Solicitors for the appellant: *Taylor & Taylor.*

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

(1) [1933] A.C. 51, at 57.

(2) [1893] A.C. 170.

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*Oct. 10.
*Nov. 20.

ELIZABETH BERG AND PENN COALS LTD. ..... } APPELLANTS;

AND

NORTHERN ALBERTA RAILWAYS COMPANY. ..... } RESPONDENT.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA

Railways—Jurisidiction of Board of Railway Commissioners for Canada—Coal lying under right of way—Fixing amount of compensation—Transfer of land—Agreement between parties—Railway Act, R.S.C., 1927, c. 170, s. 197—Applicability of judicial decision to the case.

The appellant Berg, as owner, and the appellant Penn Coals Ltd., as lessee from her, of certain quarter section situated in Alberta, presented an application to the Board of Railway Commissioners under section 197 of the *Railway Act*, asking the Board to fix the amount of compensation payable to the appellants in respect of coal lying under the right of way of the respondent railway. The latter alleged that, in 1914, it purchased the right of way from the then owner, predecessor in title of the appellants, paid him in full for all the coal required to be left for the support of the right of way and that by virtue of the transfer itself, it was entitled to such support.

Held that the judgment of the Board dismissing the appellants' application (40 Can. Ry. Cas. 361) should be affirmed.

In the absence of some plain language in the contrary sense, of which there is none, section 197 of the *Railway Act*, which was not enacted until 1919, cannot be so construed as to prejudice the rights of the parties as settled by the transaction between them in 1914.

Also, the agreement between the former owner and the railway company, dated the 5th March, 1914, but not finally completed by transfer until the 28th September, 1914, should be construed and interpreted in the light of a decision of the Judicial Committee of the Privy Council given on the 6th July, 1914.

APPEAL by leave of the Board of Railway Commissioners for Canada, from an order of that Board (No. 49760, of April 20, 1933) (1), dismissing the appellants' application to fix the amount of compensation payable to them in respect of coal lying under the right of way of the respondent railway.

The questions upon which leave to appeal was granted by the Board are stated in the judgment now reported.

*PRESENT:—Duff C.J. and Cannon, Crocket and Hughes JJ. and Maclean J. *ad hoc*.

(1) [1933] 40 Can. Ry. Cas. 361.

Section 197 of the *Railway Act*, R.S.C., 1927, c. 170, reads as follows:

> The company shall, from time to time, pay to the owner, lessee, or occupier of any such mines such compensation as the Board shall fix and order to be paid, for or by reason of any severance by the railway of the land lying over such mines, or because of the working of such mines being prevented, stopped or interrupted, or of the same having to be worked in such manner and under such restrictions as not to injure or be detrimental to the railway, and also for any minerals not purchased by the company which cannot be obtained by reason of the construction and operation of the railway.

The appeal was dismissed with costs, and the questions answered in the affirmative.

O. M. Biggar K.C. for the appellant.

Geo. A. Walker K.C. for the respondent.

The judgment of the Court was delivered by

DUFF, C.J.—This is an appeal from the Board of Railway Commissioners. By order of the Board dated 2nd June, 1933, leave was granted to appeal upon two questions which are stated thus:

> 1. Whether the Board's judgment is correct in holding that section 197 of the Canadian *Railway Act* has no bearing on the application of the applicants; and that the applicants cannot invoke its provisions in support of their application?
>
> 2. Was the legal effect of the transfer from Robert Kelly to the Edmonton, Dunvegan and British Columbia Railway Company, dated 28th September, 1914, to vest in the railway company not only the right of way thereby transferred, but the right to subjacent and adjacent support?

It will be convenient first of all to give very briefly the material facts:

In 1914, Robert Kelly, the predecessor in title of the appellants, was the owner of the quarter-section now in question with the mines and minerals thereunder. On the 28th of September that year, Kelly transferred to the Edmonton, Dunvegan and British Columbia Railway Company, the predecessor in title of the respondents, 8·64 acres required for company's right of way through this quarter-section by a transfer which reserved all mines and minerals. Before the execution of this transfer by Kelly, the railway company had taken all the proceedings required by the *Railway Act* then in force for the expropriation of the land. Notice of expropriation had been served upon Kelly, by which the company offered to pay him $3,769; this

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amount including compensation at the rate of $50 per acre for the injurious affection of 27·85 acres of coal rights.

An order for immediate possession had been granted on the 6th September, 1912, which provided that the railway company should make application upon four days' clear notice to determine what, if any, amount should be paid into court, as security for the payment of any compensation to which the parties entitled to the mineral rights might be found entitled. A further order was made on the 6th September, 1912, directing the sheriff to put the railway company in possession of the right of way, on the company's undertaking to pay into Court as security for compensation such sum as might be fixed by a judge, after determination by the Board of a pending application for permission to work the minerals under the railway right of way. Upon the 20th March, 1913, upon the application of Robert Kelly and others, the Board made the following order:

> That the applicants be, and they are hereby granted leave to work and excavate the coal lying under the right of way of the railway company on section 8, township 55, range 24, west of the 4th meridian, in the province of Alberta, as shown on the plan on file with the Board under file Nos. 20827 and 20827·1, subject to and upon the following conditions, namely:—
>
> 1. The coal not already mined under the right of way of the railway company to be left in place; and in the Kelly mine the coal to be left in place under the right of way and under additional strips fifteen and twenty-five feet in width outside the right of way on the northwest and southeast sides respectively.
>
> 2. Two levels, eight feet wide, and seven feet high, to be constructed to each mine, the levels to be seventy feet apart and the timbers to be placed inside this measurement.
>
> 3. The posts and timbers under the right of way to be of tamarack posts to be seven inches in diameter and the roof timbers eight inches by five inches, and placed on edge.
>
> 4. All work within the limits set forth in paragraph 1 to be done under the supervision of an engineer of the railway company, who shall have the right of access to the mine at any time in order to examine timbers in the levels under the right of way.
>
> 5. Where the coal has already been taken out under the right of way the applicants shall notify the railway company of the true position of the levels abandoned.

It is admitted that the effect of the Board's order, as regards the quarter-section in question, was to reduce the area injuriously affected in respect of right to coal from 27·85 acres to 8·64 acres.

In April, 1913, an order was made fixing an amount payable into court under the previous order at the sum of $4,000.

On the 5th March, 1914, Robert Kelly and the railway company entered into an agreement which, in part, is as follows:

> That the proceedings taken by the Railway Company for the expropriation of its right of way over the land above set out and as described in the notice to treat served in respect thereof are settled by the railway company agreeing to pay, and it hereby agrees to pay to Robert Kelly the sum of two thousand nine hundred and twenty-two dollars and sixteen cents ($2,922.16) and by Robert Kelly transferring and he hereby agrees to transfer free from encumbrance in fee simple but reserving the mines and minerals (the land in question).

This agreement was carried out by a transfer dated September 28th, 1914. The rights of Robert Kelly to the coal now in question were afterwards acquired by the appellant Elizabeth Berg, and the undertaking of the Edmonton, Dunvegan and British Columbia Railway subsequently became vested in the respondent company.

The first question with which we have to deal is whether or not section 197 of the *Railway Act,* that was passed after the transfer of September, 1914, applies to such a case.

Now, the reciprocal rights of the parties were determined by the transfer of September, 1914. The obligation of the railway company to compensate Kelly for land taken, as well as for injurious affection in respect of coal rights and otherwise, was discharged by payment of the sum named, while the railway company received title to the land subject to the reservation of the mines and minerals, including the right to vertical and lateral support for the railway. The Board has so decided, and, even if the Board's decision on this point were open to review before us, we should not disagree with it (*Davies* v. *James Bay Railway Co.*) (1). In the absence of some plain language in the contrary sense, of which there is none, section 197, which was not enacted until 1919, cannot be so construed as to prejudice the rights of the parties as settled by the transaction between them in 1914.

It was also pressed upon us with a great deal of vigour that the transaction between Kelly and the railway company must be interpreted in the light of a decision of the

(1) (1914) 19 C.R.C. 86.

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Supreme Court of Ontario which was afterwards held by the Privy Council to be erroneous. The agreement between Kelly and the railway company, as already observed, was dated the 5th March, 1914. The decision of the Privy Council was given on the 6th July. The agreement between Kelly and the railway company was not finally completed by transfer until September 28th, 1914. I do not know on what grounds we should be justified in holding, for the purposes of this appeal, that the agreement should not be construed according to law.

I think the learned Chief Commissioner was right in his view upon this point.

It would not be competent to us to find that the learned Chief Commissioner ought to have held on the evidence before him that the parties were dealing on some other basis and, indeed, on the interrogatories as framed, no such question is before us.

In the result, both interrogatories ought to be answered in the affirmative.

The appeal is dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Woods, Field, Craig & Hyndman.*

Solicitor for the respondent: *George A. Walker.*

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*Oct. 22.
*Dec. 12.

SCOTIA CONSTRUCTION COMPANY, LIMITED (PLAINTIFF) ..... } APPELLANT;

AND

THE CITY OF HALIFAX (DEFENDANT) RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA IN BANCO

Courts—Judgments—Jurisdiction—Res judicata — Arbitration — Appeal—Action for balance due under contract—Dismissal of application to set aside default judgment and give leave to defend—Appeal dismissed from refusal to set aside judgment, but reference made under terms of contract—Reference, and report of findings—Objection to jurisidiction—Confirmation of report—Appeal therefrom.

Plaintiff (appellant) recovered judgment by default against respondent City for $14,432.11, the balance due on a construction contract, which the City had held back as protection against workmen's claims threat-

*PRESENT:—Duff C. J. and Cannon, Crocket, Hughes and Maclean (*ad hoc*) JJ.

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ened under a wage clause in the contract. An application by the City to open up the judgment was dismissed and the City appealed. The Supreme Court of Nova Scotia *in banco* dismissed its appeal but, the contract having, by agreement, been laid before it, and its attention called to the fact that certain workmen had begun an action against the City on the basis of the said wage clause, it ordered a stay of execution as to $5,000, discontinuance of the workmen's action, and arbitration of the workmen's claims before the City Engineer (as referee named in the contract). Before the Engineer, plaintiff objected to his jurisdiction to proceed, on the ground, *inter alia*, that the contract was merged in the judgment. Before proceeding, the Engineer prepared a stated case for directions, but the Court, on application to fix a date for hearing it, directed him to proceed without delay to hear evidence. He found that $2,879.43 was due by plaintiff to workmen to comply with the contract terms. Plaintiff, treating the report as an award made under the terms of the contract, moved the Court to set it aside on the said jurisdictional ground and on the ground that it purported to set up a new contract between plaintiff and its workmen. The Court referred the matter back to the Engineer for definite findings on a point as to rate of wages. The Engineer filed a supplementary report. The City then moved for an order confirming both reports and to make them a rule of court, and plaintiff moved to set aside the award. The Court, by a majority, granted the City's motion and dismissed plaintiff's motion. From that judgment plaintiff brought the present appeal.

Held: The appeal should be dismissed. The jurisdiction of the Engineer to investigate and report depended entirely upon the jurisdiction of the Court *in banco* to make the order of reference; and this order, not having been appealed from at the proper time, could not now be reviewed; plaintiff, therefore, could not now impeach the award on the ground that the rights of the parties to the contract had become merged in the default judgment (which ground was the basis of objection to the jurisdiction of the Court *in banco* to make the order and of the Engineer to proceed under it); and there was no uncertainty or manifest error of law on the face of the award.

As to the order of reference of the Court *in banco:*

Per Duff C.J.: The Court *in banco* had discretionary authority to set aside the default judgment, and had jurisdiction to grant the stay, and to impose, as a term of its refusal to set aside the judgment, that the amount, if any, found due by the contemplated award should be treated as payment *pro tanto* on account of the judgment; which was in substance the effect of its decision. It is gravely questionable whether this Court had jurisdiction to hear an appeal from that judgment; and whether, if jurisdiction existed, the judgment dismissing the appeal having been acted upon, any appeal would not have been barred *exceptione personali*. But whether appealable or not, it was a judgment of a Court of general jurisdiction, possessing (with some reservations not here material) authority to pronounce conclusively, subject to appeal if the law gave an appeal, upon any question of its own jurisdiction; and, disregarding any question of personal estoppel by acceptance of the judgment, the Court in the subsequent proceedings was bound by its own judgment (*Samejima* v. *The King*, [1932] Can. S.C.R. 640, at 647).

Per curiam: Had the City defended the action it would have been entitled under the contract to withhold moneys due by it to plaintiff to make

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good to workmen any deficiency in the wages found to be payable to them under the wage clause; and the result of the proceedings taken under the order of reference was precisely the same as that which would have followed had the Court set aside the default judgment and allowed the City to defend; and was one which seemed to meet the justice of the case as it was brought before the Court with concurrence of both parties to the contract.

APPEAL by the plaintiff from the judgment of the Supreme Court of Nova Scotia *in banco* (1).

The plaintiff company recovered judgment, in default of defence, against the defendant city for $14,432.11, the balance payable under a contract between it and the city for construction by it for the city of sidewalks, etc.

Certain workmen had claimed that they had been paid by the plaintiff wages below that required by clause 12 of the contract, and they brought action against the city and the plaintiff in regard to the same.

The contract provided (*inter alia*) as follows:

12. The rate of wages to be paid by the Contractor for labour and truckage shall not be less than the rate paid by the City for similar classes of labour and truckage. The rate of wages for other workmen or mechanics shall be that current for workmen or mechanics engaged in the respective trades in the City of Halifax.

15. Any dispute or difference between the parties hereto—

(*a*) in respect to the proper amount payable under this agreement or the proper amount of any certificate of the Engineer for any work done, or the final settling of accounts, or

(*b*) arising out of or relating to this memorandum of agreement, including the plans, drawings, specifications and details of the work to be done and material supplied, or the construction and meaning thereof, or

(*c*) In any other way arising out of or concerning this agreement or the work to be done thereunder shall be referred to the Engineer, whose sole written decision thereon shall be absolutely final, binding and conclusive between the parties hereto, and all persons concerned and every such reference and decision, may be made a rule of court as a submission or as an award respectively, and no action or other proceedings shall be instituted or prosecuted in reference to any matter so in dispute or difference until the said matter is so referred to the Engineer and he has given his written decision thereon, and then only for the purpose of enforcing such decision.

17. (1) If the Contractor fails to pay for any labour or materials after payment is due, the City may appropriate any amount due the Contractor under this contract, or any amount held by the City by way of deposit as security for this contract, and apply the same or any part thereof towards the payment of such liabilities and the amount of any such payment shall be considered payment out of the amount due to the Contractor, or out of the value of the work performed or materials provided.

(2) If the Contractor and any labourer, or any person who has provided material, cannot agree as to the amount due, the Engineer shall

(1) May 26, 1934. Apparently not yet reported.

immediately after notice to the parties concerned, hear and determine any question as to such amount, and the amount so found to be due by the Engineer shall be final and conclusive between the parties.

(3) The City shall not in any way be liable for any such wages or materials or for any payment or appropriation made under this section, nor shall the City be bound to act under this section or to make any such appropriation.

"Engineer" (defined in the contract) meant the city engineer of the said city.

The city applied for leave to reopen the judgment entered against it by the plaintiff and to defend the action. Hall J. dismissed the application (1). The city appealed to the Supreme Court of Nova Scotia *in banco*. That court (2) dismissed the appeal, but, the contract having been laid before it by agreement of counsel and its attention called to the fact of the workmen's action, it ordered a stay of execution as to $5,000 for 30 days, with leave to apply for a further extension; it also ordered that the workmen's action be discontinued and that proceedings to arbitrate the workmen's claims be proceeded with without delay before the city engineer.

On objection by counsel for the plaintiff as to the engineer's jurisdiction to proceed, on the ground, *inter alia*, that the contract was merged in the judgment, the engineer, before proceeding with evidence, prepared a stated case to the Supreme Court for directions, but the court, on application to fix a date for hearing, directed him to proceed without delay to hear evidence. He did so and made a report. The plaintiff moved to set it aside. The court referred the matter back to the engineer to make definite findings upon a certain point, and the engineer accordingly filed a supplementary report. The above proceedings are set out with some further particularity in the judgment of Crocket J. now reported. The city moved for an order confirming both reports and to make them a rule of court so that they might be enforced as upon a judgment; and the plaintiff moved to vacate and set aside the award. The court granted the city's motion and dismissed the plaintiff's motion (Hall and Doull JJ. dissenting). It was from this judgment that the plaintiff's present appeal was brought.

(1) [1933] 1 D.L.R. 640. (2) [1933] 3 D.L.R. 156, at 160.

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R. McInnes K.C., for the appellant.

C. P. Bethune for the respondent.

DUFF C.J.—I entirely concur with my brother Crocket. The substantial question involved is whether or not there was manifest error of law on the face of the award.

The issue as to jurisdiction disappears when the true nature of the order of the full court of the 18th of February, 1933, is understood. It is explained in the reasons of Mellish, J.:

"Proceedings on the judgment to the exent of $5,000 were," he says, "stayed to enable the city to proceed under said clause 15 of the contract, and have the question in dispute as to whether clause 12 of the contract had been complied with by the contractors determined" and the further amount due to the labourers by the contractors under the terms of the contract ascertained. "*Subject to this* the appeal was dismissed with liberty to apply for further directions."

There can be no doubt that the Full Court had discretionary authority to set aside the judgment by default, or that it had jurisdiction to grant the stay, and to impose as a term of its refusal to set aside the judgment, that the amount, if any, found due by the contemplated award should be treated as payment *pro tanto* on account of the judgment. That, as Mellish J. points out, is, in substance, the effect of the Full Court's decision of February.

It is gravely questionable whether this court had jurisdiction to hear an appeal from this judgment; and whether, if jurisdiction existed, the judgment dismissing the appeal having been acted upon, any appeal would not have been barred *exceptione personali.* In any case, no appeal was attempted, and whether appealable or not, it was a judgment of a court of general jurisdiction, possessing (with some reservations not here material) authority to pronounce conclusively, subject to appeal if the law gave an appeal, upon any question of its own jurisdiction; and, disregarding any question of personal estoppel by acceptance of the judgment, the court in the subsequent proceedings was bound by its own judgment (*Samejima* v. *The* King) (1).

(1) [1932] Can. S.C.R. 640, at p. 647.

In view of this qualification introduced into the order of Hall J., the appellants, obviously, were precluded from impeaching the award on the ground that the rights of the parties to the contract had become merged in the default judgment; and I agree that there is no manifest error of law on the face of the award, and that the award is not void for uncertainty.

An award can be set aside, (1) when it has been improperly procured, and (2) on the ground of misconduct of the arbitrator. "Misconduct" is in this relation a term of very comprehensive denotation, and includes ambiguity and uncertainty in the award, as well as manifest error of law on the face of the award. The appellants have not established the existence of any of these grounds.

The appeal should be dismissed with costs.

The judgment of Cannon, Crocket, Hughes and Maclean (*ad hoc*) JJ. was delivered by

CROCKET J.—This case has already been before the Supreme Court of Nova Scotia *en banc* three times.

The first appeal to that Court was against a judgment of Mr. Justice Hall dismissing an application of the City to reopen a judgment by default which had been entered against it at the suit of the appellant for $14,432.11 and costs. This amount was a balance due on a contract for the construction of sidewalks, curbs, etc., which the City had held back to protect itself against claims which were being threatened against it by certain workmen, under a fair wages clause contained in the contract, requiring the contractor to pay them not less than the rate paid by the City itself for similar classes of labour. The Supreme Court dismissed this appeal but, the contract having been laid before it by agreement of counsel and its attention called to the fact that an action had been begun by certain of the workmen against the City for wages on the basis of the fair wages clause, it ordered a stay of execution as to $5,000 for thirty days with leave to apply for a further extension. It ordered at the same time that the workmen's action be discontinued and proceedings to arbitrate the workmen's claims before the City Engineer be proceeded with without delay. When the hearing came on before the

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City Engineer counsel for the contractor objected to his jurisdiction to proceed with the reference on the ground, *inter alia,* that the contract was merged in the judgment. The Engineer before proceeding with any evidence prepared a stated case to the Supreme Court for directions, but the Court, on an application by him to fix a date for hearing the proposed case, directed him to proceed without delay to hear evidence. In the end he found that the minimum rate of wages contemplated by the contract was 40 cents per hour, and that the sum of $2,879.43 was due by the contractor to some 159 workmen if the terms of the contract were complied with. The men had been paid at the rate of 35 cents per hour.

The contractor, treating the report as an award made under the terms of the contract, moved the Supreme Court to set it aside on the jurisdictional ground already mentioned, as well as upon the ground that it purported to set up a new contract between the company and its workmen. On this motion there was a marked difference of opinion among the members of the Court as to whether the Engineer had made any finding which could safely be acted upon as to what the rate was which the City was paying for similar classes of labour during the currency of the contract, but a majority of the Court decided that the matter be referred back to the Engineer to make a definite finding upon this point. Mellish and Carroll, JJ., thought the finding already reported was sufficient.

The Engineer accordingly filed a supplementary report, whereupon the City moved for an order confirming both reports as awards made by the Engineer, " sitting as arbitrator in the matter of an arbitration between the Scotia Construction Co. Ltd. and certain workmen " and to make them a rule of court so that they might be enforced as upon a judgment. The majority of the Court granted this motion, Hall and Doull, JJ., dissenting, and the case now comes before us on appeal from the last named judgment.

The judgment on appeal concerns only the confirmation of the two awards or findings of the Engineer. No appeal was taken from the judgment of the Court *en banc* staying execution and referring the matter in controversy to the Engineer for investigation and report. Although that

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judgment was in a sense an interlocutory proceeding it was nevertheless, to quote the language of Duff, J., in delivering the judgment of this Court in *Diamond* v. *The Western Realty Co.* (1), "a final decision in the sense that in the absence of appeal it became binding upon all parties to it." The jurisdiction of the Engineer to investigate and report depended entirely upon the jurisdiction of the Court to make the order of reference, and, this order not having been appealed from at the proper time, we are of opinion that we cannot now review it. In the words of Lord Macnaghten in delivering the judgment of the Judicial Committee of the Privy Council in *Badar Bee* v. *Habib Merican Noordin* (2), quoted by Duff, J., in *Diamond* v. *The Western Realty Co.* (3), "if the decision was wrong, it ought to have been appealed from in due time." So far, therefore, as that question is concerned, it must be taken to have been already settled.

All the objections which are now urged against the validity of the Engineer's awards or findings, save one, are in reality grounded on the alleged extinction of the contract with all its fair wages and arbitration provisions by reason of its merger in the default judgment. This was the whole basis of the objection to the jurisdiction of the Court *en banc* to make the order of reference and of the Engineer to proceed under it. Though these questions are not now open for the reason already stated, it may not be inappropriate to observe that, notwithstanding the contract was dead as between the City and the Company, it was expressly agreed by counsel for both parties that it should be laid before the Court for consideration on the first appeal from Mr. Justice Hall's judgment, and that it was thus that the dispute regarding the alleged breach of the fair wages clause and the claims of the workmen upon it were brought to the Court's attention, and, moreover, that, had the City defended the original action instead of deliberately allowing judgment to pass against it by default, it would have been entitled under clause 17 to withhold any amount due by it to the Company to make good to the

(1) [1924] Can. S.C.R. 308, at 316.

(2) [1909] A.C. 615, at 623.

(3) [1924] Can. S.C.R. 308, at 316.

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workmen any deficiency in the wages found by the Engineer to be payable to these workmen under the fair wages clause. The result of the proceedings which have been taken by the order of the Court, therefore, is precisely the same as that which would have followed had it set aside the judgment by default and allowed the City in to defend, and is one which seems to meet the justice of the case as it was brought before the Court with the concurrence of both parties to the contract.

Apart from the jurisdictional grounds the single ground put forward against the validity of the judgment now on appeal is that the awards or findings were bad for manifest error of law because of their uncertainty and indefiniteness. While one perhaps might have expected the Engineer to be more explicit in his supplementary finding in view of the reason given by the Court for sending the case to him a second time, I agree with the majority of the Judges that it cannot well be taken to be other than a finding that the rate which the City paid for similar work performed by itself during the currency of the contract was 40 cents an hour, and that the contractor had not, therefore, fully paid these workmen the wages they were entitled to receive under the fair wages clause. In my opinion this objection cannot be sustained. The awards being good on their face, we cannot go behind them in the absence of any fraud or misconduct on the part of the Engineer in the performance of the duty which the Court committed to him, of which there has been no suggestion. We must assume that he has rightly and regularly performed that duty.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *Russell McInnes.*

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

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DONALD FRASER AND OTHERS, EXECUTORS AND TRUSTEES OF THE LAST WILL AND TESTAMENT OF ARCHIBALD FRASER, DECEASED (DEFENDANTS)..... APPELLANTS; *Oct. 23, 24 *Dec. 12

AND

THE PROVINCIAL SECRETARY-TREASURER OF THE PROVINCE OF NEW BRUNSWICK (PLAINTIFF). RESPONDENT.

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

Succession Duty Act, R.S.N.B., 1927, c. 15—Construction—Ascertainment of duty—Allowance for debts, etc.—Properties against which allowances made.

F. died leaving property of the value of $175,429.11 liable by law to payment of debts, etc. In addition there were insurance policies on his life payable to his wife and children, yielding $184,884.86, and a gift made *inter vivos* to a daughter of $50,000, which policies and gift were, under s. 10 of the *Succession Duty Act*, R.S.N.B., 1927, c. 15 (and amendments), included in "property passing on the death" of F., and, under s. 3, subject to succession duty. His debts, etc., amounted to $331,343.26.

Held (Crocket J. dissenting): Under the Act, the amount of the debts, etc., should be deducted from the total of the said sums of $175,429.11, $184,884.86, and $50,000; and succession duty levied only on the difference.

The method of determining "the dutiable value of property" under s. 5, providing for allowance for debts, etc., applies to all property upon which succession duty is imposed, namely, all "property passing on the death of any person" as defined in the Act.

Judgment of the Appeal Division of the Supreme Court of New Brunswick, 7 M.P.R. 367, reversed.

Per Crocket J., dissenting: In levying the duty against the insurance moneys and the gift *inter vivos*, there should be no allowance for debts, etc., under s. 5. Under the Act, the duty is to be assessed and levied distributively on the component parts of the property passing in the hands of the individual successors to whom it goes or has gone; and the allowance for debts, etc., is deductible only from such properties as are liable by law for the deceased's debts.

APPEAL by the defendants from the judgment of the Appeal Division of the Supreme Court of New Brunswick (1) given on a special case stated for the opinion of the said Court.

*PRESENT:—Duff C.J. and Cannon, Crocket, Hughes and Maclean (*ad hoc*) JJ.

(1) (1933) 7 M.P.R. 367; [1934] 2 D.L.R. 259.

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The following facts are taken from the said special case, as agreed to for the purposes of the appeal on the question submitted.

Archibald Fraser, late of Edmundston in the Province of New Brunswick, died on October 10, 1932, while resident and domiciled in said province. He had made his last will on December 18, 1930, whereby he appointed the defendants to be executors and trustees. The will was admitted to probate and letters testamentary were issued to defendants, who filed, in accordance with the provisions of *The Succession Duty Act*, R.S.N.B., 1927, c. 15, and amending Acts, an Affidavit of Value and Relationship, with all proper schedules. According to the schedules filed the testator was, at the time of his death, seized and possessed of assets, liable for the payment of debts, encumbrances and expenses allowable under the provisions of s. 5 of *The Succession Duty Act* as deductions, of the gross value of $175,429.11. The funeral expenses, debts, encumbrances and Probate Court fees, as set forth in the Affidavit of Value and Relationship and Schedule thereto, allowable as deductions under the provisions of said s. 5, amounted to $331,343.26. In addition to the above assets the testator had insurance on his life, payable to his wife and to his children, which yielded the beneficiaries the net sum of $184,884.86. It was agreed that this latter sum formed no part of the estate and was not subject to its debts and liabilities. The schedules also disclosed that within five years before his death the testator had made a gift *inter vivos* to a daughter of a sum of $50,000.

The Proper Officer made no assessment of duty on the said assets of the gross value of $175,429.11, but made an assessment (computed in accordance with clauses of sec. 11 of the Act) on the sum of $234,884.86, which was the total amount of the said sums of $184,884.86 and $50,000. In making such assessment he allowed debts, encumbrances and expenses to the extent only that there were assets in the estate liable for the payment of debts and encumbrances and made no allowance for debts, encumbrances and expenses beyond the amount of the assets in the estate available to pay same.

The plaintiff claimed that the assessment made by the Proper Officer was correct. The defendants claimed that under the provisions of the Act the debts, encumbrances

and expenses amounting to the sum of $331,343.26, should be deducted not alone from the value of the assets forming the estate and liable to the payment of debts, encumbrances and expenses, amounting to the sum of $175,429.11, but from the value of all the property passing on the death of the testator, amounting to the sum of $410,313.90, and that duty should be assessed only on the difference, that is to say on the sum of $78,970.64.

The question which the court was asked to determine was (clause 16 of the special case) whether, under the provisions of *The Succession Duty Act,* the debts, encumbrances and expenses should be deducted only from the value of the assets of the estate, liable for the payment of such debts, liabilities and expenses, or whether the debts, encumbrances and expenses should be deducted from the value of all the property passing on the death of the testator within the meaning of the Act, including both the assets liable for the payment of debts, encumbrances and expenses and the property not so liable.

The Appeal Division of the Supreme Court of New Brunswick held (Hazen C.J. dissenting) (1) that under the provisions of the Act the debts, encumbrances and expenses should not be deducted from the value of all the property passing on the death of the testator within the meaning of the Act, including both the assets liable for the payment of debts, encumbrances and expenses and the property not so liable.

From this judgment the defendants appealed to the Supreme Court of Canada. By its judgment now reported, the appeal was allowed with costs throughout, Crocket J. dissenting.

R. B. Hanson K.C. for the appellant.

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

The judgment of the majority of the court (Duff C.J. and Cannon, Hughes and Maclean (*ad hoc*) J.J.) was delivered by

DUFF C.J.—This appeal raises questions touching the construction and application of the *Succession Duty Act* of New Brunswick. The charging section is section 3 and is in the following words:

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3. For the purpose of raising a revenue for Provincial purposes, and except as herein expressly otherwise provided, there shall be levied and paid for the use of the Province a duty to be called "Succession Duty" on all property passing either in whole or in part on the death of any person, and such duty shall be computed, assessed and levied in the manner in this Chapter provided.

It is to be observed that the subject of the duty which is to be levied and paid under that section is "all property passing either in whole or in part on the death of any person." Then, the duty is to be computed, assessed and levied "in the manner in this chapter provided."

Coming at once to section 5 upon the scope and application of which the controversy mainly turns. The purpose of that section is plainly stated: for specified purposes certain definitions are to be applied and allowances and deductions made. The opening words, which specify the subject matter in respect of which the section is to be operative, are these:

In determining the dutiable value of property, or the value of a beneficial interest in property * * *

Now, in the interpretation clause (section 2 (*d*)), we find this definition of "dutiable value":

"Dutiable value" means the value to which any rate is applied for the purpose of computation under section 11.

Then, turning to section 11, there are these words:

11. The rates by which succession duty is to be computed shall be as follows:

That is the section which enacts what the rates are to be by which succession duty is to be computed.

To summarize: Succession duty is (by section 3) to be levied and paid on all property passing in whole or in part on the death of any person. "Dutiable value" means the value to which any rate prescribed under section 11 is to be applied, and, under section 11, the rate prescribed is the rate by which succession duty is to be computed. The plain result of all this is that succession duty is to be ascertained by applying the appropriate rate, under section 11, to the value—"the dutiable value"—of "all property passing in whole or in part on the death of any person."

Then, in section 5, we have a provision for determination of "the dutiable value of property." If it had not been for the judgment of the court below, I do not think I should have had any difficulty in concluding that this necessarily means the dutiable value of the property upon which succession duty is imposed by the enactment of section 3;

that is to say, "all property passing in whole or in part on the death of any person." Then, by definition, under s. 10 (1) (*b*), as amended by 22 Geo. V, c. 14, such property includes (*inter alia*) dispositions *inter vivos*, not made bona fide five years before the death of the deceased, and, under s. 10 (1) (*f*), monies received under certain types of policies of insurance.

As it appears to me, these provisions are expressed in words which have an ordinary, grammatical, and natural sense, and, construing them according to that sense, they give a plain and intelligible result; the result I have just indicated.

Mr. Justice Baxter, with the concurrence of Mr. Justice Grimmer, in an able judgment, has given his reasons for thinking that "property," under section 5, is not used in the sense in which it is used in section 3, that it does not include property not forming part of the estate of the deceased in the ordinary sense, that is to say, property not, in fact, passing on death. This he seems to deduce from a principle he lays down: that in providing for allowances the enactment must be taken to have in contemplation, as regards debts for which allowance is to be made, only property out of which by law such debts are payable; and the learned judges seem to have been influenced by difficulties they detected in respect of the working out of the directions expressed in the section concerning allowances and deductions. With respect, I think there is nothing in the enactments of section 5 inconsistent with the view that they are applicable to all property subject to duty under section 3.

There are several powerful reasons against the acceptance of this restricted interpretation propounded by the learned judges. One is that, so construing section 5, the statute contains no provision for ascertaining the dutiable value of property which passes on death only by force of the statutory fiction. Another is: it is not easy to see why, if such property is, by force of the statutory fiction, to be subject to the duty imposed by the statute, it should not also, by force of the same fiction, be subject to the provisions of the statute by which dutiable value is to be determined; and there are at least two provisions of the Act which I am unable to reconcile with the assumption that the Legisla-

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ture recognized any such distinction in respect of the application of section 5.

First: Section 3, which is the charging section, embraces such property, and the plain direction given by section 3 is that the duty, as regards all property in respect of which it is to be levied, "shall be computed, assessed and levied in the manner in this chapter provided." Computation necessarily involves the application of the provisions of section 11, which, in turn, necesasrily involves, reading the terms of section 3 in light of the provision of section 2 (*d*), a determination of dutiable value. In other words, the determination of dutiable value is an essential step in the computation of duty. This plain imperative direction by section 3 seems, therefore, unambiguously to contemplate the provisions of section 5 which contains the only provisions of the statute giving directions for the ascertainment of "dutiable value."

Then, the language of section 10, which creates the fiction, is this:

> Property passing on the death of any person shall be deemed to include for all purposes of this Chapter the following property:

The words "for all purposes of this chapter" are as plain, as unequivocal, as words could be. Apart from some controlling context, it is impossible to give these words a construction which would exclude section 5 from the operation of the fiction. There is no controlling context. Section 10 appears to me to afford an insuperable obstacle to the acceptance of the view I am considering.

It must not be forgotten that we are dealing with a taxing statute and, where the language of such a statute has an ordinary, grammatical, and natural meaning, the courts are bound, subject, of course, to any controlling context, to give effect to that meaning, quite regardless of what the consequences may be.

I do not think it necessary for the purposes of this appeal to examine in detail the operation of section 5. I do not see that any greater difficulty arises in applying the earlier branch of the section to property which constructively passes than in applying it to property which actually passes. As regards the second branch of the section, it seems to me, and in this I agree with Baxter and Grimmer JJ., that it deals with particular items of property subject to some special charge; it does not contemplate

the liability of the assets of the deceased to be applied in payment of debts. On this point, I cannot accept the argument of the Attorney-General. There may be difficulties in working out the section, but I cannot discover any ground upon which a court of law can justify itself in excluding from the operation of the section property which only fictionally passes. These reasons seem sufficient for the disposition of the question before us, as stated in paragraph 16 of the stated case.

The answer is, as regards the first alternative stated in the question submitted, in the negative; and, as regards the second alternative, in the affirmative.

The appeal should be allowed with costs throughout.

CROCKET J. (dissenting)—The testator died seized and possessed of real and personal property of the total value of $175,429.11, which passed directly to his executors and trustees and were available for the payment of outstanding debts and encumbrances. In addition to these assets there were several insurance policies on his life payable to his wife, his two sons and his daughter, which yielded $184,884.86, and a gift *inter vivos* of $50,000 which he had made to his daughter within five years of his death. These insurance moneys and the gift *inter vivos,* while not liable in any way for the testator's debts, were liable to the payment of succession duties under s. 10 of the New Brunswick *Succession Duty Act* as "property passing" on his death. As the testator's debts together with his funeral expenses and the probate court and proctor's fees amounted to $331,343.26—a sum more than $150,000 in excess of the gross value of the properties passing directly to the executors and trustees—the Succession Duty Officer made no assessment upon these properties, but levied a duty upon the insurance moneys passing to the widow and the deceased's two sons severally and upon the insurance moneys and the gift *inter vivos* passing to the daughter, without making any allowance in respect of these items or classes of property by way of deduction for debts, encumbrances and expenses under s. 5 of the Act.

The appellants contended that under the provisions of s. 5 the debts, encumbrances and expenses should be deducted from the gross value of all the property passing or deemed to have passed within the meaning of the Act, that

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is to say, from the sum of the assets of the estate proper, which were liable for the payment of such debts, encumbrances and expenses, and of the insurance moneys and gift *inter vivos*, which were not liable therefor. A stated case was submitted to the Appeal Division of the Supreme Court for the decision of the question thus raised before the Succession Duty Officer. The Court decided, per Grimmer and Baxter, JJ., Hazen, C.J., dissenting, that the debts, encumbrances and expenses should not be deducted from the value of all the property passing on the death of the testator within the meaning of the Act, including both the assets liable for the payment of such debts, encumbrances and expenses and the property not so liable. It is from this decision the present appeal is taken.

It is apparent from this statement and the form of the question submitted for the opinion of the Appeal Division that, although the problem arises upon the provision for the allowance of debts, encumbrances and expenses, which is found only in s. 5, its solution primarily involves a consideration of the governing principle of the Act, viz: whether it imposes the duty upon the aggregate value of all property passing or deemed to pass, collectively, including gifts *inter vivos* and insurance moneys, which are not liable for the deceased debts, etc., as well as of all other properties actually passing or intended to pass on his death, which are liable therefor, or whether its governing principle is that the duty shall be assessed and levied distributively in the hands of the individual successors, to whom it severally passes or is intended to pass or has previously passed. The appellants' claim is founded entirely upon the former hypothesis. It follows that if the latter hypothesis, and not the former, is found to be the true intendment of the Act, the question must be answered against the appellants as it was by the Appeal Division.

The appellants' counsel relies upon s. 2 (*a*), (*d*), (*g*) and (*h*) and ss. 3, 4, 5, 7 and 10 as establishing " that the duty is a tax imposed on all property passing or deemed to pass on the death of a testator," and argues that the sum of $410,313.97 is the gross value of the estate in the case at bar for succession duty purposes under the provisions of the Act, and $78,970.71 its " aggregate value," determinable by deducting from the gross value the sum of $331,343.26 allowed for debts, encumbrances and expenses under s. 5.

After a careful examination of all the provisions relied upon and of the entire Act, I find it impossible to accede to the contention that the Succession Duty Officer should have deducted the whole amount of the debts and expenses allowance from the gross value of all properties liable to duty without regard to whether they are severally liable to the payment of the testator's debts, secured or unsecured, or any of the expenses specified in s. 5.

The section chiefly relied upon by the appellants' counsel is s. 3, the so-called charging section of the Act. This section undoubtedly enacts that the duty shall be levied "on all property passing either in whole or in part on the death of any person" but it leaves the computation, assessment and levying of the duty to be made "in the manner in this chapter provided." That duty cannot be assessed and levied upon all such property is, I think, clearly evidenced by the provisions of s. 7, which provides that no duty shall be computed in reference to certain estates and descriptions of property. That the word "all" does not denote in any event that the computation, assessing and levying is to be made upon the property in the aggregate is shewn, in my opinion, by the provisions of s. 11, which in reality is the section by which succession duty is to be computed. See s. 8. S. 11 does not purport to fix any uniform duty which is to be applicable to all classes and descriptions of property alike, but provides that the "rates by which succession duty *is to be* computed shall be" etc. These rates vary, not only according to "the aggregate value of the property passing on the death" of the deceased, but according to the relationship which the person or persons, to whom "the property passes either in whole or in part," bears to the deceased. It is in this section that we find the expression, "the aggregate value of the property passing on the death," upon which the appellants so much rely. This, however, is but one factor which enters into the fixing of the appropriate rate by which the duty is to be computed. Another factor, equally important, is the degree of relationship, if any, which the person or persons, to whom any property passes, bears to the deceased, and still another is the fact whether any successor to whom any of such property passes resides within or out of the province. Throughout its six subsections there are several references to property in addition to those already quoted.

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For instance, in subs. (2) we find the expression: "If the value of the property passing to or for the benefit of *any one* of the persons mentioned in subs. (1)" exceeds, etc. In subs. (3): "If *any property* subject to duty passes on the death of any person, either in whole or in part, to or for the benefit of *any* lineal ancestor or descendant," etc., and in the same subsection the expression: "If the aggregate value of *a property* passing on the death of such person," and in subs. (5) the expression "If *any property* subject to duty passes on the death of *any* person, either in whole or in part, to or for the benefit of *any* person in any other degree of consanguinity to the deceased," etc. It will be seen from these quotations from s. 11 that the term "aggregate value" is not used in the sense of indicating the subject matter upon which the succession duty is imposed, but only for the purpose of determining one of the factors which the proper officer must consider in computing the duty which is to be assessed and levied upon the different portions of the property which is subject to duty.

When s. 5 is examined, around which more than any other section the issue perhaps centres, it will be seen that it does not itself purport to determine either the "aggregate value" or the "dutiable value" of any property, or even to lay down, as I read it, a complete code for determining its dutiable value. It does prescribe the basis upon which "the dutiable value of property, or the value of a beneficial interest in property" is to be determined, viz: its fair market value as at the date of the death of the deceased, and immediately enacts that "allowance shall be made for reasonable funeral expenses, debts, encumbrances," and for probate court and proctor's fees, subject to the explicit proviso that "any debt or encumbrance for which an allowance is made shall be deducted from the value of the land or *other subject of property* liable thereto," and that an allowance shall not be made for certain descriptions of debts indicated in clauses (*a*) and (*b*) or "more than once for the same debt or encumbrance *charged upon different portions of the estate.*" The term "dutiable value" is defined by s. 2 (*d*) as meaning simply "the value to which any rate is applied for the purpose of computation under s. 11." There is no mention either of "aggregate value" or of "the property passing on the death" of the deceased anywhere in the section. The introductory clause: "In

determining the dutiable value of *property*, or the value of a beneficial interest in *property*," the mandatory proviso above quoted, and the whole context of the section appear to me to point to but one conclusion, viz: that the duty is intended to be assessed and levied distributively on the component parts of the property passing in the hands of the individual successors to whom it goes or has gone, and that the debts and expenses allowance is deductible only from such properties as are liable therefor.

I can find nothing in ss. 3, 5 and 11 or in any other section of the entire Act to indicate that the duty is assessable and leviable upon the gross value of all property passing or deemed to pass, as a whole, and that the debts and expenses allowance is to be deducted from such gross amount, regardless of whether some or any of the properties passing or deemed to pass cannot in any manner be made legally liable for the payment of such debts and expenses.

Mr. Justice Baxter, who wrote the judgment of the Appeal Division, has exhaustively and lucidly expounded all the relevant provisions of the Act. I need add to those I have particularly discussed only ss. 19 and 22, the former of which enacts that the duty imposed shall be a lien upon the property out of which it is payable, while the latter frees the executor or trustee from any personal liability to pay the duty on any property to which any legatee, donee or other successor beneficially entitled, so long as he does not transfer such property without deducting therefrom the duty to which it is liable.

For these reasons I concur in the decision of the Appeal Division and would dismiss the appeal.

Appeal allowed with costs.

Solicitors for the appellants: *Hanson, Dougherty & West.*

Solicitor for the respondent: *W. H. Harrison.*

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*May 10, 11
*Dec. 12

M. A. HANNA COMPANY (PLAINTIFF) APPELLANT;

AND

THE PROVINCIAL BANK OF CANADA (DEFENDANT) ..... RESPONDENT.

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

Banks and Banking—Trusts and trustees—Agency—Negotiable instruments—Estoppel—Coal shipped to dealer under consignment agreement—Proceeds of dealer's sales paid into dealer's bank account—Application of moneys in account towards payment of dealer's indebtedness to bank—Claim by original consignor against bank—Relationship between dealer and its consignor—Course of dealing—Conduct of the parties—Knowledge, bona fides, and rights, of bank.

E. Co., a coal dealer, was allowed a revolving line of credit by respondent bank, which held security by way of hypothecation under s. 88 of the *Bank Act* on its coal and a general assignment of book debts. Appellant company shipped coal to E. Co. under a consignment agreement whereby (*inter alia*) the title to and ownership of the coal should remain in appellant until sale thereof by E. Co., E. Co. was to keep appellant's coal separate and apart from other coal, E. Co. was to pay certain freight, insurance and other expenses, it guaranteed the payment for all sales made by it remaining unpaid for 120 days, its compensation for its services and expenditures consisted solely of surplus realized on its sales over appellant's regular circular of prices, and it was to account, with particulars, to appellant at specified times, and make payment in accordance therewith within 7 days thereafter, interest being chargeable on amounts not so paid. By the agreement as finally made, a clause, contained in an earlier document, that appellant's share should be collected first and the funds should not be confused, mixed or commingled with other funds of E. Co., but should be held separately and should immediately be deposited to appellant's account in a bank designated by appellant, was "cancelled and annulled." In practice E. Co. deposited the proceeds of sales of all coal, including appellant's coal, in one account in respondent bank, and made its payments to appellant by cheques upon its general checking account in that bank. Certain moneys and negotiable instruments (drawn or taken in E. Co.'s name) received by E. Co. from sales of appellant's coal and deposited in the bank during a time immediately preceding E. Co.'s going into bankruptcy, were applied by the bank against E. Co.'s indebtedness to it. Appellant claimed that the bank was not entitled to these as against appellant; that the moneys, etc., were in E. Co.'s hands subject to a fiduciary obligation to appellant, that this fiduciary obligation was transmitted to the bank with the moneys, etc., the bank having, it was alleged, received them with notice of the obligation and with knowledge that the application thereof by E. Co. in liquidation of its debt to the bank would be a breach of that obligation.

*PRESENT:—Duff C.J. and Rinfret, Cannon, Crocket and Hughes, JJ.

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Held: Appellant's claim failed.

Per Duff C.J. and Crocket J.: Even assuming that the proceeds of sales of appellant's coal were, as between E. Co. and appellant, held subject to a fiduciary obligation to appellant, that the bank had knowledge that the deposits of such proceeds were earmarked, and that the bank manager knew of the existence of a "consignment agreement," yet appellant's conduct precluded it from claiming the moneys as trust moneys; from disputing that, as to the proceeds of sales, the relation between it and E. Co. was that of creditor and debtor and not of *cestui que trust* and trustee. Appellant, in consenting to the deposit of the proceeds of the sales of its coal in E. Co.'s account, mixed with E. Co.'s moneys, combined with E. Co. in representing to the bank that these proceeds, so deposited, were not subject to any trust, but were moneys which E. Co. was authorized to deal with on the footing of moneys loaned to it by appellant. There was nothing in the evidence to displace the presumption that the bank followed the natural course in such circumstances, and treated the moneys as any reasonable person in appellant's position must have expected them to be treated, viz., as moneys placed at the disposition of E. Co.

Per Rinfret J.: The agreement between appellant and E. Co. allowed E. Co. to deposit the proceeds of sales in E. Co.'s general account and to use such proceeds (and dispose of them as its own) between the settlement dates, subject only to the obligation of remitting payments to appellant at the specified times; therefore E. Co.'s relation to appellant, as to such proceeds, was not that of agent or trustee, but the relation was that of debtor and creditor. On this ground alone appellant failed. But further, on the evidence in the case, there were no circumstances likely to arouse the bank's suspicion that E. Co. was depositing appellant's money or using its funds without right.

Per Cannon J.: Under the agreement E. Co. could, and did, mix with its own moneys the proceeds of sales of the coal supplied by appellant and use such proceeds for the purposes of its own business, provided it made the periodical payments under the agreement. In respect of such proceeds E. Co. was not a trustee but merely a debtor. Therefore, even had the bank been put upon enquiry and become fully acquainted with the arrangement between appellant and E. Co., it could have said that there was no trust which it was bound to recognize. And the evidence did not show any bad faith on the part of the bank.

Per Hughes J.: On the evidence it must be taken (and the findings at trial were not sufficient in their extent to contradict) that the bank took the money and negotiable instruments in good faith and for value, and with no knowledge of unauthorized application thereof by E. Co.; and therefore—regardless of whether E. Co. was a debtor or trustee of appellant in respect of the proceeds of sales of appellant's coal—in view of the established rules of law with regard to dealings in money and negotiable instruments between parties in such a position as E. Co. and the bank, the appellant's claim against the bank could not succeed.

Henry v. *Hammond,* [1913] 2 K.B. 515; *London Joint Stock Bank* v. *Simmons,* [1892] A.C. 201; *Thompson* v. *Clydesdale Bank,* [1893] A.C. 282; 62 L.J.P.C. 91; and other cases, cited.

Judgment of the Appeal Division of the Supreme Court of New Brunswick, 8 M.P.R. 138, affirmed.

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APPEAL by the plaintiff from the judgment of the Appeal Division of the Supreme Court of New Brunswick (1) which reversed the judgment of Hazen C.J. (2) who held (as expressed in the formal judgment):

that all moneys received by the defendant from the Eastern Coal Docks, Limited, from March 3rd, 1932, to the date of the bankruptcy of the Eastern Coal Docks, Limited, in the form of money, cheques, promissory notes and bills of exchange by way of deposit, discount and collection, and which were the proceeds of the plaintiff's coal sold by the Eastern Coal Docks, Limited, were the property of the plaintiff, for which the defendant must account and pay to the plaintiff.

The Appeal Division allowed the defendant's appeal, with costs, and ordered entry of judgment dismissing the plaintiff's claim, with costs.

The material facts of the case are sufficiently stated in the judgments now reported. The plaintiff's appeal to this Court was dismissed with costs.

C. F. Inches K.C. for the appellant.

A. N. Carter for the respondent.

The judgment of Duff C.J. and Crocket J. was delivered by

DUFF C.J.—I have come to the conclusion that the appeal should be dismissed. The ground upon which that conclusion is based can be stated briefly.

The Eastern Coal Docks, Limited, were acting as factors for the appellants in the sale of their coal during a period which, I shall assume, lasted from May, 1931, until the Coal Docks went into bankruptcy in the spring of 1932. A draft agreement was drawn which is dated the 1st of May, 1931, the pertinent clauses of which are these:

The Factor agrees to receive as full compensation for all its services and expenditures such surplus amounts as the Factor may obtain and collect in excess of the Principal's regular circular of prices in effect at the time of shipment f.o.b. shipping point as aforesaid and to look for payment solely to such surplus so realized and collected from such sales made by the Factor. Such compensation shall not be deducted by the Factor until the Principal's share of such sale has been collected and paid to the Principal.

The Factor agrees to collect, as agent of the Principal, all accounts for coal sold by the Factor hereunder, it being understood that the Factor shall acquire no right to any such moneys so collected or to become due on such accounts, except as to said surplus.

(1) 8 M.P.R. 138; [1934] 2 D.L.R. 471.

(2) 6 M.P.R. 426.

The Principal's share shall be collected first as aforesaid, and such funds shall not be confused, mixed or commingled with other funds of the Factor, but shall be held separately and shall immediately be deposited to the account of the Principal at the or such other bank or banks as the Principal shall designate.

Every four weeks the Factor shall notify the Principal the amount of such collections and deposits and also the amount of any and all accounts remaining unpaid.

The Factor hereby guarantees the payment of all sales of coal made by it hereunder, and agrees that any account for coal sold hereunder which shall remain unpaid for a period of one hundred and twenty (120) days, shall be deemed uncollectible, and the Factor shall thereupon make return and pay to the Principal on such account in the same manner as if collection had actually been made.

* * *

The Factor will keep said anthracite coal separate and apart from all other coal and commodities, * * *

* * *

The title to and ownership of all the coal shipped hereunder shall be and remain in the Principal until sale thereof by the Factor.

This agreement does not appear to have been executed by the Coal Docks. On the 24th of April, 1931, it was sent by Blizard, the President of the Coal Docks, to the appellants. On the 19th of June, 1931, it was returned to Blizard with some changes which are not material signed by the appellants. On the 11th of November, 1931, the formal agreement governing the relations of the parties at the material times was executed. It is convenient to reproduce it textually:

Agreement, made this 11th day of November, 1931, by and between the M. A. HANNA COMPANY, a corporation duly organized and existing under and by virtue of the laws of the state of Ohio, one of the United States of America, and having its head office at the city of Cleveland, in the state of Ohio, party of the first part, hereinafter called the "Principal," and EASTERN COAL DOCKS LIMITED, a corporation duly organized and existing under and by virtue of the laws of the province of New Brunswick and having its head office in the city of Saint John in said province, party of the second part, hereinafter called the "Factor."

WITNESSETH:

Whereas, under date of May 1, 1931, the parties hereto entered into a certain factor's agreement with reference to the sale of coal by the Factor as agent for the Principal,

Whereas, through inadvertence, the said factor's agreement provided that it was to run from date thereof, to wit, the first day of May, 1931, until the 31st day of March, 1932, although the intention of the parties was that said factor's agreement should cover all coal shipped by the Principal to the Factor after November 1st, 1930, and certain coal was delivered prior to May 1, 1931, and

Whereas, it is desired to amend said factor's agreement with respect to the manner of accounting by the Factor to the Principal for the proceeds from coal sold.

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Now, therefore, it is agreed by and between the parties hereto that said factor's agreement of May 1, 1931, shall be and the same is hereby amended as follows:

The term of said agreement shall be from November 1, 1930, to the thirty-first day of March, 1932.

In lieu of making payments to the Principal as in said factor's agreement provided, the Factor shall account to the Principal regularly in periods covering four (4) weeks' operation, giving kinds, sizes and amounts of all coal sold and delivered and the total sales money value thereof, also the amount in dollars of the collections made, and the amounts by periods of all customers accounts receivable representing sales made less than one hundred and twenty (120) days prior to the end of said period.

Of the amounts so collected the Factor shall remit to the Susquehanna Collieries Limited, Montreal, on behalf of the Principal, a remittance determined in the following manner:

Value of all coal shipped hereunder at Principal's regular circular of prices in effect, at time of shipment f.o.b. shipping point, as in said factor's agreement provided or such other value as may from time to time be mutually agreed upon	$	
Plus freight paid by Principal from shipping point to vessel	$	
Total		$
Less previous remittances		$
Balance		$
Less value of Principal's coal on Factor's dock calculated as follows: (each size and grade to be calculated separately)		
Average value of Principal's coal per ton, in effect at the time of shipment, as shown on consignment memorandums	$	
Freight rate per ton	$	
Marine insurance per ton	$	
Steamer rate per ton	$	
Customs duty per ton	$	
Stevedoring per ton	$	
Total per ton value	$	
Inventory.....tons at $....per ton		$
Accounts receivable representing sales made within one hundred and twenty (120) days		$
Total		$
Amount of remittance		$

The Factor shall make payments of such accounts and remittances in time for them to arrive in Montreal not more than seven (7) days after the last day of each accounting period. The Principal shall be entitled to interest at the rate of six per centum (6%) per annum on the amount so due from said seventh day until paid.

All bills covering coal sold hereunder by Factor shall be invoiced by Factor, "EASTERN COAL DOCKS, LIMITED, agent for the M. A. Hanna Company."

That part of said agreement dated May 1st, 1931, which reads:

"The Principal's share shall be collected first as aforesaid and such funds shall not be confused, mixed or commingled with other funds of the Factor, but shall be held separately and shall immediately be deposited to the account of the Principal at the.....or such other bank or banks as the Principal shall designate."

shall be and the same is hereby cancelled and annulled.

Except as herein specifically amended said factor's agreement of May 1, 1931, shall be and remain in full force and effect.

The Coal Docks proceeded to sell coal under this arrangement. They kept one account with the respondent bank in which they deposited their own moneys and the moneys of the appellants received from the sale of their coal. Returns and remittances were made pursuant to the agreement down to the 15th of March, 1932. On that date the final remittance was made, and it appears to have covered everything to which the appellants were entitled up to the 3rd of March, 1932. During the months of March and April, the Coal Docks paid into their account moneys received from the sale of the appellants' coal and these moneys were applied by the respondent Bank in liquidation of the indebtedness of the Coal Docks.

On behalf of the appellants, it is contended that these moneys were in the hands of the Coal Docks subject to a fiduciary obligation to them, that this fiduciary obligation was transmitted to the Bank with the moneys; the Bank having, it is alleged by the appellants, received the moneys with notice of the obligation and with knowledge that the application of these moneys by the Coal Docks, in liquidation of their debt to the Bank, would be a breach of that obligation.

By the agreement of the 1st of May, it was provided, as we have seen, that the appellants' share in moneys due upon sales "should be collected first," and that these funds should "not be confused, mixed or commingled with other funds" of the Coal Docks, but should "be held separately and * * * immediately be deposited to the account of" the appellants at a bank to be designated by them.

By the agreement of November 11th, this last mentioned clause was explicitly "cancelled and annulled." In lieu thereof, these two clauses appear:

In lieu of making payments to the Principal as in said factor's agreement provided, the Factor shall account to the Principal regularly in periods covering four (4) weeks' operation, giving kinds, sizes and amounts of all coal sold and delivered and the total sales money value

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thereof, also the amount in dollars of the collections made, and the amounts by periods of all customers accounts receivable representing sales made less than one hundred and twenty (120) days prior to the end of said period.

* * * *

The Factor shall make payments of such accounts and remittances in time for them to arrive in Montreal not more than seven (7) days after the last day of each accounting period. The Principal shall be entitled to interest at the rate of six per centum (6%) per annum on the amount so due from said seventh day until paid.

It is not disputed that, in agreeing upon the terms of the contract of the 11th November, the parties contemplated that the Coal Docks should follow the course they did actually pursue, in depositing moneys received from sales of the appellants' coal with their own moneys in the same account.

I do not think it is necessary to determine whether or not the moneys so deposited, which were the proceeds of the sales of the appellants' coal, were, as between the Coal Docks and the appellants, held subject to a fiduciary obligation to the appellants. It is not necessary for the purposes of this appeal, in my judgment, to decide whether or not, in an action between the appellants and the Coal Docks, for example, the Coal Docks could have set up the Statute of Limitations in answer to the action. I have come to the conclusion that the conduct of the appellants precludes them from disputing that, as regards the proceeds of the sales, the relation between them and the Coal Docks was that of creditor and debtor, and not the relation of *cestui que trust* and trustee.

I accept, for the purposes of this judgment, the finding of the learned Chief Justice, in which he imputes knowledge to the Bank that the deposits of the proceeds of the sale of the appellants' coal were earmarked. I accept his finding also that the manager knew of the existence of a "consignment agreement." The appellants, in my judgment, in consenting to the deposit of the proceeds of the sales of their coal in the Coal Docks' account, mixed with the Coal Docks' moneys, combined with the Coal Docks in representing to the Bank that these proceeds, so deposited, were not subject to any trust, but were moneys which the Coal Docks were authorized to deal with on the footing of moneys loaned to them by the appellants. I have carefully examined the whole of the evidence, and,

accepting the finding of the learned Chief Justice, there is, I think, nothing in the evidence to displace the presumption that the Bank followed the natural course in such circumstances, and treated these moneys as any reasonable person in the position of the appellants must, I think, have expected them to be treated, viz., as moneys placed at the disposition of the Coal Docks.

I do not think it is necessary to consider whether or not the reasoning followed by Lord Selborne in *Towle* v. *White* (1), by Lord Justice James and by Lord Justice Mellish in the same case (*Ex parte White; In re Neville* (2)), would, in view of the explicit provisions of the documents, apply to this case, and govern the reciprocal rights of the parties themselves. It is sufficient, for the disposition of this appeal, that the appellants by reason of their conduct are precluded from claiming these moneys as trust moneys.

The appeal should be dismissed with costs.

RINFRET J.—The appellant's contention that it is entitled to claim as its own certain bills of exchange, promissory notes and money received by the respondent bank from Eastern Coal Docks, Limited, (hereinafter called the Docks Company) is professedly based on two written documents dated May 1st and November 11th, 1931.

The document dated November 11th was really the final outcome of the negotiations between the appellant and the Docks Company initiated by the document dated May 1st. On the evidence, there is abundant justification for the statement of Grimmer, J., speaking for the majority of the Appeal Division, that

> As a matter of fact, though the consignment agreement was executed by the Eastern Coal Docks Ltd. at an earlier date, yet the correspondence between these parties and their principals shews that it was not intended to take effect without alterations which were not finally made until 11th November, 1931.

Moreover, the transactions between the Docks Company and the respondent bank, which are put in question by the appellant, all took place on and after March 3rd, 1932. This was several months after the execution of the second document which, to all appearances, would be the governing agreement during the material period of time.

(1) (1873) 29 L.T. 78.

(2) (1871) 6 Ch. App. 397, at 399, 400, 404-5.

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It is, however, interesting—and it seems to me very important for the purposes of this case—to compare the May document and the November document. In November, the parties, instead of drafting a new document, proceeded by the more complicated method of inserting in their agreement some of the provisions of the earlier document by mere reference thereto and of setting out in full only the amendments they had definitely agreed upon as a consequence of their negotiations. And the result of the case depends upon the true effect of these amendments on the contract finally arrived at.

Long previous to the 1st of May, the appellant had been supplying coal to the Docks Company on a buy and sell basis.

The proposition contained in the May document was that the appellant would undertake to furnish anthracite coal to the Docks Company f.o.b. vessels at certain coal piers at Philadelphia or New York City. The Docks Company was to pay all freight, transportation and discharging charges on the coal, including cargo insurance and also all the assessments, licences, rent, storage and sale expenses and all charges of whatsoever nature incurred within the Dominion of Canada. It was further to insure the coal in the name of the appellant.

The Docks Company was to use its best efforts to sell the coal; and, until the sale thereof, the title to and ownership of all the coal shipped was to remain in the appellant.

The company was to receive as full compensation for all its services and expnditures such surplus amount as it might obtain and collect in excess of the appellant's regular circular of prices in effect at the time of shipment, and to look for payment solely to such surplus so realized and collected from the sales made by the company.

The company guaranteed the payment of all sales of coal made by it remaining unpaid for a period of 120 days; the company agreeing thereupon to make return and pay to the appellant on such sales in such manner as if collection had actually been made.

There were numerous other provisions mainly concerned with the relations of the parties at the termination of the agreement and which are not material here.

But special attention must be given to the clauses of the agreement dealing with the collection of moneys and the remittance thereof by the Docks Company to the appellant. That question had been the main subject of discussion between them from May to November; and the amendments brought into the agreement definitely executed on November 11th were accepted on both sides as defining these matters about which up to that time the parties were not *ad idem*.

In the May document, the proposition was, to quote verbatim:

> The Factor agrees to collect, as agent of the Principal, all accounts for coal sold by the Factor hereunder, it being understood that the Factor shall acquire no right to any such moneys so collected or to become due on such accounts, except as to said surplus

(that is to say: the amount obtained in excess of the appellant's regular circular of prices already mentioned above).

> The Principal's share shall be collected first as aforesaid, and such funds shall not be confused, mixed or commingled with other funds of the Factor, but shall be held separately and shall immediately be deposited to the account of the Principal at the.....or such other bank or banks as the Principal shall designate.
>
> Every four weeks the Factor shall notify the Principal the amount of such collections and deposits and also the amount of any and all accounts remaining unpaid.
>
> * * *
>
> The Factor agrees upon receipt thereof immediately to endorse, assign and deliver to any bank chosen by the Principal and operating in the City of Saint John any and all promissory notes or other evidences of indebtedness representing and based upon such sales of coal to be held by said bank for collection subject to this agreement and as collateral to the sale price of said coal due the principal.

The agreement executed on November 11th departed from this system in a radical measure. In lieu of making payments to the appellant as was provided in the May document, and that is to say: by immediately depositing the funds to the account of the appellant at a bank which it was to designate; and in lieu of simply notifying the appellant every four weeks of the amounts of collection and of the deposits so made, the Docks Company was to account to the appellant in periods covering four weeks' operations

> of all coal sold and delivered and the total sales money value thereof, also the amount in dollars of the collections made, and the amounts by periods of all customers accounts receivable representing sales made less than 120 days prior to the end of said period.

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Of the amount so collected, the company was to remit to the appellant or on its behalf, only a portion thereof in a certain specified manner, into the details of which it is unnecessary to enter, except to note that it was not to include the accounts receivable representing sales made within 120 days, and that the company's equity in the coal (i.e. freight, insurance, steamers, customs duty, stevedoring and other charges paid by the company) was to be deducted.

The amount of the remittance was calculated in that way at the end of each period of four weeks' operations; and it was provided that the company

> shall make payments of such accounts and remittances in time for them to arrive in Montreal not more than seven days after the last day of each accounting period.

The appellant was entitled to interest at the rate of 6 per cent per annum

> on the amount so due from said seventh day until paid.

Finally, it was specially agreed that that part of the May document which read as follows:

> The Principal's share shall be collected first as aforesaid and such funds shall not be confused, mixed or commingled with other funds of the Factor, but shall be held separately and shall immediately be deposited to the account of the Principal at the.....or such other bank or banks as the Principal shall designate.

"shall be and the same is hereby cancelled and annulled."

In my view, these were modifications going to the very essence of the relations between the appellant and the Docks Company. They were brought about through the negotiations extending from the 1st of May until the agreement was executed on the 11th of November.

In the meantime, the appellant's auditors had been in Saint John several days in an endeavour to find a working mode of operation; and the officials of both companies had had conferences with a view to obtaining arrangements satisfactory to each side. The method of calculating the remittances and also the method in which the funds collected would be dealt with by the Docks Company during the periods preceding remittance time were the methods recommended by the appellant's auditors and fully understood and accepted by the officials of the appellant.

The understanding was and the effect of the agreement was, more particularly in the light of the changes agreed to in November, that there was to be no special and sep-

arate account at a bank designated by the appellant and into which the funds were to be deposited, or to which the promissory notes and other evidences of indebtedness were to be endorsed, assigned or delivered, to be held by the said bank for collection. This is further confirmed in that, as a matter of fact, no such bank was ever designated by the appellant; and, as a matter of practice, the operations were never carried out in that way.

Under the agreement, both upon its construction and upon the way it was understood and carried out by the parties, the funds were not to be held separately, but they were allowed to be confused, mixed or commingled with the other funds of the Docks Company, and they were to be deposited or delivered, not at a special bank or into a special bank account, but into the general bank account of the Docks Company. The result is that in the meantime, that is, during the interval between periodic remittances, the Docks Company had the use of the funds as if they were its own and the appellant trusted to the company's ability to reimburse them in due course.

The appellant went into that agreement with complete understanding of its purport. The report of the appellant's auditors recommending the mode of operations adopted in the November agreement had drawn the attention of the appellant to the fact that this system of settlement would give the Docks Company the use of certain amounts from collections which would otherwise immediately be payable to the appellant. The appellant also knew, through the same report, that, as collections were made, they were deposited in a general bank account of the Docks Company. In point of practice, all remittances to the appellant without exception were made by means of cheques drawn by the Docks Company on this general account. The company never opened a special bank account, nor were they asked by the appellant to do so. No commercial paper was ever taken in the name of the appellant. The bills of exchange were drawn and the promissory notes were made in the name of the Docks Company. Consequently, of course, the appellant never received any. I repeat that each and every remittance the appellant received from the Docks Company was made in the form of a cheque drawn upon that company's general account. All these circum-

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stances showing how the agreement was carried out are strong indications of how the parties understood the agreement and support the view already expressed as to its intention and its meaning.

I, therefore, come to the conclusion that the agreement of November 11th allowed the Docks Company to deposit the proceeds of the sale of the appellant's coal in the Docks Company's general account and to use the proceeds thereof between the settlement dates, subject only to the obligation of remitting to the appellant a sum of money equivalent to the collections at the end of the remittance period agreed upon between the parties.

As a consequence, the relation of the Docks Company towards the appellant in respect of the funds collected was not that of agent or trustee, but the relation between them was that of debtor and creditor (*Henry* v. *Hammond* (1)). The Docks Company had the use of the funds and could dispose of them as its own; and, in that aspect of the question, it is, of course, immaterial whether they disposed of it in favour of the bank respondent or in favour of other persons.

On this ground alone, I think the appeal would fail; and it makes it unnecessary to discuss the further question whether the circumstances of the case were such that the bank was put on inquiry; for, in the words of Lord Herschell, in *The London Joint Stock Bank* v. *Simmons* (2):

> When it is said that a person is put on inquiry the result in point of law is that he is deemed to know the facts which he would have ascertained if he had made inquiry. He cannot better his position by abstaining from so doing. On the other hand, his position cannot be worse than it would have been had he made inquiry and been in possession of the result of it.

I feel, however, like Lord Macnaghten, in that same case (at p. 224), and I am unwilling to pass by in silence the question whether in the premises the bank was bound to inquire, lest I should seem to intimate a doubt for which, in my opinion, there is no occasion.

It should be remembered that, as far back as December, 1930, the bank and the Docks Company had entered into an agreement whereby the bank agreed to loan and advance to the company the moneys required for the purpose of enabling it to carry on and finance its coal business. In

(1) [1913] 2 K.B. 515. (2) [1892] A.C. 201, at 220.

consideration of a revolving line of credit of $50,000 to be opened by the bank, the company agreed to give and did give the bank security by way of hypothecation, under sec. 88 of the *Bank Act*, and an assignment of all book debts due or thereafter to become due to the company. This was done on the security of all coal, coke and firewood then owned or which might be owned by the Docks Company, from time to time while any advance made under said credit remained unpaid, and which then or might thereafter be in or on the wharves, and warehouses, railway cars, freighters or property of the Docks Company or adjacent thereto in the city of Saint John. The agreement was duly filed in the office of the registrar of deeds, and, pursuant to it, the Docks Company transferred and assigned to the bank all debts, demands or *choses in action* then due or thereafter to become due.

Ever since December, 1930, as between the bank and the Docks Company, the business of the latter was conducted under the terms of the agreement so entered into and so registered. From the inception, in December, 1930, and, in my view, for the whole period extending up to November 11th, 1931, the Docks Company's business was placed on the basis that they purchased their coal from the wholesale dealers, and they were strictly the owners thereof. The appellant, no doubt, attempted in the November agreement to make its terms retroactive from November 1st, 1930; but it is needless to say that it was not within the power of the parties to that agreement to make those terms effective against the respondent and thus summarily set aside the rights already vested in the bank.

In July, 1931, the bank was approached by the Docks Company with a view of finding out upon what terms it would be willing to finance a plan of business whereby the appellant would ship its coal to the Docks Company on a consignment basis. As a result of the interviews had and the correspondence exchanged between the company and the local manager of the respondent at Saint John, the company was told that the bank did not approve the plan and that, pursuant to express instructions from the bank's head-office, if the company entered into the proposed agreement with the appellant, it would have to transfer its account to another bank.

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I do not think anything can be made out of the fact that, in his last letter of instructions to the local manager in Saint John, the bank's general manager finally yielded to the idea that a trial of the proposition might be made for a few months, as it is not shewn that this suggestion was ever communicated to the officials of the Docks Company. In point of fact, no understanding of any kind in connection with shipments of coal on a consignment basis is proven to have been arrived at between the manager of the local branch and the Docks Company. As between them, upon the evidence, matters were left where they stood when the company was told that, if they went into the consignment agreement with the appellant, they would have to take their account to another bank.

The bank was never shown either the document of May 1st or the agreement of November 11th; and it was never made aware of its contents. Matters went on as between the bank and the company in the same way as they had been going on before. Moneys were deposited as usual in the same general account. Bills of exchange and promissory notes were drawn or made exclusively in the name of the Docks Company. There was nothing to bring home to the bank that anything had been changed in the company's business, or that they had entered into a factor's agreement. And this is true of the whole dealings up to the very end.

The appellant laid much stress on the fact that for a certain time, in 1931 and 1932, the Docks Company was in the habit of making two deposits daily accompanied by two separate deposit slips on which certain notations appeared. There were also certain markings on the bills and promissory notes discounted by the bank. It was strongly urged that this was of a nature to arouse suspicion.

I confess my inability to agree with the suggestion. The two daily deposits were made in the general bank account in existence from the beginning of the operations, and the practice of making the notations on the deposit slips had started long before the date of the consignment agreement with the appellant. These markings or notations were not brought to the attention of the responsible officials of the bank. When heard at the trial, they testified that they had not noticed them; and all witnesses having a knowl-

edge of banking practice stated these markings or notations were usual; they were made by customers for office records and they conveyed no meaning to the bank. No attempt was made to shake that testimony by adducing evidence to the contrary. It was rather the other way, the Docks Company's officials and employees all stating that they did not attach any importance to these markings and they were put there merely for office checking purposes.

Such were therefore the circumstances. Never at any time was the bank told that the Docks Company were in fact operating on consignment for anybody. After the consignment agreement, there was no apparent change in the company's usual method of banking. The president of the company had told the bank, indeed had written to the bank that, if the proposed arrangement was effected, the receipts would be deposited in another bank, or, at least, in a separate bank account and notes or drafts would be endorsed over to that bank or to that account; also that the drafts and notes would be made by the Docks Company as agents. Nothing of that character was ever done.

The bank had told the Docks Company that, in case the consignment agreement was executed, the company would not be allowed to mix the funds and it would have to carry its account to another bank. There is no evidence of any subsequent interview having taken place after that between the company's officials and the bank's local manager. As late as September 29th—and, therefore, more than two months after the last letter exchanged or the last interview between the president of the Docks Company and the bank manager—the monthly statement sent by the company continued to show the anthracite coal as being still subject to the bank's lien. The coal was not sold by the Docks Company ostensibly as agent. The commercial paper was not dealt with in such a way as to indicate that there was a principal. Everything pointed to the fact that the proposed arrangement had fallen through. Why should the bank become suspicious? Up till then, it had no reason to suppose it was not dealing with honest people. From these people the bank was receiving, as it had been in the habit of receiving for a long time before, moneys and negotiable instruments and it was taking them in the ordinary way to cover its current advances (See Lord Macnaghten in *Lon-*

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don Joint Stock Bank v. *Simmons* (1)). The bank had no reason to doubt they had full authority to dispose of these moneys or securities as belonging to them or as being at their disposal, or to pay them into their bank account. (*Thompson* v. *Clydesdale Bank* (2), *per* the Lord Chancellor at p. 288, *per* Lord Watson at p. 289). It need hardly be remembered that we are in the field of mercantile operations having to do with currency and with negotiable instruments, where "it is expedient and necessary that reasonable and safe facilities should be afforded" (*per* Lord Herschell in the *Simmons* case (3); and see *Union Investment Company* v. *Wells* (4)). Furthermore, we are discussing commercial transactions in moneys, bills and notes deposited or presented for discount by a company against whose goods, accounts, book debts, commercial paper and *choses in action* the bank held a general assignment. The bank was not to be expected to inquire into the source of the moneys deposited or into the authority of the Docks Company to draw the bills or to take the notes in its own name. In that respect, it could safely trust that the company's customers would not accept the bills or give the notes in that form if these bills or notes were not strictly in accordance with the true character of the transactions thereby represented.

The bank held its general assignment which, on its face, covered exactly the same kind of property in April, 1932, as in December, 1930, at the beginning of its operations with the Docks Company. It had every reason to assume that if the Docks Company went into any agreement with some outside party of a nature in any way to affect the comprehensive rights it held under the assignment, this would not be done without its consent and even its participation. In addition, there was the fact that the proposition had been actually submitted to the bank and turned down by it; and the further fact that, the proposition having been so turned down, the bank heard nothing about it subsequently.

The appellant points to an odd sentence in a vague conversation, and, of course, to the notations and the marks

(1) [1892] A.C. 201 at 225.
(2) [1893] A.C. 282.
(3) [1892] A.C. 201 at 217.
(4) (1908) 39 S.C.R. 625, at 636.

already adverted to and also to the fact that at a certain time the monthly statements sent by the Docks Company to the bank failed to show anthracite coal. I do not see that these facts had any real significance, more particularly having regard to the general trend of events proved in this case. "It is easy enough," as was said by Lord Herschell in the *Simmons* case (1),

> to make an eleborate presentation after the event of the speculations with which the bank managers might have occupied themselves in reference to the capacity in which the broker who offered the bonds as security for an advance held them. I think, however, they were not bound to occupy their minds with any such speculations.

And, in my view, the same thing may be said of the respondent. I cannot find, in the present case, evidence of circumstances likely to arouse the suspicion that the Docks Company was depositing the appellant's money or using its funds without right—far less, if such a condition be required for the appellant's success, evidence of circumstances reasonably giving rise to "a suspicion of something wrong combined with a wilful disregard of the means of knowledge" (*per* Willes, J., in *Raphael* v. *Bank of England* (2)), or evincing "a design or fixed purpose to avoid knowing" (*per* Lord Selborne in *The Agra Bank* v. *Barry* (3)).

All this discussion, however, in my view of the case and as already stated, is only supplementary. I have felt that I should express myself on the subject because of the argument addressed to us by the appellant, but my view is that, in respect of the funds in dispute, the true relations between the appellant and the Docks Company were those of debtor and creditor, with the consequence that the appellant has no just and valid claim against the respondent.

I conclude that the appeal ought to be dismissed with costs.

CANNON J.—This is an appeal from the judgment of the Supreme Court of New Brunswick reversing the decision of the trial judge, Hazen, C.J., who declared the title to certain moneys and negotiable instruments paid to and discounted with the respondent by the Eastern Coal Docks, Ltd., and being the proceeds of retail sales of hard coal shipped in wholesale lots by the appellant to the Eastern

(1) [1892] A.C. 201, at 223. (2) (1855) 17 C.B. 161, at 174.
(3) (1874) L.R. 7 E. and I. App. 135.

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Coal Docks Ltd., to be in the appellant, and ordered a reference to determine the amount of damages. The Court of Appeal held that these moneys and negotiable instruments belonged to the respondent, (1) as transferee from the Eastern Coal Docks Ltd. when owner, and (2) as a *bona fide* holder for value.

In December, 1930, the Eastern Coal Docks Ltd., while carrying on a hard and soft coal business in Saint John, N.B., buying coal from wholesale dealers, including the appellant, and selling it locally, made an arrangement with the respondent under which it was granted a revolving line of credit of $50,000 for its fuel business on the security of a hypothecation under s. 88 of the *Bank Act* on all its coal and also on a general assignment of its book debts and various powers in connection with the loans and security.

Two accounts were opened by the respondent under the arrangement: (*a*) The company's checking account into which the respondent paid the loans made under the credit and on which the company could draw cheques; (*b*) The bank's security account, against which the Eastern Coal Docks Ltd. could not draw cheques, but in which it deposited the proceeds of its sales of coal, whether cash, notes or drafts, which were taken by the respondent and deducted from the loan then outstanding.

When the Eastern Coal Docks Ltd. made this banking arrangement, it was purchasing and continued to purchase anthracite coal outright from the appellant.

In July, 1931, the company informed Mr. Harper, the respondent's manager at Saint John, that they contemplated an arrangement to sell appellant's coal on consignment.

After corresponding about this proposal with the general manager in Montreal, Harper wrote Blizard, the President of the Coal Company, that the bank would have to call all loans made to the company and close their account if the company entered into the arrangement as disclosed. They intimated, however, that, if the company would segregate the consignment coal from that subject to the bank's lien, would place drafts for the consignment coal for collection only and remit the proceeds only upon payment and not by way of discount, the bank might consider the proposal; otherwise not.

Thereupon, on July 25th, Blizard undertook, in the event of the proposal being acted upon, to deposit the receipts in a separate bank account and to endorse the notes or drafts to the bank for collection only and deposit after payment.

After further correspondence, the head office in Montreal was willing to make a trial of the proposal outlined in Harper's letter of July 27th to Mr. Roy, which said:

> We will have a separate account on our books, in which moneys received from the sale of this coal will be deposited, * * * [The drafts] will be placed for collection only, and our customers will make these drafts as agents.

It is clear that no consignment arrangement had then been made with the Eastern Coal Docks Ltd., as on that same date, August 12th, the coal company sent a list of accounts to be paid to the bank and wrote:

> In addition to the above, we have a stock of American anthracite here, approximately $51,500, which will become part of the consignment agreement * * * *if we go into that deal with them.* On this basis M. A. Hanna Company would have an equity in this coal for its invoice value $42,728.03, but at the present time this $42,728.03 stands as an Account Payable and the stock of coal as part of your security under Section 88.

In August also Mr. Robinson, the Assistant Manager of the respondent at Saint John, under Mr. Harper's instructions, told Mr. Thompson, the Secretary Treasurer of the company, that the bank could not allow them to mix the Hanna funds with their own; and Thompson promised that he would not.

The suggested proposal, so far as the bank was informed, was not acted upon. The statement forwarded by the Eastern Coal Docks Ltd., under date of September 29, showing 2,320 tons of American anthracite on hand on September 17th, and therefore subject to the bank's lien, would confirm the fact that the proposed consignment arrangement had not yet been effected. It was only on November 11th that a definite arrangement was made with regard to the sale on consignment of coal by the appellant to the Eastern Coal Docks Ltd. The radical changes made to the proposal bearing date May 1st were to the following effect:

(*a*) The Eastern Coal Docks was to account to the appellant regularly in periods covering four weeks' operation, giving amounts of coal sold, amounts in dollars of the collections made, and the amounts by periods of all customers'

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accounts receivable representing sales made less than one hundred and twenty (120) days prior to the end of said period;

(*b*) Of the amounts so collected, the Eastern Coal Docks Ltd. were to remit to the Susquehanna Collieries Limited, on behalf of the appellant, a remittance made up according to a certain schedule which included as a deduction accounts receivable made within 120 days and certain charges;

(*c*) The Eastern Coal Docks was required to make payments of the account and remittances in time to arrive in Montreal not more than seven days after the last day of each accounting period;

(*d*) The Eastern Coal Docks was required to pay 6 per cent interest on all overdue amounts;

(*e*) The following very important clause in the draft agreement dated May 1st, 1931, was cancelled:

> The Principal's [appellant's] share shall be collected first as aforesaid, and such funds shall not be confused, mixed or commingled with other funds of the Factor, but shall be held separately and shall immediately be deposited to the account of the Principal at the
> or such other bank or banks as the Principal shall designate.

From the foregoing facts, it is fair to say that up to and after November 11th, 1931, the appellant had allowed the Eastern Coal Docks to use the proceeds of the sale of the coal and to deposit them in the latter's general account, without restriction or complaint. The settlement of accounts between the appellant and its client gives the latter the use of an equivalent amount from collections which would otherwise be immediately payable to Hanna. The memorandum accompanying the report indicates that, at least up to the 17th September, 1931, the appellant allowed collections from customers to be made by the Eastern Coal Docks and deposited in their general bank account, and not in the appellant's name; and I believe that the agreement of November 11th approved this arrangement, as it relieves the Eastern Coal Docks of any obligation to deposit moneys in a separate account in the appellant's name and requires them only to remit every four weeks, not including accounts receivable representing sales made within 120 days.

Appellant's witness E. G. Thompson swears that either Mr. Baile, President of the Susquehanna Collieries Ltd., or Mr. Scott, the attorney of the appellant, said to Mr.

Blizard, when the agreement was completed in November, that the Eastern Coal Docks was to have the use or possession of the money between the settlement dates; and that the only gamble they were taking was the amount of one month's remittance. It would appear that the appellant was then quite content to permit its customer to collect the proceeds of the consignment coal, deposit the money in its own account and use it for its own purpose, provided that it made a remittance every four weeks calculated on the basis contained in the agreement of November 11th.

Between October, 1931, and March, 1932, The Eastern Coal Docks, in its own name and on its own account, drew cheques against the respondent in favour of Susquehanna Collieries, a subsidiary of the appellant, and representing remittances aggregating over $68,000. These cheques were positive notice to the appellant that the Eastern Coal was paying the proceeds of the consignment coal to the respondent and discounting drafts for its price with the respondent. As the appellant did not object to this procedure, or give the respondent notice that it objected to the payments so made, it would show the inanity of any suggestion that the Eastern Coal Docks in paying the moneys and cheques or negotiating the drafts and notes was doing so improperly or with a defective title.

The appellant, at page 21 of its factum, after discussing the situation, says:

> If these are the facts, there may have been no breach of trust in the Factor depositing the moneys in the general account in the first instance, but they were put there for an express purpose, with the knowledge of the bank manager, and the bank manager, who was undoubtedly watching the account, with knowledge of the beneficial ownership of the moneys in the plaintiff, was guilty of breach of trust in refusing to allow the Factor to remit to its principal at the end of the month; it converted the money to its own use with knowledge of the trust, and refused to allow the Factor to remit to its principal.

The trial judge found that the bank manager must have known that these moneys were the appellants' property, while the Court of Appeal found that the plaintiffs had failed to prove this essential element of their claim.

The remittances were made, through advances made by the respondent, until, in March, 1932, a representative of the Consolidated Coal, which had been selling to the Eastern Coal Docks soft coal, told the respondent's manager that

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they owned an unpaid claim of $28,000; and as Mr. Harper had learned shortly before that an English coal company had also a claim, he refused to make further advances, except for wages, after March. Early in May, 1932, the Eastern Coal Docks went into liquidation owing the bank about $7,000 above its securities.

In their statement of claim, the plaintiffs allege that on the 12th May and June 1st, 1932, by two letters, they notified the defendant that the moneys and securities deposited with them by the Eastern Coal Docks from March 3rd to May 8th, 1932, were the property of the plaintiffs and demanded the return thereof; and they allege that the defendant knew or should have known that said moneys, bills of exchange, promissory notes were the property of the plaintiffs.

Have the appellants proven their exclusive ownership and the knowledge which would deprive the respondent of the protection which it claims from the following sections of the *Bills of Exchange Act?*

3. A thing is deemed to be done in good faith, within the meaning of this Act, where it is in fact done honestly whether it is done negligently or not.

53. (1) Valuable consideration for a bill may be constituted by

(*a*) Any consideration sufficient to support a simple contract;

(*b*) An antecedent debt or liability.

56. (1) A holder in due course is a holder who has taken a bill, complete and regular on the face of it, under the following conditions, namely:—

* * *

(*b*) That he took the bill in good faith and for value, and that at the time the bill was negotiated to him he had no notice of any defect in the title of the person who negotiated it.

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

* * *

(*b*) Where he is a holder in due course, he holds the bill free from any defect of title of prior parties, as well as from mere personal defences available to prior parties among themselves, and may enforce payment against all parties liable on the bill.

It appears from the above quotation from the appellant's factum that the parties take the common ground that the Eastern Coal Docks Company committed no breach of trust in depositing the moneys and securities in their general account. Have the appellants proven their allegation that the respondent, through their manager's knowledge, became trustees and are now bound to pay

to the appellants the proceeds of the hard coal sold by their customer under their agreement?

To completely constitute a trust, four elements are required: (*a*) A trustee; (*b*) A beneficiary; (*c*) Property the subject-matter of the trust; (*d*) An obligation enforceable in Court of Equity on the trustee to administer or deal with the property for the benefit of the beneficiary. There must be an equitable interest based on a conscientious obligation which can be enforced against the legal owner of the property alleged to be the subject-matter of the trust. Otherwise there is no trust.

Appellant does not contend that an "express trust" was created by express terms. Can they contend that an "implied trust" existed from the conduct of the parties to this transaction? It is difficult for the court to consider that it was the intention of the parties that a trust should be created because, as pointed out above, the course of action of the appellant and the coal company in dealing with these securities and in accepting advances from the bank show that the latter had no intimation whatsoever that the deposit of these moneys and bills receivable to the credit of their customer was in any way objectionable to the appellants. Can it be said that a "*constructive*" trust arises in this case? Do we find a trustee having received in his capacity as trustee property which, though not composing an express trust, he is not entitled to retain for his own benefit? Or is this the case of a stranger to a trust having received property belonging to the trust in circumstances which do not entitle him to retain it as against the beneficiary? If either of these questions must be answered in the affirmative, such property would be held subject to a constructive trust for the beneficiaries under, and on the terms of, the original trust.

But, is there evidence of an original trust? Under the agreement, the coal company could and did mix with their own moneys the proceeds of the coal supplied by the appellant and use the proceeds for the purposes of their business, provided they made a payment to the appellant every four weeks. These facts, taken with the provision for the payment of interest on overdue remittances, which was subsequently (Jan. 21, 1932) insisted on by the appellant, and the form of the accounts accompanying the remit-

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tances, go far to show that the relation existing after, as well as before, November 11, 1931, was that of debtor and creditor. See *Henry* v. *Hammond* (1):

> It is clear that if the terms upon which the person receives the money are that he is bound to keep it separate, either in a bank or elsewhere, and to hand that money so kept as a separate fund to the person entitled to it, then he *is a trustee* of that money and must *hand it over to the person who is his cestui que trust.* If on the other hand *he is not bound to keep the money separate, but is entitled to mix it with his own money and deal with it as he pleases, and when called upon to hand over an equivalent sum of money, then, in my opinion, he is not a trustee of the money, but merely a debtor.* All the authorities seem to me to be consistent with that statement of the law.

Halsbury's Laws of England (2nd Ed.), Vol. 1, p. 247, s. 420, says:

> Where money is intrusted to an agent by his principal or *received by him* on his principal's behalf, it depends upon the terms of the agency whether the agent is bound to keep the money separate or is entitled to mix it with his own. *In the former case the agent will be a trustee, in the latter a debtor.*

This case is distinguishable from *Reid-Newfoundland Co.* v. *Anglo-American Telegraph Co.* (2), because the money sought to be recovered did not come into the possession of the respondents owing to an unauthorized and improper use of the appellants' property. I would be inclined to find that we have here a mere debt arising out of transactions in respect of property, namely, coals, as to which property, no doubt, it may possibly be said that the coal company was in a sense a trustee. They were employed to sell the coals, and to receive the money for them; but they were under no obligation to keep the money so received as a separate fund, but were entitled to mix it with their own moneys, and they were merely debtors for the amount of the ultimate balance due, at the end of each period, as above detailed.

It cannot be said that the coal company fraudulently converted to its own use or fraudulently omitted to account, under the terms of article 355 of the *Criminal Code,* because it was agreed between the parties that the proceeds of the coals would form an item in a debtor and creditor account between the coal company and the appellant; and the latter relied only on the personal liability of the company as its debtor. The proper entry of the

(1) [1913] 2 K.B. 515, per Channell, J., at 521.

(2) [1912] A.C. 555.

proceeds of the coal in the accounts, according to the forms prepared by the appellant, was a sufficient accounting, and in such case no fraudulent conversion of the amount accounted for can be deemed to have taken place.

Therefore, even if the respondent had been put upon inquiry and had become fully acquainted with the arrangement between the appellant and the coal company,

it could have said that there was no trust which it was bound to recognize, for none was created by the instrument. So even if the [respondent's] manager was wilfully shutting his eyes to that which was visible to him, yet, had he looked at it, it would have done the [Bank] no harm.

I agree with the above quoted views of Grimmer and Richards, JJ., on this point and rely also on the authorities quoted by them.

Now then, if the idea of an original trust be eliminated, how can the appellant succeed? Is the constructive notice relied upon by the trial judge sufficient to make the respondents liable?

Their manager, Harper, was never informed that the Eastern Coal Docks had actually entered into a consignment agreement; their returns for August 12 and September 29 plainly showed that they had not; and no such agreement was in fact made until November 11th. There is no evidence that the draft or final agreement was ever communicated to the respondent. Harper, some time after November 11, became aware that the Eastern Coal Docks were receiving consignment coal when he noticed the segregation of the hard and soft. It may be said that he should have inquired at this stage into all particulars as to the consignment agreement. But he had the promise of both Blizard and Thompson and had made his own position quite clear. He was surely entitled to rely on their honesty and integrity without laying himself and the respondent open to a charge of fraud for having done so.

Credit, not distrust, is the basis of commercial dealings; mercantile genius consists principally in knowing whom to trust and with whom to deal, and commercial intercourse and communication is no more based on the supposition of fraud than it is on the supposition of forgery.

per Bowen, L.J., in *Sanders* v. *Maclean* (1).

I agree with Grimmer, J., who observed also that

The learned Chief Justice has not found that Harper was acting in bad faith but has simply pointed out the things which he infers that he

(1) (1883) 11 Q.B.D. 327, at p. 343.

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knew or must have known. I cannot find in the evidence anything to convince me that the bank manager was acting *mala fide*. Had the learned Chief Justice found actual fraud or wilful shutting of the eyes of the manager I would have considered that it proceeded from his observation of the demeanour of the witness on the stand and would not have felt at liberty to interfere with it. But he simply finds knowledge of certain facts, which knowledge is not incompatible with good faith. The burden of establishing *mala fides* rests upon the plaintiff. I do not think that it has been discharged.

Mr. Harper may have been negligent in not distrusting Blizard and Thompson, but this falls far short of dishonesty which alone would affect the bank. See *Raphael* v. *Bank of England* (1). In *Agra Bank, Ltd.* v. *Barry* (2), Lord Hatherley said at pp. 154-155:

> To say that a suspicion of this sort must have crossed his mind, and that if he did not act upon this suspicion he is to be held guilty of a wilful determination not to have his eyes opened, would be to say what is not warranted. It would be perfectly monstrous to hold any doctrine of that sort. He is amply relieved from that by what had previously taken place.

Moreover, the appellant had been trusting Blizard and Thompson throughout, not even troubling to inform the bank of their alleged claim of ownership to the proceeds of the coal. The suggestion that Harper acted fraudulently because he did not distrust Blizard cannot avail.

> Kekewich, J. seems to have been under the impression that relying on the broker's honesty, did not alter the result. But to my mind it makes the whole difference.

per Lord Halsbury in *London Joint Stock Bank* v. *Simmons* (3).

> The only consideration likely to engage his [i.e. the bank manager's] attention is whether the security is sufficient to justify the advances required.

(*ibid*) per Lord Herschell at p. 223. Even if the bank manager knew that the hard coal came from the appellant, under some sort of consignment agreement entered into at a date that was ignored by him, that the company continued to make two bank deposits as had been their practice since June 1st, 1931, long before the alleged consignment agreement, this would not be sufficient to establish any bad faith in the respondent.

I also believe that the notations on the deposit slips and the prefacing of the ledger references on the requisition slips, drafts and notes in some instances with the let-

(1) (1855) 17 C.B. 161.

(2) (1874) L.R., 7 E and I. App. 135.

(3) [1892] A.C. 201, at pp. 210-211.

ters S (for Susquehanna) and H (for Hanna) are not sufficient to dispel the presumption of good faith of the manager, supported as it is by the sworn evidence of all witnesses heard on both sides. On their face, none of these notes were payable to the company as agents for the appellants. It would be very difficult to hold as a fact that these letters, used for the purpose they were, fixed the respondent with notice that they represented the proceeds of Hanna or Susquehanna coal. It would be contrary to the rule that constructive notice is not extended to commercial transactions. A person taking a negotiable instrument in good faith and for value obtains a title valid against all the world. And I believe, after reading carefully the record, that it discloses no evidence of bad faith; the appellant failed to satisfy me that there was anything that actually excited the suspicion in the bank manager's mind that there was something wrong in his transactions with the coal company, or in the latter's dealing with the appellant. Because of this absence of suspicion, the taker of these negotiable instruments cannot be said to be in bad faith, to have deliberately shut his eyes to the facts or to have put any suspicions aside without further inquiry. See *London Joint Stock Bank* v. *Simmons* (1), per Lord Herschell at p. 221.

In *Union Investment Co.* v. *Wells* (2), Duff, J., now Chief Justice of Canada, said at p. 648:

> The doctrine of constructive notice is not applicable to current bills and notes transferred for value, but in all cases when the good faith of the holder is in issue the question is a question of fact to be determined on the circumstances of the particular case;

The following statement of the rule by Lindley, L.J., concurred in by Lopes and Rigby, L.JJ., in *Manchester Trust* v. *Furness* (3), was recently adopted by the English Court of Appeal in *Greer* v. *Downs Supply Co.* (4):

> As regards the extension of the equitable doctrines of constructive notice to commercial transactions, the Courts have always set their faces resolutely against it. The equitable doctrines of constructive notice are common enough in dealing with land and estates, with which the Court is familiar; but there have been repeated protests against the introduction into commercial transactions of anything like an extension of those doctrines, and the protest is founded on perfect good sense. In dealing with estates in land title is everything, and it can be leisurely investigated; in commercial transactions possession is everything, and there is no time to

(1) [1892] A.C. 201.
(2) (1908) 39 Can. S.C.R. 625.
(3) [1895] 2 Q.B. 539 at 545.
(4) [1927] 2 K.B. 28

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investigate title; and if we were to extend the doctrine of constructive notice to commercial transactions we should be doing infinite mischief and paralyzing the trade of the country.

This rule as to constructive notice applies, if its application were required, equally to the notations on the deposit slips, to the cheques drawn on the respondent and to the ledger references on the requisitions, drafts and notes.

It may be said with fairness that the appellant, knowing, as it did, the imperative need of the coal company for banking accommodation, and receiving, as it was every month, very large remittances by cheques drawn on the respondent, refrained from informing the respondent of its claim to own the proceeds of the coal, either because it was treating in fact the account as a debtor and creditor account, or because it did not think it expedient to embarrass the coal company in its banking arrangement. Whatever may have been the appellant's motive, while prepared to take advantage of its failure to notify the respondent that it claimed ownership of moneys which it knew the Eastern Coal Docks was paying to the respondent, it now seeks to make the respondent responsible for a situation which was due to its own default. In such circumstances, it is clearly inequitable that it should succeed, for

> whenever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it.

per Ashhurst, J., in *Lickbarrow* v. *Mason* (1), a statement approved and adopted by the Privy Council in *Commonwealth Trust* v. *Akotey* (2).

It is too late now to try to bolster their claim by saying that the instrument established in their favour the ownership of the coal and of the proceeds thereof—this instrument may be binding between the parties, but does not bind the bank unless it knowingly acted contrary to it. The so-called "factor" was entitled to retain out of the proceeds of the sales a considerable equity, the transportation and insurance charges, the cost of unloading, storage and his profit. Was the bank called upon to investigate and make in each case a division of these proceeds between the appellant and the coal company? Evidently nothing of the sort could be reasonably expected. As pointed out by the Court of Appeal, although the parties employ the word

(1) (1787) 2 T.R. (Dunford & East's Reports) 63, at 70.

(2) [1926] A.C. 72, at 76.

"factor" in the agreement, yet, it is difficult to say, in point of law, that the coal company was a "factor" in the true sense. They have allowed the use or possession of the moneys received from their sales, and therefore the language of Cozens-Hardy, M.R., in *Weiner* v. *Harris* (1), is applicable:

It is quite plain that by the mere use of a well-known legal phrase you cannot constitute a transaction that which you attempt to describe by that phrase. Perhaps the commonest instance of all, which has come before the Courts in many phases, is this: Two parties enter into a transaction and say "It is hereby declared that there is no partnership between us." The Court pays no regard to that. The Court looks at the transaction and says: "Is this, in point of law, really a partnership? It is not in the least conclusive that the parties have used a term or language intended to indicate that the transaction is not that which in law it is."

Nothing has been placed before us to weaken the strength of the following part of the judgment of Grimmer, J.:

Had the bank been put upon inquiry as to the existence of this agreement more than its actual contents could not be presumed against them. Per Lord Herschell in Simmons case (2) at p. 732. The agreement provides that the company "guarantees the payment of all sales of coal made by it hereunder." It was to pay the plaintiff for any coal sold and unpaid for 120 days which was to be deemed uncollectable "as if such collection had actually been made." The company was to receive the difference between the plaintiff's circular of prices and its actual receipts as its compensation. That of itself would not prevent the relation of factor and principal from being established but nowhere in the agreement do we find that the company is to sell the coal ostensibly as agent. The few instances of sales given in evidence shew unmistakably that they sold in the name of the company and that commercial paper was not taken in the name of the plaintiff or in such a way as to indicate that there was a principal. Suppose that there were accounts uncollectable as defined by the agreement. If the company paid the plaintiff as if those accounts had been collected would not the moneys from a delayed collection belong to the company? Besides they were carrying on a soft coal business and it seems to me that if the bank had had full knowledge of the agreement each deposit would have required an audit to ascertain whether or not the plaintiffs had any interest in it. Besides the plaintiffs never required the clause of the agreement as to delivery "to a bank chosen by the principal of all promissory notes and other evidences of indebtedness representing and based upon the sales of coal," to be acted upon. They never named a bank and it is quite possible, judging from the correspondence, that this clause was intended to be deleted. At all events it never was acted upon. Then we have the four weeks' credit. The plaintiff recognized that that was, as one of the officers called it "a gamble." It is easy to apply the language of James L.J. in *Ex parte White: In re Nevill* (3), at p. 75. He says—

"Mr. Nevill was not to pay immediately. Even if he sold for cash Towle & Co. had no right to say 'you have sold the goods for cash, therefore hand over the moneys to us at once' for Nevill would have justly said,

(1) (1909) 79 L.J. K.B. 342, at 346.
(2) (1892) 61 L.J. Ch. 723.
(3) (1871) 40 L.J. Bank. 73.

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'No; the *bargain between us is that I am to give you an account at the end of the month and to pay you at the end of another month.* My selling for cash does not alter the nature of the bargain between you and me, or entitle you to call upon me to hand the *moneys over to you,* or to put the money *in medio* and keep them for you.' The proceeds of sale in fact were his own moneys and not trust moneys, and he was at liberty *to deposit them with a* banker or deal with them as he pleased."

See also same case, *sub nom, Towle & Co.* v. *White* (1), where Lord Selborne L.C. says—

"It was argued that this was the account of Towle & Co. and that the balance was to be treated as a trust fund belonging to them. When we trace back the sums brought into the account to their source, it appears that they were the proceeds of sales in the market to outside purchasers, effected by Nevill, of goods which he had received, under the circumstances presently mentioned, from Towle & Co. Now, if these contracts were all contracts made by Nevill as agent for Towle & Co., then, of course, the consequence would follow that the proceeds of these sales coming into this account would be the moneys of Towle & Co. But if these contracts were between the purchasers and Nevill, Nevill's contracts, contracts in which he was the person interested, then the proceeds of those sales were Nevill's, whatever liabilities he might be under to Towle & Co. in respect of the terms arranged between him and them."

I, therefore, reach the conclusion that the knowledge and conditions necessary to constitute the trust alleged by the appellant did not exist in fact; and, therefore, this appeal should be dismissed with costs.

HUGHES J.—This action was brought by the appellant against the respondent to recover the amount of certain sums of money and the proceeds of certain bills of exchange deposited by Eastern Coal Docks, Limited, in the account of the latter in the respondent bank. Eastern Coal Docks, Limited, for some years previous to its bankruptcy in May, 1932, had carried on a retail coal business at Saint John, New Brunswick. The appellant company was a coal dealer which in the latter part of the year 1930 began to sell hard coal to Eastern Coal Docks, Limited. The coal in question was called Susquehanna anthracite.

In December, 1930, Eastern Coal Docks, Limited, began its banking business with the respondent. A line of credit of $50,000 was arranged, the respondent receiving from Eastern Coal Docks, Limited, security under section 88 of the *Bank Act* covering all coal on hand, and also a general assignment of book debts.

Subsequently a memorandum in writing dated May 1st, 1931, was drawn up between the appellant and Eastern

(1) (1873) 29 L.T. 78.

Coal Docks, Limited. By this memorandum, the appellant undertook to supply Eastern Coal Docks, Limited, called the Factor, with anthracite to March 31st, 1932, on the understanding that Eastern Coal Docks, Limited, should be a selling agent only and that the property in the coal and the proceeds thereof, less the agent's expenses and compensation as selling agent, should remain and be respectively in the appellant. The memorandum further provided that the proceeds should not be confused, mixed or commingled with the funds of the agent, but should be deposited immediately to the account of the principal. The agent further agreed to notify the principal every four weeks of the amount of the collections and deposits and the amounts of accounts unpaid. The agent further agreed to endorse, assign and deliver to any bank chosen by the appellant and operating in Saint John, all promissory notes and other evidences of indebtedness representing and based upon such sales of coal to be held by said bank subject to the agreement.

The arrangements contemplated by the memorandum did not, however, go into effect on May 1st, 1931. On June 19th, 1931, the appellant sent the memorandum to Eastern Coal Docks, Limited, with certain corrections and with the following request:—"When you have agreed upon a bank, will you please insert the name in your copy and then advise me and I will correct our copy?" On July 6th, 1931, the appellant sent to Eastern Coal Docks, Limited, the memorandum rewritten and amended by the addition of three new paragraphs for the consideration of the agent. About this time, Eastern Coal Docks, Limited, approached D. W. Harper, manager of the respondent bank at Saint John, and on July 11th, 1931, Mr. Harper wrote to C. A. Roy, General Manager of the respondent at Montreal. In this letter, Mr. Harper stated that the Susquehanna Red Ash Company or the company producing that brand of coal was requesting the Eastern Coal Docks, Limited, to act as a distributing agent for their coal on the terms that the principal should retain the property in the coal and have an assignment of book debts arising from the sales. Mr. Harper suggested it would mean another account and asked for instructions. On July 18th, 1931, Mr. Roy replied that the bank should not run risks of the coals being mixed and

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the book debts confused. On July 20th, 1931, Mr. Harper advised the Eastern Coal Docks, Limited, of the instructions of the General Manager, and added that arrangements could not be made unless the Eastern Coal Docks, Limited, wrote the respondent a letter that the coal would be segregated and the book debts kept distinct to the satisfaction of the bank. Mr. Harper went on to state that the respondent would be pleased to continue the account on the old basis, but that if Eastern Coal Docks, Limited, was determined to go on with the new proposal without satisfying the bank as above set out, the account would have to be closed and all indebtedness to the bank paid. On July 25th, 1931, Eastern Coal Docks, Limited, wrote Mr. Harper stating that if Eastern Coal Docks, Limited, should operate under the proposed consignment agreement with the appellant, the only anthracite would be Susquehanna anthracite from the appellant, that this coal would be kept separate, that a separate set of books would be kept and the receipts would be deposited in a "separate" bank account, and that notes or drafts would be endorsed to "that Bank" for collection and deposited to that account, and that the "section 88 loans" would be secured by all the bituminous coal and all the book debts of Eastern Coal Docks, Limited. On July 27th, 1931, Mr. Harper again wrote Mr. Roy stating that if the arrangement proposed by Eastern Coal Docks, Limited, was entertained, the respondent would have a separate bank account for the proceeds of the Hanna coal. On August 3rd, 1931, the appellant wrote Eastern Coal Docks, Limited, asking that the consignment memorandum of May 1st, 1931, should be signed and returned. On August 12th, Mr. Roy wrote Mr. Harper that he was not impressed with the method of financing of Eastern Coal Docks, Limited, but that he was willing that Mr. Harper should try out the proposal for a month or two according to the policy outlined in the letter from Mr. Harper to Mr. Roy of July 27th. On August 12th, Eastern Coal Docks, Limited, wrote Mr. Harper in part as follows:

> On this basis M. A. Hanna Company would have an equity in this coal for its invoice value $42,728.03, but at the present time this $42,728.03 stands as an Account Payable and the stock of coal as part of your security under section 88.

A separate bank account for the proceeds of Hanna coal as proposed in the letter of Eastern Coal Docks, Limited,

to Mr. Harper dated July 25th, was never opened by Eastern Coal Docks, Limited, nor was the separate account referred to in the letter from Mr. Harper to Mr. Roy dated July 27th ever opened.

On October 9th, 1931, W. B. Wright, an auditor of the appellant, went to Saint John and remained there until October 13th. He did not make any inquiry as to where the bank account of Eastern Coal Docks, Limited, was kept or as to the nature of the banking arrangements between Eastern Coal Docks, Limited, and its bank. But on October 24th, he sent to Eastern Coal Docks, Limited, a copy of his report to the appellant. Part of the report is as follows:—

Memorandum as to balance $11,213.70 remaining in Factor Bank Account to Sept. 17th, 1931.

As collections from customers are made by Eastern Coal Docks, Ltd., they are deposited in a general bank account of Eastern Coal Docks, Ltd., but to distinguish collections as made for Anthracite sales and collections as made for bituminous sales separate deposit tickets are now being used covering all deposits.

On Nov. 11th, W. C. Scott of Cleveland, Ohio, office attorney of the appellant, and John D. Baile of Susquehanna Collieries, Montreal, agent of the appellant, went to Saint John in behalf of the appellant. They agreed with Eastern Coal Docks, Limited, that a separate bank account would not be necessary and that the proceeds of the Hanna coal should be deposited in the bank account of Eastern Coal Docks, Limited. Accordingly, an agreement in writing was prepared and executed by the appellant and Eastern Coal Docks, Limited. This agreement amended the agreement of May 1st by providing for remittances by the agent every four weeks instead of "immediately," for a further seven days to transmit the funds to Susquehanna Collieries Limited at Montreal, for six per centum per annum interest for delay, for the cancellation and annulment of the following provision of the agreement of May 1st:

The Principal's share shall be collected first as aforesaid, and such funds shall not be confused, mixed or commingled with other funds of the Factor, but shall be held separately and shall immediately be deposited to the account of the Principal at the or such other bank or banks as the Principal shall designate.

Messrs. Scott and Baile do not appear from the evidence to have examined the banking arrangements of Eastern Coal Docks, Limited, any more than did Mr. Wright, and no person connected with the appellant interviewed or wrote

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the respondent about them until after the respondent had formally advised Eastern Coal Docks, Limited, on March 26th, 1932, that no more cheques should be issued against the account and that no further advances could be made.

It is not necessary, in the view I take of the case, to consider whether the appellant, in order not to disturb the banking credit of a large agency, refrained from formally warning the bank before the crash that it had a claim against the bank for the net proceeds of the sales of Hanna coal not accounted for by the agent. Nor is it necessary to consider whether the appellant after Nov. 11th, 1931, was actively assisting in the financing of the general coal business of Eastern Coal Docks, Limited, by extending the time for remittances, by permitting the agent to confuse, mix and commingle the funds now claimed by the appellant with the funds of the agent and by permitting the use of one bank account for both the Eastern Coal Docks, Limited, and the appellant.

The appellant urged before us that Mr. Harper knew that the appellant and the agent had entered into the consignment agreement. As a matter of fact, the principal and agent never entered into the consignment proposal of May 1st, nor into the arrangement which was discussed with Mr. Harper in the summer of 1931, but into a new and different arrangement as set out in the agreement of Nov. 11th, 1931, the contents of which were never formally communicated to Mr. Harper as far as the evidence shows. It is true that, in the latter part of the year 1931, Mr. Harper saw that the coal was segregated and came to the conclusion that Eastern Coal Docks Ltd. had entered into some arrangement for the handling of anthracite on an agency basis because the monthly reports did not show anthracite on them. Harper said he thought they must have some other bank account or a new arrangement. Harper, in fact, told his assistant manager, Robinson, to tell the officials of Eastern Coal Docks, Limited, not to put the money from the sale of anthracite into the bank, and Robinson did so tell them according to the evidence. It may here be observed that the appellant sought, through Harper and others, to fix the respondent with knowledge of a banking arrangement which they on Nov. 11th, 1931, confirmed and continued in operation. The appellant also endea-

voured to fix the respondent with notice that the net proceeds of the sales of anthracite were their property by shewing that from May or June, 1931, two deposits each banking day were made by the agent, that many of the deposit slips had figures or letters or words on them such as "1112" or "S 187" or "Susq. deposit" or "Eastern deposit" or "Hanna account." Several experienced bank employees or former employees were called and testified that such figures and words were common on deposit slips and were not regarded where the name of the account to which the deposit was to go, Eastern Coal Docks, Limited, in this case, was set out and the items and additions were correct.

The appellant also urged that the respondent had notice because many cheques were passing through the bank to Susquehanna Collieries Limited, and pointed out to us that the learned trial judge had found that Mr. Harper had sufficient knowledge to put him on inquiry and that he must have known that the moneys received on deposit from Eastern Coal Docks, Limited, were partly the proceeds of coal consigned by the appellant to the factor.

Where money is entrusted to an agent by his principal or received by him on his principal's behalf, it depends upon the terms of the agency whether the agent is bound to keep the money separate or is entitled to mix it with his own. In the former case the agent will be a trustee, in the latter a debtor.

Halsbury's Laws of England, 2nd Edition, Volume 1, page 247. In *Henry* v. *Hammond* (1), Channell J. said, page 521:

It is clear that if the terms upon which the person receives the money are that he is bound to keep it separate, either in a bank or elsewhere, and to hand that money so kept as a separate fund to the person entitled to it, then he is a trustee of that money and must hand it over to the person who is his *cestui que trust*. If on the other hand, he is not bound to keep the money separate, but is entitled to mix it with his own money and deal with it as he pleases, and when called upon to hand over an equivalent sum of money, then, in my opinion, he is not a trustee of the money, but merely a debtor. All the authorities seem to me to be consistent with that statement of the law.

Ex parte White; In Re Nevill (2). In this case T. & Co. were in the habit of sending goods for sale to N., who was a person in the firm of N. & Co., to be received on his private account. The course of dealing between T. & Co. and N. was that the goods were accompanied by a price

(1) [1913] 2 K.B. 515. (2) (1871) L.R. 6 Ch. App. 397.

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list. N. sold the goods on what terms he pleased and each month sent to T. & Co. an account of the goods he had sold, debiting himself with the prices named for them in the price list, and at the expiration of another month he paid the account in cash without any regard to the prices at which he had sold the goods or the length of credit he had given. He paid the moneys which he had received from the sales into the general account of his firm, and made his payment to T. & Co. through his firm with whom he kept an account of moneys paid in and drawn out by him in respect of moneys unconnected with the partnership, which account included many items wholly unconnected with the goods of T. & Co. N. & Co. executed a deed of arrangement with their creditors. T. & Co. sought to prove against the joint estate for the amounts standing to N.'s credit with his firm on the ground that the same arose from moneys belonging to T. & Co. and improperly placed by N. in the hands of his firm. It was held that such proof could not be admitted, because the course of dealing showed that, although both parties might look upon the business as an agency, N. did not in fact sell the goods as an agent of T. & Co. but on his own account, upon the terms of paying T. & Co. for them at a fixed rate if he sold them, and the moneys he received for them were therefore his own moneys which T. & Co. had no right to follow.

It may here be observed that under the agreement of Nov. 11th, 1931, the agent agreed to remit to the appellant's agent at Montreal the "value" of all coal shipped at the appellant's regular circular of prices in effect at the time of shipment, or such other "value" as might from time to time be mutually agreed upon. The same agreement incorporated a provision of the memorandum of May 1st, 1931, that the agent should guarantee the payment of all sales of coal and should account therefor in cash at the end of one hundred and twenty days.

In the view, however, that I take of this case, it is not necessary to decide whether Eastern Coal Docks, Limited, was a trustee or a debtor of the appellant. In *London Joint Stock Bank* v. *Simmons* (1), a broker was in the habit of pledging his customers' securities *en bloc* with the

(1) (1892) 61 L.J. Ch. 723.

appellant bank as security for advances to himself. Among these were mortgage bonds belonging to the respondent which were transferable by delivery. The bankers had no notice, and no reason to suspect, that the broker had no right to pledge these bonds for his own purposes. The broker failed and absconded. It was held in the House of Lords that the bankers, having acted in good faith and without notice of the broker's fraud, were entitled to retain and realize the bonds to repay themselves the amount due by the broker. Lord Halsbury said, page 726:

> Mr. Justice Kekewich seems to have been under the impression that relying on the broker's honesty did not alter the result. But to my mind it makes the whole difference. If there is £10,000 borrowed, and ten different clients' securities, what is there to tell the bank, or to suggest to the bank, that the ten clients had not each either a joint interest in the £10,000, or a several interest, which their several property justifies the broker in pledging?

Lord Herschell, in the same case, said, page 729:

> The general rule of the law is, that where a person has obtained the property of another from one who is dealing with it without the authority of the true owner, no title is acquired as against that owner, even though full value be given, and the property be taken in the belief that an unquestionable title thereto is being obtained, unless the person taking it can shew that the true owner has so acted as to mislead him into the belief that the person dealing with the property had authority to do so. If this can be shown, a good title is acquired by personal estoppel against the true owner. There is an exception to the general rule, however, in the case of negotiable instruments. Any person in possession of these may convey a good title to them, even when he is acting in fraud of the true owner, and although such owner has done nothing tending to mislead the person taking them.

At page 731, Lord Herschell referred to the view of Baron Parke in *Foster* v. *Pearson* (1), that it was long considered as firmly established that the holder of bills of exchange endorsed in blank, or other negotiable securities transferable by delivery, could give a title which he did not himself possess to a person taking them *bona fide* for value and that the rule should not be qualified by treating due care and caution as essential to the validity of his title besides and independently of honesty of purpose. Lord Herschell went on to say, page 731, that the view of Baron Parke was applied by Willes J. in *Raphael* v. *Bank of England* (2), where it was treated as undoubted law that negligence did not invalidate the title of a person taking a negotiable

(1) (1835) 1 Cr. M. & R. 849. (2) (1855) 17 Com. B. Rep. 161.

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instrument in good faith and for value. In the same case Lord Macnaghten said, page 734:

> Lastly, did the bank take the "Cedulas" in good faith? They took them, with other securities, from a firm of stockbrokers, who were, at the time, of unblemished reputuation. They took them in the ordinary way of business, to cover their current advances. In regard to this question the difficulty is to see what there was in the transaction to suggest a shadow of suspicion that there was anything wrong with the deposit. The only objection alleged is that securities of different customers of the stockbrokers were pledged for one entire advance, and it is said that the bank ought to have known it. But, even so, if the bank had no reason to suppose that the stockbrokers were not at liberty to pledge each and all of the securities for their full value, I cannot see in what the supposed want of good faith consists. As was pointed out in *Foster* v. *Pearson* (1), such a practice—and the practice prevails in the case of stockbrokers as much as in the case of billbrokers—has advantages for the customers as a body, though it may occasionally operate hardly on an individual.

The rule is tersely stated by Lord Herschell in the same case, page 730:

> I defer entering upon the inquiry whether it has been proved that the bank had either notice or knowledge that Delmar's title to the bonds was that of an agent only. Assuming for the moment that this was proved, what is its effect? It is contended on behalf of the respondent, as I understand, that it put the bank upon inquiry as to the title of the person with whom they dealt, and as to the authority which he possessed; and that having made no such inquiry, they obtained as against his principal no better title than he had. It was admitted that any one buying from Delmar would have obtained an unimpeachable title, notwithstanding his knowledge that Delmar was a broker, and that the bonds were the property of his principal. What ground is there for the position that in regard to a pledge the case is different; that one may safely take a negotiable instrument by way of sale from an agent without inquiry, but cannot so take it by way of pledge? It is surely of the very essence of a negotiable instrument that you may treat the person in possession of it as having authority to deal with it, be he agent or otherwise, unless you know to the contrary, and are not compelled in order to secure a good title to yourself to inquire into the nature of his title or the extent of his authority.

Thomson v. *Clydesdale Bank* (2). In this case, it was held that a person who takes money from another in discharge of a debt is not bound to inquire how the money is acquired, and is entitled to retain it in discharge of the debt, and that the knowledge that the money has been received by the person paying it on account of other persons is not sufficient of itself to prevent the payment from being a good payment in discharge of the debt. Lord Herschell said, pages 92 and 93:

> I cannot assent to the proposition that, even if a person receiving money knows that that money has been received by the person paying

(1) (1835) 1 Cr. M. & R. 849. (2) (1892) 62 L.J. P.C. 91.

it to him on account of other persons, that of itself is sufficient to prevent the payment being a good payment and properly discharging the debt due to the person who receives the money. No doubt if the person receiving the money has reason to believe that the payment is being made in fraud of a third person, and that the person making the payment is handing over in discharge of his debt money which he has no right to hand over, then the person taking such payment would not be entitled to retain the money.

Lord Watson said, page 94:

> The onus of proving that they acted in *mala fide* rests with the appellants. It is not enough for them to prove that the respondents acted negligently; in order to succeed, they must establish that the respondents knew, not only that the money represented by the cheque did not belong to the broker, but that he had no authority from the true owner to pay it into his bank account.

And in the same case Lord Shand said, page 95:

> I am of opinion that the same principle which applies to third parties generally is equally applicable to the case of dealings between stockbrokers and their bankers, and that the only circumstances in which money misapplied by a broker in payment to the banker of a debt due to him can be recovered from the banker by the principal to whom the money belonged, is where it can be shown directly, or by inference from the facts proved, that the banker or his representative in the transaction knew that the money was being misapplied.

Regardless of whether Eastern Coal Docks, Limited, was after Nov. 11th, 1931, a debtor or a trustee of the proceeds of the sales of the appellant's coal, the appellant has no sufficient finding by the learned trial judge and no sufficient evidence to bring its case, either before or after that date, within the rule of law discussed in the authorities last cited.

The appeal, therefore, should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *John C. Belyea.*

Solicitors for the respondent: *Lewin & Carter.*

1934
*Nov. 23
*Dec. 21

TRANS-CANADA INSURANCE COMPANY (DEFENDANT)..... APPELLANT;

AND

ANNIE M. WINTER (PLAINTIFF).... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Statutes—Insurance—Motor vehicles—Repeal of provision in statute and enactment at same time in another statute of substantially the same provision—Retrospective construction of latter provision—Injury to passenger in motor car—Action and recovery of judgment by injured person against owner (driver) of car, and subsequent action by injured person against owner's insurer; the actions being taken subsequent to expiry of insurance policy and subsequent to later repeal and enactment of certain respective legislation—Right of injured person to judgment against insurer—S. 87 (4) (repealed September 1, 1932) of The Highway Traffic Act (Ont.) (as amended in 1930, c. 47) —S. 183 (h) (coming into force September 1, 1932) of The Insurance Act (Ont.) (as amended in 1932, c. 25)—"Motor Vehicle Liability Policy"—Time limitation for bringing action.

Appellant insured A. by an automobile insurance policy, dated May 2, 1931, and expiring May 2, 1932. On February 9, 1932, an accident occurred in which respondent, a passenger in A.'s car (driven by A.), was injured. On December 3, 1932, respondent commenced action for damages against A. The action was tried and on March 29, 1933, judgment was given against A. Respondent, not having received payment, commenced, on May 8, 1933, an action against appellant for the amount of the judgment (and taxed costs and subsequent interest), claiming under s. 87 (4) of *The Highway Traffic Act* (Ont.) (as enacted in 1930, c. 47, s. 6) and, or in the alternative, under s. 183 (*h*) of *The Insurance Act* (as enacted by *The (Automobile) Insurance Act, 1932,* c. 25). On September 1, 1932, said s. 87 (4) had been repealed, and on the same date said s. 183 (*h*) had come into force. On a stated case (in which certain facts were admitted) appellant claimed that, in point of law, respondent was not entitled to judgment against it.

Held, affirming judgment of the Court of Appeal for Ontario, [1934] O.R. 318, that respondent was entitled to succeed.

Per Rinfret, Cannon, Crocket and Hughes JJ.:

In view of the repeal on September 1, 1932, of provisions, dealing with certain subject matters, in *The Highway Traffic Act,* and the enactments, taking effect on the same date, introducing into *The Insurance Act* provisions dealing with the same subject matters, and on comparing and considering the provisions repealed and enacted respectively as aforesaid, said s. 183 (*h*), introduced as aforesaid into *The Insurance Act,* between which section and s. 87 (4) (repealed as aforesaid) of *The Highway Traffic Act* there was (as was held) no substantial difference as to the rights of third parties against an insurer, should be construed as retrospective. Such construction was impelled by a consideration of effects of a contrary construction—

*PRESENT:—Duff C.J. and Rinfret, Cannon, Crocket and Hughes JJ.

effects which it was inconceivable that the legislature intended. *Ex parte Todd; In re Ashcroft,* 19 Q.B.D. 186, at 195, cited and applied.

The words "motor vehicle liability policy" in said s. 183 (*h*) are wide enough in form to cover the policy in question. It cannot be said that a motor vehicle liability policy is necessarily the one prescribed by *The (Automobile) Insurance Act, 1932* (amending *The Insurance Act,* and coming into force September 1, 1932) merely because *The Highway Traffic Act, 1932* (c. 32), s. 9, (coming into force September 1, 1932), introduces into *The Highway Traffic Act* s. 87 (1) to the effect that a motor vehicle liability policy shall be in the form prescribed by *The Insurance Act.*

The exclusion, by s. 183 (*d*) of *The Insurance Act* (as enacted by *The (Automobile) Insurance Act, 1932),* from an insurer's liability under an owner's policy or a driver's policy, of a claim by a passenger in the motor vehicle unless the coverage is expressly extended under s. 183 (*f*), did not exclude respondent's claim, as at the time of the accident there was no such exclusion from liability and such liability was in fact provided for by A.'s policy.

As respondent's action against appellant was brought within two months after respondent's judgment against A.—and within two months after respondent's "cause of action arose"—the limitation of one year, either in the statutory conditions in the policy or in the statutory conditions brought into force by *The (Automobile) Insurance Act, 1932,* did not bar respondent from recovering against appellant.

APPEAL by the defendant insurance company from the judgment of the Court of Appeal for Ontario (1) dismissing its appeal from the judgment of Kingstone J. (2) who held (upon a stated case in which certain facts were admitted) that in point of law the plaintiffs (including the present respondent) were entitled to judgment against the defendant for the amount of the judgments recovered by the plaintiffs against one Axford and their taxed costs. (On motion for judgment in accordance with said holding, judgment was given for the present respondent against the defendant for $2,000, and for the other plaintiffs for $200 and $280 respectively, and for the taxed costs of the action against Axford and for interest.)

(An application by defendant to the Court of Appeal for Ontario for leave to appeal from its judgment to the Supreme Court of Canada as to the claims of the plaintiffs other than the present respondent was refused).

The material facts of the case and the questions in issue are sufficiently stated in the judgment now reported. The appeal was dismissed with costs.

(1) [1934] O.R. 318; [1934] 3 D.L.R. 17.

(2) [1934] O.R. 87; [1934] 1 D.L.R. 358.

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A. C. Heighington K.C. for the appellant.

R. J. Waterous for the respondent.

DUFF C.J.—I concur in the dismissal of the appeal.

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

HUGHES J.—On or about the 9th of February, 1931, the respondent Annie M. Winter and one Gertrude Mosley were riding in a motor vehicle owned and operated by one J. Leslie Axford, when an accident occured resulting in injury to the passengers. At the time of the accident J. Leslie Axford was insured by a contract of automobile insurance with the appellant. The policy was dated May 2nd, 1931, and expired according to its terms on May 2nd, 1932.

On December 3rd, 1932, Annie M. Winter, Gertrude Mosley and George Mosley, husband of Gertrude Mosley, commenced an action for damages for negligence against Axford. The action duly came on for trial and on March 29th, 1933, judgment was given against Axford in favour of the plaintiffs as follows:—Annie M. Winter $2,000, Gertrude Mosley $200, and George Mosley $280, together with the costs of the action which were subsequently taxed at $650.95. The judgment creditors did not receive payment from Axford and on May 8th, 1933, they commenced an action against the insurer for the amounts awarded to them by the judgment and for the taxed costs and interest from the date of the judgment. They claimed that they were entitled to recover against the insurer by virtue of section 87 (4) of *The Highway Traffic Act,* as enacted by Statutes of Ontario, 1930, chapter 47, section 6, and, or in the alternative, by virtue of section 183 (*h*) of *The Insurance Act,* as enacted by *The (Automobile) Insurance Act, 1932,* Statutes of Ontario, 1932, chapter 25, section 2. The defence of the insurer was that the former provision was repealed on September 1st, 1932, and that the latter statute, which came into force on that date, was not applicable. A special case was submitted to the court and the Honourable Mr. Justice Kingstone gave judgment against the insurer. The latter appealed to the Court of Appeal for Ontario and the appeal was dismissed. The

insurer now appeals to this Court in respect to that part of the judgment which awards to Annie M. Winter $2,000 and interest from the date of the judgment.

The dates and events are somewhat numerous and it may be helpful to set them out in chronological order.

2nd May, 1931—Delivery of policy.

9th February, 1932—Accident.

2nd May, 1932—Expiration of policy.

1st September, 1932—Repeal of section 87 (4) of *The Highway Traffic Act.*

1st September, 1932—Coming into force of *The (Automobile) Insurance Act, 1932,* including sections 169 to 183 (*k*) of *The Insurance Act.*

3rd December, 1932—Action commenced against insured.

29th March, 1933—Judgment against insured.

8th May, 1933—Action commenced against Insurance Company.

The parties to this appeal admitted in the stated case that the respondent, at the time of the accident, was riding in a motor vehicle owned and operated by J. Leslie Axford, that the respondent commenced an action on December 3rd, 1932, against Axford for damages for negligence arising out of the operation by Axford of the automobile and that she recovered a judgment against him on March 29th, 1933, for $2,000 and costs and that the judgment and costs were unpaid when, on May 8th, 1933, the respondent commenced this action against the appellant. It was further admitted that Axford was insured at the time of the accident by a policy of automobile insurance with the appellant in respect of the automobile in question, effective from May 2nd, 1931, to May 2nd, 1932, with a coverage sufficient in amount. It was further admitted that the injuries for which the damages were awarded to the respondent were occasioned by the negligent operation by Axford of the automobile described in the policy.

The above section 183 *h* (1) provides that any person having a claim against an insured for which indemnity is provided by a motor vehicle liability policy shall, although 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 the judgment and may maintain

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an action against the insurer to have the insurance money so applied. Section 169 (*f*) of *The Insurance Act*, enacted at the same time as 183 (*h*), provides that "Motor Vehicle Liability Policy" shall mean a policy or that part of a policy insuring the owner or driver of an automobile against liability for loss or damage to persons or property. The term "motor vehicle liability policy" appears in the following sections added to *The Highway Traffic Act* by section 6 of *The Highway Traffic Amendment Act, 1930*:—78 (1) (*a*); 78 (3); 87 (1); 87 (3); 87 (4); 87 (4) (*a*); 87 (4) (*b*); 87 (5); 87 (6) and 87 (7). The words "motor vehicle liability policies" appear in *The Insurance Act, 1931*, Statutes of Ontario, Chapter 49, section 4. It cannot, therefore, well be said, as contended by the appellant, that a motor vehicle liability policy is necessarily the one prescribed by *The (Automobile) Insurance Act, 1932*, merely because *The Highway Traffic Act, 1932*, section 9, introduces into *The Highway Traffic Act* section 87 (1) to the effect that a motor vehicle liability policy shall be in the form prescribed by *The Insurance Act*. I am, therefore, of opinion that the words "motor vehicle liability policy" in section 183 (*h*) are wide enough in form to cover the policy in question in the appeal. It follows, therefore, that idemnity is or was provided by a motor vehicle liability policy. The indemnity is or was an indemnity to the insured, and his right to indemnity arose when the accident occurred, namely, during the term of the policy. If the insurer had cancelled the policy immediately after the accident, the insured's right to indemnity would not have been affected in any way. The right of the insured to indemnity did not terminate when the term of the policy expired. If on the day when action was commenced against the insured, namely, on December 3rd, 1932, the respondent had in the words of section 183 (*h*) said to the insured, "I have a claim against you," the insured could truly have replied, "Indemnity is provided by a motor vehicle liability policy."

The appellant, however, contends that *The (Automobile) Insurance Act, 1932*, is not retrospective. In this connection, it is important to observe at the outset that many of the provisions introduced into *The Highway Traffic Act* by *The Highway Traffic Amendment Act, 1930*,

section 6, concerned largely the subject matter of insurance, for example, 87 (1), which defined the coverage of every motor vehicle liability policy; 87 (2), which permitted excess coverage; 87 (3), which provided for approval of the form of the policy by the superintendent of insurance; 87 (4), which provided that every motor vehicle liability policy should be subject to certain provisions notwithstanding any law to the contrary. One of the latter provisions was that a judgment creditor with a judgment arising out of a claim against an insured for which indemnity was provided by a motor vehicle liability policy should, on behalf of himself and all other persons having similar judgments or claims, be entitled to maintain an action against the insurer to have the insurance money applied in satisfaction of such judgment or judgments. I have referred to the above provisions at some length in order to make it quite obvious that many of the provisions were largely insurance provisions which were rather more appropriately to be sought in an insurance Act. The desired alterations in these largely insurance provisions, whether formal only or substantial, could not be accomplished by amendment, as there was a transfer also, so to speak, of them from *The Highway Traffic Act* to *The Insurance Act,* and repeal and re-enactment were necessary. On September 1st, 1932, many wholly or partly insurance provisions disappeared from *The Highway Traffic Act* and appeared in more or less altered form in *The Insurance Act.* For example, provisions relating to the following subject matters may be found in the following sections of *The Highway Traffic Act* as amended by *The Highway Traffic Amendment Act, 1930,* chapter 47, section 6, and in *The Insurance Act,* as amended by *The (Automobile) Insurance Act, 1932,* chapter 25, section 2, respectively:— approval of motor vehicle liability policies by the superintendent of insurance, 87 (3) and 183 (*f*); extent of ordinary coverage, 87 (1) and 183 (*a*) (*b*) (*d*) and (*e*); excess coverage, 87 (2) and 183 (*f*); rights of third parties against insurer, 87 (4) and 183 (*h*). It is significant, however, that the following provision of *The Highway Traffic Act* (as amended in 1930):

71 (2) This Part shall only apply * * * to motor vehicle liability policies issued or in force after the date of coming into force of this Part,

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re-appeared as section 170 (1) of *The Insurance Act* as follows:—

> This Part shall apply to automobile insurance and to any insurer carrying on the business of automobile insurance in the Province and to all contracts made in the Province on or after the date of coming into force of this Part.

It is to be observed that the latter enactment does not contain the word "only," and it should not be construed as necessarily restrictive.

It is inconceivable that the legislature intended to cut off claims of third parties in all policies expired or in force at the time of the repeal of 87 (4) and the enactment of 183 (*h*). Such a conclusion would mean that the potential claims or rights *in futuro* of third parties in policies issued as late as August 31st, 1932, would be barred although the whole term of the policy with the exception of the day of delivery was within the time covered by the new enactment.

Now, there is no substantial difference between the rights of third parties against an insurer under 87 (4) and under 183 (*h*), although the appellant contends that the rights of third parties under 183 (*h*) were substantially different from their rights under 87 (4) in that (*a*) the repealed statute applied to judgment creditors only, and (*b*) under the repealed statute, it was necessary to shew an attempt to collect from the insured. These contentions are not well founded. Both 87 (4) and 183 (*h*) apply to judgment creditors; and 87 (4) did not provide that an attempt to collect first from the insured should be shewn. The latter was necessary only under the former section 85 of *The Insurance Act*. See *The Continental Casualty Company* v. *Yorke* (1). In his judgment in the Court of Appeal for Ontario (2), the Honourable Mr. Justice Macdonnell referred to a statement in the judgment of Lord Esher, M.R., in *Ex parte Todd; In re Ashcroft* (3). The point involved in that case was whether section 47 of the *Bankruptcy Act*, 1883, which avoided certain voluntary settlements executed by a bankrupt, was or was not retrospective. Lord Esher, in the course of his judgment, referred to the fact that in

(1) [1930] Can. S.C.R., 180. (2) [1934] O.R. at 323-4.
(3) (1887) 19 Q.B.D. 186, at 195.

In re Player (1), Mathew J. had expressed the opinion that so much of section 47 as was identical with section 91 of the former Act applied to matters which happened before the Act came into operation but that any part of it which was a new enactment was not retrospective. Later on Lord Esher stated:—

> In determining whether any provision of an Act was intended to be retrospective or not, I think the consequences of holding that it is not retrospective must be looked at, and to my mind it is inconceivable that the legislature, when, in a new Act which repeals a former Act, they repeat in so many words certain provisions of the repealed Act, should have intended that persons who, before the passing of the new Act, had broken the provisions of the old Act—who had been doing that which the legislature thought to be wrong—should entirely escape the consequences of their wrongdoing by reason of the repeal of the old Act. I think, therefore, that, so far as s. 47 is a repetition of s. 91, the legislature obviously intended to replace the old enactment at once by the new one, and that, to that extent, s. 47 must apply to transactions which took place before the commencement of the new Act. But why should we carry it any further, and say that the new part of s. 47 applies to antecedent transactions? I can see no reason for doing so, and I think it is a wholesome doctrine to hold that the section is retrospective so far as it is a repetition of the former enactment, but that it is not retrospective so far as it is new.

Fry, L.J., said that to say that a section of an Act was in part retrospective and in part not, struck him as a somewhat novel mode of interpretation. Lopes, L.J., agreed with Lord Esher. The view of the latter was unanimously applied by the Court of Appeal to the right against the insurer of the respondent third party in the case at bar, and I have not been able to find any valid reason why it should not have been so applied.

The appellant also contends that the respondent was a passenger in the automobile owned and driven by Axford and that section 183 (*d*) of *The Insurance Act* as enacted by section 2 of *The (Automobile) Insurance Act, 1932*, excludes from the liability of an insurer under an owner's policy or a driver's policy, a claim by a passenger in the motor vehicle unless the coverage is expressly extended under section 183 (*f*). At the time of the accident, however, there was no such exclusion from liability and such liability was in fact provided for by sections (A) and (B) of the insuring agreements in the policy which the appellant delivered to Axford and which was in force at the time of the accident.

(1) (1885) 54 L.J. (Q.B.D.) 553.

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The appellant further contends that there was no money payable under the policy at the time the action was brought against the insurer because at that time the rights of the insured to recover under the policy, in any event, were barred by lapse of time. The policy does not support this contention, as it provides by Automobile Statutory Condition 8 (3) (printed on the policy) that no action under the policy shall lie against the insurer unless action is brought after the amount of the loss has been ascertained either by a judgment against the insured after trial of the issue or by agreement between the parties with the written consent of the insurer and no action shall lie in either event unless brought within one year thereafter. This action was brought within two months after the judgment. The statutory conditions brought into force by *The (Automobile) Insurance Act, 1932,* section 2, provide that every action or proceeding in respect of loss or damage to persons or property shall be commenced within one year after the cause of action arose and not afterwards. This action was brought within two months after the respondent's cause of action arose.

The appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Symons, Heighington & Shaver.*

Solicitors for the respondent: *Waterous, Wallace & Hagey.*

SISCOE GOLD MINES LIMITED (DEFENDANT) ..... APPELLANT;

AND

FELIX BIJAKOWSKI (PLAINTIFF) ..... RESPONDENT.

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*Nov. 8
*Dec. 21

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

Evidence—Contract—Admissibility of oral testimony—Transfer of shares —Verbal condition as to their return—Whether a loan or a gift.

The respondent, by virtue of a transfer of their rights by two associates to himself, claimed to be the owner and demanded the delivery to him of 30,000 shares of the Siscoe Gold Mines Limited, which he alleged had been lent by way of a transfer by himself and his associates to the appellant company, on the condition that a like number of shares would be returned by the appellate company upon its mining properties being brought into production. The appellant company pleaded that the above transaction was carried out by the president of the company without authority expressed or implied and was never ratified by it, and, in the alternative, that in any event the above shares were not lent as alleged by the respondent, but were given or donated without condition as to their return. On the first point raised by the appellant company, after hearing its counsel, this Court decided that the findings of fact of the trial judge in favour of the respondent, unanimously affirmed by the appellate court, should not be disturbed; but this Court decided to hear the respondent on the question of law, raised by the appellant company in support of its second point, concerning the admissibility of oral evidence to prove the loan of the shares.

Held that, under the circumstances of this case, oral testimony was admissible. As both parties were admitting the existence of some contract for the transfer of the shares, parol evidence could be adduced to determine whether the transfer was conditional or unconditional and whether the shares were to be returned to the respondent and his associates as having been merely loaned. *Campbell* v. *Young* (32 Can. S.C.R. 547) foll.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec, affirming the judgment of the Superior Court, Loranger J. and maintaining the respondent's action and condemning the appellant to deliver to respondent 30,000 shares of appellant's capital stock and to pay to the respondent the sum of $4,200.00 the amount of dividends declared on a like number of shares, or in the event of the appellant failing to deliver the said shares, to pay to the respondent the sum of $51,600.00, being the market value of the said shares with the dividends aforesaid.

*PRESENT:—Duff C.J. and Rinfret, Cannon, Crocket and Hughes JJ.

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

Henry N. Chauvin K.C. and *E. S. McDougall K.C.* for the appellant.

Aimé Geoffrion K.C. and *B. Robinson* for the respondent.

The judgment of the Court was delivered by

CANNON J.—This appeal is asserted from the unanimous judgment of the Court of King's Bench confirming the judgment of the Superior Court (Loranger J.), which maintained respondent's action and condemned appellant to deliver to respondent 30,000 shares of appellant's capital stock and to pay to respondent $4,200, the amount of dividends declared on a like number of shares; or, in the event of the appellant failing to deliver the said shares, to pay to the respondent the sum of $51,600, being the market value of the said shares, reserving also a recourse to be discussed later.

The respondent claims to be the owner and demands the delivery to him of 30,000 shares of the Siscoe Gold Mines Limited which, he alleged, had been lent by himself and his associates, Joseph Hoffman and Joseph Pluto, to appellant on the 21st day of January, 1927, on the condition that a like number of shares would be returned by the appellant upon its mining properties being brought into production. Artifice, fraud and error were also alleged as vitiating the transaction.

The respondent sues in the right of himself and his associates by virtue of a transfer by Pluto and Hoffman to respondent.

The appellant says in defence that the transactions in connection with the above-mentioned shares were carried out by one J. T. Tebbutt, the president of the appellant company, without authority, expressed or implied, and that whatever contract was entered into or understanding arrived at between him and other persons associated with him is not binding upon appellant, who, moreover, never ratified the action of its president.

Under reserve of the foregoing plea, the appellant pleaded, in the alternative, that in any event the said shares which were transferred to the Eastern Trust Com-

pany as trustee of certain shares of the capital stock of the appellant were not lent, as alleged by respondent, but were given or donated without condition as to their return.

The respondent and his two associates Pluto and Hoffman were the original discoverers of the Siscoe Gold Mines and obtained for their interest a certain number of shares in the appellant company. The president, Mr. Tebbutt, went to Timmins and gathered together the three illiterate associates and, according to their version, which was unanimously accepted by the courts below, disclosed to them that the company needed funds, and that, in order to carry out a plan which would bring production and profit, other members of the syndicate and officers, including Mr. Tebbutt and Mr. Siscoe, the president and the vice-president of the company, had already loaned to the company a certain number of shares. These foreigners agreed to the demand of the president and took his word that this was a loan, and signed the document which he prepared, i.e. an authorization to split up three certificates of 20,000 shares each so that half would go the company and the other half back to each of them. Eventually the division took place and each received back a certificate of 10,000 shares; and the other shares were placed in the company's treasury account with the Eastern Trust Company. In reply to a demand for a return of these shares, the appellant contended that it never received them, that it had nothing to do with them, or, in the alternative, that they were donated unconditionally.

It was proven that the company actually received the shares and disposed of them in order to reimburse itself of a commission of 10 per cent in cash and 15 per cent in stock payable to W. R. Baillie through whom one G. N. Coyle had agreed to invest $75,000 with the company, under the express condition that no commission was to be paid out of the funds of the company. Whatever may have been the promise made by Siscoe to Coyle, the fact is abundantly established that the commission was paid by the appellant and that the proceeds of the sale of the 30,000 shares were deposited to the credit of the respondent. After these shares were transferred to the treasury in the hands of the Eastern Trust Company, they lost their identity and could not be further traced.

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After hearing the appellant, this Court decided that the findings of fact of the trial judge, unanimously confirmed by the Court of King's Bench, should not be disturbed; and, we, therefore, in view of the character of the evidence given, say that the shares were not donated to Tebbutt, nor to the company, by the respondent; that they were loaned to the company, who received them and placed them in its treasury, in the care of the Eastern Trust Company.

If respondent agreed to deliver, and did deliver, their shares to appellant, what that company or its officers did after is more or less irrelevant, except to show that it benefited from them. If they are not in the treasury, they must have been disposed of for the purposes of that company. In either case, the company's liability towards the respondent would not disappear.

The company was in operation when the action was taken and the time had then arrived when the loan had to be repaid. If, as pleaded, the company never authorized this agreement nor the receipt of these shares, there seems to be no good reason why it should not return them. There can be no question of a donation to the company, because the latter has expressly pleaded that never, at any time, through its board of directors or by officers duly authorized, were these shares accepted. Moreover, the evidence and the findings of the courts below disprove this contention. Both courts below reached the conclusion that the only witness heard on this point on behalf of the appellant is unreliable, and on this question of credibility, great consideration must necessarily be given to the findings of the trial judge who heard and saw the witness. Moreover, it is more than doubtful that such a gift could be legally made in the form of a verbal agreement. Art. 776 C.C.

This Court, therefore, decided to hear the respondent only on the question of law raised by the appellant concerning the admissibility of oral evidence to prove the loan of these shares.

In view of the rejection by the trial judge of Tebbutt's version of what took place when the respondent and his associates signed the authorization to transfer the 30,000 shares to the appellant and the adoption below and by

this Court of respondent's evidence, the only possibility for the appellant to succeed was to have this verbal evidence set aside as illegal. Our attention was drawn to the following part of respondent's testimony:

Q. Before you brought Hoffman, Pluto and Steinslick, did Mr. Tebbutt tell you what he wanted?

By defendant's counsel: I make a preliminary objection to anything said by Mr. Tebbutt, to the witness prior to the signing of these documents, in view of the fact we have not only this document referred to by Mr. Genest, but we have a transfer signed by the plaintiff and the other parties, of the shares in question.

And I make formal objection to any evidence as to what was said, which was preliminary to the signing of these documents.

By the Court: It explains the circumstances under which the deed was signed. Reserved.

Tebbutt was subsequently brought forward by the appellant to prove the alleged donation or gift of the shares, after he had explained to them that he had to have this stock to liquidate the alleged personal debt of vice-president Siscoe to Baillie. The trial judge gave his decision in the final judgment:

Objection est faite à toute preuve verbale comme tendant à contredire l'écrit. En remarquant que le document P. 1 ne définit aucunement la nature de la convention, pour l'interpréter il faut donc connaître les circonstances dans lesquelles l'écrit a été signé afin de se rendre compte de l'intention des parties et de lui donner effet; sans cela, il est impossible de décider le bien ou mal fondé de la réclamation. Qu'est-ce que l'écrit comporte? Est-ce un don manuel? Est-ce un prêt? Pour répondre à ces trois questions, il faut nécessairement savoir ce qui s'est passé; et seule la preuve peut nous le révéler. L'objection est rejetée.

Exhibit P. 1 reads in part as follows:

We the undersigned owners of 20,000 shares each of the Siscoe Gold Mines Company stock do hereby authorize the secretary of the Siscoe Gold Mines Company or the Eastern Trust Company of Montreal to split each 20,000 shares of stock into two certificates, one certificate for ten thousand shares to be made out to the Siscoe Gold Mines Company, and one certificate for ten thousand shares to the undersigned.

Joseph Pluto.
Joseph Hossman,
Felix Bijakowski.

The declaration alleges that the above document was signed at the request of Tebbutt, the president of the company appellant, who represented that a group of shareholders were lending a portion of their holdings to the company in order to bring it into production sooner; that the president took advantage of the fact that the plaintiff and his two companions were illiterate foreigners and

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deliberately drafted the document in indefinite terms, leading them into error and making them believe that they, in consort with other large shareholders, were lending to the company a large amount of stock which would be returned immediately after the company would begin producing; and that the plaintiff, Pluto and Hoffman were induced to sign the said document through artifice and fraud.

Plaintiff's allegation that the whole transaction was tainted with fraud and false representation, might have supported the trial judge's decision to admit parol testimony, although his judgment does not mention that ground and he did not find fraud against Tebbutt. In support of the admissibility of the evidence, it might also have been considered whether or not the writings, the books of the company, the attitude of some of the appellant's witnesses in the box, which was severely criticized by the trial judge, were not sufficient to constitute a "commencement de preuve par écrit" which would make probable the loan alleged by the respondent. In fact, some of the learned judges below adopted the view that such a foundation for oral testimony existed and quoted this Court's decision *re Campbell* v. *Young* (1). Under that precedent, both parties admitting the existence of some contract, parol evidence could be adduced to determine whether the transfer was conditional or unconditional, whether the shares were to be returned or not.

Moreover, even if the verbal evidence of what took place at Timmins, when exhibit P. 1 was prepared by Tebbutt, president of the company, and signed by the respondent, be rejected, we must not lose sight of the overwhelming evidence in writing showing that the company acted pursuant to the authority given, received the shares, placed them in its treasury and refused to hand them over.

To justify the possession and retention of the shares, the appellant alleges a free gift or donation. It was incumbent upon it to prove its title. *Reus excipiendo fit actor.* It failed to discharge the onus and the appellant having admitted respondent's ownership of the shares before the transfer, the plaintiff's case was complete and he was entitled to judgment. The transaction was either *res inter alios acta,* or is really, as found by the trial judge, part of

(1) (1902) 32 Can. S.C.R. 547.

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the business of the company and has been repeatedly ratified and acted upon by it, as appears in the books of the appellant and its bank account. The appellant, having received both the shares and the full benefit thereof (although it contended it had nothing to do with them), and having failed to prove its title thereto, cannot succeed. The attempt to bring Tebbutt before the Court to prove the contention that no one was bound to return respondent's property proved futile. This verbal evidence of Tebbutt, essential to prove appellant's version, was tendered by it after it had objected to similar verbal evidence on the same point by plaintiff, Hoffman and Pluto. It was allowed by the trial judge, but evidently was not believed.

We, therefore, reach the conclusion that the point raised before us by the appellant cannot prevail.

But, says the appellant, if the conclusion be reached that the act of the company was such as to justify the finding that the company actually received the shares, the respondent, in that event, should recover only the amount for which the shares were sold, viz $9,750.

On the other hand, the plaintiff seeks the application of article 1782 of the civil code. He claims to be entitled to the return of the shares loaned or, in default, to their full value which, under the circumstances of this case, would include the increased value of the shares since the appellant refused to remit them to the respondent.

The trial judge made a special reservation of the rights of the respondent for the losses he might suffer through the fluctuations of the market.

The trial judge fixed the value of the shares on the basis of 30,000 at $1.58 a share, the price of the stock on the day of the judgment. Since that date, the stock may have gone up in price and, by the failure to deliver the stock, the respondent may have been deprived of the opportunity of disposing of the shares at a favourable price. The appellant is given the alternative to deliver the shares or to pay the amount of the judgment. Without the reserve made by the trial judge in favour of the respondent to claim any loss resulting from the company's failure to deliver the stock at the proper time, the appellant to-day would pay the amount of the judgment and not deliver the stock. It could then dispose of the shares which belong to the re-

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spondent and profit unduly at the expense of the respondent to the extent of any difference between $1.58 and the price to-day.

This reservation would seem to be within the scope of 1073, 1074 and 1075 of the civil code because, when the company decided to refuse delivery of the stock, it must have known and it knew that the value of the shares would fluctuate and it accepted the risk of paying the highest price between the time of the demand and the delivery.

We, therefore, see no good reason to strike the reservation from the judgment as suggested by appellant's counsel. These remarks are made without prejudice to the rights of either party, should it become necessary for the respondent to take another action to recover over and above the amount of the judgment, in case the company would not return the shares.

We will therefore dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Wainwright, Elder & McDougall.*

Solicitors for the respondent: *Robinson & Shapiro.*

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*Nov. 20
*Dec. 21

IN THE MATTER OF THE ESTATE OF JAMES CARMEN MACINNES, DECEASED.

ANNIE MACINNES .....APPELLANT;

AND

MARGARET MACINNES, MAMIE CAMPBELL, AND OTHERS.....} RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Insurance (Life)—Will—Insurance Act, R.S.O. 1927, c. 222, ss. 140 (2), 142 (1), 145 (1), 146, 163 (1)—Preferred beneficiaries—Designation of beneficiary by policy—Alteration by will—Effectiveness of alteration—Document accepting participation in Employees' Savings and Profit Sharing Fund—Designation therein of beneficiary in case of death—Whether testamentary in character.

M. (now deceased) took out policies of insurance on his life, designating therein his wife as beneficiary. Later by his will he declared that "all insurance policies on my life, now payable to my wife" should be paid to his executor in trust for the use and benefit of his wife and mother

*PRESENT:—Duff C.J. and Rinfret, Cannon, Crocket and Hughes JJ.

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upon the same trusts, terms and conditions as if they had formed part of the residue of his estate; and he left the residue of his estate to his executor in trust to divide it into two equal shares to be held as separate trust funds, one for his wife, the other for his mother, during life time, each to receive the net income from her share, with power of encroachment on corpus according to need, in the executor's discretion; the survivor to have the benefit, in the same manner, of the balance of the other's share added to her own, and on the survivor's death, the trust to terminate and the whole balance to be paid to M.'s sister C., if living, otherwise to her then surviving issue. By the Ontario *Insurance Act,* where the insured designates as beneficiary or beneficiaries a member or members of the class of "preferred beneficiaries" (which class includes a wife and mother, but not a sister or her issue), a trust is created, and, so long as any member of the class remains, the insurance money apportioned to a preferred beneficiary shall not (except as otherwise provided in the Act) be subject to the control of the insured, or of his creditors, or form part of his estate. Sec. 146 provides that, notwithstanding the designation of a preferred beneficiary or beneficiaries, the insured may subsequently restrict, limit, extend or transfer the benefits to any one or more of the class to the exclusion of any or all others of the class, "or wholly or partly to one or more for life or any other term or subject to any limitation or contingency, with remainder to any other or others of the class." Sec. 163 (1) provides for power to appoint trustees.

Held (affirming judgment of the Court of Appeal for Ontario, [1934] O.R. 371): While the gift of remainder over to C. or her issue was not competent (as going outside the preferred class), yet the alteration of beneficiaries by the will was not wholly void. The phrase in s. 146 "with remainder to any other or others of the class" is severable and not conditional. Sec. 146 means that it is competent for the insured to transfer absolutely the rights of one preferred beneficiary to another preferred beneficiary, or, within the class, to transfer or leave, as the case may be, a limited estate such as a life estate, an estate for a term, an estate subject to a limitation, or an estate in remainder. The insurance moneys in question should be dealt with as directed in the will, except that, should the mother predecease the widow, the whole balance of the insurance moneys should then belong to the widow absolutely, and should the mother survive the widow, then on the mother's death the whole balance of the insurance moneys should revert to the widow's estate.

M. had joined his employer's "Employees' Savings and Profit Sharing Fund." The plan was intended to furnish to each participating employee (*a*) who served until retirement on account of age, a help to future maintenance, (*b*) who served for an extended period but not until retirement on account of age, a substantial accumulated sum, (*c*) who died while an employee, help towards an income for family or dependents. An employee might withdraw at any time, receiving thereupon an amount, or a share of the fund, determined according to length of service. If a participating employee died, a share of the fund was payable to his designated beneficiary or beneficiaries. He might designate the beneficiary by his "Employee's Acceptance" (signed on joining the plan) or by an instrument signed and lodged with the trustees of the fund, or by will, and might from time to time revoke the benefits or change the

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beneficiaries or divert the money to his own estate. In his "Employee's Acceptance" M. directed the trustees (*a*) upon his withdrawal to pay to him the amount to which he was entitled under the plan, (*b*) upon his death to pay the amount to which he was entitled to his wife, or otherwise as he might have last designated by writing lodged with the trustees or by will. There was only one witness to his signature.

Held (affirming judgment of the Court of Appeal, *supra*): The "Employee's Acceptance" designating M.'s wife as beneficiary was testamentary in character and, as it had only one witness, was ineffective to make her a beneficiary, and his share in the fund formed part of his estate. *Cock* v. *Cooke*, L.R. 1 Pro. & Div. 241, at 243 *in the Goods of Baxter*, [1903] P. 12, and other cases, cited).

APPEAL by the widow of J. C. MacInnes, deceased, from the judgment of the Court of Appeal for Ontario (1) which (varying the judgment of Garrow J. (2) on a motion for the opinion and direction of the Court upon certain questions arising in the administration of the estate of said deceased) held that the benefit to appellant as designated beneficiary in each of two policies of life insurance had been altered by the will of said deceased (to the extent as described in the judgment now reported which affirmed the said judgment of the Court of Appeal) and that the appellant, as the beneficiary in case of deceased's death designated by deceased in a certain document, did not take the amount payable on deceased's death out of a certain "Employees' Savings and Profit Sharing Fund" in which the deceased had participated, but that the amount formed part of deceased's estate. The material facts of the case and the questions in issue are sufficiently stated in the judgment now reported and are indicated in the above headnote. The appeal to this Court was dismissed with costs.

W. E. P. DeRoche for the appellant.

McGregor Young K.C. (as Official Guardian) for infant children of respondent Mamie Campbell, and (by appointment of the Court) for her unborn issue.

H. A. O'Donnell K.C. for the respondents Margaret MacInnes, Mamie Campbell, and certain of the latter's children.

K. G. Morden for respondent Executor.

DUFF C.J.—I concur in the dismissal of the appeal.

(1) [1934] O.R. 371; [1934] 3 D.L.R. 302.

(2) [1934] O.R. 120; [1934] 1 D.L.R. 733.

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

HUGHES J.—On May 19th, 1924, the late J. C. MacInnes took out a policy of insurance on his life in the sum of $1,000 in the National Life Assurance Company of Canada. He designated the beneficiary as follows "Annie MacInnes—Wife."

On November 29th, 1927, he took out a policy of insurance on his life in The Travellers Insurance Company and again designated as beneficiary his wife, Annie MacInnes.

The testator was, in his lifetime, an employee of The Robert Simpson Company, Limited. This company had what was known as an Employees' Savings and Profit Sharing Fund managed by a board of trustees. The company contributed to the Fund and each participating employee contributed five per cent of his wages, not exceeding $100 per year, and certain bonuses. The employee was entitled to withdraw from the plan at any time. If he withdrew before ten years, he received what he personally had put in together with five per centum interest. If he withdrew after ten years, he received a share of the full Fund. If an employee died, his interest was a share in the full Fund regardless of whether he had or had not served the company ten years. The late J. C. MacInnes accepted membership in the plan in September, 1926, and designated the appellant his beneficiary. There was only one witness to the execution of this document.

On July 31st, 1931, he duly made his last will and testament. The fourth to sixth clauses are important and it may be well to give them textually:—

Fourth: I will and declare that all insurance policies on my life, now payable to my wife, shall be payable and paid to Chartered Trust and Executor Company in trust for the use and benefit of my said wife and my mother upon the same trusts, terms and conditions as if the said proceeds had formed part of the residue of my estate.

Fifth: All the rest, residue and remainder of my estate both real and personal of whatsoever nature and wheresoever situate, I give, devise and bequeath to Chartered Trust and Executor Company in trust to divide the same into two equal shares which shall be held in trust as *Separate Trust Funds,* one for the use and benefit of each of my wife, Annie MacInnes, and my mother Margaret MacInnes, during her lifetimes as follows: During her lifetime each of my said wife and mother shall receive the net income from her share of the trust estate in convenient instalments, together with such portions of the principal thereof as may with the said income be necessary from time to time in

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the discretion of my trustee for her proper support and maintenance. In the event of sickness, accident or other emergency arising affecting the life, welfare or happiness of my said wife or mother my trustee is authorized to pay to her such further portions of the principal of her share necessary in its discretion under the circumstances.

Upon the death of either my wife or mother the balance of her share shall be continued in trust and added to the share of the other of them, and shall be used and held for her benefit in the same manner as her original share in the trust estate hereby created.

Upon the death of the survivor of my said wife and mother the trust shall terminate, and the whole undistributed balance of the trust estate shall be forthwith paid over to my sister Mamie Campbell, if living, otherwise to her then surviving issue per stirpes.

Sixth: Upon my death it is my sincere wish that my wife and mother or the survivor of them release to my estate any interest that they or she may have or has as preferred beneficiaries or preferred beneficiary, in the proceeds of my insurance policies now in force, in order that the distribution herein set forth may be consummated.

The request of the testator in the sixth clause of the will was of no avail, and the executor and trustee moved by originating notice for the opinion and direction of the Supreme Court of Ontario on two questions:—

(*a*) Is the declaration attached to each policy of insurance, declaring the moneys payable thereunder to the widow, a preferred beneficiary, altered or varied in any way by the said Will?

(*b*) Does the document dealing with the Robert Simpson Co. Ltd. Profit Sharing Fund create a trust of the said fund in favour of the widow, or is said fund a part of the estate?

On January 9th, 1934, the Honourable Mr. Justice Garrow gave judgment on the motion, declaring that question (*a*) should be answered in the affirmative and directing that the insurance moneys should be paid to the executor and trustee and divided into two equal trust funds, free from payment of debts, the income from one to be paid to the widow with power to encroach on corpus, and the income from the other to be paid to the mother with power to encroach on corpus, and that, on the death of either the widow or the mother, the survivor should have absolutely what remained of both funds. The learned judge in effect held that the gift over to the sister Mamie Campbell, if living, otherwise to her then surviving issue per stirpes, was severable and alone was void. As to question (*b*) the learned judge held that the document was testamentary, and that, as it had only one witness, the funds formed part of the estate.

The widow appealed to the Court of Appeal for Ontario, which affirmed the answer to (*b*), and varied the answer to (*a*) by providing that, if the widow should predecease the mother, the income from the whole insurance fund should be paid to the mother, with power to encroach on corpus, during her lifetime, and, on the subsequent death of the mother, the remainder of the fund should revert to the estate of the widow; and, in the event of the mother predeceasing the widow, the balance of the fund should thereupon belong to the widow absolutely.

From this judgment, the widow now appeals to this Court.

As to question (*a*), some provisions of the Ontario *Insurance Act* are more or less relevant. Section 140 (2) provides that preferred beneficiaries are the husband, wife, children, grandchildren, father and mother of the person whose life is insured. Section 142 (1) provides that, subject to the rights of beneficiaries for value and assignees for value and to the provisions of the Act relating to preferred beneficiaries, the insured may designate the beneficiary by the contract or by a declaration, and may from time to time by any declaration appoint, appropriate or apportion the insurance money, or alter or revoke any prior designation, appointment, appropriation or apportionment, or substitute new beneficiaries . . . Section 145 (1) provides that where the insured, in pursuance of the provisions of section 142, designates as beneficiary or beneficiaries, a member or members of the class of preferred beneficiaries, a trust is created in favour of the designated beneficiary or beneficiaries, and, so long as any of the class of preferred beneficiaries remains, the insurance money, or such part thereof as is or has been apportioned to a preferred beneficiary, shall not, except as otherwise provided in the Act, be subject to the control of the insured, or of his creditors, or form part of the estate of the insured. Section 146 provides that, notwithstanding the designation of a preferred beneficiary or beneficiaries, the insured may subsequently exercise the powers conferred by section 142 so as to restrict, limit, extend or transfer the benefits of the contract to any one or more of the class of preferred beneficiaries to the exclusion of any or all others of the class, or wholly or partly to one or more for life or any other term or subject to any limi-

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tation or contingency, with remainder to any other or others of the class. Section 163 (1) provides that the powers conferred upon the assured by that Part of the Act (which contains section 146 also) shall include power from time to time to appoint trustees for any beneficiary or beneficiaries.

The appellant contends that by virtue of section 145 (1) any attempt on the part of an assured to control the insurance money where a preferred beneficiary has been designated is void unless expressly permitted by some other provision of the Act; and that section 146 does not permit the alteration attempted by the will which purports to change the full ownership of the wife in the insurance moneys into a life estate for her in one-half and into a life estate for the mother in the other half, each with power to encroach on corpus, with remainder over to a sister of the assured, if living, otherwise to her issue per stirpes. It is conceded that the remainder over is not competent, as the latter parties are not within the class of preferred beneficiaries. The appellant contends, in other words, that on this account the attempted alteration is wholly void because section 146 permits an alteration to a life estate in one or more of the preferred class only where the remainder is to "any other or others of the class." The contention of the appellant necessarily implies that the phrase "with remainder to any other or others of the class" is a condition to the validity of such an alteration of the rights of a preferred beneficiary or beneficiaries so long as any of the class of preferred beneficiaries remains. An examination of the history of the statutory provisions in question does not throw much light on the question. It is, however, mainifest that section 146 is intended to be an enlarging enactment. This seems clear from the use of the words "notwithstanding," "extend" and "transfer" in section 146 and from the opening words of section 163, "The powers conferred upon the insured by this Part with regard to the * * * alteration or revocation of such designation or appointment * * *". Section 146 clearly purports to enlarge the power of the assured over the insurance money in extending or transferring the benefits of the contract among members of the preferred class. It is true that it is a restraining enactment at the same time, but it is re-

straining only in regard to the rights of the preferred beneficiaries which may, by the assured, be restricted, limited, extended or transferred to any one or more of the class of preferred beneficiaries to the exclusion of any or all others of the class. In my opinion, the phrase "with remainder to any other or others of the class" is severable and not conditional. In other words, the section means that it is competent for the assured to transfer absolutely the rights of one preferred beneficiary to another preferred beneficiary, or, within the class, to transfer or leave, as the case may be, a limited estate such as a life estate, an estate for a term, an estate subject to a limitation or an estate in remainder.

(*b*) The Revised Plan of The Robert Simpson Company Limited Employees' Savings and Profit Sharing Fund states that the intention of the Plan is to furnish to each participating employee:

(*a*) Who remains an employee until retirement on account of age, an important contribution to future maintenance;

(*b*) Who serves for an extended period of years, but not until retirement on account of age, a substantial accumulated sum;

(*c*) Who dies while an employee, assistance in providing an income for family or dependents.

The Plan further states that participation in it will be entirely voluntary. Any employee is eligible to participate after one year of service and as long thereafter as he is employed. In order to join, the employee must sign an "Employee's Acceptance" and deposit the same with the Board of Trustees. Each participating employee deposits 5 per centum of his wages, not exceeding $100 yearly, and certain bonuses to the credit of the Fund. The company contributes 5 per centum of its net profits and The Robert Simpson Eastern Limited 5 per centum of the net profits of its mail order branch at Toronto. Provision is made for a Board of five Trustees selected by the company and for the vesting of the Fund in and the management of the Fund by the Board of Trustees, who stand possessed of the Fund and the investments, and of the interest of each participating employee upon the trusts and conditions and for the purposes of the Plan. An em-

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ployee who has not completed ten years of service may withdraw from the Plan at any time and shall thereupon be entitled to the amount deposited by him with interest at 5 per centum per annum with minor adjustments. If there is a balance at the credit of the employee's account, it will revert to the Fund. A participating employee may, according to the Plan, after ten years of service withdraw and shall thereupon be entitled to the full balance at his credit with minor adjustments. Upon the death of a participating employee, the full balance at his credit less minor adjustments shall be paid to such beneficiary or beneficiaries as the employee may have designated in writing lodged with the trustees, or by will. A participating employee may designate the beneficiary by the "Employee's Acceptance" or by an instrument in writing signed and lodged with the Trustees or by will, and the employee may from time to time revoke the benefits or change the beneficiaries or divert the money to his own estate.

On September 9th, 1926, the late J. C. MacInnes executed an "Employee's Acceptance" and joined the Plan. In it he authorized the company to pay to the Board of Trustees of the Fund the bonus to which he might yearly be entitled and also 5 per centum of his wages and he directed the Board of Trustees provided by the Plan, (*a*) upon his withdrawal to pay to him the amount to which he was entitled in accordance with the Plan, (*b*) upon his death to pay the amount to which he was entitled to his wife, Annie MacInnes, or otherwise as he might have last designated by writing lodged with the Board of Trustees or by will. There was only one witness to his signature.

On July 31st, 1931, as above stated, the late J. C. MacInnes made his last will and testament. On June 17th, 1932, he assigned and transferred to the Bank of Montreal his interest in the Fund as collateral security for a loan. He covenanted that he had full power to assign the same and that he would execute such further assignments as might be required. After his death, the debt was paid off by the executor and trustee.

The precise question is whether the "Employee's Acceptance" with the designation of Annie MacInnes as beneficiary is a trust in her favour or a testamentary instrument. If the latter, it is void, having only one wit-

ness. On this question the words of Sir J. P. Wilde in *Cock* v. *Cooke* (1) are frequently quoted:

> It is undoubted law that whatever may be the form of a duly executed instrument, if the person executing it intends that it shall not take effect until after his death, and it is dependent upon his death for its vigour and effect, it is testamentary.

Shortly afterwards, Lord Penzance in *Robertson* v. *Smith and Lawrence* (2), said that the guiding principle in determining whether a paper was or was not testamentary was this—that it would be held testamentary if it was the intention of the maker that the gifts made by it should be dependent on his death. In *In the Goods of Joseph Baxter* (3) referred to by the Honourable Mr. Justice Middleton in the Court of Appeal, consideration was given to a nomination paper executed by the nominator under section 25 of the *Industrial and Provident Societies Act* (1893). The paper was signed in the presence of two witnesses. It was invalid as a nomination paper because the amount it purported to dispose of was in fact over £100, but it was held testamentary and admitted as a will. Section 25 (1) provided that a member of a registered society might in writing nominate any person to or among whom his property in the society in whole or part should be transferred at his decease provided the amount credited to him in the books of the society did not then exceed £100. Section 25 (2) provided that a nomination so made might be revoked or varied by a similar writing but not by the will of the nominator. Joseph Baxter on January 6th, 1899, signed a nomination paper whereby he purported to give the whole amount at his credit at the time of his death to his nephew John Baxter. The nominator died on September 21st, 1901. After the death John Baxter applied for payment but was refused. A lawful sister and next of kin of the deceased then applied for and obtained a grant of letters of administration, she having sworn that Joseph Baxter died intestate. John Baxter then moved the court to revoke the letters of administration and to pronounce the nomination paper a will duly executed. Gorell Barnes J. held that, as the document was not operative as a nomination, subsection 2 had no effect, and granted administration with the will annexed to the

(1) (1866) L.R. 1 Pro. & Div. 241 at 243.
(2) (1870) L.R. 2 Pro. & Div. 43.
(3) [1903] P. 12.

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applicant as the sole beneficiary. This case was referred to in *Griffiths* v. *Eccles Provident, etc., Society, Limited* (1). The question in the latter case was simply whether the word "then," in section 25, subsection 1, referred to the date of the nomination paper or the date of death. It was held by Vaughan Williams, L.J., and Kennedy, L.J., that the word "then" referred to the date of the nomination, Farwell, L.J., dissenting. The point decided in that case is not important in the case at bar, but certain statements in the judgments as to the testamentary character of a nomination under section 25 are helpful. Vaughan Williams, L.J., said, at page 282:—

> The view which I am taking is not a novel view, because in *In the Goods of Baxter* (2), this very question was raised and decided. Gorrell Barnes J. said in that case: "In my judgment this document is testamentary. It fails, under the provisions of the Industrial Societies Act, 1893, to operate as a nomination paper. Under that Act, a member of the society may, by writing under his hand, nominate a person or persons to whom his interest in the society is to go after his death, * * *"

Kennedy, L.J., agreed with the judgment of Vaughan Williams, L.J. In his dissenting judgment, Farwell, L.J., said, at page 284:

> The nomination in pursuance of such a power is, like any other testamentary disposition, revocable, as, under the Wills Act, a will is revocable, and, like a will, does not, prior to the nominator's death, affect his property, but leaves him free to deal with it as he pleases, either by withdrawing it in accordance with the rules of the society, or receiving payment of his loans to the society, without any power of interference by the nominee. The nominator is in the position of a testator, and the nominee of a legatee.

The decision of the Court of Appeal was affirmed by the House of Lords (3). Earl Loreburn, L.C., was of opinion that the judgment of the Court of Appeal should be affirmed. Lord Mersey said, page 490, that, once made, the nomination took effect, not by creating any charge or trust in favour of the nominee as against the nominator, but by giving to the nominee a right as against the society, in the event of the death of the member without having revoked the nomination, to require the society to transfer the property in accordance with the nomination. Until death the property was the property of the member, and all benefits accruing in respect of it during his lifetime were his also. Lord Atkinson concurred in the judgment

(1) [1911] 2 K.B. 275. (2) [1903] P. 12, 14.
(3) [1912] A.C. 483.

of Lord Mersey. Lord Shaw of Dunfermline dissented on the point involved in the case, but nowhere was it suggested in the Court of Appeal or in the House of Lords that the nomination was not testamentary in character.

It has already been pointed out that the intention of the Plan in the case at bar was to furnish to each participating employee who remained until retirement on account of age, a contribution to future maintenance; to each employee who served an extended term of years, but not until retirement on account of age, a substantial accumulated sum; and to each employee who died, assistance in providing for his family or dependents. An employee with less than ten years of service could withdraw for himself approximately the amount deposited with interest. An employee after ten years of service could withdraw for himself approximately the balance at his credit. Any participating employee could revoke the benefits or change the beneficiaries or divert the money to his estate by instrument in writing or by will. The "Employee's Acceptance" did not, in the words of Lord Mersey, *supra,* create any charge or trust in favour of the nominee against the nominator. Until death the beneficial interest in the amount which the participating employee could withdraw was in the employee. If he died while a participating employee, his beneficiary had a right to his share of the Fund. The right of the beneficiary was dependent upon the death of the participating employee for its vigour and effect.

I am, therefore, of opinion that the appeal should be dismissed with costs payable by the appellant.

Appeal dismissed with costs.

Solicitors for the appellant: *Johnston, Grant, Dods & MacDonald.*

Solicitors for the respondents Margaret MacInnes, Mamie Campbell, and certain children of the latter: *Stewart & O'Donnell.*

Official Guardian, representing infants and unborn issue of Mamie Campbell: *McGregor Young.*

Solicitors for the Executor of the Estate of Deceased: *Armstrong & Sinclair.*

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*Oct. 22, 23
*Dec. 12

FRED M. BROWN (PLAINTIFF).....APPELLANT;

AND

CANADA BISCUIT COMPANY, LIMITED (DEFENDANT) ..... } RESPONDENT.

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

Master and servant—Contract—Trial—Action for damages for alleged wrongful refusal by employer to permit employee to perform duties for which he was employed—General verdict for plaintiff—Trial judge's charge to jury—Alleged misdirection—Objection on appeal that specific questions not put to jury—Sufficiency of evidence to support verdict.

APPEAL by the plaintiff from the judgment of the Supreme Court of New Brunswick, Appeal Division (1), setting aside the verdict for the plaintiff at the trial, and granting a new trial.

The plaintiff claimed damages in the amount of the compensation which would have been payable by the defendant to him for his services (calculated at the rate of $5,000 per year from October 19, 1929, to April 1, 1931), had the defendant not wrongfully refused, as alleged, to permit him to perform the duties of Chief of Factory Planning Division of the defendant's Moncton plant, as set out in a certain agreement or contract of employment dated April 3, 1928. At the trial the jury found a general verdict for the plaintiff for $7,261.40, and judgment was entered for him for that sum. The Appeal Division set aside the verdict and ordered a new trial, it being of opinion that there was misdirection in the trial judge's charge to the jury, that the verdict was against the weight of evidence, and that specific questions should have been put to the jury. The plaintiff appealed to this Court.

After hearing arguments of counsel, this Court reserved judgment and on a subsequent day delivered judgment allowing the appeal and restoring the judgment at trial, with costs throughout. Reasons for judgment were delivered by Duff C.J. and by Cannon J. (with whom Crocket, Hughes and Maclean (*ad hoc*) JJ. concurred. Duff C.J. in his reasons also expressed concurrence with Cannon J.).

*PRESENT:—Duff C.J. and Cannon, Crocket, Hughes and Maclean (*ad hoc*) JJ.

(1) 8 M.P.R. 102; [1934] 3 D.L.R. 216.

Duff C.J. was of opinion that the issue for the jury was stated in the trial judge's charge clearly and with substantial accuracy; that, while an isolated sentence here and there might, if separated from its context, convey a false impression, the charge as a whole could not operate unfairly to the defendant's prejudice; this view being fortified by the fact that no exception was taken by counsel at the trial. He was also of opinion that the evidence was not insufficient to support the verdict. As to the objection that specific questions should have been put to the jury, he pointed out that the matter was one peculiarly for the judgment of the trial judge; it did not appear that counsel suggested that specific questions should be addressed to the jury; the trial judge might well have considered the course he adopted as the more just and convenient one. He concluded as follows:

"Having reached the conclusion that there was no substantial misdirection, that the issue for their decision was adequately put before the jury, and that there was evidence upon which they might reasonably determine that issue as they did (and the learned trial judge having exercised the discretion with which the law invests him as to the form in which the jury was to be asked to express this finding), the appellant could not properly be deprived of the verdict he has obtained, because I might think that, if I had been in his place, I might have considered it convenient to submit specific questions; unless, at all events, it plainly appeared that, because of the course taken by the trial judge, the respondents had suffered some substantial wrong or prejudice."

Cannon J., after dealing with the facts and the evidence at length, and discussing the trial judge's charge to the jury, expressed the opinion that the trial judge had not misdirected the jury; that the trial judge was entitled to use his discretion about putting specific questions to the jury under ss. 41 and 42 of the New Brunswick *Judicature Act;* that his charge explained clearly to the jury upon what findings of fact they could find generally for either plaintiff or defendant. He pointed out that it did not appear that counsel for defendant required the judge to submit specific questions. As to non-direction, in the absence of a request by counsel to the judge to add to his

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charge, Cannon J. referred to *B.C. Electric Ry. Co.* v. *Key* (1), and held that, under the circumstances of this case, a new trial for non-direction should not be granted, as the interests of substantial justice did not require it, quoting from the judgment of Lord Morris in *Seaton* v. *Burnand* (2). Upon the verdict and the evidence he concluded as follows:

"We cannot reach the conclusion that the verdict of the jury was unreasonable or against the weight of the evidence, although we might have reached a different view if we had been members of the jury. There was sufficient evidence, written and verbal, to justify the verdict, and we cannot substitute ourselves for the jury in what by law is their exclusive realm. There was testimony as to the exact scope of the appellant's duties brought by both sides, and the jury were entitled to believe the appellant; they had sufficient evidence before them to find that the duties as defined in Walker's letter were not those of the Chief of the Planning department and constituted a breach of the contract by the respondent. The jury also must have found, under the judge's directions, that at all times the appellant was willing to perform his duties and that, instead of being called upon to do so, he was wrongfully refused the right to perform them."

Appeal allowed with costs.

O. M. Biggar K.C. and *H. T. Reilly* for the appellant.

James Friel K.C. and *P. J. Hughes K.C.* for the respondent.

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(1) [1932] Can. S.C.R. 106, at 108, 110, 111.

(2) [1900] A.C. 135, at 145.

THE CITY OF HALIFAX.....APPELLANT;

AND

HALIFAX HARBOUR COMMISSIONERS.....RESPONDENT.

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*May 9, 10
*Decr. 21

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA EN BANC

Assessment and taxation—Crown—Assessment of Halifax Harbour Commissioners for business tax as "occupier" within s. 357 (1) of Halifax City Charter—Occupation for the Crown—The Halifax Harbour Commissioners' Act, 1927, c. 58 (Dom.).

The Halifax Harbour Commissioners, who occupy the Crown property of Halifax Harbour for the exercise of their powers under 17 Geo. V (1927, Dom.), c. 58, are not assessable for business tax as an "occupier" within s. 357 (1) of the Halifax City Charter (1931). The relation of the Commissioners to the Crown in respect of their occupation of the harbour property is of such a character as to constitute that occupation an occupation "for the Crown" in the sense of the principle stated in *The Queen* v. *McCann*, L.R. 3 Q.B. 141, at 145-6, and as elucidated in its application in other cases. (*Coomber* v. *Justices of Berks*, 9 App. Cas. 61, and other cases, cited. *Fox* v. *Government of Newfoundland*, [1898] A.C. 667, and *Metropolitan Meat Industry Board* v. *Sheedy*, [1927] A.C. 899, distinguished, in view of the constitution, duties and powers of the bodies there in question). Provincial legislation to tax the Commissioners as occupier of the harbour property would be *ultra vires;* and the general taxing words of the City Charter should be read as excluding such a tax.

APPEAL by the City of Halifax from the judgment of the Supreme Court of Nova Scotia *en banc* (1) holding in effect that the Halifax Harbour Commissioners (respondents) occupy the Halifax Harbour property as agents of the Crown and are exempt from the business tax (for which they were assessed) imposed by The City Charter (1931) of the City of Halifax. Certain questions were submitted in a case stated by the Court of Tax Appeals of the City of Halifax, under s. 406 of the City Charter, for the Judge of the Supreme Court of Nova Scotia presiding in Chambers at Halifax, and were referred by Hall J. to the Supreme Court *en banc.*

The stated case sets out (*inter alia*) as follows: The Halifax Harbour Commissioners is a body corporate incorporated by c. 58 of the Statutes of Canada, 1927. It

*PRESENT:—Duff, C.J., and Rinfret, Cannon, Crocket and Hughes, JJ.

(1) 8 M.P.R. 263; [1934] 3 D.L.R. 614.

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does not own any real estate within the City of Halifax, the title to all real property occupied or operated by it being vested in His Majesty the King in the Right of the Dominion of Canada. It carries on operations at the Port of Halifax, as provided by said c. 58 of the Statutes of Canada, 1927, and for such purpose controls, operates and occupies certain lands in the City of Halifax. On February 6, 1933, Halifax Harbour Commissioners was assessed under the provisions of the Halifax City Charter (1931) on the assessment roll of the City of Halifax for $450,000 in respect of business tax for property occupied for business or professional purposes, as provided by s. 357 (1) of the Halifax City Charter (1931) (said property being that above referred to). The Commissioners appealed to the Court of Tax Appeals for the City of Halifax. That court stated a case in writing for the opinion of a Judge in Chambers. Certain sections of the City Charter are set out, including the following:

356. The taxation of the City shall consist of

(*a*) Business Tax,
(*b*) Household Tax,
(*c*) Licences and Special Taxes,
(*d*) Poll Tax and Non-residential Tax,
(*e*) Real Property Tax,

all as hereinafter specified and defined.

357. (1) The Business Tax shall be a tax payable by every occupier of any real property for the purposes of any trade, profession or other calling carried on for purposes of gain, except such as is exempt as is herein provided, and shall be payable by such occupier, whether as owner, tenant or otherwise and whether assessed as owner of such property for real property tax or not.

(2) [Tax rate and percentage of value of premises on which rate fixed].

(3) The occupant of any real property for any other purpose other than for the purpose of any trade, calling or profession, or other calling carried on for purposes of gain, and not for residential purposes, and not otherwise exempted, shall be liable to a tax of one-half of one per cent on the value of the premises so occupied. 1921, c. 77, s. 20; c. 78.

370. The following real property shall be exempt from real property tax:

(*a*) the property of His Majesty used for Imperial, Dominion or Provincial purposes;

* * *

371. No household tax or business tax shall be paid by the occupiers of any of the foregoing properties declared to be exempt from real property tax if such occupiers are the owners thereof and are occupying the same solely for the purposes of the association or other body specified as entitled to exemption.

372. If any real property entitled to exemption is let for residential or business purposes, the portion so let shall cease during the period of such letting to be entitled to any exemption and the occupant thereof shall be liable to household tax or business tax as the case may be.

373. No exemption from taxation conferred by this Act or under the authority thereof shall apply to any person occupying for a residential, recreational, commercial or industrial purpose any building or land, the property of His Majesty, as represented by either the Government of Canada or of the Province of Nova Scotia; and every person so occupying any such land shall be rated and taxed in like manner as if he were the actual owner of such land and shall be liable to the rates and taxes assessed and rated in respect thereto, 1925, c. 83, s. 3.

374. Except as is herein otherwise provided, if any property is let to the Crown or to any person, corporation or association exempt from taxation, such property shall be deemed to be in the occupation of the owner thereof for business or residential purposes as the case may be, and he shall be assessed and rated for household tax or business tax according to the purpose for which it is occupied.

The stated case sets out that the Commissioners allege, and the City denies, that the assessment was illegal on the ground that the Halifax Harbour Commissioners is exempt from business tax by virtue of s. 125 of the *British North America Act* and the provisions of the City Charter, the reasons urged on behalf of the Commissioners being that:

(1) The said Halifax Harbour Commissioners does not own any real property in the City of Halifax.

(2) The only property at present occupied by the Commissioners is property of His Majesty used for Dominion purposes, which property is exempt from taxation by virtue of the British North America Act.

(3) Under the City Charter (1931) no business tax is payable in respect of the occupancy of any property exempt from taxation.

(4) The said Halifax Harbour Commissioners does not occupy any building or land whatever for any commercial or industrial purpose.

(5) All real property, lands and buildings within the City of Halifax at present occupied or used by the Commissioners are the property of His Majesty and are used for Dominion purposes and are not used for commercial or industrial purposes, and the said Halifax Harbour Commissioners in using and occupying such land is doing so as the agent and servant of the Government of Canada and for governmental purposes only.

The questions reserved for decision were:

(1) Whether the Halifax Harbour Commissioners are occupiers of any real property within the meaning of the City Charter (1931).

(2) If the answer to the first question is in the affirmative whether the Halifax Harbour Commissioners are occupiers of any real property for the purpose of any trade, profession or other calling carried on for the purpose of gain.

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(3) If the answer to the foregoing questions are in the affirmative and the Halifax Harbour Commissioners are occupiers of real property for the purposes of any trade, profession or other calling carried on for the purposes of gain, whether they are exempted from Business Tax by any provision of the Halifax City Charter or by any other enactment.

(4) If the answers to questions 1 and 2 are in the negative and it is decided that the Halifax Harbour Commissioners are not liable to be assessed for Business Tax whether the tax provided by Subsection 3 of Section 357 can be assessed against the Halifax Harbour Commissioners.

(5) How the costs of the application are to be borne.

In the Court *en banc,* Graham J., with whom Carroll and Hall JJ. concurred, came to the conclusion, "with some doubt," that "the Commissioners are to be considered agents of the Government," and that the third question should be answered in the affirmative. Doull J. held that the Commissioners were "exempt from business tax as agents and servants of the Crown occupying the property on behalf of the Crown." By the formal judgment of the Court *en banc,* the questions submitted were answered as follows: (1) Yes, (2) Yes, (3) Yes, (4) No, (5) There should be no costs to either party.

The City of Halifax appealed.

C. P. Bethune for the appellant.

C. B. Smith K.C. for the respondent.

The judgment of the Court was delivered by

DUFF, C.J.—The question, the answer to which, in my view, must determine this appeal, is whether or not the respondents, the Halifax Harbour Commissioners, fall within the description "occupier" within the meaning of section 357 (1) of the Halifax charter. The conclusion I have reached is that this question must be answered in the negative.

The governing principle can, perhaps, for the purposes of this case, be most conveniently stated in the words of Lord Blackburn (Blackburn J. as he then was), in his

judgment in *The Queen* v. *McCann* (1). He is there dealing with an issue raised as to the liability of the Commissioners of Works and Buildings to be rated to the relief of the poor under 43 Eliz., ch. 2, s. 1, in respect of their occupation of a bridge across the Thamas at Chelsea. He says:

> Since the decision relating to the Mersey Docks, as a general rule, the occupier of property from which profit is derived, is to be rated, without regard to the purpose to which the profits are ultimately appropriated; but property in the occupation of the Crown—the Crown not being named in the statute of Elizabeth—forms an exception to this rule; consequently where the Crown is the occupier of property it is not to be rated; and further, where property is occupied for the Crown it is not to be rated. It is on this principle that a servant of the Crown, who had taken a lease of premises to be used as barracks, as in *Lord Amherst* v. *Lord Sommers* (2), was held not liable to be rated; and this principle extends to the case of a person in occupation of premises, whether as servant or trustee for the Crown: and so far from being overruled in the case of *Mersey Docks* (3), this principle was affirmed.

The courts have had to decide, in a number of cases, whether property occupied for public purposes was occupied "for the Crown," or in trust for the Crown, within this principle. I think the principle is properly applicable to the construction of such an enactment as section 357. The rule has been uniformly followed in England and Scotland in the application of rating statutes, and one may fairly assume that one is not running counter to the intention of the legislature in applying it to a Canadian enactment *in pari materia* and expressed in terms not substatially differing in effect.

There are, morever, relevant considerations resting upon the circumstances that the respondents are a public body charged with the management and administration of property of the Crown in the right of the Dominion, and that their revenues are derived from charges collected in the course of such administration, and from tolls levied under the authority of the Parliament of Canada, in respect of the use of the public harbour of Halifax of which the Crown, in the right of the Dominion, is proprietor, to which it will be necessary to advert.

Before discussing these matters, it is advisable to consider the powers and rights of the respondents, under the

(1) (1868) L.R. 3 Q.B. 141, at 145-6
(2) (1788) 2 T.R. 372.
(3) *Jones* v. *Mersey Docks*, (1864) 11 H.L.C. 443, at 464.

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statute of 1927, by which they were incorporated, and subsequent statutes affecting them, and, in particular, the relation in which they stand, in the exercise of these powers, to His Majesty and His Majesty's Privy Council and Ministers of State for Canada.

The property occupied by the respondents consists of property belonging to the harbour of Halifax, and is the property of the Crown. The object and purposes of the Legislature in vesting the occupation of this property in the respondents are disclosed by the legislation we have to discuss. Broadly speaking, the duties of the Commissioners are, in general terms, of two descriptions. First, they are responsible for the management and administration of the harbour and of property belonging to the harbour and of facilities connected therewith; secondly, they are charged with the duty of regulating the exercise of public rights of navigation within the harbour, including the mooring, berthing, discharging or loading of vessels, and everything incidental thereto.

In the exercise of all their powers, they are, as we shall see, subject to the control of the Crown, exercised either through the Governor in Council, that is to say, the Governor, as the representative of His Majesty, acting upon the advice of His Majesty's Privy Council for Canada, or through the Minister of Marine and Fisheries. This is a matter of no little importance and it is right, therefore, to enter into particulars.

By section 8, the statute declares that nothing shall be deemed "to give the Corporation jurisdiction or control respecting private properties or rights" within the limits of the harbour as defined.

Then, by the same secton, it is enacted that the respondents shall have no right to enter upon, or to deal with, any property of the Crown, except when so authorized by Order in Council.

The respondents, by section 10, are given wide powers for the acquisition of real and personal property for the purposes of the harbour, but these powers can only be executed after approval by the Governor in Council. There is also, under the same section, a power to sell or lease, but subject to the same condition. The section, moreover, enacts that real property acquired under these

powers shall "be acquired in the name of, and vested in, His Majesty."

Where the respondents proceed (under the authority of the Government, of course) by way of expropriation, they are entitled to avail themselves of the provisions of the *Railway Act*, but, even in such proceedings, the powers vested by that statute in the Board of Railway Commissioners are to be exercised by the Governor in Council (section 13).

Again (section 14), the Governor in Council is authorized to transfer elevators, wharfs, piers, buildings, structures, machinery and equipment, the property of His Majesty, within the limits of the harbour, foreshores, water lots and other real property "to the jurisdiction of" the respondents, to be "subject to the control of and administration by" the respondents; but under such terms and contions as may be prescribed by the Governor in Council.

The respondents are empowered to make regulations by by-law, concerning the conduct and government of the Corporation, its officers and servants; the compensation or salaries to be paid to such officers or servants; the management, control and improvement of the property, real and personal, under its jurisdiction; the use of harbour facilities; the lease or allotment of harbour property, plant or facilities; the construction and maintenance of wharfs, piers, buildings and other structures within the harbour limits; the imposition and collection of rates and tolls on vessels and their cargoes, on goods or cargo landed, shipped or stored in the harbour, and for the use of any buildings, plant or facilities under the control of the Corporation; but no such by-law can have any force or effect until confirmed by the Governor in Council. The same observation applies to by-laws regulating the navigation of the harbour and matters incidental thereto.

For our present purposes, perhaps the most significant provisions of the statute are those relating to the sources of capital funds and revenue and the expenditure thereof. The contemplated sources of revenue appear to be the rates and tolls on vessels and cargoes, and on goods, and the charges for the use of buildings, plant and harbour facilities, which, as already mentioned, the respondents are empowered to impose by by-laws confirmed by the

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Governor in Council; and penalties imposed under like authority. As to the sources of capital funds, the respondents are, by the statute of 1927, invested with borrowing powers (section 18). These borrowing powers are given for the purpose of enabling the respondents to

construct, acquire, repair or improve wharves and other works and structures in the harbour;

but only

after the approval by the Governor in Council, on the recommendation of the Minister, of the plans, specifications and estimates in detail for the work proposed, and the amount proposed to be borrowed.

Debentures may be issued, secured upon the revenues or property receivable or controlled by the Corporation, and may be sold on terms approved by the Governor in Council.

It does not appear, from the statute of 1927 itself, whether or not it was supposed that the capital funds provided by borrowing should be obtained from or through the Government, or from other sources. However that may be, statutes were passed in substantially identical terms, except as to amounts, in the years 1928, 1929 and 1931, for providing the respondents with capital funds by loans from time to time from the Government of Canada, not exceeding a maximum named in each case.

Under the statute of 1928, the total amount to be advanced, which, the statute declares, it was understood would meet the total requirements of the respondents for the ensuing year, was not to exceed the sum of $500,000. The statute of 1929 authorized the advance of a total sum not exceeding $5,000,000 in addition to moneys already placed at the disposition of the respondents; and that of 1931, a further sum of $3,500,000.

It is material to refer to the conditions controlling the Governor in Council in making these advances. The purposes of the advances, the statutes declare in general terms, is to enable the respondents to construct such terminal facilities in the harbour of Halifax, according to plans approved by the Governor in Council, as may be necessary properly to equip the harbour. No loan, it is enacted, is to be paid, unless detailed plans, specifications and estimates, for the works on which the money is to be expended, satisfactory to the Minister of Marine, have been approved by the Governor in Council, before any part of the work has been commenced.

The respondents are required to

submit to the Minister of Marine and Fisheries, for approval, monthly applications for loans on account of the different items of construction of terminal facilities, accompanied by statements showing the total expenditure on these different items in detail, for the month which the loan is to cover, and any other statements required in such form as the Minister shall direct; and upon approval of the application, authority for the payment of the amount so applied for may be granted by the Governor in Council.

Upon any loan being made, debentures equal in par value to the loan, bearing interest at five per cent, payable half-yearly, are to be deposited with the Minister of Finance; and the principal and interest of the sums loaned are to be payable "by the Corporation out of all its property and assets and out of all its tolls, rates, dues, penalties and other sources of revenue and income" and charged thereon under the conditions laid down by section 19 of the Act of 1927.

The legislation provides no means of obtaining capital funds other than such borrowing, except the sale of property; and, in resorting to that, as well as in exercising their borrowing powers, the respondents are entirely under the control of the Governor in Council.

The property under the control of the respondents, other than its revenues, consists, therefore, of properties transferred by the Crown "to the jurisdiction of" the respondents, or "entered upon," with the authority of the Governor in Council; properties purchased with money taken from revenue, with the consent of the Governor in Council; properties acquired and constructed through the expenditure of moneys borrowed (which, in fact, seem to have been confined to moneys advanced by the Governor in Council under the legislation of 1928, 1929 and 1931); and, as regards this last mentioned class, the respondents, as we have seen, are, at every step in the course of the acquisition of such properties, under the control of the Minister of Marine and Fisheries and the Governor in Council.

The revenues, as already indicated, would be revenues derived from charges collected for the use of the property and facilities under the "jurisdiction" of the respondents, and tolls payable for the use of the port, and from penalties; all such charges and tolls and penalties being fixed by by-laws which must be approved by the Governor in Council.

The control over the expenditure is singularly rigorous. We have noticed the conditions under which moneys borrowed are disbursed. By section 19 (1) (*a*) all revenue is to

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be applied, first of all, in payment of the necessary expenses incurred in the collection of it, and

in the management and operation of the harbour services, and in the maintenance and ordinary repair of its works and facilities;

and, by the same clause, the expenditure of all revenue is subject to the supervision and control of the Minister. The compensation and salaries of all officers, assistants, engineers, clerks and servants are to be fixed by by-law, which must receive the approval of the Governor in Council.

By section 21 (*a*) the respondents are required to keep separate detailed accounts of receipts and disbursements on capital account, as well as on revenue account, and there is to be an audit by the Department of Marine and Fisheries.

Then, by section 20, the Minister may, when the gross revenue exceeds $50,000 per annum, require the respondents to submit at the beginning of each current year, an estimate of its expenditures on each of the different services of the harbour, (*a*) out of revenue, and (*b*) out of capital funds. These estimates are to be subject to the approval of the Minister; who may require the reduction of any item. And the statute requires peremptorily that the expenditure for the year shall be confined "to a total within the estimates so approved." This last is a statutory provision binding, apparently, upon the Minister and the Governor in Council, as well as on the respondents. But further, within the limits so fixed, the expenditure of all revenue is, as already mentioned, by section 19, subject to the supervision and control of the Minister. Any surplus of revenue, after payment of the costs of collection and services, is to be applied, first, in payment of interest on money borrowed, and, secondly, under the direction of the Minister, in the creation of a sinking fund.

The remaining provisions of the statute, except those concerned with the constitution of the Corporation, do not require any special comment save, perhaps, this: the powers of the respondents in respect of the collection of rates and tolls, and the enforcement and collection of penalties, and their rights in respect of the recovery of damages to their property are exceptional, and of such a character as to suggest that the services of the respondents are regarded by the statute as exclusively governmental services.

The constitution of the Corporation is important. There are three Commissioners, each of which is appointed by the Governor in Council on the recommendation of the Minister. Their tenure of office is "during pleasure." One of them is to be President, to be named from time to time by the Governor in Council. A Commissioner resigns his office by notice in writing to the Minister. The Governor in Council determines their remuneration, which is to be paid out of the revenue of the harbour.

I agree with the view unanimously accepted by the Supreme Court of Nova Scotia that the relation of the respondents to the Crown, in respect of the occupation for which they have been assessed, is of such a character as to constitute that occupation an occupation "for the Crown" in the sense of the principle as stated above, in the language of Lord Blackburn, and as elucidated in its application by the courts in England and by the Judicial Committee of the Privy Council.

It is not necessary, I think, to go through the authorities in detail. The judgments of Lord Blackburn and Lord Watson in *Coomber* v. *Justices of Berks* (1) show very clearly indeed the view accepted by these great judges as to the scope of the principle. They both adopt the statement of it by Lord Cairns in *Greig* v. *University of Edinburgh* (2) in these words:

> The Crown not being named in the English or Scotch statutes on the subject of assessment, and not being bound by statute when not expressly named, any property which is in the occupation of the Crown or of persons using it exclusively in and for the service of the Crown, is not rateable to the relief of the poor.

It is quite clear, however, that the phrase "service of the Crown" is not understood by them in any such limited sense as would exclude such services as those performed by the respondents. At page 68, Lord Blackburn, after referring to Lord Westbury's language in the *Mersey Docks* case (3), says:

> * * * in *Greig* v. *University of Edinburgh* (4) he more clearly shows what was his view by using this language "property occupied by the servants of the Crown, and (according to the theory of the Constitution) property occupied for the purposes of the administration of the government of the country, became exempt from liability to the poor-rate."

(1) (1883) 9 App. Cas. 61.
(2) (1868) L.R. 1 H.L., Sc. 348, at 350.
(3) (1864) 11 H.L.C. 443.
(4) (1868) L.R. 1 H.L., Sc. 348, at 354.

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He proceeds to say that Lord Cranworth (in his judgment in the *Mersey Docks case* (1)) was on his guard against being supposed to decide that all the earlier cases were right "in deciding that the purposes were those of the public government"; but that he does not impeach them.

Turning to the judgment of Lord Watson, we find him employing language pointing to the essential distinction as that between public purposes in the broad sense and (in Lord Blackburn's phrase) "purposes of the public government." At p. 73, Lord Watson says it was sufficient in the *Mersey Docks* case (2)

> to establish that occupation for what were strictly speaking public, though in no sense Government, purposes, was not, as regarded exemption from the poor-rate, in pari casu with the occupation of the Crown.

He seems to say that the point for consideration in such cases is whether or not the occcupation "must be held to be" for "a proper Government use," and this appears to be adopted by Lord Bramwell at p. 79.

To state again, in more summary fashion, the nature of the powers and duties of the respondents: Their occupation is for the purpose of managing and administering the public harbour of Halifax and the properties belonging thereto which are the property of the Crown; their powers are derived from a statute of the Parliament of Canada; but they are subject at every turn in executing those powers to the control of the Governor representing His Majesty and acting on the advice of His Majesty's Privy Council for Canada, or of the Minister of Marine and Fisheries; they cannot take possession of any property belonging to the harbour property without the consent of, and only upon such terms as may be imposed by, the Government; they cannot acquire property or dispose of property without the same consent; they can only acquire capital funds by measures taken under the control of the Government; they can only apply capital funds in constructing works and facilities under a supervision and control, the character of which has been explained; the tolls and charges which are the sources of their revenue they can only impose under the authority of the Government; the expenditure of revenues in the maintenance of services is under the control and supervision of a Government Department;

(1) (1864) 11 H.L.C. 443, at 508. (2) (1864) 11 H.L.C. 443.

the salaries and compensation payable to officers and servants are determined under the authority of the Government; the regulations necessary for the control of the harbour, the harbour works, officers and servants, the proceedings of the Corporation, can only take effect under the same authority; the surplus of revenue after providing for costs of services and the interest on the debenture debt goes into a sinking fund under the direction of the Minister; finally, they are appointed by the Crown and hold office during pleasure.

I cannot doubt that the services contemplated by this legislation are, not only public services in the broad sense, but also, in the strictest sense, Government services; or that the occupation of the Government property with which we are concerned is, in the meaning with which Lord Cairns used the words in the passage cited (and in the sense in which those words were interpreted by Lord Blackburn and Lord Watson), an occupation by persons "using" that property "exclusively in and for the service of the Crown."

It is not without importance to observe that, since Confederation, except in special cases where it has been found convenient to make provision for the administration of harbours by the appointment of harbour commissioners, the control, management and regulation of the matters committed to the charge of the respondents have been treated in this country as belonging to the services of the Crown.

By chapter 89 of the Revised Statutes of Canada (1927), section 4,

> * * * the use, maintenance, and ordinary repairs of all harbours, wharfs, piers and breakwaters constructed or completed at the expense of Canada, or in any way the property of Canada, and the making and enforcing of regulations concerning such use, maintenance and ordinary repairs, and the collection of tolls and dues for such use,

are placed under the control and management of the Minister of Marine and Fisheries. By the same statute (section 7), the Governor in Council is empowered "on the recommendation of the Minister" (of Marine and Fisheries) to "make rules and regulations for the use and management of such harbours, wharfs, piers and breakwaters" and to establish "a tariff or tariffs of the tolls and dues to be paid for the use of" them "to be levied

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on persons or vessels using them, and on goods, wares or merchandise landed or shipped on or from off them."

The statute substantially in its present form has been in effect since 1877. Prior to that date, the powers vested in the Department of Marine and Fisheries by the statute of 1877 had been exercised in part by that department, and in part by the Public Works Department. By chapter 42 of the statutes of 1872 it was enacted:

> 2. The Governor in Council may from time to time appoint a fit and proper person to be Harbour Master for the Port of Halifax, in the Province of Nova Scotia.
>
> 3. Every Harbour Master appointed under this Act shall be under the control of the Minister of Marine and Fisheries, to whom he shall furnish a report in writing and on oath, as soon as possible after the thirty-first day of December in each year, of his doings in office, and of the fees of office received by him during such year.
>
> 4. The rights, powers and duties of the Harbour Master for the Port of Halifax, shall be such as may from time to time be conferred and imposed upon him by rules and regulations made by the Governor in Council for the government of his office and of the Port of Halifax, and for his remuneration, which rules and regulations the Governor in Council is hereby authorized and empowered to make, and from time to time to alter, amend or repeal.

These provisions applied to the Port of Halifax down to 1927.

Two judgments of the Judicial Committee of the Privy Council are relied upon by the appellants. The first is *Fox* v. *Government of Newfoundland* (1). The question involved in that case was whether certain moneys owing to the boards of education of Newfoundland took priority over ordinary debts in the liquidation of a bank, as falling within the description "debts and claims due to the Crown or to the government or revenues of the Colony." The question considered by the Judicial Committee was whether or not these boards were agents of the government. It was held they were not. That view was based upon provisions of the statute by which the boards were constituted. Their Lordships held that,

> The appointment of boards for each of the three religious denominations, and the constitution of the board, indicate that it is * * * to have within the limit of general educational purposes a discretionary power in expending

the moneys transferred to it—"a power which is independent of the Government." There was provision for auditing of the accounts, but it was held that this was merely for

(1) [1898] A.C. 667.

the information of the Government and Legislature and not in order that any item of expenditure might be disallowed if the Government did not approve of it. The statute made a distinction between money to be expended by a board of education and money to be expended as the Governor in Council might determine.

It is quite evident that these considerations have no application in the present case. The control, carefully reserved, as we have seen, to the Government, by the statute before us, had no place in the Newfoundland scheme.

In *Metropolitan Meat Industry Board* v. *Sheedy* (1) a similar question was raised: that is to say, whether a debt due to the Metropolitan Meat Industry Board of New South Wales was a debt due to the Crown. Lord Haldane, who delivered the judgment of the Committee, discusses the cases to which reference has already been made. As regards *Fox* v. *Government of Newfoundland* (2), he explains the *ratio decidendi* in this way:

> The reason was that the various boards of education were not mere agents of the Government for the distribution of money entrusted to them, but were to have, within the limits of general educational purposes, uncontrolled discretionary power in expending it. The service, in other words, was not treated as being the service of the Sovereign exclusively within the meaning of the principle, but their own service.

As regards the New South Wales Board, whose powers were under review, he says,

> They are a body with discretionary powers of their own. Even if a Minister of the Crown has power to interfere with them, there is nothing in the statute which makes the acts of administration his as distinguished from theirs. That they were incorporated does not matter. It is also true that the Governor appoints their members and can veto certain of their actions. But these provisions, even when taken together, do not outweigh the fact that the Act of 1915 confers on the appellant Board wide powers which are given to it to be exercised at its own discretion and without consulting the direct representatives of the Crown. Such are the powers of acquiring land, constructing abattoirs and works, selling cattle and meat, either on its own behalf or on behalf of other persons, and leasing its property. Nor does the Board pay its receipts into the general revenue of the State, and the charges it levies go into its own fund.

Obviously, there is little relevant analogy between such a body and the respondents, whose duties mainly consist in managing and administering property which belongs to the Crown, and whose activities, and whose revenues and ex-

(1) [1927] A.C. 899. (2) [1898] A.C. 667.

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penditures, are subject to the control and supervision of the Crown, as explained above.

The position of the respondents cannot, I think, in any pertinent sense, be distinguished from that of the Commissioners whose status was in question in *The Queen* v. *McCann* (1). Indeed, if, instead of three Harbour Commissioners to be appointed by the Crown, holding office during pleasure, the statute had made provision for the appointment of a single Harbour Commissioner, that Commissioner to be the Minister of Marine, or the Deputy Minister of Marine, for the time being, we should have had a substantially identical case.

But there is another point of view from which the controversy in this appeal ought to be considered. It results, I think, from the examination of the legislation, first, that, as I have already said, the occupation by the respondents of the property and facilities under their "jurisdiction" is an occupation for the Dominion of Canada; and, second, that the property of the respondents is part of the public property of Canada.

I have nothing to add upon the first branch of this proposition. As to the second, there are some points which ought, perhaps, to be emphasized.

First of all, the public harbour of Halifax passed, by force of section 108 of the *British North America Act*, as property, to the Crown in right of the Dominion, and is still part of the public property of the Dominion. Admittedly, indeed, all the real property and harbour facilities over which the respondents exercise any control are the property of the Government. The sources of revenue are the charges and tolls payable in respect of the use of the harbour and harbour facilities. Moneys obtained by borrowing are obtained upon the security of these revenues and sources of revenue—in actual fact in the form of advances by the Government upon such security. The ultimate source of all revenue, outside of port dues (part of the duties and revenues vested in the Dominion by the *British North America Act*, section 102), is the property of the Dominion. The statute treats all these revenues as moneys at the disposition of Parliament, and, subject to the specific direc-

(1) (1868) L.R. 3 Q.B. 141.

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tions of the statute, gives the control of them to the Government.

If the Corporation had been constituted as above suggested, as consisting of a single Commissioner, to be the Minister of Marine for the time being, it would not have been disputed that a proposal to levy a tax upon the Corporation's occupation of the harbour property was virtually a proposal to tax the Dominion Government, or the property of the Dominion Government. Any such attempt must fail, as *ultra vires* of a Provincial Legislature. The general words of the charter should be read as excluding such a tax.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *C. P. Bethune.*

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

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*Oct. 16
*Dec. 12

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Husband and wife—Suit for nullity of marriage because of malformation and impotence—Lapse of time since marriage—Unsatisfactory explanation for delay—Reversal of findings at trial.

A marriage, one of the parties to which is incapable of properly consummating it, may, nevertheless, be so approbated by the acts and conduct of the other as to preclude the latter from impeaching its validity (*G.* v. *M.*, 10 App. Cas. 171, at 186). Lapse of time, though not in itself under ordinary circumstances an absolute bar to a suit for nullity, is yet an important factor for consideration, and may operate with other circumstances as a bar to such a suit (*B-n* v. *B-n*, 164 Eng. Rep. 144).

Where a husband petitioned, over eight years after the marriage, for nullity of his marriage because of his wife's malformation and impotence, this Court *held* (affirming judgment of the Court of Appeal for Manitoba which reversed judgment at trial granting the petition) that the husband, on the facts and circumstances established, should have known years before the suit, and would have so known had he acted as any ordinarily reasonable and prudent man would have acted in the circumstances, that his wife's condition was one which could not be rectified by surgical skill, and his explanation at the trial for his inaction was one which should not be accepted as valid and sufficient in the circumstances disclosed.

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*PRESENT:—Duff, C.J., and Cannon, Crocket, Hughes, and Maclean (*ad hoc*) JJ.

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Where the relevant facts as to the relation and conduct of the parties are not disputed, a judge sitting on appeal, with the whole record before him, is quite as competent to make a finding, as to the petitioner's belief and motive, as the trial tribunal, and should find in accordance with his firm conviction thereon.

APPEAL (by leave granted by the Court of Appeal for Manitoba, on certain conditions fulfilled) by the petitioner (husband) from the judgment of the Court of Appeal for Manitoba which reversed the judgment of Montague J. granting the petitioner a decree of nullity of his marriage with the respondent. The material facts of the case are sufficiently stated in the judgment now reported. The appeal to this Court was dismissed with costs.

J. S. Lamont for the appellant.

P. C. Locke and *L. D. Morosnick* for the respondent.

The judgment of the court was delivered by

CROCKET J.—This is an appeal from the judgment of the Court of Appeal for Manitoba setting aside the decision of Mr. Justice Montague granting the prayer of the appellant's petition for the nullity of his marriage with the respondent by reason of malformation and impotence.

The marriage was solemnized at Winnipeg on June 20th, 1925, and the appellant's petition filed on January 19th, 1934, after the parties had lived and cohabited together continuously and apparently congenially for a period of over eight years.

The appellant was 28 years old at the time of the marriage. He was then a practising barrister, but some time afterwards accepted a position with the Traders' Finance Corporation of Winnipeg. He said his wife was the same age, but her counsel stated before the Appeal Court that her age at the time of the marriage was 25.

There seems to be no doubt as to the existence of an irremediable congenital malformation on the part of the respondent, which rendered normal coition impossible. Indeed that fact was expressly admitted by the respondent's counsel at the trial, where the controversy between the parties was confined to the issue as to whether the

appellant, by reason of his constant cohabitation with the respondent for a period of more than eight years and his laches, delay and insincerity in seeking a nullity decree, had not barred himself from the relief to which he would otherwise have been entitled.

There is no doubt that it must now be taken as authoritatively settled that a marriage solemnized between two persons, one of whom is incapable of properly consummating it, may, nevertheless, be so approbated by the acts and conduct of the other as to preclude the latter from impeaching its validity. Lord Chancellor Selborne's dictum to this effect in the Scottish appeal of *G.* v. *M.* (1) in the House of Lords in 1885 has never since been questioned. "There may" he said,

> be conduct on the part of the person seeking this remedy which ought to estop that person from having it; as, for instance, any act from which the inference ought to be drawn that during the antecedent time the party has, with a knowledge of the facts and of the law, approbated the marriage which he or she afterwards seeks to get rid of, or has taken advantages and derived benefits from the matrimonial relation, which it would be unfair and inequitable to permit him or her, after having received them, to treat as if no such relation had ever existed.

It must also, we think, be taken as settled that lapse of time, though not in itself under ordinary circumstances an absolute bar to nullity proceedings, is yet an important factor for consideration, and *will,* if not satisfactorily accounted for, operate with other circumstances proving insincerity, as a bar to such a suit. See *B-n* v. *B-n* (2), in which Dr. Lushington in delivering the judgment of the Privy Council in 1854, said:—

> It is obvious, for these reasons, that time, though not in itself, under ordinary circumstances, a bar, yet, especially when the lapse has been very considerable, is not an unimportant matter in suits of this description, and more particularly as concerns the wife.
>
> In other respects, too, as relates to the right of the husband to prosecute a suit of this description, time, with other facts, deserves great consideration. The law affords a remedy to those who are really aggrieved and sensible of the grievance, and then only *vigilantibus non dormientibus.* The remedy is given on account of the loss sustained and the evil felt, not to promote or assist other purposes having no relation to it. If the husband is silent for so long a period, unaccounted for, that the presumption would necessarily arise that he acquiesced in the consequences which such an unfortunate connection entailed upon him, he could hardly be entitled to say, "Give me a remedy for a grievance I have not felt," and that to the detriment of another.

(1) 10 App. Cas. 171, at 186.

(2) (1854) 1 Spinks (Ecc. & Ad.) 248; 164 Eng. Rep. 144.

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Their Lordships are all of opinion that cases might occur where long acquiescence with knowledge, or the means of procuring knowledge, would operate as a bar to the prosecution of such a suit, and more especially if the circumstances shewed that the suit was brought, not on account of the evils resulting from such imperfection, but for other and different reasons.

The learned trial Judge with an apparently clear appreciation of these principles found that the appellant did not learn of the incurability of the condition complained of until January, 1934, and that a satisfactory, reasonable explanation had been given as to why he had not learned it sooner. He also found that during the time the marriage existed the petitioner had done nothing, knowing the true facts, which amounts in law to approbation of the marriage and which made it unfair and inequitable for him to take these proceedings, and that there was nothing in the evidence which would in the slightest degree justify the court in inferring insincerity on his part.

During the more than eight years of their cohabitation it seems it was Mr. and Mrs. B.'s custom to occupy the same bed and that, notwithstanding from the very beginning both parties recognized that there was some serious impediment to normal coition, imperfect acts of intercourse were more or less regularly indulged in by the husband with the wife. Both seem at the outset to have regarded the condition as temporary and one which would in time disappear. As it did not, they discussed the advisability of a surgical examination, but no physician or surgeon was even consulted until July, 1929, when Mr. B. says his wife consented to submit herself to examination by an elderly practitioner, Dr. Hurst. The excuse put forward by him for doing nothing up to this time was his wife's sensitiveness and aversion to such an examination. Dr. Hurst made a manual examination and reported an abnormal vagina. He advised that an exploratory examination would be necessary in order to determine whether the condition could be remedied. Mr. B. says the doctor informed him that the operation would cost $400 and he gave this and his financial straits and the uncertainty of his income as his reason for not having such an operation performed. Mrs. B. says that after Dr. Hurst's preliminary examination and a discussion between them immediately thereafter the matter was allowed to drop and that it was never mentioned again between them.

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In the summer of 1933, after their return to Winnipeg from a several months' temporary residence in Saskatoon, and while they were living together in an apartment suite, Mrs. B.'s health became impaired and later she was found to be developing goitre. A consultation by Mr. and Mrs. B. on December 26th, with a Dr. Douglass, a lady practitioner, led to the calling in of a surgeon, Dr. Fahrni, who upon a manual examination found the same condition as Dr. Hurst had reported four and a half years before, and undertook on instructions from Mr. B. and Mrs. B.'s father to do the goitre operation and at the same time while the patient was under the anaesthetic to make an exploratory vaginal examination to ascertain if the malformation was curable. Dr. Fahrni performed the operation on January 3rd, 1934, and found as to the vaginal condition that no operation could be performed for its correction.

Mrs. B. was discharged from the hospital on January 10th, and went to her parents' home where it had been arranged she should remain during her convalescence. On January 16th or 17th Mr. B., after having conferred with her father, had a two or three hours' interview with his wife, during which he informed her he had decided that they must separate. He stated that her attitude during the interview was friendly and that she made no objection to their separation, though she did suggest that it should be brought about by an action for divorce, to which he objected. He says she asked if they could not go to their suite the next day and spend the week-end to sort out and pack their personal belongings, which he agreed to do. This was not denied by Mrs. B. He did not, however, call to see her the next day, and when he went back on January 19th, in response to a telephone call from her, after she had been served with the nullity petition, he found her attitude had changed. She told him she thought he was cruel and refused to go to the suite with him. That was their last meeting.

Whatever may be said as to the correctness of the statement in the Appeal Court's judgment that it was not necessary to the success of the present respondent's appeal to that court to dispute the findings of the learned trial Judge as to delay and insincerity, and that his nega-

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tiving of an approbation of the marriage was a finding of law, it is perfectly clear from the reasons for the Appeal Court's judgment, as delivered by Mr. Justice Richards, that that court did reject the learned trial Judge's finding

> that during the time the marriage existed the petitioner has done nothing, knowing the true facts, which amounts in law to approbation of the marriage and which makes it unfair and inequitable for him to take these proceedings.

That finding manifestly involves not only the whole question of delay and the petitioner's explanation therefor, but the whole question of knowledge, as well as the petitioner's sincerity in instituting the nullity proceedings, and it is quite evident from the whole judgment of the Appeal Court that it did in fact consider all these features. Otherwise it could not have founded its reversal of the judgment of the learned trial Judge upon the cases of *G.* v. *M.* (1) and *B-n* v. *B-n* (2), as it undoubtedly did.

Witness the following passages from Mr. Justice Richard's opinion:—

> Now what are the facts here as stated by the husband? He found immediately after the marriage that his wife was incapable of ordinary sexual intercourse. He thought for a while the difficulty would be overcome but soon came to the conclusion that an operation would be necessary. He has given his reasons for taking no action. One of them is that the inquiry as to an operation, or whatever might be required to cure his wife, was postponed because he expected to have a child as soon as his wife's condition has been overcome and he would be in a position to assume the responsibility.
>
> It seems to me that the inescapable conclusion to be drawn from that statement, the long delay, the continued imperfect acts of coition and the happiness with which the parties lived together is that for the time being he preferred things as they were and deliberately resolved not to have an operation for some time.
>
> The petitioner is a lawyer and knew his legal rights. It is true that he had not been informed that the trouble was incurable but he must have known that it might be. In effect he acted as though he had decided: "I love my wife; I am happy; I will take the chance of a cure being possible or impossible; I will approbate the marriage in any event."
>
> The parties discussed a number of times during the last few years the advisability of adopting a child. That indicates that they realized that the wife might be incapable of bearing one.
>
> The age of the wife at the time of her marriage was 28 years according to the evidence. Her counsel, on the argument said 25 years. It makes no difference. Eight and one-half of the best years of her life have gone. If the husband had acted promptly, those years could have

(1) (1885) 10 App. Cas. 171.

(2) (1854) 1 Spinks (Ecc. & Ad.) 248; 164 Eng. Rep. 144.

been spent by the wife in preparing herself for a business life to earn a competency for her old age, or some man might have come along who would have married her for her companionship.

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The wife was a good housekeeper and the husband took the benefit of that during their married life.

My greatest difficulty has been to determine whether the Appeal Court was justified in rejecting or ignoring the findings of the trial tribunal on such questions as the petitioner's knowledge of the incurability of his wife's condition and the reasonableness and *bona fides* of his excuse for not sooner discovering the permanent character of that condition. Personally, I am disposed to shrink from the responsibility of setting aside the findings of any trial tribunal on questions which depend entirely on the credibility and sincerity of witnesses that tribunal has had the advantage of seeing in the witness box, and especially where the issues the court is trying are themselves directly pointed to the motives and good faith of a plaintiff or petitioner in instituting such a suit as this.

The relevant facts of this case, in so far as they concern the relations and conduct of the parties, are not in any manner disputed. The cruical question concerns the belief and motive of the petitioner's mind and heart, as to which his own statement, with whatever apparent sincerity it may be made, ought not for that reason alone to be deemed to be conclusive. Its real truth can only be satisfactorily tested by a judge or jury by a careful consideration of its consistency or inconsistency with the undisputed or established facts. As to this, where the relevant facts are all admitted or undisputed, a judge sitting on appeal, with the whole record before him, is quite as competent to make a finding as the trial tribunal, and if the admitted or proved facts are such as to force upon one's mind a firm conviction that they do not accord with the declared attitude of the party concerned, one should not hesitate to say so.

After as careful consideration, I think, as I have ever bestowed upon any case, I have not been able to resist the conviction that, if the appellant did not definitely know until Dr. Fahrni's exploratory examination in January, 1934, that his wife's condition was one which could not be rectified by surgical skill, he should have known years before and would have known had he acted as any ordinarily

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reasonable and prudent man would have acted in the unfortunate circumstances in which he found himself, and that the explanation which he advanced on the trial for his inaction during a period of more than eight years is one which the learned trial Judge should not have accepted as valid and sufficient in the circumstances disclosed. In *B-n* v. *B-n* (1) the full Board of the Judicial Committee of the Privy Council, though accepting the plaintiff's statement that he did not become aware of the incurability of a malformation of the same character until seventeen years after his marriage, did not hesitate to find that he should have known long before, and that the explanation put forward for not knowing before was not a valid or satisfactory excuse.

For this reason I am of opinion that the findings of the learned trial Judge were not reasonably warranted by the evidence, and that this appeal must now be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Clark, Jackson, Arundel & Robertson.*

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

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*Nov. 7
*Dec. 21

GROVER H. SCHATZ ÈSQUAL (PLAINTIFF) . . APPELLANT;

AND

JOHN McENTYRE ÈSQUAL (DEFENDANT) . . RESPONDENT.

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

Minor—Automobile accident—Action in damages—Minor injured, residing in United States—Guardian appointed by court of that country—Authorized by it to take action—Letters of guardianship providing for fyling of a bond before receiving moneys—Bond not fyled—Exception to the form—Private international law—Art. 6 C.C.—Arts. 78, 79 C.C.P.

One Ruth Schatz, domiciled in the state of New York, was injured in an automobile accident in Montreal and suffered serious personal injuries. In order to bring an action in damages, being a minor, she had to be represented according to article 78 C.C.P. Accordingly she filed a petition in the Surrogate's Court of the state of New York asking for the appointment of her father, the appellant, as "her general guardian to

*PRESENT:—Duff C.J. and Rinfret, Cannon, Crocket and Hughes, JJ.

(1) (1854) 1 Spinks (Ecc. & Ad.) 248; 164 Eng. Rep. 144.

commence and carry on such action for her." Pursuant to an order from that court granting the petition, letters of guardianship were issued appointing the appellant "limited guardian of the person and estate of the said minor on (his) making, executing and filing with the said Surrogate such bond or application as is required by the statute in such cases made and provided"; the same court in its previous order having stipulated that "until the filing of a bond * * * the guardian (was) restrained from receiving any funds arising from said action." The appellant then brought the present action in damages on his own behalf and as guardian to his minor daughter and, with the return of the writ, he filed duly certified copies of the decree and of the other judicial proceedings in the New York court. The respondent made a motion in the nature of an exception to the form disputing the appellant's capacity and quality to bring his action on behalf of his minor daughter on the ground that he had been appointed limited guardian on "filing with the Surrogate's Court a bond or obligation as is required by statute" which provision had not been complied with by him. The exception to the form was dismissed by the Superior Court; but the appellate court reversed that decision and dismissed the appellant's action as to the damages claimed on behalf of his minor daughter.

Held, reversing the judgment of the Court of King's Bench (Q.R. 56 K.B. 520), that, by virtue of his appointment as guardian by the court of the state of New York, the appellant had the quality and the capacity to bring in the province of Quebec an action in damages on behalf of his minor daughter. According to the provisions of article 79 C.C.P. and also in uniformity with the terms of article 6 C.C., all foreign persons may come before the Quebec courts, providing they are authorized to appear in judicial proceedings under the law of their country: the test of their capacity or quality before the Quebec courts being their quality or capacity in the courts of their own country. Although there is in the record no evidence of the New York law by expert witnesses, the decree and the other judicial proceedings in the New York court, duly filed, make *prima facie* proof of the facts therein set forth and they afford the best evidence that the law therein applied is the law in force in the country in which the judgment had been rendered. Therefore, by force of that decree and of the foreign law of which it bears evidence, the appellant was a person duly authorized to appear in judicial proceedings within the meaning of article 79 C.C.P., and it follows that he had the quality and capacity assumed by him in this action. As to the restriction placed upon the appellant's authority to receive the funds arising from the action until he had fyled a bond required by the order appointing him as guardian, it should be held that the letters of guardianship cannot be construed as limiting the authority of the guardian to proceed with the action and that such restriction has to do with nothing else but the final discharge if and when payment would be made; and the Quebec court seized with the case, by force of its inherent power and *proprio motu,* would have the power to stay proceedings at any stage, or at all events, before making its final adjudication, so that the condition imposed in the restriction may be previously complied with: in that way, the court would keep control of the case and would give judgment only after it would be satisfied that the required bond has been approved.

(1) (1934) Q.R. 56 K.B. 520.

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APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), reversing the judgment of the Superior Court, Curran J. (1), and maintaining the respondent's motion in the nature of an exception to the form.

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

Wm. F. Macklaier for the appellant.

Walter A. Merrill K.C. and *Gordon D. McKay* for the respondent.

The judgment of the Court was delivered by

RINFRET J.—This appeal raises a question of private international law.

Ruth Schatz, domiciled at Poughkeepsie, in the state of New York, United States of America, was injured in an automobile accident which happened in the city of Montreal, province of Quebec. She suffered serious personal injuries. She intended to sue the person whom she held liable for the damages she sustained; but, being a minor and not having the free exercise of her rights, she could not, in the province of Quebec, be a party to an action. In order to bring her action, she had to be "represented (or) assisted * * * in the manner prescribed by the laws which regulate (her) particular status or capacity" (Art. 78 C.C.P.).

Under the Quebec law (Art. 6 C.C.), persons domiciled out of the province of Quebec "as to their status and capacity, remain subject to the laws of their country."

Accordingly, Ruth Schatz filed a petition in the Surrogate's Court of the State of New York, representing that she desired "to commence an action in the city of Montreal, province of Quebec, Dominion of Canada, against John G. McEntyre, an infant, and his guardian, John McEntyre, who are residents of the city of Montreal, province of Quebec, Dominion of Canada." (N.B. The latter are the present respondents.)

The petition alleged:

That the action arises out of personal injuries sustained by (the) petitioner through the careless and negligent operation of an automobile operated and controlled by the said John G. McEntyre in the city of

(1) (1934) Q.R. 56 K.B. 520.

Montreal, province of Quebec, Dominion of Canada * * * that the estimated value of the personal property to which the petitioner is or will be entitled on a favourable decision of this action will not exceed $5,000; that she had no additional income from any other source;

therefore she prayed that Grover H. Schatz, her father (the present appellant),

be appointed her general guardian to commence and carry on such action for her.

The petition was supported by affidavit.

Upon the petition, the Surrogate's Court

Ordered and decreed that said Grover H. Schatz be and is hereby appointed general guardian of the person and property of said infant, to serve until said infant shall attain the age of twenty-one years, or a successor to said general guardian shall be appointed, and that letters of guardianship issue, on filing the oath required by law.

And it was also

Ordered and decreed that the guardian proceed with such action as may be advisable to protect the infant's rights in the action stated in her petition;

And it was further

Ordered and decreed that the filing of a bond be dispensed with until further order of this court but that until the filing of a bond satisfactory to this court the said guardian is hereby restrained from receiving any funds arising from said action.

Pursuant to this, letters of guardianship were issued. They were signed by the "Clerk of the Surrogate's Court." They recite:

That said minor is entitled to certain property and estate and that, to protect and preserve the legal rights of said minor, it was necessary that some proper person should be duly appointed guardian of her person and estate * * *

* * * The said Surrogate's Court did order that the said Grover H. Shatz be appointed limited guardian of the person and estate of the said minor on (his) making, executing and filing with the said surrogate such bond or application as is required by the statute in such cases made and provided; and you, the said Grover H. Schatz, having executed the proper oath of office approved by the said Surrogate, according to the form of the said statute, we do by these presents constitute and appoint you, the said Grover H. Schatz, limited guardian of the person and estate of the said minor until she shall attain the age of twenty-one years, or until another guardian shall be appointed.

The appellant, having been appointed guardian in the manner just stated, brought the action with which we are at present concerned, both for himself personally and in his quality of guardian on behalf of his daughter Ruth Schatz. With the return of the writ, he filed duly certified copies of the decree and of the other judicial proceedings in the New York court (including a copy of the oath of office executed by him). The action was at once met by

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the respondent's motion in the nature of an exception to the form disputing the appellant's capacity and quality to bring the action on behalf of his minor daughter.

The ground of the motion was that the appellant

had not such full and complete capacity, authority or power as is required by a person making claim before the courts of the province of Quebec.

that his power was in fact limited, and, as appeared by the letters of guardianship, he was appointed limited guardian on, among other things,

filing with the Surrogate's Court a bond or application, as is required by statute,

which provision had not been complied with by him.

The exception to the form was dismissed by the Superior Court: but the Court of King's Bench (appeal side), by a majority, reversed that decision and dismissed the appellant's action

jusqu'à concurrence de l'indemnité de $5,000 qui y est demandée pour et au nom de la mineure, Ruth Schatz.

The guardian then appealed to this Court. Since this appeal has been lodged, both Ruth Schatz and John G. McEntyre became of age and now have and enjoy the free exercise of their rights. Suggestions were filed with the prayer that each of them be added as a party to the appeal. This may be done under the rules of the Court (rule 50); and, indeed, has become essential, since the guardian, acting on behalf of Ruth Schatz, and the tutor representing John G. McEntyre are *functi officio*.

The fact, however, that Ruth Schatz has now attained the age of majority cannot be allowed to improve the proceedings originally entered in the province of Quebec by her guardian, if these proceedings were invalid. Her present application to be substituted for her guardian cannot affect the situation as it existed when the action was instituted. If the appellant was then lacking in the quality or the capacity required to bring the action, the appeal must be dismissed and the adding of Ruth Schatz as a party becomes immaterial. If, on the contrary, we come to the conclusion that the original proceedings were properly and competently brought by the appellant, the granting of the applications to add as parties both Ruth Schatz and John G. McEntyre should follow as a matter of course.

It is, therefore, necessary to discuss the case as it stood before the courts of the province of Quebec.

The question is whether the appellant, by virtue of his appointment in the state of New York, had the quality and the capacity to bring the action in the province of Quebec.

Under Article 79 of the Code of Civil Procedure,

> All foreign corporations or persons, duly authorized under any foreign law to appear in judicial proceedings, may do so before any court in the province.

It follows from the provisions of this article that all foreign persons may come before the Quebec courts, provided they are authorized to appear in judicial proceedings under the law of the country. The test of their capacity or quality before the Quebec courts must be their quality or capacity to appear in the courts of their own country. This is further borne out by article 6 of the Civil Code already adverted to.

In order to answer the question now before us, the inquiry, therefore, must be: What is the law of the State of New York in respect to the authority of the appellant to appear in these judicial proceedings?

There is in the record no evidence of the New York law, in the sense that no witnesses were heard who, on account of their profession or their expert knowledge, are recognized as being in a position to state what that law is; but the appellant alleged that,

> in his quality of guardian to the said minor Ruth Schatz, he was well and truly entitled by the laws of the state of New York to institute and carry on the present action,

in support of which he filed copies of the decree and the other judicial proceedings had in the New York court. These documents make *prima facie* proof of the facts therein set forth (Art. 1220-1 C.C.), and they afford the best evidence that the law therein applied is the law in force in the country in which the judgment was rendered (*Bauron* v. *Davies* (1), and authorities there cited at pp. 551, 552 and 553).

As was said in the House of Lords by Lord Cranworth, in the case of *Doglioni* v. *Crispin* (2).

> It is the decision of a court of exclusive jurisdiction, a decision which we are bound to receive without inquiry as to its conformity or non-conformity with the laws of the country where it was pronounced.

(1) (1897) Q.R. 6 Q.B. 547.

(2) (1866) 35 L.J., Pro. and Mat. 129, at 135.

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So that the matter resolves itself into the interpretation of the decree appointing the appellant and of the accompanying documents. The guardian's powers are there set out.

Now, if we turn to these documents, we find that the decree of the Surrogate's Court was sought for the very purpose of appointing a guardian to Ruth Schatz, because she desired to institute the present action in the province of Quebec against John G. McEntyre and his tutor. The petition states that she had no income from any other source and that the estimated value of her personal property was the value of the damages resulting from the automobile accident and to which she claimed to be entitled on a favourable decision of her action. Then the decree appoints her father, the present appellant,

general guardian of the person and property of the said infant, orders that letters of guardianship do issue on filing the oath required by law

and

that the guardian proceed with such action as may be advisable to protect the infant's rights in the action stated in her petition.

And the decree goes on to say that

the filing of a bond be dispensed with until further order of the Surrogate's Court and that until the filing of a bond satisfactory to that court the said guardian is hereby restrained from receiving any funds arising from said action.

The letters of guardianship state that the appellant has executed the oath of office (copy of which, as a matter of fact, is filed with the return of the action) and they declare the appellant limited guardian of the person and estate of the said minor.

No explanation is given for the use of the word "limited" in the letters of guardianship signed by the clerk of the Surrogate's Court. The reasonable interpretation would be that the word is referable to the restriction put upon the guardian's right to receive the funds arising from the action until he has filed a bond satisfactory to the New York court. Be that as it may, the letters of guardianship cannot be construed as limiting the authority of the guardian to proceed with the action, in the province of Quebec, in order to protect the infant's rights, which is expressly given in the decree and which, indeed, was the sole apparent purpose for which the petition was presented and the decree issued. There can be no doubt that, by force of the decree and of the foreign law of which it bears evidence,

the appellant is a person duly authorized to appear in judicial proceedings within the meaning of art. 79 of the Code of Civil Procedure. It follows that he has the quality and capacity assumed by him in this action. He has the quality of guardian to which was expressly attached the power to commence and carry on the action for Ruth Schatz.

The argument made against him is that, on account of the restriction placed upon his authority to receive the funds arising from the action, he is not fully clothed with all the powers requisite to bring the action. In a general way, it is said that he who cannot receive payment of a sum of money cannot bring action to recover that sum.

With great respect, it seems to us that the argument so presented forgets the quality in which alone the appellant appeared in these proceedings. The action is concerned not with the appellant's rights, but with the minor's rights. The appellant is not claiming for himself; he is claiming on behalf of the minor. The minor's rights are full and complete; they constitute (to borrow the language of the Court of King's Bench) "un droit né et actuel." The action whereby he claims those rights belongs to the minor; and the only reason why the guardian appears is because

> Actions belonging to a minor are brought in the name of his tutor. (Art. 304 C.C.).

This provision is implemented by that of the Code of Civil Procedure (art. 78) whereby

> No person can be a party to an action. . . unless he has the free exercise of his rights * * *
>
> Those who have not the free exercise of their rights must be represented, assisted or authorized in the manner prescribed by the laws which regulate their particular status or capacity.

In this case the appellant merely represents the minor, and he does so

> in the manner prescribed by the laws which regulate the particular status or capacity

of the minor and his own. We are unable to come to the conclusion that, for this purpose, he was not adequately and sufficiently authorized by the New York decree. The restriction therein has to do with nothing else but the final discharge if and when payment is made.

The respondent complains that he was not faced with a claimant to whom a payment could be made and from whom a discharge could be obtained.

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The first observation ought to be in this respect that the point does not arise, for the respondent does not disclose any intention of making payment, nor can we discern any indication of his willingness to offer any proposition of settlement.

Should the respondent wish to pay the claim in full, we should be sorry if no means could be found under the laws of Quebec whereby a good and valid discharge could be given to him. Should he be willing to compromise, he would have no more difficulty to do so as a consequence of the New York decree than he would have in the case of a tutor appointed under the Quebec law. In the first case, he need only require, before paying, a certified copy of the order of the Surrogate's Court approving the bond, upon the filing of which the restriction put upon the respondent's power to receive the money shall be removed. In the second case, he could not transact with the tutor unless the latter was authorized by the court, a judge or a prothonotary on the advice of the family council (art. 307 C.C.). The restrictions in both cases are of a similar character. They cannot affect the quality of the New York guardian more than they do the quality of a Quebec tutor.

It is true, as was argued by the respondent, that, before the bond is filed and approved, the restriction in the decree may suspend the power of the appellant to prosecute the execution of a judgment given in his favour. A somewhat similar objection was advanced in the case of *London Life Insurance Company* v. *Séguin* (1), and it was rejected by the Court of King's Bench as not being a bar to the capacity to bring the action and as raising a point which could be taken care of after judgment, should the defendant be called upon to pay.

While we think a preferable way would be for the court not to make any adjudication of the money until the appellant has complied with the condition; without going as far as the decision in the *Séguin* case (1) and without waiting until after final judgment is rendered, it does not seem to us that the Quebec courts are lacking in power to deal with the matter. The restriction against the appellant's authority to receive payment is not absolute. The authority is not taken away. It is, in fact, given to him condi-

(1) (1933) Q.R. 55 K.B. 332.

tionally; and the condition is that he should file the prescribed bond. It was suggested that the respondent might have met the situation completely by taking advantage of paragraph 2 of art. 179 of the Code of Civil Procedure and by asking that the suit be stayed until the bond had been filed and approved, as provided for in the decree, the whole of which could have been certified to the Quebec court in the usual way. To this suggestion the respondent was unable to give any satisfactory answer.

Under all circumstances, we see no reason to doubt that the Quebec court seized with the case, by force of its inherent power and *proprio motu,* could stay proceedings at any stage or, at all events, before making its final adjudication, so that the condition imposed in the restriction may be previously complied with. In that way, the court would keep control of the case and would give judgment only after it is satisfied that the required bond has been approved. Authority for this course could be found in the judgments of *Grondin* v. *Cliche* (1) and *Ellard* v. *Millar* (2).

The appellant, no doubt, in the conclusions of his declaration, prayed for the payment to himself in his capacity of guardian, although at that time he was still affected by the restriction. This was pointed out by the respondent.

In our view, the objection does not go to the question raised by the exception to the form. In the words of Japiot (Traité élémentaire de procédure, p. 61),

> L'on fait souvent intervenir à tort la notion de qualité en contestant à une personne la qualité, alors qu'il vaudrait mieux contester l'existence du droit.

The appellant may have asked for more than he was entitled to until he had filed the bond required by the New York decree. But this does not affect his quality or his capacity to appear for and on behalf of the minor and to represent her. If he had limited his conclusions to a prayer that the defendant be condemned to indemnify Ruth Schatz in the amount of $5,000 and that payment of that sum, or of such other sum as may be awarded, be made to him as guardian of Ruth Schatz after he has filed in the case a bond satisfactory to the New York Surrogate's Court, there could have been no question as to his quality or capacity to do so.

(1) [1922] S.C.R. 390. (2) [1930] S.C.R. 319.

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The complaint of the respondent really is that the appellant's conclusions go too far, at least for the present. It may be conceded that they ought not to be granted precisely in the form in which they are, unless the bond has been previously filed. But, if the facts are found in favour of the minor, it will be within the power of the court, indeed it would no doubt be its duty to see that the respondent should not be compelled to pay except upon being adequately protected in respect to the discharge to which he is entitled. (Compare: *Montreal Street Ry.* v. *Girard* (1); *People's Holding Company Ltd. v. Attorney-General* (2). In the later case, objection was made and doubts were expressed both by the Court of King's Bench and by this Court whether the prayer of the information was not in excess of the powers of the Attorney-General of Quebec. Yet, as it appeared that, upon his allegations if proven, he was entitled to some measure of relief, it was held the objection did not affect his quality or capacity, and it would be for the courts, on the merits, upon the conclusions as drawn or upon proper amendments, to order the appropriate remedy.

The appeal should, therefore, be allowed and the judgment of the Superior Court restored with costs here and in the Court of King's Bench in favour of the appellant.

The application to have Ruth Schatz and John G. McEntyre added as parties will be granted with costs in the cause. Our decision was reached, as it should be, independently of that consideration; but it is satisfactory to realize that as Ruth Schatz now enjoys the full exercise of her rights, the possibility of the difficulty anticipated by the respondent and discussed in this judgment has disappeared and no question subsists as to her capacity to give a valid discharge in the future.

Appeal allowed with costs.

Solicitors for the appellant: *MacDougall, MacFarlane & Barclay.*

Solicitors for the respondent: *Merrill, Stalker & McKay.*

(1) (1911) Q.R. 21 K.B. 121, at 127.

(2) (1930) Q.R. 48 K.B. 133; [1931] S.C.R. 452, at 459.

HUMPHREY MOTORS LIMITED (PLAINTIFF) ..... APPELLANT;

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* Feb. 25, 26.
* April 15.

AND

JOSEPH ELLS (DEFENDANT)..... RESPONDENT.

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

Conditional sale—Default in payment—Repossession and resale by vendor—Question of vendor's right to sue for deficiency—Conditional Sales Act, R.S.N.B., 1927, c. 152, s. 10.

Appellant sold to respondent a motor truck on a conditional sale agreement, and took as collateral a promissory note for the amount of the deferred payments. The agreement provided that the title to the truck was to remain in the vendor's name until payment in full of the purchase price and interest. The agreement did not expressly provide for the purchaser to have possession nor for the vendor to retake possession and resell, or to recover deficiency on resale. At the time of the agreement possession was delivered to respondent. On subsequent default in payment, appellant retook possession (apparently with respondent's expressed or implied consent) and resold the truck (after fulfilling the procedure required by s. 10 of the *Conditional Sales Act* of New Brunswick), realizing an amount less than that owing on the note, and sued on the note for the deficiency.

Held: Appellant's resale of the truck had the effect of rescinding or terminating the contract, and of relieving respondent from further obligation as to the price (*McEntire* v. *Crossley*, 64 L.J.P.C. 129; *Sawyer* v. *Pringle*, 18 Ont. A.R. 218), and appellant could not recover.

Sec. 10 of the *Conditional Sales Act*, R.S.N.B., 1927, c. 152, does not create by implication a right in the seller to look to the buyer for a deficiency; s. 10 (3) merely limits and regulates the exercise of such a right where the right exists independently of the statute. The Act must not be regarded as a complete code; nor construed as repealing the common law as to the effect of a resale in a case such as the present one. Nor did the terms of the agreement in question justify the application of the "mortgage theory" (by regarding the conditional sale as in effect a legal mortgage and governed by the law relating to mortgages) so as to give a right to resell and look to the buyer for any deficiency (*C. C. Motor Sales Ltd.* v. *Chan* [1926] Can. S.C.R. 485, distinguished).

The court could not treat the action as one for damages for breach by respondent of his contract to purchase; and could not, therefore, regard the amount of the deficiency as the measure of damages which appellant might have obtained had he sued on that ground. The promissory note, on which the action was brought, being collateral to the agreement, was rescinded as between the parties by the rescission of the agreement.

Judgment of the Supreme Court of New Brunswick, Appeal Division (8 M.P.R. 57), affirmed.

* PRESENT:—Duff C.J. and Lamont, Cannon, Davis JJ. and Dysart J. (*ad hoc*).

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APPEAL by the plaintiff (by special leave) from a judgment of the Supreme Court of New Brunswick, Appeal Division, which (1) had allowed an appeal by defendant from an order of the Judge of the Westmorland County Court in favour of the plaintiff in an action for the balance claimed on a certain promissory note (made by defendant as collateral to a certain conditional sale agreement for sale by plaintiff to defendant of a motor truck). The material facts of the case and questions in issue are sufficiently stated in the judgment now reported (except that it may be further mentioned that before reselling the truck in question the plaintiff fulfilled the procedure required by s. 10 of the *Conditional Sales Act* of New Brunswick) and are indicated in the above headnote. The appeal was dismissed with costs.

J. L. Ralston K.C. and *J. E. Friel* for the appellant.

G. F. G. Bridges for the respondent.

The judgment of the Court was delivered by

DYSART J. (*ad hoc*)—This is an appeal from the Supreme Court of New Brunswick, Appeal Division, reversing a judgment of the County Court of Westmorland in favour of the appellant (plaintiff) in an action for the balance of the sale price of a motor truck. The appeal involves the interpretation and effect of a conditional sale agreement, and of the *Conditional Sales Act,* R.S.N.B. 1927, cap. 152.

The facts are simple. On October 15, 1932, the respondent purchased a motor truck from the appellant upon the terms and conditions set forth in a conditional sale agreement which was styled "Retail Buyers' Order and Agreement." The price of the truck, $815, was made payable, as to part in the equivalent of cash, and as to the balance, namely, $565, in consecutive monthly instalments of $25 each with interest. A promissory note payable in one

(1) 8 M.P.R. 57; [1934] 3 D.L.R. 140. The formal judgment of the Appeal Division merely reversed an order in the County Court allowing plaintiff to sign summary judgment, and permitted defendant to defend. On proceedings taken subsequently to this judgment (and for the purpose of enabling plaintiff to prosecute an appeal from a final judgment), final judgment was entered in the County Court in favour of the defendant, from which plaintiff appealed to the Appeal Division of the Supreme Court of New Brunswick, and it was from the dismissal of this latter appeal that the present appeal was, in form, brought.

month, but renewable monthly on payment of the instalments provided for in the agreement, was also given by the buyer as collateral to the agreement. Among the "terms and conditions" of the contract is the following:

> It is expressly understood and agreed that the title to the motor vehicle is to remain in Vendor's name until the full amount of purchase price and interest and other charges have been paid.

The truck was immediately given into the possession of the buyer, a feature of the transaction not provided for by the written contract. A few months later, the buyer being then in default in his payments, the seller retook possession of the truck, resold it for less than the amount owing on the note, and then, in an action on the note, obtained judgment for the deficiency, about $300. This judgment was reversed on appeal, and from that reversal the present appeal is taken.

The case is of importance not because of the amount involved, but because it is in the nature of a test case.

The sole issue is whether or not the seller, having repossessed and resold the truck with the acquiescence of the buyer, has the right to sue for the deficiency on the resale. The answer to that question depends upon the interpretation and effect of the contract which the parties entered into. No such right is conferred by the written contract, certainly not in express terms. Apart from the provision already quoted, wherein the title is reserved to the seller until full payment of the price, the agreement contains only one provision which has been thought capable of conferring such right. The provision is:—

> I agree to pay the balance due and accept the motor vehicle mentioned in this order and agreement within forty-eight hours after I have been notified that it is ready for delivery. Failure on my part to comply, forfeits my deposit as liquidated damages for your expense and efforts, and permits you to otherwise dispose of the motor vehicle without any liability to me whatsoever.

This provision, like some others in the document, is not applicable to the sale which the parties here intended, but is designed to cover a case where the buyer orders a motor vehicle which the seller has not then on hand or at least not then ready for delivery, and which he is therefore to deliver or tender for delivery at some then future date. In the sale as arranged in the present case, the truck was on hand at the time the bargain was entered into, and was immediately delivered to the buyer. The presence of

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the provision in the contract is due to the evident fact that the contract was drawn up on a general "form" designed to cover different kinds of sales with apt provisions for all of them.

Apart from that clause there is not a word in the contract expressly giving the seller the right, whether on default of payment or other breach of condition by the buyer, to retake possession or to resell or to recover any deficiency on a resale. There is not even a provision that possession should pass to the buyer while title remains with the seller, and consequently, there was no need to provide for the seller's retaking of possession.

The act of retaking possession was evidently acquiesced in or consented to by the buyer and so the seller's right to repossess was never questioned nor determined. It is important, however, that the right, if any, be now ascertained and declared because, as we shall presently see, if possession was retaken under the provisions of the contract, then section 10 of the *Conditional Sales Act* will apply to it, whereas if possession was not retaken under the contract, but under some other right, the section will not apply.

When the buyer defaulted in his payments, the seller retook possession as a matter of fact, but the default itself did not authorize such repossession. According to the contract, the seller's only protection or security for the price was to hold the title until payment was made. In these circumstances, the retaking of possession was a tortious act on the part of the seller unless the retaking was effected with the consent expressed or implied of the buyer, as it apparently was. Once the seller had thus resumed possession, and there being no provision in the contract entitling the buyer to have possession, the seller was entitled to hold it as an incident of ownership of the truck. The situation then was that the seller, having both title and possession, and the buyer being under an obligation to pay the price by instalments, the agreement was an ordinary executory contract for future sale, and the seller had no right to recover the price unless he delivered or was ready and willing to deliver the truck. The resale of the truck had the effect of rescinding or terminating the contract, and of relieving the buyer from further obligation in regard to

the price. *McEntire* v. *Crossley*, a decision of the House of Lords (1); *Sawyer* v. *Pringle* (2). There are other decisions in some of our provincial courts to the same effect.

Turning now to the *Conditional Sales Act*. Section 2 (*b*) defines a conditional sale in terms which clearly include the transaction in this case as it stood immediately prior to the default. It reads in part as follows:

2. (*b*) "Conditional sale" means (*a*) any contract for the sale of goods under which possession is or is to be delivered to the buyer and the property in the goods is to vest in him at a subsequent time upon payment of the whole or part of the price or the performance of any other condition;

Section 10 of the Act will have to be set out more fully.

10. (1) Where the seller retakes possession of the goods pursuant to any condition in the contract, he shall retain them for twenty days, and the buyer may redeem the same within that period by paying or tendering to the seller the balance of the contract price, together with the actual costs and expenses of taking and keeping possession, or by performance or tender of performance of the condition upon which the property in the goods is to vest in the buyer and payment of such costs and expenses; and thereupon the seller shall deliver up to the buyer possession of the goods so redeemed.

(2) When the goods are not redeemed within the period of twenty days, and subject to the giving of the notice of sale prescribed by this section, the seller may sell the goods, either by private sale or at public auction, at any time after the expiration of that period.

(3) If the price of the goods exceeds thirty dollars and the seller intends to look to the buyer for any deficiency on a resale, the goods shall not be resold until after notice in writing of the intended sale has been given to the buyer.

[(4), (5) and (6) relate to the notice, its contents, and when it may be given.]

(7). This section shall apply notwithstanding any agreement of the contrary.

This section is in the same terms as the corresponding section in the British Columbia Act. The corresponding provisions in the Ontario Act do not include the right of resale expressed by subsection (2) and refer to cases where possession is retaken for "breach of condition" instead of "pursuant to any condition in the contract."

It is argued by the appellant that this Act is a code, and should, therefore, be interpreted in a liberal, comprehensive way as though it were replacing common law, and stating anew the entire body of law relating to conditional sales. This argument follows that of the late Mr. Justice Orde in the Ontario Court of Appeal in the case of *Harris*

(1) (1895) 64 L.J.P.C. 129. (2) (1891) 18 Ont. A.R. 218.

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v. *Tong* (1). On the other hand, the respondent urges that the Act was designed to correct certain defects in the common law and to prevent frauds on the public, growing out of transactions in which possession and apparent ownership of a chattel are committed to one person while the title and real ownership remain in another; and that, having corrected these evils, the Act leaves the rest of the law untouched.

The latter view commends itself to us as quite sound and consistent with the text of the Act. The first few sections of the Act are designed evidently to protect the public against the evils mentioned; sections 9 and 10 are designed to protect the buyer and to give certain rights to the seller. The Act does not pretend to apply to all conditional sales and impliedly excludes many; subject to the imperative terms and conditions imposed upon conditional sales, the Act leaves the parties free to insert in their contract any mutually protective terms and conditions they may desire.

Subsections (1) and (2) of section 10 give the buyer the right to redeem within twenty days and the seller the right to resell after twenty days, in all cases where the chattel has been repossessed "pursuant to any condition in the contract." The Act does not expressly confer such rights except where possession has been retaken pursuant to some term in the contract. Subsection (3) of the same section apparently relates to goods repossessed as mentioned in subsections (1) and (2) and provides procedure to be followed by the seller if he "intends to look to the buyer for any deficiency on a resale." This subsection is restricted to goods in excess of $30 in price; it does not apply to goods of a lesser value nor when repossession is not based on the contract. The subsection does not create a right in the seller to look to the buyer for a deficiency; it merely limits and regulates the exercise of the right in all cases where the right exists independently of the statute.

No other provision in the Act has been invoked as conferring on the seller the right to claim a deficiency.

It is argued, however, that the section confers the right by implication. This argument is based upon the assumption that the Act is a code and is to be construed as embracing all conditional sales. As already pointed out, we do

(1) (1930) 65 Ont. L.R. 133, at 137.

not regard the Act as a complete code. If the *Conditional Sales Act* seeks only to remedy certain evils inherent in or incidental to conditional sales, it ought to be interpreted as amending and not as repealing the common law on the subject; if, on the other hand, it is a general Act, it "must not be read as repealing the common law relating to a special and particular matter unless there is something in the general Act to indicate an intention to deal with that special and particular matter" (*per* Channell J. in *The King* v. *Bishop of Salisbury* (1). To interpret section 10 as appellant suggests, would be to import into the section something which is not there and which, if there, would have the effect of repealing the common law. We are therefore unable to accept the conclusions based upon the argument.

It is also urged that all conditional sales are in effect legal mortgages, and should, therefore, be governed by the law relating to mortgages. On this basis, the right of a mortgagee to resell his security and look to the mortgagor for any deficiency on the resale is thought to be applicable to a vendor under a conditional sale where he resells the chattel. This theory was propounded by Maclennan J.A., in his dissenting judgment in the case of *Sawyer* v. *Pringle* (2); was adopted by Newcombe J., in delivering the unanimous opinion of this court in *C. C. Motor Sales Ltd.* v. *Chan* (3); and was later elaborated by Orde J.A. in the Ontario Court of Appeal in the case of *Harris* v. *Tong* (4). An examination of the agreements in each of these three cases discloses a wide difference in terms. In the two Ontario cases, the theory was rejected or at least was not adopted by a majority of the judges, and, in any event, the decision turned upon the interpretation of the agreement then before the courts. In the *Chan* case (3), Newcombe J., in expressing the opinion that the agreement was in effect a legal mortgage, emphasized the fact that "by the express provisions of three of the clauses" the agreement was intended to "operate as a security to the vendor for the principal and interest of the debt." The agreement with which we have to deal is noticeably different in that there is a complete absence of any reference directly or indirectly to security.

(1) [1901] 1 Q.B. 573, at 579.
(2) (1891) 18 O.A.R. 218.
(3) [1926] Can. S.C.R. 485.
(4) (1930) 65 Ont. A.R. 133.

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Moreover, Newcombe J. in the *Chan* case (1) supported the mortgage theory on the additional ground that the agreement in that case had certain elements of absoluteness in which it differed from the agreement in *Sawyer* v. *Pringle* (2) which was thought to be more uncertain. On this point the agreement with which we are dealing contains the following clause: "It is expressly agreed that if for any reason purchase of motor vehicle is not consummated," certain consequences are specified to follow as in a case of rescission. This lack of absoluteness, coupled with a paucity of protective or remedial provisions, sharply distinguishes this agreement from that in the *Chan* case (1) as well as from mortgages generally. Whatever may be thought of the applicability of the mortgage theory to some conditional sale agreements, the theory does not apply to all such agreements, certainly not to this one. Each contract must stand on its own footing and be interpreted in the light of its own terms and conditions. This principle was adopted in the *Chan* case (1) where Newcombe J. at page 487 said: "The question depends upon the interpretation and effect of the agreement of sale between the parties."

In disposing of this appeal, we are not at liberty to treat the action as one for damages for breach by the buyer of his contract to purchase, and may not, therefore, regard the amount of the deficiency as the measure of the damages which the seller might have obtained had he sued on that ground and for which he had a right to sue; *Harold Wood Brick Co.* v. *Ferris* (3). The action as brought was on the promissory note for the balance owing on it after the net proceeds of the resale had been credited, but, because the note was collateral to the written contract, it was rescinded as between the parties by the rescission of the agreement. We have seen that a right to sue for a deficiency after the resale was not provided for by the contract nor conferred by the *Conditional Sales Act,* and so there is no ground on which the seller's action can be maintained.

The appeal will, therefore, be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Friel & Friel.*

Solicitor for the respondent: *G. F. G. Bridges.*

(1) [1926] Can. S.C.R. 485. (2) (1891) 18 Ont. A.R. 218.
(3) [1935] W.N. 21.

T. C. GLENNIE (DEFENDANT)..... APPELLANT;

AND

McD. & C. HOLDINGS LIMITED (PLAINTIFF) ..... RESPONDENT.

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*Feb. 21, 22, 25.

*April 15.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA EN BANC

Stock-broker and client—Carrying of stocks on margin—Alleged instructions by client to sell—Stocks retained on brokers' advice—Alleged non-disclosure of brokers' personal interest in stocks of same companies—Brokers' duties and liabilities.

The action was to recover a balance claimed as owing by defendant to a firm of stock-brokers (and now vested in plaintiff) for commissions, etc., and moneys paid in the purchasing and selling of stocks for defendant. Defendant claimed that in July, 1930, when prices were declining and he was being pressed for marginal protection, he told the brokers to sell out; that if the stocks had been sold at that time the account sued on would not have arisen; that the brokers advised him not to sell; that it was on their advice that he subsequently put up more moneys and endeavoured to hold the stocks; that, unknown to defendant, the brokers were interested in pools in stocks of the same companies as those in whose stocks defendant's holdings largely consisted, and by reason thereof were not in a position to give defendant independent and disinterested advice. There was conflicting evidence, and much contention as to the implications involved in, and the inferences to be drawn from, what was proved. In answers to questions, the jury found that there was a lack of due skill and care by the brokers; that this was "in not selling stock when requested"; that by reason thereof defendant suffered loss equal to or exceeding the amount claimed against him; that defendant, to the brokers' knowledge, was relying on their advice, and that their advice and their method of handling defendant's account was not disinterested and in good faith. Judgment dismissing the action was reversed on appeal, and defendant appealed to this Court.

Held: There was evidence sufficient to support the jury's findings, which must, therefore, stand; these indicated, that they accepted defendant's evidence that he told the brokers to sell in July, 1930 (at which time a sale would have left him without any debit balance); that the brokers advised him not to sell; and that he acted upon their advice, which was not "disinterested and in good faith." As to the brokers' liability in law: Having undertaken to advise, they owed a duty to defendant to advise fully, honestly and in good faith, and the non-disclosure of their own substantial interest in stocks of the same companies as the stocks of defendant which he wanted to sell, was a breach of duty for which the brokers were liable for any damages consequently suffered by defendant; while there was no evidence that defendant would have taken a different course had disclosure been made, yet, once the interest was shewn to exist, the

*PRESENT:—Duff C.J. and Lamont, Cannon, Davis JJ. and Dysart J. (*ad hoc*).

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burden was on plaintiff to exonerate the brokers and establish that the advice given and the mode of handling the account was not affected by the brokers' very large interest in the pools; the fullest and clearest explanation for the non-disclosure rested upon plaintiff and was not given. The judgment at trial dismissing the action should be restored. (Judgment of the Supreme Court of Nova Scotia *en banc*, 7 M.P.R. 544, reversed).

APPEAL by the defendant from the judgment of the Supreme Court of Nova Scotia *en banc* (1) which court, by its formal judgment, allowed the plaintiff's appeal from the judgment of Ross J. (on the trial with a jury) dismissing the action, and set aside the findings and answers of the jury and the judgment at trial, and ordered judgment for the plaintiff for $136,484.13, with interest. The action was to recover a balance claimed to be owing by defendant to a firm of stock-brokers for work and labour done as stock-brokers for defendant and at his request in and about the purchasing and selling of stocks, shares and securities and for commission and brokerage, and also for moneys paid by the brokers at defendant's request in the purchasing and selling of stocks, shares and securities for the account of the defendant; which claim had been vested in the present plaintiff. The material facts and circumstances of the case and the questions in issue are sufficiently stated in the judgment now reported. The appeal to this Court was allowed and the judgment of the trial Judge restored, with costs throughout.

J. L. Ralston K.C. for the appellant.

L. A. Lovett K.C. and *D. McInnes* for the respondent.

The judgment of the court was delivered by

DAVIS, J.—This is an appeal from the judgment of the Supreme Court of Nova Scotia *en banc* allowing the appeal of the plaintiff, McD. & C. Holdings Limited, from the judgment dismissing the action after a trial with a jury before the Honourable Mr. Justice Ross. The Court *en banc* under the judgment appealed from gave judgment for the plaintiff (respondent) against the defendant (appellant) for the sum of $136,484.13 with interest.

(1) 7 M.P.R. 544; [1934] 3 D.L.R. 360. For supplementary judgment as to the effect of the judgment, see said reports at p. 561 and p. 373 respectively; it is also set out in the judgment now reported.

The action was brought by the respondent against the appellant for the sum of $148,484.13 and interest, which the respondent claimed was the balance owing by the appellant to the firm of McDougall & Cowans, stock brokers, for work and labour done by said McDougall & Cowans as stock brokers for the appellant and at his request in and about the purchasing of stocks, shares and securities and for commission and for brokerage, and also for moneys paid by McDougall & Cowans at the request of the appellant in the purchasing and selling of stocks, shares and securities for the account of the appellant. The respondent further claimed that a receiving order under the provisions of the *Bankruptcy Act* had been made on the 5th day of October, 1931, against said McDougall & Cowans and that by judgment of the Superior Court of the Province of Quebec, Bankruptcy Division, dated the 11th day of March, 1932, the property and assets of McDougall & Cowans in bankruptcy, including the claim alleged in the present action, were vested in the respondent. The said judgment in the bankruptcy court had approved a scheme of arrangement, the proposal for which is Exhibit AA/12. Under paragraph 1 (*b*) of this proposal, all the property of McDougall & Cowans vested in the realization company, the present respondent.

The statement of defence alleged, (*a*) that McDougall & Cowans were the confidential advisers of the appellant in connection with the purchase and sale of the stocks, shares and securities; (*b*) that unknown to the appellant McDougall & Cowans were interested in pools in shares of International Nickel Limited and Brazilian Traction Light, Heat & Power Company, which were the stocks which the appellant very largely held, and by reason thereof were not in a position to give the appellant independent and disinterested advice; (*c*) that the said McDougall & Cowans advised the appellant from time to time not to sell his stocks, shares and securities; (*d*) that said McDougall & Cowans failed to sell stocks, shares and securities when intructed so to do by the appellant; (*e*) that the appellant relied upon the advice given by McDougall & Cowans not to sell such stocks, shares and securities; (*f*) that the loss for which the respondent is suing in the present action arose from the sale of stocks, shares and securities, which was wrongful inasmuch as the same could have been resold

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without a loss if McDougall & Cowans' advice to and their handling of the account of the appellant had been disinterested and in good faith.

By an interlocutory order made by Mr. Justice Graham in Chambers, it was ordered that the respondent be at liberty to prove by affidavit (*a*) the facts in connection with the purchase and sale of the stocks, shares and securities; (*b*) the disbursements made by McDougall & Cowans; (*c*) that the stocks, shares and securities were purchased and/or sold at the request of the appellant; (*d*) that the moneys alleged to be paid by McDougall & Cowans were paid at the request of the appellant; (*e*) that the commission and brokerage charges were proper charges; (*f*) that the rates of exchange were at the then prevailing rates, and (*g*) that the appellant was entitled to the credits set out in the statement of claim. The respondent put in evidence at the trial of this action affidavits in compliance with the said order. The particulars of the respondent's claim are contained in Exhibit S/C.

The action came on for trial before Mr. Justice Ross with a jury. The learned trial judge put the entire case to the jury in a series of questions to which, with the answers given by the jury, I shall refer later.

The evidence in this case reveals the course of speculation on the stock market immediately before and after the commencement, in the autumn of 1929, of the period of world-wide depression. The appellant was a lumber operator actually engaged in the woods at considerable distances from the city of Halifax. In March, 1926, he opened a marginal trading account with McDougall & Cowans, stock brokers, of Montreal, through their Halifax office. By January, 1929, his cash deposits had only aggregated $9,482.18, and yet it is admitted that by that date he could have taken out of the market in profits an amount of approximately $600,000. He knew that at the time, but chose to remain in the market rather than sell, with the result that by September, 1931, all his remaining stocks in the account had been forced to sale by his brokers or their bankers; and on October 5, 1931, the brokers, McDougall & Cowans, went into bankruptcy. The appellant's account on their books showed a debit of $148,484.13, and this notwithstanding the fact that the appellant had

actually paid in an endeavour to protect his account amounts aggregating nearly $80,000.

The assets of the brokerage house were in the course of administration by bankruptcy transferred, with the approval of the court, to a joint stock company incorporated and organized for the benefit of creditors. The company then commenced this action as assignee of the alleged indebtedness of the appellant to the brokers to recover the alleged indebtedness of the appellant in connection with the purchase and sale of the stocks and for commissions, interest, etc.

The main defence of the appellant was that, through negligence and breach of duty on the part of the brokers, he had suffered a loss in excess of the alleged indebtedness, and that the one set off the other. Shortly stated, his contention was that after paying in substantial amounts to protect his account in a rapidly falling market (a total of $68,883.86 down to and including July 7, 1930, of which sum $13,096.65 were the proceeds of life insurance, to the knowledge of the brokers) he reached a point about the middle of July, 1930, when he made up his mind to take his loss and sell out his account. He swears definitely that he told Peebles, the manager of the Halifax office of McDougall & Cowans with which he had his account, to sell out the account. It is common ground that the account was not closed out at that time, and it is not in dispute that if the account had been closed out by sale of the stocks in July, 1930 (when the appellant says he told the brokers to sell), there would have been no loss except the amount he had already paid in. The debit and credit would have about balanced, perhaps with eight to ten thousand dollars to the appellant's credit. A summary of the account as at July 15, 1930, shows an equity of $10,494.59; as at July 20, 1930, an equity of $12,699.59; as at July 25, 1930, an equity of $10,832.59; and at July 31, 1930, an equity of $3,318.92. The appellant says that the fact is that he was prevailed upon by the brokers to "hang on" to his stocks, and he did so upon the advice which they gave him, with the result which followed, that he not only lost what he subsequently put up as further margins, $5,000 on July 26, 1930, $4,000 on October 4, 1930, and $500 on April 21, 1931; but incurred a debit

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balance of over $148,000, which amount the respondent seeks to recover against him in this action.

From the opening of the account in March, 1926, the appellant says he purchased from time to time on the advice of the brokers various stocks until he was holding in May, 1929, 24 different stocks. From May, 1929, to January, 1930, he says he sold on the advice of the brokers 17 of these stocks, leaving his account then concentrated in 7 stocks, and that by the end of January, 1930, he had sold on the brokers' advice 4 of these 7 stocks, which left him at that time with his entire account concerntrated in three stocks, Brazilian, Nickel and Radio. No stocks were purchased by the appellant at any time after April, 1930, in which month he purchased on the advice of the brokers, he says, more Brazilian and more Radio. That was the state of the account when in July, 1930, the appellant says he definitely told the brokers to sell but was prevailed upon by their advice not to do so. The appellant now alleges that the advice then given him was tainted by a personal interest on the part of the brokers which they did not disclose to him and which was not at any time before bankruptcy known to him, this interest being that the brokers were personally involved (as a result of pools in which partners of the firm were largely concerned and which accounts were carried by the firm) in a liability of more than eight millions of dollars in the first two named stocks, Brazilian and Nickel. Statements of these pool accounts are shown at pages 238 and 239 of the case. The total figures in Brazilian at July 31, 1930, were $4,161,443.09, and in Nickel on the same date $4,159,273.30. The appellant points to the letter of July 16, 1930, from the brokers to himself, in which they suggest that he reduce his holdings by the sale of Radio, while silent as to Brazilian and Nickel, as a significant piece of evidence in support of his allegation against the brokers.

The respondent, on the other hand, says that the appellant was a competent business man of wide experience with large dealings during several years with other brokers as well as McDougall & Cowans, that he was very familiar with the stock market, its fluctuations and losses, and exercised at all times his own judgment. The respondent says that, when the appellant was told by McDougall & Cowans

in January, 1929, that he could sell out with a profit of nearly $600,000 but preferred to stay in the market, he showed himself to be a man of highly speculative nature and one who did exactly what he wanted to do without reference to the advice of his brokers; that when in July, 1930, he says he told the brokers to sell, he only told them that (if he did) by way of a disgruntled acquiescence in their statement to him that if he did not put up more margin they would have to sell him out. The interpretation put upon his words by counsel for the respondent, without admitting that the words were used, is "Well, sell me out—if you insist upon it—I can't give you the margin you say I must give you to prevent a sale." The respondent says that the appellant not only desired to stay in the market in July, 1930, for he had hopes it would right itself and he could save himself some of his losses, but that the subsequent deposits made by him to the credit of the account on July 26, 1930, October 4, 1930, and April 21, 1931, evidenced his desire to hold his stocks and prevent a forced sale of them on a rapidly falling market. The respondent treats the fact of the heavy obligations of the brokers in connection with the two stocks, Brazilian and Nickel, as evidence that the brokers had great confidence in these two stocks themselves or they would not have been involved in them to the extent they acknowledge they were and that when the brokers advised the appellant from time to time they gave him the same advice that they were acting upon themselves.

It would be useless to detail the mass of evidence given at the trial. Each story taken separately is in itself a convincing story, but when you hear both stories together you realize that the difficulty lies not so much on the facts as in the implications involved in, and the inferences to be drawn from, the proved facts. There is really very little substantial dispute as to the facts. The correspondence between the parties over a period of years, the circulars issued by the brokers from time to time and the different conversations related in the evidence are taken by the parties and interpreted from the different points of view. The difficulty in the case does not lie so much in the facts as in the inferences that may fairly and reasonably be drawn from them. The whole matter was left to the jury

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and on their answers to specific questions the learned trial judge entered judgment dismissing the action with costs.

Bearing in mind that the respondent sued for $148,484.13 as the balance of the account after all the stocks had been sold and the fact that the appellant swore definitely that in July, 1930, when the sale of his stocks would admittedly have left no debit balance, he told the brokers to sell but was prevailed upon to remain in the market, we turn to the questions and answers to the jury which were as follows:

Q. 1 (*a*) Was there a lack of due skill and care on the part of McDougall & Cowans in handling defendant's accounts?

A. Yes.

Q. (*b*) If so, in what respect?

A. In not selling stock when requested.

Q. (*c*) If your answer to 1 (*a*) is in the affirmative, then state what loss, if any, the defendant suffered by lack of such care and skill?

A. $148,000 or more.

Q. 2. Was defendant to McDougall & Cowans' knowledge relying on the latter's advice as to buying and selling stocks?

A. Yes.

Q. 3. Was McDougall & Cowans' advice given to defendant, and their method of handling defendant's account, disinterested and in good faith?

A. No.

It is to be observed that, while counsel for the appellant suggested a slightly different wording for the questions, counsel for the respondent took no objection whatever to the form of the questions though contending that the case should not be given to the jury.

The respondent appealed to the Supreme Court of Nova Scotia *en banc*. Written reasons for judgment were delivered (1). Mr. Justice Graham did not see any sufficient grounds for setting aside the answers to sub-questions (*a*) and (*b*) of the first question. Reading them together he thought the jury found as they fairly might that there was lack of due care in not selling defendant's stock when told to do so. The answers to the second and third questions constituted, in his view, a defence to the action without any support from the answers to the first question. If the brokers in advising the defendant and in doing his business acted in bad faith against his interest, their conduct would be fraudulent and they ought not to recover. He thought the finding in answer to the second question, that the de-

(1) 7 M.P.R. 544; [1934] 3 D.L.R. 360.

fendant acted upon the advice of the brokers, could not be set aside. As to the third question, he could not see how the jury could reasonably find that the brokers advised or acted dishonestly. The fact that the defendant accepted the situation when he found that the brokers had not sold his stock does not necessarily absolve them from liability for loss up till that time, but it prevents him from getting damages which accrued afterwards. The jury in fixing the damages at the amount claimed by the plaintiff and allocating it to a single negligent omission of the brokers, instead of to the general negligence which might be found to be disclosed, were probably confused by the form in which the questions were submitted. In his view, the answer to question 1 (*c*) as set down and allocated should be set aside. Upon the whole, however, Mr. Justice Graham thought the result of the trial to be unsatisfactory, and that it was a case in which the court in its discretion might properly order a new trial.

Mr. Justice Carroll took the view that the plaintiff could only succeed on the appeal if the answers to the questions submitted to the jury could not stand, and the answers could only be set aside if they were such answers as reasonable men could not reasonably find on the evidence. After briefly dealing with the evidence, he reached the conclusion that there was evidence which justified the jury making the answers which they did to questions 1 and 2. The answer to the third question presented some difficulties to Mr. Justice Carroll. He concluded that the proper and reasonable inference for a jury to draw from the evidence, especially where there was no explanation of the non-disclosure, was that the brokers were not disinterested in giving their advice to the defendant and in handling his account. Having regard to the relationship of the parties, he thought that the brokers had disqualified themselves from acting impartially, and that there was lacking that element of good faith which the law requires to be present throughout transactions of this kind. The brokers had withheld from the defendant the fact that they were interested in certain stocks, and that was equivalent to misrepresentation regarding a very essential and material fact. Mr. Justice Carroll did not see the reason for putting question 1 (*c*) to the jury. The defendant was not seeking damages but setting up a defence to the claim, and if the

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jury was justified upon the evidence to give the answers they did, then the defendant had made a good defence. He would dismiss the appeal with costs.

Mr. Justice Doull (with whom Mr. Justice Hall concurred) wrote a lengthy judgment reviewing the evidence, the judge's charge, the answers of the jury to the questions submitted, and discussed the authorities which he thought applicable to the facts. He dealt with one phase of the action which was again pressed before us but which I shall pass over for the moment, that is the question whether or not the brokers had been in a position to make delivery to the defendant of the shares in view of the evidence that these shares had been re-pledged by the brokers to their bankers. Dealing with the answers of the jury, he held that the answer to the first question should be set aside upon the ground that there was no foundation in the evidence of an order to sell, the failure to comply with which would give rise to an action for damages. Nor did the defendant regard the failure to sell as any breach of instructions, because he wrote on October 3, 1930, "I certainly appreciate what you have done for me in carrying the burden through this period of depression," and sent a cheque for $4,000. In any case the defendant revoked any order he had given to sell, for within a few days after the alleged conversation, i.e., on July 26, 1930, he paid $5,000. These acts, in the view of Mr. Justice Doull, undoubtedly ratified the action of McDougall & Cowans in continuing the account. As to the answer to the second question, that the defendant to the knowledge of McDougall & Cowans was relying on the latter's advice as to buying and selling stocks, he thought that if the word "relying" meant that the defendant bought the stocks which he did buy and sold the stocks he did sell because of advice which the brokers gave him, there is evidence to support the finding, although there is a great deal of evidence to show that the defendant was always exercising his own judgment also. There is evidence that the defendant held on after the stocks had badly slumped because of the advice of Percy Cowans, one of the partners. Under the circumstances the defendant was entitled to have disinterested and *bona fide* advice. There was no evidence, however, that McDougall & Cowans were engaged as the defendant's "confidential adviser" or that their

relationship to him was different from that which existed between them and their other clients, and certainly no evidence whatever that they were to do the buying or selling without his orders. Then, as to whether or not the advice given was *bona fide* and disinterested— There was ample evidence that the brokers knew that the defendant was acting, to some extent at any rate, on their advice. It was not in most cases advice given to him individually, and not advice which was paid for. Mr. Justice Doull did not think that any great fault should be found with the advice given by McDougall & Cowans as to buying, and that the defendant did not always follow the brokers' advice as to selling. He thought there was no evidence that the defendant followed their advice at all. He thought the advice given by Mr. Percy Cowans was reasonable advice. He could find no evidence of bad faith on the part of the brokers, and, while he thought it clear enough that the defendant could be successful in the absence of actual fraud or actual bad faith if the brokers were guilty of negligence under the circumstances of the relationship between the parties, he thought that the lack of due skill and care which the jury found to be "not selling stock when requested" precluded the finding of negligence on other grounds. The jury having found as they did, he saw no necessity for sending the case back for another trial, and was of opinion that the defence had failed and that judgment should be entered for the plaintiff for the amount of its claim, which was, as above stated, $148,484.13 and interest.

To summarize these conclusions of the members of the Appeal Court—Graham J. would order a new trial, Carroll J. would affirm the judgment dismissing the action, while Hall J. and Doull J. would set aside the findings and enter judgment for the amount of the plaintiff's claim.

After the reasons for judgment of the members of the Appeal Court were given and filed, counsel for the respondent applied to the Court for a formal order allowing the respondent's appeal and giving judgment for the claimant with costs. The Court reserved judgment on that application and subsequently a supplementary judgment was given and filed in the following terms:

The opinion of the majority of the Court (Graham, J., dissenting) is that the effect of the judgment is that the appeal is allowed.

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Counsel for plaintiff intimated that he was willing that the amount of the claim should be reduced by $12,000 to meet the finding in the judgment of Graham, J.

The amount will be reduced accordingly.

On the same date the Court granted a formal order directing judgment for the plaintiff in the sum of $136,-484.13 with interest. We are without the benefit of the explanation for this conclusion of the appeal, in view of the written reasons for judgment of the several members of the Court. But it is from the judgment of the Court and not from the reasons that an appeal lies.

The defendant appeals. Counsel on each side reviewed the evidence in careful detail, drawing different inferences and finding different implications from the same facts. It must be plain, however, that it was the peculiar function of the jury on the whole evidence to reach their own conclusions, and if there is evidence to support their answers, they must stand.

I now turn to a consideration of the evidence that may be regarded as the basis of the jury's answers. The appellant swore definitely that he told Peebles, the Halifax manager of McDougall & Cowans, in the middle of July, 1930, to sell out his stocks. On July 5, 1930, the appellant remitted to the brokers $10,055.91. On July 16, 1930, Peebles wrote the appellant:

> The anticipated check on my extension to you of the privilege of holding your stocks without marginal protection, came to-day.
>
> I am directed to state when full margin may be expected on your account. It is suggested that the firm has handled your account very generously through the depression. I am told that 7,000 shares of stock is more than we can reasonably be expected to carry for any account, without marginal protection.
>
> They ask that if you are unable to finance the account further, now you will reduce your holdings, on this rally, which in the case of Radio is nearly ten points.
>
> Kindly let me have your decision at your earliest convenience, as I am required to present my report to the head of the firm.

At this time, on the basis of thirty per cent. marginal requirements, the account stood with $62,000 shortage of margin, and the appellant's equity was $10,494.59. The appellant says that in July, 1930, Peebles began to call him up quite often. The appellant swore:

> * * * I could not put up much more; I was pretty well exhausted financially * * * when he called up that time I told him he would have to sell the account, and told him to sell it. * * * When I told him to sell the account out that day, there was not much more said after I told him to sell out, that I could not put up any more, and

the conversation ended. The receiver was hung up. Very shortly afterwards, I got another call saying it was too bad to sell the stocks now, as they thought they would soon come back * * * He said he thought I should do something as it would only be in my favour to try and help the account out. I told him I didn't like the idea, but at the same time I would think the matter over, and I think I went down to Halifax after that and talked the matter over, and he advised me to try and put up some more and hold the account.

The appellant fixes the date of the receipt of the letter of July 16, 1930, as the time Peebles called him up for more money, and he told him,

"I cannot give you any more"—I told him to sell me out.

On cross-examination as to the payment of $5,000 on July 26, 1930, the appellant swore that Peebles

kept calling me and said I had better hang on and probably it would work out for me the best by supporting the account some and I did not like it. I said I didn't like it. However, I later on agreed to do what I could. I said I will do what I can, I will do my best for you, I will try and get you some more; I don't know how I got it, through the bank or somehow, but I got it for them.

The appellant's son, Don Glennie, swore that he heard his father tell Peebles to sell out, and fixes the conversation between the middle and the latter part of July, 1930.

Peebles, recalled in rebuttal and examined in chief, swore he never received any instructions from Glennie to sell his account, but in the cross-examination he gives the following evidence:

Q. Am I correct in assuming that it is quite possible that there may have been discussions with Mr. Glennie with regard to selling?

A. Yes, he spoke about it very often.

Q. And you discussed it with him?

A. Yes, sir.

Q. And it is possible that in those conversations he may have said, I guess the best thing for me to do is to sell out?

A. He may have suggested that.

Some argument was directed to us on the assumption that there was difficulty in understanding exactly what the jury meant in their answer to the first question—"In not selling stock when requested." It was contended that "requested" was not a word of instruction or direction, and was something different from a finding that the appellant had "ordered" the brokers to sell. I do not think that any such distinction can be made. The learned trial judge in his charge to the jury used the word "requested" in discussing the sale of stocks by a broker when undermargined, and that may account for the jury using the word. In any case the word is more than one of assent,

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and the jury in effect found that the customer told the brokers to sell his stocks and that they did not do so.

Counsel for the respondent argues that even if that finding is well founded, the appellant subsequently cancelled his request, put up more moneys and endeavoured as best he could to avoid liquidation of his stocks on the falling market. There can be no doubt that he did, but that does not answer the appellant's charge that he did so at the insistence of the brokers and upon their advice, and that this advice was neither disinterested nor in good faith, in that the brokers were themselves involved in liabilty at the time in Brazilian and Nickel to the extent of over eight million dollars as mentioned above; and that when the brokers undertook to advise him not to sell, they should have disclosed to him their personal interest in the two stocks in question.

It is contended by the appellant that from July, 1930, onwards there was a consistent and continuous policy or system on the part of the brokers to advise their customers, and in particular the appellant, not to sell out Brazilian and Nickel, and that this policy was prompted by the very heavy interest of the brokers in these two stocks. There is no explicit evidence of this, and the question is whether or not it may be fairly and reasonably inferred from the evidence. There is a letter of August 28, 1930, from the brokers to the appellant stating that it is imperative that they have further support for his account in view of the continuing weakness in the Canadian market.

> If you decide to hold your present stocks, it will be necessary to make a further deposit in your account. If this is not possible at the present time, a reduction of 1,000 shares will be accepted, as a temporary reduction. This has been decided on by the firm, but we will wait a reasonable time for your instructions.

The respondent emphasizes the suggested reduction of 1,000 shares in the account, and the appellant emphasizes the statement of the necessity to make a further deposit in the account. This letter is rather typical of all the correspondence in that counsel find different implications and draw different inferences from the same letter. Then on September 6, 1930, the Halifax office of the brokers sent to the appellant, as they did to their customers generally, a circular letter. In this circular the brokers said that the

reports from Montreal and New York indicated that the turning movement predicted for the stock market was then in progress, and stated that, while financial statements for the third quarter of the year were discouraging and financial publications for the most part pessimistic, the situation in 1921 was almost parallel and writings almost identical with the market conditions and financial literature at the time of the circular, and that there followed during the seven years after 1921 the greatest market in history. The brokers then expressed their attitude on the high grade stocks, which, in their judgment, would make outstanding progress if bought around current prices and held for the better times. Particular reference was made in this circular to Brazilian and Nickel. As to Brazilian, the circular concludes:

> During the present year there should be another surplus to strengthen the equity behind the common stock.

and as to Nickel:

> * * * we believe this company is only on the threshold of its career.

The closing paragraph of the circular states:

> Our recommendations also include Dominion Bridge and Shawinigan Water & Power Co., all of which we believe will sell much higher, subject of course to market fluctuations.

Then on September 25, 1930, Peebles writes to the appellant expressing regret at the pressure he is compelled to put on the appellant "to strengthen your account"—

> * * * with conditions as they are I am afraid every day that my chief will sell your account out and if he decides on that, there is no appeal. The idea of carrying about 6,000 shares of stock for any client without margin is unheard of and there is no protection in your account at present prices.
>
> We were given to understand that you would turn over some funds in August. The fact that nothing came was very embarrassing to me. I have now reported that you expect to make a deposit the first of October.
>
> * * *
>
> If you are not able to raise more funds to support your holdings, it looks as if some of them will have to go at a very bad time. Please keep me posted on your prospects.

Then on October 3, 1930, the appellant writes to the brokers enclosing his cheque for $4,000, and says:

> I certainly appreciate what you have done for me in carrying the burden, through this period of depression, and I always want you to feel that I am trying to do my best to help out. As I get hold of some payments due me I will send you further amounts, and try to hold down until the market improves.

That letter is taken by the respondent as evidence that the appellant was hanging on to his stocks at his own free

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will, and inconsistent with his position in this action that he was over-reached by the brokers and persuaded by them to remain in the market. The appellant, on the other hand, contends that the letter must be read in the light of the non-disclosure to him by the brokers of their substantial personal and adverse interest in the particular stocks held by him.

On October 6, 1930, Peebles writes the appellant as follows:

My head office to-day notified me by wire that they would require a substantial liquidation of your debit balance. The conditions under which we are labouring to-day being so full of uncertainties that the loan in your account is considered unsafe.

Your account requires to-day fifty thousand dollars ($50,000) protection and we are unable to carry the account without a substantial deposit as protection.

At that time the sale of the stocks would have involved a loss to the appellant of approximately $100,000. Obviously alarmed with the situation, he went to Montreal and interviewed Mr. Percy Cowans, one of the senior partners of the firm of brokers, on October 9, 1930. I take the following from the direct examination of the appellant at the trial with reference to this interview:

Q. Tell us the substance of the conversation you had with him?

A. I told him I had come to see him about this account. I told him, had the account been sold out as I directed in July it would have been much better for me, I would not be where I was now; it had shrunk off quite a lot. I told him that I didn't know much about these stocks, I relied on them entirely for information to keep me posted, and I took their advice from the time I started the account to where it was now; and he told me, he said you have good stocks, Mr. Glennie, don't be afraid of those stocks; those stocks, he said, will go higher. He said, I will tell you right now Brazilian will go to $100 per share. He said, as regards Nickel, he said I have been up over the International Nickel plant many times; I know it, he says, all over, I have been through it and I know its resources, and I know what it can make. He took his pencil, and on the counter, right on his desk, and figured up to me what great resources there were in Nickel and what great prospects and what great paying power it had. He said Nickel will go to $100, and he said Brazilian will do the same; and he said I will carry those stocks for you until they come back, because I know what I am talking about when I am telling you about these stocks.

Q. What did you say to that?

A. I said I don't know; I would rely on what he said. He said if you can give us any assistance to help us along it will be much better, but he said I will carry the stocks for you because I know they will come back.

Q. Now at that time you discussed with him a proposition about the bank, about some stocks the bank were carrying?

A. I told him I had some stocks held by the Bank of Montreal; that I owed them an account there.

Q. Yes, go ahead.

A. I told him that the stocks I held would pay off both him and the bank as near as I could tell, and I thought I could get the bank to release the stock provided they paid my account off; so he asked me to go to the bank and get a list of the stock, and I went to the Bank of Montreal in Montreal and got the manager to take a list of the stocks off, and I brought them to Mr. Cowans and he took a list off in his office. He said, these are all good stocks, Mr. Glennie, and it is a shame to sell them now, they will everyone come back. He said, did the bank question you, and I said not at all, but I thought I would hand them over to you and clean up both accounts.

Q. What do you mean by that?

A. Clean his account off, and the bank's both.

Q. You mean by selling the stock?

A. Yes. He said, no, sir, I will not press you for my account, I will carry it for you, and he said take them back to the bank and hand them back to them for I don't want them, or he said they could keep the stock.

Q. What did you say to that, what was your decision and what did you say?

A. Well, I took him at his word and told him I would rely on his advice entirely.

In cross-examination upon this interview the appellant repeats substantially the same statement. In October, 1930, Brazilian was selling at $25, and Nickel at $17.

Mr. Cowans was not called as a witness at the trial, and no explanation is offered for his not being called. The evidence of the appellant as to that interview was uncontradicted. The jury may have thought it significant that no further deposit was made by the appellant except a payment of $500 on April 21 of the next year, 1931.

On February 5, 1931, Peebles wrote to the appellant as follows:

> Not having heard from you since your last visit to Halifax, we are writing to let you know that head office is constantly inquiring as to when we may expect a payment on account from you. While we may hold your stock for some time at present prices, the future chances of holding your account depends, of course, upon the assistance you give us in supporting your stocks in the meantime.

And again on February 18, 1931, Peebles wrote to the appellant as follows:

> The head office is making constant demands upon me for some action on your account, as the absence of any deposits whatever since last fall is creating a very unfortunate impression. I trust that you will be able to make a deposit shortly as I feel that anything you get now would be greatly to your advantage.

Peebles admitted that his firm were advising the holding of Brazilian and Nickel in 1931, based on Mr. Cowans' opinion very largely, and that he did not know when advising the appellant that partners of his firm with others

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were interested in Brazilian and Nickel to the extent of millions of dollars in accounts carried by the firm, as disclosed at the trial.

On November 7, 1930, the brokers sold out all the Radio. The loss represented by the difference between the cost and the amount realized on Radio was $50,090.50. The appellant was then entirely in Brazilian and Nickel.

On May 19, 1931, the brokers sold 1,000 shares of Brazilian at $13\frac{7}{8}$. In April, 1930, these shares had cost 50 to 54. On the same day they sold 1,000 Nickel at 12. The last 1,000 shares of Nickel had been bought on January 28, 1929, at 68.

On May 28, 1931, Peebles wrote the appellant asking for $10,000 as margin.

On September 24, 1931, the bankers of the brokers sold all the then remaining stocks of the appellant—at least the brokers treated part of the shares pledged by them to and sold by the bank on that day as his shares. Mr. Russell Cowans deposed to the sales by their bankers during the month of September, 1931, and stated that

> the proceeds of such sales were apportioned pro rata by McDougall & Cowans to the accounts of those clients who were under the market, and as a result of this apportionment the account of the said T. C. Glennie was credited with the sale price of 560 shares of International Nickel;

and similarly with the sale price of 2,721 shares of Brazilian, which entries appear in the appellant's account of September 28, 1931, and September 26, 1931, respectively. The bankruptcy of the brokers then ensued on October 5, 1931.

It is easy to draw inferences and the court must guard against inferences being drawn that cannot fairly and reasonably be drawn from the evidence, but I think the jury were entitled upon the evidence in this case to make the findings they did. Counsel for the respondent urged upon us that the different questions and answers must be separated and considered singly, and from that point of view he argued, having regard to the charge of the learned trial judge, that all the findings of negligence must be taken to be contained in the answer to question 1, and that the answer to question 3 negatived negligence. But in a complicated case such as this, if the trial judge in his discretion thinks it a fit case for a jury and leaves the

whole case to the jury as was done here, we must read the questions and answers together as far as practicable to ascertain the true meaning and effect of the jury's findings. Treated in that manner and having regard to the evidence, I think the jury's answers clearly indicate that they accepted the appellant's evidence that he told the brokers to sell him out in July, 1930, at which time it was admitted a sale would have left him without any debit balance; that he was advised by the brokers against taking this course; that he acted upon their advice, which was "not disinterested and in good faith"; that in consequence thereof he ended his speculations with a loss in his account of $148,484.13. That, I think, is a fair interpretation of the jury's answers, and, while a jury might well have taken a contrary view of the evidence, there was evidence which, if believed, was sufficient to support the findings.

In considering the answer to question 3, we should recall the language of the learned trial judge in submitting that question to the jury:

> In a word, what defendant says is that there came a time in the negotiations when McDougall & Cowans were acting dishonestly with him; that they were acting in bad faith. Now if you find that McDougall & Cowans were acting in bad faith, you will answer that question "Yes," but let me suggest to you that when you are considering that question you ought to be able to say just at what time this bad faith began; when did McDougall & Cowans commence (to use a somewhat slang expression) to put one over on the defendant? Not when they bought the stocks for the defendant. Not during the whole of 1927 and 1928, and up to the time in 1929 when this defendant had a clear profit of five or six hundred thousand dollars. There was no talk about bad faith then, although during that time McDougall & Cowans held large quantities of Brazilian and International Nickel.
>
> * * *
>
> In deciding that question of bad faith you can hardly base your finding on any one particular fact in the case, but you must review the transactions between the parties, it seems to me, from beginning to end.

The respondent contends in any event that the appellant subsequently to July, 1930, acquiesced in the suggested concellation of his order to sell and waived his request, relying upon the subsequent marginal deposits made by the appellant: July 26, $5,000; October 4, $4,000; April 21, 1931, $500; and that the damages, if any, should have been assessed at the difference in the value of the stocks between the date of the alleged breach of duty in not selling and the date of the alleged waiver—a difference of only

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a few thousand dollars, apparently covered by the respondent's consent in the Court of Appeal to a reduction of $12,000. But having regard to the evidence of the appellant of the advice he was given by Peebles in July, 1930, and to the uncontradicted evidence of the appellant of the statements made and advice given to him by Mr. Percy Cowans in Montreal on October 9, 1930, and to the letters and circular from the brokers to the appellant subsequently to the middle of July, 1930, the jury was entitled to reach the conclusion that the appellant's course of conduct from and after his request to the brokers to sell in July, 1930, was predicated upon the advice of the brokers. The jury's findings read as a whole indicate that such was the conclusion they reached. The inference the jury drew, it seems to me, was that the subsequent demands, either to liquidate or to put up further margins, were intended to draw out more money from the appellant to support his account rather than to induce the sale of the stocks. That is an inference which I think the jury could very properly draw from the evidence, and, taken with the fact of the non-disclosure at all times of the liability of the brokers to the extent of some eight millions of dollars in Brazilian and Nickel, justifies the conclusion of the jury that the advice given to the appellant was not disinterested and in good faith, and induced the appellant to remain in the market and resulted in the ultimate loss.

The case presents some serious difficulties quite apart from the findings of the jury. One difficulty is whether or not the plea of the appellant was as a matter of law a defence to the claim. The claim is put as the balance due in respect of moneys paid in the purchase of stocks, shares and securities and for brokerage commissions, interest, etc. The appellant admitted the correctness of the accounts.

The respondent contends that the appellant's claim for damages for breach of duty is not a defence in law to the claim but a matter for cross-action. The defence has been dealt with throughout, however, as a proper subject matter by way of defence in whole or in part to the claim. It is always desirable to avoid circuity of action which would result from compelling the defendant to pay the amount of the claim and leaving him to cross-action. Substantially it was one transaction between broker and customer

and the damages alleged arose, if at all, out of negligence or breach of duty by the brokers in connection with the transaction. We cannot give effect to this objection of the respondent as to the form of the action and defence.

A more serious difficulty that presents itself is the absence of an explicit finding of the causal relation between the alleged negligence or breach of duty and the damages assessed. The form of the questions submitted to the jury was not as precise as might be desired but, substantially, the answers, taken as a whole, indicate that the jury, treating negligence broadly as a breach of duty, have ascribed the appellant's loss to the extent of the amount of the debit balance sued upon, to the advice given by the brokers to the appellant.

During the argument the nature and extent of the rights and obligations of brokers to their customers were broadly discussed by counsel but it is unnecessary for us in this case to attempt to lay down any general statement. The customer here requested the brokers to sell. The brokers undertook to advise the customer at that time not to sell, for that must be involved in the findings of the jury. Having so undertaken to advise, the brokers undoubtedly owed a duty to their customer to advise fully, honestly and in good faith, and the non-disclosure to the customer of their own substantial interest in the stocks that he was carrying and wanted to sell was a breach of duty for which the brokers were liable for any damages suffered by the customer in consequence of that breach of duty. There is no evidence that the appellant would have taken a different course had disclosure been made to him, but once the interest was shown to exist, the burden rested upon the respondent to exonerate the brokers and establish that the advice given and the mode of handling the account was not affected by the brokers' very large interest in the pools. The fullest and clearest explanation for the non-disclosure rested upon the respondent and no attempt was made to give any explanation.

I therefore think that the judgment directed to be entered by the learned trial judge dismissing the action ought to be restored with costs throughout.

It is unnecessary, in the view I take of this appeal, to consider the question raised by counsel for the appellant

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at the trial and again on the appeal in the court below and much stressed by him before us, that the respondent could not succeed in the action in any case because it had not established that McDougall & Cowans were in a position at all material times to deliver the stocks to the customer had he tendered payment of the balance of his account. It was contended that the stocks when purchased had been pledged by the brokers to their bankers to such an extent as to deprive the brokers of a compellable title to the particular stocks purchased for the appellant. I should like to say that, without further consideration of this aspect of the case, I should not want to be taken as in agreement with the views expressed on this question in the court below.

Appeal allowed with costs.

Solicitor for the appellant: *J. S. Smiley.*

Solicitor for the respondent: *L. A. Lovett.*

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*Feb. 7, 8.
*Apr. 15.

THE MINISTER OF FINANCE OF BRITISH COLUMBIA ..... APPELLANT;

AND

HIS MAJESTY THE KING (AT THE PROSECUTION OF ANDLER ET AL)..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Real property—Land Registry Act, R.S.B.C., 1924, c. 127, ss. 216, 217, 218, 226—Liability of assurance fund—Whether judgment recovered is one for "damages" within meaning of the Act—Certificate of the court shewing award of damages—Mandamus to Minister of Finance—Whether Minister servant of the Crown.

The prosecutors, now respondents, had been given judgment on October 27, 1933, in an action in which they alleged that the defendants in that action had fraudulently obtained a deed of conveyance which had been placed in escrow and had fraudulently registered it under the provisions of the *Land Registry Act* and then raised money upon the property by way of mortgage. The charge of fraud was sustained by that judgment, and the land was vested in the prosecutors respondents subject to the mortgage, and the judgment further pro-

PRESENT:—Duff C.J. and Lamont, Cannon and Davis JJ. and Dysart J. *ad hoc.*

vided for a reference to the district registrar to ascertain the amount received by the wrongdoers under the mortgage and also rents and profits and that the prosecutors recover "the sum found due on the taking of such account." A certificate of the district registrar on the reference directed by the judgment was dated November 22, 1933. This amount having been so fixed at a sum of $34,730.95, the district registrar, without making any further application to the court, entered judgment on December 30, 1933. Writs of execution having been issued on such judgment and returns of *nulla bona* made thereto, a demand was made upon the Minister of Finance pursuant to section 218 of the *Land Registry Act*, for payment of the amount of the judgment out of the assurance fund provided for by the Act. This demand being refused, the prosecutors obtained from D. A. McDonald J. an order for a writ of *mandamus* commanding him to pay. The Court of Appeal held that the order had been properly made under sections 216 and 218 of the Act.

Held, reversing the judgment of the Court of Appeal ([1935] 1 W.W.R. 113), that, upon the facts and circumstances of this case, the Minister of Finance was entitled to refuse the demand made upon him and that a writ of *mandamus* should not have been issued to compel him to pay to the respondents the sum demanded, or in fact any other sum. Upon the analysis of this case, this Court could not ascertain what if any damages were in fact sustained in consequence of the fraudulent registration; and it was precisely in order to avoid questions of fact such as have been raised in the present proceedings that the *Land Registry Act* expressly provides that the certificate of the Court shewing an award of damages, in an action between the lawful owner and the wrongdoer, is a necessary foundation to a proper claim against the Minister of Finance under section 218 of the Act. The alternative would be that this Court would resettle for the Minister the statement of the damages, if any, sustained by the person wrongfully deprived of land in consequence of a fraudulent registration by another person; and the words of the statute completely negative the right of any further tribunal to review the decision in the action.

Held, also, that in a proper case a *mandamus* lies against the Minister of Finance to compel payment out of the assurance fund when there is no suggestion that the fund itself is not sufficient to meet the claim without resort to any moneys of the Consolidated Revenue Fund. Distinction must be made between a Minister acting as a servant of the Crown and acting as a mere agent of the legislature to do a particular act. Under the provisions of the statute, a particular fund is established by the legislature and created by the setting aside of a certain proportion of the fees paid by persons registering documents under the *Land Registry Act* so that a fund may be available to compensate those persons who have registered their documents and become deprived of their land or some interest therein in consequence of some fraud by other persons in procuring registration of documents under the Act. The fund is not public money of the Crown but the Minister of Finance for the province has been designated by the legislature to pay out of that fund damages sustained by those persons, upon proof by certificate of the court of certain conditions prescribed by the statute.

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APPEAL from the judgment of the Court of Appeal of British Columbia (1), affirming the order of D. A. McDonald J., whereby he ordered that a peremptory writ of *mandamus* should issue commanding the appellant to pay to the prosecutors respondents the sum of $34,730.95 damages and $381.95 costs, and to charge the same to the account of the Assurance Fund provided by the *Land Registry Act,* R.S.B.C. 1924, chapter 127.

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

C. W. Craig K.C. for the appellant.

Alfred Bull K.C. for the respondent.

The judgment of the Court was delivered by

DAVIS J.—This appeal arises out of proceedings by way of *mandamus* instituted by the respondents, who alleged that they were wrongfully deprived of certain land or an interest therein situate in Victoria, B.C., in consequence of fraud in the registration of a certain deed of conveyance, against the Minister of Finance of the province of British Columbia, to compel payment of the amount of their damages by him out of the Assurance Fund under the *Land Registry Act,* R.S.B.C. 1924, c. 127.

Under the terms of an agreement of purchase and sale of the lands in question, the deed of conveyance was put in escrow to be taken up by the purchaser upon payment of the purchase price. The respondents as vendors alleged that the purchaser fraudulently obtained possession of the deed without payment of any of the purchase price, registered the same under the provisions of the *Land Registry Act* and then raised money upon the property by way of mortgage. The deed of conveyance was dated September 25, 1925, and was registered October 13, 1925. The $30,000 mortgage to which we shall later refer was registered on May 13, 1926, and the respondents' action to set aside the registration of the deed of conveyance and to revest the property in them was commenced April 8, 1927. The judgment in the action in favour of the respondents as plain-

(1) [1935] 1 W.W.R. 113.

tiffs was delivered October 27, 1933, the certificate of the district registrar on the reference directed by the judgment was dated November 22, 1933, and the final judgment, dated December 30, 1933, adjudged that the respondents as plaintiffs recover against the defendants in the action who were responsible for the fraud the sum of $34,730.95 and costs. The defendants in the action appealed but they subsequently abandoned their appeal and it was formally dismissed by the Court of Appeal of British Columbia on March 7, 1934. A return of *nulla bona* having been made by the sheriff to a writ of *fieri facias*, the respondents on March 21, 1934, demanded payment from the Minister of Finance under the provisions of s. 218 of the *Land Registry Act* of the amount due on the said judgment, $34,730.95 and certain costs. The Minister refused to comply with the demand and the respondents then on April 18, 1934, moved for an order directing that a writ of *mandamus* do issue directed to the Minister of Finance commanding him to pay the respondents the above amounts awarded by the judgment in the action to which we have referred. The Minister had by notice of motion dated April 9, 1934, made application to the Chief Justice of British Columbia for leave to intervene in the said action and for an extension of time within which to appeal from the judgment in the action but this application was dismissed on April 13, 1934. Mr. Justice D. A. McDonald on May 3, 1934, in the proceedings instituted by the respondents against the Minister granted an order directing a peremptory writ of *mandamus* to issue directed to the Minister commanding him to pay to the respondents the amount of damages and costs—namely, $34,730.95 damages and $381.95 costs—awarded by judgment in the said action. The Minister appealed to the Court of Appeal of British Columbia (1), which court dismissed the appeal on October 2, 1934, Martin and McPhillips, JJ., dissenting. The Minister now appeals to this Court.

Before entering upon a discussion of the particular facts of the case, we should review briefly the legislation of the province of British Columbia respecting the creation and maintenance of the Assurance Fund under the *Land Registry Act* of that province.

(1) [1935] 1 W.W.R. 113.

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The fund appears to have been first created by s. 14 of the *Land Registry Act*, c. 29 of the statutes of British Columbia of 1898, which section became s. 136 of the Revised Statutes of 1911, c. 127, and read as follows:

136. The Assurance Fund shall be formed by deducting from the amount of fees received by the registrar after the thirtieth day of June, 1898, for the purposes of the *Land Registry Act* the amount of twenty per centum per annum, and accumulating the same with interest thereon until the fund shall reach the sum of fifty thousand dollars, after which the twenty per cent shall not be deducted unless at any time the fund shall be diminished by payment, when the addition to it of a like sum of twenty per cent shall be resumed until the fund shall again reach the amount of fifty thousand dollars, and so on in perpetuity; and all sums of money so received and deducted, together with all interest and profits which may have accrued thereon, shall from time to time be invested by the Minister of Finance and Agriculture in such securities as may from time to time be approved of by the Lieutenant-Governor in Council for the purposes herein provided.

Other sections of the 1911 Act to which reference should be made are secs. 127 and 174, which read as follows:

127. The Minister of Finance and Agriculture shall pay the amount of any judgment obtained, payable out of the Assurance Fund, notwithstanding that there may not be a sufficient sum to the credit of the Assurance Fund.

174. There shall be paid to the registrar, in respect of the several matters mentioned in the Third Schedule hereto, the several fees therein specified or such other fees as the Lieutenant-Governor in Council may from time to time by Order direct; and all fees paid to the registrar pursuant to this Act shall be paid into the Provincial Treasury, and shall, less twenty per cent thereof, which is to be placed to the credit of the Assurance Fund, while the amount to the credit of same does not exceed the sum of fifty thousand dollars, be carried to the Consolidated Revenue Fund.

The Act of 1911 and subsequent amendments were repealed by the *Land Registry Act*, being c. 26 of the 1921 statutes. The Assurance Fund was continued by s. 228 which is now s. 228 of the Revised Statutes of 1924, c. 127, and reads as follows:

228. The Assurance Fund of fifty thousand dollars existing on the thirty-first day of May, 1921, under the Acts repealed by chapter 26 of the statutes of 1921 shall be continued for the purposes of this Act, and together with all interest and profits which have accrued or accrue thereon shall from time to time be invested by the Minister of Finance in securities approved by the Lieutenant-Governor in Council. If at any time the Assurance Fund is reduced to an amount below the sum of fifty thousand dollars by the payment of claims, it shall again be brought up to that sum by deducting one-fifth of all fees received by the registrars and adding the amounts so deducted to the fund.

Section 127 of the 1911 Act remains the same in the present Act as s. 220. Section 174 in amended form is now s. 254.

It is to be observed then that the Assurance Fund was created by setting aside a portion of the registration fees collected under the *Land Registry Act* until the sum of $50,000 was reached, the balance of the fees collected being paid into the Consolidated Revenue Fund. Provision was made that if the Assurance Fund should become reduced below $50,000, a certain portion of the registration fees should again be set apart to reimburse the fund and in so far as the fund might be insufficient at any time to meet the lawful claims upon it, what is in effect a loan from the Consolidated Revenue Fund is made available to bring the fund up to the fixed amount.

For the purpose of these proceedings it may be assumed that the Assurance Fund was at the time of the demand and refusal of payment thereout of the amount claimed sufficient without any encroachment upon the Consolidated Revenue Fund, for it appears to have been stated by counsel for the respondents on the hearing for the issue of the writ of *mandamus* and not challenged by counsel for the Minister that the Assurance Fund at the time in fact exceeded the sum of $140,000.

We may now turn to the provisions of the *Land Registry Act* governing the rights of persons who are wrongfully deprived of their land in consequence of fraud in the registration of documents under the Act. The relevant sections of the *Land Registry Act* (R.S.B.C. 1924, c. 127) read as follows:

216. Any person wrongfully deprived of land, or any estate or interest in land, in consequence of fraud or misrepresentation in the registration of any other person as owner of such land, estate or interest, or in consequence of any error, omission, or misdescription in any certificate of title, or in any entry in the register may bring and prosecute an action at law for the recovery of damages against the person by whose fraud, error, omission, mispresentation, misdescription, or wrongful act such person has been deprived of his land, or of his estate or interest therein. The bringing or prosecuting of an action as aforesaid shall not prevent proceedings being taken against the registrar in respect of any loss or damage not recovered in such action: Provided that no action shall in such case be brought against the registrar without first proceeding as above provided unless authorized by the fiat of the Attorney-General.

217. Nothing in this Act contained shall be so interpreted as to leave subject to action for recovery of damages as aforesaid, or to action of ejectment, or to deprivation of the estate or interest in respect of which he is registered as owner, any purchaser or mortgagee *bona fide* for valuable consideration of land, on the plea that his vendor or mortgagor may have been registered as proprietor through fraud or error, or may have derived from or through a person registered as owner through

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fraud or error; and this whether such fraud or error shall consist in wrong description of the boundaries or of the parcels of any land, or otherwise howsoever.

218. In case the person against whom such action for damages may be brought as aforesaid shall be dead, or cannot be found within the province, then in such case it shall be lawful to bring such action for damages against the registrar as nominal defendant for the purpose of recovering the amount of the said damages and costs against the Assurance Fund; and in any such case, if final judgment be recovered, and also in any case in which damages may be awarded in any action as aforesaid, and the sheriff shall make a return *nulla bona*, or shall certify that the full amount, with costs awarded, cannot be recovered from such person, the Minister of Finance, upon receipt of a certificate of the Court, shall pay the amount of such damages and costs as may be awarded, or the unrecovered balance thereof, as the case may be, and charge the same to the account of the Assurance Fund.

226. In any case where it appears that the Assurance Fund is clearly liable for any loss or damage to any person under any of the provisions of this Act, and where it appears that the claim for loss or damage is a fair and reasonable one, the Minister of Finance may, without an action being first brought, pay the amount of any such claim: Provided that no such claim shall be paid unless the Minister of Finance is authorized to do so by the reports, advising such payment, of the Attorney-General and the registrar of the district in which the land which is the subject of such claim lies or is registered.

The statute requires that the respondents shew that they were wrongfully deprived of land or of any estate or interest in land in consequence of fraud in the registration of some other person as owner of such land, estate or interest and that they recovered damages in an action at law brought and prosecuted by them against the person by whose fraud they were deprived of their land or of some estate or interest therein, and that the sheriff has made a return of *nulla bona*. Upon receipt of a certificate of the court, the Minister of Finance shall pay the amount of such damages and costs as may be awarded, or the unrecovered balance thereof as the case may be, and charge the same to the account of the Assurance Fund.

Counsel for the appellant contends at the outset that proceedings by way of *mandamus* do not lie against the Minister of Finance in respect of the claim in question upon the ground that the Minister of Finance is a servant of the Crown and as such is not amenable to the ordinary process of the courts. Reliance is put upon the words of Cockburn, C.J., in *The Queen* v. *Lords Commissioners of the Treasury* (1):

(1) (1872) L.R. 7 Q.B. 387, at 394.

I take it, with reference to that jurisdiction, we must start with this unquestionable principle, that when a duty has to be performed (if I may use that expression) by the Crown, this Court cannot claim even in appearance to have any power to command the Crown; the thing is out of the question. Over the sovereign we can have no power. In like manner where the parties are acting as servants of the Crown, and are amenable to the Crown, whose servants they are, they are not amenable to us in the exercise of our prerogative jurisdiction.

and upon the words of Lush, J., at p. 402 of the same case:

When the money gets to the hands of the Lords Commissioners of the Treasury, who are responsible for dispensing it, it is in their hands as servants or agents of the Crown, and they are accountable theoretically to the Crown, but practically to the House of Commons, and in no sense are they accountable to this or any other Court of Justice.

If the Minister of Finance was acting as a servant of the Crown in discharging his duties with reference to the Assurance Fund there can be no doubt that he would not be subject to a writ of *mandamus* to compel him to pay the respondents out of that fund, for it is beyond question that a *mandamus* cannot be directed to the Crown or any servant of the Crown simply acting in his capacity of servant. As Lord Esher, M.R., said in *The Queen* v. *The Secretary of State for War* (1):

Assuming that the Crown were under any obligation to make this allowance to the claimant, a *mandamus* would not lie against the Secretary of State, because his position is merely that of agent for the Crown, and he is only liable to answer to the Crown whether he has obeyed the terms of his agency or not: he has no legal duty as such agent towards any individual.

But a classic statement of the distinction between a Minister acting as a servant of the Crown and acting as a mere agent of the legislature to do a particular act is that of Sir George Jessel when counsel in *The Queen* v. *The Lords Commissioners of the Treasury* case (2):

Where the legislature has constituted the Lords of the Treasury agents to do a particular act, in that case a *mandamus* might lie against them as mere individuals designated to do that act; but in the present case, the money is in the hands of the Crown or of the Lords of the Treasury as ministers of the Crown; in no case can the Crown be sued even by writ of right. If the Court granted a *mandamus*, they would be interfering with the distribution of public money; for the applicants do not shew that the money is in the hands of the Lords of the Treasury to be dealt with in a particular manner.

Here we have a particular fund established by the legislature and created by the setting aside of a certain proportion of the fees paid by persons registering documents under the *Land Registry Act* so that a fund may be available

(1) [1891] 2 Q.B. 326, at 338. (2) (1872) L.R. 7 Q.B. 387, at 389.

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to compensate those persons who have registered their documents and become deprived of their land or some interest therein in consequence of some fraud by other persons in procuring registration of documents under the Act. The fund is not public money of the Crown but the Minister of Finance for the province has been designated by the legislature to pay out of that fund damages sustained by persons who have been wrongfully deprived of their land in consequence of fraudulent registrations, upon proof by certificate of the court of certain conditions prescribed by the statute. We are of opinion that in a proper case a *mandamus* lies against the Minister to compel payment out of the fund when as here there is no suggestion that the fund itself is not sufficient to meet the claim without resort to any moneys of the Consolidated Revenue Fund.

But counsel for the Minister takes the position that even if *mandamus* lies in a proper case, there has been in this case no action at law in which damages have been awarded. Taking the pleadings in the action and judgment therein it was, he submits, plainly an action for a declaration that a deed of conveyance was fraudulently registered and for an order setting aside the same and for an account of the rents and profits and of any payments made under the contract of purchase and sale and not a common law action for damages. The statutory obligation of the Minister to pay is upon an award of damages by the court in an action. Upon the very face of the record of the action no damages, strictly speaking, were either sought or awarded. I confess to have been much impressed by this argument during the hearing but upon reflection I have concluded that if the substantial effect of the judgment in the action was the establishment of the amount of the damages actually suffered by the respondents in consequence of the fraudulent registration, we should not allow the form of the action or judgment to becloud the real substance of the matter.

That brings us to a consideration of the judgment in the action in an effort to ascertain what if any damages were in fact established. The lands were by the judgment revested in the respondents but subject to the $30,000 mortgage that had been charged against them. No ques-

tion is raised as to the *bona fides* of that mortgage in the hands of innocent third parties, and though the value of the lands was not proved except in so far as the contract of purchase and sale fixed the price at $55,000 on terms of payment of $10,000 in cash and the balance by a promissory note to be secured by a mortgage on properties in California, we may reasonably infer, I think, that the lands were worth at least the amount of the mortgage. It was proved that the amount of the mortgage was actually received by the parties who committed the fraud. If the fact of the $30,000 mortgage stood alone, we might not feel much difficulty in dealing with the matter on the basis that the damages were the amount of the mortgage with which the respondents found their property charged upon its return to them by the vesting order of the court made in the action. But the judgment directed a reference as to payments made upon the contract of purchase and sale and as to the rents and profits and these, together with the $30,000 mortgage, were respectively debited and credited in arriving at the final sum of $34,730.95 for which, with certain costs, the respondents demanded payment from the Minister out of the Assurance Fund as damages awarded to them for the wrongful deprivation of their property or some interest therein in consequence of the fraudulent registration. Now it is to be observed that the account of the rents and profits was taken by the registrar for a period of time that not only commenced thirteen days prior to the date of the fraudulent registration but extended beyond the date of the judgment. Not only this, but it would appear that in the action a receiver had been appointed by the court *pendente lite* and that the accounts for the period covered by the reference were divided into two groups, one relating to the period prior to and the other to the period subsequent to the appointment of the receiver. The balance of the moneys in the hands of the receiver, some $3,721.75, should be treated as moneys to which the respondents as successful plaintiffs in the action were entitled. But in any event the loss of the rents and profits did not arise "in consequence of the fraudulent registration," to use the exact words of the statute, and stand in a totally different position to the registered mortgage. The rents and profits therefore cannot properly be

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taken into account in arriving at the damages sustained in consequence of the fraudulent registration. If we disregard then the rents and profits and consider only the mortgage the damages might be said to be $30,000, but the matter is not so simple as that. The property has been revested in the respondents subject to the mortgage and the contract of purchase and sale has been rescinded. Substantial cash payments, however, were found by the registrar to have been made by the purchaser on account of the purchase price, $2,000 on the 1st December, 1925, and $8,000 in June, 1926, to which amounts the registrar added interest calculated to the date of his certificate, in the aggregate sum of $5,320, making the total payments so found with interest $15,320. With the property revested in the respondents the total principal payments of $10,000 on the purchase money at least must be taken into account if the actual damages suffered by the respondents are to be arrived at. Moreover, very substantial improvements were made to the buildings upon the lands. The defendants in the action in giving particulars of their statement of defence stated that they had expended the sum of $11,525 between February, 1926, and January, 1927, for altering the front of the building and show windows, redecorating the interior, replacing radiator, rewiring basement, installing awning fixtures and for architect's fees in respect of alterations; and while the repairs and improvements are not specifically dealt with in the registrar's certificate, the total disbursements during the first period for maintenance of the premises are given at $5,043.23, and during the second period at $32,457.68; and it does not seem unfair, therefore, to infer that the item in the particulars of the statement of defence relating to alterations and improvements and amounting to $11,525 was correct. If the true amount of damages is to be ascertained, it may be necessary to take this amount into consideration. The utter confusion into which one falls in attempting to deal with the subject matter of the judgment as substantially one of damages, though in form something quite different, is best evidenced by extracting from the judgment certified by the Court to the Minister the following paragraphs from the findings of the registrar on the reference:

> And I do further certify that the moneys received for the period from the 12th day of April, 1927, to the 18th November, 1933, on account of

rents and profits of the said lands and premises amount to $49,241.93; and that the total disbursements during the said period for maintenance of the said lands and premises amount to $32,457.68; and that after deducting the said total disbursements from the total receipts for the said period there remains a balance of $16,784.25, being the net rents and profits during the said period; and after deducting therefrom the sum of $3,721.75 now in the hands of the said receiver, J. C. Bridgman, there remains the sum of $13,062.50, being the moneys received by the defendants or any of them from the rents and profits of the said lands and premises during the said period.

Upon that state of facts, the courts below directed the issue of the old peremptory writ of *mandamus* against the Minister to compel him to pay to the respondents out of the Assurance Fund the full amount of the judgment in the action, $34,730.95, in effect as damages. Obviously that sum is not the amount of the damages and it is elementary that before *mandamus* will lie there must be a strict legal right and a proper and sufficient demand.

Even with the analysis of the case that I have sought to make, I cannot approximately arrive at the amount of damages sustained in consequence of the fraudulent registration. I cannot help thinking that it was precisely in order to avoid questions of fact such as have been raised in these proceedings that the statute expressly provides that the certificate of the Court shewing an award of damages, in an action between the lawful owner and the wrongdoer, is a necessary foundation to a proper claim against the Minister under s. 218. It seems to me that it is the duty of this Court to hold that there be such a certificate. The alternative is a very difficult alternative. It really amounts to this, that the Court should direct the Minister upon the question what is to be considered as damages and what is to be omitted. In other words that the Court should resettle for the Minister the statement of the damages, if any, sustained by the person wrongfully deprived of land in consequence of a fraudulent registration by another person. The words of the statute completely negative the right of any further tribunal to review the decision of the action. This is in substance the language of Lord Hewart, C.J., in considering the certificate of value by the district auditor in the recent case of *Rex* v. *Ayton, Ex Parte Cardiff Corporation* (1).

(1) [1935] 1 K.B. 225, at 234.

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However widely we might be disposed to relax the rigour of the strict requirements governing the right to the issue of a peremptory writ of *mandamus* in order to effectuate the spirit and intention of the legislation for the payment of claims out of the Assurance Fund, we cannot go so far as to say upon the facts and circumstances of this case that the Minister was not entitled to refuse the demand and that a writ of *mandamus* should be peremptorily issued to compel him to pay to the respondents the sum demanded or in fact any other sum. We are conscious of the probability, if not the certainty, that the respondents suffered substantial damages in consequence of the fraudulent registration complained of, but we cannot give the relief sought in these proceedings upon that basis. We feel confident, however, that the responsible advisers of the Crown in the province of British Columbia will not fail to see that in some way the respondents are fully compensated out of the Assurance Fund to the extent of any just claim they may have. We would respectfully draw the attention of the Minister of Finance to s. 226 of the statute, to which we have referred earlier in this judgment, as affording ample authority for doing justice in the matter.

The appeal must be allowed and the judgments below set aside.

Appeal allowed.

Solicitor for the appellant: *Eric Pepler.*

Solicitors for the respondents: *Walsh, Bull, Housser, Tupper & Ray.*

CENTURY INDEMNITY COMPANY (DEFENDANT) ..... APPELLANT;

AND

NORTHWESTERN UTILITIES LIMITED (PLAINTIFF) ..... RESPONDENT.

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*Feb. 12, 13.
*Apr. 15.

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

Insurance (casualty)—Policy indemnifying gas company against liability for damages to property—Interpretation of policy—Break resulting from negligent installation of pipes—Damage by fire following explosion.

The appellant, an insurance and indemnity company, issued to the respondent, a gas company, a policy by which it agreed to indemnify the respondent "for any and all sums which the assured (respondent) "shall by law be liable to pay for (*inter alia*) damages to property "* * * as a result of any one accident caused by or arising out "of the operation of natural gas * * * by or for the assured"; the policy further provided that it was "understood and agreed that "the policy (was) issued to indemnify the assured (respondent) as "the result of accidents caused by, or arising out of, all the assured's "operations in drilling, handling and distribution of natural gas." While the policy was in force, gas accidentally escaped through a break in the service pipe located under the premises of a customer and caused a conflagration which did extensive damage to the customer's premises, the break resulting from the negligent installation of the pipe by the respondent's servants some years before. For this damage the respondent was adjudged liable, and after satisfying the judgment brought an action against the appellant on the policy for indemnity. The service pipe belonged to the owner of the building, but, like all other such pipes in the city, was installed by the respondent for the owner, who paid for it. The respondent's action was maintained by the trial judge, which judgment was affirmed by the appellate court.

Held, affirming the judgment of the Appellate Division, ([1934] 3 W.W.R. 638), that the liability of the respondent for the damages so arising was one covered by the express terms of the policy.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1), affirming the judgment of the trial judge, Ewing J. (2), in favour of the respondent for $47,749.96 on a policy of indemnity or casualty insurance.

*PRESENT:—Duff C.J. and Lamont, Cannon and Davis JJ. and Dysart J. *ad hoc*.

(1) [1934] 3 W.W.R. 638. (2) [1934] 3 W.W.R. 507.

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

Thomas N. Phelan K.C. for the appellant.

G. H. Steer K.C. for the respondent.

The judgment of the Court was delivered by

DYSART J. *ad hoc*—This is an appeal from the dismissal by the Appellate Division of the Supreme Court of Alberta of an appeal from a judgment in favour of the respondent for $47,749.96 and costs under a policy of indemnity insurance.

The appellant and the respondent both carry on business in the city of Edmonton, Alberta—the appellant as an insurance company, and the respondent as a gas company. On January 1, 1932, the appellant issued to the respondent a policy whereby it contracted to indemnify the respondent throughout the calendar year 1932 against any loss resulting from accidents caused by or arising out of the respondent's operations in drilling, handling and distributing natural gas. The relevant provisions of the policy read as follows:

> The company hereby agrees to indemnify the assured for any and all sums which the assured shall by law be liable to pay and shall pay or by final judgment be adjudged liable to pay (subject to the limitations hereinafter mentioned) as damages for injuries to or death of any person or persons (other than employees of the insured while acting as such) and for damages to property (other than property owned, leased and/or operated by the assured) as a result of any one accident caused by or arising out of the operation of natural gas and electric power plants by and/or for the assured covered hereunder.
>
> * * *
>
> It is hereby understood and agreed that the policy to which this endorsement is attached, is issued to indemnify the assured as the result of accidents caused by, or arising out of, all the assured's operations in drilling, handling and distribution of natural gas.

On February 14, 1932, while the policy was in force, gas accidentally escaped from the service pipe located on the premises of a customer and caused a conflagration which did extensive damage to the customer's premises. For this damage the respondent was adjudged liable, and after satisfying the judgment brought an action against the appel-

lant on the policy for indemnity, and in its turn secured a judgment from which the present appeal is taken.

The gas plant referred to in the policy consists of gas wells located some distance from the city, large mains for bringing the gas to the city, apparatus for reducing the natural pressure of the gas, mains for distributing the gas throughout the city streets and lanes, and finally service pipes for conducting the gas from the street mains to the gas meters placed by the company upon the premises of customers. The "operations" of every part of this plant are covered by the policy. The ownership is in the respondent of every part of the gas plant except those portions of the service pipes which lie in and upon the premises of customers connecting the street portion of the service pipes with the gas meters. And even these portions have all been supplied and installed by the respondent. In every instance, including that of the customer on whose premises the disastrous fire occurred in this case, the respondent insisted on installing the service pipe for the reason, presumably, that safe and satisfactory installation was more likely to be had from the respondent's own skilled and experienced workmen. After the installation, in this case as in all others, the customer paid the respondent the cost of the installation and became the owner of the pipe. The customer was the owner of the pipe at the time of the "accident." There is no suggestion of interference with the pipe by the customer or by the "conscious act of any other volition."

In the action by the customer, the learned trial judge, Ewing, J. (1), found that the gas which exploded had escaped from the break in the service pipe, that the break was the result of the negligent manner in which the pipe had been installed in 1928 by the respondent; and that these two facts, conjoined with fire, had caused the explosion for which he found the respondent liable.

In the suit on the policy the defence is raised that the negligent installation of 1928 was an act of construction of plant and had nothing to do with the "operation" of the plant within the meaning of the policy; and further, on any view of it, the negligence long antedated the period of time covered by the policy.

(1) [1934] 3 W.W.R. 507.

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The negligence in connection with the installation lay in the method of installing the pipe. Instead of excavating a trench for the reception of the pipe, the respondent's workmen forced the pipe endwise through the ground in the desired direction by means of powerful jack screws. The method is known as "jacking." If the pipe in question had followed a true course in its enforced progress through the ground all would have been well; but it followed a devious course and as a result became sharply bent in places, and was thereby put under severe strain from which it eventually broke in 1932. The bends were not discovered till the pipe was excavated after the accident.

In distributing gas to its customer, the respondent forced the gas under pressure through the whole of its distributing system of street pipes and service pipes, through the gas meters to the point of consumption. Until the gas passed through the meter it remained the property of the respondent unmeasured as to quantity, and therefore undelivered as an article of merchandise: Sale of Goods, R.S. Alta. 1922, c. 146, s. 20, rule III.

Gas is a substance which unless properly confined is liable to escape and which, if it does escape, is liable to do damage to person or property The respondent as distributor was therefore bound to take all reasonable precautions to guard against the escape of such gas. This was a duty imposed upon it in favour of its customers and the public generally. *Dominion Natural Gas Company Ltd.* v. *Collins & Perkins* (1).

In that case, which originated in Ontario, natural gas escaped from a safety valve which had been allowed to get out of efficient working condition and caused an explosion and damage. The plaintiff sued both the gas company which had supplied and installed the equipment, and the railway company on whose premises the gas exploded. The gas company in its defence raised the ground that some one must have intermeddled with the equipment and so relieved it from responsibility. At page 646 Lord Dunedin says:

> It has, however, again and again been held that in the case of articles dangerous in themselves, such as loaded firearms, poisons, explosives, and other things *ejusdem generis*, there is a peculiar duty to

(1) [1909] A.C. 640.

take precaution imposed upon those who send forth or install such articles when it is necessarily the case that other parties will come within their proximity. The duty being to take precaution, it is no excuse to say that the accident would not have happened unless some other agency than that of the defendant had intermeddled with the matter. A loaded gun will not go off unless some one pulls the trigger, a poison is innocuous unless some one takes it, gas will not explode unles it is mixed with air and then a light is set to it. Yet the cases of *Dixon* v. *Bell* (1), *Thomas* v. *Winchester* (2), and *Parry* v. *Smith* (3) are all illustrations of liability enforced. On the other hand, if the proximate cause of the accident is not the negligence of the defendant, but the conscious act of another volition, then he will not be liable. For against such conscious act of volition no precaution can really avail.

The respondent, having been exclusively responsible for the installation, must be held to have had notice of the defective condition of the pipe. When, therefore, it forced its gas into this defective pipe on February 14, 1932, it committed an act which can be characterized as nothing less than negligence, and when that gas escaped through a rupture in the defective pipe and caused damage to the customer, the respondent company was properly held responsible for the damage that ensued. This negligent use of the defective pipe within the period of time covered by the policy is sufficient, when conjoined with the other assigned causes, to support the judgment rendered against the respondent. It becomes unnecessary, therefore, to invoke the negligence of 1928.

Even disregarding the element of negligence, it would still appear that the conflagration on the customer's premises was

> the result of accidents * * * arising out of * * * the assured's operations in * * * handling and distribution of natural gas,

and was, therefore, covered by the express terms of the policy. The explosion was certainly an accident in the sense that it was unexpected and undesired. It arose out of the distributing of gas through the respondent's distributing system in the ordinary course of the "operations" of the gas plant. On this broad ground, it would seem that the respondent's liability for the explosion may also be clearly rested.

In view of the conclusion already reached, it will be unnecessary to consider the other grounds urged for or

(1) (1816) 5 M. & S. 198. (2) (1852) 6 N.Y.R. 397.
(3) (1879) 4 C.P.D. 325.

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against this appeal. One of these grounds, however, must be briefly referred to. It is that by co-operating with the respondent in defending the original action brought by the respondent's customer, the appellant thereby estopped itself from later repudiating liability under the policy for the customer's loss. Without definitely expressing an opinion on this question of estoppel, we are inclined to think that inasmuch as the right to co-operate in the defence was a contractual one conferred on the appellant by the specific terms of the policy, the exercise of that right could hardly give rise to an estoppel.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Kerr, Dyde & Becker.*

Solicitors for the respondent: *Milner, Steer, Dafoe, Poirier & Martland.*

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* Mar. 11.
* Apr. 15.

STANLEY JOHNSTON ET AL (DEFENDANTS) ..... APPELLANTS;

AND

DAME VERA CHANNELL ET VIR (PLAINTIFFS) ..... RESPONDENTS.

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

Broker—Stock exchange transaction—Action by married woman for annulment owing to want of marital authorization and for return of shares deposited—Allegations in plea that married woman was not owner of shares—Inscription in law—Simple deposit—Obligation to return—Evidence of ownership—Whether broker had sufficient interest —Arts. 183, 1799, 1800, 1808, 1966, 1969, 1971, 1972, 1975—Art. 77 C.C.P.

Upon an action against a broker by a married woman asking for the annulment of certain stock transactions on the ground of their absolute nullity as having been made without marital authorization and also for the return of certain bonds and shares deposited with him as guarantee for advances made to her, the broker cannot allege in his plea that these bonds and shares were not the property of the married woman because they had been either acquired by or loaned to her without the authorization of her husband. It becomes a case of simple deposit and, according to article 1808 C.C., the

* PRESENT:—Duff C.J. and Lamont, Cannon and Davis JJ. and Barclay J. *ad hoc.*

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depository cannot exact from the depositor proof that he is the owner of the thing deposited.

Moreover, the broker in making such allegations in his plea did not possess the "existing and actual interest" enabling him to do so, such as required by article 183 C.C., nor even the eventual interest mentioned in article 77 C.C.P.

Judgment of the Court of King's Bench (Q.R. 56 K.B. 573) aff.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), affirming the judgment of the Superior Court, Denis J. and maintaining a partial inscription in law in respect of certain paragraphs of appellant's plea and ordering that these paragraphs be deleted and struck off.

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

W. F. Chipman K.C. and *G. F. Osler* for the appellant.

John T. Hackett K.C. and *J. E. Mitchell* for the respondents.

The judgment of the Court was delivered by

CANNON J.—Les défendeurs-appelants, poursuivis par la demanderesse assistée de son mari en annulation de certaines transactions de bourse couvrant la période de septembre 1927 à décembre 1930 qu'elle allègue être nulles en vertu de l'article 183 C.C. d'une nullité que rien ne peut couvrir, parce qu'elle n'était pas, bien que femme mariée, autorisée par son mari, ont plaidé, entre autres moyens, que les valeurs que la demanderesse aurait remis en gage pour garantir le paiement des avances à elle faites par les défendeurs n'étaient pas sa propriété, parce qu'elles auraient été, les unes, acquises sans l'autorisation de son mari, et, les autres, empruntées sans l'autorisation maritale de leur véritable propriétaire et qu'elle excipait du droit d'autrui en en demandant la remise.

Dès l'abord, remarquons que la demanderese, par ses conclusions, demande premièrement que les différentes ventes et achats de valeur faits pour elle par les défendeurs soient déclarés nuls et de nul effet; et, comme conséquence, demande

(1) (1934) Q.R. 56 K.B. 573.

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that defendants be condemned to render to plaintiffs an accounting for any and all payments of money received by them from or on behalf of said female plaintiff and for the market value at the date of delivery to defendants of all securities received by defendants from or on behalf of said female plaintiff, * * * that defendants be condemned jointly and severally, to pay to the plaintiffs such balance as may be shown to be owing and due to plaintiffs after deduction of such amounts as may have been received by the female plaintiff from the defendants during the course of the said alleged dealings; and in default of the payment by defendants of such balance within the aforesaid delay, that the defendants be jointly and severally condemned to pay the plaintiffs the sum of one hundred and sixty-two thousand dollars ($162,000), with interest from the date of each payment or delivery to defendants, and costs.

Nous n'avons pas au dossier l'examen "on discovery" de la demanderesse qui semble servir de base aux allégués du plaidoyer attaqués en droit. Par le paragraphe 18 du plaidoyer, les défendeurs enumèrent les valeurs placées au crédit ou déposées en garantie collatérale des comptes de la demanderesse. Le paragraphe 19 énumère un certain nombre de ces valeurs qui étaient enregistrées au nom de la demanderesse avant leur transport aux défendeurs; et le paragraphe 20 nous donne les valeurs qui, avant ce transport aux défendeurs, étaient (*a*) au nom de Madame W.-B. Channell, mère de la demanderesse; (*b*) au nom de Muriel C. Greenleaf, sa soeur, et (*c*) au nom de Grace-B. Channell, une autre soeur de la demanderesse; et ajoute, au paragraphe 21, que d'autres valeurs y énumérées étaient réclamées par la demanderesse, tandis que d'autres, d'après elle, étaient la propriété de sa mère.

Enfin, suivent les paragraphes incriminés comme suit:

23. As to the securities listed in paragraph 19 hereof all of said securities were acquired by the female plaintiff subsequent to her marriage and without the authorization of her said husband for her to acquire the same by purchase or to accept the same as a donation or gift, and female plaintiff could not and did not have title to the same.

24. The female plaintiff was not the owner of the securities listed in paragraph 20 of this plea nor was she authorized by the male plaintiff to borrow the same from the owners thereof.

25. As to the securities listed in paragraph 21 hereof, the female plaintiff was not authorized by the male plaintiff to acquire those claimed by her as her property and had no title to the same, such of said securities as were the property of others she was not authorized to borrow.

26. The female plaintiff is not entitled to avail herself of the rights of others (exciper du droit d'autrui) and her action in respect of the securities listed in paragraph 18 hereof is unfounded in fact and in law.

L'Honorable juge Denis, en Cour Supérieure, a ordonné la radiation de ces paragraphes 23, 24, 25 et 26 par les *considérants* suivants:

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Considering that paragraphs 23, 24, 25 and 26 are irrelevant, useless and without relation to the rights and claims which the defendants seek to advance by their plea, and can have no bearing upon the litigation;

Considering that it is not open to defendants to question the female plaintiff's title to the securities which may have been owned by her or pledged by her in support of her several trading accounts;

Considering that if defendants have illegally held the said securities or the proceeds of the sale thereof, they cannot retain either the said securities or the proceeds thereof, because of any alleged defect in the female plaintiff's title or justify any illegality in their transactions;

Considering that the said inscription in law is well founded as to the said paragraphs 23, 24, 25 and 26 of defendants' plea, but ill-founded as to paragraphs 22 and 32 of the said plea;

La Cour du Banc du Roi a unanimement confirmé ce jugement. (1)

Les appelants nous demandent de rétablir ces allégués de leur plaidoyer comme étant une réponse suffisante à l'action, si leurs allégués sont établis en fait. Pour les fins de l'inscription en droit, les faits allégués sont censés prouvés et démontreraient, d'après les appelants, que la demanderesse n'a aucun intérêt au maintien de la présente action, parce qu'elle n'a rien perdu; les valeurs qu'elle aurait données en gage aux défendeurs n'ayant jamais été sa propriété, vu qu'elle ne pouvait y acquérir titre sans le consentement de son mari, soit par emprunt, donation ou acquisition. Or, les allégués attaqués nient qu'elle fût dûment autorisée.

Si les opérations de bourse incriminées sont réellement nulles et de nul effet, les mises en gage des différentes valeurs devront aussi être annulées et les parties remises, autant que possible, dans l'état où elles étaient auparavant. Il s'agit du nantissement d'une chose mobilière que l'article 1966 du code civil définit:

un contrat par lequel une chose est mise entre les mains du créancier, ou, étant déjà entre ses mains, est par lui retenue, du consentement du propriétaire, pour sûreté de la dette.

La chose peut être donnée soit par le débiteur ou par un tiers en sa faveur.

Ce gage, d'après l'article 1969 du code civil, donne

au créancier le droit de se faire payer sur la chose qui en est l'objet par privilège et préférence aux autres créanciers.

Mais il ne peut, à défaut de paiement de la dette, disposer du gage. Il peut le faire saisir et vendre suivant le cours ordinaire de la loi, d'après les articles 1969 et 1971 du code civil.

(1) (1934) Q.R. 56 K.B. 573.

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Enfin l'article 1972 nous dit que

Le débiteur est propriétaire de la chose jusqu'à ce qu'elle soit vendue ou qu'il en soit disposé autrement. Elle reste entre les mains du créancier comme un *dépôt* pour assurer sa créance.

Nous référant au chapitre concernant le dépôt, nous trouvons les articles suivants:

1799. Le dépôt volontaire est celui qui se fait du consentement réciproque de la personne qui le fait et de celle qui le reçoit.

1800. Le dépôt volontaire ne peut avoir lieu qu'entre personnes capables de contracter.

Néanmoins si une personne capable de contracter accepte le dépôt fait par une personne incapable, elle est tenue de toutes les obligations d'un dépositaire, et pour l'exécution de ces obligations, elle peut être poursuivie par le tuteur ou autre administrateur de la personne qui a fait le dépôt.

1808. Le dépositaire ne peut pas exiger de la personne qui a fait le dépôt la preuve qu'elle est propriétaire de la chose déposée.

L'action et les paragraphes du plaidoyer attaqués en droit reposent sur la nullité radicale que l'article 183 du code civil énonce en ces termes:

183. Le défaut d'autorisation du mari, dans le cas où elle est requise, comporte une nullité que rien ne peut couvrir et dont se peuvent prévaloir tous ceux qui y ont un intérêt né et actuel.

Comme le fait remarquer Mignault (Droit civil canadien, 1er volume, p. 548), il n'en est pas ainsi aujourd'hui en France. L'article 225 du code Napoléon dit que la nullité fondée sur le défaut d'autorisation ne peut être opposée que par la femme, par son mari ou par les héritiers. Vu cette différence essentielle entre notre droit et le droit français, il est plus prudent de ne pas appliquer à notre espèce les autorités qui ont commenté le code Napoléon. En France, l'acte est annulable, tandis qu'en ce pays l'acte fait par la femme sans autorisation est nul *ab initio*. En France, la nullité n'est que relative, tandis que chez nous elle est absolue et peut être opposée par tous ceux qui y ont un intérêt né et actuel.

Peut-on dire que les défendeurs ont l'intérêt né et actuel requis pour opposer à l'incapable la nullité de la mise en sa possession ou celle des acquisitions qu'elle aurait faites des valeurs mises en gage?

L'article 77 du code de procédure civile nous dit que:

Pour former une demande en justice, il faut y avoir intérêt.

Cet intérêt, excepté dans les cas de dispositions contraires, peut n'être qu'éventuel.

L'exception, vu que les véritables propriétaires des titres ne sont pas en cause et n'ont d'aucune façon, d'après le

dossier, demandé aux défendeurs la restitution des valeurs mises en gage, est basée sur le danger éventuel que les défendeurs pourraient courir si, après avoir remis les valeurs ou leur équivalent en argent à la demanderesse, les véritables propriétaires les leur réclamaient. Encore une fois, ils n'en ont rien fait jusqu'à présent.

Il ne peut y avoir de doute que la femme assistée de son mari a l'intérêt requis pour demander la déclaration de nullité de toutes les transactions intervenues entre elle et les défendeurs comme courtiers.

Peut-on invoquer cette même nullité en recherchant de quelle façon et de quelle personne elle a acquis ou s'est procuré par emprunt ou quelque autre procédé les valeurs mises en gage et acceptées par les défendeurs et vendues au profit de ces derniers.

Si le contrat est nul, la demanderesse n'a encouru aucune dette; s'il n'a jamais existé de dette, les mises en gage en garantie de cette dette sont également nulles et les parties doivent, autant que possible, être mises dans la situation où elle étaient lors de la mise en gage.

Peut-on remonter plus haut et discuter dans la présente instance, avant la reddition de compte, le titre de la demanderesse à ces valeurs? Les défendeurs ont-ils un intérêt né et actuel exigé par l'article 183 du code civil, dont les termes sont moins généraux que ceux de l'article 77 C.P.C. et qui semble être une disposition contraire à l'assertion d'un droit éventuel?

Le savant juge Andrews, dont l'opinion doit être considerée comme très respectable, a décidé, dans la cause de *Létourneau* v. *Blouin* (1), que l'intérêt né et actuel de l'article 183 C.C. est un intérêt pécuniaire immédiat; qu'un intérêt éventuel, comme celui résultant du danger que la femme revienne plus tard réclamer de lui une pension alimentaire, n'est pas un intérêt suffisant pour le mari séparé de corps pour faire prononcer la nullité d'une vente faite par sa femme sans son autorisation.

Mais, dans l'espèce, les défendeurs n'ont pas même un intérêt éventuel. Avec Langelier, 5e volume, p. 397, sous l'article 1808 C.C., nous sommes disposés à dire que si le véritable propriétaire veut empêcher la remise au déposant par le dépositaire, il doit pratiquer une saisie-revendica-

(1) (1892) Q.R. 2 S.C. 425.

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tion de la chose entre les mains du dépositaire. Sans cette revendication, le dépositaire n'a pas le droit de refuser de restituer la chose déposée à celui qui a fait le dépôt, sous prétexte qu'elle ne lui appartient pas mais appartient à un tiers, parce que ce serait exciper du droit de ce dernier.

Le texte de l'article 1808 du code civil,

> Le dépositaire ne peut pas exiger de la personne qui a fait le dépôt la preuve qu'elle est propriétaire de la chose déposée,

semble justifier la conclusion de Mignault, dans son huitième volume (p. 156), que

> le dépositaire est valablement déchargé de toute responsabilité à l'égard du véritable propriétaire en remettant la chose à celui qui la lui a déposée.

Cela fait disparaître l'intérêt éventuel que font valoir les défendeurs.

D'après le code français, si le dépositaire découvre que la chose a été volée et qui en est le véritable propriétaire, il doit lui dénoncer le dépôt avec sommation de le réclamer dans un délai déterminé et suffisant. Si le propriétaire néglige de réclamer la chose, lui, le dépositaire, est valablement déchargé par la tradition qu'il en fait à celui duquel il l'a reçue.

Nos codificateurs n'ayant pas reproduit cette disposition, nous restons purement et simplement avec l'obligation du dépositaire de remettre la chose déposée à la personne qui a fait le dépôt, sans qu'il puisse exiger d'elle la preuve qu'elle est propriétaire de la chose.

La Cour de Revision, à Quebec, composée du juge-en-chef Meredith et des juges Stuart et Caron, dans la cause de *Tourigny* v. *Bouchard* (1), a décidé expressément:

> that a bailee of moveables cannot question the title of the person who has placed such moveables in his care.

Mignault, en commentant l'article 1975 du code civil, dans son huitième volume (p. 409), dit:

> Il paraît à peine nécessaire d'ajouter que lorsque le code parle de paiement comme mettant fin au droit de rétention du créancier, il faut étendre sa disposition à tout mode d'extinction des obligations. Du moment que la dette est éteinte, le gage qui est un contrat accessoire, ne saurait subsister.

Si, comme dans notre espèce, le contrat de gage est un contrat accessoire dont le sort doit suivre le sort du contrat principal qu'il garantit, il faut rejeter tout moyen qui permettrait de maintenir les conséquences du contrat acces-

(1) (1878) 4 Q.L.R. 243.

soire alors que le contrat principal est reconnu nul et caduc. Dès lors que l'emprunt est nul, le gage qui le garantit doit tomber: aucun moyen de droit ne doit être mis au service du gagiste pour lui assurer la conservation des prérogatives attachées à une qualité et à un titre qu'il n'a pas. La demanderesse n'invoque pas précisément un droit de propriété, mais bien plutôt, et même uniquement, une action personnelle qui n'est autre que l'action en nullité du contrat de gage. Le détenteur est donc tenu d'une obligation personnelle de restitution. Voir *Dérivaud & autres* C. *Crédit Lyonnais & autres,* Cassation, Gazette du Palais, 1922, volume 2, page 46.

Si les déclarations de nullité demandées par l'action doivent être accordées—et pour la décision de l'inscription en droit les parties ont admis la nullité des transactions—le contrat de gage disparaît et nous restons avec un simple dépôt entre les mains des défendeurs qui, aux termes de l'article 1808, ne peuvent pas exiger de la personne qui a fait le dépôt la preuve qu'elle est propriétaire de la chose déposée. Or, c'est précisément là le litige que les défendeurs ont cherché à soulever par les quatre allégués de leur plaidoyer, que les cours inférieures ont, à bon droit, retranchés du dossier comme étrangers à la question soulevée par l'action de la demanderesse et partant inutiles à la solution du litige.

Pour ces raisons, l'appel doit être renvoyé avec dépens.

BARCLAY J. *ad hoc*—I am of opinion that this appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Brown, Montgomery & McMichael.*

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

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MONTREAL ISLAND POWER COMPANY ..... } APPELLANT;

AND

THE TOWN OF LAVAL DES RAPIDES ..... } RESPONDENT.

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

Assessment and taxation—Municipal corporation—Water-power company—Flooded land—Whether assessable—Actual value—Arts. 503, 585 C.C.—Cities and Towns Act, R.S.Q. 1925, c. 102, s.s. 485, 488, 500, 504, 510, 511—Watercourses Act, R.S.Q. 1925, c. 46, ss. 16, 17, 18.

Land which had been flooded by a power company in order to raise the level of a river to a certain elevation for the purpose of establishing a power house is assessable and must be given some actual or real value.

Duff C.J., after commenting on the meaning of the words "actual value" when used for the purpose of defining the valuation of property for taxation purposes, was of the opinion, although not dissenting formally from the judgment of the majority of the Court, that the assessors of the respondent municipality had not performed the act of valuation in respect of the submerged land in conformity with sections 485 and 488 of the *Cities and Towns Act*, and, consequently, that there was no valid assessment in point of law; and, also, that this Court had no material before it by which it was able to perform itself the act of assessment.

Per Rinfret, Cannon, Crocket and Hughes J.J.—Such flooded land cannot be valued as having become industrialized as part of the water-power development of the company, when the water-power site and generating plant are situate outside the municipality within which the land is included; and the value of such flooded land cannot be the same as that of non-flooded land belonging to the company adjacent thereto. But, in order to avoid further litigation and costs, considering the elements contained in the record, the valuation placed on the flooded land by the judgment of the appellate court should be reduced by one-half.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec, reversing the judgment of Stackhouse J., Circuit Court, which had held that certain flooded or submerged lands were not assessable for purposes of taxation as having no real value.

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

H. E. Walker K.C. for the appellant.

Alphonse Décary K.C. for the respondent.

* PRESENT:—Duff C.J. and Rinfret, Cannon, Crocket and Hughes JJ.

DUFF C.J.—I do not find it necessary to dissent from the judgment upon which my colleagues have agreed. The amount involved is insignificant and although, I humbly think, we should follow the logical course by referring back the question of value with instructions as to the principles upon which that value is to be ascertained in accordance with the views I am about to express, still, I think, it is really a case of *de minimis* and that, whatever the result of such a reference, the pecuniary advantage to the appellants would be merely negligible. I wish to make it very clear, however, that I disagree with the principles upon which the majority of the court proceeds. We have to apply a statute of the legislature of Quebec. That statute lays upon the assessor a duty which is defined in sections 485 and 488 of *The Cities and Towns Act*. Those sections are in these words:

485. The assessors shall each year, at the time and in the manner ordered by the council, assess the taxable property of the municipality, according to its real value.

488. The actual value of the real estate in the municipality assessable for purposes of taxation shall comprise lands and buildings, workshops and machinery and their accessories thereon erected, and all the improvements made thereto.

Obviously, "real value" and "actual value" are regarded by the legislature as convertible expressions. The construction of these phrases does not, I think, present any difficulty. The meaning of "actual value," when used in a legal instrument, subject, of course, to any controlling context, is indicated by the following passage from the judgment of Lord MacLaren in *Lord Advocate* v. *Earl of Home* (1):

Now, the word "value" may have different meanings, like many other words in common use, according as it is used in pure literature, or in a business communication or in conversation. But I think that "value" when it occurs in a contract has a perfectly definite and known meaning unless there be something in the contract itself to suggest a meaning different from the ordinary meaning. It means exchangeable value—the price which the subject will bring when exposed to the test of competition.

When used for the purpose of defining the valuation of property for taxation purposes, the courts have, in this country, and, generally speaking, on this continent, accepted this view of the term "value."

(1) (1891) 28 Sc. L.R. 289, at 293.

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In *Grierson* v. *Edmonton* (1), Sir Charles Fitzpatrick, with, I think, the concurrence of all the members of the Court, used these words:

> Speaking generally the intrinsic value of a piece of property must necessarily be the price which it will command in the open market and the local Judge sitting in appeal with his knowledge and experience in ascertaining the price of real estate within his jurisdiction would, under normal conditions, be in a better position to judge of the value of such property than I can assume to be.

In *Cummings* v. *Merchants' National Bank of Toledo* (2), Mr. Justice Miller, speaking for the majority of the Supreme Court of the United States, said:

> It is proper to say, in extenuation of the rule of primary valuation of different species of property developed in this record, that it is not limited to the State of Ohio, or to part of it. The constitutions and the statutes of nearly all the States have enactments designed to compel uniformity of taxation and assessments at the actual value of all property liable to be taxed. The phrases "salable value," "actual value," "cash value," and others used in the directions to assessing officers, all mean the same thing, and are designed to effect the same purpose. Burr. Tax., p. 227, sec. 99. But it is a matter of common observation that in the valuation of real estate this rule is habitually disregarded.

The court in that case virtually adopted a passage in Burroughs on Taxation at page 227. The writer of that well known textbook treated the rule as settled in the United States, and the Supreme Court of the United States adopted his view.

I mention also the judgment of the Court of Appeal in Ireland in *Curneen* and *Tottenham* (3), (Lord Ashbourne, Chancellor, FitzGibbon, Barry and Walker L.JJ.) and particularly the judgment of FitzGibbon L.J. at p. 362-3).

Of course, it may be that there is no competitive market at the date as of which the value is to be ascertained. In such circumstances, other indicia may be resorted to. There may be reasonable prospects of the return of a market, in which case it might not be unreasonable for the assessor to evaluate the present worth of such prospects and the probability of an investor being found who would invest his money on the strength of such prospects; and there may be other relevant circumstances which it might be proper to take into account as evidence of its actual capital value.

(1) (1917) 58 Can. S.C.R. 13; [1917] 2 W.W.R. 1139.

(2) (1880) 25 Law. Ed. 903, at 906.

(3) [1896] 2 Ir. Rep. 356.

Considerations of this character, as we will see, do not come into play on this appeal. I think it important to say that, in my view, the standard of assessment laid down by the Legislature of the province of Quebec is not a standard which, for the purpose of assessing property for taxation purposes under these sections (485 and 488), admits of the application of the principle by which compensation to the owner of land is determined when it is compulsorily taken from him under the authority of an expropriation act. In the case of expropriation, the rule is undisputed. The person whose property is taken is entitled to be compensated for the loss he has suffered by being deprived of his land compulsorily; the value of the land, for the purpose of ascertaining such compensation, is the value of the land to him. Cases often arise in which the land taken has no market value for various reasons, and no value which could be ascertained by a reference to any of the considerations just mentioned. Nevertheless, compensation must be paid; and one method of ascertaining that compensation has been applied in, for example, cases where a recreation park, that the owners are prohibited from alienating, or a part of a golf course, which the owners would not alienate, and in respect of which there would be no purchaser, except, possibly, for a price measured by the agricultural value of the land, and that method is described in the formula enunciated by Lord Moulton in *Pastoral Finance Ass'n, Ltd.* v. *The Minister* (1): the owner is entitled to that which a prudent man in his position would have been willing to give for the land sooner than fail to obtain it.

There is no room for the application of any such formula in the administration of an assessment act, because the amount ascertained under the formula depends upon the special position of the owner with regard to the land. If the owner were a golf club, it would be influenced in determining the amount it would be willing to pay by reference to the convenience of having the particular piece of land in view of its situation and adaptability as a part of the particular golf course. That is not a principle of valuation contemplated, in my opinion, by the assessment provisions of *The Cities and Towns Act*. These assess-

(1) [1914] A.C. 1083, at 1088.

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ment provisions, like other assessment provisions, contemplate an objective standard which can be applied with fairly reasonable uniformity to all classes of owners alike.

It seems to me clear that the assessors in this case proceeded upon some rule of thumb and they did not really attempt to ascertain the actual or real value of the particular lands they were assessing.

Moreover, it is very important to insist on two things: first, there is not a scrap of evidence before this Court by reference to which we can determine the value of this property to the appellant; its value, let us say, as part of the appellant's undertaking considered as an integer. We do not know that the undertaking as a whole, or this particular part of it, has any value whatever to the appellants. For all we know it may be *damnosa haereditas*. On that basis, we cannot judicially find that it has any value and any figure assumed to be the result of such a process could be nothing but a guess. Second, there is no evidence before us that there is not any market for this property, nor do we know that there may not be some method according to which, by reference to other circumstances, some actual value might not be arrived at.

I am disposed to think that market value, present or prospective, is really the only practical basis of the assessment of this property under the enactments by which we are governed; but, if some other method were admissible, we have been left entirely without information as to the necessary facts to enable us to apply it.

I have no doubt, I should add, that the assessors did not perform the act of valuation in respect of the submerged lands as required by the statute as essential to a valid assessment, and, consequently, that there was no valid assessment in point of law; nor do I doubt that this Court has no materials before it by which it can perform the act of assessment itself.

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

CANNON J.—The appellant brought before the Circuit Court for the district of Montreal, under the provisions of s. 504 of the *Cities and Towns Act* (R.S.Q. 1925, c. 102) an appeal against the homologation by the municipality of the valuation roll for 1932

to the end that the valuation roll may be amended and the values placed on the property of the company fixed at their true value and comparatively equal to the values placed on other properties in the said municipality.

This seemed to limit the conflict to an alleged discrimination against the company. In its conclusions, however, the appellant demanded that the Circuit Court fix the valuation as indicated in a certain statement annexed to their notice of appeal. This statement showed the 1931 assessed value per square foot of each lot belonging to the appellant in Laval des Rapides and also the valuation complained of with the company's valuation. Opposite each of the flooded areas in that statement, the company's valuation appears to be: Nil.

The learned trial judge, Stackhouse, C.C.J., considered that in assessing appellant's flooded lands as being industrial lands at the same valuation as those lands which are not flooded, the respondent adopted a wrong principle of law; that these flooded or submerged lands have no real value and, therefore, their assessment for taxable purposes is illegal, null and should be set aside.

The town brought the matter before the Court of King's Bench and was successful on this issue, the formal judgment fixing at ten cents per foot the real value of the submerged land, the same as that of the adjoining riparian lots. Bernier and Hall, J.J., dissented and gave elaborate reasons accepting the finding of the trial judge.

The company brought the matter before us for the sole purpose, according to its factum, of determining

(1) Has the municipality the right to tax the land which has been flooded?

(2) If this land can be taxed, is it fair to tax it at the same value per foot as the adjacent unflooded land?

And it contends: First, that the flooded areas on the Boulevard des Prairies at 10 cents a foot: $51,788.90, and the flooded areas in the Marigo (which was periodically flooded before the establishment of the company's dam) at varied valuations per arpent and per foot: $12,509.65, total: $64,298.55, should be entirely struck from the valuation roll; second, that in any case, if these flooded areas are to be valued at all, they should not be valued at the same per foot valuation as is placed on their marketable dry land.

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Section 485 of the *Cities and Towns Act*, R.S.Q. 1925, c. 102, provides that

> The assessors shall each year, at the time and in the manner ordered by the council, assess the taxable property of the municipality, *according to its real value.*

Section 488, under the caption "What real estate taxable?" says:

> The actual valuation of the real estate in the municipality assessable for the purposes of taxation shall comprise lands and buildings, work-shops and machinery and their accessories thereon erected, and all the improvements made thereto.

Section 500 enables the council, after the homologation of the roll, to cause the valuation of such property to be reduced to its real value if it is considerably diminished in value either by fire, the pulling down of buildings or any other cause.

The powers of the Circuit Court on the appeal are

(*a*) to confirm the decision appealed from, amend or annul the same;

(*b*) or render such decision as the council ought to have rendered;

(*c*) order it to exercise the functions respecting which recourse is had (sec. 510).

Section 511 enacts that the decisions of the council may be set aside only when a *substantial injustice* has been committed and never by reason of any trifling variance or informality.

It should be noted immediately that the company never asked for the annulment of the roll, but only for its amendment, so that, on the face of the record, it must be found that these flooded areas, not forming part of the natural bed of the Rivière des Prairies, are not public property. They are still owned by the appellant, so that there only remains the second question: Had this flooded land in 1932 any real or actual value?

In the year 1928, the appellant, having obtained a lease of the bed of the Rivière des Prairies from the province of Quebec for the purpose of establishing a power house at St. Vincent-de-Paul village, which is situate a few miles below Laval des Rapides, also obtained authority under the provisions of the *Watercourses Act*, 1925, R.S.Q., c. 46, to submerge all lands necessary to raise the level of the river to a certain elevation. After a long drawn period of discussions, the legislature of the province of Quebec,

on the 7th of May, 1909, passed 9 Ed. VII, c. 68, with this preamble:

Whereas the development and utilization of the falls and water-powers of the province is a matter of public utility as they tend to the advancement of industries established and the creation of new ones by allowing of the utilization of their motive power;

Whereas certain conditions hinder the development and utilization of such falls and powers and it is important to cause the same to disappear, while at the same time safeguarding the private interests affected;

enacting as follows:

1. Every water-power formed by a lake, pond, water-course or river whether floatable or not, belonging to any person, is declared to be a matter of public interest, and the proprietor thereof may proceed to expropriate the adjacent lands so as to allow him to utilize such water-powers in the manner and subject to the conditions mentioned in this Act.

2. The following alone shall be subject to expropriation under this Act:

1. Immoveable property or any part thereof and riparian rights, necessary for the establishment of factories, manufactories and their dependencies and for the construction and maintenance of drains, canals, sluices, pipes and flumes.

2. Immoveable property or any part thereof, necessary for roads communicating with the most convenient highway as well as for the posts, wires, conduits and apparatus used for the transmission of power, light or heat, subject to the approval of the municipal council of the locality when such posts, wires, conduits and apparatus are placed on a highway.

3. Such expropriation under this Act shall not take place except for the benefit of a water-power of an average natural force of at least two hundred horse power, and large enough for industrial purposes, and shall in no case prejudice an industry already established or water-works supplying a municipality wholly or in part.

These sections are now sections 16, 17 and 18 of the Revised Statutes of Quebec (1925), c. 46.

This legislation completed the existing right embodied in article 503 of the Civil Code.

Are also relevant the following sections of the same *Watercourses Act:*

4. Every owner of land may improve any watercourse bordering upon, running along or passing across his property, and may turn the same to account by the construction of mills, manufactories, works and machinery of all kinds, and for such purpose may erect and construct in and about such water-course, all the works necessary for its efficient working, such as flood-gates, flumes, embankments, dams, dykes and the like.

5. 1. No flood-gate, flume, embankment, dam, dyke or other similar work, the construction or maintenance of which will cause public property or the property of third persons or public or private rights to be affected, either by the backing up of the waters or otherwise, shall be constructed or maintained in any of the water-courses referred to in section 4, unless the site on which it is to be constructed has been approved by the Lieutenant-Governor in Council, nor unless it is constructed and maintained in accordance with plans and specifications likewise approved by the Lieutenant-Governor in Council.

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2. If any such work be constructed without such approval, or if, after having been constructed, it be not kept up in accordance with the plans and specifications which have been so approved, the demolition of such work and the restoration of such public or private land to its original condition as nearly as possible approaching thereto, may be ordered by any court of competent jurisdiction, upon an ordinary action instituted by the Crown or by any interested party, according as the land taken, occupied or affected is public or private property, without prejudice to any other recourse at law.

22. No expropriation proceedings may be had unless the Lieutenant-Governor in Council, upon application of one of the parties, notice whereof must be given to the other, has first approved of the area to be expropriated.

The application for approval must be made by petition to the Minister of Lands and Forests, accompanied by plans of the land to be expropriated and by reasons in support of the application.

Acting under these provisions, the company either expropriated or purchased the lands in question in lieu of paying the damages anticipated from the necessary floodings which would practically have destroyed their whole value for their then owners. It would appear that the total price paid was $709,397.79.

It is also in evidence that the company, before submerging these lands, laid on same rubble stone masonry to prevent erosion by water.

The assessors, considering that these lands were used for industrial purposes, fixed a higher value on them than that on neighbouring lands which were mostly used for residential purposes.

The Court of King's Bench said that, under the circumstances and in view of the fact that these lands were only an adjunct of the water-power of the appellant which is situate in the neighbouring municipality, the land owned by the company and used for the purpose of raising the water level of the river should be treated as equal in value to its dry land adjacent.

It seems to me that when attempting to increase the real or actual value of these flooded lands for the reason that they had become industrialized as part of the water-power development of the appellant, the assessors and the municipality lost sight of the important fact that the water-power site and generating plant, the industry is situate miles below, outside the limits of Laval des Rapides. The power site which has been developed by the company, the source of electrical energy, which would be called in French "la houille blanche" does not exist in Laval des

Rapides and, therefore, is clearly not assessable by the respondent. The lands are needed in Laval des Rapides, not to generate power, but to avoid paying damages to the riparian owners whose properties were affected by the building of the dam.

In 1918, in France, they passed legislation similar to the one adopted by the Quebec legislature in 1909 and for the same purposes. In order to facilitate the exploitation of water-powers, the state intervened and gave or exercised expropriation powers to abate the nuisance of the "barreurs de chutes," the owners whose excessive demands often proved a complete barrier to the creation and exploitation of hydraulic forces. Messrs. Planiol & Ripert, *Droit Civil,* vol. 3, p. 488, say:

> Un bien nouveau a été créé par la loi: *l'énergie hydraulique.* Non pas que celle-ci n'existât auparavant, mais elle était confondue avec l'eau qui lui sert de véhicule; elle n'était que l'une des formes d'utilisation de l'eau. Elle acquiert désormais une individualité juridique; elle se sépare de l'eau de la même manière que, dans la législation minière, la propriété du tréfonds est séparée de la propriété de la surface. Et ce bien nouveau va obéir à des règles propres, déterminées eu égard à sa nature et à son rôle économique.

Whether this new species of property, the hydraulic power, is to be considered as moveable or immoveable, is not a question which we have to decide in the present case. Even if it be an immoveable, it would not exist, as stated above, within the limits of the respondent municipality.

But nowhere have I been able to find in the *Cities and Towns Act* power to value and assess hydraulic powers such as the one developed and owned by the appellant on Rivière des Prairies. Whether or not these flooded lands which we are now considering form part of the bottom or the sides of the reservoir authorized by the province under certain conditions, I do not think that they had, as such, in 1932, a real market value; even if the company had wished to dispose of them, nobody would have been willing to purchase them separately in their present state. But the company goes too far when it claims that these lands holding the water of the Rivière des Prairies are of no real or actual value to it.

On the other hand, I am not ready to say with the Court of King's Bench that the value of this submerged property is the same as that of the dry land belonging to the com-

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pany adjacent thereto. Value of property in the neighbourhood is an element to be considered; but in order to adopt the same value for two neighbouring properties they must be *similar*. No one can contend that, during the year 1932, similar conditions were found in the flooded portions and the dry land. Some of the latter at least could have been offered for sale for building purposes by the company with the advantage of being on the new artificial shore of the river. But none of the flooded land could be used for any purpose, except perhaps to add to the enjoyment of the riparian owners by the acquisition from the company of a water lot opposite the shore. The water, either impounded or not, is not the property of the company. It is one of the things which, under art. 585 of the Civil Code have no owner and the use of which is common to all. The enjoyment of it is regulated by laws of public policy; and, in the province of Quebec, by the above quoted sections of the revised statutes supplementing art. 503 of the code, which reads as follows:

503. He whose land borders on a running stream, not forming part of the public domain, may make use of it as it passes, for the utility of his land, but in such manner as not to prevent the exercise of the same right by those to whom it belongs; saving the provisions contained in chapter 51 of the Consolidated Statutes for Lower Canada, or other special enactments.

He whose land is crossed by such stream may use it within the whole space of its course through the property, but subject to the obligation of allowing it to take its usual course when it leaves his land.

Planiol & Ripert, in the same volume, define exactly what I have in mind as follows:

492. *Condition juridique des eaux courantes.* A la différence du lit sur lequel elles coulent, les eaux courantes font partie des choses communes qui n'appartiennent à personne, mais qui diffèrent des choses sans maître, en ce que nul n'en peut devenir propriétaire exclusif, parce que leur usage est commun à tous. Il résulte de là que les eaux courantes sont, en principe, à la disposition du public. Mais la loi a reconnu au profit des seuls riverains certains droits d'usage particuliers, appelés droits de riveraineté.

493. *Droits de la collectivité sur les eaux courantes.* Les eaux courantes étant des *res communes*, le public possède sur ces eaux un droit d'usage général. Il faut en déduire que chacun peut s'en servir en vue des usages domestiques, c'est-à-dire puiser de l'eau, se baigner, laver du linge, faire abreuver les animaux domestiques et aussi circuler en bateau, puisque cet usage n'est prohibé par aucun texte particulier.

Mais ce droit d'usage général rencontre dans son exercice une triple limitation. Tout d'abord, il ne peut être exercé que si l'accès à la rivière est possible. Or, s'analysant juridiquement en une simple *faculté légale*, il ne donne pas à son titulaire le pouvoir de contraindre les riverains à lui livrer passage. Il n'est donc pratiquement réalisable que sur les points

où le cours d'eau est contigu à un terrain laissé à la disposition du public. Ensuite, il ne doit pas porter atteinte aux droits reconnus par la loi au profit des riverains, car, s'il peut y avoir conflit d'intérêts entre le public et ces derniers, il ne peut y avoir entre eux conflit de droits, puisque le public ne jouit que d'une simple faculté. Enfin, il est soumis aux règlements de police qui peuvent en régler l'exercice.

The fact that water is within reach and easy of access of the dry lands owned by the company might add to the value of this part of its property but does not add to the market or actual value of the land supporting the increased volume of water resulting from the erection of the company's dam a few miles below. It appears by the document annexed to the complaint that these flooded lots were assessed in 1931 at prices ranging from ·00⅓ of a cent per square foot to, in a few instances, ·12¼ and ·17½. Despite the fact that that company did not in 1931 protest the valuation cannot bind them as to the real or actual value of this property in 1932, may it not be said with fairness that at least they did not feel that they were suffering the *substantial* injustice that would, according to sec. 511 of the *Cities and Towns Act,* have authorized the court to amend the valuation? Therefore, I do not agree with the motive given by the Court of King's Bench to assimilate and treat as being of equal value the flooded and the non-flooded property.

On the other hand, this flooded land owned by the appellant within Laval des Rapides is assessable and must be given some actual or real value. The appellant says in its memorandum that the case was conducted before the Circuit Court on the assumption that if the flooded area could not be taxed on the basis of the use the company was making of it, it would have no market value.

Leach states, confirming the document filed with the notice of appeal, that the company's valuation on the flooded area in each case is: Nil; and that he considers it to have no value.

Fillion, one of the town's witnesses, testifies as follows:

D. Pensez-vous, prenons quelques-unes des propriétés de la Montreal Island Power Company par exemple la subdivision de lot cadastral 296, pensez-vous qu'on puisse emprunter de l'argent sur cette propriété-là? * * * Sur le terrain privé, là? * * * L'un ou l'autre. R. Bien sûr qu'on peut emprunter de l'argent mais beaucoup moins.

D. Mais personne ne les achète? R. Je crois bien, vous les avez inondées presque toutes.

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D. Si on veut vendre ces propriétés-là est-ce qu'elles n'ont pas de valeur du tout? R. Non, je comprends les terrains qui ne sont pas bâtissables * * *

D. Maintenant, ils n'ont pas de valeur du tout? R. Je comprends que vous les avez noyées d'un bout à l'autre.

And Trottier, the chief assessor of the town, says:

D. En mettant une évaluation sur une terre, ordinairement il y a des bases sur lesquelles vous pouvez fixer la valeur, par exemple, il y a des ventes et il y a l'utilité de ces terrains; mais si vous voulez évaluer un bord de l'eau situé à plusieurs milles au-dessus d'un développement, hydraulique, qui a été un peu inondé par ce développement qu'est-ce qu'il y a pour indiquer une valeur, comment pouvez-vous fixer un prix de vingt cents (0.20), c'est ce que je voudrais savoir? R. Le prix de vingt cents (0.20) c'est la manière de l'employer, ce terrain-là. Le propriétaire le veut pour manufacturer de l'électricité, il passe de l'eau pour manufacturer de l'électricité, il fait un pouvoir, *il couvre des terrains d'eau qui n'auront aucune valeur à l'avenir, qui sont finis pour toujours*. Tout cela, c'est pour des fins industrielles, c'est du commerce, c'est de la manufacture, c'est pour faire de l'électricité pour envoyer en dehors, ici et là. Ce n'est pas du commerce comme un autre. C'est la raison pour laquelle nous avons mis cela à vingt cents (0.20). Nous considérons que c'est une industrie. Que ce soit la Montreal Island Power ou une autre, il n'y a pas de différence, il n'y a pas de parti pris.

This epitomizes the basic principle adopted by the assessors, which goes too far, in my opinion. They considered as assessable the electrical power, the product of the harnessing of the river. Hawley, one of the appellant's witnesses, stated that it would be disposed to allow any purchaser of one of its riparian lots, if he wished it,

to fill in to the original property line, that is the amount of property the company had under water.

Treating, therefore, this property separate and apart from the water which flows over it, just as a bottle containing wine may be considered as distinct from its content, we cannot ignore that the appellant used the submerged land to impound water to turn the wheels of its generating units. The simplest and most convenient method would be to value the whole development as an entire thing; but this cannot be done as only a part of the property is situate in the respondent's territory. We are, therefore, compelled to separate the whole into its component parts and to value such parts separately. While that method is more difficult, it involves no injustice or unfairness to the taxpayer, because, after all, the value of the whole would be the sum of the values of its component parts considered as parts of the whole. The appellant, as far as I understand the case, does not object to the valuation of its submerged lands as separate items,

but contends their valuation is excessive and includes elements which were not incidental or a part of the land as land. In 1932, these submerged lots had no intrinsic value as land in the ordinary acceptation of the word, if considered as separate and independent parcels. They were not adapted or adaptable to many of the uses to which land is ordinarily put. They could not be utilized or grazed, nor could they be used for residential or any other industrial purposes; they could, as above mentioned, be utilized for the service and enjoyment of the owner of adjoining riparian lots when these were of sufficient depth to be sold for residential purposes. But when all these parcels were consolidated by the company into a single unit which could be utilized as an aid in the profitable production of power, they each acquired in the hands of the appellants a definite actual value by reason of that relationship as part of that unit. "The company had made the realization of a potentiality a certainty for itself." Anglin J. *Irwin* v. *Campbell* (1).

I therefore say that the assessors would have ignored the actual tangible fact if they had considered that each piece of property had no value, except from its quality as land. The power producing unit including these lots might unquestionably be sold as a whole and the real value of these lands lies in the fact that they are part of a natural basin through which the river flows and within a few miles falls, and that, by the erection of a dam across the only outlet from that basin, the waters of that river may be and have been impounded so as to generate power. I cannot say that its realized utility for that purpose gives no additional value to the land. As stated by the Court of Appeal of Maryland in the case of *Susquehanna Power Company* v. *State Tax Commission* (2), affirmed by the Supreme Court of the United States (3):

> No one of the parcels into which the lands were formerly divided had any such utility considered apart from the other parcels which together form the value, for unless all were used none could be used. But when they were all gathered into a single unit and the potential utility latent in them became available and apparent and for that reason when so held the entire tract of land was properly assessed as a unit.

(1) (1915) 51 Can. S.C.R. 358, at 372.
(2) (1930) 159 Maryland Rep. 334, at 355.
(3) (1931) 283 U.S. Rep. 291.

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But the record shews that the respondent municipality and the appellant, as well as the courts below, have undertaken to value each parcel of land separately; they could not do otherwise, the real water power having been developed elsewhere. In considering the value of each parcel, can we ignore the fact that the company owns not only the parcel in question but all the other lots in the respondent municipality which were especially adaptable to contribute to the attainment of the object of its incorporation and the exercise of the licence from the provincial government to create new wealth in the national interest under the form of electrical power? I believe that in order to reach the real actual value, some consideration must be given to that special adaptability which has been utilized by the appellant.

On the other hand, the acquisition price paid once for all to avoid the payment of damages to the riparian owners is not the actual value to the company after the property has been flooded. It represents the value to the vendor plus the value of the special adaptability and immediate prospects and, besides, the damages resulting from the expropriation.

What should be done under such circumstances?

I think that we have the power to refer the case back to the judge who heard the appeal from the assessors, in order that he might, if necessary, hear fresh evidence, to value, on what we believe proper principles, the flooded lands. But, in order to avoid further litigation and costs with the elements in hand, including the 1931 valuation, the valuation now accepted by both parties for 1932 of the lots not covered by water owned by the company immediately adjoining the flooded lots, and for the motives hereinabove exposed, I would rather settle the matter and reduce the valuation placed on these lots by the Court of King's Bench by one half, that is to say, I would substitute 5 cents to 10 cents a foot for the flooded lots along the Rivière des Prairies enumerated in the judgment a *quo*.

In his factum, the appellant's counsel said:

> In the Marigo, we have accepted the town's valuation except that we put no value on what is under the water.

These Marigo lots consisted of a swamp before the water was raised. It had its mouth opening into the river a mile or two below Laval des Rapides. This swamp ex-

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tended from its mouth back into the country, partly parallel but diverging from the river. The top of the Marigo extends into the territory of the respondent. When the river was raised, the Marigo was filled and, in anticipation, the company had purchased land both on the river frontage and on the Marigo. The unflooded land in the latter area was placed at a lower valuation and the flooded land valued at the same figure. Before us the appellant complained especially of the valuation of the water lots bordering the river. It does not seem to have stressed the same objection to the valuation placed by the municipality on the Marigo lots found in the judgment appealed from, and did not demur when M. Décary stated that there was no appeal as far as this inlet is concerned or he said that the amount involved is insignificant. Therefore we should not interfere with the valuation of these Marigo lots and the appeal should be allowed in part and the valuation reduced to 5 cents for the water lots on the Rivière des Prairies. As both parties before this Court were partly successful, there will be no costs on this appeal.

Judgment varied, no costs.

Solicitors for the appellant: *Chauvin, Walker, Stewart & Martineau.*

Solicitors for the respondent: *Décary & Décary.*

GEORGE DOZOIS AND IDA DOZOIS (PLAINTIFFS) ..... } APPELLANTS;

AND

THE PURE SPRING COMPANY LIMITED AND THE OTTAWA GAS COMPANY (DEFENDANTS) ..... } RESPONDENTS.

1933

*Nov. 30.
*Dec. 1.

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*June 6.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Negligence—Claim for damages for injury from alleged escape of gas—Evidence—Directions in charge to jury—Construction of jury's findings—New trial—Absence of fume pipe on boiler—Liability of defendant which installed gas appliances on the other defendant's premises.

Plaintiffs sued P. Co. and O. Co. for damages for injury to one of them (wife of the other) alleged to have been caused by escape of gas from P. Co.'s premises (which were in the same building as plaintiffs'

*PRESENT:—Duff C.J. and Rinfret, Smith, Cannon and Hughes JJ.

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premises). O. Co. had, five years before the alleged injury, installed gas appliances in P. Co.'s premises, and it supplied gas to P. Co. At the trial the jury found that plaintiff was injured by gas; that it escaped from gas appliances on P. Co.'s premises; that P. Co. had not satisfied the jury that it was not guilty of negligence causing or contributing to the escape; that O. Co. did not take the precautions it ought to have taken in installing and maintaining the gas appliances; that its failure to take such precautions caused or contributed to the causes of the injury; that O. Co. was guilty of negligence in the installation or maintenance, causing in whole or in part the injury, "in failing to install fume pipe on boiler when said boiler was installed"; that there was a verbal agreement between P. Co. and O. Co. "to install the aforementioned boiler and maintain same in good order"; and that the companies failed to observe the terms of such agreement "by not insisting on the installation of fume pipe on boiler at the time said boiler was installed"; that O. Co.'s failure to observe its agreement caused or contributed to the causes of the injury; and assessed damages. Judgment was given against both defendants. The Court of Appeal for Ontario reversed the judgment and dismissed the action. Plaintiffs appealed.

Held: There should be a new trial. Cannon and Hughes JJ., dissenting, would restore the judgment at trial.

Duff C.J. and Smith J., while not entirely satisfied to go as far as the Court of Appeal, held that on the record, including the evidence and the judge's charge to the jury, the trial and its result were so unsatisfactory that the verdict should not stand and there should be a new trial. As to the jury's finding that defendants were both negligent in not insisting upon setting up a fume pipe, they held that this finding meant that it was perfectly well understood on all sides that the installation was incomplete, in that the absence of a fume pipe might have the effect of allowing noxious gases to escape which might do harm; and that the negligence found occurred when the boiler was installed—five years before the alleged injury; and Duff C.J. and Smith J. held that in such circumstances O. Co. would not be responsible (*M'Alister* v. *Stevenson,* [1932] A.C. 562, at 578; *Gregson* v. *Henderson Roller Bearing Co.,* 20 Ont. L.R. 584; *Farr* v. *Butters,* [1932] 2 K.B. 606, at 617; *Caledonian Ry. Co.* v. *Mulholland,* [1898] A.C. 216; and *Bottomley* v. *Bannister,* [1932] 1 K.B. 458, at 472-3, referred to).

Rinfret J., while otherwise concurring with Duff C.J. and Smith J., expressed an inclination to hold that the action as against O. Co. should be dismissed—that the effect of the verdict was that its negligence occurred at the time "when said boiler was installed," five years before the alleged injury; and, applying to the verdict the principle laid down in *Dominion Natural Gas Co. Ltd.* v. *Collins,* [1909] A.C. 640, and having regard to the jury's answers with respect to the full knowledge of P. Co. concerning the incomplete nature of the installation, the result was that O. Co. was not legally liable; but, in view of the opinions of the other members of the court, equally divided, he concurred in disposing of the case as proposed by Duff C.J. and Smith J.

Cannon and Hughes JJ., dissenting, were of opinion that there was reasonable support in the evidence for the jury's findings; and that, applying the law to the facts as found by the jury, the judgment at trial

against both defendants should be restored. (With regard to the liability of O. Co., reference was made to *M'Alister* v. *Stevenson*, [1932] A.C. 562, at 611-612, 580-581, 595-597; *Dominion Natural Gas Co. Ltd.* v. *Collins*, [1909] A.C. 640, at 646, 647.)

APPEAL by the plaintiffs from the judgment of the Court of Appeal for Ontario, which reversed the judgment of McEvoy J. (given upon the findings of the jury) in favour of the plaintiffs, and dismissed the plaintiffs' action (Magee J.A. dissenting as to the judgment at trial against the defendant The Pure Spring Co. Ltd., which he would affirm). The action was brought by the plaintiffs, husband and wife, for damages for injury to the plaintiff, Mrs. Dozois, alleged to have been caused by gases escaping from the premises of the defendant The Pure Spring Co. Ltd. (which premises were in the same building as was the plaintiffs' apartment), in which premises there were certain gas appliances which had been installed by the defendant The Ottawa Gas Co., which company supplied gas through a meter at the outer wall of the premises of The Pure Spring Co. Ltd. The plaintiffs alleged that the alleged escape of gases was caused by the negligence of the defendants, their servants or agents.

A. W. Beament and *G. M. Bleakney* for the appellants.

E. J. Murphy K.C. and *A. F. Moore* for the respondent The Pure Spring Co. Ltd.

G. F. Henderson K.C. and *J. D. Watt* for the respondent The Ottawa Gas Co.

The judgment of Duff C.J. and Smith J. was delivered by

DUFF C.J.—The Chief Justice of Appeals in Ontario (Latchford C.J.) and Mr. Justice Fisher, have unanimously held that, on the evidence as it stands, that is to say, upon the facts admitted or not disputed, or necessarily inferable, the plaintiffs' action ought to be dismissed against both defendants. I should have no hesitation whatever in coming to that conclusion had it not been for the verdict of the jury and, although I think the case is very near the line, I cannot express myself as entirely convinced that the findings can properly be set aside upon these grounds. Other questions, however, arise when the Court of

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Appeal finds the evidence in such a state that, as said in effect by Lord Halsbury in *Jones* v. *Spencer* (1), the court may find the trial so unsatisfactory on various grounds as to make it a duty of justice to set aside the findings although granting the party affected the right to bring the matter before another jury; or the court may specifically find that matters, or a matter, or the matter, which the jury had to consider were not brought so clearly and so fairly to the minds of the jury as to justify them in allowing the verdict to stand. The court may think, on the whole record as it stands, that there has been grievous error amounting to injustice, and, consequently, that the verdict ought not to stand.

I am satisfied in this case that, regarding the case as a whole, the verdict ought not to be permitted to stand. The judgment of Mr. Justice Fisher develops the facts, though much might be added to what he has said, and I have no hesitation whatever in saying that, examining the evidence in the record, the result of this trial is to my mind entirely unsatisfactory; and so unsatisfactory and on such grounds that there should be a new trial. I am not, as I have said, entirely satisfied that we should go so far as the Appellate Division has gone but, at least, the respondent should have an opportunity to submit the issues to another jury.

There are one or two matters which would appear to require special attention. The questions submitted to the jury as affecting especially the liability of the Pure Spring Co. Ltd., respondents, were in these words:

1. Was the plaintiff Mrs. Dozois injured by inhaling poisonous gases or fumes?—Ans. Yes.

2. If so, did the said gases or fumes escape from or emanate from gas appliances upon the premises occupied by the defendant Pure Springs Company?—Ans. Yes.

3. If the said gases or fumes escaped from the said appliances on the premises occupied by the defendant Pure Springs Company, has the defendant Pure Springs Company satisfied you that the Pure Springs Company, or its servants or agents, were not guilty of any negligence causing or contributing to the said escape?—Ans. No.

It is too obvious for comment that, under questions one and two, the onus was on the appellants to establish that Mrs. Dozois was injured by inhaling poisonous gases or

(1) (1897) 77 L.T. 536.

fumes and, further, that such gases and fumes escaped from or emanated from the gas appliances kept by the defendant Pure Spring Company. In addition to that, the onus was on them also to prove that the Pure Spring Co. was guilty of negligence causing or contributing to "such escape."

Now, when one reads the charge of the trial judge as affecting the issues raised by these questions, one receives at once the impression that the respondents are burdened with an onus to rebut the charges which form the basis of these issues. The learned trial judge begins his charge by saying that the first thing that seems to him important is that the jury should get "into their minds" how the case came about and then he says:

> From that point of view, the first thing is you must consider what is the nature of gas, and how does it diffuse itself, because that is at the very foundation of this action. You have had a number of gentlemen of experience who have given you an account how gas, not this gas, but how gas travels from place to place.

Though not in explicit terms, yet by implication, it would rather appear that the learned trial judge was asking the jury to assume that the illness from which Mrs. Dozois suffered was derived from the escape of gas. This, of course, was one of the most critical points of dispute in the action and the learned trial judge ought to have been most careful to call the jury's attention to the fact that the onus was on the appellants and that they must be satisfied by reasonable evidence that such was the case.

Then, the learned trial judge goes on to point out that an attempt has been made by the Pure Spring Company to show that no gas fumes escaped at all and, therefore, he says:

> * * * it appears to me that it would be well for you to commence your consideration of the matter by trying to determine upon this evidence whether or not there was any gas, any poison gas, escaping from the Pure Spring premises into the hall and up to the place where this woman lived. In weighing that evidence and looking at it, you will not forget the importance to the defendants of making it appear to the court and jury that there never was any gas escaping from that place up to the place where this woman says she was poisoned.

Observe that there is no caution that the very basis of the case is, not merely that gas was escaping in some quantity, but that gas did escape and that the gas which did escape caused the illness complained of.

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Then,

> You will begin by considering that question; was there any gas escaping up to that stairway at all, or was it, as has been boldly said, something that has been framed up? The evidence of the defence began and persisted largely upon the theory that there never was any gas came to this place, and this woman never was gassed, and there was no gas there to gas her anyway, and she could not be gassed. They seek to prove that in two ways at least. One way is by calling a number of people who were about the place, and who say, "We were there such and such a time and there was no gas." Another way is by seeking to satisfy the jury that this woman was not suffering from gas poisoning at all * * *.

The trial judge seems, I think, to be conveying to the jury the impression that the ultimate onus is on the respondents. His language is not calculated to make the jury understand that the onus was plainly on the appellants to show, not merely that there was gas escaping but that the escaping gas did in fact injure the appellant. Then, later on, he puts the matter in a more explicit form. He says:

> You will remember that the task of the defendants is to show that there was no gas escaping from their premises that was poisoning this woman.

That seems to be a very plain misdirection and it is very difficult indeed to think that the minds of the jury were not affected by it. Then he goes on to say that during the few days including the day on which Mrs. Dozois' injury is alleged to have occurred the respondents were doing something with the gas appliances. That in itself might have been an innocuous observation, but, taken together with what immediately preceded it, viz., that the "task" of the appellants was to negative the escape of gas, it strikes one as being very far from innocuous. Then he proceeds to discuss what occurred in the Pure Spring Company's plant on the Sunday on which the accident occurred. Three young men said they were playing cards there all day and that the plant as usual was closed down and there was no sign of escaping gas. The learned trial judge asked them to consider the likelihood of these three people playing cards, as he describes it, "on ginger beer," and he suggests to them that they must consider very carefully whether something did not happen on that occasion which would cause an escape of gas. All this must be considered in relation to what the learned trial judge had already said as to the onus on the respondents. It cannot, I think, be regarded as harmless.

Then, there is a suggestion, which appears to be based upon nothing, that this whole story of card playing is a pure myth because the other side have said Mrs. Dozois was not sick from gas poisoning but sick from something else, and that, therefore, her claim had no foundation. The learned trial judge thought it proper to suggest that the jury might consider, in the absence of any foundation in the evidence for such a suggestion, that these young men were engaged in a conspiracy to defeat by false evidence the appellants' case.

Then, I find the learned trial judge, dealing with the evidence given on behalf of the defendants by the letter carrier, Mr. White, to the effect that he never smelt gas in the apartment, says:

> But in that regard I have to say this to you, that under our law a man who swears he does see something is considered very much stronger, and a very much more important witness than a man who swears that he does not see anything.

Now, that, I think, was a misdirection and a dangerous misdirection. It is quite true that the jury may properly in the exercise of their commonsense say to themselves that, other things being equal, credibility, for example, being equal, etc., the evidence of a man who remembers that he has seen something is of greater weight than the evidence of the man who says, "I did not see it." But, to lay down the broad proposition, laid down by the learned trial judge as a proposition of law, is wrong, and a misdirection, and, I think, in this case, was calculated to mislead the jury.

I shall not proceed further with the incidents of the conduct of the trial except to call attention to the fact that the learned trial judge, in effect, left the jury under the impression that if the respondents, the Pure Spring Company, in whose premises the machine was installed, were negligent in not insisting upon the installation of a fume pipe, that would not affect the responsibility of the Gas Company. It is quite true that the learned trial judge did not put the matter precisely in that way, but the jury found in most explicit terms that the defendants were both negligent in not insisting upon the setting up of a fume pipe. I do not think there can be any misconception whatever as to the meaning of that finding. I think it meant that it was perfectly well understood on all sides that the

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installation was incomplete, in that the absence of a fume pipe might have the effect of allowing noxious gases to escape which might do harm; and that the negligence found occurred when the boiler was installed, that is to say, five years before the alleged injury. Now, as I understand the law laid down in *M'Alister* v. *Stevenson* (1); *Gregson* v. *Henderson Roller Bearing Co.* (2); *Farr* v. *Butters* (3); *Caledonian Ry. Co.* v. *Mulholland* (4); and *Bottomley* v. *Bannister* (5); in such circumstances, the Gas Company would not be responsible.

For these reasons I think the trial was most unsatisfactory, and that the verdict cannot stand. The costs, including the costs of both appeals, should be reserved to be disposed of by the trial judge.

RINFRET J.—On the issue between the appellants and the respondent The Pure Spring Company Limited, I concur with my Lord the Chief Justice and with Mr. Justice Smith; and, for the reasons stated by the Chief Justice, I agree that there should be a new trial giving the appellants the opportunity to submit the issue to another jury.

On the issue in respect of The Ottawa Gas Company, I would have felt inclined to dismiss the appeal from the judgment of the Court of Appeal for Ontario, which was unanimous in holding that the verdict of the jury could not be upheld.

As I read the verdict, the negligence of the Gas Company was found to have consisted only in the installation—not the maintenance—of the appliances.

The jury did find the existence of a verbal agreement between The Pure Spring Company and the Gas Company both to install the boiler and to maintain it in good order. If, however, the other answers of the jury are looked at, although the jury says that the Gas Company did not "take the precautions it ought to have taken in installing and maintaining the gas appliances on The Pure Spring Company's premises," and although the jury did say that this failure caused in whole or in part the appellants' injuries, it will be noticed that Question No. 6, to which they gave this affirmative answer, was put to them

(1) [1932] A.C. 562, at 578.
(2) (1910) 20 Ont. L.R. 584.
(3) [1932] 2 K.B. 606, at 617.
(4) [1898] A.C. 216.
(5) [1932] 1 K.B. 458, at 472-3.

in the alternative, viz.: "Was the defendant gas company guilty of any negligence in the installation or maintenance of any of the gas appliances, etc.?" But the meaning of the answer to Question 6 is cleared up by the subsequent answer to Question 7, where the jury is asked to state fully in what such negligence consisted. The answer is: "In failing to install fume pipe on boiler when said boiler was installed."

This was not an oversight on the part of the jury, for their attention was drawn to it by the presiding judge, who said: "That is originally you mean, when they put it in five years ago, or something? You are all agreed to that, are you?" And the jury assented.

This was again shown by the answer to Question 10.

10. In what respect, if any, did either party fail to observe the terms of such agreement?—A. By not insisting on the installation of fume pipe on boiler at the time said boiler was installed.

Again the attention of the jury was drawn by the trial judge to this feature of their answer. He said:

You mean that The Pure Spring people were the ones that neglected; that is, they did not insist on having it done? Is that what you mean?

The FOREMAN: Yes, both companies, Your Honour.

His LORDSHIP: You do not seem to lay any fault to the Gas Company for not doing it. The Pure Spring people did not insist on it, and you think they ought to have insisted?

The FOREMAN: Your Honour, the jury feels that both should have insisted—either one or both should have insisted on it.

His LORDSHIP: I think I must accept that explanation just the way they give it.

In my view, the effect of the verdict is that, so far as the Gas Company is concerned, its negligence occurred at the time "when said boiler was installed". In fact, those are the precise words used by the jury after their attention was drawn to it by the presiding judge. Now, the installation was made five years before the accident.

It being so, my view would be that, applying to the verdict the principle laid down by the Privy Council in *Dominion Natural Gas Company Limited* v. *Collins* (1), and having regard to the answers of the jury with respect to the full knowledge of the other defendant, The Pure Spring Company Limited, concerning the incomplete nature of the installation, the result is that the Ottawa

(1) [1909] A.C. 640.

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Gas Company is not legally liable and the action against that respondent ought to have been dismissed.

As matters stand, however, two of my learned brothers are of opinion that the appellants should succeed *in toto* and that the judgment of the trial judge should be restored, while my Lord the Chief Justice and Mr. Justice Smith think there should be a new trial against both respondents. Under the circumstances, I shall concur in disposing of the case as proposed by the Chief Justice (*Carter* v. *Van Camp* (1); *Littley* v. *Brooks & C.N.R.* (2)).

The judgment of Cannon and Hughes JJ., dissenting, was delivered by

CANNON J.—The plaintiff and his wife complain by their action that they suffered damages because the defendant, The Pure Spring Company Limited, who occupied the basement and the ground floor of the building in which they resided, for some time prior to the 21st December, 1930, allowed dangerous and noxious gases to escape from their premises on to the premises of the plaintiffs. They also allege that, on the night of the 21st December, 1930, and all day the 22nd and in the morning of the 23rd, large quantities of gas escaped from the premises of the defendant and the plaintiff Ida Dozois was asphyxiated and poisoned.

The plaintiffs also aver that the Ottawa Gas Company distributed this poisonous gas to, and had installed, two large gas water heaters operated by The Pure Spring Company in the premises.

The plaintiffs further alleged that the escape of the said gas was caused by the negligence of the defendant companies and that the plaintiff's wife, after being ill and confined to the hospital for sixteen days, had suffered a great destruction of nervous tissues with a paralysis of the lower extremities and consequent pain and suffering and great bodily weakness

The Ottawa Gas Company denied all liability and claimed that, although they delivered gas at the exterior of the premises of their co-defendant, they had no control over it or its use after it entered the said premises.

(1) [1930] Can. S.C.R. 156, at 174. (2) [1932] Can. S.C.R. 462, at 467.

The Pure Spring Company pleaded that no gas could escape, or had escaped, from their premises; and also that if plaintiff Ida Dozois had suffered illness, it was not from the effect of gases emanating from the defendant's premises but due to other causes. They also pleaded, in the alternative, that if any gas emanated from their premises, injuring the plaintiff, the same was due to the negligence of the Ottawa Gas Company, which had sold and installed the gas equipment and fittings used in the said premises.

Mr. Justice McEvoy, who presided at the trial, after hearing the plaintiff's evidence, refused the motions for non-suit submitted by the defendants; and the case went to the jury, who answered the questions as follows:

1. Was the plaintiff Mrs. Dozois injured by inhaling poisonous gases or fumes?—Ans. Yes.

2. If so, did the said gases or fumes escape from or emanate from gas appliances upon the premises occupied by the Defendant Pure Springs Company?—Ans. Yes.

3. If the said gases or fumes escaped from the said appliances on the premises occupied by the defendant Pure Springs Company, has the defendant Pure Springs Company satisfied you that the Pure Springs Company, its servants or agents, were not guilty of any negligence causing or contributing to the said escape?—Ans. No.

4. Did the defendant Gas Company take the precautions they ought to have taken in installing and maintaining the gas appliances on the Pure Spring Company's premises?—Ans. No.

5. If you answer Question 4 "no," then did the failure of the gas company to take such precautions as they ought to have taken cause or contribute to the causes of the plaintiff's injuries?—Ans. Yes.

6. Was the defendant gas company guilty of any negligence in the installation or maintenance of any of the gas appliances upon the premises of the defendant Pure Springs Company, or of any of the attachments thereto, which caused in whole or in part the plaintiff's injuries?—Ans. Yes.

7. If you answer Question 6 "yes" state fully in what such negligence consisted?—Ans. In failing to install fume pipe on boiler when said boiler was installed.

That is originally you mean, when they put it in five years ago, or something? You are all agreed to that, are you? (Jury assent.)

8. Was there any agreement between the Pure Springs Company and the Gas Company in regard to the appliances in question?—Ans. Yes (verbal).

9. If so, what was the agreement?—Ans. To install the aforementioned boiler and maintain same in good order.

10. In what respect, if any, did either party fail to observe the terms of such agreement?—Ans. By not insisting on the installation of fume pipe on boiler at the time said boiler was installed.

You mean that the Pure Spring people were the ones that neglected; that is, they did not insist on having it done? Is that what you mean?

The FOREMAN: Yes, both companies, your Honour.

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His LORDSHIP: You do not seem to lay any fault to the Gas Company for not doing it. The Pure Spring people did not insist on it, and you think they ought to have insisted?

* * * * *

11. If you find that the Gas Company failed to observe its agreement with the Pure Springs Company, did the failure of the gas company to observe its agreement cause or contribute to the causes of the plaintiff's injuries?—Ans. Yes.

12. At what sum do you assess the damages to,—

(*a*) the plaintiff George Dozois $700.00.

(*b*) the plaintiff Ida Dozois $4,000.00

From the judgment rendered according to this verdict, an appeal was brought to the learned judges of the Court of Appeal who unanimously dismissed the action against the Ottawa Gas Company and by a majority against The Pure Spring Company. Mr. Justice Magee found that the verdict of the jury, as far as The Pure Spring Company Limited was concerned, could not be disturbed.

After reading with care all the evidence, I have reached the conclusion that there was abundant evidence for the jury to reach reasonably the conclusion that the plaintiffs and their witnesses did smell gas on the occasions in question; that such escape could come only from the premises of The Pure Spring Company. The jury had a right and were in duty bound after the way the trial was conducted by the respondents to believe or disbelieve the denials of their witnesses and to accept or reject the evidence in support of the action. Could they reasonably reach the conclusion that the plaintiffs had proven their case? It was admitted that if gas was diffused in the apartment, it could come exclusively from the Pure Springs' plant, installed and served by the Ottawa Gas Company—in that building. There was no gas leak on the street or in the neighbourhood. The jury were duly warned by the learned trial judge that the plaintiffs and the members of the family or immediate friends were to be considered as interested witnesses, but they accepted as sufficient and acted upon the evidence they gave as to the presence of gas on several occasions and specially on the 20th, 21st and 22nd of December, 1930. They knew that on several prior occasions, Dozois complained to the landlord who passed the complaints to the Pure Spring Company. Louis Shapiro, one of the defendant's witnesses, stated that on the Sunday night at 10.30 Dozois complained to him about the smell of gas.

Moreover, several independent witnesses, Burgess, the bread salesman, Belisle, the bread-driver, and Léo Chartrand swore that from the 1st of October to the date of the accident they smelled cooking gas there.

There being gas in and about that apartment from the 1st of October on, is it unreasonable to reach the conclusion that Mrs. Dozois was injured by it? The jury had the admission by the medical expert for the defence that it was quite possible that this woman, in the house almost all the time, had before the accident built up a certain amount of carbon monoxide poisoning which would make her more susceptible, especially after exertion, walking fast and running upstairs, to the obnoxious results of the inhaling of illuminating gas. This would reasonably explain why, of the whole family, she was the only one who suffered seriously from the combination of carbon monoxide with the blood.

The evidence of Dr. A. V. Kniewasser, who, previously unknown to the plaintiffs, was called in and diagnosed monoxide poisoning and swore that his diagnostic was correct, corroborated by Dr. Cairns, more than established the plaintiff's case. This medical attendant is the only one who spoke from actual personal observation. The other medical witnesses gave only opinions to the effect that the paralysis, if genuine, could be caused by a hemorrhage. They could not give facts. The jury, amidst the obscurity which the expert testimony often brings to a case, chose the evidence of the practitioner who could and did swear to a constant positive fact—that his patient was suffering, when he was called, from gas poisoning, and that he himself had smelt the gas going upstairs to her apartment.

This is not a case where the jury had to infer from certain elements of proof a certain conclusion; there was no hiatus to be bridged, but, if they accepted the evidence of the plaintiffs, actual observations of facts which, in their mind, brought practical certainty—or at least reasonable probability, far above a mere guess or conjecture.

A court of appeal is not called upon to substitute its own views of the evidence to set aside the verdict of a jury. The Court of Appeal and ourselves have not to decide whether the jury were right or wrong in their views of

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the facts. We are merely to determine whether there was evidence on which reasonable men, properly instructed by the judge, could have come to the conclusion at which the jury arrived. *Metropolitan Railway Co.* v. *Wright* (1); *Laporte* v. *C.P.R.* (2).

The judge's instructions to the jury were acceptable to both parties; and, moreover, the case was eminently one in which the question of the credibility of the witnesses was specifically left to the jury, as all parties went on the basis that evidence was fabricated by the other party and the learned trial judge especially called the attention of the jury to this state of affairs in his address.

It is impossible to say that there was no evidence, as contended by the defendants, that Mrs. Dozois had been exposed to poisonous gases and that her injuries resulted from such exposure. Moreover, Mirsky, heard for the defendants, admitted that the appellants complained of gas. William Delorme, another witness for the defendants, was called on the 20th December because there had been a complaint of a gas leak. He admits that he smelled a slight odour of fumes. Prindiville, another employee of the Gas Company, went down to the premises and also smelled fumes, as a result of which he repeated his recommendation that a gas fume pipe be installed in the basement. Up to that time, the defendants' installation was not complete. McIntyre, the gas company's superintendent, says:

Q. No job is complete without a fume pipe?—A. I would say no. No gas appliance is complete without a fume pipe.

Q. Suppose on the night of the 20th of December somebody had gone out of those premises and inadvertently left the gas on in this boiler and there had been a fume pipe—what would have happened?—A. The gas would have gone through the building.

Q. *Would it have been carried off through the fume pipe?—A. Yes.*

Q. If the fact was there was no fume pipe, and somebody left the gas turned on what would happen to the gas?—A. It would go through the building.

Q. It would go out of the apparatus into the atmosphere and through the building?—A. That is if it was turned on.

Mr. HENDERSON: That is all elementary.

In fact, this fume pipe was installed only on the day that the plaintiff Ida Dozois was taken to the hospital and was

(1) (1886) 11 App. Cas. 152.

(2) [1924] Can. S.C.R. 278, at 287 & 288.

entered by her physician as suffering from carbon monoxide poisoning.

There was evidence, besides the smell of unburnt illuminating gas, of emanations of the product of the incomplete combustion of the said gas which contains a high percentage of carbon monoxide.

I therefore reach the conclusion that the plaintiffs' appeal should be maintained against The Pure Spring Company Limited and the verdict against it restored.

Now, what about the Gas Company?

Mr. Justice Magee says in his judgment:

As regards the Gas Company different considerations arise. The Spring Company were not bound to use any defective appliances and thereby allow the others to be injured. The Gas Company cannot be brought within the principle of the so-called snail case of *M'Alister (Donohue)* v. *Stevenson* (1) where the manufacturer of ginger beer was held liable to the donee of a purchaser from his retailed customer for injury to the donee's health from the concealed presence of a dead snail in the stone bottle nor is the Gas Company in the position of the manufacturers of the Ross rifle as in *Ross* v. *Dunstall* (2). In *Gregson* v. *Henderson Roller Bearing Co.* (3) the defendant company were tenants and the plaintiff was injured by the fall of a wooden platform insecurely placed on edge by the employees of the co-defendant Eckhardt who undertook to make some repairs and who happened to be landlord. It was held that Eckhardt was not liable to the plaintiff but the tenants alone were liable. I at least am bound by that decision and I think it applies to the present case and relieves the Gas Company so far as liability to the plaintiffs are concerned.

On this point, the trial judge says:

As it seems to me upon the findings of the jury the Pure Spring Co. had gas upon its premises and allowed it to escape upon the premises to the damage of the plaintiffs and thereby were guilty of a breach of duty to take care of a dangerous substance which they had upon their premises to the purposes of their business; and the Gas Company is guilty of a breach of duty amounting to negligence by installing and maintaining this dangerous machine without a fume pipe whereby the gas was allowed to accumulate and enter the plaintiffs' premises doing damage.

The following abstract from the discussion as to the questions to be submitted to the jury may explain, to a certain extent, the view taken by the trial judge:

His LORDSHIP: You mean there is evidence that might make me think, especially the evidence of McIntyre, who says, supposing the cock had been left partly open and the fume pipe has been there, the fume pipe would have carried it out and it would not have circulated through the building.

Mr. BEAMENT: And Prindiville said the same thing.

Mr. HENDERSON: That is common sense anyway.

(1) 48 T.L.R. 494. (2) 62 S.C.R. 393.
(3) 20 O.L.R. 584

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His LORDSHIP: I thought McIntyre's evidence was that if somebody did kick the top of one of these machines and knock it partially open, and that raw gas began to circulate there, the fume pipe would carry it away.

Mr. HENDERSON: It is common ground between my friend and myself. I would not attempt to deny it for one moment, if that happened through carelessness or design, if you like. That is why a fume pipe is necessary, to make a job complete. A fume pipe makes the apparatus practically fool-proof. The fume pipe is unimportant as regards merely the fumes from burnt gas because they don't hurt anybody.

Mr. BEAMENT: That is for the jury to decide.

The jury found the following against the Gas Company:

1st. That they did not take the precautions they ought to have taken in installing and maintaining the gas appliances on these premises;

2nd. That the failure of the Gas Company to take such precautions as they ought to have taken caused or contributed to the cause of the plaintiff's injury;

3rd. That the Gas Company was guilty of negligence in the installation or maintenance of the appliances which caused the plaintiff's injuries in failing to install a fume pipe on the boiler when the said boiler was installed;

4th. That there was a verbal agreement between the Pure Spring Company and the Gas Company in regard to the appliances in question to install the aforementioned boiler and maintain same in good order; and the jury found that both parties should have insisted on the installation of this fume pipe at that time.

In *Dominion Natural Gas Co.* v. *Collins* (1), Lord Dunedin, speaking for the Privy Council, said that the findings of the jury must be the basis of consideration, unless it can be said that these findings are incapable of support by the evidence.

In this case, it is shown and it is practically common ground that the Gas Company took special care in looking after its appliances and sent an inspector to look them over, even without being called upon to do so. It is also abundantly shown that Prindiville, their employee, insisted, at the time of the installation and after, and also on the day on which the female plaintiff went to the hospital, on the necessity of a fume pipe. As in the *Collins* case (2),

(1) [1909] A.C. 640, at 647; 79 L.J.P.C. 13, at 16
(2) [1909] A.C. 640, at 646; 79 L.J.P.C. 13, at 16.

The gas company were not occupiers of the premises on which the accident happened. Further, there being no relation of contract between the company and the plaintiffs, the plaintiffs cannot appeal to any defect in the machine supplied by the defendants which might constitute breach of contract. * * *.

On the other hand, if the proximate cause of the accident is not the negligence of the defendant, but the conscious act of another volition, then he will not be liable.

Can it be said in this case that the Gas Company owed a duty to all the occupiers of the building in which they introduced an admittedly dangerous thing? Were they bound to take all precautions to prevent its escape or to neutralize the danger to such occupiers in case of an accident causing such an escape? Therefore, were they not bound, as found by the jury, to insist and complete the installation and make it safe by installing the fume pipe which would have brought the noxious gas into the open air, instead of allowing its diffusion into the building? If so bound, did they satisfy the onus cast upon them of proving that the proximate cause of the accident was not their negligence, but the conscious act of another volition?

Very recently, after the trial of the present case, Lord MacMillan, in *M'Alister* v. *Stevenson* (1), says:

The exceptional case of things dangerous in themselves or known to be in a dangerous condition has been regarded as constituting a peculiar category outside the ordinary law both of contract and of tort. I may observe that it seems to me inaccurate to describe the case of dangerous things as an exception to the principle that no one but a party to a contract can sue on that contract. I rather regard this type of case as a special instance of negligence where the law exacts a degree of diligence so stringent as to amount practically to a guarantee of safety.

In the same case, Lord Atkin, speaking for the majority of the House of Lords, gave us the present state of the law of England as follows (2):

At present I content myself with pointing out that in English law there must be and is some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances. The liability for negligence, whether you style it such or treat it as in other systems as a species of "culpa," is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour?

(1) [1932] A.C. 562, at 611-612; 101 L.J.P.C. 119, at 143.

(2) [1932] A.C. at 580-581, 595-597; 101 L.J.P.C. at 127-128, 135.

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receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question. This appears to me to be the doctrine of *Heaven* v. *Pender* (1) as laid down by Lord Esher (then Brett M.R.) when it is limited by the notion of proximity introduced by Lord Esher himself and A. L. Smith, L.J., in *LeLievre* v. *Gould* (2). Lord Esher says: "That case established that, under certain circumstances, one man may owe a duty to another, even though there is no contract between them. If one man is near to another, or is near to the property of another, a duty lies upon him not to do that which may cause a personal injury to that other, or may injure his property." So A. L. Smith, L.J.: "The decision of *Heaven* v. *Pender* (1) was founded upon the principle, that a duty to take due care did arise when the person or property of one was in such proximity to the person or property of another that, if due care was not taken, damage might be done by the one to the other." I think that this sufficiently states the truth if proximity be not confined to mere physical proximity, but be used, as I think it was intended, to extend to such close and direct relations that the act complained of directly affects a person whom the person alleged to be bound to take care would know would be directly affected by his careless act. * * * I do not find it necessary to discuss at length the cases dealing with duties where a thing is dangerous, or, in the narrower category, belongs to a class of things which are dangerous in themselves. I regard the distinction as an unnatural one so far as it is used to serve as a logical differentiation by which to distinguish the existence or non-existence of a legal right. In this respect I agree with what was said by Scrutton, L.J., in *Hodge & Sons* v. *Anglo-American Oil Co.* (3), a case which was ultimately decided on a question of fact. "Personally I do not understand the difference between a thing dangerous in itself, as poison, and a thing not dangerous as a class, but by negligent construction dangerous as a particular thing. The latter, if anything, seems the more dangerous of the two; it is a wolf in sheep's clothing instead of an obvious wolf." The nature of the thing may very well call for different degrees of care, and the person dealing with it may well contemplate persons as being within the sphere of his duty to take care who would not be sufficiently proximate with less dangerous goods; so that not only the degree of care but the range of persons to whom a duty is owed may be extended. But they all illustrate the general principle. In *Dominion Natural Gas Co. Ltd.* v. *Collins and Perkins* (4), the appellants had installed a gas apparatus and were supplying natural gas on the premises of a railway company. They had installed a regulator to control the pressure and their men negligently made an escape valve discharge into the building instead of into the open air. The railway workmen—the plaintiffs—were injured by an explosion in the premises. The defendants were held liable. Lord Dunedin, in giving the judgment of the Judicial Committee (consisting of himself, Lord Macnaghten, Lord Collins, and Sir Arthur Wilson), after stating that there was no relation of contract between the plaintiffs and the defendants, proceeded: "There

(1) (1883) 11 Q.B.D. 503, 509.
(2) [1893] 1 Q.B. 491, 497, 504; 62 L.J.Q.B. 353.
(3) (1922) 12 Ll. L. Rep. 183, 187.
(4) [1909] A.C. 640, 646; 79 L.J. P.C. 13, 16.

may be, however, in the case of any one performing an operation, or setting up and installing a machine, a relationship of duty. What that duty is will vary according to the subject-matter of the things involved. It has, however, again and again been held that, in the case of articles dangerous in themselves, such as loaded firearms, poisons, explosives, and other things *ejusdem generis,* there is a peculiar duty to take precaution imposed upon those who send forth or install such articles when it is necessarily the case that other parties will come within their proximity." This, with respect, exactly sums up the position. The duty may exist independently of contract. Whether it exists or not depends upon the subject-matter involved; but clearly in the class of things enumerated there is a special duty to take precautions. This is the very opposite of creating a special category in which alone the duty exists. I may add, though it obviously would make no difference in the creation of a duty, that the installation of an apparatus to be used for gas perhaps more closely resembles the manufacture of a gun than a dealing with a loaded gun. In both cases the actual work is innocuous; it is only when the gun is loaded or the apparatus charged with gas that the danger arises.

After the jury had retired and after taking up this matter and discussing the above quoted *Collins* case (1) with counsel for the Gas Company, the jury returned for further instruction and was told:

His LORDSHIP: Counsel for the gas company points out to me that I said to you that in installing and handling gas, it was a dangerous substance, and that they had a duty to exercise of precaution and care, which they ought to exercise in order to prevent somebody being hurt by their gas. I think I did say that to you and I ought to have said in that connection to you that if some independent person other than the gas company, somebody by his volition did something which caused the accident that is complained of, that would relieve the gas company so far as that duty was concerned. If the Pure Spring Company, for instance, did something that really caused the accident, and did it voluntarily by their own volition, then that would be a thing that would discharge the gas company from the liability from that doctrine of duty.

MR. BEAMENT: And the gas company must prove that, my Lord.

His LORDSHIP: And before you can apply that rule you must be convinced from the evidence, not that the gas company must prove it, but from the whole evidence as you have it before you—if you conclude that the Pure Spring Company did do something in connection with that gas after the company had done their whole duty, and been as careful as they ought to have been, and did everything they ought to have done—if the Pure Spring people, or anybody else, did some act voluntarily intentionally, that really caused the harm that is complained of, then you would be right in acquitting the gas company from any liability on that branch of the case.

The answers of the jury show that they did not find that the accident was entirely caused, independently of the negligence of the Gas Company, by the conscious act of another volition against which no precaution could really avail; on the contrary, they found joint negligence; and in

(1) [1909] A.C. 640; 79 L.J.P.C. 13.

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apportioning the blame, the jury considered that 60% of it should be assigned to the Gas Company for failing in their duty to protect the plaintiff's wife, as one of the persons who were so closely and directly affected by the introduction of poisonous gas in the building that they (the company) ought reasonably to have had her in contemplation as being immediately affected by the acts or omissions called in question—and they evidently found that the Gas Company had not exculpated itself by establishing that the accident had been caused by the independent conscious act of another volition. The instructions of the learned trial judge to the jury have not been challenged and the latest authorities confirm his directions in law.

Applying the law to the facts as found by the jury, I reach the conclusion that the appeal should be allowed with costs throughout and the judgment of the trial court restored against both respondents.

Appeal allowed; new trial ordered.

Solicitor for the appellants: *George M. Bleakney.*

Solicitor for the respondent Pure Spring Co. Ltd.: *Allan F. Moore.*

Solicitors for the respondent Ottawa Gas Co.: *Henderson, Herridge & Gowling.*

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* Nov. 14, 15.

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* May 13.

HIS MAJESTY THE KING (RESPONDENT) . . APPELLANT;

AND

DOMINION BUILDING CORPORATION LIMITED (CLAIMANT) AND JAMES L. FORGIE (ADDED AS A PARTY CLAIMANT BY ORDER MADE BY THE PRESIDENT OF THE EXCHEQUER COURT OF CANADA ON THE 4TH MARCH, 1931). } RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Damages—Breach of contract to sell land—Ascertainment of amount of damages—Building project—Factors affecting claimants' successful financing of project—Valuation of possibilities.

There had been referred to the Exchequer Court of Canada a claim by the claimants for damages from the Crown for its refusal to carry

* PRESENT AT THE HEARING:—Duff C.J. and Rinfret, Cannon, Crocket and Hughes JJ. Rinfret J., through illness, took no part in the judgment.

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out an alleged contract for sale by the Crown of certain land, on which, combined with certain adjoining land, there was to be erected an office building, certain floors of which were to be leased to the Crown. The Judicial Committee of the Privy Council held ([1933] A.C. 533) that there had been a valid contract binding upon the Crown, and that the judgment of the Exchequer Court of Canada ([1933] Ex.C.R. 164), holding that the claimants were entitled to recover from the Crown damages for breach of contract (reversed by the Supreme Court of Canada, [1932] S.C.R. 511), should be restored. By subsequent judgment in the Exchequer Court the claimants' damages were fixed at $400,000. The Crown appealed.

Held: Having regard to the terms of the claim as made and the form of the reference thereof to the Exchequer Court, and to the evidence, insufficient weight had been given, in fixing the damages, to certain factors (including the absence of a lease to a certain Government department, on which proposed lease, as well as on the lease first above mentioned, the claimants had depended, as indicated in their claim) tending to affect adversely the claimants' successful financing of the project. In fixing damages, the claimants were entitled to a valuation of possibilities or probabilities which, if becoming actualities, might have led to success of their project. On its above views, this Court fixed the damages at $75,000

APPEAL by the Crown from the judgment of Maclean J., President of the Exchequer Court of Canada, holding that the claimants (the present respondents) were entitled to recover from the Crown $400,000 damages for breach of contract.

The contract in question was for the purchase by the claimant Forgie from the Crown of a certain property in the city of Toronto, on which property, combined with certain adjoining property, Forgie was to erect a twenty-six storey office building, certain floors of which were to be leased to the Crown. Forgie assigned all his right, title and interest in the contract to the claimant Dominion Building Corporation Limited. The latter claimed from the Crown damages for the Crown's refusal to carry out the alleged contract, which claim was referred by the Acting Minister of Railways and Canals (reserving the right to plead and maintain that the claimant was not entitled to any compensation) to the Exchequer Court of Canada. Forgie was subsequently added as a party claimant by an order in the Exchequer Court of Canada.

The action was tried by Maclean J., President of the Exchequer Court of Canada, who held (1) that the claimants were entiled to recover from the Crown damages for breach of contract, reserving in the meantime the ascertain-

(1) [1933] Ex.C.R. 164.

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ment of the amount of such damages. On appeal by the Crown to the Supreme Court of Canada, this judgment was reversed and the action dismissed (1). An appeal by the claimants to the Judicial Committee of the Privy Council was allowed and the judgment of the Exchequer Court of Canada was restored (2). The assessment of damages then came before Maclean J., President of the Exchequer Court of Canada, who delivered judgment fixing the damages at $400,000. The present appeal was from the last mentioned judgment.

The material facts and circumstances of the case are sufficiently set out in the said reported judgments and in the judgments (particularly the judgment of Hughes J.) now reported. By the judgment of this Court, now reported, the judgment of the Exchequer Court was varied by reducing the damages to $75,000.

W. N. Tilley K.C. and *C. F. H. Carson* for the appellant.

I. F. Hellmuth K.C., R. S. Robertson K.C., and *W. R. Wadsworth K.C.* for the respondents.

DUFF C.J.—I have come to the conclusion that the learned trial judge has not given sufficient weight to certain material circumstances, to some of which I shall call particular attention; and that it is necessary to examine the evidence as on a re-hearing to ascertain what damages the respondents are entitled to.

I am unable to treat the claim advanced by the respondents, and the form of the reference to the Exchequer Court, as of inconsiderable importance. The reference is in these terms:

> In the matter of Dominion Building Corporation, Limited, Claimants, and His Majesty the King, Respondent.
>
> Reserving the right to plead and maintain that the said Dominion Building Corporation, Limited, is not entitled to any compensation, I hereby refer to the Exchequer Court of Canada the annexed claim of the said Dominion Building Corporation, Limited, for compensation alleged to be due by reason of the allegations therein set forth.
>
> Dated at Ottawa this sixteenth day of September, 1926.
>
> (Sgd.) H. L. DRAYTON,
> Acting Minister of Railways and Canals.
>
> To the Registrar of the Exchequer Court of Canada, Ottawa.

(1) [1932] Can. S.C.R. 511. (2) [1933] A.C. 533.

It will be observed that the claim which is referred to the Exchequer Court is a claim for compensation "alleged to be due by reason of the allegations set forth." The claim itself is in these words:

Claim of Dominion Building Corporation annexed to Reference, September 4, 1926.

TORONTO, ONT., September 4, 1926.

The Honourable the Minister of Railways and Canals,
Department of Railways and Canals,
Ottawa, Ont.

DEAR SIR,—In November of 1924, negotiations were begun for the purchase of the property on the corner of King and Yonge streets, in the city of Toronto, belonging to the Canadian National Railways, and, ultimately, under an order in council which was passed on the 29th of July, 1925, a contract was entered into for the purchase of the lands in question, for the sum of $1,250,000, the purchase to be completed on the 15th of September, 1925. It was a term of the order in council that, on obtaining possession of the premises on or before the 15th September, 1925, a twenty-six storey modern fireproof office building should be erected on the premises and on lands immediately adjoining the premises and formerly known as the Home Bank of Canada, Head Office site, such building to be ready for occupation for the Canadian National Railways, as tenant, on rentals and for the time mentioned in the order in council, the obligation of the Canadian National Railways being to rent, for the time and on the terms mentioned in the order in council, the ground floor and three of the floors of the building.

It was part of the original negotiation that the Customs and Excise Department should also rent five floors of the building on the terms and for a time which was agreed upon, and provision for such renting was to be made by order in council, and an order in council to give effect to such arrangement was actually prepared on the 3rd of September, 1925, but, not having been passed at the request of the Government, an extension of time to complete the purchase up to the 28th of September was asked for and was granted, it being expected that before that date the last-mentioned order in council would be passed. This order in council was not passed during the year 1925, and, from time to time, at the request of the Government, extensions of the time for completing the purchase were applied for and were granted. The last written extension fixed the time for completion at the 30th of December, 1925, because it was intended to have a session of Parliament in the month of November, when the Government expected to be able to pass the necessary order in council to make the contract completely effective.

On the 29th of December, 1925, the order in council providing for the leasing of five floors by the Customs and Excise Department not having been passed, and the House not having met, at the suggestion of the Government, a further extension of the time for completion was applied for.

Finally, the order in council providing for the leasing of the floors in question by the Customs and Excise Department, was passed on the first of February, 1926, and, on the 6th of that month, the Right Honourable the Minister of Railways and Canals was notified that the purchase would be completed on or about the 10th of February, 1926.

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On the 9th of February, 1926, the Right Honourable the Minister, by letter, terminated the original contract.

On the 9th of February, 1926, the Executive of the Canadian National Railways, at a meeting held in Montreal, passed a resolution purporting to reduce the number of floors to be rented by the Canadian National Railways from the ground floor and three additional floors, to the ground floor and one additional floor.

After the contract was entered into, the property known as the Home Bank property, was purchased for the purpose of carrying out the contract at the price of $500,000 and subsequently a contract was entered into with Anglin-Norcross, Limited, for the construction of the building.

By the 22nd of January, 1926, $150,000 had been expended including payment on the purchase price of the Home Bank building, and $25,000 had been paid on account of the purchase of the property from the Crown, and a very considerable sum had been expended in examination of titles, preparation of plans, and other necessary expenses.

It was well understood from the inception of the negotiations by the Right Honourable the Prime Minister, by the Right Honourable the Minister of Railways and Canals, the Honourable the Minister of Public Works, and by other members of the Cabinet, as well as by the Canadian National Railways, that the successful financing of this operation depended upon the leasing by the Canadian National Railways of the ground floor and three additional floors of the building, and also by the leasing by the Customs and Excise Department of the five other floors referred to in this letter, and it was well known that, until the passage of the necessary orders in council making it quite certain that the floors in question would be leased, definite arrangements which would enable the completion of the purchase could not be made, and it was because of such knowledge by the Government and the members of the Cabinet, that the Government requested that the applications for the extensions of time to complete the said contract, be made.

The refusal by the Right Honourable the Minister of Railways, on the 9th of February, 1926, to complete the said contract, which refusal was wholly unjustified, in view of the negotiations above detailed, will entail an immense loss upon the undersigned, who are the assignees of the original contractor, and who may be involved in protracted litigation, with the possibility of the recovery of heavy damages.

Notwithstanding the refusal of the Right Honourable the Minister of Railways and Canals to complete the contract, the undersigned have, without prejudice to their rights, offered to and have always been ready and willing to carry out the said contract.

The amount which the undersigned have lost or are liable for, by reason of the cancellation of the contract, is $981,000, which includes the price of the Home Bank property, and which sum is hereby claimed, and the undersigned have the honour to request that this claim be referred to the Exchequer Court of Canada for assessment under the provisions of the Exchequer Court Act.

We have the honour to be, sir,

Faithfully yours

(Sgd.) DOMINION BUILDING CORPORATION LIMITED.
Per J. P. ANGLIN.

The Exchequer Court, by the explicit terms of the reference, was to pass upon the claim "for compensation alleged to be due by reason of the allegations set forth" in this claim. Among the "allegations" there are these: that it was well understood that the successful financing of the project depended upon the "leasing" by the Customs Department of five floors of the building; that it was "well known" that

> the successful financing of this operation depended upon the leasing by the Canadian National Railways of the ground floor and three additional floors of the building, and also by the leasing by the Customs and Excise Department of the five other floors referred to in this letter, and it was well known that, until the passage of the necessary orders in council making it quite certain that the floors in question would be leased, definite arrangements which would enable the completion of the purchase could not be made, and it was because of such knowledge by the Government and the members of the Cabinet, that the Government requested that the applications for the extensions of time to complete the said contract, be made.

It is not established as a fact, and I am satisfied it is not the fact, that the various extensions of time referred to were made "at the request" of the Government. These extensions of time were necessary for the purposes of the respondents, and were granted for their benefit.

It is not necessary to decide whether or not it was open to the respondents to claim before the Exchequer Court compensation upon the footing that the respondents could successfully have financed and carried out the contract with Forgie upon which the petition is based, in the absence of the acceptance of a lease by the Department of Customs, in the terms mentioned in the claim. An exceedingly heavy onus, at least, rested upon the respondents to show that the allegations to the contrary effect were not well founded. I agree that the weight of evidence, and the weight of probability arising from the evidence, is against the respondents upon this issue. It is quite clear, I think, that the Crown is right in its contention that from the moment Anglin became interested in the project he took over the management of the respondents' affairs. He first took up the matter of financing the project with McLeod. Here, he experienced so much difficulty, that he seems to have been obliged to turn his attention to the possibility of making a sale of the respondents' rights, and, so far as one can gather from the evidence, it would appear that, from

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the 25th of September, 1925, down to the middle of February, he was relying entirely on his contract with the Wrigleys for the financing of the Forgie contract; and, moreover, that he was never in a position to carry out his arrangement with Wrigleys.

The respondents give evidence of two sets of negotiations with a view to obtaining assistance in carrying out the Forgie contract; the first with McLeod, the second with the Wrigleys. In both cases the persons approached insisted upon the Customs lease as an essential condition of any arrangement. With the Wrigleys, there was an actual contract of which the condition was a term. Forgie's letter of the 23rd of October, 1925, shews that the respondents were relying upon the Wrigleys to provide the moneys for the purchase of the Home Bank property; and the evidence satisfies me that, down to the 19th of February, 1926, Anglin was still relying upon his arrangements with the Wrigleys for the purpose of enabling him to procure the carrying out the enterprise; and that the Wrigleys became satisfied in February that Anglin was not, and never had been, in a position to carry out his contract with them. It seems clear, moreover, that it was well understood by Anglin, as well as by the Wrigleys, that an extension of time for the completion of the building under the Forgie contract would be necessary. This, no doubt, was well known to the Minister of Railways.

My view is that, assuming the Minister of Railways had been correctly advised as to the legal position, and had acted in accordance with such advice, and had been ready to execute the lease in February under the constraint of such advice, notwithstanding his strong desire to refuse to do so, in which he must have been influenced by powerful reasons, it by no means follows that the order in council authorizing the execution of the Customs lease, which the Crown was under no legal obligation to grant, would have been acted upon. Still, of course, there was a possibility of fresh arrangements being made by Anglin for financial assistance on the basis of a completed contract with the Department of Railways, and a possibility, perhaps, that the Customs lease might even have been granted to the respondents, and, even that the time might have been extended for completing the building. The value of these

possibilities, in my judgment, is the measure of the damages to which the respondents are entitled. I think the amount which my colleagues have agreed upon is a reasonable one.

CANNON J.—I have little to add to the very careful and complete study of the facts and law prepared by my brother Hughes. Assuming, as we must after the judgment of the Judicial Committe of the Privy Council (1), that there was a valid and binding contract existing between the parties in the terms of the offer of July 27, 1925, we only have to determine the damages recoverable by respondents as the natural and probable result of the breach of this particular agreement.

1. Although the respondents had represented that they owned the Home Bank property, the fact is that, at the time of the breach, the property was yet to be acquired at a cost of $500,000.

2. They had to pay to the appellant for the corner in question $1,250,000, which was $50,000 more than what had been paid by the Canadian National Railways, peak price ever paid for real estate in Canada.

3. They had, besides, to build a twenty-six storey modern fireproof office building, which would have cost $2,105,000. They had, therefore, to find, to carry out their part of the agreement, at least $3,855,000.

On the other hand, the respondents claim that, on account of the breach, they lost the rentals that they expected to receive from the Canadian National Railways, $186,750 in each year from the 25th day of October, 1926, for the period of thirty years.

The Dominion Building Company was incorporated on or about the 9th of June, 1925, and all the capital stock, except a few qualifying shares, were owned by Forgie, who relied exclusively on the late Mr. Anglin to finance the matter. The latter was a contractor and expected to make, at the expense of the respondents, a profit of $200,000 on the construction work, which, he says, was more than the average profit because, as he puts it, it was partly in compensation for advancing money. So that, at the time of the breach, the respondents, in order to secure, first the improved properties, and, as a probable consequence, the

(1) [1933] A.C. 533.

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possible rentals from the appellant, had to find and spend nearly $4,000,000. The respondents at that time had no assets, no cash in the treasury of the company and depended entirely for finances on advances to be made by Mr. Anglin or his construction company. This service had to be paid for by enhancing what would have been the normal cost of construction and giving to Mr. Anglin shares in the respondent's capital structure. It is in evidence that, at the time of the breach, the William Wrigley Jr. Co. Ltd. were willing to purchase through Anglin the two lots at the north-west corner of Yonge and King streets for $2,000,005, but were insisting for the transfer of the two government leases, of which, at the time, only one had been secured. This company also asked for changes in the conditions which the respondents were not in a position to fulfil.

Forgie says in his evidence that his remuneration for his work as a lobbyist or promoter was in the future consummation of the project. At the time of the breach, his remuneration was, therefore, not secured and, therefore, he could not lose it as a natural result of this first disappointment. The Dominion Building Corporation Ltd., the other claimant, seems to have been incorporated to allow Anglin and Forgie to fix with themselves the price to be paid to the contractor for erecting the proposed skyscraper. The voluminous evidence of damages offered by the respondent is mostly of paper values, possibilities and hopes covering a period of thirty years in the future, and assumes as a basis the completion in a given time and under pressure of a huge undertaking which was only in embryo at the time of the breach complained of. The record reveals a typical example of the kind of so-called business enterprise which was popular before the economic crash of 1929 and depended for success almost entirely upon the gullibility of the public. The so-called investors were expected to purchase bonds guaranteed by mortgage on buildings not yet in existence but to be erected on real estate purchased at the very highest prices. The only hope of such promoters was that the money spent in such extravagant way would eventually come from the pockets of the investing public whose good will and enthusiasm would be properly exploited by one of the numerous self-styled financial bankers who were then competing for projects of this kind. Under those

circumstances, can it be said that the respondents were really deprived of a bargain when the Minister of Railways declined to go any further with the agreement which was, according to the respondents, one of the essential parts of their scheme? It must not be forgotten that, according to the agreement and respondents' offer, the latter were supposed, when they made the offer, to be the owners of the Home Bank property. This was another essential ingredient of the whole scheme. In fact, they did not own the property at the time and never were able or willing to pay the price agreed upon with the liquidators of the Home Bank.

Moreover, another very important element of the project was the second lease to be secured from the Customs Department; which was always lacking.

We must, therefore, eliminate as flowing naturally from the breach of this particular agreement the loss of profit that the respondents hoped to secure over a period of thirty years if they could pay for the Home Bank property, get the Customs lease and find someone to finance the funds required for that purpose and the completion of the building.

This is a case where it is impossible to regard the damages that are alleged to have followed the breach as that for which plaintiff is to be compensated, for the alleged injury to the plaintiff may depend on matters which have nothing to do with the defendant. Damages, in order to be recoverable, must be such as arise out of the contract and are not extraneous to it. *Chaplin* v. *Hicks* (1).

The damages claimed and considered by the learned trial judge were not the direct and natural consequence of this particular breach of contract. I have mentioned above some of the other factors which brought disappointment to the respondents. What was the actual cash value of the contract at the time of the breach, considering the heavy obligations which the agreement entailed for the respondents? The abortive sale to Wrigley does not seem to show that it could have been very advantageous to the respondents as sellers of their conditional right, in view of the helpless condition in which they were financially and

(1) [1911] 2 K.B. 786, at 794.

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otherwise. In order to carry on and perform their obligations to build within a very short delay, they both were practically at the mercy of Anglin and of all others who might be called to their rescue.

Remembering, however, that there has been a breach of agreement, according to the judgment of the Privy Council, and that the respondents are entitled not to nominal but to general damages, I feel that the Court would be generous, as a jury, if a compensation of $75,000 be fixed. This would cover all the specific items mentioned in the claim, except the $25,000 paid on account, which has to be refunded to the respondents under the first judgment of this Court, which order was confirmed by the Privy Council.

I would, therefore, allow the appeal, reduce the recovery to $75,000, each party paying their own costs of this appeal.

The judgment of Crocket and Hughes JJ. was delivered by

HUGHES J.—On September 4, 1926, Dominion Building Corporation Limited, per J. P. Anglin, wrote the Minister of Railways and Canals as follows:—

TORONTO, ONT., September 4, 1926.

The Honourable the Minister of Railways and Canals,
Department of Railways and Canals,
Ottawa, Ont.

DEAR SIR,—In November of 1924, negotiations were begun for the purchase of the property on the corner of King and Yonge streets, in the city of Toronto, belonging to the Canadian National Railways, and, ultimately, under an order in council which was passed on the 29th of July, 1925, a contract was entered into for the purchase of the lands in question, for the sum of $1,250,000, the purchase to be completed on the 15th of September, 1925. It was a term of the order in council that, on obtaining possession of the premises on or before the 15th September, 1925, a twenty-six storey modern fireproof office building should be erected on the premises and on lands immediately adjoining the premises and formerly known as the Home Bank of Canada, Head Office site, such building to be ready for occupation for the Canadian National Railways, as tenant, on rentals and for the time mentioned in the order in council, the obligation of the Canadian National Railways being to rent, for the time and on the terms mentioned in the order in council, the ground floor and three of the floors of the building.

It was part of the original negotiation that the Customs and Excise Department should also rent five floors of the building on the terms and for a time which was agreed upon, and provision for such renting was to be made by order in council, and an order in council to give effect to such arrangement was actually prepared on the 3rd of September, 1925, but, not having been passed at the request of the Government, an

extension of time to complete the purchase up to the 28th of September was asked for and was granted, it being expected that before that date the last-mentioned order in council would be passed. This order in council was not passed during the year 1925, and, from time to time, at the request of the Government, extensions of the time for completing the purchase were applied for and were granted. The last written extension fixed the time for completion at the 30th of December, 1925, because it was intended to have a session of Parliament in the month of November, when the Government expected to be able to pass the necessary order in council to make the contract completely effective.

On the 29th of December, 1925, the order in council providing for the leasing of five floors by the Customs and Excise Department not having been passed, and the House not having met, at the suggestion of the Government, a further extension of the time for completion was applied for.

Finally, the order in council providing for the leasing of the floors in question by the Customs and Excise Department, was passed on the first of February, 1926, and, on the 6th of that month, the Right Honourable the Minister of Railways and Canals was notified that the purchase would be completed on or about the 10th of February, 1926.

On the 9th of February, 1926, the Right Honourable the Minister, by letter, terminated the original contract.

On the 9th of February, 1926, the Executive of the Canadian National Railways, at a meeting held in Montreal, passed a resolution purporting to reduce the number of floors to be rented by the Canadian National Railways from the ground floor and three additional floors, to the ground floor and one additional floor.

After the contract was entered into, the property known as the Home Bank property, was purchased for the purpose of carrying out the contract at the price of $500,000 and subsequently a contract was entered into with Anglin-Norcross, Limited, for the construction of the building.

By the 22nd of January, 1926, $150,000 had been expended including payment on the purchase price of the Home Bank building, and $25,000 had been paid on account of the purchase of the property from the Crown, and a very considerable sum had been expended in examination of titles, preparation of plans, and other necessary expenses.

It was well understood from the inception of the negotiations by the Right Honourable the Prime Minister, by the Right Honourable the Minister of Railways and Canals, the Honourable the Minister of Public Works, and by other members of the Cabinet, as well as by the Canadian National Railways, that the successful financing of this operation depended upon the leasing by the Canadian National Railways of the ground floor and three additional floors of the building, and also by the leasing by the Customs and Excise Department of the five other floors referred to in this letter, and it was well known that, until the passage of the necessary orders in council making it quite certain that the floors in question would be leased, definite arrangements which would enable the completion of the purchase could not be made, and it was because of such knowledge by the Government and the members of the Cabinet, that the Government requested that the applications for the extensions of time to complete the said contract, be made.

The refusal by the Right Honourable the Minister of Railways, on the 9th of February, 1926, to complete the said contract, which refusal was wholly unjustified, in view of the negotiations above detailed, will entail an immense loss upon the undersigned, who are the assignees of

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the original contractor, and who may be involved in protracted litigation, with the possibility of recovery of heavy damages.

Notwithstanding the refusal of the Right Honourable the Minister of Railways and Canals to complete the contract, the undersigned have, without prejudice to their rights, offered to and have always been ready and willing to carry out the said contract.

The amount which the undersigned have lost or are liable for, by reason of the cancellation of the contract, is $981,000, which includes the price of the Home Bank property, and which sum is hereby claimed, and the undersigned have the honour to request that this claim be referred to the Exchequer Court of Canada for assessment under the provisions of the Exchequer Court Act.

We have the honour to be, sir,

Faithfully yours,

(Signed) DOMINION BUILDING CORPORATION, LIMITED,
Per J. P. ANGLIN.

On September 16, 1926, Sir Henry L. Drayton, Acting Minister of Railways and Canals, referred this claim to the Exchequer Court of Canada, the reference being as follows:

In the matter of Dominion Building Corporation Limited, Claimants, and His Majesty the King, Respondent.

Reserving the right to plead and maintain that the said Dominion Building Corporation, Limited, is not entitled to any compensation, I hereby refer to the Exchequer Court of Canada the annexed claim of the said Dominion Building Corporation, Limited, for compensation alleged to be due by reason of the allegations therein set forth.

Dated at Ottawa, this sixteenth day of September, 1926.

(Sgd.) H. L. DRAYTON,
Acting Minister of Railways and Canals.

To the Registrar of the Exchequer Court of Canada, Ottawa.
Filed the 23rd September, 1926.

On November 24, 1926, an Order in Council was passed purporting to withdraw the reference. On March 1, 1927, the respondent (the present appellant) moved before the President of the Exchequer Court of Canada for an order granting leave to the respondent to withdraw the reference on the ground that it was irregular, not having been made by the Minister of Customs, or the Minister of Public Works as well as by the Minister of Railways and Canals, upon the further ground that the amount of damages claimed in the letter of September 4, 1926, was substantially smaller than that claimed in the statement of claim, and upon the further ground that the respondent was entitled to withdraw the reference under the Act and particularly under rule 109 of the Exchequer Court Rules. On March 2, 1927, the learned

President dismissed the motion (1). From this decision an appeal was taken to this Court which allowed the appeal in respect of the first ground and held that the Exchequer Court was without jurisdiction (2). An appeal was taken from this decision to the Judicial Committee of the Privy Council and the judgment of the Exchequer Court of Canada was restored (3). On March 4, 1931, the learned President of the Exchequer Court of Canada gave judgment in favour of the claimants for damages to be assessed for breach by the present appellant of a contract in writing made in July, 1925 (4). This judgment was reversed by this Court (5), and subsequently restored by the Judicial Committee of the Privy Council (6). The assessment of damages duly came on for hearing before the learned President, who, on April 6, 1934, awarded the claimants $400,000 and costs.

From the latter judgment, the respondent now appeals to this Court.

The facts are set out very fully in the reports above enumerated and in the judgment appealed from, and it is not advantageous to repeat them in detail again.

It was contended before us by the appellant that the judgment appealed from was in error in the following respects:—

(1) In not finding that the respondents were never in a position to finance the project.

(2) In holding that completion of the building by 25th October, 1926, was not required by the contract.

(3) In finding that the building could have been completed by such date.

(4) In not holding that, even if the project had been carried out, it would have resulted in no profit to the respondents.

(5) In taking into consideration items that should have been disregarded.

(6) In not holding that the respondents were entitled to nominal damages only.

(7) In assessing damages on a wrong principle.

(8) The damages awarded were grossly excessive.

(1) [1927] Ex.C.R. 101.
(2) [1928] Can. S.C.R. 65.
(3) [1930] A.C. 90.
(4) [1933] Ex.C.R. 164.
(5) [1932] Can. S.C.R. 511.
(6) [1933] A.C. 533.

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It will be convenient to take up these various contentions in the above order.

1. In not finding that the respondents were never in a position to finance the project.

The learned President thought that it was reasonably safe to hold, and he did in effect hold, that the claimants with the assistance of J. R. Anglin could have financed the whole undertaking upon some plan or other. The latter was a contractor of thirty or forty years' experience. He was President of Anglin-Norcross Limited, an extensive contracting company which had built in recent years in Toronto alone such large structures as Royal York Hotel, Canada Permanent Building, Canadian Bank of Commerce Building and Canada Life Assurance Building. Anglin had been building in Toronto for about twenty years. He had, of course, also built extensively in the city of Montreal, the city of Quebec and elsewhere. Early in 1925, he was approached by the respondent, James L. Forgie, or by the architect, Eustace G. Bird, to verify the cost of the proposed building, and later to ascertain if Anglin-Norcross Limited would be interested in associating itself with the project. On May 2, 1925, Forgie wrote Anglin that, in consideration of his advancing the money necessary to secure an option on the Home Bank property to the west and $25,000 as a part payment on the purchase price of the corner property, he would, on completion of the contract to purchase, assign the option and contract respectively to a company to be incorporated and would cause the company to enter into an agreement with Anglin-Norcross Limited for the construction of the building and would deliver to Anglin " 25 per cent in fully paid shares " of the capital stock of the company. On May 6, 1925, Anglin-Norcross Limited paid $10,000 at the request of Forgie to secure for the latter the option on the Home Bank property. Later, in pursuance of the foregoing, Anglin-Norcross Limited advanced the $25,000 referred to in the offer to purchase the corner property dated July 27, 1925, from Forgie to the appellant which offer was accepted by Order in Council dated July 29, 1925, as found by the Judicial Committee of the Privy Council (1). On August 7, 1925, the contract for the erection of the building was

(1) [1933] A.C. 533, at 547.

completed between Anglin-Norcross Limited and Dominion Building Corporation Limited. Anglin at the trial estimated the profit to his company at over $200,000 had the building contract been carried out and completed. C. D. Harrington, Vice-President and General Manager of Anglin-Norcross Limited, an engineer who had been with Anglin since 1907 and who had built the buildings above enumerated and many others, testified that he considered that Anglin's estimate of the profit in the contract was correct. The date for closing the contract and for delivery of possession of the corner property was, according to Forgie's offer of July 27, 1925, and the Order in Council of July 29, 1925, the 15th day of September, 1925. On September 14, 1925, Forgie or Dominion Building Corporation Limited, to which Forgie had assigned the contract with the present appellant, asked for an extension of time for closing on the ground that delay had been caused by financing arrangements. On September 16, 1925, the time for closing was extended by the appellant to September 28, and on September 19 the appellant vacated the corner property. On September 25, William Wrigley Jr. Company Limited made an offer to Anglin to purchase the corner property and the Home Bank property. This offer is not long and it is simpler to set it out than to attempt to summarize it. The offer is as follows:—

To. JAS. P. ANGLIN, Esq.,
Toronto.

We hereby offer to purchase from you the properties at the north-west corner of Yonge & King streets, Toronto, described in Schedules hereto attached it being understood and agreed that the properties are contiguous for the price or sum of Two Million and Five Thousand Dollars ($2,005,000.00) payable as follows: Six hundred and five thousand dollars ($605,000) in cash on the date of closing, and the balance by giving mortgages on the Government and Home Bank properties for One Million Dollars ($1,000,000) and Four Hundred Thousand Dollars ($400,000.00) respectively payable on the 1st day of January, 1927, with interest half-yearly at five per cent per annum, with right in each to pay off at any time without notice or bonus, and to remove all buildings, the taking of the mortgage by the Government to be duly authorized.

Provided the titles are good and free from encumbrance, except local rates; said titles to be examined by us at our own expense, and we are not to call for the production of any Title Deeds, or Abstract of Title, Proof or Evidence of Title, or to have furnished any copies thereof, other than those in your possession or under your control. We are to be allowed until October 10, 1925, to investigate the title at our own expense, and if within that time we shall furnish you in writing with any valid objection to the title which you shall be unable or unwilling to remove,

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and which we will not waive, the agreement between us shall be null and void at our option and the deposit money returned to us without interest.

This offer to be accepted within Ten (10) days otherwise void and the deposit hereinafter mentioned to be returned. Sale to be completed on or before the 12th day of October, 1925, when the said properties are to be conveyed to us free from encumbrance except as aforesaid, and possession is to be given us free from any tenancy.

Adjustments of taxes and local improvement and water rates to be made as of the day of completion of sale.

You are to have delivered to us at time of closing all necessary deeds and two leases duly authorized executed and delivered on behalf of His Majesty the King, one lease in the form of the attached copy covering, 1st the ground floor and next three typical floors, and the other lease as provided for in the report to Council hereto attached for 2nd, the next five typical floors, except that the following changes in them are to be made:—

1. The dates mentioned in the first lease, viz., 25th of October, 1926, 25th of January, 1927, and 25th of February, 1927, are to be changed to the 25th of January, 1927, 25th of April, 1927, and 25th of May, 1927, respectively, and the provisions of the second lease are to accord with this.

2. All signs are to be confined to the windows of the buildings and no signs are to be fixed to the outward walls.

3. The porter service for the Government Portion of the building to be supplied by the Government themselves.

4. The rental value as fixed by the Board of Arbitrators to be accepted by the Government.

5. The appointment of the third arbitrator to be made by any Judge of the Supreme Court of Judicature of the Province.

6. The building need not be known as the Canadian National Building.

7. The rental of the second lease is to be One Hundred and ten thousand Dollars ($110,000) irrespective of what the actual space may be.

If the leases are to be made by us we will execute the same but if the leases are executed by any predecessor in title we will agree to assume all obligations therein imposed upon the lessor.

We agree in case the purchase of the said properties is completed to contract with Anglin-Norcross Limited for the erection of the building generally described in the plans and specifications produced to us at a price of One Million seven hundred thousand dollars ($1,700,000), all extras and additions by reason of substitutions to be paid for on a cost plus ten per cent basis.

We will accept the obligation of Mr. Bird's contract provided that he will be satisfied with Seventy thousand dollars ($70,000) cash commission in full, no matter what the cost of the building may be, we to have the right to appoint a supervising architect of the building contract who shall be the final arbitrator under the contract, also to appoint any engineers we may require, we to pay the cost of such supervising architect and engineers ourselves.

We hereby hand you Thirty thousand dollars ($30,000) as a deposit. The acceptance of the deposit shall not constitute an acceptance of this offer, but in case of acceptance of the offer the deposit is to be applied on the cash payment.

Time shall be of the essence of this offer.
Dated this 25th day of September, 1925.

WM. WRIGLEY JR. CO. LIMITED,
(Signed) J. A. ROSS,
President.

Witness:
(Signed) ARCHIBALD FOULDS.

On September 28, 1925, the appellant granted the request of the respondents for an extension of time for closing until October 12, 1925. On September 30, 1925, Forgie wrote the Deputy Minister of Railways and Canals that he had agreed with J. Allen Ross, President of Wm. Wrigley Jr. Company Limited, to assign to him the property and the benefits of the lease and asked for changes in the lease as requested by Ross. On October 1, 1925, Anglin accepted the offer of Wm. Wrigley Jr. Company Limited subject to a variation that the mortgage on the Home Bank property should be $300,000 instead of $400,000 and the cash payment increased $100,000 accordingly. Wm. Wrigley Jr. Company Limited confirmed the variation on the same day. On October 2, 1925, the Deputy Minister wrote Forgie that his Department could not consent to any changes in the lease. On October 9, 1925, Forgie asked an extension until October 19 on the ground that Wrigley's solicitors had served him with requisitions on title requiring considerable work. On October 10, 1925, the Deputy Minister granted this extension. On October 17, Forgie wired the Deputy Minister of Railways and Canals for an extension to October 26, 1925, and the latter granted the extension. On October 23, 1925, Forgie wrote Wm. Wrigley Jr. Company Limited, that the purchase price of the properties payable to the appellant and to the National Trust Company (for the Home Bank property) was to be provided by Wm. Wrigley Jr. Company Limited and that the latter company must make good any loss sustained by reason of delay in closing. On October 23, Forgie wired the Deputy Minister for an extension until November 9, and on the next day the Deputy Minister granted an extension to November 3. On November 3, Forgie wired the Deputy Minister for an extension to November 17 which was granted. On November 10, Forgie wrote Mr. Gerard Ruel, K.C., Vice-president and General Counsel of the Canadian National Railways, for the desired changes in the draft lease. On November 13, Mr. Ruel replied

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that no changes could be made in the draft lease without submission to the Board. On November 16, Forgie wrote the Deputy Minister for an extension until December 30, which was granted next day. On December 29, Forgie wrote the Deputy Minister for an extension to January 31, 1926, to which there is no reply in the record. On January 12, 1926, Anglin wrote Ross that he had information that the railway president desired to reduce the amount of space to be taken and that such a reduction might involve raising the price of the ground floor to $19 or more to offset the reduction, that he would follow up the matter and that plans on steel work were proceeding. On January 29, 1926, Anglin-Norcross Limited per J. P. Anglin wrote Ross that "all of the required changes in connection with the second order" had been approved, and that, should they be able to negotiate adjustment of the "railway portion" on Monday, everything would be in readiness to proceed immediately. It is here helpful to quote from the judgment of the Judicial Committee (1), as to what took place between Forgie and the Minister of Railways about this time:—

> The appellant Forgie stated in the box that he saw Mr. Graham, the Minister of Railways and Canals, in January, 1926. His account of what took place was as follows: "I had a conversation with Mr. Graham about this matter. The conversation at the outset was purely personal. I told him I had written for this extension and was very much exercised over the fact that I had not heard about it, and he said: 'I do not see what cause you have to worry, Forgie, I have not cancelled your contract.' I said: 'I am very glad to hear that but I would like to have it in writing.' He said: 'There is no necessity to worry—the matter stands as it did.'" This evidence was not shaken in cross-examination, in the course of which the witness, when asked whether he discussed with Mr. Graham the fact that he had not yet got through the matter of the lease to the Department of Customs and Excise, answered, "We discussed the whole thing from beginning to end." Mr. Graham admitted that he knew what was taking place with regard to the proposed lease to the other Department, but he also said, "I have no recollection of having a conversation with Mr. Forgie, and if he seriously says that I had I will not dispute it, but if he makes a suggestion that this contract would be extended I absolutely deny that."
>
> The Courts below do not appear to have expressed any view as to the proper conclusion of fact to be drawn from the evidence as to this interview, but if such an interview did take place, it affords some explanation of the absence of an answer to the application of December 29, 1925, which absence is otherwise unexplained.

On February 1, 1926, an Order in Council was passed on the recommendation of the Minister of Public Works

(1) [1933] A.C. 533, at 542-543.

granting authority for the leasing of the fifth to the ninth floors, both inclusive, of the building in question at $110,000 per annum, for ten years from October 1, 1926, with option of renewal for a further period of ten years at the same rate. On February 3, 1926, Forgie wrote the Minister of Railways that he would be ready to close the purchase on February 10. On February 8, 1926, the Minister wrote Forgie that he had failed to close on the contract date and on the date of each extension and that the failure was not that of the Government or the Canadian National Railways. On February 10, 1926, Forgie wrote the Minister that he was ready to close, that Wrigleys were insisting upon Anglin and Dominion Building Corporation Limited completing their contract with them and that they were threatening action, and that Forgie would have to apply for a fiat. On February 12, 1926, the Minister wrote Forgie that there would be no more extensions and that he would oppose the issue of a fiat. The letter concluded with the following:—

> If you and your friends are wise you will not "delay in closing with the Canadian National Railways for whatever space they may wish to contract for" because at the termination of the period named by the executive of the Canadian National Railways, the property will either be sold to other parties who are negotiating for it or will be reoccupied by the Company.

On February 15, 1926, Forgie wrote the Minister of Railways urging that failure to close on the last extended date was not due to any default on his part or on the part of those he represented. He went on to state that the Government in 1925 had decided to lease five floors for other departments, that this was one of the factors in financing and that the Order in Council was not passed until February 1, 1926. On February 20, 1926, the Minister of Railways wrote Forgie that the latter could not be allowed to mix up the contract with the proposed lease of five floors for the Public Works Department. Further correspondence also took place between Anglin and Ross, the result of which was that the Wrigley contract was cancelled, Anglin returning or agreeing to return the deposit.

The learned President gave credit to the evidence of the claimants' witnesses, J. A. Gibson and Frank McLaughlin. Gibson testified that the autumn of 1926 and the spring of 1927 were good times for the landlords in leasing office space in downtown Toronto. This building was to have been

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erected at the corner of the better side of Yonge Street and the better side of King Street, in Gibson's opinion, then the best retail and financial streets respectively in Toronto. At that time, he said, the financial centre of Toronto was at Yonge and King Streets. It was later that the Imperial Bank and the Bank of Nova Scotia bought at Bay and King Streets and that such important buildings as the Canada Permanent Building, Canadian Bank of Commerce Building, Sterling Tower, Star Building and Concourse Building were erected west of Yonge Street. If this building had been erected, it would, in his opinion, have kept the financial centre at King and Yonge Streets much longer and some of the other buildings would probably not have been erected. The project, in his opinion, would have been almost as good without the Customs lease as with it because there would not have been difficulty in renting the space at similarly favourable figures. Gibson prepared a statement of his estimate of the gross rental revenue of the building with the government lease of the main floor and three upper floors but without the customs lease as follows:

Main floor at $16 per sq. foot and three upper floors at $3 per sq. ft.	$186,750
22 upper floors at $2.50 per sq. ft.	385,000
Basement at $2 per sq. ft.	11,500
Concessions.	1,200
Gross Annual Revenue.	$584,450
From which would be deducted—	
10 per cent for vacancies, failures, on all space not leased to the Government ($397,700) . .	39,770
	$544,680
Taxes, insurance, and operating charges. . . .	181,980
Leaving as a net annual operating surplus. . . .	$362,700

The learned President found that the sum of $181,980 was a fair approximation for taxes, insurance and operating charges. Gibson considered that the above approximate returns could be had during the life of the building. McLaughlin estimated the net annual surplus at $362,050 for thirty years. W. H. Bosley, an experienced real estate man but not as experienced as Gibson in such buildings

as the one contemplated, placed the rental for the upper floors at $2.25 per square foot. The difference in the gross annual rentals as estimated by Gibson and McLaughlin for the respondents and Bosley for the appellant was only about $40,000. All three agreed that in a project of this kind it is in practice required to have a net operating revenue sufficient to pay annually six per cent on the cost of the land and nine per cent on the cost of the building and Gibson said that the latter includes enough to amortise the cost of the building at the end of its estimated life, namely, thirty-three years. The purchase price of the corner property was $1,250,000 and the option price of the Home Bank property, $500,000, making a total of $1,750,000 for the land. The cost of the building as estimated by the respondents' witnesses was $2,050,000 made up as follows:—

Building—	
Contract price for building	$1,725,000
Architect's fees	103,500
Taxes on land during construction	18,000
Interest during construction	90,000
Cost securing first mortgage loan	26,850
Legal fees and extras	86,650
	$2,050,000

Six per cent on the cost of the land amounts to $105,000. If this sum is deducted from the estimated net revenue of $362,700, there is a balance of $257,700. Gibson capitalized the latter sum at nine per centum, making $2,863,333, and making the value of the project slightly more than $4,600,000. Gibson, McLaughlin and Bosley all agreed that revenues were the best test of value. The six per centum on the cost of the land and nine per centum on the cost of the building amounted, according to Gibson's figures with which McLaughlin substantially agreed, to $289,500 per year. This deducted from the estimated net annual operating surplus of $362,700 left a net surplus annually of about $73,000 during the anticipated life of the building, the present value of which at five per centum is more than $1,000,000 and at six per centum more than $900,000. Bosley, for the appellant, arrived at a net annual surplus of $2,635 but the learned President was not satisfied with

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his treatment of certain costs. Bosley also allowed for an annual sum for depreciation of the building of $26,470. If Bosley's depreciation allowance of $26,470 had not been deducted, his annual surplus would have been $29,105, the present value of which for thirty years is upwards of $400,000.

D. I. McLeod, of McLeod, Young and Weir, testified in behalf of the respondents before the learned President that his firm had handled the major financing of many large buildings. He said it would be safe to underwrite a bond issue on the project up to sixty per centum of a valuation of $4,600,000 made by the firms represented by Gibson and McLaughlin respectively or either of them. To take up the first mortgage bonds and the second mortgage bonds, both the railway lease and the customs lease would have been essential; but he would have been prepared to purchase the first mortgage bonds without the customs lease. The price was not settled. If Anglin-Norcross Limited had taken up the junior securities, there would not have been, he said, the slightest difficulty in financing. However, the negotiations never reached an agreement.

J. P. Anglin testified before the learned President that in February, 1926, he or Anglin-Norcross Limited was in a position to pay over the $1,225,000 to the appellant to close the transaction. He had a "set-up" of the proposed financing, which was as follows:—

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Financial Statement

Canadian National Railways Lease..		$186,750
Basement		15,000
Commissions..		2,750
22 floors, 7,000 ft. each, at $2.75..	$423,500	
5 per cent vacancies..	21,175	
		402,325
Income total..		$606,825
1st M. Bonds $3,250,000 at 6 per cent..	195,000	
Genl. M. 1,150,000 at 7 per cent..	80,500	
Operation..	175,000	
	$450,500	
		$450,500
Net Income..		$156,325

He said the location was the best and the project the finest that was ever contemplated. There does not appear to be evidence other than the foregoing as to the source of the money to pay the balance due for the Home Bank property or to take up the junior securities. The learned President said that it was reasonably safe to hold, and he did in effect hold, that the respondents with the assistance of Anglin could have financed the whole undertaking upon some plan or other. The learned President said that it was not clear whether Anglin's firm was willing to take up the junior securities, but that D. I. McLeod had stated that there would have been no difficulty in marketing senior securities to the amount of $2,760,000. The learned President said he assumed that Anglin or his firm would also furnish the money to take over the Home Bank property although, as he said, no mention of it was made in the evidence. It is not clear how Anglin proposed to market the $650,000 first mortgage bonds proposed in his "set-up" over and above the amount of $2,760,000 which D. I. McLeod said he could finance. Nor does Anglin explain the inconsistency between his proposed "set-up" and the Wrigley contract, in reference to which he wrote, on the very eve of the breach, namely, on January 29, 1926, to Ross reporting progress towards closing with the appellant. It was possibly not called to the attention of the learned President that, as above set out, Anglin on September 4, 1926, wrote the Minister of Railways and Canals on behalf of the Dominion Building Corporation Limited and set out, with the care which must have been given to a claim of that magnitude, a summary of the salient facts; a claim for $981,000 for breach of contract and a request that the claim be referred to the Exchequer Court of Canada. In that letter, as above stated, above the signature of Anglin appeared the following statements:—

> It was well understood from the inception of the negotiations by the Right Honourable the Prime Minister, by the Right Honourable the Minister of Railways and Canals, the Honourable the Minister of Public Works, and by other members of the Cabinet, as well as by the Canadian National Railways, that the successful financing of this operation depended upon the leasing by the Canadian National Railways of the ground floor and three additional floors of the building, and also by the leasing by the Customs and Excise Department of the five other floors referred to in this letter, and it was well known that, until the passage of the necessary orders in council making it quite certain that

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the floors in question would be leased, definite arrangements which would enable the completion of the purchase could not be made, and it was because of such knowledge by the Government and the members of the Cabinet, that the Government requested that the applications for the extensions of time to complete the said contract, be made.

As already stated, on September 16, 1926, the Acting Minister of Railways and Canals referred to the Exchequer Court of Canada "the annexed claim of the said Dominion Building Corporation, Limited, for compensation alleged to be due by reason of the allegations therein set forth." The claim and reference were of the very foundation of the present litigation. It follows that the proposed Customs lease must be taken into consideration as, in the words of the Dominion Building Corporation Limited per J. P. Anglin on September 4, 1926, the successful financing of the project depended upon both leases. Both leases were required by Wm. Wrigley Jr. Company Limited. It is quite possible that the Minister of Public Works might have utilized the authority given to him in the Order in Council of February 1, 1926, to lease the five floors; but that was not more than a possibility or a probability.

2. In holding that the completion of the building by October 25, 1926, was not required by the contract.

This contention of the appellant is not important in this appeal because of the finding of the learned President on reasonable evidence that Anglin-Norcross Limited could have completed the building by October 25, 1926, in the absence of strikes, riots or unforeseen circumstances of that kind. The witness C. D. Harrington has already been referred to. His experience in erecting large structures of this kind was so great that the finding of the learned President that Anglin-Norcross Limited was probably so efficiently organized and of such financial strength that it could have completed a rush job of that kind more quickly than most building concerns in Canada, cannot lightly be interfered with by an appellate tribunal. Harrington swore emphatically that his company was ready at the time of the breach to undertake to do the job by October 25, 1926, and to furnish a performance bond. There was, of course, much evidence that the building could not be completed by that time. The record shews, as above indicated, that at the time of the breach, negotiations for sale were still proceeding between Anglin and Wm. Wrigley Jr. Company Limited, that building permits still had to be secured and

arrangements made for light over the Bank of Montreal building at the west. It is not easy to believe that Harrington could have completed the building, after the above preliminary arrangements had been made, by October 25, 1926, but the learned President on conflicting evidence believed Harrington and found that he could have so done and that, it seems to me, is conclusive on this point, subject, of course, to what has been said on the necessity for both leases.

The remaining contentions of the appellant concern directly or indirectly the quantum of damages.

In *Robinson* v. *Harman* (1), the defendant with knowledge that he had no title agreed to deliver to the plaintiff a valid lease. At the trial Lord Denman, C.J., allowed the plaintiff the expenses he had been put to and also damages for loss of his bargain. An appeal from the decision was dismissed. In the judgment on appeal, the often quoted words of Parke B. on this subject are found:—

> The rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.

Shortly afterwards was decided the very important case of *Hadley* v. *Baxendale* (2). The plaintiffs in that case were millers and mealmen and proprietors and occupiers of a mill run by a steam engine. The crank shaft of the engine broke and the plaintiffs, having ordered a new one, gave the broken shaft to the defendants, who were common carriers, to be delivered at once to the machinery firm. The defendants' clerk was told that the mill was stopped and that delivery must be specially hastened. Delivery was delayed and a loss of profit arose from the enforced idleness of the mill. It was held that such loss could not be recovered. The judgment of the court was delivered by Alderson B., who said the damages for breach of contract ought to be such as might fairly and reasonably be considered as arising either naturally, i.e., according to the usual course of things from such breach of contract itself; or such as might reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of a breach of it. If the special circumstances under which the contract was

(1) (1848) 1 Ex. 850. (2) (1854) 9 Ex. 341.

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made were communicated by the plaintiff to the defendant, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily flow from the breach under the special circumstances so communicated and known. If, on the other hand, the special circumstances were unknown to the defendant, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally and in the great majority of cases not affected by any special circumstances from such breach of contract. In *Engell* v. *Fitch* (1), Channell and Cleasby, BB., Byles, Montague Smith and Brett, JJ., concurred in the judgment of Kelly C.B. in the Exchequer Chamber. In this case, the defendants, mortgagees with a power of sale of a house, sold it by auction to the plaintiff, possession to be given on completion of the purchase. The title was satisfactory but the defendants refused to oust the mortgagor and the plaintiff brought an action for breach of the contract of sale. It was held, affirming the judgment of the Court of King's Bench, that the plaintiff was entitled to recover not only his deposit and the expense of investigating the title but also damages for the loss of his bargain; and that the measure of damages was the difference between the contract price and the value at the time of the breach and that the profit which the plaintiff could have made on a resale was evidence of this enhanced value. In the course of his judgment Kelly C.B. adopts the general rule as enunciated by Parke B. in *Robinson* v. *Harman* (2), and adds that *Flureau* v. *Thornhill* (3), qualified the rule of the common law to this extent that a vendor shall not be liable for any damages beyond the deposit and costs of investigating the title when he is unable to perform his contract by reason of his inability to make out a good title. The learned judge proceeds to say, page 667, that there is no authority to shew that when a breach of contract for the sale of real property has been on any other ground than that in *Flureau* v. *Thornhill* (3) any other rule as to damages applies than that which prevails in the ordinary case of breach of contract. The learned judge then asks what damages would place the plaintiff

(1) (1869) L.R. 4 Q.B. 659. (2) (1848) 1 Ex. 850.
(3) 2 W. Bl. 1078.

in the same position as if the defendant's contract had been performed; and he points out that if the contract had been carried out, the plaintiff would have been possessed of property with an increased value of £105 and that it follows that he is entitled to damages for that amount. He adds that it may be suggested that such a view is contrary to *Hadley* v. *Baxendale* (1), but that, without saying that in all cases parties to the sale of real estate must be taken to have contemplated a re-sale, he thinks that if an increase in value takes place between the contract and the breach, such an increase may be taken to have been within the contemplation of the parties within the meaning of *Hadley* v. *Baxendale* (1). In *McMahon* v. *Field* (2), Brett L.J. says that the remoteness of damage has become a difficult one since, according to the case of *Hadley* v. *Baxendale* (1), it is for the court and not for the jury to determine whether the case comes within any of the following rules, namely, first, whether the damage is the necessary consequence of the breach; secondly, whether it is the probable consequence of the breach; and thirdly, whether it was in the contemplation of the parties when the contract was made. He then states that the question in the case is whether the fact of some of the horses taking cold after being turned out of stable by the defendant in breach of contract with the plaintiff, is within any of the rules. He adds that it was not the necessary consequence of the breach of contract, but that he had no doubt that it was a probable consequence, and, if so, it follows that it was in the contemplation of the parties within the meaning of the third rule. Cotton L.J. was of the same opinion. He adds in his judgment that parties never contemplate a breach, and the rule should rather be that the damage recoverable is such as is the natural and probable result of the breach of contract.

In *Cunard* v. *The King* (3), this Court considered, on an appeal from the Exchequer Court, the amount of compensation to be allowed an owner of land in Halifax, including a lot extending into the harbour. The lot could have been made much more valuable by the erection of wharves and piers for which, however, authority had to

(1) (1854) 9 Ex. 341. (2) (1881) 7 Q.B.D. 591.
(3) (1910) 43 Can. S.C.R. 88.

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be obtained from the Dominion Government, and the question of the value of the chance or possibility of obtaining leave was considered at length.

In *Chaplin* v. *Hicks* (1), the Court of Appeal considered an appeal from a judgment in favour of the plaintiff. The respondent, an actress, secured a right by contract to belong to a limited class of competitors for a prize. It was held by the Court of Appeal, affirming the judgment, that a breach of the contract by reason of which the respondent was prevented from continuing as a member of the class and was thereby deprived of all chance of obtaining the prize was a breach in respect of which the respondent was entitled to recover substantial, and not merely nominal, damages; and that the existence of a contingency which was dependent on the volition of a third person did not necessarily render the damages incapable of assessment.

Whether, in the case at bar, the Minister of Public Works would or would not have utilized the authority granted to him to lease the five floors for the Department of Customs is unknown. Successful financing depended on both leases, as is evident from the claim over Anglin's signature of September 4, 1926, and from the contract made by Anglin with Wm. Wrigley Jr. Company Limited (about which Forgie corresponded at length), which not only required both leases, but required certain changes in the Railway lease, to which the appellant never at any time agreed. For the Customs lease the respondents never had a contract but only a possibility or a probability. It follows that the award of the learned President must be set aside.

After very lengthy consideration of all the circumstances, I am of opinion that $75,000 would be a generous amount and I would fix the damages at that figure.

As success is divided, there will be no costs of the appeal.

Judgment of the Exchequer Court varied by reducing the damages to $75,000. No costs of the appeal.

Solicitor for the appellant: *W. Stuart Edwards.*

Solicitor for the respondents: *R. V. Sinclair.*

(1) [1911] 2 K.B. 786.

CARL SCHWARTZENHAUER..... APPELLANT; 1935

AND

HIS MAJESTY THE KING..... RESPONDENT.

*May 1, 2.
*June 10.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law—Indictment for murder—Conviction of manslaughter—Offence of counselling abortion—Dying declaration—Admissibility—Sections 69 and 303 Cr. C.

The accused was convicted of manslaughter on a charge of murder for having caused the death of V. K. by counselling or procuring G. S. unlawfully to use instruments upon her with intent to procure her miscarriage, contrary to the combined effect of sections 69 and 303 of the Criminal Code. The dying declaration was a lengthy narrative by the deceased which day by day she related to her mother, who wrote down the story; this narrative, which concluded with the words "I wish Carl punished," appeared to have been read over to the deceased shortly before her death and adopted by her at that time as a true statement; a number of questions at the same time were submitted to her by police officers, and her answers with the questions were the subject matter of two separate declarations. The narrative, together with the two short statements containing the questions and answers, were all put before the jury. It was common ground that the case against the accused could not be established without evidence of the dying declaration.

Held, reversing the judgment of the Court of Appeal ([1935] 2 W.W.R. 146) that the dying declaration was inadmissible. Therefore the conviction was quashed and a judgment and verdict of acquittal was directed to be entered.

Per Lamont and Davis JJ.—Assuming that the indictment could properly be said to be one for homicide (it is apparently one for the statutory offence of abortion), a great part of the narrative and the statements was outside the competence of a dying declaration in that many of the facts alleged and the wish expressed by the deceased were irrelevant as no part of the *res gestae,* extending far beyond the immediate circumstances of the death of the declarant, and were most harmful to a fair trial of the accused. Dying declarations are competent only in homicidal cases, and then only in so far as the statements therein could have been given in evidence by the deceased had she lived. To permit an entire statement to go to a jury, with instructions from the trial judge to disregard such portions as he might point out to be irrelevant and inadmissible, may in the case of a simple and short statement be proper, but in a statement in the form of a lengthy narrative it would be highly improper to permit the whole statement to go to the jury notwithstanding instructions from the judge as to the portions which he thought incompetent. In spite of instructions, the jury might easily be influenced against the accused.

* PRESENT:—Lamont, Cannon, Crocket and Davis JJ. and Dysart J. *ad hoc.*

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Per Cannon and Crocket JJ.—In order to obtain the conviction of the accused on the indictment as laid, the Crown had to rely on section 69 (*d*) of the Criminal Code and prove first that he had counselled or procured the abortion. In order to prove this essential element and link the accused to the abortion and killing, the statements contained in the dying declaration could not be used. The accused's alleged relations with the woman G. S. is a subject-matter different from that of the immediate circumstances of the death of V. K. The statement of the deceased may perhaps be used to prove the cause of the death and the intervention of the abortionist's instrument, but could not be used as evidence that the accused had anything to do with the abortionist. Even if the dying declaration may have been admissible as a whole against the woman G. S. (which is at least doubtful) it certainly could not be used to prove circumstances, not directly and immediately connected with the fatal application of instruments which finally brought death.

Per Dysart J. (*ad hoc*)—The charge as laid was at most a charge of bringing about the death of V. K. by counselling or procuring G. S. to perform on V. K. an abortion resulting in the death. Under this specific charge, most of the statements contained in the dying declaration, alleging that the accused counselled or procured V. K. herself to bring about or undergo an abortion operation, were irrelevant and therefore inadmissible. The only statement that may have a bearing at all upon the charge as laid could not possibly support a conviction on that charge, and, therefore, ought to have been excluded. Thus all parts of the declaration are shown to have been inadmissible. If, however, any portion of it could be thought to be admissible, the admissible parts should have been placed before the jury, separate and apart from the document.

APPEAL from the judgment of the Court of Appeal for British Columbia (1) affirming the conviction of the appellant for manslaughter, in a trial before D. A. McDonald J. and a jury.

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

R. L. Maitland K.C. for the appellant.

Gordon McG. Sloan K.C. for the respondent.

The judgment of Lamont and Davis JJ. was delivered by

DAVIS J.—The real question in this appeal is as to the admissibility of a dying declaration. It is common ground that the case against the accused cannot be established without the evidence of the dying declaration.

(1) [1935] 2 W.W.R. 146.

In the words of Byles, J., in *Rex* v. *Jenkins* (1),

> These dying declarations are to be received with scrupulous, I had almost said with superstituous, care. The declarant is subject to no cross-examination. No oath need be administered. There can be no prosecution for perjury. There is always danger of mistake which cannot be corrected.

Here the indictment in my opinion is not one for homicide but for the statutory offence of abortion (sections 69 and 303 of the Criminal Code). The sections of our statute which define and prescribe a punishment for abortion do not make the death of the woman one of the constituent elements of the offence. Where, however, as in some of the United States, the statutes provide for the punishment of abortions resulting in death, 1 Corpus Juris, p. 326, the woman's dying declarations have been admitted upon the ground that the death is an essential ingredient of the offence and the subject of the charge.

As early as 1824, in *The King* v. *Mead* (2) Abbott C.J. stated the general rule that evidence of dying declarations is only admissible where the death of the deceased is the subject of the charge and the circumstances of the death the subject of the dying declaration. In a footnote to the report of that case, *Rex* v. *Hutchinson*, tried before Bayley, J., at the Durham Spring Assizes, 1822, is referred to. There the prisoner was indicted for administering savin to a woman pregnant, but not quick with child, with intent to procure abortion. The woman was dead, and for the prosecution, evidence of her dying declaration upon the subject was tendered. The learned judge rejected the evidence, observing that, although the declaration might relate to the cause of the death, still such declarations were admissible in those cases alone where the death of the party was the subject of enquiry. Then in *Regina* v. *Hind* (3), the accused was tried and convicted upon an indictment charging him with feloniously and unlawfully using certain instruments upon the person of one Mary Woolford, deceased, with intent to procure the miscarriage of the said Mary Woolford. On the trial, a dying declaration of the said Mary Woolford was tendered in evidence on the part of the prosecution and objected to on the part of the prisoner, upon the ground that the death of Mary

(1) (1869) 11 Cox's Cr. C. 250. (2) (1824) 2 Barn. & Cres. 605.
(3) (1860) 8 Cox's Cr. C. 300.

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Davis J.

Woolford was not the subject of the enquiry. Pollock, C.B., in delivering the judgment of the Court of Criminal Appeal, said:

> In this case we are all of opinion that the dying declaration of the woman was improperly received in evidence. The rule we are disposed to adhere to, is to be found laid down in *Rex* v. *Mead* (1). There Abbott C.J. said, "The general rule is, that evidence of this description is only admissible where the death of the deceased is the subject of the charge, and the circumstances of the death the subject of the dying declaration." Speaking for myself, I must say that the reception of this kind of evidence is clearly an anomalous exception in the law of England, which I think ought not to be extended.

The conviction was quashed.

If the indictment here can properly be said to be one for homicide (though I do not think it can) the dying declaration is in fact a lengthy narrative by the deceased which day by day she related to her mother, who wrote down the story. This narrative, which concludes with the words "I wish Carl punished," appears to have been read over to the deceased shortly before her death and adopted by her at that time as a true statement. A number of questions at the same time were submitted to her by police officers, and her answers with the questions were the subject matter of two separate declarations. The narrative, together with the two short statements containing the questions and answers, were all put before the jury. Upon any view of the matter, much of the narrative and the statements was plainly outside the competence of a dying declaration in that many of the facts alleged and the wish expressed by the deceased were irrelevant as no part of the *res gestae,* extending far beyond the immediate circumstances of the death of the declarant, and were most harmful to a fair trial of the accused. Clearly, dying declarations are competent only in homicidal cases, and then only in so far as the statements therein could have been given in evidence by the deceased had she lived. To permit an entire statement to go to a jury, with instructions from the trial judge to disregard such portions as he might point out to be irrelevant and inadmissible, may in the case of a simple and short statement be proper, but in a statement in the form of a lengthy narrative it would be highly improper in my view to permit the whole statement to go to the jury notwithstanding instructions from

(1) (1824) 2 Barn. & Cres. 605.

the judge as to the portions which he thought incompetent. In spite of instructions, the jury might easily be influenced against the accused. There is authority, on the other hand, for the Court entirely excluding such portions of the declaration as the judge might consider irrelevant and inadmissible, but in the case of a lengthy statement in the nature of a narrative (most of which is irrelevant and inadmissible) it would be difficult if not impossible to pick out certain sentences here and there to submit to a jury without altering the meaning which the same bore with the remainder in its orignal context, and such a course is too dangerous to adopt.

There being plainly no evidence upon which a conviction could properly be sustained without the admission of the dying declaration, the appeal must be allowed and the conviction quashed, and pursuant to section 1014 (3) (*a*) and section 1024 of the Criminal Code, a judgment and verdict of acquittal directed to be entered.

The judgment of Cannon and Crocket JJ. was delivered by

CANNON J.—The appellant was found guilty of manslaughter, with a strong recommendation to mercy, and sentenced to five years' imprisonment on the following indictment:

That he did unlawfully between the twenty-ninth day of August, in the year of our Lord one thousand nine hundred and thirty-four, and the sixteenth day of September one thousand nine hundred and thirty-four, at or near Greenwood, or Grand Forks, in the said county of Yale, counsel or procure a certain person, to wit, Grietje Sundquest, to commit an indictable offence, namely, to use unlawfully on the person of Veronica Kuva an instrument or instruments with intent to procure a miscarriage of Veronica Kuva, which offence the said Grietje Sundquest did commit and did thereby kill and slay the said Veronica Kuva against the form of the statute in such case made and provided and against the peace of our Lord the King, his Crown and Dignity.

The Court of Appeal of British Columbia dismissed his appeal on the 23rd of January, 1935 (1), and the formal judgment sets out that the Honourable Mr. Justice McPhillips dissented on the grounds in law that:

(1) The dying declaration of Veronica Kuva was wrongfully admitted in evidence; or wrongfully admitted as to counselling; and

(2) that the learned trial judge misdirected the jury respecting the said evidence of the said Veronica Kuva.

(1) [1935] 2 W.W.R. 146.

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Cannon J.

All agree that if the dying declaration be inadmissible, there is no evidence upon which a jury could find against the appellant.

The learned dissenting judge first says that it is by no means clear that the dying girl made the declaration when in extremity and at the point of death. We are not in a position to decide this point, in view of the fact that the evidence of the circumstances surrounding the making and taking of the alleged dying declarations is not before us; moreover, the question whether the deceased had such a belief of impending death as to make her declaration admissible as a dying declaration was for the judge and not for the jury. We are unable from the record to say that the circumstances were such that the judge's decision to admit the statement of the deceased as a dying declaration was against the law.

The learned dissenting judge adds the following:

If it could be said successfully that the dying declaration is receivable in evidence all reference to counselling should be excluded from the declaration—see *Regina* v. *Horsford*—referred to in *Regina* v. *Rowland* (1) —further admittedly it is the evidence of an accomplice and whilst it may well be said that the learned trial judge did give at first the proper warning to the jury—he with great respect went on and said this—which to my mind constituted a fatal error—

"If keeping all these things in mind, the dangers, and the law as I have tried to give it to you, you say 'Well, I have thought this over 'carefully, the judge has told us we can do it if we see fit to do it. He 'has warned us of the danger, and warned us we ought not to do it, still 'we think in this case if there ever was a case we ought to convict.' If you feel that way, gentlemen, then it is your duty to convict, but be very, very careful."

This amounted to a direction to the jury that if they believed the evidence of the accomplice although uncorroborated *it was their duty to convict the appellant.* This course of action on the part of the trial judge was in effect to render nugatory the safeguard of the law—that is, he in the end failed to give the proper warning to the jury as to the danger of convicting on the evidence of the accomplice without corroboration in a material particular implicating the appellant—that being the case the conviction should be quashed—*Rex* v. *Tate* (2); *Rex* v. *Baskerville* (3); *Rex.* v. *Charavanamuthu* (4).

Our jurisdiction in this matter is limited to the questions of law raised by the learned dissenting judge as above.

Instead of simply indicting the appellant with murder, or manslaughter, the Crown compounded a charge of coun-

(1) (1898) 62 J.P. 459.
(2) [1908] 2 K.B. 680; 77 L.J.K.B. 1043; 99 L.T. 620; 1 Cr. App. R. 39.
(3) [1916] 2 K.B. 658; 12 Cr. App. R. 81.
(4) (1930) 22 Cr. App. R. 1.

selling and procuring, between the 29th day of August and the 16th day of September, 1934, the abortionist to use unlawfully instruments with intent to procure the miscarriage of Veronica Kuva; and the indictment adds that the abortionist did commit the indictable offence charged, viz., the unlawful use of instruments, and did thereby kill and slay the person whose dying declaration was used against the appellant.

It is evident that the person who drew the indictment had in mind, first, section 69 (*d*) of the code and, secondly, used the terms of section 303 of the Criminal Code, which reads as follows:

303. Every one is guilty of an indictable offence and liable to imprisonment for life who, with intent to procure the miscarriage of any woman, whether she is or is not with child, unlawfully administers to her or causes to be taken by her any drug or other noxious thing, or unlawfully uses on her any instrument or other means whatsoever with the like intent.

The date of the death of the girl is not mentioned in the indictment. This would seem to be an important ingredient, if the Crown Attorney had in mind a charge of homicide, in view of section 254 of the code:

254. No one is criminally responsible for the killing of another unless the death takes place within a year and a day of the cause of death.

2. The period of a year and a day shall be reckoned inclusive of the day on which the last unlawful act contributing to the cause of death took place.

There is no doubt that the charge, which is particularized, does not specify the requirements of section 259 of the code concerning murder. No malice aforethought is alleged. It did not even state that the appellant did counsel or procure an act which he knew or ought to have known to be likely to cause death. The indictment says that he counselled the unlawful use of an instrument with intent to procure a miscarriage; but does not say that he knew or ought to have known that this was likely to cause death.

However that may be, and without deciding whether or not the combination or compound of these elements might constitute a charge of homicide, it is nevertheless true that, *qua* the appellant, the Crown had to rely on section 69 (*d*) and prove first that he had counselled or procured the abortion; otherwise he was not amenable to answer for the happenings subsequent to the 16th of September. In order to prove this essential element and link

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him to the abortion and killing, can the dying declaration be used? His alleged relations with the woman Sundquest is a subject-matter different from that of the immediate circumstances of the death of Veronica Kuva. The statement of the deceased may perhaps be used to prove the cause of the death, the intervention of the abortionist's instrument, but could not be used as evidence that from August to the 16th of September the accused had anything to do with the abortionist. The alleged declarations were heard and taken on the 3rd and 4th of October, 1934, and covered events subsequent to the 16th of September, viz., the illness of the patient and the other facts connected with the fatal result of the abortion—i.e., with the killing. It would be dangerous to allow such an extension of the exception to the law of evidence which admits in cases of homicide only, although hearsay evidence, the unsworn statement of the victim (whose death must be the subject of the charge) although such statement is not made in the presence of the accused and is not tested by cross-examination. Even if the dying declaration may have been admissible as a whole against the woman Sundquest (which is at least doubtful) it certainly could not be used to prove circumstances, not directly and immediately connected with the illegal application of instruments which finally brought death.

In *Rex* v. *Gloster* (1), Charles J., upon an indictment for murder, by performing an illegal operation, statements made by a dying woman, in the absence of the prisoner, were held admissible as to contemporaneous symptoms of her bodily condition but nothing in the nature of a narrative was held admissible *to show who caused them or how they were caused.*

The Court of Appeal in *Rex* v. *Thomson* (2) approved this ruling and Lord Alverstone C.J., Darling and Avory JJ. quoted Charles J. as a great authority. I take this to be the law.

Moreover, it is doubtful whether or not the only part of the declaration implicating the appellant as "having, that night (2nd of September) talked to Mrs. Sundquest" relates to a conversation in the presence of the girl, or is only hearsay as far as she is concerned. If only

(1) (1888) 16 Cox 471.

(2) [1912] 3 K.B. 19, at 22.

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hearsay, she would not have been competent to testify about the alleged conversation if sworn in the cause; therefore, her declaration as to this matter would not be admissible.

In view of the above, it is not necessary to determine the second question raised by the dissenting judgment.

We will, therefore, allow the appeal; and, as there is no other evidence available against the appellant, direct a judgment and verdict of acquittal to be entered.

DYSART J. (*ad hoc*)—in dissenting from the majority of the learned judges of the Court of Appeal of British Columbia (1), Mr. Justice McPhillips says: "In my opinion the conviction herein must be quashed. Without the dying declaration *there is no evidence* upon which the jury could found their verdict—and my view is that the dying declaration is inadmissible in law." The reasons for his dissent may be summarized thus: (1) that the declarant was not at the point of death when she made the declaration, or if she was, she did not realize it; (2) that the portions of the declaration relating to counselling are inadmissible in any event; (3) that the jury were not properly warned of the danger of convicting on the uncorroborated evidence of the declarant, who was an accomplice.

This dissent involves several questions of law, any one of which, if the dissenting judge is correct, would be fatal to the conviction. The most important of these is the question of admissibility. While the right of a convicted person to appeal to this Court is confined to "any question of law on which there has been dissent in the Court of Appeal" which affirmed his conviction (section 1023 Cr. C.) this Court is not restricted on such appeal to the grounds or reasons upon which the dissent is based but may deal with the question of law entirely upon its merits.

Dying declarations are admissible in evidence only in cases of homicide, where the death of the deceased is the subject of the charge and where the circumstances of the death are the subject-matter of the declaration: *Reg.* v. *Hind* (2). The first condition of admissibility of such declaration is that the charge laid against the accused, on

(1) [1935] 2 W.W.R. 146. (2) (1860) 8 Cox C.C. 300.

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Dysart J.

whose trial the declaration is tendered, shall be one of homicide. Is that condition satisfied in this case?

The charge, which is set out verbatim in the reasons of Mr. Justice Cannon, need not be repeated here. It contains a direct allegation, and a statement of facts and consequences. The direct allegation is that the accused did

> counsel or procure * * * Grietje Sundquest to commit an indictable offence, namely, to use unlawfully on the person of Veronica Kuva an instrument or instruments with intent to procure a miscarriage of Veronica Kuva.

Then follows

> which offence the said Grietje Sundquest did commit and did thereby kill and slay the said Veronica Kuva. * * *

Is the direct allegation of counselling or procuring sufficiently strengthened or buttressed by the succeeding words to constitute a charge of homicide? Every charge must be clear and unmistakable. Although section 852 of the Criminal Code dispenses with the need of technical language and unnecessary matter in charges, it does not dispense with the necessity of specifying the offence in "words sufficient to give the accused notice of the offence with which he is charged." The offence so specified is the only one on which the accused can properly be tried, and the prosecution must confine itself strictly within the terms of the specifications. The specifying of the offence is equivalent to, or analogous with, the giving of particulars, and restricts the field of the prosecution. Where evidence is tendered which is outside of the confines of the specified charge, it is inadmissible for irrelevancy, and even though not objected to by counsel, should be excluded by the trial judge whose duty and responsibility it is to see that nothing but properly admissible evidence is placed before the jury. Although the charge, as here laid, seems to contain all the elements or factors of a charge of homicide, that alone is not enough to satisfy the requirements of such a charge.

Assuming, without deciding, that the charge might be considered one of homicide, the most that can be said for it is that it is homicide by the specified means of counselling or procuring Mrs. Sundquest to commit the crime, thereby making the accused a principal party under s. 69. On this view any evidence tending to prove that the accused committed homicide by means other than the *counselling or procuring of Mrs. Sundquest* is irrelevant and inadmissible.

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The dying declaration, which is in writing, contains much matter which could not on any view be regarded as relevant to the circumstances of the death. These portions may or may not have been prejudicial to the accused on his trial. If they were, they should have been excluded, and the exclusion of them would exclude the written declaration as a whole. Then there are statements lying nearer the circumstances of the death, but these have to do almost exclusively with transactions between the accused and the declarant herself. The efforts of the accused in counselling or procuring the declarant to undergo the illegal operation are therefore inadmissible on the grounds above stated. These statements are to the effect that the accused was responsible for the declarant's pregnancy; that after he had tried unsuccessfully to bring about miscarriage by counselling or procuring her to take certain pills, which she did take with intent to bring about miscarriage, he counselled her to go to Grietje Sundquest "to get rid of the baby"; that he handed her $20 to give to Mrs. Sundquest and said that if the sum were not enough he would give her more later; that he on one occasion conveyed her to the vicinity of Mrs. Sundquest's premises, and on other occasions supplied her with carfare for transportation to the same place. These and other such statements were inadmissible because irrelevant, and in as much as their effect upon the jury must have been prejudicial to the accused, ought not to have been admitted. Their exclusion would exclude the document as a whole.

The only statement contained in the declaration that bears at all upon the charge as laid is that the accused on the night of September 2 "spoke to Mrs. Sundquest." It is not shown whether the declarant stated this from personal knowledge or from hearsay, nor is the subject of the conversation between the accused and Mrs. Sundquest mentioned. There is nothing to indicate that he at that time counselled or urged Mrs. Sundquest to bring about miscarriage. The inference is that the subject was not mentioned, as shown by another statement in the declaration, that the declarant when she first visited Mrs. Sundquest said "my boy friend sent me"—a statement to which Mrs. Sundquest is not reported to have replied, and which suggests that the accused had not previously

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spoken to Mrs. Sundquest on the subject. Apart from these statements there is nothing in the dying declaration to show the accused had ever directly or indirectly communicated with Mrs. Sundquest. These statements could not possibly support a conviction on the charge as laid and, therefore, ought to have been excluded.

Thus all parts of the declaration are shown to have been inadmissible. If, however, any portion of it could be thought to be admissible, the admissible parts should have been placed before the jury, separate and apart from the document. This might have been done by witnesses using the document to refresh recollection and putting in the relevant or admissible portions in that form: *Thiffault* v. *The King* (1).

It is unnecessary to deal with the other questions raised on the dissent. The appeal should be allowed and a verdict of acquittal should be entered.

Appeal allowed.

1934
*Nov. 20, 21.
1935
*May 13.

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

AND

ALBERT DUBOIS AND ANTOINETTE DUBOIS (SUPPLIANTS) ..... RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Crown—Liability of, for negligence of its servant "while acting within the scope of his duties or employment upon any public work" (Exchequer Court Act, R.S.C. 1927, c. 34, s. 19 (c))—"Public work"—Alleged negligence of occupants of motor car used in detection and elimination of radio inductive interference.

A motor car owned by the Government of Canada, used by the Radio Branch of the Department of Marine in the detection and elimination of radio inductive interference, and specially equipped for that purpose, was, in such use, while returning to headquarters, stopped by its occupants (the driver and a radio electrician) on the highway, and was struck by another car, with fatal result to a passenger in the latter. Damages were claimed from the Crown on the ground that the collision and fatality were due to the negligence of the occupants of the Government car. The case was heard on certain questions of law.

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*PRESENT:—Duff C.J. and Rinfret, Cannon, Crocket and Hughes JJ.

(1) [1933] S.C.R. 509 at 514.

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Held: The Government car was not a "public work," nor were its occupants acting within the scope of their duties or employment "upon any public work," at the time in question, within the meaning of s. 19 (*c*) of the *Exchequer Court Act* (R.S.C. 1927, c. 34). (Judgment of Maclean J., President of the Exchequer Court of Canada, [1934] Ex. C.R. 195, reversed).

Having regard to the history of the legislation and the judicial decisions upon it (reviewed at length in the judgment), the phrase "public work" in s. 19 (*c*) means a physical thing having a defined area and an ascertained locality, and does not comprehend public service or employment, as such; nor does it include vehicles or vessels. This construction is further supported by the language of the French version of the section.

Semble, where there is a "public work" in the sense above indicated, and an injury is caused through the negligence of a servant of the Crown in the execution of his duties or employment in the construction, repair, care, maintenance, or working of such public work, such an injury may come within the scope of s. 19 (*c*), though the servant's negligent act was not committed on the public work in the physical sense.

APPEAL by the Crown from the judgment of Maclean J., President of the Exchequer Court of Canada (1), deciding certain questions of law in favour of the suppliants.

The suppliants, by petition of right, claimed against the Crown the sum of $5,000 by reason of the death of their son, Albert Dubois Jr., due, it was alleged, to the negligence of certain servants of the Crown. The following facts of the case are taken from the reasons for judgment of the President of the Exchequer Court:

"There is in the Department of Marine at Ottawa, what is known as the Radio Branch, and one important work carried on by this Branch, from coast to coast in Canada, is the detection and elimination of radio inductive interference. The extent of this particular work may be gathered from the Introduction to a Bulletin issued by that Branch in 1932, entitled "Radio Inductive Interference," and from which it appears that over thirty thousand sources of radio interference have been investigated. The varied and important activities of the Radio Branch may be gathered from its Annual Reports, and the Radiotelegraph Act, Chap. 195, R.S.C., 1927.

"In the investigation of radio inductive interference specially equipped motor cars owned by the Government of Canada are employed by the Radio Branch. In October, 1931, such a car, allocated for such work in the district

(1) [1934] Ex. C.R. 195.

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surrounding Ottawa, was being used on a regular inspection tour for the detection of radio inductive interference, one Pollard being the radio electrician and investigator, and one Langlois the driver, both being regularly employed by the Radio Branch of the Department of Marine; Pollard and Langlois were on this occasion returning to their headquarters at Ottawa, from Fitzroy Harbour, when, towards the close of the afternoon, darkness, rain and fog rendered driving conditions so bad that they were obliged, while nearing the village of Britannia, to stop the car on one side of the travelled road in order to wipe the windshield. An oncoming car, in which Dubois the deceased was a passenger, collided with the Government car with fatal results to Dubois. The suppliants allege that the collision and fatality were due to the negligence of Pollard and Langlois."

The case was set down for hearing on the following questions of law raised by the pleadings, namely: (1) whether the said Government owned motor car, equipped and used as aforesaid and in occupation and control of the persons mentioned on the occasion in question, was at the time of the collision in question a "public work" within the meaning of s. 19 (*c*) of the *Exchequer Court Act,* R.S.C. 1927, c. 34; and (2) whether Pollard and Langlois were, at the time of the collision in question, officers or servants of the Crown acting within the scope of their duties or employment upon a public work, within the meaning of said s. 19 (*c*).

It was adjudged in the Exchequer Court that the motor car was at the time in question a public work within the meaning of s. 19 (*c*) of the *Exchequer Court Act;* and that the said Pollard and Langlois were at the time in question officers or servants of the Crown acting within the scope of their duties or employment upon a public work within the meaning of said s. 19 (*c*); and that the Exchequer Court had jurisdiction to entertain the petition of right.

The Crown appealed.

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

C. Morse K.C. and *E. G. Gowling* for the respondent.

The judgment of Duff C.J. and Cannon, Crocket and Hughes JJ. was delivered by

DUFF C.J.—This appeal involves the construction of section 19 of the *Exchequer Court Act* (R.S.C. 1927, ch. 34). The enactment now before us, and the parent enactment which it reproduces in amended form, have been the sub-

ject of a considerable number of decisions in the Exchequer Court and in this Court.

It will appear as we proceed that the most effectual way of ascertaining the import of the language we have to construe is to note the course of legislation upon the subject matter of the enactment from 1870 onward, and to examine with some care the course of judicial decision upon that legislation.

One general observation will not, I think, be superfluous. The judicial function in considering and applying statutes is one of interpretation and interpretation alone. The duty of the court in every case is loyally to endeavour to ascertain the intention of the legislature; and to ascertain that intention by reading and interpreting the language which the legislature itself has selected for the purpose of expressing it.

In this process of interpretation the individual views of the judge as to the subject matter of the legislation are, of course, quite irrelevant. To start with presumptions as to policy is, as Lord Haldane said in *Vacher & Sons Ltd.* v. *London Society of Compositors* (1), to enter upon a labyrinth for the exploration of which the judge is provided with no clue.

We have before us an enactment which presents certain peculiarities. There is a remedy given against the Crown in a limited class of torts; and the reasons which actuated the legislature in prescribing the limitations cannot be stated with any kind of certainty. That is no ground for ignoring the limitations, or for ascribing a non-natural meaning to the words in which they are stated in order to minimize the effect of those words. A particular enactment of the legislature is sometimes, as everybody knows, the result of compromise—a result which it would often be difficult to explain by reference to any broadly conceived principle of legislative action.

It is the duty of the courts to give effect to the language employed, having due regard to the judicial construction which it has received. The parent enactment of section 19 (*c*) of the *Exchequer Court Act,* R.S.C. (1927), cap. 34 (the section we have to construe and apply), was section 16 (*c*) of the statute of 1887 (50-51 Vict., ch. 16)

(1) [1913] A.C. 107, at 113.

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(by which statute the Exchequer Court, in its present constitution, came into being); and section 19 (*c*), in the English version, received its present form by an amendment brought into force by section 2 of ch. 23 of the Statutes of 1917. The French version of section 19 (*c*) (in the R.S.C. 1927, cap. 34) was not mentioned in argument. That version, as will very clearly appear at a later stage, is most illuminating upon the question of construction. In the meantime, I shall, in my references to the statute of 1887, and the amendment of 1917, confine myself to the English version. Section 16 of the statute of 1887, which became section 20 in the Revised Statutes of 1906, was as follows:

16. The Exchequer Court shall also have exclusive original jurisdiction to hear and determine the following matters:

(*a*) Every claim against the Crown for property taken for any public purpose;

(*b*) Every claim against the Crown for damage to property, injuriously affected by the construction of any public work;

(*c*) Every claim against the Crown arising out of any death or injury to the person or to property on any public work, resulting from the negligence of any officer or servant of the Crown, while acting within the scope of his duties or employment;

(*d*) Every claim against the Crown arising under any law of Canada or any regulation made by the Governor in Council.

The amendment of 1917 was in these words:

2. Paragraph (*c*) of section twenty of the said *Exchequer Court Act* is repealed and the following is substituted therefor:

"(*c*) Every claim against the Crown arising out of any death or injury to the person or to property resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment upon any public work."

An important change was effected in the law in the amendment of 1917; by the simple process of taking the phrase "on any public work" from its place following "property," and with the substitution of the preposition "upon" for the preposition "on," attaching it to the end of the paragraph, immediately after the word "employment." The phrase "public work" remained unchanged, a phrase which also appears, as will be noticed, in paragraph (*b*). It was early held (*The City of Quebec* v. *The Queen* (1)) that while in form section 16 (*c*) (of the Statutes of 1887) only conferred jurisdiction, it gave,

(1) (1892) 3 Ex.C.R. 164 and (1894) 24 Can. S.C.R. 420.

nevertheless, by necessary implication, a substantive right of action to the subject.

It will be convenient, first of all, to consider section 16 (*c*) in its original form, and the decisions upon it prior to the amendment of 1917. The actual decisions of this court upon the enactment establish three propositions: first, that the phrase "on a public work" served the office of fixing the locality within which the death or injury must occur in order to bring the enactment into operation; second, that the phrase "public work" denoted, not a service or services, but a physical thing; third, that such physical thing must have a fixed situs and a defined area.

The determination of the present appeal largely turns upon the meaning to be ascribed to the phrase "public work" in the existing statute, that is to say, in the form the statute, in its English version, assumed in consequence of the amendment of 1917.

The jurisdiction created by section 16 (*c*) of the legislation of 1887 was a jurisdiction transferred from the Official Arbitrators to the Exchequer Court (*Graham* v. *The King* (1); *Armstrong* v. *The King* (2)). The jurisdiction of the Official Arbitrators in relation to this particular subject had originally been constituted by section 1 of chapter 23 of the Statutes of 1870; which provided that where there was a supposed claim upon the Government of Canada

> arising out of any death, or any injury to person or property on any railway, canal, or public work under the control and management of the Government of Canada

the claim might, by the head of the department concerned therewith, be referred to Official Arbitrators who should have power to hear and make an award upon such claim.

In the Revised Statute of 1886, the Act relating to Official Arbitrators reproduced this provision in slightly altered form (ch. 40, sec. 6), the words there being:

> claim * * * arising out of any death, or any injury to person or property on any public work;

"public work" being thus defined by section 1, "unless the context otherwise requires,"

> (*c*) The expression "public work" or "public works" means and includes the dams, hydraulic works, hydraulic privileges, harbours, wharves, piers and works for improving the navigation of any water—

(1) (1902) 8 Ex.C.R. 331, at 335. (2) (1907) 11 Ex.C.R. 119, at 122, 123.

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lighthouses and beacons—the slides, dams, piers, booms and other works for facilitating the transmission of timber—the roads and bridges, the public buildings, the telegraph lines, Government railways, canals, locks, fortifications and other works of defence, and all other property which now belong to Canada, and also the works and properties acquired, constructed, extended, enlarged, repaired or improved at the expense of Canada, or for the acquisition, construction, repairing, extending, enlarging or improving of which any public money is voted and appropriated by Parliament, and every work required for any such purpose; but not any work for which money is appropriated as a subsidy only.

Section 6 also gave jurisdiction to the Official Arbitrators, on reference by a Minister in respect of other matters:

* * * any claim for property taken, or for alleged direct or consequential damage to property, arising from or connected with the construction, repair, maintenance or working of any public work, or arising out of anything done by the Government of Canada.

Section 16 of the Exchequer Court Act of 1887, which, by section 58, repealed the *Official Arbitrators Act* (R.S.C. 1886, c. 40), gave to the newly created Exchequer Court jurisdiction in a modified form in respect of these matters. It is not without relevancy to note that claims for

alleged direct or consequential damage to property, arising from or connected with the construction, repair, maintenance or working of any public work.

(in the *Official Arbitrators Act*) become claims

for damage to property, injuriously affected by the construction of any public work

in section 16 (*b*) of the Statute of 1887.

The decisions in this Court and in the Exchequer Court upon claims under section 16 (*b*) have proceeded upon the view that the words of that paragraph must be construed by reference to the decisions of the English courts in respect of the subject of "injurious affection" (*MacArthur* v. *The King* (1); *The King* v. *MacArthur* (2)). There can, I think, be no doubt that "public work" in that paragraph is to be construed by reference to the interpretation clause in the *Official Arbitrators Act* (R.S.C. 1886, c. 40) and to the interpretation clause in the *Expropriation Act* (R.S.C. 1886, c. 39) which correspond *ipsissimis verbis*. In that definition, it will be observed that the phrase "all other property which now belong to Canada" is, if read alone, very comprehensive; but, as Burbridge J. held in *Larose* v. *The Queen* (3), that expression in the *Expropriation Act*, where, as I have already said, the definition precisely con-

(1) (1903) 8 Ex.C.R. 245, at 257. (2) (1904) 34 Can. S.C.R. 570.
(3) (1900) 6 Ex.C.R. 425.

forms to that in the *Official Arbitrators Act*, must be read in connection with the words preceding it, and not in the broadest possible sense.

I entertain no doubt that "public work," as employed in section 6 of the *Official Arbitrators Act*, and in the contemporaneous *Expropriation Act*, did not embrace any subject not falling within the definition quoted. Moreover, I have no doubt that when the jurisdiction conferred by that section was transferred, with the modifications noticed above, to the Exchequer Court by the Statute of 1887, the phrase "public work," as employed in paragraphs (*b*) and (*c*) of section 16 of that statute, must be read and construed by reference to that definition. So read and construed, the term "public work" cannot be given the sense the respondent seeks to ascribe to it: of public service, employment or duty; nor can it fairly be read as comprehending such things as vehicles and vessels. This, we shall see, is the effect of the decisions of this court respecting the construction of these paragraphs.

I now proceed to consider the decisions. In *The City of Quebec* v. *The Queen* (1), Mr. Justice Gwynne thus states his views as to the effect of section 16 (*c*) of the Statute of 1887:

> The object, intent and effect of the above enactment was, as it appears to me, to confer upon the Exchequer Court, in all cases of claim against the government, either for the death of any person, or for injury to the person or property of any person committed to their charge upon any railway or other public work of the Dominion under the management and control of the government, arising from the negligence of the servants of the government, acting within the scope of their duties or employment upon such public work, the like jurisdiction as in like cases is exercised by the ordinary courts over public companies and individuals.

In *the Queen* v. *Filion* (2) Mr. Justice Sedgewick expressly adopted the view thus expressed. These words of Mr. Justice Gwynne, adopted by Mr. Justice Sedgewick, give no countenance to the suggestion that the phrase "public work" in the enactments under consideration should be construed in the sense of public employment or service.

Since I came to this court in 1906 there have been a good many appeals involving the construction of this en-

(1) (1894) 24 Can. S.C.R. 420 at 449-450.

(2) (1895) 24 Can. S.C.R. 482.

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actment. The first of these was in *Paul* v. *The King* (1), which was decided in the year 1906. The construction there laid down by Davies J., as the basis of his judgment (at p. 132), was expressed in these words:

> I think a careful and reasonable construction of the clause 16 (*c*) must lead to the conclusion that the public works mentioned in it and "on" which the injuries complained of must happen are public works of some definite area, as distinct from those operations undertaken by the Government for the improvement of navigation or analagous purposes; not confined to any definite area or physical work or structure.

This, be it observed, was no mere dictum. It was concurred in by Mr. Justice Maclennan and myself and was deliberately adopted as the ratio of the decision by the majority of the court.

This decision in *Paul* v. *The King* in 1906 (1), is conclusive upon the point that "public work" in the statute of 1887 did not bear the sense of public employment, public service, public labour, public business. The suppliant's steamship *Préfontaine* had been damaged in a collision with a loaded scow fastened to the side of the steam tug *Champlain,* which the latter was towing from the dredge *Lady Minto,* working in one of the channels of the St. Lawrence river. The dredge, the steam tug and the scow were all the property of the Government, and the claim was based upon section 16 (*c*). It was held that, assuming the collision was due to the negligence of those in charge of the tug *Champlain,* there was no remedy because the injury was not "on a public work." Now, the officers in charge of the tug were, admittedly, engaged on a public service, in a public employment. Construing "public work" in the sense contended for on behalf of the present respondent (as comprehending public service or employment), and assuming negligence, the statutory conditions were plainly satisfied. As I have already pointed out, the judgment of the court expressly rejected that construction; and I am now pointing out that the decision necessarily involved the rejection of it.

Moreover, it was held by Mr. Justice Burbridge in the Exchequer Court (2) that neither the tug nor the scow was a "public work" within the meaning of the statute. His view, to which I shall have to advert later, was that the phrase "on a public work" in the statute was sufficiently

(1) (1906) 38 Can. S.C.R. 126. (2) (1904) 9 Ex.C.R. 245, at 270.

comprehensive to include the case of an injury occasioned by something done on the public work; although the injury itself did not occur there. The negligence of the officers navigating the tug was not, in his view, within that description, that is to say, was not something done on a "public work," because the tug was not, at all events when separated from the dredge, a "public work."

In the Supreme Court of Canada, the majority maintained the view that neither the dredge, nor the tug, nor the scow, was a "public work." It may be observed at this point that in *Montgomery* v. *The King* (1) this was applied by Cassels J., who held that a dredge belonging to the Dominion Government was not a "public work" within the contemplation of section 16 (*c*).

Before passing from this decision, it is, perhaps, well to emphasize the principle of the decision, stated in the quotation from the reasons of Mr. Justice Davies, which were expressly adopted as the reasons of the majority of the court. "Public work" is there defined in such a way as to exclude from its ambit public employment or public service, as such, and this, as I have said, was necessary to the decision; and, further, the decision is explicitly rested upon the proposition that "public work," within the meaning of the statute, means a physical thing having a definite area.

Paul v. *The King* (2) has been consistently followed; there is no decision of this court which is, in the slightest degree, at variance with it.

The next appeal in which the point arose was in *The King* v. *Lefrançois* (3), and I there endeavoured to sum up the tenour of the previous decisions in their application to the case under consideration in these words:

> Having regard to the previous decisions of this court, the phrase "on a public work" in section 20, subsection (*c*), of "The Exchequer Court Act" must, I think, be read as descriptive of the locality in which the death or injury giving rise to the claim in question occurs. The effect of these decisions seems to be that no such claim is within the enactment unless "the death or injury" of which it is the subject happened at a place which is within the area of something which falls within the description "public work." (*Paul* v. *The King* (4) and the cases there cited).

(1) (1915) 15 Ex. C.R. 374.
(2) (1906) 38 Can. S.C.R. 126.
(3) (1908) 40 Can. S.C.R. 431.
(4) 38 Can. S.C.R. 126.

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I pause here to observe that the phrase "happened at a place which is within the area of something which falls within the description 'public work'," could hardly be read as contemplating a vehicle or a public service.

The section came before this court again in *Chamberlin* v. *The King* (1). The Chief Justice, Mr. Justice Girouard and Mr. Justice Idington adopted the phraseology of *Lefrançois'* case (2) in the passage cited. The Chief Justice used these words (p. 351):

> In a long series of decisions this court has held that the phrase "on a public work" in sec. 20, subsec. (*c*), of the "Exchequer Court Act," must be read, to borrow the language of Mr. Justice Duff in *The King* v. *Lefrançois* (3), at p. 436, "as descriptive of the locality in which the death or injury giving rise to the claim in question occurs," and that to succeed the suppliant must come within the strict words of the statute. (Taschereau J. in *Larose* v. *The King* (4). See also *Paul* v. *The King* (5), and cases there cited).

Mr. Justice Davies says (p. 353):

> We are all of the opinion that the point has already been expressly determined by this court, particularly in the case of *Paul* v. *The King* (5). In that case the majority of the court held after the fullest consideration that clause (*c*) of the 16th section of the "Exchequer Court Act," which alone could be invoked as conferring jurisdiction, only did so in the case of claims
>
> "arising out of any death or injury to the person or property *on any public work* resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties."
>
> Claims for injuries not within these words of the section and occurring, not on, but away from, a public work, although arising out of operations wheresoever carried on, were held not to be within the jurisdiction conferred by the section.

Mr. Justice Davies added,

> With the policy of Parliament we have nothing to do. Our duty is simply to construe the language used, and if that construction does not fully carry out the intention of Parliament, and if a wider and broader jurisdiction is desired to be given the Exchequer Court, the Act can easily be amended.

Mr. Justice Anglin and myself agreed with the views expressed by the Chief Justice, as well as with those expressed by Mr. Justice Davies.

The next case to which I shall refer is *Olmstead* v. *The King* (6), in which a claim was made for the flooding of lands in consequence of the negligent operation of a dam on the Rideau Canal. At pp. 456-7 of the report Mr. Justice Anglin said:

(1) (1909) 42 Can. S.C.R. 350.
(2) (1908) 40 Can. S.C.R. 431.
(3) 40 Can. S.C.R. 431.
(4) (1901) 31 Can. S.C.R. 206.
(5) (1906) 38 Can. S.C.R. 126.
(6) (1916) 53 Can. S.C.R. 450.

The plaintiff's claim, however, is for damages for injuries sustained through the negligence of a Crown servant in carrying on a public work. The injury of which he complains did not happen on the public work. Section 20 (*c*) of the "Exchequer Court Act," therefore, does not confer jurisdiction on the Exchequer Court. *Chamberlin* v. *The King* (1); *Paul* v. *The King* (2). Since these cases were decided *Letourneux* v. *The King* (3) cannot be followed in such a case as this. In that case the full limitative effect of the words "on any public work" in sub-sec. (*c*) of sec. 20 would appear not to have been sufficiently considered. The suppliant points to no other provision giving him a right of action against the Crown.

Before passing on to the next case, it is well to observe, perhaps, that *Letourneux* v. *The King* (3)) (decided in 1903 before *Paul* v. *The King* (4)), mentioned in the judgment of Mr. Justice Anglin, is very imperfectly reported. Only two judgments are in evidence. There was there no question as to the meaning of the phrase "public work." The injury complained of was, in part, the result of the negligence of employees of the Crown in failing to keep a siphon culvert clear and in proper order to carry off the waters of a stream which had been diverted and carried under the Lachine Canal. In part it appears to be a claim under paragraph (*b*) of section 16, for injurious affection. It is impossible now to ascertain what were the grounds on which the majority of the court proceeded.

In *Piggot* v. *The King* (5), Mr. Justice Cassels, President of the Exchequer Court, (at pp. 489-492) cited verbatim and applied the judgments of the Chief Justice and of Davies J. in *Chamberlin* v. *The King* (6), including the passages I have already cited from the latter. I quote what he said, verbatim, because his reasons were explicitly approved by one of the members of this Court:

Section 20, subsection (*c*) of the *Exchequer Court Act* (R.S.C. 1906, c. 140) reads as follows:

"The Exchequer Court shall have exclusive original jurisdiction to hear and determine: (*c*) Every claim against the Crown arising out of any death or injury to the person or to property on any public work."

In the case of *Chamberlin* v. *The King* (6), the Chief Justice of the Supreme Court says at p. 353:

"In a long series of decisions this Court has held that the phrase 'on a public work' in section 20, subsection (*c*) of the *Exchequer Court Act* must be read, to borrow the language of Mr. Justice Duff, in *The King* v. *Lefrançois* (7), 'as descriptive of the locality in which the death or injury (that is injury to property) giving rise to the claim in ques-

(1) (1909) 42 Can. S.C.R. 350.
(2) (1906) 38 Can. S.C.R. 126.
(3) (1903) 33 Can. S.C.R. 335.
(4) (1906) 38 Can. S.C.R. 126.
(5) (1915) 19 Ex. C.R. 485.
(6) (1909) 42 Can. S.C.R. 350.
(7) (1908) 40 Can. S.C.R. 431.

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tion occurs,' and that to succeed the suppliant must come within the strict words of the statute. In this case the property destroyed by fire, previous to and at the time of its destruction, was upon the land of the suppliant, some distance from the right of way of the Intercolonial Railway and was not property on a public work. As to the objection that this question was not raised in the Court below, I refer to *McKelvey* v. *LeRoi Mining Company* (1). If questions of law raised here for the first time appear upon the record we cannot refuse to decide them where no evidence could have been brought to affect them had they been taken at the trial. The point was taken by the pleadings if not urged at the argument below."

Sir Louis Davies says:

"This was an action brought in the Exchequer Court on a claim for damages arising out of the destruction of the property of the suppliants claimed to have been caused by sparks from the smoke stack of an Intercolonial Railway engine.

"The property destroyed was previous to and at the time of its destruction upon the land of the suppliant some distance from the right of way of the railway and was not property on a public work.

"The learned Judge, Mr. Justice Cassels, who delivered the judgment of the Court of Exchequer, had not heard the witnesses, who had given their testimony before the late Judge Burbidge.

"The suppliants were desirous to avoid the expense of a rehearing and with the assent of the respondent the case was fully argued before Mr. Justice Cassels on the evidence taken before Mr. Justice Burbidge.

"The learned Judge found as a fair conclusion to be drawn from the evidence that the fire originated from a spark or sparks emitted from the engine, but he was unable to find that it was caused through any defect in the engine for the existence of which and the failure to remedy which the Crown could be held liable for the losses claimed. On this appeal the jurisdiction of the Court of Exchequer over the claim in question was challenged and denied by Mr. Chrysler, his contention being that such jurisdiction was limited to claims against the Crown arising out of injuries to the person or property on a public work, and did not extend to injuries happening away from a public work, although caused by the operations of the Crown's officers or servants. The cases in which the question has already come before this Court for consideration were all referred to.

"We are all of the opinion that the point has already been expressly determined by this Court, particularly in the case of *Paul* v. *The King* (2). In that case the majority of the Court held after the fullest consideration that clause (*c*) of the 16th section—(that is the same as this is)—of the *Exchequer Court Act*, which alone could be invoked as conferring jurisdiction, only did so in the case of claims arising out of any death or injury to the person or property *on any public work* resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties, claims for injuries not within these words of the section and occurring not on, but away from, a public work, although arising out of operations wheresoever carried on, were held not to be within the jurisdiction conferred by the section.

"With the policy of Parliament we have nothing to do. Our duty is simply to construe the language used, and if that construction does

(1) (1902) 32 Can. S.C.R. 664. (2) (1906) 38 Can. S.C.R. 126.

not fully carry out the intention of Parliament, and if a wider and broader jurisdiction is desired to be given the Exchequer Court, the Act can easily be amended.

"Under these circumstances we must, without expressing any opinion upon the conclusions of fact reached by the learned judge, dismiss this appeal with costs.

At this point, it is convenient to observe that, in the Supreme Court of Canada (1), in giving judgment in the appeal from Cassels J., this language is expressly adopted by Anglin J. in these words:

I respectfully concur in the reasons assigned by the learned judge of the Exchequer Court for dismissing this action.

Again, in this court (1), Mr. Justice Idington, at p. 630, used these words:

The words therein, "on any public work," rendered it impossible, in the case of *Chamberlin* v. *The King* (2), for us to interfere, solely because the injury, if any, was done to property a long distance from the place where the public work existed from which it was said the cause of the destruction of suppliant's property originated.

Here, once more, the phrase "place where the public work existed" is not a phrase that would be used in relation to a public service, or employment, or to a vehicle.

In *La Compagnie Generale D' Entreprises Publiques* v. *The King* (3), a derrick scow which was used for the purpose of making repairs to a wharf, that was, admittedly, a public work, was made fast to the face of the wharf. The scow was crushed and sunk owing to the negligence of the officers working a Government ferry. The view of Idington J., and apparently of the Chief Justice, was that the locality of the scow was "on a public work." Anglin J. expressed the opinion that "public work" in section 16 (*c*) might be read as meaning "any operations undertaken by or on behalf of the Government in constructing, repairing or maintaining public property." Such a view could not be reconciled with the decisions, already mentioned, which were binding on the court, and was not accepted by any other judge. The decision is of no assistance, and I mention it only because the observation of Anglin J. was relied upon. To that observation I shall revert later.

Before coming to the amendment of 1917, it is important, I think, to refer to some dicta by Mr. Justice Burbridge and some decisions of this court upon a question which arose at an early stage, that is to say, whether, if the in-

(1) (1916) 53 Can. S.C.R. 626. (2) (1909) 42 Can. S.C.R. 350.
(3) (1917) 57 Can. S.C.R. 527.

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jury in respect of which the claim was made was caused by something done on a public work, the claimant was entitled to the benefit of the statute, although the injury did not actually occur on the public work. Mr. Justice Burbidge expressed the view that in such a case the statute would apply (*The City of Quebec* v. *The Queen* (1); in *Price* v. *The King* (2); in *Paul* v. *The King* (3)). This view was negatived in this court in a number of decisions.

Two of these decisions, *Chamberlin* v. *The King* in 1909 (4), and *Piggott* v. *The King* in 1916 (5), were rather striking. In the first case, the statute was held not to apply where the injury was caused by the escape of sparks from a locomotive engine, negligently constructed or maintained, on the Intercolonial Railway. The second case concerned injury to the property of the suppliant resulting from blasting operations carried on by the Crown in clearing the site of a public work. It must have been a little difficult to understand why the Crown should be responsible for the negligence of its train hands in failing to ring a bell, on approaching a highway, and not responsible for damages caused by the escape of sparks due to the employment of inadequate appliances for the prevention of such escape; and, perhaps, more difficult to understand why, where the safety of people was endangered by the negligent manner in which blasting operations were conducted, one person, who happened to be on a public work, should be entitled to recover damages for injuries due to such negligence, while another person, who was in the vicinity, but not on the public work, should have no remedy. I have no doubt that these decisions explain the introduction of the amendment of 1917,

It should, perhaps, be observed that in many cases in the Exchequer Court the ratio of *Paul* v. *The King* (6), as expresed in the passage from the judgment of Davies J., above quoted, has been applied. Among them may be mentioned *Piggot* v. *The King* (7), *supra,* decided in 1915; *Theberge* v. *The King* (8), decided in 1916; *Coleman* v.

(1) (1891) 2 Ex.C.R. 252 at 260 and 270; (1892) 3 Ex.C.R. 164, at 178.
(2) (1906) 10 Ex.C.R. 105, at 137.
(3) (1904) 9 Ex. C.R. 245, at 270.
(4) 42 Can. S.C.R. 350.
(5) 53 Can. S.C.R. 626.
(6) (1906) 38 Can. S.C.R. 126.
(7) 19 Ex.C.R. 485.
(8) 17 Ex.C.R. 381.

The King (1), decided in 1918; and *Desmarais* v. *The King* (2), decided in 1918.

We now come to the effect of the statute of 1917. In substance, it is contended on behalf of the respondents, first, that the automobile by which the deceased Albert Dubois, Jr., was killed was a "public work" within the meaning of section 19 (*c*) of the *Exchequer Court Act* (R.S.C. 1927, ch. 34); and, second, if the automobile itself was not a "public work," then the driver of the automobile, whose negligence unfortunately resulted in the death of the suppliants' son, was engaged in a public service, the nature of which it is not necessary to enter upon; and, consequently, was within the meaning of the statute "acting within the scope of his duties or employment" upon a "public work" when guilty of that negligence.

The amendment with which we have to deal was an amendment introduced into the *Exchequer Court Act,* an amendment effected, as already observed, by a change in the order of the words in one paragraph of section 16 of that Act. The term "public work" was already there in paragraph (*b*). It was already there and remained there in the amended paragraph (*c*). The scope of the phrase in section 16, as ascertained by reference to the legislation in which those provisions took their origin and the definitions in that legislation, and as determined by the decisions of this court, was plainly settled. No expansion of the meaning of the term "public work," so determined, was necessary to give full effect to the amendment. There is nothing in the amendment requiring any alteration in the sense of the term as settled. The amendment, so to speak, was an amendment within the framework of the existing statute; which framework is not altered by it. "Public work" still, in paragraph (*c*), as well as in paragraph (*b*), designates a physical thing, and not a public service. Indeed, I find it impossible to suppose that anybody drafting an amendment to paragraph (*c*), by which he proposed to make the Crown liable for the death or injury resulting from the negligence of any officer or servant of the Crown acting within the scope of his duty or employment in the public service, would have retained the phrase "public work." Either the term public service,

(1) 18 Ex.C.R. 263. (2) 18 Ex.C.R. 289.

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or public employment, or public labour, or public business, or public duty, would have been made use of, or the phrase "upon any public work" would have been dispensed with altogether; because it is quite clear that the contention that "public work", in the amended statute, is equivalent to public service leads to the conclusion that the phrase "upon any public work" is merely redundant, if not tautological.

Moreover, if you substitute "public service" for "public work," or "public employment" or "public labour" for "public work," you establish a liability on the part of the Crown generally for the negligence of its servants. It is not a liability for every tort, but it is a liability embracing the vast majority of torts committed by public employees. Maritime torts committed by His Majesty's vessels, for example, would, speaking generally, fall within it. Such a construction, in a word, adopts the doctrine of *respondeat superior* generally throughout the whole field of negligence.

I have nothing to say upon the point whether such an amendment of the law would be desirable. I am not concerned with that. That is for the legislature, not for me. But it would effect a great enlargement of the field of responsibility of the Crown for tort, and the courts can only accept a proposed construction of a statutory enactment accomplishing such a result, where the language is reasonably clear. To me it is not at all doubtful that the language of the statute of 1917 would have been very different if such had been the object of it.

There have been some decisions of this court since the enactment of the amendment of 1917. The first to which I must refer is *Wolfe* v. *The King* (1). The precise question before the court in that case was whether or not the Crown was responsible, under the amendment of 1917, for damages caused by a fire which originated in the basement and first floor of a building leased by the Government of Canada under a lease terminable on fourteen days' notice, as a recruiting station, in 1916-17. In the Exchequer Court it was held that the portion of the building occupied by the Government was not a public work within the meaning of paragraph (*c*). The Chief Justice adopted that view (2). Mr. Justice Anglin held that the term "public

(1) (1921) 63 Can. S.C.R. 141. (2) (1921) 63 Can. S.C.R. 141, at 144.

work" in subsection (*c*) must be largely governed by the construction given to it in subsection (*b*), and that "public work" in subsection (*b*) comprehends only "physical works which are the subject of construction." Nevertheless, he adhered to the opinion, already referred to, which he had expressed in *La Compagnie Generale D'Entreprises Publiques* v. *The King* (1), as to the effect of paragraph (*c*), prior to the amendment of 1917.

It may be noted here that Anglin J. did not suggest and, as I think, plainly enough, did not hold the view, that "public work" under the amended statute had any broader signification than it had prior to this amendment.

It ought, perhaps, to be noticed here that Mr. Justice Anglin, apparently, in his judgment in *La Compagnie Generale D'Entreprises Publiques* v. *The King* (1), where he was dealing with the construction of the phrase "public work" as found in the parent enactment, that is to say, prior to the amendment of 1917, seems to have overlooked the circumstance that the rule of construction deducible from the reasons of Davies J. in *Paul* v. *The King* (2), as applied to the facts of that case, was more than an expression of that learned judge's individual opinion. It was, as we have seen, the basis of the decision of the majority of the court. The ratio of that decision, which was that "public work" ought not to be construed in such a way as to include within its scope public services, as such, but only physical things having a defined area and an ascertained locality, was, of course, binding upon him as well as upon all the members of the court.

Mr. Justice Mignault thought (p. 154) that "public work" in paragraph (*c*) should receive, if possible, the same construction as in paragraph (*b*); that the public work contemplated by paragraph (*b*) is a public work coming within the definition of "public work" and "public works" in the *Expropriation Act*; and that "it would, at all events, be impossible to give a wider meaning to these words" (any public work) "in subsection (*c*) than in subsection (*b*)." He held that the property in question occupied by the Crown was not a public work within the meaning of paragraph (*c*).

(1) (1917) 57 Can. S.C.R. 527. (2) (1906) 38 Can. S.C.R. 126.

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It must be observed that here Mr. Justice Mignault gives no countenance to a construction of the phrase "public work" under the amended Act which would ascribe to it a broader scope than that which had been attributed to it by the decisions of this court prior to the amendment. Indeed, he expressly holds that its scope is limited by the definition in the *Expropriation Act*; that such scope cannot be broader than that of the same words in paragraph (*b*), where they admittedly include only physical things, not services, and could, of course, not be applied to such a thing as a vessel or vehicle.

I should, perhaps, call attention to an error in the headnote in *Wolfe* v. *The King* (1). That note ascribes to Mr. Justice Mignault, as well as to Mr. Justice Anglin, the view that "public work," in section 20 (*c*) of the Act of 1917, "includes any operation undertaken by or on behalf of the Crown in constructing, repairing or maintaining public property." It is implied in what I have just said, and a perusal of the judgment of Mr. Justice Mignault establishes it, that Mr. Justice Mignault did not give his adherence to that view, but, on the contrary, was of the opinion that by reason of the context, "public work" in paragraph (*c*) must be read as limited by the definition of "public work" in the *Expropriation Act* and, consequently, as excluding public services, as such.

The next case is *The King* v. *Schrobounst* (2). Before proceeding with the discussion of that case, it is convenient to give what I believe to be the proper construction of the statute as amended. My own view, as already intimated, is that the principal object of the amendment of 1917 was to bring within the scope of the statute those cases such as *Piggott* v. *The King* (3) and *Chamberlin* v. *The King* (4), in which an injury not occurring on a public work was caused by the negligence of some servant of the Crown upon a public work; injuries, for example, caused by the escape of sparks from a carelessly constructed locomotive engine, by blasting operations carelessly conducted, and cases in which, through the negligent working of a canal, lands at some distance from the canal are flooded.

(1) (1921) 63 Can. S.C.R. 141.
(2) [1925] Can. S.C.R. 458.
(3) (1916) 53 Can. S.C.R. 626.
(4) (1909) 42 Can. S.C.R. 350.

My view has always been that where you have a public work, in the sense indicated in the course of the preceding discussion, and an injury is caused through the negligence of some servant of the Crown in the execution of his duties or employment in the construction, the repair, the care, the maintenance, the working of such public work, you are not deforming the language of the section, as amended in 1917, by holding that such an injury comes within the scope of the statute; that is to say, that it is an injury due to the negligence of an employee of the Crown while acting in the scope of his duties or employment "upon a public work." I have always thought, moreover, that the principle ought not to be applied in a niggardly way and that it ought to extend to the negligent acts of public servants necessarily or reasonably incidental to the construction, repair, maintenance, care, working of public works.

My reason for this view I can state in a sentence or two. The purpose of the legislation having been, as I have said, to correct the "stupid" inequalities, to use the phrase of Mr. Justice Idington, arising in the application of the statute as it stood before 1917, it seemed to me that that purpose would be largely frustrated if you read the word "upon," which had been substituted for the word "on," strictly as a preposition of place. In a very large number of cases the officer of the Crown responsible for the injury would be a person whose duties were not carried out on the public work in the physical sense. These considerations have seemd to me to be sufficient to justify the construction I have indicated.

Coming now to *Schrobounst's* case (1). In that case we had to consider a claim arising from the injury to a suppliant who had been run down by a motor vehicle driven by a servant of the Crown who was engaged in transporting to Thorold workmen employed on the Welland Canal there. The question at issue arose on demurrer, and I thought it involved no undue distortion of the language of the statute, as amended, to hold that an allegation that the driver was employed upon the Welland Canal was not, in the circumstances, a demurrable allegation. Further investigation of the circumstances might have disclosed that the employees who were being carried entered upon their duties

(1) [1925] Can. S.C.R. 458.

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in entering the motor vehicle. It is possible that *Schrobounst's* case (1) has carried the construction of section 19 (*c*) to the furthest permissible limit, but the principle on which it is based is clearly capable, in my opinion, of justification upon the grounds I have indicated.

The next decision was that in *The King* v. *Mason* (2). There, Government employees were engaged in dredging a part of a harbour adjoining a public pier for the purpose of effecting an excavation by which the harbour would be deepened and the navigation of it facilitated. They were engaged, in other words, in effecting a navigation improvement. The plans in evidence show that the excavation was to be of defined area and dimensions. It was, therefore, a public work within the meaning of the definition of "public work" contained in the *Expropriation Act* and in the *Official Arbitrators Act*. The injury was caused, it was held, by the negligent navigation of a tug which was towing away a scow laden with material taken up by the dredge. The operation in which the officer in charge of the tug was engaged was an operation necessarily incidental to the deepening of the harbour, to the creation, that is to say, of the harbour improvement. He was, therefore, on the principle indicated, employed upon the harbour improvement.

It is important, in applying legislation of this character, to be on one's guard against a very natural tendency. For the reasons I have given, the conclusion is inescapable that the purpose of the statute is not to establish the doctrine *respondeat superior* as affecting the Crown throughout the whole field of negligence. The area of responsibility, even in respect of negligence, is restricted. In *Schrobounst's* case (1) this court thought it was not infringing upon this restriction in holding that the facts of that case brought it within the statute. There is a natural tendency to take the latest case as a new starting point and to apply the statute to all cases which seem to fall within any of its apparent logical implications. But one thing is indisputable. If the supposed logical implication carries you beyond the area delimitated by the language of the statute, then you cannot give effect to it without transcending your function as a judge. You are

(1) [1925] Can. S.C.R. 458. (2) [1933] Can. S.C.R. 332.

constituting yourself a legislator; and you cannot, for the purpose of this case, having regard to the history of the legislation and the decisions upon it, which are binding on this court, hold that "public work," in this enactment, includes matters which are not physical things, but public service or public employment as such.

What I have said in relation to public service and public employment applies, in large degree, *mutatis mutandis*, to such things as vessels and vehicles.

The decisions of this court upon the statute as it stood prior to the amendment of 1917 (section 16 (*c*) of the statute of 1887) exclude, as appears above, the possibility of reading the words "public work," in the last mentioned statute, as including within their scope vehicles or vessels. Mr. Justice Burbidge, it is true, while rejecting the suggestion that vehicles or vessels generally fall within the scope of the phrase, did suggest, in *Paul* v. *The King* (1), that a dredge engaged in deepening one of the channels of the St. Lawrence river might be a public work or "on a public work"; but this suggestion was, as we have seen, definitely rejected by the Supreme Court of Canada on appeal from Mr. Justice Burbidge in that case (2); and, as already pointed out, vehicles and vessels are not within the definition in the *Official Arbitrators Act* or the *Expropriation Act*. Of course, if a construction had been adopted by which "public work," in the phrase "on a public work" in the statute of 1887, was held to signify public service or public employment, then the statute might have been applied to injuries caused by the negligence of a servant of the Crown driving a vehicle within the scope of his duties as such. But this view of the statute was rejected and the phrase "on a public work" was read as indicative of the locality in which the injury must occur in order to bring the case within the statute; and necessarily, as already explained, in view of the fact that the jurisdiction under the Act of 1887 was a jurisdiction transferred from the *Official Arbitrators Act* where the language, so far as pertinent to the present point, was identical with that employed in the statute of 1887; and in view of the definition of "public work" in the *Official Arbitrators Act*, and the scope and signification which, by force of that

(1) (1904) 9 Ex. C.R. 245. (2) (1906) 38 Can. S.C.R. 126

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definition, had become attached to the words "public work."

Having regard to all this, I find it very difficult to convince myself that anybody intending to subject the Crown to liability for negligence of its servants engaged in driving vehicles belonging to the Crown, or in navigating a vessel belonging to the Crown, could employ the procedure followed in effecting the amendment of 1917. If such had been the purpose of that amendment a different procedure would most assuredly have been resorted to.

I should add that if "public work" embraces employment and service as well as physical things, then the reference in *Schrobounst's* case (1) to the "public work" at Thorold was entirely superfluous; because the driver of the motor vehicle was admittedly, "acting within the scope of his duties or employment" upon a public service—that of driving the vehicle. On the construction now contended for, that, in itself, was sufficient to establish liability.

I have not thought it necessary to discuss the wealth of material put before us by Mr. Morse in his most able and interesting argument: because decisions in other jurisdictions upon other statutes, not in *pari materia,* interesting as they may be, cannot safely be relied upon as a guide, especially when, in the decisions of this Court, and in the history of the legislation under review, we have a very sufficient lexicon for the purpose in hand.

I now turn to the consideration of a point not mentioned on the argument which has been brought before us as the result of the research of our brother Cannon.

The respondents' claim rests upon section 19 of the *Exchequer Court Act* (R.S.C. 1927, ch. 34). In the French version the enactment upon which the respondents rely reads as follows:

19. La cour de l'Echiquier a aussi juridiction exclusive en première instance pour entendre et juger les matières suivantes:

* * *

(c) Toute réclamation contre la Couronne provenant de la mort de quelqu'un ou de blessures à la personne ou de dommages à la propriété, résultant de la négligence de tout employé ou serviteur de la Couronne pendant qu'il agissait dans l'exercice de ses fonctions ou de son emploi dans tout chantier public;

* * *

(1) [1925] Can. S.C.R. 458.

Before calling attention to the effect of this language, it is right to mention, first of all, that the statutes of the Parliament of Canada in their French version pass through the two Houses of Parliament and receive the assent of His Majesty at the same time and according to the same procedure as those statutes in their English version. The enactment quoted is an enactment of the Parliament of Canada just as the enactments of the same section, expressed in English, are.

The first section of the Act respecting the Revised Statutes of Canada, assented to on the 19th of July, 1924, is in these words:

1. So soon as the said Commissioners or a majority of them shall report in writing the completion of the said consolidation, including therein such Acts or parts of Acts passed during the present session and subsequent thereto as the Governor General upon the said report may deem advisable so to be included, the Governor General may cause a printed Roll thereof, attested under his signature and that of the Clerk of the Parliaments to be deposited in the office of such Clerk; and such Roll shall be held to be the original of the said statutes so revised, classified and consolidated.

Sections 4, 5 and 8 are as follows: ,

4. The Governor in Council, after such deposit of the said last mentioned Roll, may, by proclamation, declare the day on, from and after which the same shall come into force and have effect as law, by the designation of "The Revised Statutes of Canada, 192..."

5. On, from and after such day, the said Roll shall accordingly come into force and effect as and by the designation of "The Revised Statutes of Canada, 192...," to all intents, as if the same were expressly embodied in and enacted by this Act, to come into force and have effect, on from and after such day.

2. On, from and after such day, all the enactments in the several Acts and parts of Acts in Schedule A above mentioned shall stand and be repealed to the extent mentioned in the third column of the said Schedule A.

* * *

8. The said Revised Statutes shall not be held to operate as new laws, but shall be construed and have effect as a consolidation and as declaratory of the law as contained in the said Acts and parts of Acts so repealed, and for which the said Revised Statutes are substituted.

2. If upon any point the provisions of the said Revised Statutes are not in effect the same as those of the repealed Acts and parts of Acts for which they are substituted, then as respects all transactions, matters and things subsequent to the time when the said Revised Statutes take effect, the provisions contained in them shall prevail; but, as respects all transactions, matters and things anterior to the said time, the provisions of the said repealed Acts and parts of Acts shall prevail.

The proclamation contemplated by this Act was made on the 22nd of December, 1927.

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It is quite clear that, as regards the alleged negligence, in respect of which the respondents' claim arises, which occurred after the Revised Statutes received the force of law, the respondents' remedy, if any, must be derived from the Revised Statutes. It seems equally clear that, in construing section 19 of the *Exchequer Court Act*, the statute in its French version cannot be ignored.

The phrase "pendant qu'il agissait dans l'exercice de ses fonctions ou de son emploi dans tout chantier public" is plainly inconsistent with any construction of the phrase "public work" which has the effect of extending its meaning in such a way as to include public services. The rule for the construction of the parent enactment (50-51 Vict., c. 16, s. 16 (*c*)), laid down in *Paul* v. *The King* (1), that the phrase "public work" includes physical things of defined area and ascertained locality and does not include public services, is plainly sanctioned and adopted by these words as the rule applicable to the construction of section 19 in the Revised Statutes of 1927.

"Chantier," in this connection, implies defined area and locality and is incapable of application in such a way as to include public services, as such. We are indebted to our brother Cannon for the following note upon the subject which puts this point beyond dispute:

Littré, "Dictionnaire de la langue française," *verbo* "chantier" nous dit que d'après le sens donné soit par le bas latin, soit par le français, le chantier est une place, un espace vide où l'on entasse du bois, où l'on radoube un vaisseau, où l'on travaille quoi que ce soit.

Larousse du XXème siècle le définit: Atelier à l'air libre, clôturé ou non, où l'on travaille des matériaux de construction (bois, pierre, fer, etc.).

Harzfeld, Darmesteter & Thomas, "Dictionnaire de la langue française"; Lieu où l'on dépose des matériaux pour les travailler.

Lafaye, "Dictionnaire des synonymes de la langue française," sous la rubrique: "boutique, magasin, atelier, chantier, le définit: Tout lieu consacré à une industrie. Ces auteurs nous disent: Dans le chantier, comme dans la boutique, on fait deux choses, on tient des objets et on travaille. Mais le chantier, du latin *canterius*, chevron, étançon, se distingue par la matière des objets. Ce qu'on y tient en dépôt ou en vente, c'est exclusivement du bois, bois de chauffage, de charpente, de charronnage, de construction, et quelquefois des pierres à bâtir; d'autre part, le bois et la pierre sont les seules matières employées dans les travaux du chantier tous ou la plupart relatifs à l'industrie du bâtiment, et qui comprennent principalement ceux des charpentiers, des scieurs de long, des constructeurs de navires et des tailleurs de pierre.

Lebrun & Toisoul, "Dictionnaire Etymologique de la langue française:

Chantier: Atelier à l'air libre, clôturé ou couvert, où l'on travaille le bois, la pierre.

(1) (1906) 38 Can. S.C.R. 126.

Sachet, "Accidents du travail, 1er vol. p. 85, n° 82, nous dit:

"Le chantier est, en principe, à l'industrie du bâtiment et de la construction ce que l'usine, la manufacture ou la fabrique sont à l'industrie de la production: pris dans son acception première il signifie l'emplacement où des ouvriers sont occupés à travailler le bois, la pierre, la terre et les différents matériaux destinés à l'édification de bâtiments ou à la construction de routes, chemins, chaussées, travaux d'art, etc. Mais peu à peu le sens de cette expression s'est élargie et a fini par englober, du moins dans le langage courant, tous les lieux de travail un peu vastes, ainsi que les dépôts de marchandises des négociants en gros, quelle que soit la nature des travaux qui y sont exécutés."

La Revue Trimestrielle de Droit Civil, 1902, 1er vol., étudiant la loi sur la responsabilité des accidents du travail, donne, à la page 456, les indications suivantes:

"37. Chantiers—Dans quel sens le législateur de 1898 a-t-il entendu employer le mot "chantier"?

Pour M. Cabouat c'est un terme vague sans acception précise. Pour M. Loubat c'est un 'lieu en plein air où on dispose les objets pour les travailler' (Loubat, op. cit., p. 91, n° 100). Avec M. Sachet au contraire nous nous trouvons en présence d'une définition précise et restrictive: 'C'est un emplacement où des ouvriers sont occupés à travailler le bois, la pierre, la terre et les différents matériaux destinés à l'édification de bâtiments ou à la construction de routes' (Sachet, op. cit., p. 84, n° 10).

Cette définition est rejetée par la Cour de Caen, qui décide que 'l'expression chantier de l'article 1er de la loi de 1898 implique le groupement, dans un emplacement déterminé, d'un certain nombre d'ouvriers employés à la préparation des matériaux destinés à des constructions *ou à des travaux quelconques*' (C. Caen, 30 janv. 1901, *Rec. Arr. Caen*, 1901, p. 5).

The statute, in the French version, plainly does not envisage a vessel, as such, although it does envisage a shipyard. Nor does it contemplate an automobile as such, although it may very well be held to contemplate an automobile factory.

The statute, in the French version, must, of course, be read with the statute in the English version. I am not suggesting that, read in that way, the proper construction and application of the statute is inconsistent with the construction and application of it in the actual decision in *Schrobounst's* case (1) or in *Mason's* case (2), *supra;* but, the phraseology of the French version markedly emphasizes what I have already indicated, that is to say, the impropriety of making these two decisions a new point of departure for the development of a principle of liability which the statute plainly does not sanction.

The appeal should be allowed and the petition dismissed. We assume the Crown will not ask for costs.

(1) [1925] Can. S.C.R. 458. (2) [1933] Can. S.C.R. 332.

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RINFRET J.—The appeal should be allowed and the petition dismissed. In my opinion this is not a case for costs.

Appeal allowed.

Solicitor for the appellant: *W. Stuart Edwards.*

Solicitor for the respondents: *Paul Labelle.*

1934

*Nov. 21

1935

*May 13

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

AND

ROSE MOSCOVITZ AND ANNA MOSCOVITZ (SUPPLIANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Crown—Liability of, for negligence of its servant "while acting within the scope of his duties or employment upon any public work" (Exchequer Court Act, R.S.C. 1927, c. 34, s. 19 (c))—Collision through negligent driving of Crown's motor truck by soldier in Canadian Army Service Corps on returning from delivering military stores to Airport of Royal Air Force.

The suppliants claimed damages from the Crown by reason of the death of M., who was fatally injured when a motor truck in which he was riding collided with a motor truck of the Crown, driven (negligently, as found at trial) by K., a private in the Canadian Army Service Corps. K's duties were those "of driver of a mechanical transport vehicle," and he had driven the truck from its garage (which served as a depot for such vehicles) at Kingston, with military stores which were being sent by the Canadian Army Service at Kingston to a detachment of the Royal Air Force airport at Trenton. The stores had been delivered and the truck was returning to Kingston when the accident happened.

Held: The negligence of K. was not "negligence of any officer or servant of the Crown while acting within the scope of his duties or employment upon any public work" within s. 19 (*c*) of the *Exchequer Court Act* (R.S.C. 1927, c. 34), so as to make the Crown liable. While the airport at Trenton, as well as the garage at Kingston, might well fall within the description "public work" (*The King* v. *Dubois*, ante, p. 378), and while the duties of the officer or servant, in the execution of which the negligence occurs, may be so connected with the public work (in or in relation to the construction, repair, maintenance, working or care of it) as to bring negligence in their performance, elsewhere than on the public work, within the scope of the enactment (*The King* v. *Dubois supra*), there was in the present case no such connection between the duties or employment in which K. was engaged at the time of the collision, and either the garage at

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*PRESENT: Duff C.J. and Rinfret, Cannon, Crocket and Hughes JJ. (Rinfret J., through illness, did not take part in the judgment).

Kingston or the Trenton airport, as to bring his negligence within the scope of the words quoted. "Public work" in the enactment cannot be read as the equivalent of public service (*The King* v. *Dubois, supra*).

Judgment of Maclean J., President of the Exchequer Court of Canada, [1934] Ex. C.R. 188, reversed.

APPEAL by the Crown from the judgment of Maclean J., President of the Exchequer Court of Canada (1), in favour of the suppliants, who, by petition of right, had claimed damages from the Crown for the death of one Himan Moscovitz, who died from injuries received in a collision of motor trucks. The suppliant Rose Muscovitz was the widow of the deceased and was executrix of his estate. The suppliant Anna Moscovitz was step-mother of the deceased.

The deceased's death ensued from a collision between a motor truck in which he was a passenger, and a motor truck, the property of the Crown, driven on the occasion in question by Private Kelly, a soldier in a detachment of the Canadian Army Service Corps, stationed just outside the city of Kingston, Ont. Kelly's duties were those "of driver of a mechanical transport vehicle." The truck he was driving on the occasion in question was, when not in use, ordinarily stored in a garage at Kingston, which garage was owned or rented by the Crown and was occupied by the Royal Canadian Army Service Corps, and served as a depot for mechanical transport vehicles.

The truck, driven by Kelly, had been carrying certain military stores, sent by the Canadian Army Service at Kingston to a detachment of the Royal Air Force airport at Trenton, Ont. The stores had been delivered at Trenton, and the truck was on its return to Kingston, when the collision occurred. The trial judge found that the accident was owing to the negligent driving of Kelly.

The trial judge held that on the occasion in question Kelly was engaged upon a public work (within the meaning of the *Exchequer Court Act*), the transporting of military stores belonging to the Crown, from one point to another, from one public service to another, by a motor truck belonging to the Crown; also that Kelly was acting within the scope of his duties as a servant of the Crown at the time of the accident; and that the Crown was liable in damages to the suppliants.

(1) [1934] Ex. C.R. 188.

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THE KING v. MOSCOVITZ.

By the judgment of the Supreme Court of Canada, now reported, the appeal was allowed and the petition of right dismissed.

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

B. C. Donnan, K.C. and *N. Borins* for the respondent.

The judgment of Duff C.J. and Cannon, Crocket and Hughes JJ. (Rinfret J., through illness, not taking part in the judgment) was delivered by

DUFF C.J.—The learned President of the Exchequer Court has held that the Crown is responsible under section 19 (*c*) of the *Exchequer Court Act* (R.S.C. 1927, ch. 34) for the consequences of the negligence of Private Kelly in driving a motor truck, the property of the Crown, in the exercise of his functions as a private in the Canadian Army Service Corps. This negligence, it has been found, was the cause of the death of the deceased Himan Moscovitz in respect of which his widow and his stepmother, the respondents, claim compensation under Lord Campbell's Act.

The learned President says:

> I am of the opinion that on the occasion in question Kelly was engaged upon a public work, the transporting of military stores belonging to the Crown from one point to another, from one public service to another, by a motor truck belonging to the Crown. I am of the opinion also that Kelly was acting within the scope of his duties as a servant of the Crown at the time of the accident.

Kelly's duties were those "of driver of a mechanical, transport vehicle." In pursuance of those duties, on the 8th of November, 1932, he drove a truck from the garage at Kingston to the airport at Trenton for the delivery there of military supplies for the use of the "personnel of the airport." Kelly was not in any way attached to the airport, had no connection with the Air Force, and was not subject to the orders or instructions of any Air officer at the airport.

The stores in the truck were in charge of Private Batty who had been detailed for that purpose. Batty's truck was accompanied by another engaged on the same service in charge of Corporal Cherry. After unloading at Trenton, the trucks did not return to Kingston direct but proceeded to Belleville, where, as he explained, Corporal Cherry "had business." At Belleville they stopped for an hour and a half or two hours, leaving, about seven o'clock in the evening, on their return to Kingston. It was on this stage of their journey that the collision occurred in which the deceased Himan Moscovitz unhappily lost his life.

The question of substance on the appeal is whether or not the negligence of Kelly, in the language of section 19 (*c*), is

negligence of any officer or servant of the Crown while acting within the scope of his duties or employment upon any public work

or, in the French version,

negligence de tout employé ou serviteur de la Couronne pendant qu'il agissait dans l'exercice de ses fonctions ou de son emploi dans tout chantier public.

It will be clear, from what has been said in the judgment in *The King* v. *Dubois* (1), that the airport at Trenton, as well as the garage at Kingston, may well fall within the description "public work" or "chantier public," in the meaning of this enactment.

The precise point for determination is whether or not Kelly, in driving a truck belonging to the Army Service Corps, was in the sense of the enactment "acting within the scope of his duties or employment upon" such "public work"; or "dans" the "chantier public" in question.

The phrases "public work" and "chantier public" contemplate, as has been fully explained in *Dubois'* case (1), not public services, but physical things. Nevertheless, the phrase "upon any public work," "dans tout chantier public," has received a liberal construction in the decisions of this court in *The King* v. *Schrobounst* (2) and *The King* v. *Mason* (3). It is not essential that the act of negligence should be committed by the negligent officer or servant during his presence on the public work. The duties of the officer or servant, in the execution of which the negligence occurs, may be so connected with the public work (in or in relation to the construction, repair, maintenance, working or care of it) as to bring negligence in their performance elsewhere within the scope of the statute. The ground upon which such a construction may be supported has been explained in the judgment in *Dubois' case* (1).

I cannot find here any such connection between the duties or employment in which Kelly was engaged at the time of the collision, and either the garage at Kingston which served as a depot for mechanical transport vehicles, or the Trenton airport, as to bring Kelly's negligence within the scope of the words quoted. Kelly was, in truth, simply the driver of an automobile the property of the Crown un-

(1) Ante, p. 378. (2) [1925] Can. S.C.R. 458.
(3) [1933] Can. S.C.R. 332.

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der the control of the Army Service Corps; an automobile used generally, it may be assumed, for the purposes of military transport. If you interpret "public work," "chantier public," as the learned President has done, as embracing a public service of that kind, then the case, of course, falls within the statute. I have given my reasons in the *Dubois* case (1) for the conclusion that the phrase cannot receive such an extended interpretation. Such a public service is not, as explained in that judgment, for the purpose in hand, differentiated by any substantial distinction from any other public service; and to read "public work," "chantier public," as the equivalent of public service, is, for the reasons there given, plainly inadmissible.

The appeal should be allowed and the action dismissed. I assume the Crown will not ask for costs.

Appeal allowed.

Solicitor for the appellant: *Chas. A. Payne.*

Solicitor for the respondents: *B. C. Donnan.*

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* May 22.
* June 10.

WILLIAM STOTT AND SARAH STOTT (DEFENDANTS) ..... } APPELLANTS;

AND

ELLIS A. HENINGER (PLAINTIFF).... RESPONDENT.

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

Landlord and tenant—Distress Act, section 5—Right of distress as against chattel mortgage from "the tenant"—Mortgage given while mortgagor was not tenant of distraining landlord—The Distress Act, R.S.A., 1922, c. 97, s. 5.

One Beatrice A. Raby, some years prior to becoming the tenant of the appellants, had given the respondent a chattel mortgage on her household goods and furniture. During the tenancy, the appellants made a distress for overdue rent and seized the goods found on the premises. The respondent claimed the goods under the chattel mortgage and asserted that they were exempt from the appellants' distress for rent. An interpleader issue between the parties was directed to be tried. Section 5 of the Alberta *Distress Act,* R.S.A., which restricts a landlord's right of distress to the goods of the tenant contains the proviso that the "restriction shall not apply * * * in favour of

* PRESENT:—Duff C.J. and Cannon, Crocket and Davis JJ. and Dysart J. *ad hoc.*

(1) Ante, p. 378.

any person whose title is derived by purchase, * * * assignment from the tenant whether * * * by way of mortgage or otherwise" * * * The trial judge, Lunney, J., held in favour of the appellants (landlords); the Appellate Division (Clarke, J. dissenting) took the opposite view, and accordingly gave judgment in favour of the respondent (chattel mortgagee). The Appellate Division gave special leave to the appellants to appeal to this Court.

Held, reversing the judgment of the Appellate Division ([1934] 3 W.W.R. 332), that the goods and chattels covered by the mortgage were subject to the appellants' distress for rent.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1), reversing the judgment of the trial judge, Lunney J., and maintaining the respondent's action.

The appellants, having rented certain premises to one Beatrice A. Raby, made a distress for $365 overdue rent and seized certain chattels on the premises. The respondent claimed these chattels under a chattel mortgage for $1,500 made to him by Beatrice A. Raby before the tenancy commenced. An interpleader issue between the parties was directed to determine whether at the time of the seizure under the distress warrant the chattels distrained were the property of the respondent or of the landlords.

O. M. Biggar K.C. for the appellants.

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

The judgment of the Court was delivered by

DAVIS J.—This appeal raises a very narrow, though rather difficult, point. Beatrice A. Raby, some years prior to becoming the tenant of the appellants, had given the respondent a chattel mortgage on her household goods and furniture. During the tenancy, the appellants made a distress for overdue rent and seized the goods found on the premises. The respondent claimed the goods under the chattel mortgage and asserted that they were exempt from the appellants' distress for rent. An interpleader issue between the parties was directed to be tried. The parties reside and the premises are situate in the city of Lethbridge, Alta.

Section 5 of the Alberta *Distress Act,* R.S.A., ch. 97, is as follows:

(1) [1934] 3 W.W.R. 332.

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5. A landlord shall not distrain for rent on the goods and chattels the property of any person except the tenant or person who is liable for the rent although the same are found on the premises; but this restriction shall not apply in favour of a person claiming title under or by virtue of an execution against the tenant or in favour of any person whose title is derived by purchase, gift, transfer or assignment from the tenant whether absolute or in trust or by way of mortgage or otherwise nor to the interest of the tenant in any goods on the premises in the possession of the tenant under a contract for purchase or by which he may or is to become the owner thereof upon performance of any condition nor where goods have been exchanged between two tenants or persons by the one borrowing or hiring from the other for the purpose of defeating the claim of or the right of distress by the landlord nor shall the restriction apply where the property is claimed by the wife, husband, daughter, son, daughter-in-law, or son-in-law of the tenant or by any other relative of his in case such other relative lives on the premises as a member of the tenant's family.

The respondent's chattel mortgage having come into existence before Beatrice A. Raby became the tenant of the appellants, the sole question for decision is whether or not the goods and chattels covered by the mortgage were subject to the appellants' distress for rent. At common law, goods were liable to be distrained for rent in respect of their locality, that is by reason of their being on the demised premises, and not in respect of their ownership; and the goods of a stranger to the tenancy might be distrained on as well as the tenant's own goods. But the English law became so altered by the *Law of Distress Amendment Act,* 1908, that it may be said that the goods of any other person than the tenant cannot now be distrained on unless they are exempt from the protection given by that Act or otherwise by law. The Alberta statute provides that a landlord shall not distrain for rent on the goods and chattels the property of any person except the tenant or person who is liable for the rent although the same are found on the premises, but certain exceptions are made to this general restriction. One of these exceptions is that the restriction shall not apply

in favour of any person whose title is derived by purchase, gift, transfer or assignment from the tenant whether absolute or in trust or by way of mortgage or otherwise.

The point in issue is whether in order to come within this exception the mortgage must have been made while the mortgagor was the tenant of the landlord or whether the exception applies irrespective of the time of the making of the mortgage. The exception is " of any person whose title is derived * * * from the tenant * * *." Is

it necessary that the mortgage be made during the term of the tenancy?

Lunney, J., of the Supreme Court of Alberta, on the trial of the issue held in favour of the appellants (landlords). Upon appeal, the Appellate Division of that Court (1) (Clarke, J. dissenting), took the opposite view and accordingly gave judgment in favour of the respondent (chattel mortgagee). The Appellate Division gave special leave to the appellants to appeal to this Court.

The English statute, the *Law of Distress Amendment Act*, 1908, 8 Edw. VII, c. 53, s. 4, provides that the Act shall not apply

to goods comprised in any bill of sale, hire-purchase agreement, or settlement made by such tenant.

There appears to be no case under the English statute that has raised the point with which we have to deal, but I find in the last edition of Woodfall's Landlord and Tenant (23rd ed., 1934) at p. 581, in discussing the exception in respect of "goods comprised in any bill of sale" the following comment in foot-note (*o*),

the exclusion of such goods was intended to prevent the tenant from giving the appearance of a financial position which he does not possess.

In my opinion it is too narrow a view of the statute to draw a distinction between a chattel mortgage made before and one made after the commencement of the tenancy. The words of the exception must be considered with relation to the principal matter. The intention of the legislature obviously was to protect the landlord from claims against the goods on the premises that might be made by the different classes of persons enumerated in the section, and to give to the landlord in respect of his rent a priority over such claims. I can find nothing in the language of the section to support the view that the only mortgage in contemplation of the legislature was a mortgage made after the commencement of the tenancy. It would have been easy to have so said if that had been in the mind of the legislature. In *Hackney Furnishing Co.* v. *Watts* (2), Bray, J., in considering whether the goods distrained on were comprised in a hire-purchase agreement within the meaning of s. 4 of the *Law of Distress Amendment Act*, 1908, said, at p. 232:

(1) [1934] 3 W.W.R. 332. (2) [1912] 3 K.B. 225.

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Davis J.

It must be remembered that the statute is one depriving the landlord of a part of his common law right to distrain. The words must not be strained so as to further restrict his rights.

It had been held in the Court of Appeal in *Rogers, Eungblut and Co.* v. *Martin* (1), that the words "made by such tenant" in s. 4 of the Act, refer not only to the word "settlement," which immediately precedes them, but also to the previous words "bill of sale" and "hire-purchase agreement."

I would allow the appeal and determine the issue in favour of the appellants with costs throughout.

Appeal allowed with costs.

Solicitors for the appellants: *G. Virtue.*

Solicitors for the respondent: *Johnstone, Ritchie & Huckvale.*

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* Feb. 13, 14.
* June 10.

ROBERT W. MAGUIRE (DEFENDANT) ..... APPELLANT;

AND

NORTHLAND DRUG COMPANY, LIMITED (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Contract—Bond given by employee not to set himself up in like business or work—Consideration—Enforceability—Public policy—Restraint of trade—Rights of employer—Onus.

The appellant, after being in the employment of the respondent company for about eleven months in its retail drug business in Flin Flon, signed a bond under seal in the sum of $5,000 which, after reciting that the respondent company had agreed to take him into its employment as a druggist, stated the condition of the bond was that if he should leave or be dismissed from the respondent's services he would not set himself up in like business or work for anyone else within 25 miles from Flin Flon within a period of five years after such leaving or dismissal. The appellant understood that his refusal to execute the covenant would lead to an early termination of his employment. About four years later the respondent company terminated the employment by giving the appellant one month's notice, and soon after his dismissal, the appellant entered service with another drug company which had opened a drug store immediately adjoining the respondent's store. Alleging breach of covenant, the respondent company brought action on the bond for the penal

* PRESENT:—Duff C.J. and Lamont, Cannon and Davis JJ. and Dysart J. *ad hoc.*

(1) [1911] 1 K.B. 19.

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sum of $5,000, and, at the trial, was allowed to ask for additional relief by way of injunction. The trial judge dismissed the action on the ground that there was no consideration for the bond. The majority of the Court of Appeal held that the bond was sufficiently supported by consideration and was otherwise enforceable.

Held that there was in this case legal consideration for the bond; but, reversing the judgment of the Court of Appeal ([1934] 2 W.W.R. 298), that, under the circumstances of this case, the bond was unreasonable and unenforceable.

Per Davis J.—A master is not permitted to impose restraint outside of reasonable limits upon his servant, after discharge, from turning his skill and knowledge to the best account and the respondent company failed to establish facts and circumstances surrounding the employment of the appellant sufficient for the Court to say that the agreement was reasonable.

APPEAL from the judgment of the Court of Appeal for Manitoba (1), reversing the judgment of the trial judge, Adamson, J. (2) and maintaining respondent's action by awarding damages in the sum of $2,000 for past breach, and granting an injunction against further breach, of a covenant in restraint of trade as between an employer and an employee.

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

O. M. Biggar K.C. and *M. B. Gordon* for the appellant.

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

The judgment of Duff C.J. and Lamont and Cannon JJ. and Dysart J. *ad hoc* was delivered by

DYSART J. *ad hoc*—This is an appeal from the Court of Appeal for Manitoba (1) pronounced the 14th day of May, 1934, setting aside a judgment of Adamson J. (2), and awarding damages in the sum of $2,000 for past breach, and granting an injunction against future breach, of a covenant in restraint of trade as between an employer and an employee.

The Northland Drug Company, a partnership, was doing retail drug business at the town of The Pas in Northern Manitoba in January, 1928, and had planned to open up branch stores at Flin Flon and other mining localities in that part of the province. In January, the company engaged the appellant, a pharmaceutical druggist, to enter its

(1) [1934] 2 W.W.R. 298. (2) [1933] 3 W.W.R. 82

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employ with the view of taking charge of the Flin Flon store when opened. The hiring was by the month at a monthly salary of $200 and certain living privileges. After a few weeks spent at The Pas, the appellant was placed in charge of the newly-opened Flin Flon store and there continued in the capacity of manager until September, 1932, when he was dismissed on one month's notice. In the interval, in May, 1928, the said partnership was changed to an incorporated company, and in December of that year, nearly eleven months after the commencement of his employment, the appellant executed the covenant in question.

The covenant is in the form of a bond under seal, and is conditioned as follows, that,

> The said Robt. W. Maguire shall not while in the employment of the said Northland Drug Company, Limited, or its successors in business, whether in his present or any other capacity, or during the period of five years after he shall * * * have ceased to be so employed, directly or indirectly, and whether as principal, agent, director of a company, traveller, servant or otherwise, carry on, or be engaged, or concerned, or take part in the business of retail druggist, or such sundry business as is usual to the retail drug within 25 miles of Flin Flon Mine, except on behalf of or with the consent in writing of the said Northland Drug Company, Limited, or its successor in business.

The circumstances in which the bond was executed were as follows: the general manager of the respondent, in one of his frequent visits to the Flin Flon store for the purposes of inspection and overseeing, produced the document which he had had prepared for the occasion, and requested the appellant to sign it, stating that all branch managers of the respondent were required to sign similar bonds. This was the first intimation the appellant had of any such requirement. Nevertheless, he signed without protest or objection. Thereafter he continued in his employment, without change in the tenure thereof or in the scope of duties, until dismissed nearly three years later.

The appellant's duties are not clearly defined in evidence. His work at the store at The Pas was presumably intended as preparatory for his work at the Flin Flon, and we may assume that he was there made acquainted with many of his employer's business methods and practices. At Flin Flon he is said to have been "in charge of" the store as "manager," but the bond recites that he was employed "in the capacity of druggist." It appears that he gave orders for the purchase of merchandise from time to time, but always subject to the supervision and directions of

the respondent's general manager; and also that he acted as salesman in the store. The scope and nature of the business carried on at the Flin Flon store are variously supposed to include the sundry businesses usual to a retail drug store, adapted to the needs of a frontier mining town.

Soon after his dismissal, the appellant entered service in another drug store, which then opened at Flin Flon immediately adjoining the respondent's store, in which employment his duties were quite similar to those which he had performed for the respondent. Alleging breach of covenant, the respondent brought action on the bond for the penal sum of $5,000, and, at the trial, was allowed to ask for additional relief by way of injunction. The learned trial judge (1), feeling that he was bound by the decision of the Manitoba Court of Appeal in the case of *Copeland-Chatteton* v. *Hickok* (2), dismissed the action on the ground that there was no consideration for the bond. On appeal, the majority of the learned judges distinguished the *Copeland-Chatteton* case (2) and held that the bond was sufficiently supported by consideration and was otherwise enforceable. Trueman and Robson JJ. dissenting, differed on the point of consideration, but were both of opinion that the covenant was unreasonable and therefore unenforceable.

There was ample consideration for the bond. Although the necessity of proving consideration for the covenant is not dispensed with by the presence of a seal in a case of this kind, sufficient appears from the evidence adduced at the trial to establish, that the employee was given to understand, and did understand, that his refusal to execute the covenant would lead to an early termination of his employment, and that the employer tacitly promised that if the bond were signed, the employment would not soon be terminated. On this mutual understanding the covenant was entered into, and thereafter the employer refrained indefinitely from exercising its legal right to issue the notice which, at the expiration of one month, would terminate the employment. This continuance of employment constitutes legal consideration, the adequacy of which will not

(1) [1933] 3 W.W.R. 82. (2) (1907) 16 Man. R. 610.

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be inquired into by courts: *Gravely* v. *Barnard* (1); *Skeans* v. *Hampton* (2).

The decision in this case must turn on the larger question of whether or not this particular covenant is one which ought to be enforced. Public policy, as interpreted by the courts, requires on the one hand that employers be left free to protect from violation their proprietary rights in business, and on the other hand, that every man be left free to use to his advantage his skill and knowledge in trade. In the weighing and balancing of these opposing rights, the whole problem in cases of covenants in restraint of trade is to be found. Less latitude is allowed in the enforcement of restrictions as between employer and employee than as between vendor and purchaser of good will. *Prima facie* all covenants in restraint of trade are illegal and therefore unenforceable: *Morris* v. *Saxeby* (3). The illegality being a presumption only, is rebuttable by evidence of facts and circumstances showing that the covenant is reasonable, in that it goes no further than is necessary to protect the rights which the employer is entitled to protect, while at the same time it does not unduly restrain the employee from making use of his skill and talents. The onus of rebutting the presumption is on the party who seeks the enforcement, generally the covenantee. Reasonableness is the test to be applied in ascertaining whether or not the covenant is a fair compromise between the two opposing interests.

The practical question then is this, (1) what are the rights which the employer is entitled to protect by such a covenant, and (2) does the covenant not go beyond what is reasonably adequate in furnishing that protection. Proprietary rights, such as secrets of manufacturing process and secret modes of merchandising, clearly come within the group of rights entitled to protection. So also is the right of an employer to preserve secret information regarding his customers, their names, addresses, tastes and desires: *Mason* v. *Provident Clothing Co.* (4). Competition, as such, is something which will not be restrained: *Vancouver Malt & Sake Brewing Co.* v. *Vancouver Breweries Ltd* (5).

(1) (1874) 18 Eq. 518.
(2) (1914) 31 O.L.R. 44.
(3) [1916] 1 A.C. 688.
(4) [1913] A.C. 724.
(5) [1934] A.C. 181.

The information and training which an employer imparts to his employee become part of the equipment in skill and knowledge of the employee, and so are beyond the reach of such a covenant; *Leng* v. *Andrews* (1). The covenant in any event must not go further than is reasonably adequate to give the protection that is to be afforded; if it goes too far or is too wide, either as to time or place or scope, it will not be enforced; and if bad in any particular, it is bad altogether; *Mason* v. *Provident Clothing Co.* (2).

Viewed in the light of these well-established principles, the case before us disclosed several grave defects and weaknesses. The evidence discloses no special proprietary rights, and we are left to infer from the general nature of the business what general rights were entitled to protection. We are not told that there were any secrets of manufactuing or of buying or selling to be protected; no private knowledge concerning customers, their names, addresses, is revealed. Even if there were any such, the evidence does not show that the employer imparted to the employee in confidence any information concerning any of these matters. There is no hint that the employee has ever abused or misused, or that he has threatened or is likely, to abuse or misuse any such information. In the face of the almost entire lack of evidence on these points, the Court should not supply the deficiencies from the realm of conjecture or supposition.

The only evidence offered in support of the claim for relief is that the respondent's gross sales substantially declined in the months following the employee's change of employment. The decline, however, had already set in before 1932 and had more than once been called to the attention of the employee; how far, if at all, it had been a factor in bringing about his dismissal is not mentioned. But the decline in sales must have been due in large measure to the general depression in business, and perhaps to the existence of the new competing store,—two factors against neither of which the employer had a right to be protected by this covenant. It is said that some customers transferred their patronage from the old to the new store, and that this is to be counted a violation of the covenant.

(1) [1909] 1 Ch. 763. (2) [1913] A.C. 724.

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The customers were free to change their patronage at will, and to show their preference for superior attractions in a rival store, or for the personality and efficiency of the salesmen thereof. So long as the change was not brought about by the solicitation and canvassing of the appellant, there could be no good grounds for complaint.

If the purpose of the bond was to prevent competition, it is illegal, and it is difficult to see that its main purpose was not to prevent competition. The secrets of trade, if any must have been acquired by the covenantee long before the bond was given. The nature of the business would indicate that in the purchasing and disposing of goods there was little that was secret or peculiar to this company. In opening up the store at Flin Flon, the employer took financial risks which increased as time went on, and gross sales began to decline. Considering the time and circumstances in which the bond was taken, it appears that one of its main objects was to prevent competition. If so, the bond is unenforceable.

Moreover, the bond goes beyond what is reasonably adequate in furnishing any protection to which the employer could conceivably be entitled. It forbids the covenantee, not only from violating proprietary rights, but from exercising his right to follow his trade or calling in any capacity, however humble or obscure, or however remote from the danger of infringing any proprietary rights of the covenantee.

For all these reasons, we think the bond is unreasonable, and is not enforceable. The appeal is allowed and the judgment of the trial judge is restored with costs throughout.

DAVIS J.—I agree that this appeal must be allowed and the judgment of the trial judge restored with costs throughout. This conclusion I reach upon the simple ground that a master is not permitted to impose restraint outside of reasonable limits upon his servant, after discharge, from turning his skill and knowledge to the best account and that the respondent (plaintiff) failed to establish facts and circumstances surrounding the employment of the appellant (defendant) sufficient for the Court to say that the agreement was reasonable.

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The continuance of the appellant in the service of the respondent was in itself sufficient consideration for an agreement imposing a reasonable restraint, but the respondent having failed to establish that the restraint imposed by the agreement was reasonable under all the circumstances, the action to enforce the agreement must fail. The appeal should be allowed and the judgment at the trial restored with costs throughout.

Appeal allowed with costs.

Solicitor for the appellant: *C. C. Sparling.*

Solicitor for the respondent: *J. A. Campbell.*

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* Mar. 19.
* Apr. 18.

DAME MARIE-ANNA SARRAZIN (PLAINTIFF) ..... APPELLANT;

AND

LES CURÉ ET MARGUILLIERS DE L'ŒUVRE ET FABRIQUE DE LA PAROISSE DE ST-GABRIEL DE BRANDON (DEFENDANTS)..... RESPONDENT.

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

Bankruptcy—Motion for leave to appeal—Whether ecclesiastical bodies or institutions within the ambit of the Bankruptcy Act—Whether a "corporation" or "a person"—Bankruptcy Act, section 2 (cc, k. p.).

Ecclesiastical bodies or institutions are not included within the ambit of a bankruptcy statute essentially designed for the administration of the property of persons or corporations carrying on business. The *Bankruptcy Act* was never intended to apply to a parish or church or other religious body.

MOTION for special leave to appeal to the Supreme Court of Canada from a judgment of the Court of King's Bench, appeal side, province of Quebec (1), quashing an order of Boyer J. granting the appellant's petition in bankruptcy for a receiving order against the respondents.

Oscar Gagnon for the motion.

Paul Belcourt contra.

* Davis J. in chambers.

(1) (1935) Q.R. 58 K.B. 123.

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SARRAZIN v. LES CURÉ ET MARGUILLIERS DE ST. GABRIEL DE BRANDON.

DAVIS J.—The petitioner, dame Marie-Anna Sarrazin, moved before me for special leave to appeal to the Supreme Court of Canada from the judgment of the Court of King's Bench, appeal side, province of Quebec, rendered on January 31, 1935 (1), whereby an order of Mr. Justice Boyer, granting her petition in bankruptcy for a receiving order against the respondent, Les curé et marguilliers de l'œuvre et fabrique de la paroisse de St-Gabriel de Brandon, was quashed upon the ground that the provisions of the *Bankruptcy Act* do not apply to the respondent. A similar decision upon somewhat similar facts, *Demoiselle Bricault et autres* v. *Les curé et marguilliers de l'Œuvre et fabrique de la paroisse de Saint-Etienne* (2), was rendered by the Court of King's Bench.

The appellate court from which leave to appeal to this Court is now sought held that the respondent was not a corporation within the definition of that word in the *Bankruptcy Act,* section 2 (*k*) which is as follows:

"Corporation" means any company incorporated or authorized to carry on business by or under an Act of the Parliament of Canada or of any of the provinces of Canada, and any incorporated company, wheresoever incorporated, which has an office in or carries on business within Canada, but does not include building societies having a capital stock nor incorporated banks, savings banks, insurance companies, trust companies, loan companies or railway companies.

Counsel for the petitioner admits that the respondent has no corporate existence by statute or otherwise and, while not abandoning the contention advanced by him in the courts below that the respondent is in the nature of a corporation, now puts his case mainly upon the definition of the word "person" in the *Bankruptcy Act,* section 2 (*cc*) which is as follows:

"Person" includes a firm or partnership, an unincorporated association of persons, a corporation as restrictively defined by this section, a body corporate and politic, the successors of such association, partnership, corporation, or body corporate and politic, and the heirs, executors, administrators or other legal representative of a person according to the law of that part of Canada to which the context extends.

It is useful in considering the matter to refer to the definition in the Act of the word "debtor"—section 2 (*p*).

"Debtor" includes any person, whether a British subject or not, who, at the time when any act of bankruptcy was done or suffered by him, or any authorized assignment was made by him.

(i) was personally present in Canada, or

(ii) ordinarily resided or had a place of residence in Canada, or

(1) (1935) Q.R. 58 K.B. 123.

(iii) was carrying on business in Canada personally or by means of an agent or manager, or

(iv) was a corporation or a member of a firm or partnership which carried on business in Canada.

Counsel do not substantially differ in their statements as to the nature of the respondent. Counsel for the petitioner says that the curé and the three elected wardens of the parish constitute what he terms a special board empowered to manage the temporal affairs of the parish. Counsel for the respondent describes the respondent as a council of administration charged with the administration of the affairs of the parish.

I have no doubt that the *Bankruptcy Act* was never intended to apply to a parish or church or other religious body. Clear and explicit language would be necessary to bring ecclesiastical bodies or institutions within the ambit of a bankruptcy statute essentially designed for the administration of the property of persons or corporations carrying on business.

Moreover, the petitioner's debt is represented by two promissory notes aggregating $525 signed in the name of the respondent by a former curé of the parish. A very serious question was raised by the present curé and wardens when this bankruptcy petition was filed that the parish was not bound in law by these notes signed by the former curé alone, and it appears that many other notes of similar kind extending into very large sums of money are outstanding. Counsel for the petitioner admits that before this petition was filed he knew that the present curé and wardens repudiated any liability on the part of the parish for payment of the two notes upon which the petition was founded. The question of liability of the parish for these notes was something that had to be faced as a matter of law at the very outset in order to establish the relation of debtor and creditor between the petitioner and the respondent. The learned judge before whom the petition came took evidence on this issue and determined that the respondent was liable. Then in order to establish the essential fact of insolvency, the present curé was asked whether the parish could meet all the known outstanding notes of similar kind to those upon which the petition was based if the question of liability were determined against the parish, and the curé admitted that if there

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was liability on the parish in respect of all similar notes, running into very large amounts, the parish would be unable to pay them. That was not proof of the act of bankruptcy charged against the respondent that it had ceased to meet its liabilities generally as they became due. I do not feel justified in granting leave in this case, and the motion must therefore be dismissed with costs.

Motion dismissed with costs.

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*May 13.

JOHN R. TAYLOR (PLAINTIFF)..... APPELLANT;

AND

THE LONDON ASSURANCE CORPORATION AND OTHER ASSURANCE COMPANIES (FIVE APPEALS CONSOLIDATED) (DEFENDANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Fire insurance—Action to recover for loss—Question whether, in applying for insurance, there was misrepresentation or "fraudulent" omission to communicate material circumstance within statutory condition 1 of The Insurance Act, R.S.O. 1927, c. 222.

In statutory condition 1 under s. 98 of *The Insurance Act*, R.S.O., 1927, c. 222, voiding a policy if the applicant for insurance "misrepresents or fraudulently omits to communicate any circumstance which is material * * *," the word "fraudulently" connotes actual fraud.

On an appeal by the insured under certain fire insurance policies, from the judgment of the Court of Appeal for Ontario ([1934] O.R. 273) dismissing his appeal from the judgment of Kelly J. (*ibid*) dismissing his actions, it was *held* that said statutory condition did not afford a defence to the respondent insurance companies; the course of the litigation precluded them from relying upon any charge of actual fraud; and, while the plaintiff's (appellant's) agent's partial statement of the facts to the insurance agent (in stating that there were fires "all over the country"; without disclosing that there was a fire in McNish township, which, as known to plaintiff but not to plaintiff's agent, adjoined the township in which was the lumber camp proposed to be insured) might, if calculated to mislead the insurance agent, amount to a misrepresentation, yet this was an issue of fact not suggested by the insurance companies at the trial, and the evidence did not shew that the insurance agent was misled; further, a misrepresentation, to produce a legal effect, must be one influencing the other party to enter the contract, and it did not appear that anything said by the plaintiff's agent influenced the insurance agent in assenting to effect the insurance. (*Smith* v. *Chad-*

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wick, 9 App. Cas. 187, at 195-197, cited). The appeal was allowed and judgment given for the insured.

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APPEAL by the plaintiff from the judgment of the Court of Appeal for Ontario (1) dismissing his appeal from the judgment of Kelly J. (1) dismissing his actions. The plaintiff brought five separate actions, each against an insurance company to recover its proportionate share of a loss sustained by plaintiff through the destruction by fire of his camp buildings and equipment, which, he claimed, had been validily insured by them. The actions were tried together. The appeals to this Court were, by order, consolidated and proceeded with as one appeal.

The facts are discussed at length in the judgments below (1). The plaintiff, a lumberman residing in North Bay, Ontario, owned certain camp buildings and equipment situate in the township of MacBeth in the District of Sudbury in the Province of Ontario. On May 24, 1932, the forests in MacBeth and in the adjoining townships were very dry and there were numerous forest fires in various parts of the district other than the township of MacBeth. On that day a forest fire started in the township of McNish, which adjoins the township of MacBeth. In the afternoon of that day the chief forester for the North Bay District by telephone informed the plaintiff's wife (the plaintiff being absent from home) of the fire in McNish. About six or six-thirty o'clock in the evening she got in touch by telephone with the plaintiff who was some 150 miles distant. He asked her to telephone Mr. Kennedy, a local insurance agent in North Bay, through whom insurance on this camp had in former years been placed, and to have the property in question insured. This she did that evening, and Kennedy (who was authorized by the defendant companies to issue policies) undertook, over the telephone, to hold the property in question covered or insured to the same extent as in previous years. The plaintiff's wife, in her evidence, stated that Mr. Kennedy had asked her " are there any fires?" to which she answered " Yes, all over the country "; but that she did not mention McNish; that at that time she did not know, though the plaintiff did, that McNish was next to MacBeth. The policies were

(1) [1934] O.R. 273; [1934] 2 D.L.R. 657.

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completed about ten or eleven o'clock the next day (May 25th). The property in question was burned about noon or one o'clock on the 25th, from the fire which had extended from its starting point in McNish. The policies were delivered on the morning of the 26th, at which time Kennedy knew that the fire in question had occurred, but felt bound by his above mentioned undertaking on May 24th. Subsequently on the same day plaintiff paid the premium, which was subsequently tendered back by the companies but was not accepted by the plaintiff.

Counsel for the defendant companies, at the opening of the trial, said:

> Mr. Taylor is a gentleman of good standing in the community, and we do not desire to suggest that either Mrs. Taylor or Mr. Taylor was guilty of fraud in the ordinary sense of the word, but we say in law what happened consisted of fraudulent omission to notify the agent who, of course, had no knowledge of the fact that the fire was raging or of the existence of the fire. It seems to me that that is a question more of law than fact. There is some fact in it, of course.

The actions were tried with a jury; but the trial judge submitted only one question to them, reserving all others to the Court. The question submitted to the jury was: "Did Mrs. Taylor tell Mr. Kennedy, when asking him to place the insurance, that there were fires all over the country?" (as to which matter there was dispute in the evidence, Mr. Kennedy stating that he did not make "any query as to any fires"), and the jury's answer was "yes." The trial judge reserved judgment, and subsequently delivered judgment dismissing the actions. An appeal by the plaintiff to the Court of Appeal was dismissed; and plaintiff appealed to this Court.

Peter White K.C. and *Grant Gordon* for the appellant.

D. L. McCarthy K.C. and *J. D. Watt* for the respondents.

The judgment of Duff C.J. and Cannon and Crocket JJ. was delivered by

DUFF C.J.—I think I can most conveniently explain my view of the questions in controversy on this appeal by first reproducing textually the first condition to be read into fire insurance policies in Ontario by force of 14 Geo. V., ch. 50, sec. 92; and also, textually, the condition which it replaced (R.S.O. 1914, ch. 183, sec. 194). The condition under the first mentioned statute is in these words:

If any person applying for insurance falsely describes the property to the prejudice of the insurer, or misrepresents or fraudulently omits to communicate any circumstance which is material to be made known to the insurer in order to enable it to judge of the risk to be undertaken, the contract shall be void as to the property in respect of which the misrepresentation or omission is made.*

The condition under the earlier statute (R.S.O. 1914, ch. 183, sec. 194) is as follows:

1. If any person insures property, and causes the same to be described otherwise than as it really is to the prejudice of the company, or misrepresents or omits to communicate any circumstance which is material to be made known to the company, in order to enable it to judge of the risk it undertakes, such insurance shall be of no force in respect to the property in regard to which the misrepresentation or omission is made.

The only material change in the condition, as prescribed by the later statute, is effected by introducing the adverb "fraudulently" before the verb "omits."

My view of these words is that the adverb "fraudulently" connotes actual fraud. I think the words of this condition must be read in their ordinary sense, and that such is the ordinary sense of them. True it is that the term "fraud" is, and has always been, employed by lawyers in different senses. Where a fiduciary relation exists, a violation of a fiduciary duty without fraudulent intention may amount to fraud in the contemplation of a court of equity. Again, in the case of contracts *uberrimae fidei,* the insurance contract for example, a failure to disclose a material fact, however innocent from the moral point of view, or a misstatement of fact, however innocent from the same point of view, is conduct to which lawyers commonly apply the term "fraud."

We are not concerned with frauds consisting in a breach of duty arising out of a fiduciary relation; and it is too plain for argument that if the term "fraudulently" is used in this statutory condition to describe an innocent breach of the duty to disclose material facts which rests upon the insured under a contract of insurance, then the amendment of the condition effected by the legislation of 14 Geo. V. was merely pleonastic.

I think the course of the litigation precludes the respondent from relying upon any charge of actual fraud. No such charge was pleaded. At the opening of the trial there was an application to strike out the jury notice on the ground that the questions involved were really questions of

*Reporter's Note: This became the first statutory condition under s. 98 of *The Insurance Act,* R.S.O. 1927, c. 222.

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law. Counsel for the respondent disclaimed any intention of charging "fraud in the ordinary sense." He announced his intention of contending that the failure to disclose material facts in breach of the duty to disclose constituted a fraudulent omission within the contemplation of the condition as amended—"fraud in law," as he described it. An amendment was allowed permitting the respondent to set up the condition, but no amendment was allowed or asked for alleging fraud in fact.

During the course of the trial, counsel for the respondents disclaimed, on more than one occasion, any imputation of intentional wrongdoing on behalf of the plaintiff or his wife. Then, at the conclusion of the trial, there was some discussion about the submission of questions to the jury. What occurred on that occasion is rather important, and I quote from the record:

Mr. WHITE: At the request of your Lordship made to my friend and myself to discuss the question as to what, if anything, is to be left to the jury—

His LORDSHIP: Questions of fact.

Mr. WHITE: I submit that there should be left to the jury the question as to whether there was on the part of the plaintiff or his agent an omission to communicate to the agent of the insurance company any circumstances material to be made known to the defendants in order to enable them to judge of the risk to be undertaken, and also this further question: If so, was such omission fraudulent?

His LORDSHIP: "Omitted fraudulently with intent to deceive," if you are following the language of the section.

Mr. HENDERSON: "Fraudulently" within the meaning of the first statutory condition.

Mr. WHITE: No; I think I will leave it.

His LORDSHIP: I will put this on record as if it were taking place in court in the absence of the jury. My present inclination is that, after having heard all the evidence, I must conclude that the questions of law and fact are generally so involved that the case can be better disposed of without the assistance of the jury, but I am willing that there should be submitted to the jury any questions purely as to fact; and later, in view of this ruling, counsel have agreed that I should submit this question:

Q. Did Mrs. Taylor tell Mr. Kennedy, when asking him to place the insurance, that there were fires all over the country?

That is the only thing upon which counsel need address the jury.

The learned trial judge dismissed the action. The material part of his judgment I set out verbatim:

The important question is whether plaintiff, through his wife as his agent or otherwise, made full and frank disclosure to the defendants or their representatives of all such matters as were material to be made known to them in order to enable them to judge of the risk to be undertaken. Kennedy, with several years' acquaintance with and knowledge of

plaintiff, says he is not the sort of person who would fraudulently misrepresent. From what I observed, I would expect the same to be said of plaintiff's wife. She says she was not then aware of the location of McNish township with reference to the township of MacBeth. While it must be taken that she told Kennedy there were fires all over the country, she did not tell him what Greenwood said about the fire in the township of McNish nor did plaintiff by any other means convey to the defendants' representatives the information which he had that there was a fire in McNish. While defendants' representatives must have been aware of the existence of bush fires in some localities, they could not reasonably be presumed to have known that there was a fire in McNish township. A definite and express mention of a fire in that township would have localized their knowledge and might have so affected their judgment and decision in the matter as to result in a refusal on their part to undertake the risk. This is a reasonable inference independent of the evidence at the trial of Kennedy and witnesses Hamilton and McBride on that point. It appears to me that Greenwood's information on the 24th that there was a fire in the township of McNish indicated to plaintiff that danger to his camp was imminent. He has admitted that until May 24th he did nothing in regard to placing insurance on this property. On that day he seems to have been stirred into action by learning that there was a fire in McNish. That information was manifestly material and important to him; in any event he so regarded it; and being material and important to him who then, and no doubt in consequence thereof, desired and gave instructions to have insurance placed on the property, why not equally material and important to defendants and their representatives who were asked to assume and did assume the risk? In my opinion, the existence of a fire in the township of McNish was a material fact within the knowledge of plaintiff at the time the insurance was effected which he did not disclose, but omitted to communicate to the insurers. It has been contended that he did not fraudulently omit to communicate that fact. The omission may not have been fraudulent in the sense that he deliberately withheld the information with intent to deceive the insurers; but I do think that it was fraudulent in the sense that he did not observe that good faith towards the insurers which his duty to them called upon him to observe, in that he did not make a full disclosure of this material fact. The duty which rests upon an owner in effecting insurance is dealt with in Welford and Otter-Barry's Law relating to Fire Insurance, 3rd Edition, at p. 126 and following pages, where many reported cases are cited which I need only refer to. I draw attention, however, to the case of *Carter* v. *Boehm* (1), because of these statements therein of Lord Mansfield (at page 1909) in regard to non-disclosure of a material fact, even without fraudulent intentions:—

"Insurance is a contract upon speculation. The special facts, upon which the contingent chance is to be computed, lie most commonly in the knowledge of the insured only; the underwriter trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge, to mislead the underwriter into a belief that the circumstance does not exist, and to induce him to estimate the risque, as if it did not exist. The keeping back such circumstance is a fraud, and therefore the policy is void. Although the suppression should happen through mistake, without any fraudulent intention, yet still the underwriter is deceived, and the policy is void; because the risque run is

(1) (1766) 3 Burr. 1905.

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really different from the risque understood and intended to be run, at the time of the agreement."

The issue with which the learned judge is dealing in this passage is stated in his first sentence:

> The important question is whether plaintiff, through his wife as his agent or otherwise, made full and frank disclosure to the defendants or their representatives of all such matters as were material to be made known to them in order to enable them to judge of the risk to be undertaken.

He finds that there was a fraudulent omission within the meaning of the condition, but his construction of the condition is made clear by this sentence:

> The omission may not have been fraudulent in the sense that he deliberately withheld the information with intent to deceive the insurers; but I do think that it was fraudulent in the sense that he did not observe that good faith towards the insurers which his duty to them called upon him to observe, in that he did not make a full disclosure of this material fact.

and by his reproduction of the passage from Lord Mansfield's judgment in *Carter* v. *Boehm* (1).

No issue of fraud in fact, that is to say, of fraudulent intention, was pronounced upon by the learned trial judge or was tried. No charge of fraud in that sense was made. Indeed, as we have seen, the intention to make any such charge was explicitly disclaimed.

In the Court of Appeal, the learned Chief Justice of Ontario accepted the judgment of the trial judge and based his own judgment on the grounds therein explained. Mr. Justice Masten negatives fraud. Mr. Justice Macdonnell negatives actual or "moral" fraud.

The substantial question upon which we have to pass is that which is raised in the very clear and forcible judgment of Mr. Justice Davis. Put concisely, his view is this: the appellant knew that there were fires not far from his camp; that his camp was in danger, and, although Mrs. Taylor herself was not aware of this, her statement is Taylor's statement, and her statement that there were fires all over the country, without disclosing that they were fires in the vicinity of the camps, amounted to misrepresentation. Now, whether or not that is so, is a question of fact. If Mrs. Taylor's partial statement of the facts was calculated to mislead the person to whom it was addressed, then it might amount to a misrepresentation. But no such issue of fact

(1) (1766) 3 Burr. 1905.

was suggested by the respondents at the trial. The agent Kennedy, who was called as a witness, does not intimate that he was in any way misled by anything that Mrs. Taylor said. I should not be prepared myself to find as a fact, in view of what occcurred at the trial, that such was the case.

But there is a more serious difficulty. A misrepresentation in the air is of no legal consequence. It must, to produce such effects, as the phrase is, be *dans locum contractui;* that is to say, it must be a misrepresentation influencing the other party to enter the contract. As I have said, the witness with whom Mrs. Taylor had the conversation in the course of which this misrepresentation, if it was such, occurred, does not suggest that anything Mrs. Taylor said to him had any effect on his mind of any description whatever; much less that it influenced him in assenting to effect the insurance. My conclusion, from the evidence as a whole, is that it had no such effect.

I think Lord Blackburn's language in *Smith* v. *Chadwick* (1) is in point. At pp. 195-197, he says:

> In an ordinary action of deceit the plaintiff alleges that false and fraudulent representations were made by the defendant to the plaintiff in order to induce him, the plaintiff, to act upon them. I think that if he did act upon these representations, he shews damage; if he did not, he shews none. And I think the plaintiff in such a case must not only allege but prove this damage. It is as to what is sufficient proof of this damage that I wish to make my remarks. I do not think it is necessary, in order to prove this, that the plaintiff always should be called as a witness to swear that he acted upon the inducement. At the time when *Pasley* v. *Freeman* (2) was decided, and for many years afterwards, he could not be so called. I think that if it is proved that the defendants with a view to induce the plaintiff to enter into a contract made a statement to the plaintiff of such a nature as would be likely to induce a person to enter into a contract, and it is proved that the plaintiff did enter into the contract, it is a fair inference of fact that he was induced to do so by the statement. In *Redgrave* v. *Hurd* (3), the late Master of the Rolls is reported to have said it was an inference of law. If he really meant this he retracts it in his observations in the present case. I think it not possible to maintain that it is an inference of law. Its weight as evidence must greatly depend upon the degree to which the action of the plaintiff was likely, and on the absence of all other grounds on which the plaintiff might act. I quite agree that being a fair inference of fact it forms evidence proper to be left to a jury as proof that he was so induced. But I do not think that it would be a proper direction to tell a jury that if convinced that there was such a material representation

(1) (1884) 9 App. Cas. 187.
(2) 2 Sm. L.C. 66, 73, 86 (8th ed.)
(3) (1881) 20 Ch. D. 1, at 21.

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they ought to find that the plaintiff was induced by it, unless one of the things which the late Master of the Rolls specified was proved; nor do I think he meant to say so. I think there are a great many other things which might make it a fair question for the jury whether the evidence on which they might draw the inference was of such weight that they would draw the inference. And whenever that is a matter of doubt I think the tribunal which has to decide the fact should remember that now, and for some years past, the plaintiff can be called as a witness, on his own behalf, and that if he is not so called, or being so called does not swear that he was induced, it adds much weight to the doubts whether the inference was a true one. I do not say it is conclusive.

I think the appeal should be allowed and the appellant should have judgment for the amount claimed with costs throughout.

RINFRET J.: I agree with the Chief Justice that this appeal should be allowed and the appellant should have judgment for the amount claimed, with costs throughout.

HUGHES J.: I agree with the Chief Justice. The appeal should be allowed with costs throughout.

Appeal allowed with costs.

Solicitors for the appellant: *White, Ruel & Bristol.*

Solicitors for the respondents: *Henderson, Herridge & Gowling.*

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CLEMENT HAMBOURG (PLAINTIFF), APPELLANT;

AND

THE T. EATON COMPANY LIMITED (DEFENDANT) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Negligence—Injury to pianist while playing in auditorium, from bursting of lens of spotlight—Liability of proprietor of auditorium—Relationship between proprietor and pianist—Mere licensee—Extent of proprietor's duty.

Defendant rented its auditorium to H. for a musical recital which H. was giving, and permitted H., without charge, to use it for a rehearsal previous to the recital. Plaintiff, H.'s brother, was, for a fee (which also covered his preparatory work), to assist H. as a pianist in the recital. During the rehearsal, while plaintiff was playing a piano on the stage of the auditorium, the lens of a spotlight suspended above the piano burst and a piece of broken glass cut his hand. He sued defendant for damages.

Held: Plaintiff was a mere licensee of defendant, without an interest, plaintiff not having entered the auditorium upon business which concerned

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defendant upon defendant's invitation, express or implied. In such circumstances plaintiff did not come within the rule applied in *Indermaur* v. *Dames*, L.R. 1 C.P. 274, L.R. 2 C.P. 311, and certain later cases, which treat a licensee with an interest as being entitled practically to the same degree of protection at the hands of the licensor as an invitee in the usual sense. To bring a person within this category it must be shewn that he was upon the premises for some purpose in which he and the proprietor had a common or joint interest (*Hayward* v. *Drury Lane Theatre*, [1917] 2 K.B. 899, at 913; *Addie* v. *Dumbreck*, [1929] A.C. 358, at 371). Even if plaintiff had a substantial financial interest in the success of the recital, this would make no difference in the relationship between defendant and plaintiff and would be quite insufficient to make plaintiff a licensee with a joint or common interest as between him and defendant. Plaintiff being a mere licensee, defendant's only duty to him was not to expose him to a hidden peril or trap, that is, a peril which was not apparent to the licensee but the existence of which was known to the licensor (or which ought to have been known to the licensor, should it be taken from certain dicta in *Addie* v. *Dumbreck*, [1929] A.C. 358, and *Fairman* v. *Perpetual Investment Bldg. Soc.*, [1923] A.C. 74, that the proprietor's duty is recognized as so enlarged; whether so or not, the law still recognizes a distinct line of demarcation between the duty owed to an invitee and that owed to a mere licensee).

Held, further: Upon the evidence, the spotlight in question was not a trap or hidden peril within the meaning of the cases.

Dismissal of the action by the Court of Appeal for Ontario (reversing judgment at trial) was affirmed.

APPEAL by the plaintiff from the judgment of the Court of Appeal for Ontario (1), which reversed the judgment of McEvoy J. in his favour, and dismissed the action. The action was for damages for injury to the plaintiff's hand caused by its being struck by a piece of broken glass when the lens of a spotlight, suspended above the piano at which the plaintiff was playing on the stage of the defendant's auditorium, burst. Plaintiff claimed that the injury was caused by defendant's negligence. The material facts of the case are sufficiently stated in the judgment now reported. The plaintiff's appeal to this Court was dismissed with costs.

J. E. Corcoran K.C. for the appellant.

G. W. Mason K.C. for the respondent.

The judgment of Duff C.J. and Cannon, Crocket and Hughes JJ. was delivered by

(1) [1934] O.W.N. 115.

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HAMBOURG v. THE T. EATON CO. LTD.

CROCKET, J.—The appellant, a professional pianist and piano teacher, was playing a piano on the stage of the auditorium of the respondent company in its Toronto departmental store in the forenoon of May 10th, 1932, when the lens of a spotlight suspended above the piano burst and one of the pieces of the broken glass fell upon his left hand and cut his forefinger. The resulting wound was dressed by a surgeon who put four stitches in it. These stitches were taken out a week later when the skin had fully healed but the appellant claimed that he suffered serious damage in consequence of his being incapacitated for the proper carrying on of his lessons with his pupils for some weeks and in the enforced cancellation of several important concert engagements to which he was looking forward as opportunities for enhancing his professional reputation. He brought this action to recover compensation from the respondent as the proprietor of the auditorium, claiming that his injury was caused by the respondent's negligence.

At the time of the accident a rehearsal was in progress of a program for a recital which the appellant's brother, Boris Hambourg, with the assistance of some other musicians, was to give in the auditorium that night. The latter, through his concert agent, had some time previously entered into a written rental agreement for the use and occupation of the auditorium for the purpose of this recital between the hours of 7 p.m. and 12 p.m. on May 10th at a rental of $125, one of the terms of which was that the lessor should heat, seat and light the auditorium, but that it should not be responsible for any interruption of or interference with such heating or lighting. The lessee upon his part agreed, *inter alia,* that no alterations should be made to the auditorium, its furnishings or equipment, without the consent of the lessor in writing, and that if any special lights, decorations or settings were required, to the installation of which the lessor might be agreeable, such would be supplied by the lessee at the lessee's own expense.

The lease contained no provision for the holding of any rehearsal but permission had been granted by the respondent's auditorium manager to Mr. Boris Hambourg to use the auditorium for this purpose without charge dur-

ing the forenoon of that day. The appellant was to assist in the recital as a pianist but was not a partner of his brother in the undertaking, having no responsibility for any of the expenses or no right to share in the profits. He was to receive a fee or honorarium of $100 for his participation, which, it was explained, was to cover all his preparatory work therefor.

The evidence shews that the rehearsal had been in progress for about two hours when the appellant went to the piano to play an accompaniment for his brother in a particular piece and that he had been at the piano for not more than five or ten minutes when the lens burst. The lights apparently had been on from the beginning of the rehearsal, including the spotlight in question.

As to just what happened in connection with the positioning of the spotlight in relation to the piano the evidence is very obscure and unsatisfactory. Mrs. Hambourg says that some red and blue lights had been in use which she told someone—she couldn't remember whom—she did not like, and that these lights were almost instantaneously turned off, she presumed by a switch, leaving a beam of uncoloured light trained on the piano and that the crash occurred almost instantaneously with the turning off of the coloured lights. Mr. Tait, the manager of the auditorium, who is an experienced electrician, was not on the stage at the time but in some portion of the wing. He said he knew nothing about any request being made for or anything being said about the non-use of coloured lights in connection with the rehearsal or the recital either before or during the progress of the rehearsal, and did not remember Mrs. Hambourg speaking to him at any time about coloured lights. He said he had given the instructions for the hanging of the spotlight because he had been asked to arrange the lighting as it had been for a concert held a few nights before and that he gave these instructions to one or other of two union electricians whom he usually employed for the placing or changing of the stage lights to suit the requirements of the lessees. It appears that these men hung the spotlight in the usual manner from one of several parallel metal pipes or battens extending from one side of the stage to the other, and which were movable up and down by means of pulleys,

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and that the particular spotlight with which the action is concerned was placed for use on this occasion between 15 and 17 feet above the keyboard of the piano.

No evidence was given to shew who placed the piano under the spotlight, or whether the spotlight was suspended from the batten after the position for the piano had been selected, but it appears that a Heintzman concert grand piano had been supplied to Boris Hambourg for special use at the recital, so that one would naturally infer that either the lessee or some of his assistants would select the particular position in which it was to be placed. Neither of the two men who were employed to do the work and actually placed the spotlight in position was called as a witness, and none of the plaintiff's witnesses vouchsafed any explanation as to the placing of the piano directly below the spotlight or who directed it to be placed in that position.

Although no definite evidence was given on the point, it was estimated by a Mr. Gordon Best, an electrician, who gave evidence in behalf of the plaintiff, from two of the broken pieces which fell on the piano, that the lens was an 8-inch diameter lens and several inches thick. It was mounted in the frame or housing containing a 5-inch diameter 1,000 watt bulb 5 inches below the bulb, by means of a grooved ring of spring brass or bronze in which it was firmly held by two small bolts. Provision for ventilation was made by means of a circle of round holes bored through the metal of the hood below the bulb and above these a number of rectangular slits running lengthwise of the lamp. That at least is the effect of the somewhat confused description which was attempted of the ventilation system of the lamp, as I interpret it.

These spotlights and the other electrical equipment had been purchased about a year before on the opening of the auditorium by Mr. Tait from the Amalgamated Electric Co. of Toronto, which he described as one of the best electrical equipment firms in the country. The electrical equipment provided for the auditorium, he said, he considered the best on the market, both in construction and design and adaptability to their needs.

The action was tried before Mr. Justice McEvoy without a jury. His Lordship found that the defendants knew

or ought to have known that the lens was liable to crack from the heat of the bulb and fall and strike anyone upon the stage, and that it was quite impossible on the evidence to hold that the plantiff had any possible chance of knowing the danger created by suspending over the stage such a lens with such a light behind it and that such a piece of mechanism was liable to crack and fall upon the stage. He held that the defendants were negligent in not having inspected the dangerous lens to see that it was in safe condition and in not providing some shield to prevent the same from falling upon the plaintiff or other people lawfully using the stage from time to time, and that upon the evidence the defendants were liable to the plaintiff for the injuries suffered. He assessed the damages at $3,000.

On appeal to the Court of Appeal the trial judgment was set aside and the action dismissed, per Mulock, C.J., and Riddell and Middleton, JJ. The Appeal Court held that the plaintiff was nothing more than the licensee of the defendant; that, while he undoubtedly had permission to use the auditorium, the sole right he had as licensee was as a member of the concert company; and that any change which had been made in the premises or its equipment after his entry into the auditorium was made at the express request of those through whom his right as licensee came; that the change was made for his advantage in all probability and that it would be absurd to hold the defendant liable for a change so made; that he was excluded from the rule in *Indermaur* v. *Dames* (1); and that, even if the plaintiff could be considered in the category of invitee, there was no actionable negligence for which the defendant could properly be held liable.

I am of opinion that the Appeal Court was right in holding upon the evidence that the relationship between the respondent and the appellant was that of a mere licensee without an interest, the latter not having entered the auditorium upon business which concerned the respondent upon the respondent's invitation, express or implied. In such circumstances the appellant in my judgment does not fall within the rule which was applied in *Indermaur* v. *Dames* (2) or in the later cases of *Holmes*

(1) (1866) L.R. 1 C.P. 274; L.R. 2 C.P. 311.

(2) (1866) L.R., 1 C.P. 274, affirmed L.R. 2 C.P. 311.

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v. *North Eastern Ry. Co.* (1) and *Wright* v. *London & North Western Ry. Co.* (2), all of which treat a licensee with an interest as being entitled practically to the same degree of protection at the hands of the licensor as an invitee in the usual sense. To bring a person within this category, however, it must be shewn that he was upon the premises for some purpose in which he and the proprietor had a common or joint interest, as pointed out by Scrutton, L.J., in *Hayward* v. *Drury Lane Theatre* (3), and by Viscount Dunedin in the Scottish Appeal of *Addie* v. *Dumbreck* (4) in the House of Lords.

In the case at bar the learned trial Judge, in addition to the findings already quoted, held as a fact that the plaintiff had a substantial financial interest in the success of the recital. This, with all respect, I think, makes no difference in the relationship between the respondent and the plaintiff and is quite insufficient to make the latter a licensee with a joint or common interest as between him and the respondent whom he seeks to fix with the same degree of liability as if the respondent were an invitor, and he the respondent's invitee, that is to say, with the duty on the part of the invitor to the invitee, to quote the words of Willes, J., in *Indermaur* v. *Dames* (5) to "use reasonable care to prevent damage from unusual danger, which he (the invitor) knows or ought to know," or, as Lord Hailsham, L.C., put it in *Addie* v. *Dumbreck* (6), "the duty of taking reasonable care that the premises are safe." Apart from contractual obligations, this is the highest duty the law imposes upon proprietors of premises towards those who go upon them, and applies only where persons go upon the premises as invitees of the proprietors. "The lowest," said Lord Sumner, then Hamilton, L.J., in *Latham* v. *Johnson* (7).

is the duty towards a trespasser. More care, though not much, is owed to a licensee—more again to an invitee * * * The rule as to licensees, too [as in the case of trespassers], is that they must take the premises as they find them apart from concealed sources of danger; where dangers are obvious they run the risk of them. In darkness where they cannot see whether there is danger or not, if they will walk they walk at their peril.

(1) (1869) L.R. 4 Ex. 254; (1871) L.R. 6 Ex. 123.
(2) (1876) 1 Q.B.D., 252.
(3) [1917] 2 K.B. 899, at 913.
(4) [1929] A.C. 358, at 371.
(5) (1866) L.R. 1 C.P. 274.
(6) [1929] A.C. 358.
(7) [1913] 1 K.B. 398, at 410-411.

With every word of this passage Viscount Dunedin said in *Addie* v. *Dumbreck* (1) he agreed and that it was the law of Scotland as well as that of England. In the same case Lord Hailsham, L.C., said:—

> In the case of persons who are not there by invitation, but who are there by leave and licence, express or implied, the duty is much less stringent—the occupier has no duty to ensure that the premises are safe, but he is bound not to create a trap or to allow a concealed danger to exist upon the said premises, which is not apparent to the visitor, but which is known—or ought to be known—to the occupier.

Whether the words "or ought to be known" in the last quoted dictum are to be taken as a recognition that the proprietor's duty in respect of concealed dangers or "traps" has been enlarged, is a question upon which there has been much argument. It is clearly obiter, as all the Law Lords taking part agreed that the boy in that case was a trespasser and not a licensee, either with or without an interest. In *Fairman* v. *Perpetual Investment Building Society* (2), Lord Atkinson, in discussing the question of "a hidden peril," also made use of the phrase "of the existence of which he knew, *or ought to have known,*" and Lord Wrenbury did the same thing. In the following year, in *Sutcliffe* v. *Clients Investment Co.* (3) where the question of the correctness and intention of these dicta was elaborately and ably argued, Bankes, L.J., stated that these dicta were obiter and that it did not appear anywhere in the *Fairman* case (4) that either Lord Atkinson or Lord Wrenbury intended to make any alteration in the law. He added:—

> No alteration was in fact made if the plaintiff in that case was a licensee with an interest, because there is no material difference between a licensee with an interest and a person who is described as an "invitee," that is to say, a person in the position of the plaintiff in *Indermaur* v. *Dames* (5).

Scrutton, L.J., said:—

> If that is law, in what class should this workman be placed? He was allowed by the tenant to be upon the premises for the purpose of doing repairs, and so far as access to the balcony was necessary for that purpose he was there with the consent of the landlords. He was a licensee with an interest. Now I will do nothing to interfere with the classical judgment of Willes J. in *Indermaur* v. *Dames* (6).

Atkin, L.J., agreed.

(1) [1929] A.C.358.
(2) [1923] A.C. 74.
(3) [1924] 2 K.B. 746.
(4) [1923] A.C. 74.
(5) L.R. 1 C.P. 274; L.R. 2 C.P. 311
(6) L.R. 1 C.P. 274, 288.

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Whether or not the dicta of Lords Atkinson, Wrenbury and Hailsham are accepted as recognizing any extension of the proprietor's obligation in respect of concealed dangers by making the liability of a proprietor of premises for a concealed danger depend not only upon his actual knowledge, but upon his means of knowledge as well—or what he ought to have known—it is quite apparent that the law still recognizes a distinct line of demarcation between the duty owed by a proprietor of premises to one who is an invitee and to another who is a mere licensee. Indeed the very dicta themselves, from which the debated alternative phrase has been extracted to support the extension of the principle contended for, afford conclusive evidence that it was never intended thereby to place invitees and mere licensees in the same category as regards the proprietor's responsibility towards them. Witness Lord Hailsham's statement that in the case of persons who go upon the premises by leave and licence, express or implied, the duty is *much less stringent,* than in the case of those who are present by the invitation of the occupier. If there were not still a material and very important distinction between the two degrees of duty, can it be supposed that Viscount Dunedin in the very same case would have emphasized as he did that in considering cases of that class the first duty of the trial tribunal was "to fix once and for all into which of the three classes the person in question falls" (trespassers, licensees or invitees) and apply the law governing that category without "looking to the law of the adjoining category?" Or that His Lordship should have used such a striking expression as: "There is no half-way house, no no-man's land between adjacent territories"?

For my part I cannot think that it was intended, by the use of the debated alternative phrase in defining an owner's or occupier's liability for a concealed danger in the quoted passages relied upon, to lay down the principle that the owner or occupier owed the same duty to a licensee without an interest as to an invitee.

The appellant being a mere licensee, the respondent's only duty to him was not to expose him to a hidden peril or trap, that is, as I understand it, a peril, which was not apparent to the licensee but the existence of which was known to the licensor—(or, if one is disposed to add the alternative

phrase above discussed) or which ought to have been known to the licensor.

Was, then, this spotlight, suspended above the piano in the position described, with no netting or screen below it to prevent pieces of broken glass falling upon persons or objects on the stage floor in the event of the lens cracking or bursting, a trap or hidden peril within the meaning of the cases?

I am of opinion that it was not.

There is but one conclusion, I think, which can reasonably be drawn from the evidence regarding the bursting of the lens, viz: that it broke, either in consequence of some latent defect in the glass itself or in consequence of its becoming overheated from the incandescent lamp in the hood above. There was no fore-warning of impending danger. No evidence of anything else than the sudden, instantaneous crash itself. No flaw or defect whatsoever in the lens or any part of the spotlight, so far as the evidence discloses, which was visible or discoverable, to indicate that it held any danger that would not be common to all other spotlights of the same type. The most thorough examination possible before the occurrence of the accident would not have revealed to the manager of the auditorium any more than to the appellant or anybody else that the lens was likely to burst.

This particular spotlight had been used with others of the same type for more than a year since the opening of the auditorium. The lens had never cracked before, even though it seems that it had at times been mounted on the stage floor or a table in a reverse position with the lens above the bulb—a position in which the manager admitted some lenses had cracked—but he had never known of one to crack in a spotlight suspended from above with the lens below the bulb. Best, the plaintiff's witness, admitted that the tendency of a lens to crack was much greater where it was above the lamp than where it was below, and it is obvious that such ample provision as was made for the ventilation of the hood of the particular one in question might reasonably be relied upon by anyone to remove all danger of the lens becoming overheated from an incandescent light above it. The auditorium manager had never known any lens to crack from overheating from an incandescent lamp placed above it. Neither had Donald Cowburne, the only other electri-

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cian who gave evidence in behalf of the respondent. Gordon Best, the appellant's expert, although he stated he had heard of it, was unable to give a single specific instance. Cowburne testified that when lenses did crack they usually cracked directly across the lens; and that it was quite unusual for them to break in any other way.

Apart from the fact that the lens did burst on the occasion in question there was no evidence whatever, it seems to me, to suggest that the spotlight was a source of danger, and, even after the event, the entire evidence leaves it exceedingly problematical as to whether the bursting was in reality caused by the overheating of the lens or by some latent undiscovered defect in the glass.

Be this as it may, the spotlight itself, which had no visible or discoverable flaw or defect, suspended as it was without a protecting shield, was in no sense a trap or hidden peril. If it held any danger, which might reasonably have been anticipated at all, that danger was in no manner a hidden or concealed one. It must have been quite as apparent to any visitor on the stage floor, and especially to one who went to the piano to play in and directly under its flood light, as to the auditorium manager or the particular workman who had placed it in position. The only conceivable ground, in my judgment, upon which it could be held to be a concealed danger within the meaning of the cases would be, either that the auditorium manager knew that the lens was likely to become overheated from the incandescent lamp above it and to burst, or that he ought to have known of that likelihood. That he was convinced that there was no such danger and that the spotlight in the position in which it was placed was absolutely safe cannot, I think, be doubted upon the evidence. This being so, it seems to me to be quite impossible to hold either that he knew the lens was likely to become overheated and burst or that he ought to have known that to be the case.

The appeal should be dismissed with costs.

RINFRET J.—I concur with Mr. Justice Crocket that the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Godfrey & Corcoran.*

Solicitors for the respondent: *Mason, Foulds, Davidson, Carter & Kellock.*

GEORGE ST. JOHN AND THE VANCOUVER STOCK AND BOND COMPANY LIMITED (PLAINTIFFS) APPELLANTS;

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* May 2, 3.
* June 10.

AND

GEORGE L. FRASER (DEFENDANT).. RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Securities Act—Investigation—Delegation of authority—Nature of proceedings—Whether judicial—Right to cross-examine witnesses—Natural justice—Right to injunction—Section 29 as bar—Security Frauds Prevention Act—B.C. (1930) c. 64, ss. 10, 29.

Authority was delegated by the Attorney-General under section 10 of the *Securities Fraud Prevention Act* to the respondent to conduct investigations to ascertain whether any fraudulent act or any offence against the Act or the regulations has been, was being or was about to be committed by Wayside Consolidated Gold Mines Limited, and for that purpose to examine any person, company or thing whatsoever. During the course of the investigation by the respondent, it became apparent that the Vancouver Stock and Bond Company Limited, one of the appellants, had been an underwriter of the securities of the Wayside Company, and the appellant St. John, who was a shareholder and the business manager of the underwriting company, was called upon and did give evidence. The investigation extended over several months, from the date of the respondent's appointment on August 15, 1934, until October 22, 1934, during which time a great deal of evidence was taken, on which last day the appellants issued a writ against the investigator Fraser for an injunction to restrain him from proceeding further with the investigation in so far as it either directly or indirectly related to the conduct of the appellants and from making any finding or report to the Attorney-General in connection therewith. The appellants' grounds for an injunction were that the respondent Fraser had not given them notice of the examination of witnesses concerning the appellants' relations with the Wayside Consolidated Gold Mines Limited and that he had not afforded them an opportunity of cross-examining such witnesses, as their status and reputation may be affected by such examination. The trial judge maintained a motion to dissolve the *interim* injunction, which judgment was affirmed by the appellate court.

Held, affirming the judgment of the Court of Appeal (49 B.C.R. 502), that the respondent investigator could not be restrained from proceeding with the investigation.

Per Lamont, Cannon and Crocket JJ.—Section 29 of the *Securities Act,* which purports to bar actions and proceedings by way of injunction or other extraordinary remedy, relating to investigations by the Attorney-General or his representative under the provisions of the statute constitutes an insuperable barrier to the appellant's claim.

* PRESENT:—Lamont, Cannon, Crocket and Davis JJ. and Dysart J. *ad hoc.*

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Per Lamont, Cannon and Crocket JJ.—The investigation provided for by the *Securities Act* was not a judicial proceeding in any sense of the term but was intended to be conducted by the investigator in private and no person or company should have the right of cross-examining any witness or witnesses brought before the investigator whether the evidence of such witness or witnesses should affect the status or reputation of such person or company or not. Such investigation is in no sense a judicial proceeding for the trial of any offence but merely an enquiry conducted for the information of the Attorney-General in order that the latter may take such proceedings as he may deem advisable in the circumstances for the protection of the public as shown by the provisions of ss. 11 and 12.

Per Lamont and Davis JJ.—The investigation provisions of the statute dealing generally with the prevention of fraud by stock brokers were part and parcel of the administrative machinery for the attainment of the general purposes of the statute. The investigator was not a court of law nor was he a court in law. While the investigator was bound to act judicially in the sense of being fair and impartial, that is something quite different from the right asserted by the appellants of freedom of cross-examination of all the witnesses.

APPEAL from the judgment of the Court of Appeal for British Columbia (1) maintaining the judgment of the trial judge, Morrison C.J.S.C. (2), and dissolving an *interim* injunction restraining the respondent from proceeding further in connection with the investigation being held by him into the affairs of the Wayside Consolidated Gold Mines Limited pursuant to the authority delegated to him by the Attorney-General under the *Securities Fraud Prevention Act* in so far as the same either directly or indirectly related to the conduct or actions of the appellants, and from making any finding or report to the Attorney-General in connection therewith until judgment in the appellants' action.

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

J. W. de B. Farris K.C. for the appellant.

Gordon McG. Sloan K.C. and *G. R. Nicholson* for the respondents.

LAMONT J.—In this case I agree with the conclusions reached by my brothers Crocket and Davis, and for the reasons given by them respectively. I would therefore dismiss the appeal with costs.

(1) (1935) 49 B.C. Rep. 502; [1935] 2 W.W.R. 64.

(2) (1934) 49 B.C. Rep. 274; [1935] 1 W.W.R. 26.

The judgment of Cannon and Crocket JJ. was delivered by

CROCKET J.—This is an appeal from the judgment of the Court of Appeal for British Columbia (1) dismissing an appeal from a judgment of Morrison, C.J. (2), dissolving an *interim* injunction granted by him restraining the respondent Fraser from proceeding with an investigation which he was making into the affairs of Wayside Consolidated Gold Mines Limited, in pursuance of the instructions of the Attorney-General of British Columbia under the provisions of the *Securities Act*, c. 64, statutes of British Columbia (1930), in so far as the said investigation directly or indirectly related to the conduct or actions of the appellants or either of them, and from making any finding or report to the Attorney-General in connection therewith.

The action, which was merely for the injunction, was commenced on October 22, 1934, against the respondent Fraser only and the *interim* injunction granted on the same day. The Attorney-General was added as a party defendant and joined with Mr. Fraser in a motion which was heard by the learned Chief Justice on October 30, to dissolve the injunction and dismiss the action.

It appears from the affidavits used on the hearing of this motion that the Wayside Consolidated Gold Mines had made a new issue of stock, of which the Vancouver Stock and Bond Company Limited had underwritten a large amount, which it was endeavouring to sell on the market, and that the facts in connection with the issue and sale of this stock was the principal subject-matter of the investigation. The appellant St. John was a shareholder and business manager of the Stock and Bond Company and was examined by Mr. Fraser on August 22, August 30, October 15 and October 18, 1934, the solicitor for the appellants being present at all these examinations and their counsel (Mr. Farris) at the last two. Both the solicitor and the counsel took part in these examinations of their client and Mr. Farris as counsel was afforded the fullest opportunity for argument on his client's behalf. Mr.

(1) (1935) 49 B.C. Rep. 502; [1935] 2 W.W.R. 64.
(2) (1934) 49 B.C. Rep. 274; [1935] 1 W.W.R. 26.

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Fraser had in the meantime examined some other witnesses on matters concerning the appellants' conduct in relation to the sale of the stock without notice to the appellants, whose counsel had no opportunity of cross-examining them. Mr. Fraser alleges in his affidavit that no application was ever made to him by either the solicitor or counsel for the appellants or by Mr. St. John himself and that no request was at any time made to him for any advance notice to be given to them respecting any person or persons whom he proposed to examine or for the privilege of cross-examining any witnesses who had been examined. He states that on October 12 the appellants' counsel requested a copy of the evidence of two particular witnesses which had previously been taken and that he informed him that in view of the fact that the appellant St. John was about to be recalled to give further evidence he would furnish counsel with copies of the transcript of the evidence so requested after Mr. St. John had been further examined, and suggested that counsel could recall him to give any further evidence or explanation that might be desired. He further states that the appellants' counsel agreed that such procedure was satisfactory and that thereafter he furnished him with copies of the evidence requested for his perusal. It was admitted, however, on the argument before us that the Attorney-General had taken the position after Mr. Farris's intervention in the case as counsel that he was not entitled to cross-examine any of the witnesses who had been examined by Mr. Fraser in the course of the investigation and that he, the Attorney-General, had so instructed his investigator.

The whole question involved in this appeal is as to whether the respondent Fraser could properly be restrained from proceeding with the investigation and making a report or finding to the Attorney-General on the ground that he had not given notice to the appellants of the examination of witnesses concerning the appellants' relations with the Wayside Consolidated Gold Mines Limited and their conduct regarding the sale of the stock referred to and that he had not afforded them an opportunity of cross-examining such witnesses. The solution of this question is to be found, in my judgment, only in the provisions of the statute. See the observations of Lords Thankerton and Macmillan in *Hearts of Oak Assurance Co.* v. *Attorney-*

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General (1). See also *In re The Grosvenor and West End Terminus Hotel Co. Ltd.* (2), and *O'Connor* v. *Waldron* (3).

Unless by virtue of other provisions of the statute it can properly be held that the investigation was a judicial or quasi-judicial proceeding and that the opportunity of cross-examining any witness examined by the investigator on matters affecting the appellants' status or reputation was such an essential requirement in the conduct of the investigation as went to the investigator's jurisdiction to proceed with it, section 29 clearly constitutes an insuperable barrier to the appellants' claim, as held by Mr. Justice McPhillips. This section is as follows:

> No action whatever, and no proceedings by way of injunction, mandamus, prohibition, or other extraordinary remedy, shall lie or be instituted against any person, whether in his public or private capacity, or against any company in respect of any act or omission in connection with the administration or carrying out of the provisions of this Act or the regulations where such person is the Attorney-General or his representative, or the Registrar, or where such persons or company was proceeding under the written or verbal direction or consent of any one of them, or under an order of the Supreme Court or a Judge thereof made under the provisions of this Act.

As to whether the affording to all persons, whose status and reputation may be affected, of the opportunity to cross-examine any and every witness brought before the investigator is such an essential requirement as goes to the investigator's jurisdiction, depends on the nature and purpose of the investigation as evidenced by the provisions of the entire statute.

Upon a careful consideration of all the sections referred to on the argument and the entire statute, I have come to the conclusion that the only reasonable inference to be drawn therefrom is that the Legislature never intended that notice should be given to any and every person, whose status or reputation might be affected thereby, of the examination of any other witness or witnesses and that any and all such persons should be afforded the privilege of cross-examining any such witness or witnesses. The whole tenor of the statute in my judgment points quite the other way. While section 10 provides that the Attorney-General may delegate authority to any person to examine

(1) [1932] A.C. 392 at 396 and 401.

(2) (1897) 13 T.L.R. 309.

(3) [1935] A.C. 76.

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any person, company, property or thing whatsoever at any time in order to ascertain whether any fraudulent act or any offence against this Act or the regulations has been, is being or is about to be committed,

and no doubt contemplates a report to the Attorney-General, where the investigation is conducted by a person named and authorized by him, the person so authorized is given no power to make any adjudication which is under any of the provisions of the statute in any sense binding upon the Attorney-General or upon anyone else. While it may be said to contemplate a finding upon the question as to whether any fraudulent act or any offence against the statute or the regulations has been, is being or is about to be committed, such finding, I think, is intended only for the purpose of communicating to the Attorney-General the opinion he has formed as the result of the examination he has made, precisely as in the case of the inspector's report to the commissioner in *Hearts of Oak Assurance Co.* v. *The Attorney-General* (1), as pointed out by Lord Macmillan.

That the investigation is in no sense a judicial proceeding for the trial of any offence but merely an enquiry conducted for the information of the Attorney General in order that the latter may take such proceedings as he may deem advisable in the circumstances for the protection of the public is shown clearly by the provisions of ss. 11 and 12. If the Attorney-General as a result of his representative's investigation was of opinion that the appellant St. John was concerned in any fraudulent act or offence against the statute or the regulations which had been, was being or was about to be committed, he as the responsible minister designated to administer the Act might suspend his privileges as a registered broker for any period not exceeding ten days. If he considered such a suspension inadequate he might apply to the Supreme Court or a Judge thereof for an order restraining him or any broker concerned in such fraudulent act or offence against the statute from trading in any security whatever absolutely or for such period of time as should seem just, or for an order restraining either or both the appellants from trading in the security with reference to which any fraudulent act or offence had been or was about to be committed, or from trading in any security whatever. And he might in any case give notice

(1) [1932] A.C. 392, at 401, 402.

of any fraudulent act to which the appellants or either of them was a party, to the public by advertisement or otherwise or to any individual by letter or otherwise as in his discretion he should deem advisable. It is the Attorney-General and not his investigator, when he authorizes another to make the investigation for him, who determines under s. 11 (c) whether notice of the fraudulent act shall in any case be given to the public by advertisement or otherwise or to any individual by letter or otherwise. It cannot well be supposed that this provision of the statute contemplates his giving any such notice unless he upon a consideration of the investigator's report himself fully agrees with his investigator that a fraudulent act has actually been, was being or was about to be committed.

If there could be any well founded doubt as to the right or privilege of cross-examination contended for being excluded by the nature and purpose of the investigation in the light of the passage I have already quoted from section 10 and of the provisions of section 11 to which I have referred, subsection 4 of section 10, it seems to me, concludes the question. This reads as follows:

> Disclosure by any person other than the Attorney-General, his representative, or the registrar, without the consent of any one of them, of any information or evidence obtained or the name of any witness examined or sought to be examined under subsection (1) shall constitute an offence.

Looking at this subsection in the light of the other provisions to which I have alluded, I find it quite impossible to avoid the conclusion, not only that the investigation provided for was not a judicial proceeding in any sense of the term but that it was intended to be conducted by the investigator in private and that no person or company should have the right of cross-examining any witness or witnesses brought before the investigator whether the evidence of such witness or witnesses should affect the status or reputation of such person or company or not. The case is one which does not fall within the principle stated in *Bonanza Creek Hydraulic Concession* v. *The King* (1); *Smith* v. *The King* (2); *Wood* v. *Woad* (3); *Errington* v. *Minister of Health* (4), nor any of the other cases relied upon by the appellants.

(1) (1908) 40 Can. S.C.R. 281.
(2) (1878) 3 App. Cas. 614.
(2) (1874) 9 L.R. Ex. 190
(4) [1935] 1 K.B. 249.

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Crocket J.

The appeal should be dismissed with costs.

DAVIS J.—The Attorney-General of British Columbia, under section 10 of the *Securities Frauds Prevention Act* (c. 64 of the statutes of British Columbia, 1930) delegated his authority to the defendant Fraser, a solicitor of the city of Vancouver, to examine into the affairs of Wayside Consolidated Gold Mines Limited in order to ascertain whether any fraudulent act or any offence against the Act or the regulations had been or was about to be committed. Subsection (1) afforded the representative of the Attorney-General

> the same power to summon and enforce the attendance of witnesses and compel them to give evidence on oath and to produce documents, records, and things as is vested in the Supreme Court or a Judge thereof for the trial of civil cases.

It may be observed in passing that the words of the section are "may examine * * * in order to ascertain." By subsection (2) when the Attorney-General or his representative is about to examine or is examining any person or company under this section, the Attorney-General may appoint an accountant or other expert to examine documents, properties, records and matters, and to report thereon. By subsection (3) the failure without reasonable excuse of any person summoned for examination to appear or his refusal to give evidence or to answer any question or to produce anything where the evidence, answer or production can be required under the section of the statute, is made an offence and shall also be *prima facie* evidence upon which

> (*a*) The Attorney-General or his representative may base an affirmative finding concerning any fraudulent act to which he may deem it relevant; or
>
> (*b*) The Supreme Court or a Judge thereof may grant an interim or permanent injunction; or
>
> (*c*) A magistrate may base a conviction for an offence against this Act or the regulations.

That the investigation is intended to be a secret investigation is made plain by subsection (4):

> (4) Disclosure by any person other than the Attorney-General, his representative, or the Registrar, without the consent of any one of them, of any information or evidence obtained or the name of any witness examined or sought to be examined under subsection (1) shall constitute an offence.

By section 11 of the statute,

> 11. If the Attorney-General or his representative upon investigation finds that any fraudulent act, or that any offence against this Act or the

regulations, has been, is being, or is about to be committed, the Attorney-General:

(a) May, where a registered broker, company or salesman is in his opinion concerned therein, order that the broker, company, or salesman and any other registered broker, company or salesman connected with the same organization be suspended from registration for any period not exceeding ten days; or

(b) May, where he considers a suspension for ten days inadequate, or where any unregistered person or company is in his opinion concerned in such fraudulent act or in such offence, proceed under the provisions of section 12, or otherwise under this Act or the regulations; and

(c) May in any case give notice of the fraudulent act to the public by advertisement or otherwise, or to any individual by letter or otherwise, whenever he deems it advisable.

During the course of the investigation by the defendant Fraser into the affairs of Wayside Consolidated Gold Mines Limited, it became apparent that the Vancouver Stock & Bond Company, Ltd., one of the plaintiffs in this action, had been an underwriter of the securities of the Wayside Company and the plaintiff St. John, who was a shareholder and the business manager of the underwriting company, was called upon and did give evidence. The investigation conducted by the defendant Fraser extended over several months, during which time a great deal of evidence was taken by him. His appointment was made on August 15, 1934, and proceeding thereunder continued until October 22, 1934, on which day the underwriting company, the Vancouver Stock & Bond Company, Ltd., and its business manager St. John, apprehending that the investigator Fraser might report to the Attorney-General adversely to them or either of them, issued a writ of summons in the Supreme Court of British Columbia against the investigator Fraser. The claim as endorsed upon the writ is as follows:

The plaintiffs' claim is for an injunction to restrain the defendant from proceeding further in connection with the investigation being held by him into the Wayside Consolidated Gold Mines, Limited, pursuant to the authority delegated to him by the Attorney-General under the provisions of the *Securities Act;* and to restrain him from making any finding or report to the Attorney-General in connection therewith in so far as the same, either directly or indirectly, relates to the conduct or action of the plaintiffs, or either of them.

On the day the writ was issued the learned Chief Justice of the Supreme Court of British Columbia granted an *ex parte* injunction against the defendant Fraser enjoining and restraining him from proceeding further in connection with the investigation being held by him into the affairs

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of the Wayside Consolidated Gold Mines, Ltd., pursuant to the authority delegated to him by the Attorney-General under the provisions of the statute,

in so far as the same either directly or indirectly relates to the conduct or actions of the plaintiffs, or either of them, and from making any finding or report to the Attorney-General in connection therewith until judgment in this action, or until further order.

Leave was granted to the defendant to apply to dissolve this injunction upon two days' notice to the plaintiffs.

Subsequently, on October 26, 1934, the Attorney-General was, upon his own application and by order of the Court, added as a party defendant in the action. The plaintiffs did not amend their writ and no claim is made in the action against the Attorney-General. Then, on October 30, 1934, the learned Chief Justice who had granted the *ex parte* injunction dissolved the same on the application of the defendants, and all parties to the action having agreed to turn the motion into one for final judgment, the action was dismissed with costs. From this judgment the plaintiffs appealed to the Court of Appeal for British Columbia and on March 12, 1935, the appeal was dismissed, Mr. Justice Martin and Mr. Justice J. A. Macdonald dissenting (1). Subsequently the plaintiffs applied for and were granted leave by the Court of Appeal to appeal to this Court.

The Attorney-General sought to take advantage of section 29 of the statute, which purports to bar actions and proceedings relating to investigations by the Attorney-General or his representative under the provisions of the statute. Section 29 reads as follows:

29. No action whatever, and no proceedings by way of injunction, mandamus, prohibition, or other extraordinary remedy, shall lie or be instituted against any person, whether in his public or private capacity, or against any company in respect of any act or omission in connection with the administration or carrying out of the provisions of this Act or the regulations where such person is the Attorney-General or his representative, or the Registrar, or where such person or company was proceeding under the written or verbal direction or consent of any one of them, or under an order of the Supreme Court or a Judge thereof made under the provisions of this Act.

The validity of the statute was not attacked and there was no suggestion that the defendant Fraser was not properly authorized to make the investigation into the affairs of the Wayside Consolidated Gold Mines, Ltd., or

(1) (1935) 49 B.C. Rep. 502; [1935] 2 W.W.R. 64.

that he was acting at any time beyond his jurisdiction except in the sense advanced by counsel for the appellants that he declined to permit counsel for the appellants before him to cross-examine at large all the witnesses whose evidence he had taken or might thereafter take. I cannot agree that this is a want of jurisdiction that takes the plaintiffs out of the rigour of the prohibitory section of the statute. Section 29 was obviously intended to prevent just such an action as this for an injunction to restrain the investigation from continuing, and the wisdom or fairness of such prohibitory legislation is not a matter with which we are concerned, for it is clearly within the competence of the legislature. While it is fundamental that a subject cannot without express words or necessary intendment be deprived of the protection of the Courts, the Courts must not interfere with competent legislation or attempt to so whittle away the obvious intention of the legislature as to destroy the effectiveness of its enactment. I do not find it necessary, however, to examine the precise scope of this section of the statute, preferring to deal with this appeal as if the action properly lay.

Assuming then in favour of the appellants that the prohibitory section does not apply in this case, the real issue on the merits is whether or not the plaintiffs were entitled as of right to be afforded freedom of cross-examination of each and every witness called by the investigator. Counsel for the appellants says that such a right is founded upon what he terms "natural justice," "essential justice" or "British justice." Such phrases are rather loose and vague terms. The rights of the parties must be determined upon the basis of what they are entitled to according to law. A decision in accordance with the law is justice.

Lord Shaw of Dunfermline said in *Local Government Board* v. *Arlidge* (1):

> In so far as the term "natural justice" means that a result or process should be just it is a harmless though it may be a high-sounding expression; in so far as it attempts to reflect the old *jus naturale* it is a confused and unwarranted transfer into the ethical sphere of a term employed for other distinctions * * *

The Attorney-General contends that the provisions of the statute were only intended to afford to him the right of an investigation into the facts, upon the report of which

(1) [1915] A.C. 120, at 138.

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it became his duty as a member of the Executive to form his own opinion and to exercise such if any of the powers as are given to him by section 11 of the statute, and that if during the investigation every witness called was entitled to have his own counsel cross-examine all the other witnesses, the enquiry would become utterly ineffective, prolonged in duration and costly in administration. The Attorney-General stresses the secrecy provision of the statute, subsection (4) of section 10, as indicating in itself the very nature of the investigation.

It is not suggested by counsel for the appellants that the investigator is a court of law or even a tribunal having similar attributes to a court of law, but it is contended that the investigator is not a purely administrative body but what counsel calls " a quasi-judicial tribunal." Broadly speaking, there are only two divisions—judicial and administrative—though within those two broad divisions there have been tribunals with certain features common to both which have given rise to a somewhat loose, perhaps almost unavoidable, terminology in an effort to again subdivide the two broad classes of tribunals. Fundamentally, the investigator in this case was an administrative officer, and the machinery set up by the statute was administrative for the purpose of enquiring as to whether or not fraudulent practices had been or were being carried on in connection with the sale of the securities of the Wayside Company. The investigation provisions of the statute dealing generally with the prevention of fraud by stock brokers were part and parcel of the administrative machinery for the attainment of the general purposes of the statute. The investigator was not a court of law nor was he a court in law, but to say that he was an administrative body, as distinct from a judicial tribunal, does not mean that persons appearing before him were not entitled to any rights. An administrative tribunal must act to a certain extent in a judicial manner, but that does not mean that it must act in every detail in its procedure the same as a court of law adjudicating upon a *lis inter partes*. It means that the tribunal, while exercising administrative functions, must act " judicially " in the sense that it must act fairly and impartially. In *O'Connor* v. *Waldron* (1),

(1) [1935] A.C. 76, at 82.

Lord Atkin refers to cases where tribunals, such as a military court of enquiry or an investigation by an ecclesiastical commission, had attributes similar to those of a court of justice.

> On the other hand (he continues) the fact that a tribunal may be exercising merely administrative functions though in so doing it must act judicially, is well established, and appears clearly from the *Royal Aquarium* case (1).

In the *Royal Aquarium* case (1) "judicial" in relation to administrative bodies is used in the sense that they are bound to act fairly and impartially.

In this case the defendant Fraser has sworn in his affidavit filed on the plaintiffs' motion for an injunction, and it is in no way denied,

> 4. That during the course of my said examination I gave the fullest opportunity to the plaintiffs and each of them to appear before me and state all such relevant facts and information as they might desire to advance or to give an explanation or explanations to me, either through the plaintiff St. John, or their counsel, as they or either of them might deem expedient. The said St. John was examined and gave evidence before me at length on the 22nd and 30th days of August and the 15th and 18th days of October, A.D. 1934, and his evidence given before me comprises some 953 folios of the official transcript.
>
> 5. That I further permitted the solicitor and counsel for the plaintiffs to be present and take part in the examination of the plaintiff St. John and extended to the plaintiffs' counsel fullest opportunity for argument on his clients' behalf, which opportunity was taken full advantage of and argument was submitted by plaintiffs' counsel on their behalf to the extent of some 340 folios of the official transcript.

Moreover, it is admitted that the plaintiff St. John was recalled at the conclusion of the hearing of the witnesses by the defendant Fraser and afforded full opportunity to give any explanation he desired to give. His counsel had been furnished with a copy of all the evidence that he had requested. The only objection taken by the appellants, and it was very strenuously and earnestly pressed upon us in a very able argument by their counsel Mr. Farris, was that it was against natural justice that the plaintiffs should have been denied the right they claim of cross-examining every witness who was heard by the investigator. The right was asserted as a right to which every witness against whom a finding might possibly be made was entitled. I do not think that any such right exists at common law. The investigation was primarily an administrative function under the statute, and while the investigator was bound

(1) [1892] 1 Q.B. 431.

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to act judicially in the sense of being fair and impartial, that, it seems to me, is something quite different from the right asserted by the appellants of freedom of cross-examination of all the witnesses. It is natural, as Lord Shaw said in the *Arlidge* case (1), that lawyers should favour lawyer-like methods but it is not for the judiciary to impose its own methods on administrative or executive officers.

Undoubtedly in the early days of administrative tribunals the courts took the position that the procedure to be followed by these tribunals should be the same as that of a court of law. In 1889 Field J. in *Parsons* v. *Lakenheath School Board* (2), said,

> They have been entrusted with judicial duties, and should, I think, perform those duties in the ordinary judicial way.

But with the increasing number of statutes which delegated power to administrative bodies, we find Lord Loreburn in *Board of Education* v. *Rice* (3) saying:

> They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view.

In the *Arlidge* case (4), a majority of the Court of Appeal decided that because Arlidge, after three full opportunities to present his case, was not permitted to see the report which the inspector remitted to the department for its consideration, he had been deprived of natural justice. The House of Lords emphatically denied this proposition, holding in effect, to quote Lord Haldane at p. 132, "What the procedure is to be in detail must depend on the nature of the tribunal." The *Arlidge* case (4) was followed by the Judicial Committee in *Wilson* v. *Esquimalt and Nanaimo Ry.* (5), the judgment being delivered by the present Chief Justice of this Court.

The only claim in the action is for relief by way of an injunction against the investigator Fraser to restrain him from proceeding with his investigation. Apart altogether from the formidable objection to the action raised by the prohibitory section of the statute (section 29), I cannot accept the contention of the appellants of the existence of the right which they have asserted in the action.

(1) [1915] A.C. 120, at 138.
(2) (1889) 58 L.J.Q.B. 371, at 372.
(3) [1911] A.C. 179, at 182.
(4) [1915] A.C. 120.
(5) [1922] 1 A.B. 202.

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The appeal therefore should be dismissed with costs.

DYSART J. *ad hoc*—I agree in the result.

Appeal dismissed with costs.

Solicitor for the appellants: *Stuart Hugh Gilmour.*

Solicitors for the respondent: *McCrossen, Campbell & Meredith.*

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*June 5, 6
*June 24

TORONTO TRANSPORTATION COMMISSION (PLAINTIFF) ..... APPELLANT;

AND

THE CORPORATION OF THE VILLAGE OF SWANSEA (DEFENDANT).... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Highways—Right of access—Action to compel municipality to permit change in curb to afford owner of adjoining land convenient access to street for purposes of its business—Municipal Act, R.S.O. 1927, c. 233; Local Improvement Act, R.S.O. 1927, c. 235.

At common law an owner of land was entitled to access to an adjoining public highway at any point at which his land actually touched such highway, for any kind of traffic which was necessary for the reasonable enjoyment of his premises and which would not, as he proposed to conduct it, cause a substantial nuisance. A municipal authority, in the absence of an express right to the contrary, was not entitled to deprive him of the full enjoyment of such right. But in Ontario the *Municipal Act,* R.S.O. 1927, c. 233 (ss. 483, 484, 342, 344, and other sections, specifically referred to), and the *Local Improvement Act,* R.S.O. 1927, c. 235 (ss. 2, 20 (2) (*d*), 3 (2), specifically referred to), have created an interference with such common law rights. And where the sidewalks and curbs in question, on streets adjoining land now owned by appellant, had been constructed about 13 years ago under the provisions of the *Local Improvement Act,* it was *held* that appellant had no right to compel the respondent municipality to permit a change in the curb to afford appellant convenient access to the streets for the purpose to which appellant intended to use its land.

APPEAL by the plaintiff from the judgment of the Court of Appeal for Ontario dismissing its appeal from the judgment of McEvoy J. dismissing its action.

The plaintiff corporation owns certain lots in the village of Swansea (the defendant municipality), the land

*PRESENT:—Duff C.J. and Cannon, Crocket, and Davis JJ., and Dysart J. *ad hoc.*

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comprising a parcel roughly 50 feet in width by 150 feet in depth running between Kennedy avenue and Runnymede road in said village. The land was purchased by plaintiff in or about the year 1931. Some years earlier the defendant municipality, in the course of its rights and duties, had constructed sidewalks and roadways, with curbs between, upon the said two streets. The plaintiff desired to use its said land to loop empty buses through, and submitted to defendant municipality proposals for overcoming the barrier to vehicular traffic created by the curbs and requested that the work be carried out either by itself or by defendant, and offered to pay the full cost and expense of the work. The plaintiff alleged that defendant refused to permit the curbs to be altered as suggested or in any other manner to give reasonable vehicular access from the highways to plaintiff's land, and also alleged discrimination by defendant in that defendant had granted vehicular access to every other landowner who applied for it. Plaintiff claimed a declaration that it was entitled to reasonable vehicular access, a mandatory order compelling defendant to take such measures as might be necessary to give plaintiff such access, an injunction restraining defendant from refusing such access, and damages for interference with plaintiff's vehicular access.

In its statement of defence the defendant municipality alleged, *inter alia,* that, at the time of constructing the sidewalks and curbs in question, it dealt with and constructed all approaches applied for in accordance with s. 3 (2) of the *Local Improvement Act,* R.S.O. 1927, c. 235, and that an approach to the said property from Runnymede road was applied for and constructed at that time. The defendant denied that the plaintiff was entitled to any of the remedies claimed, and pleaded the *Local Improvement Act,* R.S.O. 1927, c. 235, and amendments thereto, and the *Municipal Act,* R.S.O. 1927, c. 233, and amendments thereto, and more especially s. 344 of the said *Municipal Act.*

By the judgment now reported the plaintiff's appeal to this Court was dismissed with costs.

I. S. Fairty K.C. for the appellant.

J. J. Addy for the respondent.

The judgment of the court was delivered by

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DAVIS, J.—Stripped of several collateral issues developed in evidence and discussed throughout the trial, the real point of the case is the determination of the right asserted by the appellant, an owner of land adjoining a public street within a village in the Province of Ontario, to compel the municipality, respondent, to permit a change in the level of the sidewalk and curb in front of its land in order to afford it convenient access to the public street for the purpose to which it intends to use its land. The point is a narrow and rather difficult one. It seldom arises as a matter of practical importance, for it may be taken as admitted that municipal authorities in Ontario generally afford to owners of land adjoining public streets such changes in the sidewalks and curbs in front of their property as are reasonably necessary to meet the changing conditions and requirements of the particular owner and the use to which he intends to put his property. In this case, however, a strict right is asserted by the appellant (owner) and denied by the respondent (municipality) and the matter falls for careful reasoning and interpretation of the law upon the subject.

There is no difficulty upon the question of the right at common law of an owner of land adjoining a public highway. He is entitled to access to such highway at any point at which his land actually touches such highway for any kind of traffic which is necessary for the reasonable enjoyment of his premises and will not, as he proposes to conduct it, cause a substantial nuisance. Halsbury (Hailsham ed.), Vol. 16, p. 251. This is a right of property that was well settled at the common law. A private owner was always entitled to a full and uninterrupted access from his property that adjoined a public highway to that public highway and a municipal authority, in the absence of express statutory right to the contrary, was not entitled to deprive the private owner of the full enjoyment of this right. When he reaches the public highway and travels upon it, the private owner becomes then one of the public using the highway and subject to all the duties and obligations that rest upon the public generally, but it is his private right to be fully and freely permitted at all points of his private property to have freedom of access to the adjoining public highway. That principle of the

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common law has been fully and completely restated very recently by Lord Atkin in delivering the judgment of the House of Lords in *Marshall* v. *Blackpool Corporation* (1). That leads us to an investigation and consideration of any statutory provisions in Ontario altering the common law in this respect. By the *Municipal Act*, R.S.O. 1927, ch. 233, "highway" means a common and public highway, and includes a street (sec. 1 (*e*)). By sec. 443, unless otherwise expressly provided, the soil and freehold of every highway shall be vested in the corporation or corporations of the municipality or municipalities, the council or councils of which for the time being have jurisdiction over it under the provisions of the *Municipal Act* or any other Act. And by sec. 444, except where jurisdiction over them is expressly conferred upon another council, the council of every municipality shall have jurisdiction over all highways within the municipality. By sec. 469, every highway shall be kept in repair by the corporation the council of which has jurisdiction over it, or upon which the duty of repairing it is imposed by the Act.

Then by sec. 483, the council of every municipality may pass by-laws,

(*a*) for establishing and laying out highways;
(*b*) for widening, altering or diverting any highway or part of a highway;
(*c*) for stopping up any highway or part of a highway and for leasing or selling the soil and freehold of a stopped up highway or part of a highway;
(*d*) for setting apart and laying out such parts as may be deemed expedient of any highway for the purpose of carriage ways, boulevards and sidewalks, and for beautifying the same, and making regulations for their protection;
(*e*) for permitting subways for cattle under and bridges for cattle over any highway;
(*f*) for acquiring land or an interest in land at street intersections for the purpose of rounding corners.

Sec. 484 provides that a by-law shall not be passed for stopping up, altering or diverting any highway if the effect of the by-law will be to deprive any person of the means of ingress or egress to and from his land or place of residence over such highway or part of it unless in addition to making compensation for such person, as provided by this Act, another convenient road or way of access to his land or

(1) [1935] A.C. 16.

place of residence is provided. Sec. 486 provides for publication of notice of any by-law for the stopping up, altering, widening, diverting, selling or leasing of a highway or for establishing or laying out a highway. Other sections of the *Municipal Act* deal with various phases of matters incidental to the carrying out of the general powers of municipalities in connection with highways but the sections to which I have referred indicate generally the scope and extent of the powers of municipal councils over highways.

The *Local Improvement Act*, R.S.O. 1927, ch. 235, specifically provides by sec. 2 thereof for works of the following character or description which may be undertaken by the council of a municipal corporation as a local improvement, that is to say:

(*a*) Opening, widening, extending, grading, altering the grade of, diverting or improving a street;

(*f*) paving a street;

(*g*) constructing a curbing or a sidewalk in, upon or along a street.

This section does not extend or apply to a work of ordinary repair or maintenance. The procedure for undertaking local improvement works is set out in this statute and provision is made as to how the cost of the work is to be borne. By sec. 20 (2) (*d*) there may be included in the cost of such work "compensation for lands taken for the purposes of the work or injuriously affected by it." By sec. 3 (2) of this Act,

where the work is the construction of a pavement, the council may from time to time during the progress of the work, upon the written request of the owner of the lot to be served, provide for the construction, as part of the pavement, of an approach of such width and character as the council may determine, from the boundary line of the pavement to the street line, so as to form an approach to a particular lot, and the cost of such approach shall be specially assessed upon the particular lot so served.

Reverting to the *Municipal Act*, it is provided by sec. 342 thereof that

where land is expropriated for the purposes of a corporation, or is injuriously affected by the exercise of any of the powers of a corporation under the authority of this Act or under the authority of any general or special Act, unless it is otherwise expressly provided by such general or special Act, the corporation shall make due compensation to the owner for the land expropriated and for any damage necessarily resulting from the expropriation of the land, or where land is injuriously affected by tthe exercise of such powers for the damages necessarily resulting therefrom, beyond any advantage which the owner may derive from any work, for the purposes of, or in connection with which the land is injuriously affected.

The amount of the compensation, if not mutually agreed upon, shall be determined by arbitration.

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By sec. 344,

except where the person entitled to the compensation is an infant, a lunatic, or of unsound mind, a claim for compensation for damages resulting from his land being injuriously affected shall be made in writing, with particulars of the claim, within one year after the injury was sustained, or after it became known to such person, and, if not so made, the right to compensation shall be forever barred.

In this case it was proved that the existing sidewalks and curbs were constructed some thirteen or fifteen years ago by the respondent municipality under the provisions of the *Local Improvement Act*. The lands were in exactly the same condition as regards curbs and sidewalks when purchased by the appellant three or four years ago. It is admitted that it is not unlikely that the owner or owners of the land in question when the sidewalks and curbs were constructed were in fact petitioners under the *Local Improvement Act* for the work to be undertaken by the municipality. At any rate, it is plain that if their lands were then injuriously affected by the construction of the work, the then owners were entitled to compensation. It is not disclosed whether any such compensation was sought. But there was authority in the municipality by virtue of the express provisions of the *Municipal Act* and of the *Local Improvement Act*, to which I have referred, to construct the sidewalks and the curbs that are now complained of as preventing the full enjoyment of the property by the present owner in the use to which he intends to put the land. To this extent there is a statutory interference with the common law rights of owners of land adjoining a highway.

We were not referred to any statutory provisions in Ontario, and I know of none, setting up any procedure permitting a change by individual owners in the level of sidewalks or curbs constructed by the municipality under the *Local Improvement Act*. In the *Blackpool Corporation* case (1) the statute set up a procedure for every person desirous of forming a communication for horses or vehicles across any footpath so as to afford access to any premises from a street, to submit to the corporation a plan of the proposed communication, shewing where it will cut the foothpath, and what provision (if any) is made for curbing and for a paved crossing and the dimensions and gradients of the necessary works, and providing that after hav-

(1) [1935], A.C. 16.

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ing obtained the sanction of the corporation such person may execute the works at his own expense under the supervision and to the satisfaction of the corporation and not otherwise.

In view of the statutory provisions in Ontario the appellant is not entitled to the right which it has asserted in this action and its appeal to this Court from the judgment of the Court of Appeal for Ontario which dismissed its appeal to that Court from the judgment at the trial which dismissed its action for a declaration of the right asserted, must be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *Irving S. Fairty.*

Solicitor for the respondent: *J. J. Addy.*

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*June 10
*June 28

YETTA WEISS AND MORRIS WEISS, EXECUTRIX AND EXECUTOR OF THE ESTATE OF BARNETT WEISS, DECEASED, AND THE SAID YETTA WEISS (PLAINTIFFS) ..... } APPELLANTS;

AND

THE STATE LIFE INSURANCE COMPANY (DEFENDANT) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Insurance (Life)—Contract—Payment—Person insured in Ontario by United States company—Policy providing for payment of amount of insurance (expressed in "dollars") at company's head office in United States—Premiums on policy paid in Canadian currency—United States dollars worth more than Canadian dollars at time when insurance became payable—Payment of policy—Sufficiency or insufficiency of payment in Canadian dollars to the number of dollars specified in policy—Provisions of policy—Ontario Insurance Act, R.S.O. 1914, c. 183, s. 155; R.S.O. 1927, c. 222, ss. 119-159.

Respondent, a foreign life insurance company, with head office at Indianapolis, in the State of Indiana, one of the United States of America, and at all material times duly registered in the Province of Ontario and as fully entitled as any domestic insurance company to transact there the business of life insurance, issued, on August 9, 1917, two policies on the life of W., a resident of Toronto, Ontario, and de-

*PRESENT:—Duff C.J. and Cannon, Crocket, and Davis JJ., and Dysart J. *ad hoc*.

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livered the policies to him in Toronto. They were executed by respondent at its head office in Indianapolis, and provided for payment on the insured's death of a certain number of "dollars" "at the Home Office of the Company, Indianapolis, Indiana." They provided that the premiums be paid "at said Home Office or to an agent of the Company." All the premiums were paid in Canadian moneys. W. died on March 10, 1933. At the time the insurance became due and payable, there was a premium on United States money in terms of Canadian money; and appellants claimed that respondent was bound to pay the value of United States dollars to the number of dollars specified in the policies.

Held (Duff C.J. and Davis J. dissenting): Payment in Canadian dollars to the number of dollars specified in the policies, was sufficient to discharge respondent's obligation. Judgment of the Court of Appeal for Ontario, [1934] O.R. 677, affirmed.

Per Cannon J.: Any inference in favour of United States dollars that might be drawn from the naming of Indianapolis as a place of payment is rebuttable, and is rebutted in this case by (1) the provisions of *The Ontario Insurance Act* (R.S.O. 1914, c. 183, s. 155; R.S.O. 1927, c. 222, s. 159) and (2) the interpretation put upon the ambiguous contract by the acts of the parties.

Per Crocket J. and Dysart J. (*ad hoc*): To assume that in entering into the contract the parties directed their attentions solely to the wording and meaning of the policies, and not in any degree to the provisions and effect of the insurance law of the Province, would do violence to the underlying facts and the background of the case. From the circumstances, it might be assumed that the parties realized they were making a contract in Ontario and subject to the laws of Ontario. While it is well settled law that contracts which are to be performed by payment of money in a designated place or country require that payment shall be made in the legal tender or currency of the place set for payment, yet this is only a *prima facie* rule or presumption, and is rebuttable (*Adelaide Electric Supply Co. Ltd.* v. *Prudential Assurance Co. Ltd.*, [1934] A.C. 122, at 151, 152, 155); and the presumption is rebutted in this case by the statute law of the Province relating to payment of the insurance money (*The Ontario Insurance Act*, R.S.O. 1914, c. 183, s. 155; not changed in substance, as affecting said policies, by R.S.O. 1927, c. 222); by the provisions of the policies relating to the payment of premiums; and by the conduct of the parties (in making and accepting payment of premiums throughout in Canadian currency). (Discussion as to the distinction of this case from others in that the term "dollars" is common both to Canada and the United States and represents a unit or denomination of currency of practically the same value when the dollar is accepted at par in the two countries; and as to the use in the policies of the term "dollars" without any epithet or other qualification; reference to the *Adelaide* case, *supra*, at 152, 155, 148).

Per Duff C.J. and Davis J. (dissenting): A contract to pay in a unit of currency *prima facie* means currency according to the meaning of the unit at the place where payment is called for by the contract (the *Adelaide* case, *supra*, at 156). The currency of the place of payment, i.e., Indianapolis, was the currency intended by the contract to govern the payment of the "dollars" stipulated to be paid. On the construction of the contract alone there was no ambiguity—payment was due in United States dollars. The intention of *The Ontario In-*

surance Act (R.S.O. 1914, c. 183, s. 155, in force when the contracts were made; not changed in substance, so far as payment is concerned, by R.S.O. 1927, c. 222, in force when the policies matured), was not to fix the amount to be paid as something different from the amount settled by the contract between the parties, but merely to determine the manner in which the amount already fixed by the parties was to be discharged; to make payable within Ontario in lawful money of Canada whatever was the agreed amount of insurance. The amount of insurance to be paid was the value, in lawful money of Canada, of United States dollars to the number of dollars specified in the policies.

APPEAL by the plaintiffs from the judgment of the Court of Appeal for Ontario (1) allowing the defendant's appeal from the judgment of McEvoy J. (2) in favour of the plaintiffs.

The dispute was with regard to the amount payable by the defendant insurance company, in Canadian money, on two life insurance policies. The defendant had paid the face amount of the policies, $17,400, in Canadian funds. The plaintiffs claimed that the payment should have included the further sum of $3,632.25, as being premium, at the rate of $20\frac{7}{8}$ per cent. as of April 6, 1933, by which the value in Canadian money of said sum of $17,400 in United States money exceeded the said sum in Canadian money.

The determination of the question came before McEvoy J. upon a motion for judgment under Ontario Consolidated Rule 222, on facts stated and admitted in the pleadings.

The admitted facts included the following:

The defendant is a foreign life insurance corporation organized under and in accordance with the laws of the State of Indiana, one of the United States of America, with its head office, or Home Office, in the city of Indianapolis in said State. Defendant is, and during the whole currency of the policies in question has been, under the laws from time to time in force, as fully entitled to transact the business of life insurance in Ontario as any domestic insurance company. On August 9, 1917, it issued two insurance policies (being those in question) on the life of Barnett Weiss, who resided in the city of Toronto, in the Province of Ontario, and the policies were delivered to Weiss in the said city of Toronto.

(1) [1934] O.R. 677; [1934] 4 D.L.R. 469.

(2) [1934] O.R. 677, at 677-679.

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By each of the policies the defendant agreed to pay "a monthly income of Fifty Dollars per month" to Yetta Weiss, wife of the insured, for 240 successive months, and for so many months thereafter as she should live, "at the Home Office of the Company, Indianapolis, Indiana," the first monthly payment to be made immediately upon receipt at such Home Office of due proof of the death of the insured, during the continuance of the policy, and of the interest of the claimant. It was agreed that the insured reserved the right to change the method of payments of the policy as a death claim without the consent of any beneficiary, by filing at the Home Office of the Company a written request therefor, accompanied by the policy for endorsement. By a letter signed by the insured dated 30th October, 1917, he directed that Yetta Weiss, the beneficiary named, "shall at the time of my death have the option of accepting the commuted value stipulated in said policies in lieu of the monthly income payments, provided for in said policies"; and there was a signed endorsement on each of the policies dated November 22, 1917, to the effect that in accordance with said direction the said beneficiary at the time of the insured's death should have the option "of accepting the commuted value of this policy in lieu of the monthly income payments provided for in the policy."

Each of the policies provided:

(*e*) This contract is made in consideration of the application therefor, which is made a part hereof, and a copy of which is hereto attached, and in further consideration of the sum of Three Hundred Ninety-three & 90/100 Dollars, to be paid in advance to the Company on or before the delivery of this Policy, and of the payment of a like sum on or before the Ninth day of August in each year during the continuance of this contract.

(*f*) All premiums are payable in advance at said Home Office, or to an agent of the Company, upon delivery of the receipt therefor signed by the President or Secretary of the Company, and countersigned by the said agent.

(*g*) Canadian Residents. Should this policy be issued in favour of a resident of Canada, any action to enforce the obligations of the same may be validly taken in any court of competent jurisdiction in the Province where the policyholder resides, or last resided prior to his decease.

Attached to each policy was a photostatic copy of an application signed by Barnett Weiss and dated at Toronto, Ontario, on the 24th day of July, 1917, and in the policies the following statement appeared:

In witness Whereof the State Life Insurance Company has caused this policy to be signed by its President and Secretary at its Home Office in the City of Indianapolis, this 9th day of August, 1917.

All of the premiums paid by the insured were paid in Canadian funds.

The insured, the said Barnett Weiss, died at the said city of Toronto on March 10, 1933.

The said Yetta Weiss, after the death of the insured, elected to accept the commuted value of the policies. The commuted value of each policy was $8,700, totalling for the two policies $17,400.

Some years prior to the death of the insured the defendant for convenience in handling its Canadian business had opened a bank account with the Canadian Bank Commerce at Toronto and defendant had continuously kept the said account.

The plaintiffs claimed that the payment under the policies should be in United States funds, which were, at the time the insurance moneys became due and payable, at a premium over Canadian funds. It was agreed that the cheque sent by the defendant for $17,400, which was payable at the Canadian Bank of Commerce, Toronto, might be cashed, without prejudice to the right to demand and recover the additional amount claimed.

Yetta Weiss aforesaid and Morris Weiss, as executrix and executor of the estate of Barnett Weiss, deceased, joined with Yetta Weiss, in bringing the action, for the purpose of endorsing her claim as beneficiary under the policies.

By the judgment now reported, the plaintiffs' appeal to this Court was dismissed with costs, Duff C.J. and Davis J. dissenting.

R. S. Robertson K.C. and *R. M. Fowler* for the appellants.

A. W. Anglin K.C. for the respondent.

CANNON, J.—I agree with Mr. Justice Masten in the court below that any inference in favour of American dollars that might be drawn from the naming of Indianapolis as a place of payment is rebuttable and is, in fact, rebutted in this case, first, by the provisions of the Ontario Insurance Acts in force during the life of and at the date of maturity of the policies, and, secondly, by the interpretation which has

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been put upon the ambiguous contract by the acts of the parties.

This appeal must be dismissed with costs.

The judgment of Crocket J. and Dysart J. *ad hoc* was delivered by

DYSART, J. (*ad hoc*)—With the greatest deference to the members of this Court who take a contrary view, it seems to me that the result arrived at by the Court of Appeal of Ontario is correct and that this appeal ought to be dismissed.

The single point for determination here is whether the policies in question are payable in United States dollars or in Canadian dollars. The practical importance of the question is, that because of the conditions of money exchange on the date on which payment should have been made, United States dollars were at a premium in Ontario, and were worth more in Ontario than a corresponding number of Canadian dollars.

If it be assumed, as I think it should not, that in entering into this contract, the parties directed their attentions solely to the wording and meaning of the policies, and not in any degree to the provisions and effect of the insurance law of the Province, it might be that they contemplated payment in United States dollars. To make such an assumption in this case would, I think, do violence to the underlying facts and the background of the case.

In 1917, when the policies in question were issued, the Insurance Company was registered in Ontario, had offices and agents there with sufficient authority to transact all things necessary or incidental to the business of securing applications for insurance, of delivering policies, and of collecting premiums. At that time, and subsequently, the insured was a resident of the Province. It may, therefore, be assumed that both contracting parties realized that they were making a contract in Ontario and subject to the laws of Ontario; and that if they adverted at all to the meaning of the term "dollars" as used in the policies, they intended to comply with the laws of the Province in that regard. The Insurance Company in par-

ticular should be assumed to have been fully informed of the law governing the issue and discharge of insurance policies in the Province.

The statutory law of the Province in force in 1917 was *The Ontario Insurance Act*, R.S.O. 1914, ch. 183, which provided in section 155 (1), so far as here relevant, that a policy delivered in the Province to a resident therein,

shall be deemed to evidence a contract made therein, and the contract shall be construed according to the law thereof, and all moneys payable under the contract shall be paid at the office of the chief officer or agent in Ontario of the insuring corporation in lawful money of Canada.

And, (2)

This section shall have effect notwithstanding any agreement, condition or stipulation to the contrary.

By section 154

Except where otherwise provided sections 155 to 158 shall apply to every contract of insurance.

Of these four sections, section 155 is alone relevant to the issues of this case.

When the policies matured in 1933, the Act had changed in form, but, so far as affects the policies, not in substance; R.S.O. 1927, c. 222, ss. 121-159 still required the insurance moneys to be paid in the Province "in lawful money of Canada."

The policies themselves were executed by the Insurance Company at its head office (called Home Office) in Indianapolis, and provided for payment on the death of the insured of " * * * Dollars * * * at the Home Office of the Company, Indianapolis, Indiana." The sums so payable consisted of a series of instalments which were subsequently by arrangement of the parties changed to a lump sum of 17,400 "dollars."

It is well settled law that contracts which are to be performed by payment of money in a designated place or country require that payment shall be made in the legal tender or currency of the place set for payment. But this is only a *prima facie* rule or presumption, and of course is rebuttable: *Adelaide Electric Supply Co. Ltd.* v. *Prudential Assurance Co. Ltd.* (1). It seems to me that the presumption is rebutted in this case by the statute law of the Province relating to payment of the insurance money; by the provisions of the policy relating to the

(1) [1934] A.C. 122, at 151, 152 and 155

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payment of premiums; and by the conduct of parties—of the insured in paying, and of the insurer in accepting payment, of premiums in Canadian currency throughout the whole period. (1) The statutory law relating to the point I have already set out, namely, that "all moneys payable under the contract shall be paid * * * in Ontario * * * in lawful money of Canada." Standing by itself this provision means that *all* moneys—both premiums and insurance moneys—shall be paid in Canadian currency. (2) The provisions respecting the payment of premiums as set out in the policy are that they be paid "at said Home Office or to an agent of the Company." This means that the premiums might be paid to an agent in Ontario, in other words, in Canadian currency. And if the premiums were payable in Canadian currency, then the insurance money should be payable in the same currency because, as is well known, insurance business is conducted on a basis of, *inter alia,* a definite relationship or ratio between the amount of the premiums and the amount of the insurance. To disregard this relationship or to assume that the Insurance Company meant to pay the insurance moneys in United States dollars irrespective of the currency in which the premiums were paid, is, I think, to attribute to the contracting parties something that they would probably not have agreed to if their attention had been called to it. (3) The premiums throughout the whole currency of the policies were paid in Ontario in Canadian currency. The conduct of the parties on this point is entitled to some weight as to the meaning of the contract, or at least as to their intentions respecting the medium of payment.

The contracts, however, should be construed upon broad grounds. To say that the parties in making the contract directed their attention only to the written document, and entirely ignored the existence of Provincial statutory law, is hardly consistent with the probabilities; and is surely inconsistent with what the law imputes to them. Apart from the statute, the policy was on its face made in the United States, was issued from the "Home Office," all premiums were to be made there, or to an agent who might be in the United States, and the insurance moneys were eventually to be paid there in United States currency.

Notwithstanding those express terms, the contract is deemed to be an Ontario contract, performable at least in part in Ontario; and this, by virtue of the force of the Insurance Act of Ontario. In other words, the Act has varied some of the express provisions of the contract, or has substituted its own provisions for others. If the Act can go that far, why may it not go further and substitute also the provisions respecting the currency in which the insurance moneys are to be paid?

The confusion or difficulty in this case arises from the fact that the term "dollars" is common both to Canada and the United States, and represents a unit or denomination of currency of practically the same value when the dollar is accepted at par in the two countries. This fact distinguishes this case from others in which the amount of insurance to be paid in a foreign country is stated in denominations of currency of that country not in use in Canada. In such cases, there is no difficulty. The contract in those cases is to be discharged in foreign currency, converted into Canadian currency at the prevailing rates of exchange. If in this case the policy had been payable in "United States dollars," there would have been no difficulty. But the term "dollar" used without any epithet or other qualification leaves us uncertain as to whether United States "dollars" or Canadian "dollars" is meant. As Lord Wright said in *Adelaide Electric Supply Co. Ltd.* (1) *supra,* at page 152,

> where the same denomination is used in the two countries, the result may be that the sum in figures is to be construed as meaning that number of the common unit of account, "pounds" according to its meaning in the currency law of the country where payment is to be made. Thus it will be a question of construction in the absence of express terms whether the word "pound" means what may compendiously be described as an English pound or a Colonial pound.

And again at p. 155:

> Where the denominations of the currency are different, as in the case of the Spanish pesetas (2), it is clear that an exchange operation is necessarily involved. But where the denomination of the unit of account is identical in the two currencies, though the measure of value which is expressed by the unit of account is different, the question is not so concluded.

(1) [1934] A.C. 122.

(2) *Ralli Brothers* v. *Compañia Naviera Sota y Aznar,* [1920] 2 K.B. 287.

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Lord Russell at page 148 of the same case introduces another factor in construction when he says:

> It is not a question what amount of coins or other currency has the debtor contracted to pay. A debt is not incurred in terms of currency, but in terms of units of account. It is a question of discharging a debt incurred in terms of units of account common to more than one country, in the currency which is legal tender in the particular country in which the debt has to be paid.

This language of Lord Russell's is helpful also as suggesting that the intention of the contracting parties here may have been directed to the *number* of "dollars" to be paid under the policies rather than the *currency* in which those dollars were to be found.

Reverting again to section 155 (1) above quoted in part, and bearing in mind that "the contract shall be construed according to the law of Ontario," it may be said that the law of Ontario is that the currency to be used in paying the insurance moneys is the currency of the place of payment, that is the United States. While this is true, it is also the law of Ontario, that the payment in this case was *presumably* to be made in United States dollars, and that the presumption is rebuttable, as I have above indicated.

I desire to be understood as confining my remarks in this judgment to the circumstances and the policies in this case.

For these reasons, most of which were expressed by the learned judges of the Court of Appeal, I think the payment of these policies should be made in Canadian dollars to the number specified in the policies. As payment in fact has been so made, without prejudice to this appeal, the appeal should be dismissed with costs.

The judgment of Duff C.J. and Davis J. (dissenting) was delivered by

DAVIS, J.—There are no facts in dispute in this action but the facts raise a narrow and difficult question of law. The parties agreed to have the action determined upon a motion for judgment on the pleadings under Consolidated Rule 222 of the Ontario Rules of Practice.

The question of law is whether or not the respondent, a life insurance company with head office in the city of Indianapolis in the United States of America, was bound

to pay upon the death of the insured Weiss the proceeds of the life insurance calculated in terms of the value of Canadian or of American dollars. At the time the insurance moneys became due and payable there was a premium of $20\frac{7}{8}$ per cent. on American money in terms of Canadian money. The company paid the full face value of the two policies on the life of the insured to the widow of the deceased, as sole designated beneficiary thereof, in Canadian dollars without prejudice to the question of exchange, it being asserted by the widow that the company was bound to pay in terms of the value of American dollars. This action was brought by the widow and the legal representatives of the deceased insured against the company to recover $3,632.25 (with interest), being the amount of the exchange. Mr. Justice J. A. McEvoy, who heard the motion for judgment in the action, decided in favour of the plaintiffs for that sum. Upon appeal, the Court of Appeal for Ontario set aside that judgment and ordered that the action be dismissed. The plaintiffs now appeal to this Court.

The insured was Barnett Weiss, a business man resident in the city of Toronto who died on March 10, 1933. The appellants are his widow and the executors of his will. The respondent, the State Life Insurance Company, is a foreign life insurance company organized under and in accordance with the laws of the State of Indiana, one of the United States of America, with head office (referred to by the company as its "Home Office") in the city of Indianapolis in the said State. The respondent has at all material times been duly registered in the Province of Ontario as a life insurance company entitled to transact the business of life insurance within the province.

On or about August 9, 1917, the respondent issued two insurance policies on the life of the late Barnett Weiss and delivered the policies to him in Toronto. By the terms of the said policies, identical in form, the respondent insured the life of the said Weiss and agreed upon his death to pay a monthly income of $50 to his wife during 240 successive months and for so many months thereafter as she should live.

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The policies were attested in the following words:

In witness Whereof the State Life Insurance Company has caused this policy to be signed by its President and Secretary at its Home Office in the City of Indianapolis, this 9th day of August, 1917.

Attached to each policy is a photostatic copy of a letter to the respondent signed by the insured at Toronto the 30th day of October, 1917, directing, pursuant to certain provisions of the policies, that his wife as the beneficiary named in the policies shall at the time of his death have the option of accepting the commuted value stipulated in the said policies in lieu of the monthly income payments. And typewritten upon the back of each of the policies appears an endorsement, dated November 22, 1917, signed by the Vice-President of the company stating that

In accordance with the written direction of the insured, dated October 30th, 1917, the beneficiary Yetta Weiss, at the time of the death of the insured shall have the option of accepting the commuted value of this policy in lieu of the monthly income payments provided for in the policy.

It is admitted that proper and sufficient proofs of loss were completed and forwarded by the appellants to the respondent at its home office in Indianapolis and that the appellant Yetta Weiss, the widow of the insured and the sole beneficiary of the policies, elected to accept the commuted value of the policies pursuant to the endorsement upon the policies. A cheque of the respondent for the commuted value of the policies, $17,400, payable at the Canadian Bank of Commerce, Toronto, was delivered by the respondent to the appellants by letter, dated April 6, 1933, sent by the respondent from its home office at Indianapolis. The appellants claimed that the payment under the two policies in question should have been the equivalent in Canadian money of the commuted value of the policies in American money. By arrangement between the parties, the appellants became entitled to cash the cheque without prejudice to the question of exchange. On April 6, 1933, the premium on American moneys is admitted by the parties to have been $20\frac{7}{8}$ per cent. Yetta Weiss, the widow of the insured and the sole named beneficiary under the policies, commenced this action on October 23, 1933, to recover the amount of the premium. The executors of the last will of the deceased joined in the action for the purpose of endorsing the claim of Yetta Weiss as beneficiary under the policies.

The policies in question contained, amongst others, the following clause:

Canadian Residents. Should this policy be issued in favour of a resident of Canada, any action to enforce the obligations of the same may be validly taken in any court of competent jurisdiction in the Province where the policyholder resides, or last resided prior to his decease.

The action against the company was brought in the Province of Ontario.

It is admitted that all the premiums paid by the insured on the said policies were paid in Canadian moneys and that for some years prior to the death of the insured the company for convenience in handling its Canadian business opened a bank account with the Canadian Bank of Commerce at Toronto and that the company has continuously kept the said account from the date of its opening to the present time. No particulars are given as to either the payment or receipt of the premiums from time to time and, apart from the admission that the company was fully entitled to transact the business of life insurance in Ontario, there is nothing to shew the extent to which this power was actually exercised.

The policies expressly state that the company agrees to pay "* * * dollars at the Home Office of the Company, Indianapolis, Indiana." Upon those words of the policies the appellants assert the right to be paid on the basis of the value of American money. With the greatest deference to those of the court below who have expressed the opinion that the language is ambiguous, I cannot see any ambiguity. In the very recent case of *Adelaide Electric Supply Co. Ltd.* v. *Prudential Assurance Co. Ltd.* (1), it was clearly stated in the House of Lords that a contract to pay in a unit of currency *prima facie* means currency according to the meaning of the unit at the place where payment is called for by the contract. At p. 156 Lord Wright says,

The old cases I have cited show, as I think, that in determining what currency is intended, the general rule *prima facie* applies that the law of the place of performance is to govern. As Lord Eldon said in *Cash* v. *Kennion* (2), the debtor is bound to have the money ready at the appointed time and place of payment. It is natural and reasonable that the money he should be bound to have ready should be the legal money of that place, rather than that he should have a foreign currency or should have an amount in his home currency which is not the agreed figure, but a different figure representing an exchange operation by which the agreed figure is converted (in this case) from sterling to currency. Similarly,

(1) [1934] A.C., 122. (2) (1805) 11 Ves. 314, 316.

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if a Frenchman and a Belgian were to agree that francs were to be paid by one to the other in Brussels, it would naturally be inferred in the absence of express terms that the Belgian franc was intended. The currency of the place of payment, i.e., Indianapolis, was the currency intended by the contract to govern the payment of the "dollars" stipulated to be paid. If the contract stood alone I should have no doubt that payment was due in American dollars.

The difficulty, however, is that the provisions of the *Ontario Insurance Act*, both at the date of the issue of the policies and at the date of the death (for it is not contended that there is any substantial difference in the language of the statute at the two dates) are urged upon us as governing these policies.

If the provisions of the *Ontario Insurance Act* apply to the policies in question and to the payment of the proceeds thereof, and it is not in dispute that they do, it seems plain that payment is to be made "in lawful money of Canada" notwithstanding any agreement in the contracts to the contrary.

It is admitted that the company

> during the whole currency of the insurance policies * * * has been, under the laws from time to time in force, as fully entitled to transact the business of life insurance in Ontario as any domestic insurance company. (Par. 2 of the statement of claim)

and that the policies

> were delivered to the insured, Barnett Weiss, in the City of Toronto, County of York, in the Province of Ontario. (Par. 3 of the statement of claim).

The provisions of the Ontario *Insurance Act*, R.S.O. 1927, ch. 222, in operation at the date of the maturity of the policies, relevant to the present case, appear in Part V dealing with "Life Insurance."

> Sec. 119 (2) "Contract" or "contract of insurance" means a contract of life insurance;
>
> (10) "Insurance money" includes all insurance money, benefits, surplus, profits, dividends, bonuses and annuities payable by an insurer under a contract of insurance;
>
> Sec. 120 (2) Unless hereinafter otherwise specifically provided, this Part shall apply to the unmatured obligations of every contract of life insurance made in the Province before the coming into force of this Part.
>
> Sec. 121 A contract is deemed to be made in the Province,
>
> (*a*) If the place of residence of the insured is stated in the application or the policy to be in the Province; or,
>
> (*b*) If neither the application nor the policy contains a statement as to the place of residence of the insured, but the actual place of

residence of the insured is within the Province at the time of the making of the contract.

Sec. 159 (1) Insurance money which is expressed to be payable at the maturity of the contract shall be payable thirty days after reasonably sufficient proof has been furnished to the insurer of the maturity of the contract, of the age of the person whose life is insured, and of the right of the claimant to receive payment.

(2) Insurance money shall be payable in the Province in lawful money of Canada.

The above provisions came into force on January 1st, 1925, and while made applicable to the unmatured obligations of every contract of life insurance made in the Province of Ontario before their coming into force, it is convenient to refer to the relevant provisions of the *Ontario Insurance Act* in force at the time the contracts were made. Such provisions are found in the Revised Statutes of Ontario, 1914, ch. 183:

Sec. 155 (1) Where the subject-matter of a contract of insurance is property or an insurable interest in property within Ontario, or is a person domiciled or resident therein, the contract of insurance, if signed, countersigned, issued or delivered in Ontario or committed to the post office or to any carrier, messenger or agent to be delivered or handed over to the assured, his assign or agent in Ontario, shall be deemed to evidence a contract made therein, and the contract shall be construed according to the law thereof, and all moneys payable under the contract shall be paid at the office of the chief officer or agent in Ontario of the insuring corporation in lawful money of Canada.

(2) This section shall have effect notwithstanding any agreement, condition or stipulation to the contrary.

This section was introduced into Ontario by 60 Vict. (1897), ch. 36, sec. 143, amending 56 Vict. (1893), ch. 32, sec. 10.

It will be seen that no useful argument is available as to whether the statutory provisions in force at the date of the issue of the policies or at the date of the maturity of the policies should govern, because, so far as payment is concerned, the words of the two statutes are substantially the same.

The Court of Appeal for Ontario unanimously decided that the payment of the commuted value of the policies in Canadian dollars was a complete satisfaction of the obligation of the company, having regard to the statutory provisions, and dismissed the action. The appellants in their appeal before us argued that these provisions of the *Ontario Insurance Act* mean that the agreed amount of insurance, whatever it be according to the contract, is to be paid "in the Province of Ontario" and "in lawful money of Canada," but that the statute has not the effect of changing

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the agreed amount of the insurance. The argument is that if the amount of money contracted for in the policies is 17,400 dollars payable at Indianapolis then the value of that sum is to be paid, by reason of the statute, in Ontario in lawful money of Canada, and that this necessarily involves an exchange transaction at the rate of exchange on the day when payment is due.

If there had been no such statutory enactment in Ontario the respondent would have been required to pay the beneficiary at its home office in Indianapolis $17,400 in American currency. That must be the plain effect of the words of the contract. Then, applying the statutory provisions, no difficulty arises as to the place of payment, for it is plain that the company must pay the beneficiary " in Ontario," but the problem is, do the words of the statute " in lawful money of Canada," involve payment of the stipulated number of dollars in Canadian currency or payment in lawful money of Canada of what is at the proper time the equivalent in Canadian currency of the value of the debt in terms of the contract between the parties? The difficulty arises because the word " dollar " has been used in both Canada and the United States to denote a measure of value expressed in the currencies of those countries. Supposing the policy had been issued by an English company, licensed to do business in Ontario, and delivered within Ontario to the insured, a resident of Ontario, and had provided for payment at maturity of " a thousand pounds at the head office of the company in London, England," what would the effect of the statutory provision in Ontario be upon that policy? Counsel for the respondent frankly admits that in that case the beneficiary would be entitled to payment in Canadian money of such a sum as represents the value in English currency of the nominal amount of the policy at the prevailing rate of exchange. But the contracted debt, in this case, being in " dollars," counsel for the respondent argues that the *prima facie* presumption of American dollars arising out of the stated place of payment in the policy, Indianapolis, is dislodged by the statute operating upon the contract and substituting Ontario as the place of payment instead of Indianapolis. That is the crucial point of the case and it depends upon what the effect of the statute is.

Did the legislature have in mind that it would interfere with the contract that the parties had made and change the amount which the parties had agreed upon, or, was the legislature accepting the amount fixed by the contract to be paid and merely providing the manner in which the amount so fixed was to be discharged? It is difficult to attribute to the legislature an intention of intervening between the parties to the contract to protect the insured against any depreciation of foreign currency. It appears more reasonable to attribute to the legislature the intention of bringing the insuring corporation within the jurisdiction of the province by requiring it to have a registered agent upon whom process could be made and of providing the method in which a debt of fixed amount is to be discharged. We are all aware of the difficulties that presented themselves to beneficiaries in the different provinces in Canada in enforcing claims against foreign companies in the courts of their own province because of the absence of any agent of the companies upon whom process could be served, and it seems to me that the real object and intention of the legislature of Ontario when in 1897 it first introduced the provision that

> all moneys payable under the contract shall be paid at the office of the chief officer or agent in Ontario of the insuring corporation, in lawful money of Canada, and this section shall have effect notwithstanding any agreement, condition or stipulation to the contrary

was to overcome the difficulties in enforcing payment in Ontario against foreign insuring companies. If that was the object and intention of the legislature, there was no intention to fix the amount to be paid as something different from the amount settled by the contract between the parties but merely to determine the manner in which the amount already fixed by the parties was to be discharged.

The question is by no means free from doubt. One can quite understand another view being taken. But upon the whole I think that the statute only intended to make payable within Ontario in lawful money of Canada whatever was the agreed amount of insurance. When the parties agreed by their contract that there should be so many thousand dollars payable at the home office of the insuring company in Indianapolis, *prima facie* that meant American dollars, being the currency of the place of payment

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agreed upon. To dislodge that *prima facie* presumption, something more, it seems to me, is necessary than a statutory provision directed toward bringing the insuring corporation within reach of the beneficiary so that it might be sued within the province in which the insured resided and in which the policy was delivered. And to enter suit in the courts of the province it was convenient, if not necessary, to provide that the obligation under the contract should be payable in lawful money of Canada. That interpretation of the statute does not destroy the contract made between the parties as to the amount of insurance to be paid. It would require very clear and precise language to lead to an interpretation which would have the effect of destroying the contract between the parties in so far as the extent of the obligation is concerned.

I would therefore allow the appeal and restore the decision on the motion for judgment on the pleadings, with costs throughout.

Appeal dismissed with costs.

Solicitors for the appellants: *McMaster, Montgomery, Fleury & Co.*

Solicitors for the respondents: *Hunter & Hunter.*

1935
*May 8.
*June 10.

PHILIP A. HAUCK AND OTHERS (PLAINTIFFS) ..... } APPELLANTS;

AND

JOSEPHINE SCHMALTZ AND OTHERS (DEFENDANTS) ..... } RESPONDENTS.

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

Will—Construction—Intention of the testator—"Advances heretofore made by me to my children"—Whether debts or notes owing by certain children discharged.

The will in question in this case devised and bequeathed "all my real and personal estate of which I may die possessed," and, after giving certain specific legacies, contained the following clause: "The balance of my property to be divided between my ten children (naming them), and so that the said Joseph P. Hauck shall receive one thousand dollars less than the shares coming to the other chil-

*PRESENT:—Duff C.J. and Lamont, Cannon, Crocket and Davis JJ.

dren named, in consideration of advances previously made to him by me, and with this exception no account shall be taken or had of advances heretofore made by me to any of my children." Four of the sons were indebted to the estate on promissory notes given by them individually to the testator. Joseph P. had received $1,000 from his father in connection with some partnership transaction in land which they had entered into together. Other than the above-mentioned transactions with the five sons, the only advances were wedding presents of not over $100 each to the four daughters.

Held, reversing the judgment of the Appellate Division ([1934] 3 W.W.R. 335), that the debts represented by the notes were discharged by reason of the words in the will "and with this exception no account shall be taken or had of advances heretofore made by me to any of my children." According to the intention of the testator, ascertained by a fair construction of the will and under the circumstances of the case, the words being given their usual and ordinary meaning, the moneys covered by the notes ought to be treated as no longer owing.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1), reversing the judgment of the trial judge, Ewing J. and dismissing the appellants' action, upon an issue directed by Simmons C.J. as to the construction of the will of the father of the parties in this case, the question being the alleged release by the testator of certain debts represented by promissory notes owing to him by some of his sons at the date of his death.

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

R. D. Tighe K.C. for the appellants.

H. J. Macdonald for the respondents.

The judgment of the Court was delivered by

LAMONT J.—This is an appeal by the plaintiffs from a judgment of the Appellate Division of the Supreme Court of Alberta (1) which reversed (Lunney and McGillivray JJ. A. dissenting) the judgment of Ewing J. in favour of the plaintiffs.

The question in the appeal is as to the proper construction of the will of Engelbert Hauck which, after making provision for a couple of small bequests, reads as follows:—

(1) [1934] 3 W.W.R. 335.

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I give, devise and bequeath all my real and personal estate of which I may die possessed in the following manner, that is to say:

Twenty-five hundred (2500) dollars and my household furniture and effects (if still undisposed of at the time of my decease) to my beloved wife, Annie Hauck, free from succession duty;

The balance of my property to be divided between my ten children, Joseph P. Hauck, Josephine Schmaltz, Albin Hauck, Annie Waechter, Tillie Heidmiller, Mary Heisler, Philip A. Hauck, Henry Hauck, Clarence Hauck and Edwin Hauck, and so that the said Joseph P. Hauck shall receive one thousand dollars less than the shares coming to the other children named, in consideration of advances previously made to him by me and with this exception no account shall be taken or had of advances heretofore made by me to any of my children.

And I nominate and appoint Philip A. Hauck, Henry Hauck and Clarence Hauck to be executors of this my last will and testament. * * *.

The will was made on the 29th day of October, 1930, and Engelbert Hauck died on the 15th day of June, 1931, at Heisler, Alberta. He left him surviving his widow, Annie Hauck, and ten children—six sons and four daughters. At the date of the will the daughters were all married.

Upon the application of Joseph P. Hauck, Josephine Schmaltz, Annie Waechter and Mary Heisler, all beneficiaries under the will, and it appearing that four of the sons, namely, Philip, Clarence, Henry and Albin, had made certain promissory notes in favour of Engelbert Hauck, deceased, for moneys advanced, which notes the respective makers thereof claimed had been discharged and satisfied by the provision of the will, an issue was directed wherein Philip, Clarence, Henry and Albin were directed to be plaintiffs; and Matilda Heidmiller, Joseph P. Hauck, Josephine Schmaltz, Annie Waechter and Mary Heisler were directed to be defendants, and the question to be tried was:—

The plaintiffs affirm and the defendants deny that the plaintiffs, and each of them, were and are fully discharged and released from any and all liability in respect of the promissory notes given by the plaintiffs respectively to Engelbert Hauck.

The promissory notes referred to were the following:—

Promissory note for $5,000 dated November 1, 1925, made by Philip Hauck in favour of Engelbert Hauck, payable one year after date with interest at 5 per cent. Promissory note for $70 dated May 1, 1925, made by Philip Hauck in favour of Engelbert Hauck, payable six months after date with interest at 5 per cent. Promissory note for $250 dated November 1, 1925, made by Philip Hauck in favour of Engelbert Hauck, payable one year after date with interest at 5 per cent. Promissory note for $1,500 dated November 1, 1925, made by Philip Hauck in favour of Engelbert Hauck, payable one year after date with interest at 5 per cent. Promissory note for $8,066 dated November 1, 1928, made by

Clarence A. Hauck, payable at the Imperial Bank of Canada, Daysland, Alberta, as soon as possible after date. Promissory note for $7,200 dated December 1, 1926, made by H. Hauck in favour of Engelbert Hauck, payable as soon as possible after date. Promissory note for $1,000 dated March 1, 1927, made by Albin Hauck in favour of Engelbert Hauck, payable three years after date with interest at 4 per cent per annum. Promissory note for $2,000 dated March 30, 1922, made by Albin Hauck in favour of E. Hauck, payable twelve months after date with interest at 4 per cent.

The issue came on for trial before Mr. Justice Ewing at Edmonton, on the 22nd March, 1934. That learned judge construed the will to mean that the plaintiffs were discharged of their obligations under the notes. On appeal to the Appellate Division that judgment was reversed (Lunney J. A. and McGillivray J. A. dissenting) (1). The plaintiffs now appeal to this Court.

The question for determination is: What was the intention of Engelbert Hauck, did he intend to discharge and release the plaintiffs from their respective liabilities on the promissory notes which he held, or did he intend that these notes should still be obligations on the part of his sons and form part of his estate?

For the purpose of ascertaining the intention of a testator the will is to be read in the first place without reference to or regard to the consequences of any rule of law or canon of construction. The words are to be given their usual and ordinary meaning, the particular passage concerned being taken together with whatever is relevant in the rest of the will to explain it.

The will gives, devises and bequeaths

all my real and personal estate of which I may die possessed in the following manner, that is to say: * * *

No assistance can be derived from this disposition of his property, as, later on in the will, he directs that, with the exception of the advance to Joseph, no account shall be "taken or had of advances heretofore made by me to any of my children." These are the words requiring interpretation. Without these words the notes would undoubtedly have formed part of his estate. But the question is: To what was he referring when he used the word "advances"?

From the language of the will it appears that Joseph owed his father $1,000, which the father says was "in consideration of advances made to him." From the evidence put in

(1) [1934] 3 W.W.R. 335.

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this was shewn to be in connection with some partnership transaction in land which Joseph and his father had entered into together in 1910. The will speaks of it as advances to Joseph. But whether it was cash loaned to Joseph or money paid by the father for Joseph's share in the partnership is not disclosed. At any rate in the end it was a debt which Joseph was to pay into the estate, but, with the exception of that advance, the executors were directed not to take into account any other advance which the father may have made to any of his children.

The word "advances" primarily means advances of money whether by way of loan or payment at the request of the legatee. *In re Jacques, Hodgson* v. *Braisby* (1). In that case Stirling J., at page 274, said:

> The word primarily refers to advances of money. And advances of money is commonly spoken of, and the expression is perfectly intelligible to everyone; but an advance of a house or a chattel would not be understood without explanation by anyone but a lawyer.

In referring to his "advances" to Joseph the father used the word in its primary meaning. What reason have we for concluding that he did not give it its primary meaning when referring to advances to his other children?

The evidence put in shews what the moneys represented by the notes was given for. In every case it was cash given to the son, or paid out by the father at the son's request, or property sold by the father to his son and a promissory note taken for the price, or a part thereof. It was admitted by the plaintiffs that they looked upon the money received from their father as loans and that they had always intended to pay them when they got in a position to do so.

If the words "advances heretofore made" do not refer to the moneys for which the plaintiffs gave notes, there is nothing either in the will or in the evidence which shews to what it does refer. It was suggested that it might refer to some gift of money or household furniture (not over $100) which the evidence discloses was given to each of the daughters on her marriage. In my opinion this suggestion cannot be accepted, not only on account of the smallness of the amount but also because it is highly improbable that the father would have kept track of wedding presents, or would have expected them to be returned to him or paid

(1) [1903] 1 Ch. 267.

for. None of the members of the family know of any other moneys having been loaned or given to any of the children.

In the case at bar we are asked to read "advances" in the sense of the expression "advancement by portion" and then apply the equitable presumption against double portions. I do not think this presumption can have any application to a case of this kind. The father was making loans to his sons to help them along, he was not advancing to them a portion of what they were to receive out of his estate. They were loans which the boys intended to pay back. No doubt he was not pressing either for principal or interest, but some of the boys were paying interest regularly. Then, on October 29th, 1930, he came to make his will. In doing so he must be supposed to have reviewed in his mind the circumstances of each of his children, and then to have done, as Lord Cottenham said in *Pym* v. *Lockyer* (1), quoted with approval by Bowen L.J. in *In re Lacon* (2):

> A father who makes his will, dividing his property amongst his children, must be supposed to have decided what under the then existing circumstances ought to be the portion of each child, not with reference to the wants of each, but attributing to each the share of the whole which, with reference to the wants of all, each ought to possess.

The survey of the circumstances of his children would shew the testator that his four daughters were all married and were in fair financial circumstances; that, owing to the hail and drought of 1929 and 1930, the crops around Heisler were, in these years, almost negligible. The farmers were unable to pay their bills with the result that his sons, who were in business there, had suffered great losses and were themselves faced with insolvency and would be forced into bankruptcy if called upon to pay the notes he held which they would be upon his death unless they were protected. The sons who were farming in the west were experiencing the results of bad crops or no crops at all from drought and depression. Joseph, who was living in Ontario, may have been well-to-do. So far as the will or the evidence discloses no sums other than those secured by the plaintiffs' notes were ever given by the father to any of his children. Why then reject the construction that he intended to cancel the notes? The objection taken to this construction is that it contravenes the view of law that

(1) (1840) 10 L.J. Ch. 153. (2) (1891) 60 L.J. Ch. 403, at 410.

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equality is what the father in dealing with his children would in most cases presumedly intend. This presumption, however, does not apply where the language is clear and plain, and, where it does apply, it may be rebutted. Whatever reason the father had for making Joseph pay the advance to him while cancelling the notes of the other sons, we need not inquire, for in unambiguous language he directs that Joseph's debt should be charged against what Joseph was receiving from the estate. Now it is a paramount rule that a testator can do as he likes with his own property. All he has to do is to say, in clear and unambiguous language, to whom it is to go and the courts will respect his wishes. In my opinion the language of this will is sufficiently clear and unambiguous and, as there were no moneys advanced by him except those covered by the notes, I think the notes are what he was referring to.

I therefore agree with the trial judge that the fair construction of the will is that the moneys covered by the notes were not to be brought into hotchpot but were to be treated as no longer owing. It is, in my opinion, not sufficient answer for a court to say: "We do not know what the testator meant by 'advances heretofore made by me to my children' but as the construction given to it in the court below works an inequality as between the children, the testator could not have meant that."

I take it that this father, along with many another father in the western provinces, in the last five years, was confronted in making his will with the question, not: How can I divide my estate so that all my children will get an equal share? But: How can I distribute it so as to keep them from being forced into bankruptcy?

The appeal will therefore be allowed, the judgment below set aside and the judgment of the trial judge restored.

Appeal allowed with costs.

Solicitors for the Appellants: *Tighe & Wilson.*

Solicitors for the respondents: *Wood, Buchanan & Macdonald.*

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

AND

DAME ORIZE DEMERS (PLAINTIFF) RESPONDENT.

1935
*Mar. 4, 5
*June 10

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

Practice and procedure—Petition of right—Fiat—Granted against the "Minister of Roads" as prayed for—Petition to amend fiat—Substituting the name of "His Majesty The King"—Jurisdiction of trial judge to grant petition.

The respondent presented a petition of right, which was granted, praying that she be authorized to bring action against the "Minister of Roads" to recover the sum of $10,000 as damages for the death of her husband who was killed following a collision of his automobile on a provincial highway with a tractor belonging to the Department of Roads. The respondent, after the hearing of the case but prior to judgment, made a motion before the trial judge for leave to amend the prayer of her petition of right by replacing the words "Minister of Roads" by the words "His Majesty the King." The motion was granted by the trial judge at the same time that judgment was given on the petition of right awarding $5,000 as damages, which judgment was affirmed by a majority of the appellate court. The appellant's counsel before this Court, besides denying any liability of the Crown upon the facts of the case, contended that the trial judge should not have allowed the substitution of the name of "His Majesty the King" for the "Minister of Roads" without the previous authority of a new fiat.

Held that it was competent to the Superior Court to grant the motion to amend the petition of right, if that were considered necessary.

Held, also, Cannon J. and Dorion J. *ad hoc* dissenting, that upon the facts of the case as found by the trial judge, the appellant was liable.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec, affirming the judgment of the trial judge, Sévigny J. and maintaining the respondent's petition of right for $5,000 damages.

On the evening of the 18th July, 1929, the respondent's late husband, Lucien Robillard, while driving his automobile on the Sherbrooke-Magog highway, and approaching Magog, met a tractor belonging to the Department of Roads, which was towing a scraper designed to level the surface of the road. One part of the scraper extended about ten or twelve inches farther to the left than the

*PRESENT:—Duff C.J. and Lamont, Cannon and Davis JJ. and Dorion J. *ad hoc*.

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side of the tractor, and it is assumed that the deceased collided with that part of the scrapper, as a result of which he lost control of his machine, which turned over three times and did not come to stop until it had reached a distance of 200 feet behind the tractor. The driver, the late Robillard, was almost instantly killed. The respondent presented a petition of right on the 18th July, 1930, praying that she be authorized to take action against the "Minister of Roads" to recover the sum of $10,000.00 damages. At the conclusion of the enquête, the respondent presented a motion for leave to amend the conclusions of her petition by substituting the name of "His Majesty the King" for the "Minister of Roads." This motion was granted by the trial judge at the same time that he rendered judgment on the merits, by which he found that the accident was due to the common fault of the deceased and the servants of the Department of Roads, and he, accordingly, gave judgment in favour of the respondent for the sum of $5,000. This judgment was affirmed by a majority of the appellate court.

Charles Lanclot K.C. and *Adolphe Allard K.C.* for the appellant.

Aimé Chassé K.C. and *Maurice Boisvert K.C.* for the respondent.

The judgment of Duff C.J. and Davis J. was delivered by

DUFF C.J.—I agree with the learned trial judge that the arrangement of the lights upon the vehicle that Bolduc, the servant of the Roads Department, was driving, when the mishap occurred in which the husband of the respondent lost his life, was calculated to mislead the drivers of automobiles met with on the road; and that the servants of the Roads Department were guilty of actionable negligence in proceeding along the road in such circumstances.

I concur with the majority of the Court of King's Bench in their view that the appeal of the Crown from the learned trial judge could not be sustained as concerns the issues of fact. This was my view at the conclusion of the argument; and a careful examination of the evidence since then confirms it.

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I also agree with the majority of the Court of King's Bench that it was competent to the Superior Court to give judgment upon the petition of right as framed, or to amend the same if that were necessary. My own view is that amendment was unnecessary.

Neither before us, nor at any stage of the proceedings, was it contended on behalf of the Crown that, given the facts as found by the majority of the Court of King's Bench, a petition of right, properly framed, would not lie for the damages claimed by the respondent. It must be taken to be conceded, for the purposes of this case, that a petition of right, properly framed, lies, but we are giving no decision upon the point.

The appeal should, therefore, be dismissed with costs.

LAMONT J.—I am of opinion that this appeal should be dismissed. The only question is: Has it been shown that the accident was caused or contributed to by the failure of the Department of Highways for the province of Quebec, which owned and operated the truck and the scraper, to have sufficient and proper lights on the scraper when being driven along the highway at night?

The truck was going towards Sherbrooke while the automobile, driven by the petitioner's late husband, was going in the opposite direction towards Magog. It was about ten o'clock at night and dark. A collision took place in which the husband of the petitioner was killed.

The truck was travelling at a speed of four miles an hour; the automobile was travelling thirty-five miles at least. Behind the truck a scraper used for levelling the road or keeping it smooth was being dragged. This scraper was fitted to a frame which was attached to the truck by means of a chain about five feet long. This scraper not only covered the ground the full width of the truck, but extended some ten inches beyond its left side.

The truck had the following lights: (*a*) two headlights in front (white lights); (*b*) a red lantern on the left side of the truck hanging from the top over the driver's seat; (*c*) another white light behind the tractor which could not be seen by anyone travelling in a direction opposite to that of the truck, but which was intended to reflect the

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light upon the scraper and in this manner notify drivers of automobiles or other vehicles of the danger to be apprehended from the scraper extending into the road ten inches further than the truck. It was in fact this extension of the scraper beyond the truck that caused the damage.

The deceased man was driving at a rapid pace on a good road towards Magog; he safely passed the truck but ran against the scraper with the result that his automobile turned over three times, went into a five foot ditch, and he was killed. With the two headlights shining in his face it would be difficult, in my opinion, for the driver of the automobile to see any reflection on the scraper from the light behind the truck, and, in any case, the existence of the red light on the left side of the truck indicated the extreme left of the danger to be apprehended, whereas the danger which caused the accident was the extension of the scraper beyond the red light. In my opinion there was abundant evidence to justify the finding that the accident was due to the common fault of the driver of the automobile in driving at the rate of speed at which he was going and a failure on the part of the operator of the truck in not having the scraper sufficiently and properly lighted. If the truck and scraper are to be operated at night, proper precautions must be taken to notify those using the road of the danger to be apprehended. The red flag which was attached to the scraper might convey warning during the day when it could be seen, but it was perfectly useless for that purpose on a dark night.

The argument that it was *ultra vires* the power of the Superior Court judge to effect a change in the name of the respondent was properly rejected by the Court of King's Bench.

CANNON J.—La Cour du Banc du Roi, ayant renvoyé, par une majorité de trois à deux, l'appel de la Couronne du jugement de la Cour Supérieure maintenant une pétition de droit jusqu'à concurrence de $5,000 en faveur de l'intimée, la Couronne nous demande de renvoyer l'action parce que la pétition de droit aurait été illégalement amendée après l'audition et avant jugement en substituant, dans les conclusions, les mots "Sa Majesté le Roi" aux

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mots "le ministre de la voirie." Malgré tout le respect avec lequel nous avons écouté la savante plaidoirie de l'assistant-procureur-général de la province de Québec sur ce point, je dois dire que je crois, avec la Cour du Banc du Roi, que le juge de la Cour Supérieure avait le pouvoir d'amender la procédure et de considérer que, dès le commencement, en réalité, le gouvernement de la province de Québec était en cause.

Le juge de première instance, tout en blâmant le mari de la requérante d'avoir conduit sa voiture à grande vitesse, qu'il n'a pas diminuée pour rencontrer le tracteur et la niveleuse, a trouvé le gouvernement responsable parce que cette niveleuse ne portait pas une lumière ni un autre signal pouvant indiquer le danger, la nuit, résultant du fait que cette niveleuse était plus large que le tracteur et que le couteau du centre excédait le cadre de la niveleuse d'environ dix pouces à gauche. Le savant juge, sans avoir entendu les témoins, vu que l'enquête a été faite à Sorel devant un commissaire, a exprimé l'opinion, après avoir, comme nous, simplement lu la preuve, qu'il y a eu faute de la part de l'employé de la voirie en charge du tracteur et de la niveleuse, parce qu'il n'a pas indiqué le danger comme il aurait dû le faire. Le jugement dit:

> Considérant que le tracteur était conduit à la droite du chemin et portant sur le devant deux lumières blanches et, en plus, une lumière rouge, à gauche, près du siège du conducteur.

La lecture du dossier me force d'arriver à la conclusion qu'une partie de la preuve doit avoir échappé à l'attention du savant juge, parce qu'en réalité, à part ces deux lumières blanches et la lumière rouge, il y avait, en arrière du tracteur, une lumière blanche qui éclairait la niveleuse.

Hector Bolduc, qui était en charge du tracteur, nous dit que cette gratte avait 10 pieds de large, et que, le soir de l'accident, vers dix heures, à part des phares, il y avait deux lumières sur le tracteur, en avant, sur le côté, à gauche, une lumière rouge, et *en arrière une lumière blanche qui reflétait sur la niveleuse,* et un pavillon sur la gratte à gauche. Il ajoute qu'au moment de l'accident la gratte occupait la moitié du chemin qui était droit et planche.

Joseph Hamel nous dit avoir, immédiatement après l'accident, mesuré l'espace qu'il y avait entre le couteau

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du milieu de la gratte, qui excédait le tracteur d'environ dix pouces, et l'autre côté du chemin carossable. Il nous dit qu'il y avait là un espace de dix pieds, libre pour le passage de l'automobile, venant à la rencontre de l'appareil. Le même témoin, dit que, immédiatement après l'accident, il a constaté qu'il y avait une lumière en arrière du tracteur, qui reflétait sur la gratte.

Un troisième témoin, Odilon Vaillancourt, corrobore Joseph Hamel quant à la distance de dix pieds entre le couteau de la gratte et le bord du chemin à gauche. Il dit avoir remarqué qu'il y avait une lumière en arrière du tracteur qui reflétait sur la gratte. Il n'a pas même été transquestionné sur ce point.

Je suis donc du même avis que l'honorable juge Hall, en Cour du Banc du Roi, lorsqu'il dit:

The only ground of fault charged by the learned trial judge against the Department is that, while the tractor was properly lighted, the scraper itself, which was being towed behind the tractor, carried no light or any other signal designed to indicate the danger.

While it is true that there was no light on the scraper itself, the trial judge has apparently overlooked the fact that there was on the scraper a red flag, and that, on the rear of the tractor itself there was a white light directly illuminating and making plainly visible the scraper with its warning flag.

The tractor was provided, in addition to the two ordinary lights, with a red lantern carried on the left side attached to the top of the chauffeur's cab.

The driver of any vehicle, therefore, approaching the tractor, received ample warning of the presence of some dangerous condition, which should have prompted to decrease his speed and pay careful attention as he was passing the tractor.

Had the deceased Robillard paid attention to this warning he could not have failed to see the scraper illuminated as it was by the rear light of the tractor, and carrying as it did a red flag.

It is fully established that the tractor was on the right side of the road, and that there was a space of at least ten feet between the extreme limit of the scraper and the other side of the road.

There was, therefore, ample room for the deceased to pass the tractor and the scraper in perfect safety had he been driving with ordinary care.

As was held by the Supreme Court of Canada in *The King* v. *Gilbert* (1), I am of the opinion that the precautions taken by the Road Department in the present instance were all that were reasonably necessary, and would offer ample protection to any one driving an automobile with reasonable care and attention.

The accident was, in my opinion, due to the sole fault of the late Lucien Robillard himself.

Il est prouvé à ma satisfaction que le tracteur et la gratte étaient du côté droit du chemin et qu'il y avait

(1) [1933] 1 D.L.R. 795.

entre l'extrémité de la gratte et l'autre côté du chemin un espace libre d'au moins dix pieds. Si le défunt s'était conformé aux exigences statutaires et avait gardé sa droite, le plus près possible du bord du chemin, il aurait, malgré sa vitesse désordonnée, évité l'accident.

Je crois que l'argument décisif en faveur de la Couronne, c'est que l'accident ne serait jamais arrivé si la victime en conduisant l'automobile avait obéi à la loi S.R.Q. c. 35, c. 36, qui dit:

> Every person driving a vehicle * * * on the public highway must, whenever possible, keep to the side of the road at his right and leave at his left as wide a passage as possible and at least one half of the road when meeting another vehicle. * * *

Pour moi, le savant juge-en-chef suppléant a imputé comme faute à l'employé de la voirie l'absence d'un signal sur la gratte, sans prendre en considération la preuve que cette gratte, munie d'un pavillon, était éclairée, tel qu'indiqué par les témoins mentionnés plus haut qui complètent le témoignage de Montgrain, qui était à bord de l'automobile. Ce dernier nous dit avoir vu la gratte après l'accident, à une distance de 50 à 75 pieds, de façon à pouvoir la décrire dans son témoignage. Elle était donc visible à cette distance. Il est vrai qu'il ajoute qu'il pense que "le nez de la machine de Robillard se trouvait reviré et que la lumière frappait." Mais nous avons le témoignage de trois témoins qui nous disent que c'était bien la lumière blanche d'en arrière, ignorée par le premier juge, qui reflétait sur la gratte et devait l'éclairer suffisamment pour qu'une personne approchant pour rencontrer à une vitesse raisonnable ait pu la distinguer assez tôt pour passer sans encombre.

Comme dans l'affaire *Gilbert* (1), je crois donc que cette cour devrait en venir à la conclusion que des précautions raisonnables avaient été prises pour fournir ample protection à toute personne voyageant en automobile avec le soin et l'attention qui s'imposent lorsqu'il s'agit, la nuit, de rencontrer un véhicule indiqué par deux lumières blanches, une lumière rouge et une autre lumière éclairant en arrière.

Je serais donc d'avis de maintenir l'appel et de renvoyer la pétition de droit avec dépens, si la Couronne croit opportun de les exiger.

(1) [1933] 1 D.L.R. 795.

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THE KING
v.
DEMERS

Dorion J.
ad hoc

DORION J. (*ad hoc*)—(1) La demande de rejet de la requête pour permission d'amender la pétition de droit en remplaçant les mots "Le Ministre de la Voirie" par les mots "Sa Majesté le Roi" dans la description de l'intimée doit être rejetée.

Sans doute, le Gouvernement est représenté par le Procureur Général. Comme son nom l'indique, celui-ci est vraiment porteur d'une procuration pour représenter le Gouvernement en toute matière judiciaire.

Or, il n'y a pas de doute que, par les mots "Ministre de la Voirie," on a voulu désigner le Gouvernement de la province de Québec, en tant que ce ministère est concerné.

C'est ainsi que l'a compris le Gouvernement lui-même puisqu'il a accordé la pétition de droit.

L'amendement n'a fait que rectifier la désignation du représentant de Sa Majesté, on y désigne la partie défenderesse sous le nom de " Sa Majesté" lui-même, et la comparution des officiers du Procureur Général représentait la Couronne et continue de le faire après le changement de nom et donne pleine juridiction au tribunal;

(2) Quand à la responsabilité de l'accident, il s'agit de peser laquelle des fautes commises, celle de l'intimée ou celle de la victime, a été cause du dommage, ou si les deux y ont contribué.

Il semble bien certain que la niveleuse dépassait en largeur le tracteur d'environ un pied. Un fanal placé à l'arrière du tracteur projetait quelque lumière sur la niveleuse et celle-ci portait un pavillon rouge à l'arrière.

Une voiture venant à la rencontre pouvait voir qu'il s'agissait d'une rencontre inusitée, ce qui aurait dû provoquer beaucoup d'attention de la part de la victime.

Il voyait les deux lumières blanches à l'avant du tracteur et une lumière rouge. A-t-il vu le reste? Cela n'est pas prouvé. Mais la vue de ces trois lumières, dont une lumière rouge, chose insolite, aurait dû le mettre sur ses gardes.

Il avait l'espace suffisant pour passer en gardant le côté droit, et il n'est pas prudent, pendant la nuit, de suivre de trop près la ligne médiane d'un chemin même en gardant son côté.

La faute principale de la victime consiste dans l'allure immodérée avec laquelle il conduisait son automobile. Il me semble certain, ou du moins extrêmement probable, que s'il eût gardé la vitesse réglementaire, il eut d'abord eu le temps d'éviter l'accident en apercevant de plus près la machine. Au moins, l'accident n'aurait pas eu les conséquences tragiques qui sont arrivées.

Les compagnons de la victime admettent que cette vitesse était de 35 milles.

Les témoins qui ont vu les débris de la machine et les traces laissées sur la route ont affirmé qu'il devait aller à 50 milles à l'heure.

Il m'est impossible de conclure en faveur de l'intimée. La cause de l'accident est la vitesse avec laquelle la victime conduisait son automobile. Le tracteur et la niveleuse n'étaient pas un obstacle sérieux à franchir pour un chauffeur qui eut exercé la prudence élémentaire et requise de tous ceux qui se servent des chemins publics.

Il ne me semble pas que l'on soit obligé de veiller à la sûreté de ceux qui prennent les risques d'actes déraisonnables, et que l'on soit tenu de se conduire avec la perfection nécessaire pour protéger ceux qui se jettent dans le danger.

J'infirmerais le jugement et je rejetterais l'action.

Appeal dismissed with costs.

Solicitor for the appellant: *Adolphe Allard.*

Solicitor for the respondent: *Aimé Chassé.*

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* May 16, 17.
* June 28.

IN THE MATTER OF A REFERENCE AS TO WHETHER PART II OF THE CANADA TEMPERANCE ACT IS IN OPERATION IN THE COUNTIES OF PERTH, HURON AND PEEL, IN THE PROVINCE OF ONTARIO, AND, IF NOT, THE PROCEDURE TO BE ADOPTED TO BRING THE SAID PART INTO OPERATION IN THE SAID COUNTIES.

Intoxicating liquors—Canada Temperance Act, R.S.C. 1927, c. 196—Liquor Control Act, Ont., 1927, c. 70, as amended—Comparative restrictiveness of Dominion and Ontario legislation—Construction of s. 175 of Canada Temperance Act (first enacted in effect by s. 2 of c. 30, 1917)—Question whether Part II of Canada Temperance Act is in operation in certain counties in Ontario (in which counties the operation of the Act had been suspended prior to passing of Liquor Control Act, Ont.) and, if not, the procedure for bringing said Part II into operation in said counties.

By sec. 175 of the *Canada Temperance Act*, R.S.C. 1927, c. 196, which section was first enacted in effect by the statutes of 1917, c. 30, s. 2, it is provided that upon receipt of a petition praying for the revocation of any order in council passed for bringing Part II of the Act into force in any city or county, "if the Governor in Council is of opinion that the laws of the province in which such city or county is situated, relating to the sale and traffic in intoxicating liquors, are as restrictive as the provisions of Parts I to IV, both inclusive, of this Act," the Governor in Council may by order suspend the operation of said Parts of the *Canada Temperance Act* in such city or county, such suspension "to continue as long as the provincial laws continue as restrictive as aforesaid."

Under said provisions (as enacted in 1917, c. 30, s. 2), orders in council were passed in 1920 and 1921, suspending the operation of the *Canada Temperance Act* (theretofore in force in the counties in question) in certain counties in the province of Ontario.

In 1927 the *Ontario Temperance Act*, which was in force in Ontario when said orders in council were passed, was repealed, and other provisions were substituted by *The Liquor Control Act (Ontario)*, 1927, c. 70, which Act was materially amended by statutes of Ontario, 1934, c. 26.

The Governor General in Council referred to this Court the following questions: (1) Are the provincial laws respecting intoxicating liquor as restrictive since the coming into force of *The Liquor Control Act* of Ontario, as amended in 1934, as the *Canada Temperance Act*? (2) If the answer to question 1 is in the negative, is Part II of the *Canada Temperance Act* in operation in said counties? (3) If the answer to question 2 is in the negative, what procedure must be adopted to bring the said Part II into operation in said counties?

Held (Cannon and Crocket JJ. dissenting), that question 1 be answered in the negative, and question 2 in the affirmative.

Per Duff C.J. and Lamont and Davis JJ.: The condition for applying the suspension under said s. 175 is that the laws of the province

* PRESENT:—Duff C.J. and Lamont, Cannon, Crocket and Davis JJ.

relating to the sale and traffic in intoxicating liquors shall be as "restrictive" of such sale and traffic as the provisions of Parts I to IV of the *Canada Temperance Act;* and the comparison required for the purposes of applying the condition is a comparison of the laws of the province with the provisions of said Parts of the *Canada Temperance Act;* there is not contemplated a process of measuring the comparative efficacy of two legislative enactments in the suppression or reduction of excessive consumption of liquor; the comparison to be instituted is between the provisions of one statute restricting the sale and traffic in intoxicating liquors and the provisions of another dealing with the same subject. And, comparing the Dominion and Ontario legislation in question, it is clear that, in point of restrictiveness, the Ontario Act makes no attempt to approach the prohibitory provisions of Part II of the *Canada Temperance Act;* the *Canada Temperance Act,* speaking broadly, has for its object the prevention of commercial dealings in intoxicating liquor within the territory in which it is in force; the Ontario *Liquor Control Act,* in its essence, is an Act for regulating the sale and consumption of such liquor, and makes provision for enabling the people to procure such liquor by the purchase of it through Government stores and other agencies. Therefore, the "provincial laws" having ceased to "continue as restrictive" as the *Canada Temperance Act,* the suspension of the operation of Parts I to IV of the *Canada Temperance Act* in the counties in question has ceased. The said words "continue as restrictive as aforesaid" should not be construed as if the words "in the opinion of the Governor in Council" were inserted therein; and no declaration by the Governor in Council is required to effect the cessation of the suspension.

As to the question of the constitutional validity of the *Canada Temperance Act,* raised in argument—Reading the order of reference in light of *Russell v. The Queen,* 7 App. Cas. 829, and *Att. Gen. for Ontario* v. *Att. Gen. for the Dominion* (local option reference), [1896] A.C. 348, the questions submitted should not be construed as involving any such question.

Per Cannon J. (dissenting): From the nature and provisions of the *Canada Temperance Act,* as a whole, and having regard to ss. 23 and 31 of the *Interpretation Act* (R.S.C. 1927, c. 1), the suspension under said s. 175 can cease only by proclamation to that effect by the Governor General in Council, fixing a date for such cessation of suspension. Part II of the *Canada Temperance Act* is not in operation in the counties in question.

Per Crocket J. (dissenting): On the true construction of said s. 175, the question as to whether the laws of any province relating to the sale and traffic in intoxicating liquors are at any time as restrictive as the provisions of Parts I to IV of the *Canada Temperance Act,* is one for the determination of the Governor in Council and not for a court. Part II of said Act is not in operation in the counties in question. The procedure to bring it into operation, is to rescind the orders in council suspending the operation of the Act in said counties, if the Governor in Council is satisfied that the provisions of the liquor laws of Ontario are not as restrictive as those of Parts I to IV of the *Canada Temperance Act,* and to promulgate the rescinding orders in the usual manner.

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REFERENCE by His Excellency the Governor General in Council to the Supreme Court of Canada, in the exercise of the powers conferred by s. 55 of the *Supreme Court Act* (R.S.C. 1927, c. 35), of the following questions: (1) Are the provincial laws respecting intoxicating liquor as restrictive since the coming into force of *The Liquor Control Act* of Ontario, as amended in 1934, as the *Canada Temperance Act?* (2) If the answer to question 1 is in the negative, is Part II of the *Canada Temperance Act* in operation in the counties of Perth, Huron and Peel in the province of Ontario? (3) If the answer to question 2 is in the negative, what procedure must be adopted to bring the said Part II into operation in the said counties?

The Order in Council referring the questions to the Court, which contains a statement of the circumstances, and references to the legislation, which led to the order of reference being made, is set out in full at the beginning of the judgment of Duff C.J.

P. M. Anderson for the Attorney General of Canada.

J. Sedgwick, K.C., and *W. B. Common, K.C.*, for the Attorney General of Ontario.

Aimé Geoffrion, K.C., R. H. Greer, K.C., and *Bethune Smith* for the Moderation League of Ontario.

N. W. Rowell, K.C., and *Peter Wright* for Temperance Federations.

The judgment of Duff C.J. and Lamont and Davis JJ. was delivered by

DUFF C.J.—We have to return to His Excellency in Council our answer to questions addressed to us under the authority of section 55 of the *Supreme Court Act*. It is convenient to set out the Order in Council in full:

AT THE GOVERNMENT HOUSE AT OTTAWA

Tuesday, the 12th day of February, 1935.

PRESENT:

HIS EXCELLENCY THE GOVERNOR GENERAL IN COUNCIL

WHEREAS there has been laid before His Excellency the Governor General in Council a report from the Minister of Justice, representing as follows:—

Part II of the *Canada Temperance Act,* chapter 196 of the Revised Statutes of Canada, 1927, prohibits, as therein provided, the dealing with, including the sale of, with certain exceptions such as for medicinal purposes, intoxicating liquor in any county or city after that Part comes into force and takes effect in such county or city.

Part I of the said Act provides for the bringing of the said Part II into force by Order in Council on the vote of the electors of such county or city indicating a desire therefor, and also for the revocation of such Order in Council after the expiration of three years from the date of the coming into force of the said Part II and after another vote of the electors indicating a desire for such revocation.

In 1916 the Parliament of Canada enacted by chapter 19 of the Statutes of 1916 "An Act in aid of Provincial Legislation prohibiting or restricting the sale or use of Intoxicating Liquors," and in 1917 Parliament enacted by Chapter 30 of the Statutes of 1917 "An Act to amend An Act in aid of Provincial Legislation prohibiting or restricting the sale of Intoxicating Liquors," and by Section 2 thereof amended the said Act of 1916 by adding thereto as Section 4C the following:—

"4C (1) Upon the receipt by the Secretary of State of Canada of a petition, in accordance with the requirements of sections one hundred and eleven, one hundred and twelve and one hundred and thirteen of the *Canada Temperance Act,* Revised Statutes of Canada 1906, chapter one hundred and fifty-two, praying for the revocation of any order in council passed for bringing Part II of the *Canada Temperance Act* into force in any city or county, if the Governor in Council is of opinion that the laws of the province in which such city or county is situated, relating to the sale and traffic in intoxicating liquors, are as restrictive as the provisions of the said *Canada Temperance Act,* the Governor in Council may, without the polling of any votes, by order, to be published in the *Canada Gazette,* suspend the operation of the *Canada Temperance Act* in such city or county, such suspension to commence ten days after the date of the publication of such order and to continue as long as the provincial laws continue as restrictive as aforesaid.

"(2) The present Section shall apply to petitions already made and upon which no polling has yet taken place."

which section was carried into the Revised Statutes of Canada, 1927, as Section 175 of the *Canada Temperance Act,* reading as follows:—

"Upon the receipt by the Secretary of State of Canada of a petition, in accordance with the requirements of sections one hundred and twelve, one hundred and thirteen and one hundred and fourteen of this Act praying for the revocation of any Order in Council passed for bringing Part II of this Act into force in any city or county, if the Governor in Council is of opinion that the laws of the province in which such city or county is situated, relating to the sale and traffic in intoxicating liquors, are as restrictive as the provisions of Parts I to IV, both inclusive, of this Act, the Governor in Council may, without the polling of any votes, by order, to be published in the *Canada Gazette,* suspend the operation of the said Parts of this Act in such city or county, such suspension to commence ten days after the date of the publication of such order and to continue as long as the provincial laws continue as restrictive as aforesaid."

Part II of the said Act came into force after a vote by the electors in the Counties of Perth, Huron and Peel in the Province of Ontario on April 18, 1914, April 28, 1914, and September 1, 1915, respectively.

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The *Ontario Temperance Act,* Chapter 50 of the Statutes of Ontario, 1916, and amendments thereto, was in force in the year 1921, the said Act having the effect of prohibiting dealings in intoxicating liquors except, generally, for medicinal purposes pursuant to the provisions of the said Act.

Under the provisions of the said Section 4C, Orders in Council dated 12th November, 1920, 12th November, 1920, and 24th March, 1921, were passed suspending the operation of the provisions of the *Canada Temperance Act* in the said Counties of Perth, Huron and Peel, respectively, and providing that such suspensions were to continue as long as the provincial law remained as restrictive as the *Canada Temperance Act.* Such suspensions became effective on 30th November, 1920, 30th November, 1920, and 12th April, 1921, respectively.

By the *Liquor Control Act (Ontario),* being Chapter 70 of the Statutes of Ontario, 1927, *The Ontario Temperance Act* was repealed, and other provisions were substituted respecting the dealing with intoxicating liquors and the sale and purchase thereof by permit in accordance with such provisions. The said *The Liquor Control Act (Ontario)* was brought into force by proclamations by Sections, and on the dates as follows: Sections 1 to 31, inclusive, 37 to 41, inclusive, 43, 68, and 69, on April 6, 1927; Sections 70 and 94 on May 26, 1927; Sections 32 to 36, inclusive, 42, 44 to 67, inclusive, 71 to 92, inclusive, and 95 to 146, inclusive, on June 1, 1927, and Section 93 on March 14, 1928.

By the *Liquor Control Act, 1934,* being Chapter 26 of the Statutes of Ontario, *The Liquor Control Act (Ontario)* was amended, particularly with respect to the sale of beer and wine; such amendments were brought into force by proclamation on July 12, 1934.

By a decision of the Court of Appeal of the Province of New Brunswick in the case of *Sheehan* v. *Shaw* (1), the Court held in effect:—

(*a*) That the question of deciding whether *The Intoxicating Liquor Act, 1927 (N.B.),* is as restrictive as the *Canada Temperance Act* is one for the decision of the Governor in Council, and not for the decision of that Court.

(*b*) That the *Canada Temperance Act* having been suspended in a certain county it will continue suspended until the Governor in Council advises that the said *Intoxicating Liquor Act, 1927,* is not as restrictive as to the sale and traffic in intoxicating liquors as the *Canada Temperance Act,* or it will continue suspended if no action is taken by the Governor in Council in regard to the matter.

Considerable legal opinion, including that of the Department of Justice, is in conflict with the decision of the Court of Appeal in New Brunswick.

AND WHEREAS the Minister of Justice is of the opinion that it is expedient that the questions in controversy respecting the interpretation of Section 4C of Chapter 19 of the Statutes of 1916, as enacted by Section 2 of Chapter 30 of the Statutes of 1917 and of Section 175 of the *Canada Temperance Act* and whether or not Part II of the *Canada Temperance Act* is in operation in the said Counties, should be referred to the Supreme Court of Canada for hearing and consideration;

THEREFORE His Excellency the Governor General in Council, in the exercise of the powers conferred by Section 55 of the *Supreme Court*

(1) (1927) 54 N.B.R. 192.

Act, is pleased, hereby, to refer to the Supreme Court of Canada for hearing and consideration the following questions:

Question 1—

Are the provincial laws respecting intoxicating liquor as restrictive since the coming into force of *The Liquor Control Act* of Ontario, as amended in 1934, as the *Canada Temperance Act?*

Question 2—

If the answer to Question 1 is in the negative, is Part II of the *Canada Temperance Act* in operation in the said Counties of Perth, Huron and Peel?

Question 3—

If the answer to Question 2 is in the negative, what procedure must be adopted to bring the said Part II into operation in the said Counties?

E. J. LEMAIRE,
Clerk of the Privy Council.

The first question for examination in logical order concerns the construction of section 175. The condition with which we are concerned under which a suspension, by force of that section, comes into operation is embodied in the words,

* * * if the Governor in Council is of opinion that the laws of the province in which such city or county is situated, relating to the sale and traffic in intoxicating liquors, are as restrictive as the provisions of Parts I to IV, both inclusive, of this Act.

The meaning of these words, in our opinion, is that the laws of the province relating to the sale and traffic in intoxicating liquors shall be as "restrictive" of such sale and traffic as the provisions of Parts I to IV of the *Canada Temperance Act.* Moreover, the comparison required for the purposes of applying the condition is a comparison of the laws of the province with the provisions of the Parts of the *Canada Temperance Act* mentioned. We do not think that these words contemplate a process of measuring the comparative efficacy of two legislative enactments in the suppression or the reduction of excessive consumption of intoxicating liquor. The comparison to be instituted is between the provisions of one statute restricting the sale and traffic in intoxicating liquors and the provisions of another dealing with the same subject.

As regards the two statutes now before us, we think there is no difficulty, for reasons we shall presently give, in reaching a conclusion without resort to evidence touching the practical operation of the statutes; but, before explaining these reasons, it is necessary to consider the decisior

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of the Supreme Court of New Brunswick in *Sheehan* v. *Shaw* (1).

The advisers of His Excellency have had some doubts about that decision and it is because of these doubts that the interrogatories set out in the Order in Council are now before us. The question concerns the final clause of section 175, which is in these words:

* * * such suspension to commence ten days after the date of the publication of such order and to continue as long as the provincial laws continue as restrictive as aforesaid.

The Supreme Court of New Brunswick held that the suspension of the operation of Parts I to IV of the *Canada Temperance Act* effected by an Order in Council, published pursuant to this section, does not come to an end until the Governor in Council has declared that "the provincial laws do not continue as restrictive as aforesaid."

Ex facie, the suspension continues so long, and only so long as "the provincial laws continue as restrictive as aforesaid." "As restrictive as aforesaid" means, we think, according to the natural and grammatical import of the words, as restrictive of the sale and traffic in intoxicating liquors as the provisions of Parts I to IV of the *Canada Temperance Act.* The words "continue as restrictive as aforesaid," which the Legislature has selected, seem to imply that the suspending order is conclusive as regards the validity of the assumption upon which it is based, viz., that the provincial laws are, in the material respects, as restrictive as the provisions of the *Canada Temperance Act,* and that this conclusiveness continues to attach to the order so long as the several legislative enactments remain unchanged; but, it would, we think, be a non-natural reading of the words to construe them as if there were inserted after "continue", the phrase "in the opinion of the Governor in Council". This view is strengthened by reference to the circumstance that no method is provided for calling the matter to the attention of the Governor in Council, or for the manner in which the opinion is to be expressed or announced. If such had been the intent of the section, we cannot doubt that some procedure with reference to such matters would, in conformity with the legislative practice of the Parliament of Canada, have been laid down.

(1) (1927) 54 N.B.R. 192.

There is not much difficulty as to the scope of the phrase "sale and traffic in intoxicating liquors." The heading of Part II of the Act is "Traffic in Intoxicating Liquors." The sections of that Part (sections 118 to 127 inclusive) indicate very clearly that "traffic" comprises commercial dealings in intoxicating liquor, including, not only the sale or barter of the same, but also the exposing or keeping for sale of such liquor, the sending, shipping, bringing, carrying of such liquor into the territory in which the prohibitions of the Act are operative, the delivery to any consignee or other person, or the storing, warehousing or keeping for delivery any such liquor so sent, shipped, brought or carried. These and similar matters seem to be the matters contemplated by the phrase "sale and traffic in intoxicating liquors." Such, it may be observed, are the matters in respect of which the prohibitions and restrictions of the Act are imposed. The probable intention would appear to be that it is in relation to such matters that the restrictiveness of the provincial laws is to be compared with the restrictiveness of the *Canada Temperance Act*.

The language employed does not suggest that the Legislature is envisaging a comparison between the feasibility or efficacy of the respective methods prescribed by the two systems of legislation for bringing the prohibitions and restrictions of the several enactments into operation. It was ingeniously argued that these last mentioned matters must be contemplated as subjects of comparison by reason of the reference to Part I of the *Canada Temperance Act*. But that reference is otherwise quite easily explicable. The prohibitions in Part II are conditionally expressed. The introductory words of section 118 are these:

> From the day on which this Part comes into force and takes effect in any county or city, and for so long thereafter as, and while the same continues or is in force therein, * * *

The enactment by virtue of which Part II comes into force, and by virtue of which the conditional prohibition takes effect, is to be found in Part I; and it was, no doubt, considered that, this enactment of Part I being the necessary complement of Part II, the omission of all reference to Part I in section 175 might leave that section incomplete and obscure.

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To compare, then, the respective systems of restriction created by the statutes, we have to consider: First of all, the provisions of Part II of the *Canada Temperance Act* may fairly be described as prohibitory; and it is, perhaps, better to quote here section 118 in full:

118. From the day on which this Part comes into force and takes effect in any county or city, and for so long thereafter as, and while the same continues or is in force therein, no person shall, except as in this Part specially provided, by himself, his clerk, servant or agent,

(*a*) expose or keep for sale, within such county or city, any intoxicating liquor;

(*b*) directly or indirectly on any pretense or upon any device, within any such county or city, sell or barter, or, in consideration of the purchase of any other property, give to any other person any intoxicating liquor;

(*c*) send, ship, bring or carry or cause to be sent, shipped, brought, or carried to or into any such county or city, any intoxicating liquor; or

(*d*) deliver to any consignee or other person, or store, warehouse, or keep for delivery, any intoxicating liquor so sent, shipped, brought or carried.

2. Paragraphs (*c*) and (*d*) of subsection one of this section shall not apply to any intoxicating liquor sent, shipped, brought or carried to any person or persons for his or their personal or family use, except it be so sent, shipped, brought or carried to be paid for in such county or city to the person delivering the same, his clerk, servant, or agent, or his master or principal, if the person delivering it is himself a servant or agent,

3. No act done in violation of the provisions of this section shall be rendered lawful by reason of

(*a*) any license issued to any distiller or brewer;

(*b*) any license for retailing on board any steamboat or other vessel, brandy, rum, whiskey, or other spirituous liquors, wine, ale, beer, porter, cider or other vinous or fermented liquors;

(*c*) any license for retailing on board any steamboat or other vessel, wine, ale, beer, porter, cider or other vinous or fermented liquors, but not brandy, rum, whiskey or other spirituous liquors; or

(*d*) any license of any other description whatsoever.

There are certain exceptions in the subsequent sections of Part II. Provision is made, for example, for the sale of wine for sacramental purposes; for the sale of intoxicating liquor for exclusively medicinal purposes, and for use in good faith in some art, trade or manufacture; and then there are provisions authorizing the sale by licensed distillers and brewers within the area in which the prohibition is in force, as well as by wholesale merchants and traders on the condition that such sales shall be in quantities of not less than ten gallons at any one time, and then only to druggists and vendors specially licensed by the Lieu-

tenant Governor in Council in the province, or to persons whom the seller has good reason to believe will forthwith carry the same beyond the limits of the territory in which the prohibition is in force.

There are also exceptions in relation to the purchase or sale by legally qualified chemists, physicians or druggists of officinal medical preparations, patent medicines, or for pharmaceutical preparations containing alcohol but not intended for use as beverage; of methylated spirits for pharmaceutical and mechanical uses; of spirituous liquors or alcohol for exclusively medicinal purposes; or for *bona fide* use of some trade, art or manufacture.

Turning now to the *Liquor Control Act* of Ontario (R.S.O. 1927, ch. 257, as amended by the statutes of 1934, ch. 26). It is perfectly obvious from an inspection of its provisions that it does not aim at the prohibition of the sale and traffic in intoxicating liquors in the sense of the *Canada Temperance Act*. The purpose of the original Act was, broadly, to establish a government monopoly in the sale of liquor, but to provide, by means of government shops chiefly, liquor for sale which might be purchased by retail with virtually no limit as to quantity by persons possessing permits issued under the statute, which permits could be obtained upon the payment of a small fee by any resident of the province of twenty-one years of age.

Very important changes were introduced by the statute of 1934, especially in relation to the permit system, and a multiplication of agencies for the sale of wine and beer. As we are only concerned with the statute as amended, we proceed at once to summarize the law as it now stands.

A Board, known as the Liquor Control Board of Ontario, is constituted by the statute (section 3) and is charged with the administration of the Act, "including the general control, management and supervision of all Government liquor stores."

The Board (section 9) is empowered to buy and sell liquor, to control the possession, sale, consumption, transportation and delivery of liquor in accordance with the provisions of the Act and the Regulations; to establish liquor stores; to make provision for the maintenance of warehouses for beer, wine or liquor; to grant, refuse, sus-

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pend and cancel permits for the purchase of liquor; to appoint officials to issue and grant permits under the Act; and generally to do all things which the Board may deem necessary or advisable for the purpose of carrying into effect the provisions of the Act and the Regulations. The Board is empowered (section 10), with the approval of the Lieutenant Governor in Council, to make regulations not inconsistent with the statute, for carrying out the provisions of the Act, for the efficient administration thereof; and such regulations on publication in the Ontario Gazette shall have the same force as if enacted in the statute itself.

Two classes of permits are provided for (s. 37); individual permits and special permits. Individual permits are granted to individuals of the full age of 21 years having resided in the province for the period of at least one month immediately preceding the date of his making the application. Individual permits may be granted to non-residents for a period not exceeding one month. Special permits, when authorized by the regulations, may be granted to enable the applicant to purchase liquor for some specified purpose; and, by the Regulations (No. 8), permits of this character are authorized. But, for the purchase of beer and wine, no permit is necessary.

By section 37 (5) the Board is authorized so to provide by regulation, and Regulation No. 1 is in the following terms:

1. A person other than the holder of an authority under the Act, unless he is prohibited by law or by a regulation or order of the Board, may under the supervision of the Board purchase beer, wine and native wine from a vendor, brewer, brewer's agent, or the holder of a Native Wine license as the case may be without any individual or special permit being necessary therefor, and beer, wine and native wine so purchased may be had, possessed, given and consumed in the residence of the purchaser.

Then, in addition to Government stores, the Act, since the amendment of 1934, provides for a number of agencies through which liquor may be distributed. These are distillers, brewers, wineries, standard hotels and beverage rooms.

By section 51 of the Act, distillers may sell their products "to the Board" or "as the Board may direct."

By section 45, brewers may be licensed:

(a) to keep for sale and sell beer to the Board;

(*b*) to deliver beer on the order of the Board or of a vendor to any person named in such order at the address therein stated.

(*c*) to keep for sale and sell beer under the supervision and control of the Board and in accordance with this Act and the regulations.

And, by force of Regulations Nos. 1 and 45 to 49, brewers may sell and keep for sale beer; and a brewer or brewer's agent may accept orders by telephone for the sale of beer, or to the holder of an authority under the Act, and may sell and deliver the beer so ordered.

There are similar provisions for the sale of native wines by the manufacturers thereof.

Then, by section 69 (1) the Board may issue "authorities" for the sale of beer and wine in standard hotels and in such other premises as the Regulations may provide and define. And, by Regulations 156 and 157, the Board may issue "authorities" for the sale and consumption of beer and wine with meals in the dining rooms of standard hotels and clubs, in railway dining cars, in steamship dining rooms and in military messes; and of beer without meals in the beverage rooms of standard hotels, in clubs, in railway dining cars, in steamships and in military messes.

The Act, of course, contains very stringent provisions designed to prevent the sale of intoxicating liquor and the consumption of it otherwise than as authorized and permitted by the Act. Nevertheless, the enactment in its essence is an Act for regulating the sale and consumption of such liquor. It cannot be seriously argued that, in point of restrictiveness, any attempt is made to approach the prohibitory provisions of Part II of the *Canada Temperance Act*. The respective objects of the two enactments are in that respect opposed to one another. The one statute, speaking broadly, has for its object the prevention of commercial dealings in intoxicating liquor within the territory in which it is in force. The other makes provision for enabling the people to procure such liquor by the purchase of it through Government stores and the other agencies mentioned above.

On the argument counsel on behalf of the provinces of Ontario and Quebec raised the question of the constitutional validity of the *Canada Temperance Act*. Reading the Order of Reference in light of the decision in *Russell*

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v. *The Queen* (1) and of the judgment of the Judicial Committee on the *Local Option Reference* in 1896 (2), we have no doubt that the interrogatories addressed to us ought not to be construed as involving any such question. At the request of counsel, we stated, however, that we should mention, in the judgment, the fact of the argument having been advanced; we now do so accordingly.

The conclusion seems to be that Interrogatory No. 1 must be answered in the negative; and, for the reasons already given, Interrogatory No. 2 should be answered in the affirmative.

CANNON J. (dissenting)—I had the advantage of perusing the carefully prepared opinions of my Lord the Chief Justice and of my brother Crocket. I cannot escape the conclusion that Parliament has left to the Executive and the Secretary of State the enforcement of the *Canada Temperance Act* and that they must take the necessary steps to bring to the knowledge of these counties the enforcement, suspension, revocation or revival of the Act, from a given date to be published in the Canada Gazette through a proclamation of the Governor General in Council.

It is essential, specially in the case of a penal statute, that the subjects be notified of the date from which they are bound to obey it. It appears from sections 9, 10, 110, 116, 175 of the *Canada Temperance Act* that the time of the bringing into operation of the provisions of the statute, of their revocation or of their suspension, is, after certain formalities, to be fixed at the discretion of the Governor General in Council. A formal announcement, under the great seal, of what the Governor General in Council wishes to make known to the subjects is a proclamation. This was needed to fix a date for the suspension of the Act. It is also needed to fix a date from which the Act will again operate in these counties, if the Governor General in Council is satisfied and deems it advisable so to do.

(1) (1882) 7 App. Cas. 829.

(2) Attorney-General for Ontario v. Attorney-General for the Dominion, [1896] A.C. 348.

Parliament, in this instance, has left the necessary measure preliminary to the enforcement of the Act, its suspension and revival to the executive powers of the Crown, i.e., the Governor General in Council. Promulgation of an Act is not necessary when Parliament makes it enforceable on the day of its sanction, because all citizens are supposed to be present or represented in Parliament and, as a consequence, to know what takes place there; but when, as in this case, the commencement of the enforcement is conditional and requires a vote of the electors and a proclamation, the Act cannot be enforced without complying with those requirements and, specifically, without bringing to the knowledge of the citizens in the interested area, the date after which they must comply with its requirements.

Now, section 23 of the *Interpretation Act,* R.S.C., 1927, ch. 1, enacts:

> 23. When the Governor General is authorized to do any act by proclamation, such proclamation is understood to be a proclamation issued under an order of the Governor in Council; but it shall not be necessary that it be mentioned in the proclamation that it is issued under such order.

We may also apply, as a guiding principle in this matter of interpreting section 175 of the *Canada Temperance Act,* what is found in s. 31 (*g*) of the same *Interpretation Act:*

> 31. In every Act, unless the contrary intention appears: * * * *
>
> (*g*) if a power is conferred to make any rules, regulations or by-laws, the power shall be construed as including a power, exercisable in the like manner, and subject to the like consent and conditions, if any, to rescind, revoke, amend or vary the rules, regulations or by-laws and make others;

I cannot conceive that Parliament ever contemplated that the suspension of the Act would be discontinued not from a date to be fixed by proclamation of the Governor General in Council, but would be left to the possible divergent opinions of Justices of the Peace or Police Court judges, with the necessary resultant state of incertitude for the populations concerned. Parliament has directed that proclamations should be issued when the executive has to take action to put the Act in force in a given territorial division of Canada. Under section 31(*e*) of the *Interpretation Act,* "if a power is conferred * * * the power may be exercised * * * from time to time as occasion requires." This is an occasion that requires that such

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powers as are necessary to enable the executive to enforce the revival of the Act "shall be understood to be also given" under sub-section (*b*) of the same section 31.

I would, therefore, answer as follows the questions put to us:

QUESTION 1—Are the provincial laws respecting intoxicating liquor as restrictive since the coming into force of *The Liquor Control Act* of Ontario, as amended in 1934, as the *Canada Temperance Act?*

Answer: *Ex facie,* according to the *wording* of the Acts, the Provincial Act, as amended in 1934, is not more restrictive of the sale and traffic of intoxicating liquors *quâ* the consumer; but it establishes and protects a monopoly and control of such sale and traffic within the Province under very drastic penalties. As to the actual *working* of the Acts, in the three counties interested, I am not in a position to answer this pure question of fact, having no elements before me to make any comparative study of results.

QUESTION 2—If the answer to Question 1 is in the negative, is Part II of the *Canada Temperance Act* in operation in the said counties of Perth, Huron and Peel?

Answer: No.

QUESTION 3—If the answer to Question 2 is in the negative, what procedure must be adopted to bring the said Part II into operation in the said counties?

Answer: A proclamation should be issued bringing to the knowledge of these counties the date fixed by Order in Council terminating the suspension of the Act.

CROCKET, J. (dissenting)—With the greatest deference, I am of opinion that on the true construction of s. 175 of the *Canada Temperance Act* the question as to whether the laws of any province relating to the sale and traffic in intoxicating liquors are at any time as restrictive as the provisions of Parts I to IV of the *Canada Temperance Act* is a question for the determination of the Governor in Council and not for this or any other court.

As I read s. 175, as it stands in the Revised Statutes of Canada, 1927, it empowers the Governor in Council, when a petition is received from the electors of any city or county

in accordance with the provisions of ss. 112, 113 and 114, praying for the revocation of any Order in Council previously passed bringing Part II of the *Canada Temperance Act* into force in such city or county, to suspend, by order to be published in the Canada Gazette, the operation of the provisions of the *Canada Temperance Act* in such city or county without the polling of any votes for and against as required by ss. 112, 113 and 114, provided

the Governor in Council is of opinion that the laws of the Province in which such city or county is situated, relating to the sale and traffic in intoxicating liquors, are as restrictive as the provisions of Parts I to IV, both inclusive, of this Act;

and enacts that, if and when an Order in Council is so passed and published, such suspension shall commence ten days after the date of the publication of such order and continue as long as the provincial laws continue as restrictive as aforesaid.

It will be observed that, while the Governor in Council is empowered to declare the suspension of the Act on the condition designated, the enactment itself provides when the suspension shall commence and how long it is to continue. The crucial question therefore is: What was the intention of Parliament as indicated by the words of the enactment " to continue as long as the provincial laws continue as restrictive as aforesaid? "

It seems to me to be manifest that, when read in connection with the antecedent text of the section, as, of course, they must be, the last words must be taken to intend, in the event of the provincial liquor laws being altered after the publication of an Order in Council suspending the operation of the *Canada Temperance Act* in any city or county, so as to render them less restrictive than the provisions of the *Canada Temperance Act,* that the suspension should continue until it is so adjudged and declared by some competent authority. Otherwise it would be quite unintelligible. It would be impossible for anyone to know whether the *Canada Temperance Act* was or was not in force in a city or county at any time or whether the provincial liquor laws were or were not in force.

Assuredly Parliament did not intend that the suspension should automatically cease upon the passage and coming into force of any provincial legislation in any way amending the provincial liquor laws, for it has plainly indicated

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that the suspension shall continue "so long as the provincial laws continue as restrictive as the provisions of the *Canada Temperance Act*". It is this provision which on its very face necessitates an adjudication by some authority at some time as to whether the provincial laws have ceased to be as restrictive in comparison with the provisions of the *Canada Temperance Act* as when the suspension of the latter Act was proclaimed. Is it to be supposed that it was intended by Parliament that such adjudication should be made by this Court or by the Supreme Courts of the different provinces? I cannot for a moment think so. Is it to be supposed that it intended that it should be left to a Police or Stipendiary Magistrate or to two Justices of the Peace to make the adjudication on such a question before issuing his or their warrant or summons charging an alleged offender with a violation of any one or more of the provisions of the *Canada Temperance Act,* the operation of which has been declared by the Governor in Council to have been suspended? I cannot, for my part, read the last words of the section in connection with its preceding text, to which the concluding words themselves expressly refer, as denoting an intention that the life of an Order of the Governor in Council suspending the operation of such an Act as the *Canada Temperance Act* in a city or county with all its provisions for the prosecution and punishment of offenders by fine and imprisonment should depend upon the view of a local Police or Stipendiary Magistrate as to the relative restrictive character of the provisions of that Act and the provisions of the provincial liquor laws. That, however, it seems to me, must be the result if the phrase "to continue as long as the provincial laws continue as restrictive as aforesaid" is to be construed, standing by itself, according to its strict grammatical meaning, without reference to the text of the whole enactment, as excluding the power of the Governor in Council to rescind or cancel all or any of the suspension orders he has made under the provisions of s. 175, upon the occurrence of the condition which calls for such action.

The reasonable and logical interpretation, in my view, is that Parliament, having empowered the Governor in Council to make the suspension order, if satisfied that the

provincial liquor laws were as restrictive as the provisions of the *Canada Temperance Act*, that order should continue in force until it should be rescinded or revoked in the usual manner by the Governor in Council who made it, when in the opinion of the Governor in Council the provisions of the provincial laws should cease to be as restrictive as the provisions of the *Canada Temperance Act*. That is the interpretation which the Appeal Division of the Supreme Court of New Brunswick placed upon it in November, 1927, when required, in the special stated case of *Sheehan* v. *Shaw* (1), to construe it in order to determine whether the *Canada Temperance Act* was then in force in the County of Carleton, in which county the Governor in Council had declared its suspension. Any other construction would leave both the federal and provincial liquor laws in such a state of confusion and uncertainty as to practically destroy their efficacy, and create such an anomaly in the practice governing the making and rescinding of Orders in Council and their promulgation as well as in the application and enforcement of the criminal and quasi-criminal laws of the country as could not well be imputed to the intention of Parliament.

I entirely concur in the interpretation which the Court of Appeal of the Province of New Brunswick placed on the enactment in question in 1927 in *Sheehan* v. *Shaw* (1) and in its conclusion, as stated by Sir Douglas Hazen, the learned Chief Justice of that Court, that the question as to whether the liquor laws of any province were as restrictive as the provisions of the *Canada Temperance Act* is one for the decision of the Governor in Council on the recommendation of the Secretary of State and not for the decision of the Supreme Court of such province, and that the suspension of the operation of the provisions of that Act, as declared by the Governor in Council, must be held to continue in force until it is cancelled or dealt with by the Governor in Council. Though the concluding phrase does not expressly say so, I think the whole section clearly implies it. It is certainly not incapable of being read in a way which will avoid such a patent anomaly as that which must result from the suggested alternative in-

(1) 54 N.B.R., 192.

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terpretation, without doing any violence to the grammatical meaning of the quoted phrase with which the section ends. The highest courts throughout the Empire have again and again held that certain words must be understood as intended to be incorporated in statutory enactments notwithstanding that the enactments have not expressly used them. Indeed, I think it will be found that, generally speaking, whenever adherence to the strictly grammatical meaning of isolated phrases in a statutory enactment leads to a patent absurdity or repugnance, they have never hesitated to discard the strictly grammatical meaning by reading into the enactment such words as will make it intelligible and reasonable, as being necessarily understood or implied.

The decision of the Appeal Division of the Supreme Court of New Brunswick has never been challenged during the seven or eight years which have since elapsed, with the result that in the majority of the counties of that province where the *Canada Temperance Act* was formerly in force, the provisions of the New Brunswick *Intoxicating Liquor Act* have consistently been enforced in all those counties as well as in the other counties of New Brunswick as the recognized law of the entire province, many alleged offenders having in the meantime been punished by heavy pecuniary fines and severe imprisonment penalties under the provisions of the last mentioned Act.

We are now asked by the Governor in Council to re-open this most important question on this reference. The formal order of reference sets forth the effect of the decision of the Court of Appeal of New Brunswick in the case referred to and, singularly enough, states that "considerable legal opinion, including that of the Department of Justice, is in conflict with the decision of the Court of Appeal in New Brunswick."

Being of opinion, for the reasons already stated, that it is entirely a question for the decision of the Governor in Council on the recommendation of the Secretary of State as a matter of governmental responsibility, I respectfully beg to be excused from answering Interrogatory No. 1.

Interrogatory No. 2 is one which clearly falls within the terms of s. 55 (*b*) of the *Supreme Court Act,* concerning,

as it does, the interpretation of an enactment of the Dominion Parliament, and involves no intervention by this Court in the exercise of governmental responsibility. Whether Interrogatory No. 1 be answered by other members of the Court in the affirmative or in the negative, I should, for the reasons already stated, answer Interrogatory No. 2 in the negative.

To Interrogatory No. 3 my answer is: By rescinding the Orders in Council suspending the operation of the *Canada Temperance Act* in the counties named, if the Governor in Council is satisfied that the provisions of the liquor laws of Ontario are not as restrictive as those of the *Canada Temperance Act*, and promulgating the rescinding orders in the usual manner.

Question No. 1 answered in the negative. Question No. 2 answered in the affirmative.

Solicitor for the Attorney-General of Canada: *W. Stuart Edwards.*

Solicitor for the Attorney-General of Ontario: *I. A. Humphries.*

Solicitors for the Moderation League of Ontario: *Smith, Rae, Greer & Cartwright.*

Solicitors for Huron County Temperance Federation, Perth Branch of the Ontario Temperance Federation, and Peel Temperance Federation: *Rowell, Reid, Wright & McMillan.*

ROSS MASON ..... APPELLANT;

AND

HIS MAJESTY THE KING..... RESPONDENT.

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* May 22, 23.
* June 28.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA EN BANC

Criminal law—Theft—Shipping—Customs Act, R.S.C. 1927, c. 42 (as amended), ss. 207, 151, 2 (o)—Vessel hovering within territorial waters of Canada with dutiable goods on board—Pursuit by police cruiser—Continuity of pursuit—Seizure of vessel on high seas—Forcible escape of vessel—Forfeiture of vessel—Time of forfeiture—Charge of theft against master—Form of charge.

The schooner *K.*, of Canadian registry, of which appellant was master, while "hovering within the territorial waters of Canada" off the

* PRESENT:—Duff C.J. and Cannon, Crocket and Davis JJ., and Dysart J. (*ad hoc*).

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shores of Cape Breton with a cargo of liquor on board (dutiable in Canada), was approached by a Canadian police cruiser, and proceeded towards the high seas. It was overhauled within the territorial waters and summoned to "heave to in the King's name," but before it could be boarded it resumed its course. The cruiser pursued for a short distance, then turned, picked up its boat which had been lowered for boarding, and hurried towards shore for about eight miles, then took bearings and received instructions by radio, and returned to the pursuit and overhauled and stopped the *K.* on the high seas about 35 miles from shore. Here its officers boarded the *K.*, asked appellant what cargo he had, were told in answer "a bit of liquor," asked to see and did see the manifest and shipping papers, and without further examination took the *K.* in charge and towed it back to a point within three miles of shore, where appellant, on some claim of navigation dangers to his vessel, forcibly took charge of the *K.'s* helm, turned it out of its course, thereby breaking the tow lines, and sailed away. The cruiser did not pursue. At trial appellant was convicted of theft of the schooner and theft of its cargo.

Held: The *K.*, at the time when appellant took it away from the officers, was lawfully under seizure and in control of the officers, and the convictions of theft must stand (Judgment of the Supreme Court of Nova Scotia *en banc*, 9 M.P.R. 97, affirmed). The effect of ss. 207, 151 and 2 (*o*) of the *Customs Act* (R.S.C. 1927, c. 42, as amended), when applied to the facts of this case, is that, by hovering in territorial waters of Canada with dutiable goods on board, the *K.* thereby became forfeited by operation of law. When the presence of liquor in its cargo was established as a fact, the forfeiture related back to the time of the hovering. The forfeiture was the legal unescapable consequence of the commission of the offence. The seizing on the high seas was part of the prolonged or continued act, which, begun within the territorial waters, and there temporarily frustrated by the *K.'s* flight, was consummated on the high seas; and the temporary abandonment of the pursuit was not such an abandonment as broke the continuity of the pursuit.

Objection on the ground that, according to the charge, the vessel taken by appellant was one which had "been seized and detained on suspicion by * * * as forfeited," was rejected. The words, "suspicion," etc., were unnecessary, and when deleted left the allegation as being "seized * * * as forfeited," which phrase falls within the definition "seized and forfeited" within s. 2 (*o*) of the Act.

APPEAL by the accused from the judgment of the Supreme Court of Nova Scotia *en banc* (1), affirming (Mellish and Carroll JJ. dissenting) his conviction, on trial before Doull J. with a jury, for theft of a schooner and theft of its cargo. (Accused was also convicted of obstructing a public officer in the execution of his duty, which conviction was affirmed by the said Court *en banc*. Accused appealed thereon to this Court with regard to the sentence). The accused was master of the vessel in question

(1) 9 M.P.R. 97; [1935] 2 D.L.R. 161.

and the alleged theft was in taking it away from the officers of a Royal Canadian Mounted Police cruiser when, it was alleged, it was lawfully under seizure and in the control of those officers. The questions in issue turned on the meaning and effect of certain provisions of the *Customs Act*. The material facts of the case and questions in issue are sufficiently stated in the judgment now reported. The appeal was dismissed.

W. P. Potter for the appellant.

G. McL. Daley K.C. for the respondent.

The judgment of the court was delivered by

DYSART J. (*ad hoc*)—This appeal from the Supreme Court of Nova Scotia affirming the conviction of the appellant on three charges—(1) theft of a schooner, (2) theft of the cargo of the vessel, and (3) obstructing a public officer in the discharge of his duty—turns on the meaning and effect of certain provisions of the *Customs Act*, R.S.C. 1927, ch. 42, and amendments. The dissent on which this appeal is based, opens up the whole case on the charges of theft.

In the early morning of December 6, 1933, the schooner *Kromhout*, of Canadian registry, of which the appellant was master, was "hovering within the territorial waters of Canada" off the shores of Cape Breton, with a cargo of liquor on board. When the Royal Canadian Mounted Police cruiser, No. 4, which had been lying in wait, approached her, the *Kromhout* started up her engines, and, with set sails, proceeded towards the high seas, but was overhauled before she got beyond the territorial waters and was summoned to "heave to in the King's name"—a summons she obeyed only after a few shots were fired across her bows. A boat was lowered from the cruiser, and officers thereof set out to row to the schooner, but, before the boat got well away, the *Kromhout* resumed her course towards the high seas. The cruiser pursued for a short distance, and then, turning about, picked up the boat and hurried towards shore for a distance of about eight miles, where, after taking bearings and receiving radio instructions, she returned to the pursuit, and about noon

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hour overhauled the *Kromhout* on the high seas, about thirty-five miles from shore. Here the schooner was stopped, boarded, and, after some discussion, was taken in charge by the cruiser's men, and towed back to a point within three miles of the shore. At this point the accused, on some pretence of navigation dangers to his vessel, forcibly took charge of the helm of the *Kromhout,* turned her out of her course, thereby breaking the tow lines, and sailed away. This time the cruiser did not pursue. By arrangement, the vessel and crew were later, near the French colony of St. Pierre, surrendered to Canadian officers without prejudice to their rights.

When the cruiser's officers boarded the schooner on the high seas, they asked the accused what cargo he had and were told, "a bit of liquor." They asked to see the manifest and shipping papers, and did see them, but these were in French and not fully understood. They made no further examination of the vessel or of the cargo or of the accused. The vessel, as a matter of fact, had on board seven hundred and fifty-one kegs of rum which were dutiable in Canada.

Upon these facts the accused was tried at Halifax, N.S., before Doull J. with a jury, and convicted on the three counts mentioned, and sentenced to three years' imprisonment on each count, the sentences to run concurrently. This conviction was upheld on appeal, Mellish and Carroll JJ. dissenting. The jurisdiction of the trial court in cases such as this to deal with offences committed on the high seas, is conferred by s. 656 of the *Criminal Code.*

On this appeal we have to determine whether or not the *Kromhout* when the accused took her away from the police officers, was lawfully under seizure and in the control of those officers. The language of the charge is that the accused committed the theft by unlawfully taking the *Kromhout* openly and with force

> without the permission of * * * the person who seized the same, or some competent authority and before the said vessel had been declared by competent authority to have been seized without due cause, the said vessel having been seized and detained on suspicion by the said Moyle A. Hyson, a member of the Royal Canadian Mounted Police, as forfeited under section 207 of the Customs Act.

The provisions of the *Customs Act* by which this case is governed are not confined to s. 207—they include other

provisions which may now be set out, so far as necessary. By section 151,

> If any vessel is hovering in territorial waters of Canada, any officer may go on board such vessel and examine her cargo and may also examine the master or person in command upon oath touching the cargo and voyage and may bring the vessel into port (Subs. 1).

Such vessel "shall proceed to come to a stop when required so to do in the King's name by any officer" (Subs. 2); and upon such vessel's "failing to proceed to come to a stop when required," the captain or master of the Government cruiser may, after first causing a gun to be fired as a signal, fire at or into such vessel (Subs. 3). Further particulars of the rights and powers of such revenue officers in dealing with such a vessel are set out in subs. 8.

Section 207 reads:—

> If upon the examination by any officer of the cargo of any vessel hovering in territorial waters of Canada, any dutiable goods or any goods the importation of which into Canada is prohibited are found on board, such vessel with her apparel, rigging, tackle, furniture, stores and cargo shall be seized and forfeited * * *

The term "hovering" is not defined by the Act, but is a term understood by mariners to mean something like fluttering about, neither coming nor going, in an undecided manner. The term "territorial waters of Canada," so far as applicable to this case, means the waters "within twelve marine miles" of the Dominion of Canada (s. 151 (7)). "Officer" means an officer of customs (s. 2 (*l*)). By s. 2 (*o*)

> "seized and forfeited," "liable to forfeiture" or "subject to forfeiture," or any other expression which might of itself imply that some act subsequent to the commission of the offence is necessary to work the forfeiture, shall not be construed as rendering any such subsequent act necessary, but the forfeiture shall accrue at the time and by the commission of the offence, in respect of which the penalty or forfeiture is imposed.

Section 143 was also referred to, but really adds nothing to sections 151 and 207. It seems to have been assumed that a cargo of rum was dutiable goods in Canada and that the Royal Canadian Mounted Police cruiser and men were acting in discharge of public duty.

The effect of the foregoing provisions, when applied to the facts of this case, is that by hovering in territorial waters of Canada with dutiable goods on board, the *Kromhout* thereby became forfeited by operation of law. *Proof* of the forfeiture itself was established *after* the offence had

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been committed, that is, when the officers stopped and boarded the *Kromhout* and ascertained from the captain (the master) that dutiable goods were on board. The fact of hovering was established beyond peradventure by the general finding of the jury under quite proper directions. The seizing of the *Kromhout* on the high seas was part of the prolonged or continued act, which, begun within the territorial waters, and there temporarily frustrated by the flight of the schooner, was consummated on the high seas; and the temporary abandonment of the pursuit of the schooner by the cruiser was not such an abandonment as broke the continuity of the pursuit. When the presence of liquor in the schooner's cargo was established as a fact, the forfeiture which followed as a matter of law related back to the time of the hovering in territorial waters. The authority given to officers to stop and board vessels and examine them and their cargoes is intended for no other purpose than to establish whether or not an offence has in fact been committed. The forfeiture itself is not brought about by any act of officers, but is the legal unescapable consequence of the commission of the offence. A failure to establish that liquor was on board a vessel so hovering, would not mean that the offence had not been committed, but that the commission had not been proved.

It is objected that the charge is defective in that it alleges that the accused took a vessel that had "been seized and detained *on suspicion* * * * as forfeited." This objection, however, seems to be rather technical, and not of the substance of the matter. The words "suspicion," etc., were really quite unnecessary and when deleted leave the allegation as being "seized * * * as forfeited," and this phrase, I think, falls within the definition "seized and forfeited" within s. 2 (*o*).

Some complaint has also been made that the charge of the trial judge was not correct, but I find nothing in it that can properly be objected to in substance.

On the charges of theft, therefore, conviction must stand.

On the remaining charge—obstructing officers—the conviction itself is not in dispute. As to the sentence, it is not perfectly clear that the dissenting judges held it to be illegal. Mr. Justice Mellish says, "I think it is exces-

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sive." Unless they dissented on the ground that it was illegal, this court has no jurisdiction to deal with the matter. Our jurisdiction is strictly limited to controversies in relation to some question of law on which there has been dissent. Whatever may be the proper construction of the judgments of Mr. Justice Mellish and Mr. Justice Carroll on this point, we think, since the sentence under the conviction upon the charge of obstruction runs concurrently with that under the conviction on the charges of theft, no useful purpose could be served by modifying it, although we are disposed to agree that, even if not illegal, it is excessive.

The appeal should be dismissed and the conviction affirmed.

Appeal dismissed.

Solicitor for the appellant: *W. P. Potter.*

Solicitor for the respondent: *W. Stuart Edwards.*

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GENERAL DAIRIES, LIMITED (DEFENDANT) ..... APPELLANT;

AND

MARITIME ELECTRIC COMPANY, LIMITED (PLAINTIFF) ..... RESPONDENT.

*Feb. 26, 27.
*June 28.

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

Estoppel—Accounts for supply of electric current—Accounts rendered for too small amounts—Action for balance—Acts by defendant as result of accounts rendered—Whether defence of estoppel precluded by Public Utilities Act, R.S.N.B. 1927, c. 127—Applicability of estoppel on general principles.

Plaintiff, a public utility within the *Public Utilities Act*, R.S.N.B. 1927, c. 127, sold and delivered electric current to the defendant dairy company, which (as known to plaintiff) used it in the manufacture of its products. Through mistake by plaintiff's employees, the amount of current supplied to defendant was wrongly determined on the meter dial readings, so that plaintiff rendered monthly accounts (which were paid) for only one-tenth of the current actually supplied. Defendant bought its cream at prices based on the difference between the market prices of its products and the cost of manufacturing

* PRESENT:—Duff C.J. and Lamont, Cannon and Davis JJ. and Dysart J. (*ad hoc*).

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them, and, believing in the correctness of plaintiff's accounts as rendered, relied upon them in reckoning up its cost of manufacture, and consequently paid for cream amounts substantially larger than it would have paid had plaintiff's accounts been correct. Plaintiff was not charged with negligence, nor with knowledge of defendant's method of fixing cream prices. After discovering its error, plaintiff sued for balance of account, and defendant pleaded estoppel. The said *Public Utilities Act*, s. 16, requires that no public utility shall charge a greater or less compensation for any service than is prescribed in established schedules, and the Act provides penalties for "unjust discrimination" or for charging "by any device" more or less than full compensation at scheduled rates.

Held: (1) The defence of estoppel was not precluded by the Act (*Burkinshaw* v. *Nicolls*, 3 App. Cas. 1004, and other cases, cited). (2) Estoppel was applicable to the case and afforded an effective defence. Plaintiff must be taken to have intended and expected that defendant would act upon plaintiff's representations in the ordinary course of defendant's business; and defendant did so act, reasonably and in a way that should not be taken as unusual, in the ordinary course of its business, to its detriment, in paying larger amounts for cream than it would otherwise have paid. (Principles of estoppel discussed, and cases referred to).

Judgment of the Supreme Court of New Brunswick, Appeal Division, 8 M.P.R. 67, reversed.

APPEAL by the defendant from the judgment of the Supreme Court of New Brunswick, Appeal Division (1), dismissing its appeal from the judgment of Richards J. (2) in favour of the plaintiff for $1,931.82, being the amount by which the total of certain accounts, as rendered by plaintiff to defendant and paid by defendant, for electric energy supplied by plaintiff to defendant and used (as known to plaintiff) by defendant in its manufacture of dairy products, fell short of the total of the accounts that, according to the amount of electric energy actually supplied, should have been rendered. The further material facts and circumstances of the case are sufficiently stated in the judgment now reported, and are indicated in the above headnote.

Special leave to appeal to this Court was granted to the defendant by the Appeal Division of the Supreme Court of New Brunswick.

The appeal to this Court was allowed and the action dismissed with costs throughout.

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

J. J. F. Winslow, K.C., for the respondent.

(1) 8 M.P.R. 67; [1934] 4 D.L.R. 436.

(2) 8 M.P.R. 67, at 67-82.

The judgment of the court was delivered by

DYSART, J. (*ad hoc*)—The question to be decided here is whether, in the circumstances of this case, a public utility company is entitled to collect a balance of accounts for electricity which it sold and delivered to a customer, or whether it is to be estopped from so collecting because of a mistake it made when, in rendering the accounts in the first instance, it understated the quantity of electricity, upon which mistake the customer relied and acted to its detriment.

The facts of the case are not in dispute. Most of them are set forth in a statement signed by counsel and filed at the trial. Both companies carry on business at Fredericton, N.B. The Dairy Company (appellant) buys cream and manufactures it into various dairy products. These products it sells at market prices, and buys its cream at prices based on the difference between the market prices of the manufactured products and the cost of manufacturing them. The manufacturing costs include the cost of motive power which is derived from electric current. The Electric Company (respondent) is a public utility, under the control and supervision of the Board of Commissioners of Public Utilities of the Province, and sells and distributes electric current to customers including the Dairy Company. To measure the quantity of electric current so supplied, the Electric Company installed on the premises of the Dairy Company an electric meter which, while satisfying in every respect the requirements of the *Electricity Inspection Act* of the Province, was one of a type which records on its dials only part of the current passing through it—a type in common use with this and other such electric companies. In order to determine the exact amount of current passing through this meter, the dial readings should have been multiplied by ten. By some unexplained oversight or mistake on the part of the Electric Company's employees, the monthly readings of the meter dials were not so multiplied, and in consequence of that omission monthly accounts were rendered for only one-tenth the amount of current actually

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sold and delivered. This mistake in accounts continued for twenty-nine consecutive months, until, in April, 1932, the company discovered its error, and demanded payment of the remaining nine-tenths of the electric current, the price of which at the scheduled rates totalled $1,931.82.

Before the mistake was discovered, the Dairy Company, believing in the correctness of the accounts as rendered, relied upon them in reckoning up the costs of manufacture, and consequently in fixing the price of cream, and paying for cream amounts substantially larger than it would have paid had the electric bills been correctly stated. The good faith of the Dairy Company in so believing and acting is not impugned. The responsibility for the mistake admittedly rests solely on the Electric Company, but the company is not charged with negligence in committing the error nor with knowledge of the Dairy Company's method of fixing cream prices.

In the action for the balance of account, the foregoing facts were admitted, and the defence of estoppel was set up. The learned trial judge, Richards J., in a considered judgment (1) held that the principles of estoppel as enunciated in *Carr* v. *London & N.W. Ry. Co.* (2) could not properly be applied to this case because the Electric Company could not reasonably be deemed to have intended that the Dairy Company should act upon the misrepresentations in the particular way in which the latter company did act. This judgment in favour of the Electric Company was on appeal to the Appeal Division of the Supreme Court of the Province (3) upheld on much the same reasoning.

To meet the defence of estoppel in this Court, the Electric Company, (1) adopts the reasons of the trial judge, that on general principles estoppel is not applicable to the case, and, (2) that even if estoppel were applicable apart from statute, it is barred or precluded by the *Public Utilities Act*. It will be convenient to deal with the second of these grounds first.

In order to get a clear view of the effect of the immediately relevant sections of the *Public Utilities Act* (R.S.

(1) 8 M.P.R. 67, at 67-82.
(2) (1875) 44 L.J.C.P. 109.
(3) 8 M.P.R. 67; [1934] 4 D.L.R. 436.

N.B. 1927, ch. 127), it will be helpful to sketch briefly the general scope of the whole enactment. The Act authorizes the creation of a "Board of Commissioners of Public Utilities" which is to "have general supervision of all public utilities and shall make all necessary examinations and inquiries and keep itself informed as to the compliance by public utilities with the provisions" of the Act (s. 5). All public utilities, including by definition such companies as the Electric Company (s. 2), are on their part required to make annual and other reports or returns to the Board giving such information as to their operation and conduct and otherwise as may be required of them by the Board. (s. 11). By section 10:—

10. Every public utility shall furnish reasonably adequate service and facilities. All charges made by a public utility shall be reasonable and just, and every unjust or unreasonable charge is prohibited and declared unlawful.

The rates, tolls and charges, to be lawful, must be such as are filed in schedules with the Board where they are open to public inspection (s. 14), and are subject to such changes therein as may be from time to time authorized by the Board. Section 16 is of vital importance. It reads:—

16. No public utility shall charge, demand, collect or receive a greater or less compensation for any service, than is prescribed in such schedules as are at the time established, or demand, collect or receive any rates, tolls or charges not specified in such schedules.

For "unjust discrimination," and for charging "by any device" more or less than full compensation at scheduled rates, penalties are provided against utility companies and their customers (ss. 18 and 19).

The Act seems, therefore, to seek to control all public utilities for the general benefit of the public, expressly declaring that fair and reasonable service shall be rendered by the utilities, at rates, tolls and charges that are approved by the Board and are known or notified to the public. Section 16 in particular *commands* that the company *shall charge* full compensation at scheduled rates for all its service, and expressly *prohibits* any deviation from charging the full amount of compensation. By "compensation" is surely meant, that the whole amount of service rendered is to be charged for and paid at the scheduled rates. Applied to the present case, the Act imposes a duty on the Electric Company to charge, and on the Dairy Company to pay, at

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scheduled rates, for *all* the electric current supplied by the one and used by the other, during the twenty-nine months in question.

The specific question for determination here is, can the duty so cast by statute upon both parties to this action, be defeated or avoided by a mere mistake in the computation of accounts?

We have not been referred to any English or Canadian cases, and we know of none, dealing directly with a case like the present. There are various decisions, especially in England, on varying aspects of the problem of how far duties imposed by public or private statutes on persons or corporations may be avoided. The general trend of the decisions seems to be that such duty cannot be avoided by a contract between the parties nor by any course of action that does not, at least squarely, raise estoppel. Each decision must be studied with reference to the particular statute on which it turns, and the circumstances with which it deals.

In *Ayr Harbour Trustees* v. *Oswald* (1), it was held that public trustees, on whom a statute imposed a duty to take land for public harbour purposes, could not fetter the freedom of themselves or their successors in dealing with such land so taken, by any resolution or purpose of their own, however commendable. In *Islington Vestry* v. *Hornsey Urban Council* (2), a municipal corporation was held not to be prevented from exercising its full powers by any arrangement or acquiescence on its part respecting the exercise of those powers. Again in *York Corporation* v. *Leetham* (3), the Commissioners empowered by statute to manage navigation and collect on the tonnage of cargoes "the tolls and rates by this Act directed to be taken, and no others" was held not prevented by a contract from collecting tolls. *The Queen* v. *Blenkinsop* (4) was a case in which a municipal corporation under a mistake of law omitted to demand from a railway company the full amount of taxes owing. After several years' omission, it was held that the municipal corporation was not prevented or estopped from collecting the arrears. In none of these

(1) (1883) 8 App. Cas. 623.
(2) [1900] 1 Ch. 695.
(3) [1924] 1 Ch. 557.
(4) [1892] 1 Q.B. 43.

cases do the elements of estoppel appear. In the last mentioned case there was neither a representation nor change of position.

The English *Companies Act, 1867,* imposed a duty or obligation on companies to collect in cash the full face amount of the shares issued and a correlative duty on the holder of the shares to pay in full. It specifically provided that

> Every Share in any Company shall be deemed and taken to have been issued and to be held subject to the Payment of the whole Amount thereof in Cash, unless the same shall have been otherwise determined by a Contract duly made in Writing, and filed with the Registrar of Joint Stock Companies at or before the Issue of such Shares. (s. 25).

Every share certificate is *prima facie* evidence of title, and is transferable but not negotiable. It amounts to a representation to all the world that the person who is named in it is the registered holder of the shares mentioned therein, and that the shares are paid-up to the extent therein mentioned; and it is given with the intention that it may be used as such a declaration: 5 Halsbury, 2nd Ed., s. 459.

Notwithstanding the statutory duties and obligations so imposed by the said Act in reference to share certificates, companies were frequently estopped from showing that the statements contained in their certificates were not true. In *Burkinshaw* v. *Nicolls* (1), certificates of shares of the company were issued as "fully paid-up" and transferred to a holder for value without notice that the shares were not in fact fully paid. The company was held estopped from collecting the unpaid balances. At pages 1026 and 1027 Lord Blackburn used this language:—

> Now in the present case the company has issued under the seal of the company a certificate in the form which is set out in the case, in which the company has asserted that these shares have been fully paid up. These certificates are issued under the directions of the Act of Parliament, and are made *prima facie* evidence of all that they state; only *prima facie* evidence.

In *Bloomenthal* v. *Ford* (2) certificates for "fully paid-up" shares were issued to the allottee by a company as security for a loan from him, he believing that they were "fully paid-up." In a winding up, the liquidator was estopped from denying these certificates. *Parbury's* case (3) was another case of certificates issued for "fully paid-

(1) (1878) 3 App. Cas. 1004. (2) [1897] A.C. 156 (H.L.)
(3) [1896] 1 Ch. 100.

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up" shares to an allottee, and again the company was estopped. The allottee had given the money to a third person to pay for the shares and believed that the money had been so applied. Where, however, the allottee had notice the shares were not fully paid, the company was not estopped. *In re London Celluloid Co.* (1).

The reasons or principles upon which these cases proceed is well stated by Bowen L.J. in *In re London Celluloid Co.* (1), *supra,* at pp. 204 and 205, where he discusses the Act and the *Burkinshaw* v. *Nicolls* case (2) *supra:*

> Nothing can be clearer than this, there is a statutory liability to pay the whole amount in cash, which can only be avoided under the statute in one way—by a registered contract. Can there be any other way of escape? Only this, that if the company has so acted as to preclude itself from denying that the Act has been complied with, that is conclusive evidence that the Act has been complied with. The company may represent to third persons, and induce them to act on the faith of the representation, that the shares have been paid up in cash. If such a representation is made by the company, and acted on by third parties, who have no notice that it is untrue, the company cannot afterwards say that the shares have not been fully paid up. An estoppel of that kind operates against the liquidator as well as against the company, and in such a case the holders of the shares are not liable for calls. *Burkinshaw* v. *Nicolls* (3) shews that such an estoppel may arise. The Act is not thereby evaded, but there is evidence, which must be taken as conclusive, that its requisitions have been complied with. The decision in that case was a ruling on a point of evidence, and it is dangerous to turn a ruling on a point of evidence into a rule of law. The company had issued certificates stating that the shares in question were fully paid up, they were sold in the ordinary course of business, and the House of Lords held that the purchasers were entitled to rely on the certificates as sufficient evidence that the shares were fully paid up.

In the cases of debentures issued by companies without authority or power to make the issue, companies issuing them may be estopped, as against innocent holders for value without notice, from denying the truth of the representations contained on the face of the bonds: *Webb* v. *The Commissioners of Herne Bay* (4). And the same result has been reached where the representations, on which the purchaser of bonds relied to his detriment, are contained in the recitals of the bond: *Horton* v. *Westminster Improvement Commissioners* (5).

(1) (1888) 39 Ch. D. 190.
(2) (1878) 3 App. Cas. 1004.
(3) 3 App. Cas. 1004.
(4) (1870) L.R. 5 Q.B. 642
(5) (1852) 7 Ex. 780.

In cases of annuities and gratuities authorized or prescribed by statute to be paid to certain classes of annuitants or beneficiaries, it has been held that where, through a mistake in classification or otherwise, compensation has been made in excess of the authorized amounts, the excess cannot be recovered, if there has been delay on the part of the officials, and change of position on the part of the recipients of the fund: *Skyring* v. *Greenwood* (1); *Holt* v. *Markham* (2). In this latter case there was a delay of only a few months but it was sufficient, in the opinion of Warrington L.J. (p. 512), to entitle the recipient to conclude that payment was authorized "and that he was at liberty to deal with the money as he pleased." The gratuitant had "availed himself of that liberty and spent the whole or a large part of the gratuity which had been paid him, and [was now no longer] in a position to repay it."

The foregoing cases show that, however imperative may be a statutory duty, the proof of any alleged violation thereof must be made in accordance with the established rules of evidence, and that by one of these rules—that is, estoppel—claims, otherwise sound, may not be susceptible to proof at all. As Bowen, L.J., said in *In re London Celluloid Co.* (3) *supra* at page 205 already quoted, "if the company has so acted as to preclude itself from denying that the Act has been complied with, that is conclusive evidence that the Act has been complied with"; and again on the same page, "the Act is not thereby evaded, but there is evidence, which must be taken as conclusive, that its requisitions have been complied with." The same learned judge in *Low* v. *Bouverie* (4), says at page 105:

> But we must be guarded in the way in which we understand the remedy where there is an estoppel. Estoppel is only a rule of evidence; you cannot found an action upon estoppel. Estoppel is only important as being one step in the progress towards relief on the hypothesis that the defendant is estopped from denying the truth of something which he has said.

And at page 106:

> Now, an estoppel, that is to say, the language upon which the estoppel is founded, must be precise and unambiguous. That does not necessarily mean that the language must be such that it cannot possibly be open to different constructions, but that it must be such as will be

(1) (1825) 4 B. & C. 281.
(2) [1923] 1 K.B. 504.
(3) (1888) 39 Ch. D. 190.
(4) [1891] 3 Ch. 82.

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reasonably understood in a particular sense by the person to whom it is addressed.

There are, so far as we know, no decisions of Canadian courts bearing on directly the point in issue here. The few indirect decisions that are reported are based on tort for misrepresentation or misquotation by the railway companies of freight rates, and consequently are of little or no assistance to us.

In the United States there are many decisions, some of which have been strongly pressed upon us in argument. These decisions, of the Supreme Court of the United States and of several State Courts, deal with section 6 of the *Interstate Commerce Act* relating to the carriage of freight and passengers. Section 6 of that Act is, in effect, the same as section 16 of the *Public Utilities Act* of New Brunswick, but descends into more particularity. It reads in part:

> * * * nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, * * * than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; * * *

The decisions need not be referred to in detail. Most of them are conveniently assembled in 83 Am. Law Rep. (annotated), pp. 245-268, and show that the duty to charge and collect full compensation under the Act is absolute, and is not subject to any relaxation or variation in any circumstance whatsoever. They deny that estoppel or other rules of evidence can affect the statutory obligation, and that no amount of harshness in consequences can affect this result. The underlying principles of the construction so placed upon that statute are well stated by Rugg, Chief Justice of Massachusetts, in the case of *New York, New Haven, & Hartford Railroad Co.* v. *York & Whitney Co.* (1). The learned Chief Justice says:

> The reason why there must be inflexibility in the enforcement of the published rate against all and every suggestion for relaxation rests upon the practical impossibility otherwise of maintaining equality between all shippers without preferential privileges of any sort. The rate when published becomes established by law. It can be varied only by law, and not by act of the parties. The regulation by Congress of interstate commerce rates takes that subject out of the realm of ordinary contract in some respects, and places it upon the rigidity of a quasi statutory enactment. The public policy thus declared supersedes the ordinary doctrine of estoppel, so far as that would interfere with the accomplishment of the

(1) (1913) 215 Mass. Reports 36, at 40.

dominant purpose of the Act. It does not permit that inequality of rates to arise indirectly through the application of estoppel, which it was the aim of the Act to suppress directly.

We know of no reason why public policy in New Brunswick should demand so rigid a rule of construction of the *Public Utilities Act* of that province. We see no reason why section 16 of that Act should not be construed in the spirit in which the *Companies Act* and other such Acts in England are construed. The section in conjunction with others of the Act, imposes a duty which cannot be avoided "by contract" nor "by any device." It aims, we think, to prevent all "unjust discrimination" and all *dishonest* evasion. At the same time, there is nothing to suggest that it ought not to be construed in the light of the law of the land, and enforced in courts according to the prevailing law as to evidence and procedure. When viewed in this way, it does not preclude estoppel which, as we have seen, is only a rule of evidence available in courts, and when applied may assist in ascertaining that the statute has been not evaded but fully met in its requirements.

Our conclusion then, on the second ground of the respondent's argument, is that the Dairy Company is not precluded by the *Public Utilities Act* from raising estoppel.

We shall now turn to the first ground and inquire whether or not on general principles estoppel is applicable to this case.

The learned trial judge thought the case governed by the third proposition laid down by Brett J. in *Carr* v. *London & North Western Ry. Co.* (1) where, discussing the principles of estoppel, he states:

> And another proposition is, that, if a man, whatever his real meaning may be, so conducts himself that a reasonable man would take his conduct to mean a certain representation of facts, and that it was a true representation, and that the latter was intended to act upon it in a particular way, and he with such belief does act in that way to his damage, the first is estopped from denying that the facts were as represented.

The trial judge in the case at bar applied that proposition in a rigid literal sense, holding that, although the plaintiff made the representations, no reasonable man would understand from them that the Electric Company intended the Dairy Company to act *in the particular way* in which it did

(1) (1875) L.R. 10 C.P. 307, at 317.

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act, that is, in using them as a basis for fixing cream prices. In my opinion, this construction is too narrow and rigid. It was enough, I think, that the Electric Company must be taken to have intended and expected the Dairy Company to act upon the representations in the ordinary course of its business, such as to devote the uncollected electric money to profits or dividends, or to building up reserves, or improving its plant; or to devote the money to increasing its business by advertising or by lowering the selling price of its products. If the money might be used for these things, or any of them, why may it not be used to increase the price of raw materials, and so, perhaps, in a competitive field, increase the volume of business, with beneficial results that might follow therefrom. Such a use of the moneys does not appear to me to be so unusual as to cause surprise in the minds of business men familiar with the management of such businesses. This broader construction is not inconsistent with the language employed by Brett J. in his third proposition, rather it is a fair interpretation of that language. And it is in harmony with the language used by Baron Parke in *Freeman* v. *Cooke* (1), where he says that,

> if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth;

and with Lord Tomlin's language in *Greenwood* v. *Martins Bank* (2) where, delivering the unanimous opinion of the House of Lords, he said, speaking generally in respect to estoppel, at p. 57:

> The essential factors giving rise to an estoppel are, I think:—
>
> (1) A representation or conduct amounting to a representation intended to induce a course of conduct on the part of the person to whom the representation is made.
>
> (2) An act or omission resulting from the representation, whether actual or by conduct, by the person to whom the representation is made.
>
> (3) Detriment to such person as a consequence of the act or omission.

The clause "intended to induce a course of conduct," used by Lord Tomlin, is broader, as well as more authoritative, than the statement of Brett J., "intended to act upon it in a particular way," and is wide enough to include, I think,

(1) (1848) 2 Ex. 654, at 663-4. (2) [1933] A.C. 51.

the course of conduct followed by the Dairy Company in reliance upon the representations made in this case.

Moreover, the Dairy Company did act upon these representations by paying the electric bills, and if for any reason the moneys it saved through the misrepresentations were distributed among the farmers or customers of the company as gratuities or bonuses so that the Dairy Company could not recover them, it seems to me that the case would be covered by estoppel as in such cases as *Skyring* v. *Greenwood* (1), *Horton* v. *Westminster Improvement Commissioners* (2).

For these reasons, I think that estoppel is applicable in this case and that the appeal should be allowed and judgment entered dismissing the action with costs.

Appeal allowed with costs.

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

Solicitors for the respondent: *Winslow & McNair.*

THE TORONTO GENERAL TRUSTS CORPORATION ..... APPELLANT;

AND

THE CORPORATION OF THE CITY OF OTTAWA ..... RESPONDENT.

1935
*June 13, 14,
*Oct. 1.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Assessment and taxation—Income tax—Exemption—Assessment by municipality for income received by a corporation as executor in Ontario on behalf of and payable to persons resident outside of Ontario—Assessment Act, R.S.O. 1927, c. 238, as amended in 1930, c. 46—Exemption under s. 4 (22).

The appellant corporation, as executor of an estate, received in Ontario, during the year 1932, income on behalf of and payable to persons resident outside of Ontario. It was assessed in respect of such income by the respondent city, and the questions for determination were, whether appellant was entitled to exemption under s. 4 (22) of the *Assessment Act* (R.S.O. 1927, c. 238, as amended in 1930, c. 46), and, if so, to what extent.

*PRESENT:—Duff C.J. and Lamont, Cannon and Crocket JJ. and Dysart J. (*ad hoc*).

(1) (1825) 4 B. & C. 281. (2) (1852) 7 Ex. 780.

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Held: For the purposes of such assessment, appellant was not a "person" within the phrase "all other persons" in said s. 4 (22) and was not entitled to exemption thereunder. (The words "income derived" and "income received," as used in the Act, and the distinction indicated, from the Act and from the history of the legislation, in the use of those phrases, discussed, and the distinction, as made in *McLeod* v. *City of Windsor*, [1923] Can. S.C.R. 696, applied).

APPEAL by the Toronto General Trusts Corporation (hereinafter called the "Trusts Corporation") from the judgment of the Court of Appeal for Ontario (1) allowing the appeal of the City of Ottawa (the present respondent) from the judgment of Daly Co. C.J.

The Trusts Corporation is the executor or trustee of the estates in question, and, as executor or trustee, in each estate, during the year 1932, received income on behalf of and payable to more than one person resident outside of Ontario. It filed income returns in 1933 with the Assessment Commissioner of the City of Ottawa in respect of the incomes received on behalf of all such estates and such non-resident beneficiaries. The Corporation of the City of Ottawa is the municipality which, under s. 13 (1) (5) of the *Assessment Act* (R.S.O. 1927, c. 238, as amended in 1930, by 20 Geo. V, c. 46) was entitled to assess the Trusts Corporation for income received by it as executor or trustee on behalf of the several beneficiaries in such estates as were resident outside of Ontario.

In determining the amount of income to be assessed against the Trusts Corporation, as executor or trustee, the Assessment Commissioner allowed an exemption of $1,500 upon each return in respect of so much of such income as was payable by the trustee to persons resident outside of Ontario, irrespective of the number of such beneficiaries.

From such assessments the Trusts Corporation appealed to the Court of Revision of the City of Ottawa, which reduced such assessments by directing that an exemption of $1,500 be allowed in respect of the income payable to each beneficiary resident outside of Ontario.

The City of Ottawa appealed to His Honour, Judge Daly, Judge of the County Court of the County of Carleton. As the same question arose in respect of the assessment in each

(1) [1934] Ont. W.N. 269.

estate, the appeals were consolidated and heard together. The learned County Court Judge dismissed the appeal. At the request of counsel for the City of Ottawa, he stated the questions of law involved in the appeal, in the form of a special case for a Divisional Court, pursuant to the provisions of s. 84 of the said *Assessment Act*. The questions stated were as follows:—

Question 1. Was I correct in holding that the Toronto General Trusts Corporation are a "person" within the meaning of such word as used in the phrase "and to the amount of $1,500 in the case of all other persons," as they appear in subsection 22, of section 4, of the Assessment Act, namely:—

"22. The annual income derived from any source by any person assessable directly in respect to income under this Act, to the amount of $3,000 if such person is a householder in the municipality and assessed as such, or being the head of a family occupies with his family any portion of a dwelling house although not assessed therefor, or if the person is a widow or over sixty years of age, and to the amount of $1,500 in the case of all other persons."

Question 2. If the above question is answered in the affirmative, was I correct in holding, that the Toronto General Trusts Corporation, being executors, administrators, trustees or agents (as the case may be) of an estate or fund created or left by a person resident in Ontario, and having received in the year 1932, as such executors, administrators, trustees or agents, income from such fund or estate on behalf of and payable to persons resident outside of Ontario, and being assessed in respect thereof by the Appellant Corporation, were entitled under the provisions of subsection 22, of section 4, of the Assessment Act, to an exemption of $1,500, in respect of the income received by them on behalf of and payable to each such non-resident beneficiary; that is to say, where there are two or more non-resident beneficiaries in the same estate, should the income received on behalf of each such non-resident beneficiary be exempt from assessment to the extent of $1,500?

On appeal by the City of Ottawa, on the special case stated as aforesaid, the Court of Appeal allowed the City's appeal; and to question one, answered "No"; and, in consequence of such answer, found it unnecessary to answer question two.

Special leave was granted to the Trusts Corporation by the Supreme Court of Canada (1) to appeal to this Court. By the judgment now reported, the appeal to this Court was dismissed with costs.

W. F. Schroeder for the appellant.

F. B. Proctor K.C. for the respondent.

(1) [1935] Can. S.C.R. 51.

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The judgment of Duff C.J. and Lamont and Crocket JJ. was delivered by

LAMONT J.—This is an appeal from the judgment of the Court of Appeal for Ontario in a special case stated by His Honour Judge Daly, Senior Judge of the County Court of the County of Carleton. The first question set out in the special case is:—

> Was I correct in holding that the Toronto General Trusts Corporation are a "person" within the meaning of such word as used in the phrase "and to the amount of $1,500 in the case of all other persons," as they appear in subsection 22 of section 4 of the Assessment Act, namely:—
>
> "22. The annual income derived from any source by any person assessable directly in respect to income under this Act, to the amount of $3,000 if such person is a householder in the municipality and assessed as such, or being the head of a family occupies with his family any portion of a dwelling house although not assessed therefor, or if the person is a widow or over sixty years of age, and to the amount of $1,500 in the case of all other persons."

The facts of the case are as follows: The Toronto General Trusts Corporation (hereinafter called the Trusts Corporation) are the executors or administrators or trustees of the estates hereinafter mentioned, that is to say, the estate of the late J. L. Murphy, the estate of the late A. F. Rogers, the estate of the late Rev. W. T. Herridge, the estate of the late A. D. Broderick and the estate of the late W. C. MacKay.

During the year 1932 the said Trusts Corporation received certain sums of money as executors or administrators or trustees of the above mentioned estates on behalf of and payable to certain beneficiaries resident outside of Ontario. Income returns were filed in 1933 by the Trusts Corporation with the Assessment Commissioner of the City of Ottawa in respect of income payable to the several beneficiaries.

The part of the income which the return shewed was received in Ontario and was payable to each of the beneficiaries (resident outside of Ontario) was assessed by the Assessment Commissioner to the Trusts Corporation for 1933. No assessment was made against or in the name of any non-resident beneficially entitled to any part of the income.

The learned County Court Judge decided in favour of the appellant and upheld the view of the Court of Revision

that the exemption of $1,500 mentioned in subsection 22 of section 4 of the *Assessment Act* should be allowed to the Trusts Corporation in respect of each return of income made on behalf of a person residing outside of Ontario and paid to such person. The City of Ottawa appealed from this decision to the Court of Appeal for Ontario. That Court reversed the judgment and held that the answer to the first question should be "No."

The material section of the statute to be construed in the present case is section 4, subsection 22.

Two of the principal contentions on behalf of the respondent were:—

(1) That "persons" in the phrase "all other persons" of subsection 22 of section 4 of the *Assessment Act,* as amended by the Statutes of Ontario of 1930, ch. 46, s. 1, means and includes only "natural persons";

(2) That "persons" in that phrase includes only persons who are assessable in respect of income to which they are beneficially entitled.

It is unnecessary to pass on the first of these.

As to the second, Mr. Proctor very properly calls our attention to the circumstance that, in section 4, in which the general rule relating to the assessment of income is declared, there is a difference between the phraseology designating the liability of residents of Ontario in respect of the taxation of income coming to them for their own behoof, and that in relation to income received in Ontario "by or on behalf of" a person resident outside of the province. In the second case, where the recipient may or may not be beneficially entitled to the income to be assessed, that income is designated as "income received," while in the first case the income assessable falls under the phrase "income derived." This distinction of phraseology would appear to have been observed generally in the enactments relating to the assessment of income from 1897 down to the present time. For example, in section 12 (1) of the Revised Statutes of Ontario, 1927, ch. 238, the phrase employed is "income received" where the subject matter dealt with is income which is received in Ontario for or on behalf of persons resident out of Ontario and income received in Ontario for or on behalf of an

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estate or trust. On the other hand, in subsections 16 and 18 of section 4 of the same statute, the phrase "derived by any person from His Majesty's Imperial Treasury" is used to qualify officers' pay and pensions, salaries, etc.; and "income derived" is used in relation to the income which comes to a farmer from his farm. In both these cases, the income is envisaged, of course, as income to which the recipient is beneficially entitled.

The successive Assessment Acts beginning with that of 1897 and coming down to and including the *Assessment Act* in the Revised Statutes of 1927 (those of 1904, 1914 and 1927) contain in each case a provision dealing with the exemption of income, of which subsection 22 of section 4, as amended in 1930, is the successor. These various enactments, passed during this period of 30 years, all deal, obviously, with one subject matter: exemptions enjoyed in respect of income to which the recipient is beneficially entitled; and, in each case, the terms in which the enactment is expressed recognizes the distinction in phraseology adverted to. In each case, the income, to which the exemption attaches, is denoted by the phrase "income derived." In section 4 (22), as amended in 1930, this form of phraseology is preserved. Reading the amended section in light of the whole of the provisions relating to the assessment of income, including the series of enactments of 1897, 1904, 1914 and 1927, to which it is the successor, it would seem a reasonable view that the subject matter of the section, as amended, is the same as the subject matter of the section in its unamended form in R.S.O. 1927, and of each one of this succession of enactments beginning in 1897; namely, exemptions attaching to income to which the recipient is beneficially entitled. This view as to the distinction explained, in its application to the provisions of the Ontario *Assessment Act* (R.S.O. 1914, cap. 195), has been explicitly accepted in the judgments of this Court and of the Ontario Courts. *McLeod* v. *City of Windsor* (1).

Further, an exemption gives a privilege in respect of taxation, and the principle is not only well settled, but

(1) [1923] Can. S.C.R. 696, at 700, 701 and 710.

rests upon obvious reasons that those who advance a claim to special treatment in such matters must shew that the privilege invoked has unquestionably been created. (*City of Montreal* v. *Collège Sainte Marie* (1)).

On the whole, therefore, it would appear that the exempting section ought not to be applied to income assessed under section 13 (1) of the *Assessment Act,* as amended in 1930. The decision of the Court of Appeal to the effect that, for the purposes of the application of the exempting section, the appellant corporation is not a person within the meaning of the phrase " all other persons," is, in my opinion, correct and should not be disturbed.

The appeal will, therefore, be dismissed with costs.

CANNON J.—Under section 4 of the *Assessment Act,*

* * * all income [*a*] derived either within or out of Ontario by any person resident therein, or [*b*] received in Ontario by or on behalf of any person resident out of the same shall be liable to taxation,

subject to certain exemptions. Amongst others, subsection 22 exempts the annual income *derived* from *any* source by *any* person *assessable directly* in respect to income *under this Act* to the amount of $1,500 in the case of all persons other than (1) a householder in the municipality and assessed as such, or (2) being the head of a family occupies with his family any portion of a dwelling house although not assessed therefor, or (3) a widow, or (4) a person over sixty years of age. These four categories enjoy an exemption of $3,000.

Now, under section 13, subsection 1, of the Act, as amended in 1930,

Where a person resident in Ontario creates a trust or agency fund or dies leaving an estate, and income from such fund or estate is *payable* to a person resident outside of Ontario, the income *payable* to such non-resident shall be assessed in the hands of the executors, administrators, trustees or agents of such estate or fund, who may pay the amount of taxes out of the income in their hands.

This section taxes the income payable to each non-resident in the hands of the executors or trustees. Can it be said that the exempting clause does apply to the income received in Ontario by or on behalf of any person resident out of the same? It seemed to me at first, that the exemption would apply both to the income derived in

(1) [1921] 1 A.C. 288, at 290.

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Ontario by residents and to income received in Ontario for non-residents, if assessable directly, under the Act, the latter being the only one assessable in the hands of the trustee, as is clearly shown by the late Chief Justice Anglin in *McLeod* v. *City of Windsor* (1). But, in this latter case, this Court made a clear distinction between "derived" and "received" as used in this Act, and decided that "derived" meant "received by a person beneficially entitled." The trustee, although directly assessed in his representative capacity, does not "derive" any income for his own benefit, and therefore would seem to be outside the scope of the exemption clause. It may be a *casus omissus,* as this interpretation discriminates against non-residents and may have the effect, which the Legislature probably never contemplated, of causing a flight of such trust funds and capital away from this province.

The Assessment Commissioner of the respondent allowed an exemption of $1,500 upon each return in respect of so much income as was payable by the trustees to persons resident outside of Ontario, irrespective of the number of such beneficiaries. Such was the position, which was satisfactory to the respondent, before an appeal was launched by the appellants.

The Court of Revision decided that in the case of each estate the executors or trustees were entitled to an exemption of $1,500 from the amount of income in their hands for the benefit of *each* beneficiary who resided outside of Ontario.

The County Judge agreed with the Court of Revision but, in his stated case, put the questions in such a way that, when the matter came before the Court of Appeal, the respondent was enabled to secure a judgment which went much further than the position taken by the Assessment Commissioner and decided, in effect, that the exemption clause did not apply to non-residents.

It seems to me that the only issue raised by the parties at the origin of this litigation was limited to this—whether or not the Assessment Commissioner was right in limiting the exemption to $1,500 for each estate, instead of allowing the same exemption to each non-resident beneficiary.

(1) [1923] Can. S.C.R. 696, at 711-712.

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However, the sole question before us is whether or not we should give a different answer than the one adopted by the Court of Appeal. I consider myself bound by the interpretation adopted by this Court in the *Windsor* case (1) in 1923 and I would, therefore, answer in the negative the first question stated by the learned County Judge.

This appeal should be dismissed with costs.

DYSART J. (*ad hoc*)—I concur in the dismissal of this appeal.

Appeal dismissed with costs.

Solicitors for the appellant: *MacCraken, Fleming & Schroeder.*

Solicitor for the respondent: *Frank B. Proctor.*

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* June 11, 12, 13.
* Oct. 7.

PEGGY SAGE INC. AND NORTHAM-WARREN LIMITED (PLAINTIFFS) } APPELLANTS;

AND

SIEGEL KAHN COMPANY OF CANADA LIMITED (DEFENDANT) } RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Trade-mark—Expunging from register—Alleged resemblance to trade-mark in prior use by others—Danger of deception—Onus.

The plaintiff Peggy Sage Inc. was incorporated in January, 1930, for the purpose of acquiring and carrying on the business of Mrs. Sage under her trade-mark "Peggy Sage." Mrs. Sage had established in the city of New York in 1917 the business of manufacturing and selling toilet articles and toilet preparations, and the goods have been sold continuously throughout the United States since 1917 and throughout Canada since 1920, under said trade-mark. The trade-mark was registered with the Secretary of State for New York on February 10, 1927; in the United States Patent Office on July 12, 1932; and in the Canadian Patent Office on June 2, 1933, the application being filed on September 30, 1932, under the provisions of the *Trade Mark and Design Act*, R.S.C. 1927, c. 201. Defendant was incorporated in March, 1932, for the purpose of acquiring and continuing two pre-existing businesses for the sale of toilet articles, and on April 8, 1932, it filed an application to register "Peggy Royal" as a trade-mark,

* PRESENT:—Lamont, Cannon, Crocket and Davis JJ. and Dysart J. *ad hoc.*

(1) [1923] Can. S.C.R. 696.

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and was granted a certificate as of June 11, 1932 (prior to which date those words had not been used for sale of its goods). Defendant's products were of the same nature as, but were of lower grade and lower priced than, those of plaintiffs. The containers used by defendant were different from those used by plaintiffs. Plaintiffs sued to expunge the latter trade-mark from the register, on the grounds that its use would mislead the public and was an infringement of plaintiffs' trade-mark.

Held: (1) The onus was on plaintiffs to satisfy the court that the danger of deception exists, and that consequently the public should be protected by expunging the trade-mark complained of. The court, in the absence of direct evidence one way or the other, may draw such inferences from the facts proven as those facts *prima facie* warrant. The onus may be shifted. (*Dewar* v. *John Dewar & Sons Ltd.* 17 R.P.C. 341, at 356; *Benj. Edgington Ltd.* v. *J. Edgington & Co.*, 6 R.P.C. 513).

(2) The words "Peggy Royal," as printed on defendant's labels, so nearly resembled the device registered by plaintiff, and sounded so much like it, as to be calculated to deceive, and might induce some of the public to think that defendant's products were manufactured by plaintiff. Even if defendant did not intend to deceive and actual deception had not been proven, defendant's trade-mark should be expunged if, in the court's opinion, by its resemblance to that of plaintiff, it was likely to deceive the public in the course of its legitimate use in the trade. On these grounds defendant's trade-mark should be expunged (*Eno* v. *Dunn*, 15 App. Cas. 252, and other cases, cited). (Judgment of Maclean J., President of the Exchequer Court of Canada, [1935] Ex.C.R. 70, reversed).

APPEAL by the plaintiffs from the judgment of Maclean J., President of the Exchequer Court of Canada (1), dismissing their action for an order that defendant's trade-mark be expunged from the Register of Trade Marks. The material facts of the case are sufficiently stated in the judgment now reported. The appeal was allowed with costs throughout.

W. L. Scott K.C. for the appellants.

O. M. Biggar K.C. and *R. S. Smart K.C.* for the respondent.

The judgment of the court was delivered by

CANNON, J.—The plaintiffs are appealing from a judgment of the Exchequer Court, of the 21st November, 1934 (1), dismissing with costs an action to expunge from the register of trade-marks the entry by the respondents of

(1) [1935] Ex.C.R. 70.

the words "Peggy Royal," on the ground that it is calculated to deceive and that it is an infringement of the appellants' registered mark "Peggy Sage." The latter is the name adopted by Mrs. Rosabelle Sage, who established in the city of New York, in 1917, the business of manufacturing and selling toilet articles and toilet preparations.

It is not disputed that the goods have been sold continuously throughout the United States since that year and throughout Canada since 1920. These goods have from the beginning been sold under the trade-mark of "Peggy Sage," which has been extensively advertised both in Canada and in the United States.

The plaintiff Peggy Sage Inc. was incorporated on January 18, 1930, for the purpose of acquiring and carrying on the business of Mrs. Sage under the latter's trade-mark or name. The plaintiff Northam-Warren Limited is the agent of Peggy Sage Inc. in Canada.

On February 10, 1927, Mrs. Sage registered the trade-mark "Peggy Sage" with the Secretary of State for New York. Peggy Sage Inc. registered it in the United States Patent Office on July 12, 1932, and in the Canadian Patent Office on June 2, 1933. The application was filed on September 30, 1932, under the provisions of the former *Trade Mark and Design Act.*

The respondent company was incorporated on March 22, 1932, for the purpose of acquiring and continuing two pre-existing businesses for the sale of toilet articles: A. L. Siegel & Co. Inc. which had the trade-mark of "Hostess," and E. Kahn Inc. using the trade-mark "Ekay," both Canadian branches of United States businesses with headquarters in New York city.

On discovery, the secretary of the respondent company gave an account of how the words "Peggy Royal" were selected at a conference at which Mr. Siegel, Mr. Kahn and the two Chantlers met in the Royal York Hotel in Toronto. Chantler says that he chose the word "Peggy" because it was the name of a friend of his, and that either Mr. Kahn or Mr. Siegel suggested the word "Royal" because of the fact that the conference was held in the Royal York Hotel. No explanation was given why the marks previously in use in connection with the business

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of the two companies were discarded. Immediately after this meeting an application was filed on the 8th of April, 1932, to register "Peggy Royal" as a trade-mark and a certificate issued on June 11 of that year.

The registrar first objected to the use of the name "Royal" because the word was already registered by other concerns in connection with toilet brushes and soap. The respondent having agreed to except from its application these two articles, the trade-mark was granted to the respondent as of June 11, 1932.

The gist of appellants' grievance is found in the following paragraphs of their statement of claim:—

12. The defendant's reason for selecting the words "Peggy Royal" as a trade-mark for toilet articles in connection with a newly established business, was evidently because of its similarity to the plaintiff Peggy Sage Inc.'s trade-mark "Peggy Sage" and of the desire of the defendant to take advantage of the reputation that the goods of the plaintiff Peggy Sage Inc. have for so long enjoyed and of the extensive advertising by the plaintiff Peggy Sage Inc. and its predecessor in title.

13. The defendant's use of the trade-mark "Peggy Royal" constitutes an infringement on the plaintiff Peggy Sage Inc.'s trade-mark "Peggy Sage."

14. If the defendant is permitted to continue to use, for toilet articles, a trade-mark so similar to and so suggestive of, the plaintiff Peggy Sage Inc.'s trade-mark, it will result in the public's being misled and confusing the defendant's goods with those of the plaintiff, to the great detriment of the plaintiff Peggy Sage Inc.

There is no question that the goods dealt in by the parties are the same, except that the appellants' are of a much higher grade and are sold in Canada at a higher price. The packages are also of different quality. But we must not lose sight of the fact that if its trade-mark is upheld, there is nothing to prevent the respondent from engaging in the manufacture and sale of a higher grade of goods.

The registrations of both these trade-marks in Canada were made under the old *Trade Mark and Design Act*. R.S.C. 1927, c. 201. The *Unfair Competition Act, 1932*, 22-23 George V, c. 38, did not come into force until September 1, 1932; subsection 1 of section 61 thereof says that any application for the registration of a trade-mark received by the registrar at any time before the expiration of a month from the 1st of September, 1932, should be dealt with in accordance with the provisions of the *Trade Mark and Design Act.*

The grounds of appeal are the following:—

1. The learned trial judge erred in holding that the onus was on the appellants to show that the mark was calculated to deceive or mislead the public. He should have held that the onus was on the respondent and had not been discharged.

2. The learned trial judge should have held that, quite apart from any question of onus, the respondent's trade-mark "Peggy Royal" was void because of its similarity with the trade-mark "Peggy Sage" for the same class of goods and was calculated to deceive or mislead the public.

3. The trial judge should have expunged the registration of "Peggy Royal" as void because of the fact that prior to its registration it had not acquired through user a secondary meaning as designating the goods of the respondent and that as a consequence it was not adapted to distinguish the goods of the respondent from the goods of other possible manufacturers of the same name, and that it did not, therefore, contain the essentials necessary to constitute a trade-mark properly speaking.

I.

To support his first proposition, the appellant quoted *Eno* v. *Dunn* (1), where, under the English Act of 1883, the House of Lords held that, in the exercise of the discretion conferred by the Act whether to register a trade-mark or not, the Comptroller ought to refuse registration where it is not clear that deception may not result.

Section 11 of our old Act covering this case provided for the refusal by the Minister of any trade-mark "if it appears that the trade-mark is calculated to deceive or mislead the public."

In *Eno* v. *Dunn* (1), Lord Herschell says, at p. 261, that the discretion to register or not "must be reasonably exercised"; but, in his opinion, it was a reasonable exercise of it to refuse registration when it was not clear that deception might not result from it.

And Lord Macnaghten (p. 262) remarks:

> Unfortunately, in the competition for business, a trader not unfrequently endeavours to attract custom by representing that the goods

(1) (1890) 15 App. Cas. 252.

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which he offers for sale are different in origin, composition, or character from what they really are. The public are constantly tempted to buy one thing when they think they are buying another. It is not, as has been observed by Lord Cairns, the province of the Court "to protect speculations of this kind."

Between rival traders, the application of the principle is necessarily a matter of extreme difficulty. But, as between the innocent public and a trader seeking registration of a proposed trade-mark, there is, I think, no room for hesitation or doubt.

Our attention was also drawn to *McDowell* v. *Standard Oil Co.* (1), and to the words used in his speech by Viscount Cave L.C., at p. 637:

> My Lords, it has been long ago decided, and is quite clear, that the words "calculated to deceive" which are found in s. 11 of the Trade Marks Act, 1905, do not mean "intended to deceive" but "likely (or reasonably likely) to deceive or mislead the trade or the public." It has also been held in the case of *Eno* v. *Dunn* (2), decided in your Lordships' House, that the burden of proving that a proposed trade-mark is not likely to deceive lies upon the applicant, and also—a proposition which, I think, follows upon the last—that if that proof is incomplete and the matter is, as Lord Watson said in that case, in dubio, the application may be refused.

The appellants contend in their memorandum that, whereas in an action for an infringement the onus is on the plaintiff to prove the infringement, in the case of an application to register a trade-mark, the onus is on the applicant to satisfy the court that confusion might not arise from the registration of his mark. In other words, if there is any doubt at all, it must be resolved against the applicant.

The Court of Appeals of the District of Columbia, in *E-Z Waist Co.* v. *Reliance Manufacturing Co.* (3), held that if there is doubt whether the registration of a trade-mark would cause confusion with a prior trade-mark, the doubt must be resolved against the newcomer, who had the entire field in which to select a trade-mark, so that there is no excuse for his closely approaching the mark of a business rival.

The learned President of the Exchequer Court says (4):—

> The assistance to be derived from the evidence, in reaching a conclusion in this matter, is slight. In the conclusion which I am about to express it would be but pure affectation to say that I am absolutely free from doubt as to its correctness. My conclusion is that the plain-

(1) [1927] A.C. 632.
(2) 15 App. Cas. 252.
(3) (1923) 286 Federal Reporter, 461.
(4) [1935] Ex.C.R., at 75-76.

tiffs have not made out a case to expunge the defendant's mark and must fail. I cannot upon the facts before me hold the marks in question here are so similar as to be likely to cause confusion.

The respondent submits on this first point that in England the rule is that the burden of proof is always on the party applying to have any change made in the register, on account of s. 40 of the English Act of 1905, which makes registration *prima facie* evidence, in applications under s. 35, of the validity of the original registration.

Kerly, on Trade Marks, 6th ed., p. 335, says:—

> The fact that the Registrar has exercised his discretion in favour of the registration of a mark, and has allowed it to be registered, does not prevent the Court from ordering its removal if the registration was made without sufficient cause; but an applicant for rectification is in a somewhat less advantageous position than an opponent to registration.

And, at p. 336:—

> But where the objection alleged to a mark is that it is the same as that of the applicant, or that it has such resemblance to his as to be calculated to deceive, it will be some evidence against the applicant, on whom the burden lies of showing that the registration was made without sufficient cause, if he has stood by and allowed the registered proprietor to use the mark objected to for a length of time, especially if no case of actual deception is proved.

The plaintiffs in this case allege as a fact the danger of deception; and I believe that the onus of satisfying the court that such danger exists and that consequently the public should be protected by expunging the register, is on them. The court, in the absence of direct evidence, one way or the other, may draw such inferences from the facts proven as these facts *prima facie* warrant. "It is obvious that in such matters the onus may be shifted." *Dewar* v. *John Dewar & Sons Ltd.* (1). See also *Benjamin Edgington Ltd.* v. *John Edgington & Co.* (2).

II.

Although no proof was made of actual deception, the evidence shows that the appellants' goods are sometimes asked for as "Peggy" goods, especially in telephone orders.

There was also evidence given by witnesses familiar with the trade to the effect that the dominant feature of the appellants' mark was "Peggy."

Robert Fairweather says:—

> I would say that, without question, "Peggy" is the big word as far as the trade is concerned.
> * * *

(1) (1900) 17 R.P.C. 341, at 356. (2) (1889) 6 R.P.C. 513.

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It was the selling feature.

* * *

It was easily remembered and attractive.

Mrs. Alma G. Denys,

They are generally asked for by the name of Peggy Sage, but at different intervals during my four years at Simpson's I answered the telephone at the appointment desk and there different people asked me for "Peggy" Manicure. They order the goods by telephone. This not only happens in connection with the Peggy Sage goods but as we handle the Francis Fox Scalp Treatment they will call up and refer only to "Francis."

* * *

Q. Now what, in your opinion, is the dominant feature of the trade-mark "Peggy Sage"? What is the principal word in Peggy Sage?—A. Naturally it would be "Peggy."

Mrs. Olive M. Kennedy, another witness in the trade, says that the dominant feature of the trade-mark "Peggy Sage" is, of course, "Peggy," "because it is a catchy name."

William Arbuckle says that the dominant feature of the trade-mark is "Peggy" and that the people usually ask for "Peggy Sage" and at odd times "Peggy."

The appellants have clearly established their right to the use of the trade-mark or name of "Peggy Sage" under which they have advertised and sold their goods in Canada since 1920. There is no doubt that they have sold so much goods under that mark that it had come throughout Canada to be associated with their goods.

Moreover, it appears by the admission of the respondent's witness E. W. Chantler that the words "Peggy Royal" were not used for the sale of their goods before the registration, i.e., some time in the summer of 1932; so that they cannot claim in favour of the registration of their mark that it had been used as their property before registration in Canada, while "Peggy Sage" was used first and registered later and can claim protection against anybody trying to use a trade name or mark so nearly resembling it as to cause confusion.

But, says the respondent, assuming that the appellants would have an exclusive right to "Peggy Sage," they cannot claim to stop any registration of any combination of words including "Peggy."

On this point, *In re the Trade Mark of La Société Anonyme des Verreries de l'Etoile* (1) may be useful. The

(1) (1893) 10 R.P.C. 436, and (in appeal) (1894) 11 R.P.C. 142.

plaintiffs in that case, in 1876, registered as their trade-mark for glass a star, and, in 1893, they complained of a trade-mark which did not consist of a star but consisted of the words "Red Star Brand." They asked the court to expunge the entry in the register.

In that case, it was contended, as in this one, that if the evidence adduced as to the existence of the appellant's trade-mark or name had been brought before the registrar prior to registration of the respondent's trade-mark, the latter's application to the registrar would have been refused, and that nothing had occurred to prevent the court from expunging the mark.

Mr. Justice Stirling said (1) that although physically the trade-mark registered by the respondents has no resemblance to the trade-mark of the applicants, if, however, it is brought to the notice of the registrar, by the evidence adduced by an opponent that, even though the two marks are not similar,

> there is a reasonable probability of the public being misled into buying one thing when they think they are buying another, it would be his duty to refuse registration.

If the evidence brought before the court had been before the registrar when the trade-mark was sought to be registered, I think that registration ought to have been refused.

This, however, is not an opposition to the registration of a mark, but an action to expunge, and I think that the burden of authorities is to the effect that the plaintiffs must show definitely that their trade-mark will reasonably or likely be interfered with. In this case as in the other, the applicants heard of the "Peggy Royal" trade-mark registration shortly before the action was taken and took proceedings with sufficient rapidity. The evidence satisfies me that it has been used by them in Canada since 1920; and I am strongly inclined to think that the respondents were aware of the appellants' mark when they registered their own.

To my mind, the words "Peggy Royal," as printed on the respondent's labels, so nearly resemble the device registered by Peggy Sage Inc. and sounds so much like it, as to be calculated to deceive and might induce some of the

(1) 10 R.P.C., at 439.

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public to think that the lower priced products of the respondent were manufactured by the appellants.

I am helped to reach this conclusion by *Eno* v. *Dunn* (1), in which the respondent applied to register the words "Dunn's Fruit Salt Baking Powder" as a trade-mark for baking powder. The appellant, who had for many years used the words "Fruit Salt" as his trade-mark for a powder used in producing an effervescent drink, opposed the application.

The House of Lords held that upon the evidence the proposed words were as a matter of fact calculated to deceive the people and that the trade-mark ought not to be registered.

I feel, as Lord Watson felt in that case, p. 258, that I cannot avoid the conclusion that the respondent adopted the word "Peggy," as it now stands in its trade-mark, with the purpose of obtaining pecuniary advantage from the reputation of the appellants' manufacture. In that case, it was argued that to give effect to these considerations would be equivalent to allowing the appellant to appropriate as his own property two words in common use. Lord Watson answers that the argument appears to him to underrate the resources of the English language, which are quite sufficient to enable anyone honestly desirous of distinguishing his own goods to use these words in a trade-mark in such a manner as to prevent any possibility of their being connected with the competitor's goods.

Lord Herschell, in that same case, said that it was not necessary to reach the conclusion that the proposed use of the words would be calculated to deceive. He thought it would be enough to say that he was not satisfied that there would be no possible danger of the public being deceived.

Lord Macnaghten remarked, at pages 263-264:—

> The learned judges who were in favour of Mr. Dunn in the Court below seem to have come to the conclusion that Mr. Dunn's object was to obtain the benefit of the celebrity which the name adopted by Mr. Eno has acquired, but that it was not his object to steal Mr. Eno's trade. So far I am disposed to agree; but I do not think that those propositions cover the real question. The question is one between Mr. Dunn and the public, not between Mr. Eno and Mr. Dunn. It is immaterial whether the proposed registration is or is not likely to injure Mr. Eno in his trade.

(1) (1890) 15 App. Cas. 252.

As pointed out by Lindley L.J., in *In re the Trade Mark of La Société Anonyme des Verreries de l'Etoile* (1):—

> Two marks may be calculated to deceive either by appealing to the eye or to the ear, or one appealing to the eye and one to the ear.

MM. Siegel and Kahn, for obvious reasons, were not heard by the respondent to explain why they abandoned their respective trade-marks "Hostess" and "Ekay," used by them in Canada, to substitute for them the words "Peggy Royal" (which was not the name of any person connected with the manufacture or sale of their toilet products), under the guise of a signature resembling the signature of "Peggy Sage" then registered in New York and used in Canada and the United States for years and extensively advertised. Then, why did they not themselves advertise "Peggy Royal"? They might have, by doing so, prevented the public from confusing the origin of their own goods. They thought wise to use the word "Peggy," which was well known in the trade, without publishing that "Peggy Royal" was of their own manufacture.

It is true that the packing and containers are not the same. But, assuming that they did not try to confuse the eye, they, I believe, attempted to deceive by appealing to the ear of the purchasing public—and in both cases we find on the labels, printed in a peculiar but somewhat similar script, the signatures, which may, to a certain extent, deceive the eye.

But, even if the respondent did not intend to deceive, and if actual deception has not been proven, the registration should be expunged, if, in the opinion of the court, it is calculated to deceive, which does not mean "capable of being used to deceive" but that, by its resemblance to the appellants', it is likely to deceive the public in the course of its legitimate use in the trade.

Kerly, on Trade Marks, p. 266.

The appellants, therefore, ought to succeed on the second point.

It would be useless to discuss the third point as to whether or not the trade-mark "Peggy Royal" contains the necessary constituting essentials.

(1) (1894) 11 R.P.C. 142, at 146.

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I would, therefore, allow the appeal with costs and order that the respondent's trade-mark "Peggy Royal" be expunged from the Register of Trade Marks, volume 253, folio 54511, with all costs below against the respondent.

Appeal allowed with costs.

Solicitors for the appellants: *Ewart, Scott, Kelley, Scott & Howard.*

Solicitors for the respondent: *Osler, Hoskin & Harcourt.*

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* June 17, 18.
* Oct. 1.

IN THE MATTER OF THE ESTATE OF HERBERT CARLYLE HAMMOND, DECEASED

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Will—Accumulation of income—Postponed distribution of part of estate—Ownership of surplus income accumulated during period of postponement—Accumulations Act, R.S.O. 1927, c. 138, s. 1.

The testator died on January 26, 1909. Under directions in his will his executor, on an event which happened in 1912, divided the residue of his estate into two equal parts, one-half going (subject to charge) to the testator's two sons. As to the "other half" (the part now in question) the will directed that it be charged with certain annuities, etc., and that (subject to charges) upon the testator's wife's death (subject to delay in the event of her death before a certain time, which did not happen) it should be distributed in equal shares amongst nine named beneficiaries, with proviso that should any of them predecease her or die before the period of distribution (which will now, under the circumstances, be the testator's wife's death) the deceased beneficiary's child or children living at the date of such distribution should take the share which the parent would have received if then living; but if the deceased beneficiary left no child or children living at the date of distribution, the share should belong to the testator's two sons in equal shares. The testator's widow is still living. This Court has held ([1934] Can. S.C.R. 403) that, on construction of the will, the testator's two sons took, on the testator's death, a vested interest in equal shares in said "other half" (subject to charges), subject to partial defeasance in favour of any of said nine beneficiaries (or, alternatively, their issue) who might be living at the time fixed for distribution. The present question was concerned with the disposal of the surplus income accumulated from the said "other half" of the residue of the estate.

Held: The accumulation of surplus income and of income thereon during the 21 years following the testator's death (the period limited for accumulation in such a case by the *Accumulations Act*, R.S.O. 1927, c. 138) is divisible as it existed on January 26, 1930 (the end of said

* PRESENT:—Duff C.J. and Lamont, Cannon and Crocket JJ. and Dysart J. *ad hoc.*

period of 21 years) in the same manner as the corpus, upon the death of the testator's widow; and the accumulation of surplus income and of income thereon after January 26, 1930, and until the testator's widow's death, is distributable as upon an intestacy. The clear implication from the will was that the testator meant to provide for the distribution, on his widow's death, of the fund as it should then stand, including all the accumulation of surplus income and of income thereon. This is also the implication which the law, failing any words indicating the testator's intention to exclude it, would itself annex to the gift, whether the gift be one which vests in the beneficiaries on the testator's death or an executory bequest vesting only on the testator's widow's death (*Wharton* v. *Masterman,* [1895] A.C. 186, at 198, 191-192; *Bective* v. *Hodgson,* 10 H. of L. Cas. 656, at 664-665). But as the accumulations have gone beyond the period allowed by the *Accumulations Act,* to that extent the direction for accumulation is void, so that that portion of the surplus income and the income thereon which has accumulated since January 26, 1930, is distributable as upon an intestacy (s. 1 of the Act).

Judgment of the Court of Appeal for Ontario, [1935] 1 D.L.R. 263, [1935] Ont. W.N. 1, affirmed.

APPEAL by the Soldiers' Aid Commission of Ontario from the judgment of the Court of Appeal for Ontario (1) affirming (subject to a variation in form) the judgment of Hope J. on an originating motion launched by the National Trust Co. Ltd., executor and trustee of the estate of Herbert Carlyle Hammond, deceased, for the determination of certain questions as to the disposal of the accumulation of surplus income arising under paragraph 15 of the will of the said deceased.

The will, after some specific bequests, gave the residue of his estate to his executors in trust for purposes defined in the will. Then, after certain directions and gifts of annuities, the will provided, par. 14, that, "on the death of my said wife or when my youngest son shall or would have attained the age of twenty-five years whichever event shall first happen," the trustees should divide the net residue into two equal parts, and one part (subject to a charge) "shall be equally divided between my said two sons" (with provisions for gifts over in events which did not happen); then, par. 15, that the "other half" of the said residuary estate (subject to charges) "upon the death of my said wife * * * shall subject as hereinafter be distributed in equal shares amongst" nine named beneficiaries, with provisions that should any of them

(1) [1935] 1 D.L.R. 263; [1935] Ont. W.N. 1.

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"predecease my said wife or die before the period of distribution with reference to this half of my residuary estate leaving a child or children surviving, such child or children living at the date of such distribution * * * shall take the share which the parent * * * would have received if living at the time of such distribution" and that the share of any of said nine beneficiaries "who shall die before the period of distribution aforesaid without leaving any child or children who shall be living at the date of distribution shall belong to my said two sons in equal shares"; and that, in the event (which did not happen) of the wife dying before the youngest son "shall or would have attained the age of twenty-five years," then the period of distribution with regard to this half of the residuary estate should be delayed until the latter event.

The testator died in 1909, leaving his widow and two sons. The widow is still living. The younger son attained the age of 25 years in 1912, and conformably to (and subject to) par. 14 of the will, the trustee then divided the net residue of the estate into two equal parts and divided one part between the two sons. The older son died in 1915 and the younger son in 1930.

Certain questions arising under said par. 15 of the will were dealt with in a judgment of this Court delivered on March 6, 1934 (1), which held that, on construction of the will, the testator's two sons took, on the testator's death, a vested interest in equal shares in the "other half" (of the residuary estate) disposed of in par. 15 (subject to charges there mentioned), subject to partial defeasance in favour of any of the said nine beneficiaries (or, alternatively, their issue) who might be living at the time fixed for distribution; and therefore, one of the said nine beneficiaries named in par. 15 having died without issue in 1922, the sons' estates took the benefit of the aliquot part of the residuary estate which that deceased beneficiary would have received under par. 15 had she lived until the time therein fixed for distribution; but that that aliquot part was not payable until the testator's widow's death.

By *The Soldiers' Aid Commission Amendment Act, 1922,* 12-13 Geo. V, c. 40, it was enacted that the Soldiers' Aid

(1) [1934] Can. S.C.R. 403.

Commission of Ontario, the present appellant, should be the beneficiary as to one-half of the residue of the estate of Kathleen Saunders Hammond, who was the widow of, and the sole beneficiary under the will of, Frederick S. Hammond, the older son of the said Herbert Carlyle Hammond, deceased.

The Soldiers' Aid Commission of Ontario, the present appellant, contended that the intermediate income of the "other half" (of the residuary estate) disposed of in par. 15 (subject to charges there mentioned) belongs to those in whom the fund is vested, up to and until the defeasance happens, and hence the accumulation of surplus income of this "other half" belongs to the estates of the testator's two deceased sons in equal shares. Alternatively it contended that the testator did not dispose by his will of the surplus income arising out of that part of the residue of his estate dealt with by said par. 15, and that he died intestate as to such surplus income; which would mean that the surplus income would be divided into three equal parts amongst the testator's widow and the estates of the two sons.

The Court of Appeal held that all the accumulation of surplus income and of income thereon in respect of the fund disposed of by par. 15 of the will during the period of 21 years following the testator's death, to wit, from January 26, 1909, until January 26, 1930, is divisible as it exists on January 26, 1930, in the same manner as the corpus of the said fund upon the arrival of the period of distribution, which, in the events that have happened, is upon the death of the testator's widow; and that all accumulations of surplus income and of income thereon in respect of the said fund, after January 26, 1930, and until the death of the testator's widow, is distributable as upon an intestacy.

C. M. Garvey K.C. for the appellant.

G. M. Huycke for respondent the Royal Trust Co., executor of H. R. Hammond estate.

W. Lawr K.C. for respondents, Fannie Parker and others.

McGregor Young K.C. (Official Guardian) for infant respondents.

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W. B. Milliken K.C. for respondent Fannie Hammond.

W. Judson for respondent National Trust Co. Ltd., executor of H. C. Hammond estate.

The judgment of the court was delivered by

CROCKET, J.—This appeal has to do entirely with the disposal of the surplus income which has accumulated from the second half of the residue of the estate of the above named testator since his death on January 26, 1909, and which it is stated now amounts to approximately $600,000.

The testator appointed The National Trust Co., Ltd., to be the executors and trustees of his will, and, after directing payment of his debts, funeral and testatmentary expenses, and making several specific devises and bequests, devised and bequeathed all the rest, residue and remainder of his estate to his executors and trustees in trust "to realize such portions thereof from time to time as it may be necessary to realize." He then directed his trustees out of the income and profits of his estate to pay annuities of $2,000 and $12,000 to his mother and to his wife in quarterly instalments during their respective lives, and annuities of $1,000 each to his two sons until the younger of them should attain the age of 25 years, and life annuities in quarterly instalments also to fifteen named friends, as well as $7,000 per annum to the National Trust Co. with a direction to pay that sum quarterly or so much thereof as may be required for the payment of sums mentioned in a written memorandum addressed to them relating to the latter bequest. Authority was given to his executors that, if his estate should not realize sufficient profits or income to pay the charges and annuities set forth in the will, to supplement the same out of the principal so that during each quarter the full bequests specified should be received by each party entitled thereto. He authorized his trustees to advance to each of his sons out of the principal of his estate, if they thought it wise to do so after they respectively should attain majority and before the time of distribution, in addition to the annual payments of $1,000, a sum to the amount of $20,000 each. Then by paragraph 14 he directed, "on the death of my said wife or when my

youngest son shall or would have attained the age of twenty-five years whichever event shall first happen," to "divide the net residue and remainder of my estate into two equal parts," and that one of these equal parts should be equally divided between his two sons subject to the payment of one-half of the $12,000 annuity to their mother during her life, and with a provision that should either die before the period of distribution and without having disposed of his share by his last will and leaving lawful issue such share should devolve on such issue, otherwise that it should go to the survivor. The other half of the residuary estate he directed, by paragraph 15, should be charged with the payment to his wife of one-half of the $12,000 annuity given to his wife, and with all the other annuities and annual charges previously mentioned, and that upon the death of his wife this other half of his residuary estate, subject to all the existing annuities or annual charges above mentioned and after making provision for the said annuities continuing thereafter, should "be distributed in equal shares" amongst nine named beneficiaries, all of whom had already been named in paragraph 9 among the beneficiaries to whom annuities were there bequeathed, with a proviso that if any of them should predecease the testator's wife or die before the period of distribution with reference to that half of his residuary estate leaving a child or children surviving, such child or children living at the date of such distribution should take the deceased parent's share, but that the share of any of the nine named persons who should die before the period of distribution "without leaving any child or children who shall be living at the date of distribution shall belong to my said two sons in equal shares."

The younger son attained the age of 25 in 1912, whereupon the residue of the estate was divided into two equal parts, one of which, subject to the charges mentioned, was divided between the sons. No question arises as to this moiety of the residue. Both sons predeceased their mother, the testator's widow. The elder son died in 1915 and the younger in 1930. The former appointed the National Trust Co., Ltd., his executor and trustee, and devised and bequeathed all his estate, both real and personal, to his

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wife. She died in 1919 and a year later a grant of letters of administration of her estate with the will annexed was made to the National Trust Co., Ltd., also. One half of the residue of her estate subsequently became vested in the Soldiers' Aid Commission of Ontario, the present appellant, under the terms of *The Soldiers' Aid Commission Amendment Act, 1922*, 12-13 Geo. V, (Ont.), cap. 40. Probate of the last will of the younger son was granted by the Supreme Court of British Columbia (in Probate) in 1930 to the respondent The Royal Trust Co.

The widow of the testator still survives, so that no distribution has yet been made of the second half of the residue of the testator's estate under paragraph 15 of his will.

While the younger son was still living, one of the beneficiaries named in paragraph 15 of the will, Jessie Butler, died without issue, and after the younger son's death in 1930 the Supreme Court of Ontario was moved on an originating notice to determine whether the interest of the deceased younger son in Miss Butler's share of the second half of the testator's residuary estate was then payable to the deceased younger son's estate, and whether the other deceased son had a vested interest in the share of the said Jessie Butler which was then payable to his estate. These questions came before this Court in November, 1933, on a direct appeal by consent of all parties from the judgment of Kingstone, J., on the originating notice, wherein this Court unanimously held that both sons took upon the death of the testator a vested interest in equal shares in the second half of the residuary estate disposed of in paragraph 15, charged with one half of the annuity provided for the widow and with all other annuities and annual charges there mentioned, subject to partial defeasance in favour of any of the named beneficiaries (or, alternatively, their issue) at the time fixed for distribution, but that such interests were not then payable to their respective estates. See judgment of Rinfret, J., in *In Re Hammond* (1). While the latter case was still pending, the National Trust Co. launched a further motion to determine the ownership of the surplus income which had accumu-

(1) [1934] Can. S.C.R. 403, at 412 and 413.

lated on the fund dealt with by paragraph 15 of the will. The questions submitted to the court were as follows:—

1. Does the surplus income of the other half of the residuary estate of the testator mentioned in paragraph 15 of his will fall into and form part of such other half of such residuary estate, and if not, does it pass as on an intestacy?

2. If such surplus income falls into and forms part of such other half of such residuary estate then, in view of the provisions of the *Accumulations Act*, R.S.O. c. 138, what limitation, if any, is there as to the period during which such surplus income falls into and forms part of such other half of such residuary estate and if there be any such limitation, does the surplus income accumulating thereafter pass as on an intestacy?

3. If there be any surplus income which falls into and forms part of such other half of such residuary estate, then does the interest on such surplus income fall into and form part of such other half of such residuary estate, or does such interest pass as on an intestacy, and from what date does such interest accrue?

Hope, J., held upon these questions that the accumulation of income during the 21-year period following the testator's death—the period limited for accumulation of rents and profits in such a case, by the *Accumulations Act* (cap. 138, R.S. Ont.)—became part of the second half of the residue disposed of by paragraph 15 as construed by this Court, and that the accumulation of income after the expiration of the 21-year period should pass as on an intestacy.

On appeal by The Soldiers' Aid Commission, the Court of Appeal held that Mr. Justice Hope's judgment was right and affirmed the same subject to a variation in form. The formal judgment of the Appeal Court declared that all the accumulation of surplus income and of income thereon in respect of the fund disposed of by paragraph 15 of the said will during the period of twenty-one years following the death of the testator, viz., from January 26, 1909, until January 26, 1930, is divisible as it exists on the last mentioned date in the same manner as the corpus of the said fund upon the arrival of the period of distribution, which, in the events that have happened, is upon the death of the widow, and, further, that all accumulations of surplus income and of income thereon in respect of the said fund after January 26, 1930, and until the death of the said widow, is distributable as upon an intestacy, viz., one-third to the widow and one-third to each of the estates of the two deceased sons.

Another of the nine beneficiaries named in paragraph 15, Belle Marks, died in 1911, leaving surviving three children,

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who are represented by counsel on this appeal together with the remaining seven beneficiaries named in the said paragraph. These all submit that the judgment of the Court of Appeal is right. The respondent, Fannie Hammond, the testator's widow, takes the same position. The Royal Trust Co., as the executor and trustee of the estate of the younger son, Herbert R. Hammond, contends that the judgment of the Court of Appeal is correct with respect to the surplus income and income thereon which has accumulated from and after January 26, 1930, and with respect to the income which will hereafter accumulate thereon, and submits its rights to this Court as to the disposition of the surplus income which has accumulated in the 21-year period from the death of the testator, viz., January 26, 1909, to January 26, 1930.

As previously pointed out, this Court has already decided that the testator's two sons upon the death of the testator took a vested interest in the second half of the residuary estate disposed of in paragraph 15 of the will, subject to partial defeasance. Whether or not the gift to the nine beneficiaries named, or their issue, who should be living at the time of the death of the testator's widow, constituted an executory bequest which should not vest in any of them until the death of the widow, we have no doubt, from the language used, that the testator meant to provide for the distribution at that time of the entire second half of the residue of his estate as it should then stand, including all the accumulation of surplus income and of income thereon. In the absence of any specific direction to that effect, that is, we think, the clear implication to be gathered from the entire will. It is the implication as well which the law, failing any words indicating an intention on the part of the testator to exclude it, would itself annex to the gift, whether the gift be one which vests in the beneficiaries on the testator's death or an executory bequest vesting only on the death of the testator's widow. As pointed out by Mr. Justice Middleton in his reasons for judgment, Lord Davey in *Wharton* v. *Masterman* (1), stated the law as follows:—

> When there is no express trust declared of the income of a trust fund, it follows the destination of, and is an accretion to, the fund from which it is derived (unless there be words excluding that implication).

(1) [1895] A.C. 186, at 198.

And, applying it to the case then under consideration, added:—

But the source of the income in question is the investments of the surplus income; so that, even if it be not impliedly given by force of the term "accumulations," it would go in the same way as the investments of the surplus income, i.e., to the charities.

In the same case, Lord Chancellor Herschell used these words (1):—

It is true that there is no provision for the investment of the income derived from the accumulation of the surplus income, unless it be deduced from the use of the word "accumulation" in the clause which precedes the ultimate trust; but, whether this be so or not, I think the income arising from the investment of surplus income must, in the absence of any direction to the contrary, follow the destination of the investments from which it results.

Mr. Justice Middleton also quotes a dictum of Lord Chancellor Westbury in *Bective* v. *Hodgson* (2), treating of the distinction between executory devises of land and executory bequests of personal estate, in which he refers to "rules which have been very long established" as to each. The rule of law regarding executory devises of real estate, he says,

has no application to bequests of personal estate. Consequently, if by a will the whole of the personal estate, or the residue of the personal estate, be the subject of an executory bequest, the income of such personal estate follows the principal as an accessory, and must, during the period which the law allows for accumulation, be accumulated and added to the principal. Subject to the prohibition against accumulation, the ownership both of the principal and interest of the personal estate so bequeathed, may remain in suspense until the executory bequest takes effect, provided it be so given as that it must vest within the time allowed by the rule against perpetuities. In the case of personal estate, the policy of the law does not require that there should always be a representative of the beneficial ownership.

These pronouncements, in our view, settle the question as to the surplus income of the second half of the residuary estate falling into and forming part of that half of the residuary estate disposed of by paragraph 15 of the will, as propounded by interrogatory no. 1.

In the events which have happened and in the circumstances which now exist, however, the accumulations from the second half of the residuary estate have gone beyond the period allowed by the *Accumulations Act* of Ontario, i.e., beyond twenty-one years following the death of the

(1) [1895] A.C., at 191-192.

(2) (1864) 10 H. of L. cases, 656, at 664-665.

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testator. To that extent, therefore, the direction for accumulation is void, so that that portion of the surplus income and the interest thereon, which has accumulated since January 26, 1930, is distributable as if the testator had died intestate in respect thereof. Such we think is the effect of that Act, which provides by s. 1 (1) that:—

> No person shall, by any deed, surrender, will, codicil, or otherwise howsoever, settle or *dispose* of any real or personal property so that the rents, issues, profits or produce thereof shall be wholly or partially accumulated for any longer than one of the following terms:—
>
> (One of these terms is, "(*b*) for twenty-one years from the death of the grantor or testator");

and by s. 1 (3) that:—

> Where an accumulation is directed otherwise than as aforesaid, such direction shall be null and void, and the rents, issues, profits and produce of such property so directed to be accumulated shall, *so long as the same shall be directed to be accumulated contrary to the provisions of this Act,* go to and be received by such person as would have been entitled thereto, if such accumulation had not been directed.

The testator having, by virtue of these provisions of the *Accumulations Act,* died intestate in respect of all income accumulating after the lapse of twenty-one years following his death, it follows that such income is now divisible under the *Devolution of Estates Act* between his widow and the estates of his two deceased sons, who were at the time of his death the testator's next of kin and in whom as such, together with his widow, the inchoate right to such income, when it should accumulate, then vested—one-third thereof to the widow and one-third to each of the estates of the said two deceased sons. This, we take it, is the effect of the judgment of the Appeal Court as to all the accumulations of surplus income and the income thereon which have accrued since January 26, 1930.

The appeal should be dismissed and the costs of appeal of all parties, except the appellant, paid out of the estate of Herbert Carlyle Hammond, those of the executor and trustee of the said estate being taxed as between solicitor and client.

Appeal dismissed.

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Solicitors for the appellant: *C. M. Garvey & Co.*

Solicitors for respondent, the Royal Trust Company, executor of estate of H. R. Hammond, deceased: *Osler, Hoskin & Harcourt.*

Solicitor for respondents Fannie Parker and others: *Waldon Lawr.*

Solicitor for infant respondents: *McGregor Young (Official Guardian).*

Solicitors for respondent Fannie Hammond: *Mulock, Milliken, Clark & Redman.*

Solicitors for respondent, the National Trust Co., Ltd., executor of the estate of H. C. Hammond, deceased: *Aylesworth, Garden, Stuart & Thompson.*

HIS MAJESTY THE KING (RESPONDENT) APPELLANT;

AND

JOSEPH CLICHE (SUPPLIANT)..... RESPONDENT.

1935

* June 4.
* June 28.

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

Crown—Petition of right—Offence or quasi-offence—Damages—Right of action—Article 1011 C.C.P.

Under the terms of article 1011 of the Code of Civil Procedure, a right of action lies against the Crown for damages resulting either from an offence or a quasi-offence, when the formalities pertaining to a petition of right are otherwise followed.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec, affirming the judgment of the Superior Court, Gibsone J., and maintaining the appellant's petition of right against the Crown.

In his petition of right the respondent alleged that on the 17th of October, 1931, about half past nine o'clock in the evening, he was a guest passenger in a motor car which, between Beauceville and St. George, on the Levis-Jackman national highway, struck a steam roller supposed to have been used by the roads department of the province to repair the road at that place; and added that the roller was in the way and that the accident had been caused by

* PRESENT:—Duff C.J. and Lamont, Cannon, Crocket and Davis JJ.

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the lack of indications by way of lantern or otherwise on the forward part and one side of the roller. The respondent claimed an amount of $318.25, total of expenses incurred as a consequence of that accident, and a sum of $20,000 for loss of time and total incapacity.

The appellant pleaded specially that the accident was due to the fault and negligence of the proprietor and driver of the automobile who was driving his car at an excessive speed, and in a manner not allowed by law under the circumstances; that especially the road-roller was in the old road, closed to circulation by good and solid barrier and was completely outside of the way that the travelling public should follow; that the closing of the old road and the opening of a temporary road were indicated to the travelling public by a red flag placed at more than 400 feet from the site of the accident, by a similar flag put on the steam-roller and at the same time by a lighted lantern placed on the same roller. The Superior Court maintained respondent's action for a sum of $3,515.55, which judgment was affirmed on appeal, less a sum of $100 owing to an error in adding up the amounts of damages.

Aimé Geoffrion K.C. and *L. Galipeault* for the appellant.

Rosaire Beaudoin K.C. for the respondent.

The judgment of the Court was delivered by

CANNON J.—A la suite de la collision d'un automobile avec un rouleau à vapeur, sur la route nationale Lévis-Jackman, le 17 octobre 1931, l'intimé, par pétition de droit alléguant la négligence du département de la voirie de la province de Québec, a obtenu de la Cour Supérieure (Gibsone, J.) une indemnité de $3,515.55. Sur appel de la Couronne, la Cour du Banc du Roi, par son jugement du 30 novembre 1934, a confirmé le jugement, Hall J. dissident, tout en le réduisant de $100 pour corriger une erreur d'addition. Comme il s'agit purement et simplement d'une question de faits que les deux cours ont décidée en faveur de l'intimé, l'appelant, devant nous, a borné exclusivement son recours à des moyens de droit.

I

Nous référant au témoignage de Joseph Gilbert, la Couronne a prétendu que le rouleau de fer, dont la présence a amené la collision, appartenait aux dénommés Bénoni Poulin et Marcotte (les contracteurs), qui l'avaient déposé depuis trois jours sur le chemin public alors en réparation.

Quoique cette preuve ait été faite par l'intimé, je partage l'opinion de l'honorable juge Létourneau que, dans la contestation comme au cours de l'enquête, l'on a semblé prendre pour acquis qu'il était là pour les réparations qui s'y poursuivaient. A tout événement, le rouleau avait été accepté, toléré, et, lors de l'accident, était sur le chantier des travaux; de plus, il appert au plaidoyer que le département en avait assumé la garde et le contrôle, et cette particularité suffit pour que la responsabilité du maître des travaux (dans l'espèce, la Couronne) doive en résulter.

II

Le second point soulevé par la Couronne est basé sur l'article 106 du chapitre 91 des statuts refondus de la province de Québec de 1925, tel que remplacé par 17 Geo. V (1927), c. 31, s. 22, qui se lit comme suit:

106. The municipal corporation, owner of a road which the Minister of Roads maintains or upon which he does construction or improvement work, shall not be responsible for damages due to the fault of employees of the Minister of Roads, committed in the discharge of their duties, nor to any default in the fulfilment of the obligations imposed on the province or undertaken by the Minister of Roads under any provision of this Act. Such corporation shall retain its rights and control over such road subject to the restrictions created by this Act and it shall continue to have, with regard to such roads, all obligations toward the public which the law imposes upon it, save those which are removed by this Act.

Encore sur ce point, je crois, avec l'honorable juge Létourneau, qu'il est possible que, d'une façon générale, la garde d'une route, et l'obligation d'en faire disparaître les obstacles, reviennent aux municipalités; mais dans un cas comme dans l'espèce actuelle, où le département s'en est emparé pour les travaux de son ressort, il faut maintenir le principe que la responsabilité suit le contrôle. Cette disposition, d'ailleurs, semble, implicitement du moins, décréter la responsabilité en dommages du gouvernement. Or ce rouleau était certainement sur le chantier organisé par le département de la voirie et, d'après les plaidoiries, sous la garde de ses employés qui en auraient indiqué la présence

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un public voyageur par un pavillon rouge placé à quatre cents pieds de l'endroit de l'accident et par un autre pavillon semblable placé sur le rouleau à vapeur, en même temps qu'un fanal allumé, placé sur le même rouleau, éclairant très bien. Ce sont là les prétentions de la défense qui, d'après les jugements des cours inférieures, n'ont pas été prouvées, pas plus que les actes de négligence reprochés au conducteur de l'automobile.

III

Mais, nous dit en troisième lieu l'avocat de l'appelant soulevant un point qui ne semble pas avoir été du tout plaidé ou considéré devant les cours inférieures, la loi 46 Vict. (1883), c. 27, reproduite à l'article 1011 du Code de Procédure Civile, ne donne pas un recours illimité contre la Couronne pour délit ou quasi-délit. Cette disposition se lit comme suit:

Any person having a claim to exercise against the government of this province, whether it be a revendication of moveable or immoveable property, or a claim for payment of money on an alleged contract, or for damages, or otherwise, may address his petition of right to His Majesty.

Dans cette cause, la Couronne ne semble pas avoir mis en doute, d'après les plaidoiries, sa responsabilité pour les actes ou omissions des employés de la voirie. Ceci est d'ailleurs conforme à la pratique dans la province de Québec depuis que cet acte de 1883 a été passé. Ses dispositions sont plus généreuses que celles de la *Loi de la Cour d'Echiquier* du Canada qu'il nous a été donné de discuter récemment *re: The King* v. *Dubois* (1). Il semble que la législature de Québec se soit inspirée de la Crown Suits Ordinance XV de 1876, section 18, sous-section 2, se lisant comme suit:

Any claim against the Crown founded on the use or occupation, or right to use or occupation, of Crown lands in the Colony, and any claim arising out of the revenue laws, or out of any contract entered into, or which should have or might have been entered into, on behalf of the Crown, by or by the authority of the Government of the Colony, which would, if such claim had arisen between subject and subject, be the ground of an action at law, or suit in equity, and any claim against the Crown for damages or compensation arising in the Colony, shall be a claim cognizable under this Ordinance.

Ce texte a été discuté par le Conseil Privé *re: Attorney-General of the Straits Settlements* v. *Wemyss* (2), où Lord Hobhouse s'exprime comme suit:

(1) [1934] S.C.R. 378.

(2) (1888) 13 App. Cas. 192, at 197.

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Their Lordships are of opinion that the expression "a claim against the Crown for damages or compensation" is an apt expression to include claims arising out of torts, and that as claims arising out of contracts and other classes of claims are expressly mentioned, the words ought to receive their full meaning.

In the case of *Farnell* v. *Bowman* (1) attention was directed by this Committee to the fact that in many colonies the Crown was in the habit of undertaking works which, in England, are usually performed by private persons, and to the consequent expediency of providing remedies for injuries committed in the course of these works. The present case is an illustration of that remark. And there is no improbability, but the reverse, that when the legislature of a Colony in such circumstances allows claims against the Crown in words applicable to claims upon torts, it should mean exactly what it expresses.

D'ailleurs, même sans cette autorité, nous croirions devoir suivre la coutume acceptée depuis un grand nombre d'années dans la province de Québec et interpréter cet article 1011 C.P.C. comme créant un droit d'action contre la Couronne dans les cas de délits et de quasi-délits, en suivant les formalités de la pétition de droit (Vo. Rapport des codificateurs, nov. 1896—C.C.P. (Surveyer) 93).

Pour ces raisons, je suis d'avis de renvoyer l'appel avec dépens. Le demandeur cependant n'a droit aux intérêts que depuis la date du jugement de la Cour Supérieure qui devra être modifié en conséquence.

Appeal dismissed with costs.

Solicitors for the appellant: *Galipeault & Galipeault.*
Solicitor for the respondent: *Rosaire Beaudoin.*

1935

* June 18, 19, 20.
* Oct. 1.

DOMINION ROYALTY CORPORATION LTD. (INCORPORATED 1930) AND DOMINION ROYALTY CORPORATION LTD. (INCORPORATED 1934) (PLAINTIFFS) ..... APPELLANTS;

AND

W. C. GOFFATT (DEFENDANT)..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Contract—Rescission—Inability to make restitutio in integrum—Whether relief not based on rescission could be granted in the action—Form of action and conduct of case.

The judgment of the Court of Appeal for Ontario, [1935] O.R. 169, held that, while the facts in connection with the transaction in question

* PRESENT:—Duff C.J. and Lamont, Cannon and Crocket JJ. and Dysart J. *ad hoc.*

(1) (1887) 12 App. Cas. 643, at 647.

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gave plaintiff a good cause of action for rescission, yet as, through what had since taken place, the circumstances had changed and become such that plaintiff could not make *restitutio in integrum*, its right of action for rescission had gone, and as it had not framed or pursued the action for any relief except relief on the basis of rescission, its action must be dismissed. Plaintiff appealed to this Court.

Held: The appeal must be dismissed. By reason of said change in circumstances, the objections to granting relief by way of rescission were insurmountable; and a claim for relief by way of damages (as to damages no evidence had been given), or otherwise except on the basis of the setting aside of the impeached transaction, not having been presented either at the trial or in the Court of Appeal, could not properly be entertained by this Court; defendant should not be called upon in this Court to meet an entirely new case unless, at all events, it rested exclusively upon propositions of law, and unless, moreover, it appeared that he could not be prejudiced by its not having been advanced at an earlier stage.

APPEAL by the plaintiffs from the judgment of the Court of Appeal for Ontario (1), which (reversing the judgment of Hope J.) dismissed the plaintiffs' action.

The action was brought to recover from the defendant certain moneys paid by the plaintiff Dominion Royalty Corporation Ltd. (incorporated 1930) (hereinafter called the plaintiff company) as the purchase price of a certain interest in a gas and oil lease covering lands in the State of Oklahoma, U.S.A.

The Court of Appeal, while holding that the defendant was the real vendor to the plaintiff company of said interest; that the defendant stood in such a fiduciary relationship to the plaintiff company as required him to make full and complete disclosure of the material circumstances in connection with the transaction in question; that he failed to make that full and complete disclosure; and that on these facts, taken by themselves, the plaintiff company had had a good cause of action for rescission, yet held that, as, through what had since taken place, the circumstances had changed and had become such that the plaintiff company could not make *restitutio in integrum*, its right of action for rescission had gone, and that, as it had not framed or pursued the action for any relief except relief on the basis of rescission, the action must be dismissed.

(1) [1935] O.R. 169; [1935] 1 D.L.R. 780.

The material facts and circumstances of the case are dealt with at length in the reasons for the judgment appealed from (1).

By the judgment now reported the appeal to this Court was dismissed with costs.

R. S. Robertson K.C. for the appellants.

J. S. Denison K.C. and *F. T. Watson* for the respondent.

The judgment of the court was delivered by

DUFF C.J.—I agree with the unanimous view of the Court of Appeal for Ontario that, by reason of the change in circumstances, the objections to granting relief by way of rescission are insurmountable; no purpose would be served in merely repeating the reasons given in the judgments of Mr. Justice Masten and Mr. Justice Davis. On this account, the appeal should be dismissed.

No claim for relief by way of damages or equitable compensation, or to recover the moneys paid to Goffatt as moneys had and received to the use of the appellants, as distinguished from the claim for the restoration of those moneys (with interest), as consequential upon the setting aside of the impeached transaction, was presented either at the trial or in the Court of Appeal. No evidence as to damages was given. The sole title to relief advanced by the appellants was that the transaction with Goffatt was voidable and that Goffatt was bound at their demand to make *restitutio in integrum.*

In these circumstances, no claim for damages, or for equitable compensation, could properly be entertained by this Court. Similar considerations apply to the contention put forward that the appellants are entitled to recover the moneys paid to Goffatt as moneys had and received to their use; but, indeed, it seems too clear for argument that effect could only be given to such a claim if the impeached transaction were set aside. The appellants are bound by the way in which they conducted their case at the trial and in the Court of Appeal, and it would be contrary to well-settled principles to call upon the respondent in this Court to meet an entirely new case unless, at all events, that case

(1) [1935] O.R. 169; [1935] 1 D.L.R. 780.

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rested exclusively upon propositions of law, and unless, moreover, it appeared that the respondent could not be prejudiced by the fact that it was not advanced at an earlier stage.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

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

Solicitors for the respondent: *Slaght & Cowan.*

1935

* Oct. 7.
* Oct. 22.

BRITISH AMERICAN BREWING CO. LTD. (SUPPLIANT)..... APPELLANT;

AND

HIS MAJESTY THE KING..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Appeal—Jurisdiction—Dismissal of action in Exchequer Court, when called for trial and suppliant not ready to proceed and asking adjournment—Appeal by suppliant to Supreme Court of Canada—Applicability of s. 38 of Supreme Court Act (R.S.C. 1927, c. 35)—"Final judgment" within s. 82 (4) of Exchequer Court Act (R.S.C. 1927, c. 34)—Whether case one for exercise of Court's power to dismiss appeal summarily.

When the action, which was by way of petition of right in the Exchequer Court, came on for trial, counsel for the suppliant moved for postponement, and the trial judge gave directions for the trial to be had within a certain time. When the case later came on for trial, counsel for the suppliant again sought postponement, stating he was not prepared to proceed, as attendance of his witnesses could not yet be procured. Thereupon the petition of right was dismissed. The suppliant appealed to the Supreme Court of Canada. Respondent moved to quash the appeal for want of jurisdiction, on the grounds that the judgment appealed from was not a final judgment, and that it was in exercise of judicial discretion within s. 38 of the *Supreme Court Act.*

Held: The Court had jurisdiction to hear the appeal, and the motion to quash should be dismissed.

The jurisdiction of the Supreme Court of Canada in respect of appeals in exercise of a right of appeal given by the *Exchequer Court Act* is not affected by s. 38 of the *Supreme Court Act.* S. 38 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.*

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* PRESENT:—Duff C.J. and Rinfret, Lamont, Cannon and Kerwin JJ.

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The judgment appealed from was a final judgment within the meaning of s. 82 (4) of the *Exchequer Court Act*.

The case was not one in which the Court's power to dismiss summarily an appeal should be exercised.

MOTION to quash appeal for want of jurisdiction on the grounds that the judgment appealed from was not a final judgment, and that it was in exercise of judicial discretion within s. 38 of the *Supreme Court Act*.

The action was by way of petition of right in the Exchequer Court of Canada, for repayment of certain moneys alleged to have been paid by the suppliant to the Department of Customs and Excise and to the Department of National Revenue of the Dominion of Canada as an excise tax and as a sales or consumption tax on ale and beer manufactured for export and duly exported, the imposition and collection of which taxes, it was alleged, was not authorized.

The action was set down for trial before the President of the Exchequer Court at Toronto for February 19, 1935.

On February 11, 1935, counsel for the suppliant moved before the President of the Exchequer Court to postpone the trial on the ground that some of suppliant's witnesses were ill, and others who resided in the United States were not available as such for the trial on February 19. That motion was enlarged to the trial.

On February 16, 1935, counsel for the suppliant again applied to the President for a postponement of the trial, and the President again directed that the application be heard at the trial on February 19.

At the opening of the trial on February 19, counsel for the suppliant again presented his application for a postponement of the trial, and the President directed that the suppliant must move to set the case down for trial within sixty days from that date, and that the trial must take place and be concluded before the summer vacation.

On May 15, 1935, the case came on for trial before the President of the Exchequer Court at Toronto, and the suppliant again sought an adjournment until the middle of October on the ground that the witnesses that the suppliant counted on to be available were in the United States and their attendance could not be forced, and that the

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suppliant had been unable to get them to agree to be present at the trial in Toronto before the middle of October. The request for adjournment was refused, and as counsel for the suppliant stated that he was not prepared to proceed with the trial, the petition of right was dismissed with costs.

The suppliant appealed to the Supreme Court of Canada, and the respondent launched the present motion to quash the appeal.

A. C. Hill K.C. for the motion.

O. M. Biggar K.C. contra.

THE COURT.—The grounds of the motion are: first, that the judgment appealed from is not a final judgment; and, second, that the jurisdiction of this Court is excluded by section 38 of the *Supreme Court Act.*

By section 35 of the *Supreme Court Act,*

> The Supreme Court shall have, hold and exercise an appellate, civil and criminal jurisdiction within and throughout Canada;

and, by section 44,

> Notwithstanding anything in this Act contained the court shall also have jurisdiction as provided in any other Act conferring jurisdiction.

The appellate jurisdiction, bestowed upon the Supreme Court in general terms by section 35 of the *Supreme Court Act,* is, in point of fact, defined in part by the *Supreme Court Act* itself, and, in part, by other statutes, for example, the *Criminal Code* and the *Controverted Elections Act.*

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.*

We are also of opinion that the judgment appealed from is a final judgment. The formal judgment is in these words:—

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The Court.

THIS ACTION, by way of Petition of Right, having come on for trial before this Court at the City of Toronto on the 19th day of February, A.D. 1935, in presence of counsel for the Suppliant and for the Respondent and having been adjourned, and again coming on this day before this Court in the said City of Toronto in presence of counsel for the Suppliant and for the Respondent, UPON HEARING what was alleged by counsel aforesaid, counsel for the Suppliant declaring that it was not prepared to proceed and asked for an adjournment of the trial.

THIS COURT DOTH ORDER AND ADJUDGE that the Petition of Right herein be and the same is hereby dismissed.

AND THIS COURT DOTH FURTHER ORDER AND ADJUDGE that His Majesty the King is entitled to recover from the Suppliant His costs of the present action, after taxation thereof.

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*.

The contention of the Crown, therefore, on both of the grounds on which it is rested, that the appeal should be quashed for want of jurisdiction, fails. We do not think this a case in which the power of summarily dismissing an appeal, which the Court has on rare occasions exercised where there is no lack of competence to dispose of it on the merits, ought to be put into execution. Appeals have been summarily dismissed where the appellant was held, *exceptione personali*, to be demonstrably precluded by his conduct from prosecuting the appeal (*Schlomann* v. *Dowker* (1)); where, by reason of some change in circumstances, the actual interest of the appellant in the appeal had disappeared, except as regards the costs, and in other similar cases (*Moir* v. *Village of Huntingdon* (2); *McKay* v. *Township of Hinchinbrooke* (3); *Martley* v. *Carson* (4)).

(1) (1900) 30 Can. S.C.R. 323.
(2) (1891) 19 Can. S.C.R. 363.
(3) (1894) Can. S.C.R. 55.
(4) See 25 Can. S.C.R. at p. 15, note.

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The Court.

The procedure followed in these cases is not, we think, a convenient procedure in cases such as this.

The motion is dismissed with costs.

Motion dismissed with costs.

Solicitors for the appellant: *McLarty & Fraser.*

Solicitor for the respondent: *A. C. Hill.*

1935

* Oct. 28.
* Nov. 22.

GEORGE D. McMILLAN (DEFENDANT)...APPELLANT;

AND

ANNIE MURRAY (PLAINTIFF).....RESPONDENT.

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

Motor vehicles—Negligence—Pedestrian struck by motor car—Statutory onus of proof that damage did not arise through driver's negligence (Vehicles and Highway Traffic Act, Alta., 1924, c. 31, s. 66)—Meeting the onus—Effect of establishing contributory negligence.

Plaintiff, while walking easterly along the roadway (the sidewalks being in bad condition) of a street in Edmonton, Alberta, at 7.25 p.m. on March 11, 1934, was struck, four or five feet from the south (right hand) curb, by a motor car driven easterly by defendant. The evening was dark and the pavement wet. Defendant had been driving cautiously and watching for pedestrians. To avoid a motor which was meeting him, he turned towards the south curb. The glare of the other car's lights prevented him, for a moment or so, from seeing what was ahead of him. As soon as he was out of the glare he saw plaintiff about eight feet ahead of him. He immediately turned his car to the left, shut off the motor and applied his brakes, but struck her. Plaintiff's action for damages was dismissed by Ford J. ([1935] 2 W.W.R. 47), who found that defendant had satisfied the onus placed upon him by s. 66 of the *Vehicles and Highway Traffic Act* (1924, Alta., c. 31) and, on the evidence, did not in fact cause the accident by his negligence. This judgment was reversed by the Appellate Division, Alta. Defendant appealed.

Held: There was ample evidence to support the trial judge's finding; there was no ground upon which his judgment should be set aside; and it should be restored. (*Per* Duff C.J.: There was no ground in the circumstances for attributing negligence to plaintiff. The real question for the trial judge was whether or not defendant had acquitted himself of the statutory onus. On the record it would seem that defendant had shown that, in the situation which confronted him, he had not failed in that standard of care, skill and judgment which can fairly and properly be required of the driver of a motor vehicle; if there was a mistake of judgment on his part, it was an

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

excusable mistake, and the most unfortunate misadventure was an accident; the standards to be applied are not standards of perfection. In this view, the finding of the trial judge, who had the opportunity of observing defendant under cross-examination, ought not to be disturbed).

Poole & Thompson Ltd. v. *McNally,* [1934] Can. S.C.R. 717 (referred to in argument and in the judgments below) discussed and explained. Under the enactment as to onus there dealt with (s. 65 (1) of the Prince Edward Island *Highway Traffic Act,* in substance the same, in the pertinent respects, as that now in question), standing by itself, the defendant may acquit himself of the onus cast upon him, by establishing that the plaintiff's negligence materially contributed to the mishap, and that he could not, in the result, by the exercise of reasonable care, have avoided the consequences of that negligence; or that the mischief was directly caused by the negligence of the plaintiff as well as that of himself co-operating together. The enactment does not itself appear to aim at altering the substantive rules of common law touching the effect of contributory negligence; its purpose seems to be to change the law as to the burden of proof, as explained in *Winnipeg Electric Co.* v. *Geel,* [1931] Can. S.C.R. 443; [1932] A.C. 690.

APPEAL by the defendant from the judgment of the Appellate Division of the Supreme Court of Alberta (1) which gave judgment for the plaintiff for damages, reversing the judgment of Ford J. (2) who dismissed the plaintiff's action, which was brought to recover damages for injuries received when plaintiff was struck by defendant's motor car. The material facts and circumstances of the case are sufficiently stated in the judgment of Davis J. now reported. The appeal to this Court was allowed and the judgment of the trial judge restored with costs throughout.

G. B. O'Connor, K.C., for the appellant.

R. D. Tighe, K.C., for the respondent.

DUFF C.J.—I concur entirely with the conclusion as well as with the reasoning of the judgment of the Court delivered by Mr. Justice Davis.

I should not have thought it necessary to supplement those reasons had it not been for the reference to the judgment of this Court in the case of *Poole & Thompson Ltd.* v. *McNally* (3) in the judgments below and on the argument before us.

A word, first of all, as to the present case. I see no ground in the circumstances for attributing negligence to

(1) Noted in [1935] 3 W.W.R. 117 (no written reasons).
(2) [1935] 2 W.W.R. 47.
(3) [1934] Can. S.C.R. 717.

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DUFF, C.J.

the respondent. The real question for the trial judge was whether or not the appellant had acquitted himself of the statutable onus. On the record alone, as we have it before us, I should have thought the appellant had shown that, in the situation which confronted him, he had not failed in that standard of care, skill and judgment which can fairly and properly be required of the driver of a motor vehicle. In other words, I should have thought that if there was a mistake of judgment on his part, it was an excusable mistake and that the most unfortunate misadventure was an accident. The standards to be applied are not standards of perfection.

In this view, the finding of the trial judge, who had the opportunity of observing the appellant under cross-examination, ought not, I think, to be disturbed.

As to *Poole & Thompson Ltd.* v. *McNally* (1), the sole question left to the jury in that case by the judge at the trial was the question of the identity of the motor vehicle which had caused the injury of which the plaintiff complained. Admittedly, this vehicle was not brought to a stop after running into the plaintiff, and a debatable question, no doubt, arose upon the evidence whether the plaintiff had discharged the onus resting upon him to establish that the vehicle was the defendants'. The learned trial judge said to the jury:

> I am requested by counsel for Poole & Thompson Limited to direct "that the onus is on the plaintiff of establishing that the defendants' car caused the accident." The plaintiff must establish that the defendants' car caused the accident. I think I made that clear to you. If you come to the conclusion that the defendants' car caused the accident, you will bring in a verdict for the plaintiff; otherwise your verdict will be for the defendants.

No question was raised at the trial as to the construction of the statute (section 65 (1) of the Prince Edward Island *Highway Traffic Act* of 1930) which, in the pertinent respects, is in substance in the same terms as those of the Alberta statute; nor was any question of contributory negligence raised or submitted to the jury; although a plea of contributory negligence was put in the statement of defence. Counsel for the defendants had, indeed, very good reasons for not asking to have any such issue submitted to the jury. The person who was driving the defendants' vehicle denied that he had come into collision with anybody. It was plainly one of those cases in which

(1) [1934] S.C.R. 717.

the party appealing had elected to rest upon a particular issue and take his chances of success with the jury on that issue. In the judgment of this Court, at p. 724, this is pointed out; and it is also laid down that a finding of contributary negligence against the plaintiff would not have been a reasonable finding. There was not, at the pertinent time, in force in Prince Edward Island any contributory negligence statute of the type which prevails in several provinces providing for apportionment of loss according to the comparative degree of fault.

We do not think that the passage in the judgment of the Court at pp. 722-3, dealing with the construction and effect of the *Highway Traffic Act* (for which, I need, perhaps, hardly say, both in its form and substance, I accept the fullest responsibility), should be regarded as constituting part of the *ratio decidendi.*

We think that, under the statute, standing by itself, the defendant may acquit himself of the onus cast upon him by establishing that the plaintiff's negligence materially contributed to the mishap, and that he could not, in the result, by the exercise of reasonable care, have avoided the consequences of that negligence; or that the mischief was directly caused by the negligence of the plaintiff as well as that of himself co-operating together.

I prefer the use of the phrase "directly caused" in preference to such phrases as "proximate cause," "causa causans," "effective cause," for the reasons given by Lord Sumner in *Weld-Blundell* v. *Stephens* (1).

Subsection one of section 65 of the *Highway Traffic Act* does not itself appear to aim at altering the substantive rules of common law touching the effect of contributory negligence. The purpose of the statute seems to be to change the law as to the burden of proof, as explained in *Winnipeg Electric Co.* v. *Geel* (2).

DAVIS J. (all the other members of the Court concurring).—The respondent brought an action against the appellant in the Supreme Court of Alberta for damages which she claimed to have suffered by reason of being struck by the appellant's automobile on the south side of 84th Avenue in the City of Edmonton on Sunday, March

(1) [1920] A.C. 956, at 983-4.

(2) [1931] Can. S.C.R. 443; [1932] A.C. 690.

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11, 1934, at about 7.25 p.m. On the evening in question the respondent, a married woman slightly over 60 years of age, was walking from her home, about a block west of the scene of the accident, along 84th Avenue in an easterly direction towards St. Anthony's Church, which is about a block east of the scene of the accident. It was a dark night and the pavement was wet. When the respondent left her house on the south side of the avenue she crossed to the north side, but, finding the sidewalk on that side too slippery, returned to the south side. But she could not walk on the sidewalk on the south side because it was just a sheet of ice; she could not see the sidewalk at all, to quote her own words, and consequently she walked down the paved street, walking on the south side with, not against, the eastbound traffic. She says she kept as close to the south curb as she could but when she was struck she was four or five feet out from the curb. She says she did not walk on the north side of the paved street because mud from an excavation had covered part of the boulevard and had come down on to the street. The respondent says she cannot recall anything about the accident, but remembers seeing other people walking on the paved street.

The appellant was driving his car easterly along 84th Avenue to the Metropolitan Church, which is about three blocks further east from the place of the accident, driving in the same direction as the respondent was walking. He appears to have been driving cautiously about fifteen or twenty miles an hour and, as he had been driving down the same avenue to church on Sunday evenings for about eight years and had seen people walking on the street at that place and time, he was watching for pedestrians who might be on the street. Another motor vehicle, travelling in the opposite direction, approached him, and, to avoid the oncoming car, he turned towards the south curb. The glare of the lights of the approaching car prevented him, for a moment or so, from seeing what was ahead of him. As soon as he was out of the glare of the lights of the other car he saw the respondent on the roadway about eight feet ahead of him. He immediately turned his car to the left, shut off the motor and applied his brakes. He felt sure he had cleared her but he heard a thud and pulled into the curb. The respondent was lying on the road

about twelve feet behind the car. Her body was at a right angle to the curb, with her head towards the centre of the road.

The case came on for trial before Mr. Justice Ford, who delivered judgment in favour of the appellant, dismissing the respondent's action. The respondent appealed to the Court of Appeal of Alberta, who unanimously allowed the appeal and awarded the respondent $2,000 general damages and $552.22 special damages, making a total of $2,552.22. No written reasons for the judgment of the Court of Appeal were delivered and we are therefore without the benefit of the reasons stated by the learned Chief Justice at the conclusion of the argument.

The learned trial judge in a reserved judgment said that his further consideration of the evidence confirmed the view he formed at the hearing, that the appellant had satisfied the onus placed upon him by sec. 66 of *The Vehicles and Highway Traffic Act, 1924*, of Alberta (1), which reads as follows:

> 66. When any loss or damage is sustained or incurred by any person by reason of a motor vehicle in motion, the onus of proof that such loss or damage did not arise through the negligence or improper conduct of the owner or driver of the motor vehicle shall be upon the owner or driver of the motor vehicle.

The evidence satisfied the learned trial judge that the appellant did not in fact cause the accident by his negligence. There was ample evidence to support this finding and there is no ground upon which the judgment at the trial should be set aside. We concur in the views expressed by the Chief Justice as to the case of *Poole & Thompson Ltd.* v. *McNally* (2).

The appeal is therefore allowed and the trial judgment restored with costs throughout.

Appeal allowed with costs.

Solicitors for the appellant: *Young & Bisset.*

Solicitors for the respondent: *Tighe & Wilson.*

(1) *Reporter's note:* Section 66 (1) here quoted was amended by c. 82 of the Statutes of Alberta of 1935, which came into force on May 1, 1935. In the present case, the judgment of the trial judge was given on April 5, 1935, and the judgment of the Appellate Division on June 6, 1935.

(2) [1934] Can. S.C.R. 717.

1935

*June 4.
*June 28.

LOUIS TELLIER (PLAINTIFF)..... APPELLANT;

AND

LA CITÉ DE SAINT-HYACINTHE (DEFENDANT)..... RESPONDENT.

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

Municipal corporation—Assessment and taxation—Exemption—Agreement with owner of property—Free cession of soil for street—Property to be considered as land under cultivation until sold as city lots—Nullity—Ultra vires.

The municipal corporation respondent agreed, by a notarial deed duly ratified by by-law, with the appellant, owner of certain vacant land situated within the municipality, to consider such land as land under cultivation in consideration of the free cession of the soil of the streets to be made by the owner. Some years later, the appellant, being sued for taxes imposed for construction and maintenance of streets and sidewalks, brought the present action claiming that the by-laws enacting such taxes should be declared illegal and set aside, as far as he was concerned, on the ground that the municipal corporation had agreed to do at its own expenses the works for which the said taxes had been imposed upon him.

Held that the judgment appealed from, dismissing the appellant's action, should be affirmed.

Per Lamont, Cannon, Crocket and Davis JJ.—The by-law of the municipal corporation respondent, ratifying the agreement with the appellant, was radically null and illegal. Such agreement by the municipal corporation to consider as land under cultivation a property which according to the then existing laws was liable to taxation, was *ultra vires*. A municipal corporation, without special authority granted by the legislature, cannot renounce directly or indirectly its right, nor fail in its duty, to collect from assessable property the funds needed for general administration and for the performance of public works. *Hampstead Land and Construction Co.* v. *La Ville de Hampstead* (Q.R. 44 K.B. 321) ref.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec, reversing the judgment of the Superior Court, Trahan J., and dismissing the appellant's action attacking the validity of certain by-laws passed by the municipality respondent.

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

*PRESENT:—Duff C.J. and Lamont, Cannon, Crocket and Davis JJ.

Aimé Geoffrion K.C. for the appellant.

Chs. Laurendeau K.C. and *Philippe Pothier* for the respondent.

DUFF C.J.—I concur in the dismissal of the appeal.

The judgment of Lamont, Cannon, Crocket and Davis JJ. was delivered by

CANNON J.—L'appelant, après avoir réussi en Cour Supérieure (Trahan J.) à faire casser et annuler quant à lui et à ses terrains situés dans les limites de la municipalité intimée certains règlements, ordonnances et rôles de cotisation et de perception, a vu ce jugement mis à néant par la majorité de la Cour du Banc du Roi composée des honorables juges Létourneau, Hall et Saint-Jacques, les honorables juges Bernier et Rivard enregistrant leur dissentiment. L'appelant, depuis de nombreuses années, était propriétaire de terres subdivisées en lots à bâtir; et certaines rues apparaissant au plan étaient déjà ouvertes à la circulation, bien que non acquises par la cité.

Le 6 septembre 1895, le demandeur et autres personnes adressèrent au maire et aux échevins de la cité de Saint-Hyacinthe le document suivant:

Requête du demandeur et autres personnes adressée aux maire et échevins de la cité de St-Hyacinthe.

A son honneur le maire et messieurs les échevins de la cité de St-Hyacinthe.

La requête les soussignés, propriétaires de terres dans le quartier numéro cinq de la cité de St-Hyacinthe,

Expose respectueusement—

Que le plan adopté par votre conseil pour les rues traversant leurs terres ne s'accorde pas avec les plan et livre de renvoi officiels de la paroisse de St-Hyacinthe, pour les rues qui y sont indiquées;

Qu'eux, les soussignés, sont disposés à avoir les rues passant sur leurs terres, conformément au plan adopté par votre conseil à cet égard, mais qu'il serait nécessaire, pour obtenir ces fins, de faire faire un cadastre nouveau, avec plan et livre de renvoi.

C'est pourquoi, dans l'intérêt de la cité de St-Hyacinthe, comme le leur, les soussignés prient votre conseil de vouloir bien se charger de faire procéder à ce cadastre nouveau par le département des Terres de la Couronne, et ils se déclarent prêts à donner leur consentement et à signer tous actes requis à cet effet, comme aussi à donner le terrain nécessaire pour telles rues traversant leurs terres respectives lorsque requis. St-Hyacinthe, 6 septembre 1895.

Joséphine C. Desprès St-Germain.
Jules St-Germain.
Louis Tellier
Robert DesChênes.

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Le demandeur écrivit à la cité, 3 août 1911:

St-Hyacinthe, 3 août 1911.

A monsieur le maire et messieurs les échevins de Saint-Hyacinthe.

Messieurs,—Par un règlement passé déjà depuis longtemps, le conseil de ville a fixé et établi l'assiette et la verbalisation des rues du quartier numéro cinq de la cité de St-Hyacinthe, mais il n'a pas encore pris les mesures nécessaires pour acquérir le terrain requis pour le prolongement sur mes terrains des rues St-Pierre, Notre-Dame et Ste-Héloise. Je prends la liberté de vous demander ce que vous entendez faire, en ce qui concerne mes terrains. Si le conseil de ville décidait de m'en exproprier, je lui demanderais de le faire au plus tôt; si, au contraire, il déclarait, par résolution, qu'il n'entend pas les exproprier et payer, je verrais à les faire enclore et à les livrer à la culture.

Une réponse immédiate obligera beaucoup.

Votre obt. serv.

Louis Tellier.

Après de nouveaux pourparlers, les parties passèrent la convention du 20 septembre 1913, qui fut ratifiée par une résolution du conseil. Elle se lit comme suit:

Lesquelles parties nous ont dit et déclaré: Que le dit Tellier est propriétaire du sol des rues et avenues telles qu'ouvertes sur ses terrains dans le quartier numéro cinq de la cité de St-Hyacinthe, savoir: des rues Ste-Héloise, Notre-Dame et St-Pierre et de l'avenue Tellier,—et que la cité de St-Hyacinthe désire, dans l'intérêt public avoir, sans indemnité, la jouissance des dites rues et avenue ainsi ouvertes, des travaux de construction, de nivellement et d'améliorations qui faciliteraient l'établissement et la concession de *lots de ville* sur les terrains avoisinants, appartenant au dit Louis Tellier.—

En conséquence les parties ont fait et arrêté entre elles les conventions suivantes, savoir:—

Le dit Louis Tellier autorise, par les présentes, la cité de St-Hyacinthe, qui s'y oblige aussi par les présentes, à faire tous les travaux de construction, de nivellement et d'améliorations sur les dites rues et avenues telles qu'ouvertes sur les terrains du comparant Louis Tellier, et ce, pour y établir dès à présent, et y maintenir à toujours de bons chemins et trottoirs, et au besoin, des services d'eau et des canaux d'égouts, et pour y maintenir et entretenir les dits chemins et trottoirs, en toute saison dans un bon ordre, sans trous, cahots, ornières, pentes, roches, embarras ou nuisances quelconques, avec garde-fous aux endroits dangereux, de manière à rendre la circulation des voitures de toutes sortes et des piétons, facile de jour et de nuit, le tout à la condition que la dite cité de St-Hyacinthe, soit responsable de tous les accidents et dommages qui pourraient arriver sur ces rues et avenue, et que le dit Louis Tellier en soit par elle tenu indemne:—et aussi à la condition que les terrains avoisinant ces rues et avenue et appartenant au comparant Louis Tellier soient *toujours* considérés et traités par la dite cité comme terre *en culture* jusqu'à ce qu'ils soient concédés en lots de ville à des tiers:—et enfin à la condition, en faveur de la cité de St-Hyacinthe, que le comparant, Louis Tellier, lui cèdera gratuitement le sol des dites rues et avenue et lui en passera titre, dès que tous les terrains les avoisinant auront été concédés en lots de ville à des tiers, et ce à quoi il s'oblige par les présentes.

* * *

Les présentes conventions devront être ratifiées sans délai par le conseil de la cité de St-Hyacinthe, à peine de nullité.

L'appelant allègue, de plus, qu'un contrat semblable a été passé avec la succession Couillard-Després, dont il a acquis les droits.

L'appelant a prétendu qu'en vertu de la loi 51-52 Vict. c. 83, art. 93, alors en vigueur, ces propriétés, aussi longtemps qu'il n'en a pas disposé, sont exemptées de toutes taxes et cotisations; cependant, devant cette cour, son procureur a admis qu'il ne pouvait réussir au sujet des taxes imposées en vertu des règlements 300, 319, 327, 334, 342, 347, 352, 384, 392, 402 et 404.

Cet article 93 décrète:

Afin de réaliser les fonds nécessaires pour faire face aux dépenses du conseil de ville et pour effectuer dans la cité les diverses améliorations publiques nécessaires, le conseil de ville aura le droit de prélever annuellement sur les personnes et les propriétés mobilières et immobilières de la cité les taxes ci-après désignées, savoir:

1° Sur tout terrain, lot de ville ou portion de lot, soit qu'il existe ou non des bâtiments, une somme n'excédant pas trois quarts de centin dans la piastre sur sa valeur totale réelle, telle que portée au rôle d'évaluation de la cité; mais nulle terre en culture ou affermée dans les limites de la cité ne sera taxée en vertu du présent acte, excepté l'emplacement où les bâtiments seront érigés, lequel sera évalué avec les dits bâtiments.

Le conseil de ville aura le droit de faire ajouter sur le rôle d'évaluation, en tout temps, par les assesseurs en office, sur l'estimation par eux faite, toute partie de telle terre en culture qui en sera détachée comme lot de ville et sera ainsi imposable après la clôture du rôle d'évaluation et d'exiger la taxe comme sur tous les autres terrains entrés au dit rôle.

Il résulte du contrat allégué, comme l'a constaté la Cour Supérieure, que, dès avant 1913, l'appelant avait fait un cadastre particulier de ces immeubles qu'il avait divisés en lots de ville en vue d'en faire la concession à des tiers. Même si ces lots de ville étaient soumis à la culture, ils n'avaient plus le caractère particulier exigé par la loi pour bénéficier de l'exemption. Le demandeur lui-même semble l'avoir réalisé, puisqu'il a stipulé dans la convention qu'il invoque que les terrains avoisinant les rues et avenue lui appartenant seraient toujours traités et considérés comme terrains en culture jusqu'à ce qu'ils soient concédés en lots de ville à des tiers. Comme le dit monsieur le juge Saint-Jacques, le législateur a voulu protéger le cultivateur dont la terre se trouvait dans les limites du territoire nouvellement annexé à la cité; mais il n'a pas voulu accorder le même privilège et la même exemption aux terrains qui,

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bien qu'encore en culture, étaient devenus en réalité, des lots de ville déjà mis sur le marché. Le législateur a même eu soin de donner au conseil de ville le pouvoir d'amender le rôle d'évaluation en tout temps pour y ajouter comme imposable toute partie de terre en culture qui aurait été détachée comme lots de ville et serait devenue imposable.

Ce fait important, admis par les deux cours, que, dès avant 1913, les propriétés de l'appelant étaient cadastrées en lots de ville semble expliquer pourquoi l'appelant, pour obtenir ce qu'il pensait être une considération suffisante pour la valeur des terrains servant d'assiette aux rues ouvertes et à ouvrir, a stipulé que la cité devrait à l'avenir traiter ses lots comme des terres en culture.

La résolution du conseil acceptant cette stipulation lie-t-elle la corporation, ou est-elle entachée, comme l'a décidé la Cour du Banc du Roi, d'une nullité radicale? Cet engagement de considérer et traiter comme terrains en culture, et conséquemment non imposables, des terrains qui effectivement, d'après la loi existante, étaient sujets à l'impôt était-il *intra vires?*

Il me semble que poser la question c'est la résoudre. Sans une autorisation spéciale de la législature, la corporation ne pouvait pas renoncer directement ou indirectement au droit, ni manquer au devoir, de prélever sur les propriétés imposables les fonds nécessaires pour faire face aux dépenses du conseil et pour effectuer les diverses améliorations publiques nécessaires. La majorité de la Cour du Banc du Roi a cru que, dans les circonstances, la cause de *Hampstead Land & Construction Co.* vs. *La ville de Hampstead et Hand* (1) a établi un principe qui trouve ici son application:

> Une municipalité commet un excès de juridiction et un abus de pouvoir lorsqu'elle stipule, comme considération à l'achat d'une lisière de terrain de l'un de ses contribuables, l'évaluation comme terre en culture et l'exemption de taxes de ce terrain, et le contrat ainsi formé est illégal et contraire à l'ordre public, fondé qu'il est sur une considération vicieuse, prohibée par la loi, ou contraire à l'ordre public.

Mais l'appelant nous dit que le conseil de l'intimée avait le droit et les pouvoirs voulus d'acquérir les terrains nécessaires pour l'ouverture de ces rues et qu'il pouvait fournir la considération acceptée par l'appelant.

(1) (1928) Q.R. 44 K.B. 321.

En réponse à cet argument, je répète, comme je l'ai déjà fait dans la cause de *Hampstead* (1), ce que disait monsieur le juge Greenshields, *re La Tuque* v. *Desbiens* (2):

It is within the powers of a municipality governed by the *Cities and Towns' Act* to acquire land to open a street; but if the mode of procedure to give effect to such a decision is clearly prescribed in the statute governing that municipality, that procedure should be followed, and, if the members of the council decide to follow a different procedure, they can certainly be said to be acting beyond their powers or outside their powers. And while the subject matter with which the council is dealing may be within their powers, their mode of dealing with the subject may be utterly illegal and void, and to that extent and in that sense, their act may be termed *ultra vires*.

Il est bon de noter que dans l'affaire *Hampstead* (1), la Cour du Banc du Roi ayant refusé permission d'appeler, une nouvelle demande devant cette cour (3) fut refusée pour entre autres, la raison suivante:

while the statutory provision in question is of public importance, in the sense that it is of general application throughout the province of Quebec and deals with municipal matters, it is not suggested that its construction will affect any interest outside that province. It would seem, therefore, to be *prima facie* a proper subject for *final* determination by the *provincial* courts. *La Corporation du Comté d'Arthabaska* v. *La Corporation de Chester Est* (4).

Quant aux raisons d'équité qui semblent avoir servi de base au jugement de la Cour Supérieure, elles auraient dû être invoquées devant les comités de la législature. Même si nous pouvions accepter la prétention de l'appelant que ses terrains sont encore des terres en culture, il n'en reste pas moins vrai que, dès 1913, en vertu de l'article 138 de la charte de Saint-Hyacinthe, le conseil de ville avait le droit d'imposer une *taxe spéciale* sur tous les propriétaires de terrains de la cité pour rencontrer les frais d'ouverture et d'entretien des rues, parties de rues, et construction et entretien des trottoirs, canaux ou égouts, s'il juge à propos de s'en charger, telle taxe devant être basée sur le rôle d'évaluation des propriétés, alors en vigueur; ce qui semblerait indiquer, comme le dit l'honorable juge Létourneau, que l'article 93 n'avait en vue que la taxe générale.

La législature, d'ailleurs, en 1927, par le statut 17 Geo. V, c. 84, art. 11, a dit que, pour la cité intimée, l'article 522 de la *Loi des Cités et Villes* doit s'appliquer avec la réserve que pour elle.

(1) (1928) Q.R. 44 K.B. 321.
(2) (1929) Q.R. 30 K.B. 20, at 32.
(3) [1928] S.C.R. 428, at 431.
(4) (1921) 63 Can. S.C.R. 49 at 66.

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ces propriétés (toute terre en culture ou affermée, ou servant au pâturage des animaux, de même que toute terre non défrichée ou terre à bois dans les limites de la municipalité) *sont et ont toujours été sujettes à toute taxe imposée* pour la confection, le pavage et l'entretien des chemins, rues, trottoirs et égouts, et pour l'éclairage des rues et places publiques.

D'ailleurs, il semble bien établi que les terrains de l'appelant étaient, dès 1913, soit des lots à bâtir, et partant susceptibles d'être imposés pour la taxe générale, soit des lots en culture qui restaient soumis aux taxes spéciales prévues; et dès lors, je crois, avec la majorité de la Cour du Banc du Roi, qu'il aurait été illégal de prétendre les mettre à l'abri par contrat. Il serait utile de consulter en cette cause la décision du Conseil Privé, *re: City of Montreal* v. *Montreal Industrial Land Company Ltd.* (1), où il s'agissait d'une stipulation invoquée par la compagnie propriétaire, contenue dans la charte de la cité de Montréal, imposant l'obligation de paver certaines rues aux frais de la cité. Il y avait donc là plus qu'une convention, mais un statut; et cependant le pouvoir de la législature de changer la situation des propriétaires riverains et de les soumettre à une taxe pour le pavage de cette même rue n'a pas été mis en doute. Lord Wright s'exprime ainsi, à la page 706:

> It is no doubt true that the statute of 1910 imposed an obligation on the appellant city, which was recognized from time to time by the statutory provisions extending the time for performance; it may be that the obligation represented in fact a bargain between the appellant city and the town which was annexed for the benefit of the town's inhabitants; but, however that may be, the obligation was embodied simply in the statute of the province, and the legislature which enacted that statute could repeal or modify it, even though to do so might appear inequitable. The question is whether the later legislation has repealed or modified the obligation.

La procureur de l'appelant n'a pas insisté devant nous sur la confirmation statutaire de la convention par le statut 5 Geo. V, c. 95, art. 4, qui a servi de base à deux *Considérants* du jugement de première instance. Les conventions qui devaient continuer à avoir leur plein et entier effet en vertu de cette loi étant les conventions régulièrement et légalement passées par la cité, et non pas un contrat comme celui qui nous occupe qui était évidemment *ultra vires* et entaché d'une nullité radicale. Nous ne rescindons pas le contrat; mais nous constatons qu'il est inexistant. Il n'est donc pas nécessaire de rétablir les parties

(1) [1932] A.C. 700.

dans la situation où elles étaient en 1913; et nous réservons à l'appelant tous les recours qu'il peut avoir et exercer contre l'intimée pour être indemnisé de la valeur de ses terrains servant d'assiette aux rues de la cité.

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L'action et l'appel doivent donc être renvoyés avec dépens des trois cours contre l'appelant.

Appeal dismissed with costs.

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

Solicitor for the respondent: *Philippe Pothier.*

1935
* May 15, 16
* Nov. 7.

KONRAD HESSLER (PLAINTIFF).....APPELLANT;

AND

CANADIAN PACIFIC RAILWAY COMPANY (DEFENDANT).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Railways—Negligence—Railway employee, while walking on track in course of duty, struck by train between whistling post and highway crossing—Bad weather conditions—Failure to sound whistle and bell in accordance with s. 308 of Railway Act (R.S.C. 1927, c. 170)—Whether employee entitled in law to benefit of s. 308—Railway company's rules—Failure to have headlight burning under stormy conditions in day-time—Evidence—Directions to jury—Findings of jury.

Plaintiff, a section foreman for defendant railway company, while walking westerly on the track in the course of his duty of inspection, about 11 o'clock a.m. on a very cold and stormy winter's day, was struck by a special freight train of defendant coming behind him. He sued for damages. The accident occurred about 250 yards east of a highway level crossing, and west of the whistle post for that crossing. S. 308 of the *Railway Act*, R.S.C. 1927, c. 170, and also defendant's rule 31, required the whistle to be sounded at least 80 rods before reaching the crossing and the bell to be rung continuously from the sounding of the whistle until the engine had crossed the highway. These requirements were apparently (and as the jury found) not observed on the occasion of the accident, the train engineer, though frequently during his journey sounding the whistle and bell, not being able under the stormy conditions to locate exactly the whistling posts. The trial judge charged the jury that the failure to comply with s. 308 was "absolute negligence in law," and that the jury was "not free to find anything else with respect to it." Defendant's rule 17 required that a headlight be displayed to the front of every train by night,

* PRESENT:—Duff C.J. and Lamont, Cannon, Crocket and Davis JJ.

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and its rule 9 required that "when weather or other conditions obscure day signals, night signals must be used in addition." The engine's headlight had been burning but was extinguished prior to the accident, the train men regarding it as useless owing to ice and snow on the glass and the storm's severity. The trial judge put the question of the headlight to the jury as a matter for them to deal with on the meaning of the words in defendant's rule book. The jury found that the accident was caused by defendant's negligence in "no sounding of whistle, no bell ringing, no light in headlight of engine." Judgment was entered for plaintiff, which was reversed by the Court of Appeal for Saskatchewan, which dismissed the action ([1934] 2 W.W.R. 24).

Held: There should be a new trial (Cannon and Crocket JJ., dissenting, would restore the judgment at trial).

Per Duff C.J., Lamont and Davis JJ.: The said charge to the jury as to s. 308 was a misdirection.

Per Duff C.J. and Davis J.: S. 308 was designed for the protection of persons on, or about to proceed on, a highway crossing at rail level, and was not intended for the protection of persons walking along the tracks mile after mile without any reference to highway crossings, and plaintiff, upon the facts of this case, was not entitled as a matter of law to the benefit of it (*Chesapeake & Ohio Ry. Co.* v. *Mihas,* 280 U.S. 102, and *O'Donnell* v. *Providence & Worcester Rd. Co.,* 6 R.I. 211, cited. *Grand Trunk Ry. Co.* v. *Anderson,* 28 Can. S.C.R. 541, and *McMullin* v. *Nova Scotia Steel & Coal Co.,* 39 Can. S.C.R., 593, explained and distinguished). The jury's finding of negligence in respect of the failure to sound the whistle and bell was obviously based on the breach of s. 308 and said misdirection of the trial judge, and therefore could not be upheld. Their finding of negligence in respect of the headlight might fairly be attributed to the disobedience of defendant's rules; the evidence was merely guesswork as to whether or not the accident would have been avoided had the headlight been burning; and upon the evidence as it stands their finding of negligence in respect of the headlight could not be maintained. But, on the question of whether or not, quite apart from the statute, there was any negligence on defendant's part that caused the accident, the trial was very unsatisfactory, and there should be a new trial.

Per Lamont J.: Plaintiff, as an employee on the track in performance of his duty, was one for whose benefit defendant's rules were made (reference made to a "General Notice" in defendant's rule book, that "obedience to the rules is essential to the safety of passengers and employees, and to the protection of property"). As between plaintiff and defendant, the rules were as effective as the statute and were evidence of what defendant considered to be the exercise of due care. Plaintiff was injured through failure of defendant's servants to comply with the rules, and in the absence of a finding of justification or excuse for such failure, he had a right of action. Whether or not what defendant did was a reasonable precaution against accident, whether or not under all the circumstances plaintiff would have heard the whistle and bell if sounded, whether or not he would have seen the headlight if burning, were all for the jury to say. But, as it was impossible to tell whether the jury's finding as to whistle and bell was a finding of fact on the evidence or was induced by the trial judge's misdirection, there should be a new trial.

Per Cannon J. (dissenting): S. 308 would seem to protect railway employees as well as other persons (s. 419 (2) referred to in this connection). Besides, the action was based, not only on statutory duty, but also on common law negligence, and default in obeying defendant's rules; which rules were sufficient evidence of the care that should be taken. The jury's findings that the rules were not complied with, and that such non-compliance caused the accident, were based on sufficient evidence and should not be disturbed. Also the fact that plaintiff was not told, contrary to custom, before starting that day's inspection, that this extra train was coming, would aggravate defendant's imprudence in running it under such difficult weather conditions.

Per Crocket J. (dissenting): All persons rightfully upon the railway track were entitled to the benefit of s. 308 (*Grand Trunk Ry. Co.* v. *Anderson*, 28 Can. S.C.R. 541, and *McMullin* v. *Nova Scotia Steel & Coal Co.*, 39 Can. S.C.R. 593, cited); and plaintiff was entitled to rely on failure to sound whistle or bell in accordance with s. 308 as negligence, if that negligence was the direct cause of his injury. Plaintiff had a right to, and on the evidence he did, rely on compliance with defendant's rules as to whistle and bell. It was idle to suggest that, had they been sounded, he might not have heard them. The objection that the trial judge misdirected (as aforesaid) as to the effect of s. 308, was met by *Grand Trunk Ry. Co.* v. *Anderson* (*supra*) and his clear directions to the jury that, before defendant could be held liable through negligence by non-observance of the statutory requirements, they must be satisfied that the injury was the direct consequence of such negligence; and defendant was not prejudiced, nor was any substantial wrong or miscarriage occasioned, by the alleged misdirection. Defendant owed plaintiff a duty to exercise reasonable care to avoid injury to him. The plaintiff relied, throughout the case, on common law negligence as well as breach of statutory duty. The jury's finding of negligence in not using the headlight meant that, had it been on, as it should have been, it also would have warned plaintiff in time to enable him to avoid his injury; this was a finding upon a straight question of fact, depending in very large measure upon the credibility of the trainmen's testimony; which credibility the jurors had a right to test by the light of their own experience and knowledge, or as inconsistent with indisputable facts or other testimony. Whether or not engine headlights are such signals as fall within the intendment of defendant's said rule 9, the evidence shewed that, when weather conditions were such as to obscure day signals, headlights were in fact used as additional warning signals, and the question was whether in the existing circumstances it was negligence (causing the injury) to turn it off.

APPEAL by the plaintiff from the judgment of the Court of Appeal for Saskatchewan (1) which (reversing the judgment of Embury J. in favour of the plaintiff, on the findings of the jury) dismissed the plaintiff's action. The action was to recover from the defendant railway company damages for injuries received by the plaintiff when, while walking on the defendant's railway track in the

(1) [1934] 2 W.W.R. 24.

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course of his duties as section foreman in the defendant's employ, he was struck by a train of defendant. The material facts and circumstances of the case are sufficiently stated in the judgments now reported, and are indicated in the above headnote. This Court ordered a new trial (Cannon and Crocket JJ. dissenting, who would restore the judgment at trial in plaintiff's favour).

P. M. Anderson K.C. for the appellant.

W. N. Tilley K.C. and *H. A. V. Green* for the respondent.

The judgment of Duff C.J. and Davis J. was delivered by

DAVIS J.—This is an appeal by the plaintiff from the judgment of the Court of Appeal for Saskatchewan which set aside the judgment at the trial, on the verdict of a jury, in favour of the plaintiff for $8,850, in an action against a railway company for damages for the loss of a foot. The plaintiff had been in the employment of the defendant company from September, 1919, first as a section man and since 1920 as a section foreman. At the time of the accident his section was from Weyburn, Sask., easterly a distance of 6·8 miles. On February 10, 1933, at about eleven o'clock in the morning, while walking westerly between the rails of the single track in his section in the course of his duty of inspection, the plaintiff was struck by the engine of a special freight train of the defandant travelling in the same direction which overtook him. As he jumped from the track the engine hit his right foot and it was so badly injured that it had to be amputated. The railway company admits that the plaintiff was at the time lawfully and properly where he was in the course of his employment and that he is excluded from the benefits of the *Workmen's Compensation (Accident Fund) Act*, being chapter 253 of the Revised Statutes of Saskatchewan.

It was a cold, stormy day about forty degrees below zero, with a gusty wind blowing from the north-west to the south-east. It was a blizzard, the plaintiff says, and it was blowing in his face as he travelled westward. He was wearing a leather cap with ear-laps, and, though his face and nose were frozen, he says the ear-laps were hanging down loose. The plaintiff further says that he could not see very far and he knew that he might expect a train along

at any time. The place of the accident was approximately 750 feet east from a level highway crossing, and the whistle post was approximately a quarter of a mile east from the crossing. There was a statutory duty upon the railway (sec. 308 of the Dominion *Railway Act*) to sound the whistle at least eighty rods before reaching a highway crossing at rail level and to ring the bell continuously from the time of the sounding of the whistle until the engine has crossed the highway, and penalties are imposed (sec. 419) for disobedience. There were also rules of the railway company (Nos. 9 and 17) that the headlight on the engine (being a night signal) must be used when weather or other conditions obscure day signals. It may be convenient here to mention that the doctrine of common employment is negatived by statute in the Province of Saskatchewan. R.S.C. (1930) ch. 49, sec. 27 (14).

Counsel for the railway admitted that it was not proved that the whistle was blown or the bell rung at the particular whistle post. The engineer swore that the day was so stormy that he could not tell exactly where the different whistle posts along the line were but that the whistle was blown and the bell rung frequently that morning, though without reference to any particular whistle post. As to the headlight of the engine, the evidence is that it was turned off an hour or two before the accident because the glass was all covered with ice and snow and the storm was raging to such an extent that the train men regarded the headlight as useless. We have, however, the frank admission on behalf of the railway company that the company failed to prove that the whistle was blown or that the bell rang at the whistle post as required by the statute and it was admitted that the headlight on the engine was not burning as required by the company's rules. What the effect in law is of such admissions of fact is the real question with which we are concerned in this appeal.

The plaintiff charged the railway company with several acts of negligence or breach of duty. One of these was "excessive, reckless and dangerous speed (i.e., of the train) under the circumstances." The jury made no mention of this ground of complaint and the plaintiff's counsel before us did not contend that there was in fact any excessive speed but took the very opposite view of the evidence, to

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serve a particular purpose in his argument, that the speed of the train was moderate. Further, the plaintiff alleged as a ground of negligence that "the engineer and fireman failed to keep a sharp lookout and see the plaintiff and stop the train in time." The jury made no mention of any such alleged negligence and the evidence does not support any such allegation. The other grounds of complaint were the failure to sound the whistle and to ring the bell and to have the headlight burning.

The questions submitted to the jury and their answers were as follows:

1. Was there negligence of the defendant company which caused the accident?—A. Yes.

2. If so, in what did such negligence consist?—A. No sounding of whistle, no bell ringing, no light in headlight of engine.

3. Was there negligence of the plaintiff which contributed to the accident?—A. No.

4. If so, in what did such contributory negligence consist?—A. No.

5. Did the plaintiff with a full knowledge and appreciation of the risk arising from the circumstances nevertheless voluntarily elect to assume the same?—A. No.

6. In what amount do you assess the damages, if any?

A. (*a*) General damages $8,500 00

(*b*) Special damages 350 00 $8,850 00

The failure to sound the whistle and to ring the bell was put to the jury by the learned trial judge in his charge as a matter of absolute statutory duty. Dealing with sec. 308 of the *Railway Act*, which reads as follows:

When any train is approaching a highway crossing at rail level the engine whistle shall be sounded at least eighty rods before reaching such crossing, and the bell shall be rung continuously from the time of the sounding of the whistle until the engine has crossed such highway,

the trail judge said,

It is my duty to say that this provision, sec. 308 of the *Railway Act*, is an absolute provision which has to be carried out, no matter what the weather conditions might be.

I conceive it is my duty to charge you that the failure to comply with that provision in this case is absolute negligence in law, and that you are not free to find anything else with respect to it.

While no objection was taken by counsel for the railway company to this part of the charge, the plaintiff has had and taken the full benefit of it. In my view it was a plain misdirection to the jury on a question of law. The statutory provision was designed for the protection of persons on, or about to proceed on, a highway crossing at rail level.

The provision was not intended for the protection of persons walking along the tracks mile after mile without any reference to highway crossings, and the plaintiff upon the facts of this case was not entitled as a matter of law to the benefit of the statutory provision. The same question was considered by the Supreme Court of the United States in 1929 in the case of *Chesapeake & Ohio Railway Co.* v. *Mihas* (1). The Court there quoted with approval a judgment in 1859 of the Supreme Court of Rhode Island, *O'Donnell* v. *The Providence and Worcester Railroad Co.* (2), where it was held that a statute giving a right of action to one injured by the neglect of the railroad company to ring the locomotive bell before making a highway crossing was designed exclusively for the benefit of persons crossing the highway, and one injured while walking along the track not at a crossing could not recover under the statute. The court had there said (p. 214 of 6 R.I.),

> If the defendants have violated any duty owing from them to the plaintiff, and by means or in consequence of that violation the plaintiff has suffered injury, he has a right to compensation and damages at the hands of the defendants for such injury. In the language of the books, an action lies against him who neglects to do that which by law he ought to do, (1 Vent. 265; 1 Salk. 335) and that, whether the duty be one existing at common law, or be one imposed by statute. In order, however, to a recovery, it is not sufficient that some duty or obligation should have been neglected by the defendants, but it must have been a neglect of some duty or obligation to him who claims damages for the neglect. In 1 Comyns's Digest, Action upon Statute, F, it is said, "In every case where a statute enacts or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of the wrong done to him contrary to said law," confining the remedy to such things as are enacted for the benefit of the person suing.

These American cases, while not differing in principle, are closer to the facts of this case than the English decisions in *Gorris* v. *Scott* (3), and *Atkinson* v. *Newcastle & Gateshead Waterworks Co.* (4).

Counsel for the appellant relied upon the judgment of this Court in *Grand Trunk Railway Co.* v. *Anderson* (5). In that case the real question was whether or not the deceased passenger had been a trespasser or an invitee or licensee upon the railway tracks. The Court held upon the

(1) 280 U.S. 102; 50 Sup. Ct. Rep. 42.
(2) 6 R.I., 211.
(3) (1874) L.R. 9 Ex. 125.
(4) (1877) 2 Ex. Div. 441.
(5) (1898) 28 Can. S.C.R. 541.

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facts of that case that the deceased, who was not an employee of the railway company, could not be said to have been upon the railway tracks by the invitation or licence of the railway company at the time he was killed, and that the action of the deceased's administrator under Lord Campbell's Act did not lie. That is all that the case decided. Counsel for the appellant further relied upon the judgment of this Court in *McMullin* v. *The Nova Scotia Steel and Coal Co.* (1), but the point of that case was very different from what we have in this case. In that case a provision of the *Nova Scotia Railway Act* provided that

> whenever any train of cars is moving reversely in any city, town or village, * * * the company shall station on the last car in the train a person who shall warn persons standing on or crossing the track

of its approach. McMullin, who was engaged at the time in keeping the railway track clear of snow, was killed by a train, consisting of an engine and coal car, which was moving reversely. No person was stationed on the last car to give warning of its approach, and, as the bell was encrusted with snow and ice, it could not be heard. It was held that the enactment was for the protection of servants of the company. The statute there said nothing whatever about highway crossings at rail level. The question we have to determine here did not arise in that case.

Lord Maugham (then Lord Justice Maugham) said very recently in *Monk* v. *Warbey* (2):

> The Court has to make up its mind whether the harm sought to be remedied by the statute is one of the kind which the statute was intended to prevent; in other words, it is not sufficient to say that harm has been caused to a person and to assert that the harm is due to a breach of the statute which has resulted in injury.

Upon a fair construction of sec. 308 of the *Railway Act*, a workman walking along the tracks without any reference to a level highway crossing is not a person whom the Legislature intended to protect. It was that kind of consideration which affected the Court in *Groves* v. *Wimborne* (3). Section 419 of the *Railway Act*, which imposes penalties for failure to comply with the provisions of sec. 308, cannot be read so as to extend the scope of sec. 308 to cover persons to whom the section was never intended to apply. It is not that workmen of the railway

(1) (1907) 39 Can. S.C.R. 593. (2) [1935] 1 K.B. 75, at 85.
(3) [1898] 2 Q.B. 402.

company are excluded from the benefit of the section; it is that the section was never intended for the protection of persons (whether workmen or the public generally) who are walking along the tracks, mile after mile, without any reference to a level highway crossing.

The findings of the jury of negligence in respect of the failure to sound the whistle and to ring the bell were obviously based upon the admitted breach of the statutory provision and the misdirection of the learned trial judge that failure to comply with the provision is absolute negligence in law. For these reasons, the findings in respect of the failure to sound the whistle and to ring the bell cannot be upheld. This was also the unanimous view of the Saskatchewan Court of Appeal.

It remains to consider the evidence with regard to the headlight. It was a rule of the railway company that a headlight be displayed to the front of every train by night (rule 17) and that, when weather or other conditions obscure day signals, night signals must be used in addition (rule 9). The learned trial judge put the question of the headlight to the jury as a matter for the jury to deal with on the meaning of the words in the company's rule book, and we may fairly attribute the finding of negligence of the jury in respect of the headlight to the disobedience of these rules by the railway company. The evidence as it stands upon the subject of the headlight is merely guesswork as to whether or not the accident would have been avoided had the headlight been burning at the time. I agree again with the unanimous view of the Saskatchewan Court of Appeal that upon the evidence as it stands the finding of the jury of negligence in respect of the headlight cannot be maintained.

But on the question of whether or not, quite apart from the statute, there was any negligence on the part of the railway company that caused the accident, the trial of the case was very unsatisfactory. I would therefore direct a new trial.

There should be no costs of this appeal but the costs of the appeal to the Saskatchewan Court of Appeal and of the abortive trial shall be in the discretion of the Judge at the new trial.

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LAMONT J.—This is an appeal by the plaintiff from the judgment of the Court of Appeal of Saskatchewan, which reversed a judgment of the trial judge in favour of the plaintiff based upon the verdict of the jury in a running down action.

The plaintiff was an employee of the railway company for thirteen years, first as section hand until 1920, and from that date until the 10th of February, 1933, as section foreman. The section of which the plaintiff had charge ran east from Weyburn, a distance of 6·8 miles, and his duty was to patrol that section daily each way, inspecting it for broken rails or any other possible cause of accident. When the weather was fine he used the hand-car, but in stormy weather this mode of transportation was forbidden and his instructions were to walk between the rails.

On the morning of February 10, 1933, the temperature stood at 40 degrees below zero. At eight o'clock the plaintiff, after a visit to the railway station to inquire if there were any special instructions for him, and receiving none, proceeded to inspect his section, the eastern end of which he reached about ten o'clock. Only one train had passed him as he went east—a passenger train going in the same direction. He says that he heard the whistle of this train blow and the bell ring, and as it was coming behind him, he got off the track. At the east end of his patrol, he turned and started to walk back. It was then 10.10 a.m. At a few minutes after eleven o'clock, at a point about two miles from the eastern end of his section, he was overtaken by a freight train belonging to the defendants—a special train which was then one day behind its schedule time. This train was running from Arcola to Regina, and without any warning it struck the plaintiff and knocked him down at a point about 150 yards west of the whistle post, near mile post 57.

The first intimation the plaintiff had of the proximity of the train was a sound that caused him to jump sideways to get off the track. His jump, however, did not succeed in carrying him clear of the track. His right leg was caught by the train and crushed so badly that it had to be amputated between the foot and the knee. For this injury the

plaintiff brought an action, contending that the damage was caused by negligence on the part of the defendant's servants.

It is admitted by the railway company that at the time of the accident the plaintiff was lawfully on the track in the execution of his duty, and it is contended on his behalf that he was entitled to have the provisions of sec. 308 of the *Railway Act* and the provisions of the train rules of the company complied with for his protection. Section 308 of the *Railway Act* (R.S.C. 1927, ch. 170) reads as follows:

When any train is approaching a highway crossing at rail level the engine whistle shall be sounded at least eighty rods before reaching such crossing, and the bell shall be rung continuously from the time of the sounding of the whistle until the engine has crossed such highway.

In his opening to the jury at the trial, counsel for the plaintiff said:—

Mr. Hessler contends the railway company was negligent in this way: that at the whistle post they did not blow the whistle and they did not ring the bell from the whistle post to the crossing, as they should have done, according to the rules which we will put in, and that the headlight of the engine was not burning.

Train Rule 9 reads:—

Night signals are to be displayed from sunset to sunrise. When weather or other conditions obscure day signals, night signals must be used in addition.

Under the heading "Audible Signals," Rule 14 (L) provides that on approaching public road crossings at grade the engineer shall give two long and two short sounds with the whistle.

Rule 31 says:—

Signal 14 (L) must be sounded at least 80 rods (¼ mile) from every public road crossing at grade, and the engine bell be kept ringing until the crossing is passed.

Signal 14 (L) must be sounded at every whistle post.

Under the heading of "General Notice," I find the following:—

Obedience to the rules is essential to the safety of passengers and employees, and to the protection of property.

The rules, therefore, were promulgated for the protection of employees as well as for the protection of passengers and others using the railway crossing.

The jury answered the questions put to them as follows:—

(1) Was there negligence of the defendant company which caused the accident?—A. Yes.

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2. If so, in what did such negligence consist?—A. No sounding of whistle, no bell ringing, no light in headlight of engine.

(3) Was there negligence of the plaintiff which contributed to the accident?—A. No.

(4) If so, in what did such contributory negligence consist?—A. No.

(5) Did the plaintiff with a full knowledge and appreciation of the risk arising from the circumstances nevertheless voluntarily elect to assume the same?—A. No.

(6) In what amount do you assess the damages, if any?

A. (*a*) General damages $8,500 00

(*b*) Special damages 350 00

$8,850 00

In his charge to the jury, the learned trial judge, in instructing the jurors with reference to the statutory enactment of sounding the whistle and ringing the bell, said:—

> I conceive it my duty to say, with some diffidence, but it is my duty to say that this provision, sec. 308 of the *Railway Act,* is an absolute provision which has to be carried out, no matter what the weather conditions might be.
>
> I conceive it my duty to charge you that the failure to comply with that provision in this case is absolute negligence in law, and that you are not free to find anything else with respect to it.

No objection appears to have been taken by either counsel to this part of the charge, but, in my opinion, it is a misdirection on the part of the trial judge. There is no such absolute and cast iron rule of law. We do not know whether the finding of the jury, that there was no blowing of the whistle or ringing of the bell, was a finding induced by the misdirection in the judge's charge or whether it was a finding based on the evidence.

If this finding was induced by a misdirection in the judge's charge, different considerations would apply than if it were dealt with as a question of fact for the jury. It is essential that we know how the jury looked at this: whether as a matter of law, or as a question of fact.

It is clear from the evidence and admitted by the company that the whistle did not sound nor the bell ring at the whistle post near which the plaintiff was injured. Although the engineer did say that he sounded the whistle oftener than he was required to, he admits that he could not see the whistle posts or the mileage posts on account of the violence of the storm, so he adopted the practice of whistling wherever he thought a crossing or a whistle post should be, but he could not swear that he whistled at the

whistle post 150 yards east of where the plaintiff was injured, and the plaintiff swore he had not whistled there.

It is admitted, also, that there was no light showing from the headlight of the engine; that it had been burning but was extinguished by the engineer before the train reached Stoughton, which is about twenty-five miles west of Arcola, and the evidence is that it was not again lighted. This evidence was accepted by the jury, who found that it was negligence contributing to the accident not to have a light burning in the headlight of the engine under the circumstances. It was one of the plaintiff's contentions that under the weather conditions then prevailing the servants of the company should have taken the additional precaution of having the headlight of the engine burning, because the high wind and the snow made it at times impossible to see more than fifteen feet ahead of the engine.

In the Court of Appeal, the judgment which the trial judge entered for the plaintiff, based upon the verdict of the jury, was reversed on the ground that, although section 308 of the *Railway Act* provides for the blowing of the whistle and the ringing of the bell when a train is approaching the highway crossing at level rail, the result of the decisions upon that and similar sections is that the statute was intended only for the benefit of persons coming upon the crossing and that others lawfully on the track in the proximity of the crossing were not entitled to the protection afforded by it, and that, as the train rules are practically to the same effect, the plaintiff cannot get any assistance from them; and the Court cited the cases of *Gorris* v. *Scott* (1); *Le Lievre* v. *Gould* (2); and *Atkinson* v. *Newcastle & Gateshead Waterworks Co.* (3); as well as a number of American authorities.

It is admitted that in the United States it has been specifically held that statutory enactments, imposing a duty upon a railway company to blow the whistle and ring the bell when approaching public crossings at level rail, are only for the protection of those using or about to use the crossing, and do not impose any duty in respect of other persons, so that a failure to comply with such requirement

(1) (1874) L.R. 9 Ex. 125. (2) [1893] 1 Q.B. 491.
(3) (1877) 2 Ex. D. 441.

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is not evidence of negligence of which an employee injured when walking on the track can complain. (See *Norfolk & Western Ry. Co.* v. *Gesswine* (1); *Connelley* v. *Pennsylvania Ry. Co.* (2)). I do not find that the English cases have gone so far.

In *Gorris* v. *Scott* (3) the statutory provision relied on was the *Contagious Diseases (Animals) Act,* under which the Privy Council made orders, which they were authorized to do, in reference to animals brought into Great Britain on board vessels. One order was that the space in the vessel occupied by these animals should be divided into pens of a certain size. By neglect to observe the precautions prescribed by these orders, a number of sheep, which were being brought into England by the defendant in one of his vessels, were washed overboard, which they would not have been had the orders been complied with. In an action brought for damages for their loss, it was held that the owner of the sheep could not recover damages for the omission to comply with the order, because the statute and the orders were not intended for the benefit of the owner of the sheep in this way. The object of the statute and orders was to prevent the spread of contagious diseases among the sheep, but with no relation to the danger of loss at sea.

In *Atkinson* v. *Newcastle & Gateshead Waterworks Co.* (4), it was held that the mere fact that a breach of a public statutory duty had caused damage does not vest a right of action in the person suffering damage as against the person guilty of the breach. Whether the breach does or does not give a right of action must in each case depend upon the object of the legislation and language of the particular statute.

In *Groves* v. *Wimborne* (5), Vaughan Williams, L.J., says:—

> Where a statute provides for the performance by certain persons of a particular duty, and some one belonging to a class of persons for whose benefit and protection the statute imposes the duty is injured by failure to perform it, *prima facie,* and, if there be nothing to the contrary, an action by the person so injured will lie against the person who has so failed to perform the duty.

(1) (1906) 144 Fed. Rep. 56.
(2) (1915) 228 Fed. Rep. 322.
(3) (1874) L.R. 9 Ex. 125.
(4) (1877) 2 Ex. D. 441.
(5) [1898] 2 Q.B. 402, at 415.

The above paragraph from the judgment of Vaughan Williams, L.J., in my opinion, lays down the principles applicable to the case at Bar.

Did the statute or the train rules impose a duty upon the company to blow the whistle and ring the bell at every whistle post; and did the plaintiff belong to the class of persons for whose benefit and protection the rules were made? As between the plaintiff and the company, the rules are as effective as the statute and are evidence of what the railway company considered to be the exercise of due care. The rule is explicit that the whistle should be sounded at every whistle post, and there is nothing in the rules to the contrary, and, in my opinion, the plaintiff was one of the classes for whose benefit the rules were promulgated. He was an employee who was on the track in the performance of his duty. Not only was he on the track, but he was expressly directed to walk between the rails in stormy weather. He was aware of the existence of the rules, and knew that it was the duty of the train hands to comply with them, for the rule book expressly states: "Obedience to the rules is essential to the safety of passengers and employees." The rules were not complied with, and the plaintiff was injured through the failure of the company's servants to comply with them. Unless, therefore, the jury find that the failure to comply with the rules can be justified or excused, the plaintiff, in my opinion, has an individual right of action for the injury he received.

In view of the rules and the finding of the jury, it cannot be said that the risk of injury was a danger incident to the employment which the plaintiff had agreed to assume and did assume. I cannot see anything in the general scope of the rules nor the language in which they were embodied, that would justify a limitation of the application of the rules to those persons only who were crossing or approaching the crossing at level rail.

Where the statute or rules aim at the protection of a particular class, or at the attainment of a particular purpose, which in the ordinary course is calculated to benefit a particular individual or member of a class, an individual injured by a neglect of the obligation, either as one of that class, or by reason of being affected by the failure to attain

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that particular purpose, may have his remedy although a penalty is imposed by the statute.

It was argued that the evidence shows that the fierceness of the storm was such that what the defendants did was a reasonable precaution against accident. That was a matter wholly for the jury.

The plaintiff had heard both the whistle and the bell of the train that passed in the morning, and the view of the jury was that the engineer's failure to blow the whistle and ring the bell contributed to the accident by which the plaintiff was injured. It was for the jury to say, under all the circumstances, whether or not the plaintiff would have heard the whistle and the bell. Train rule requires that, when the weather or other conditions obscure the day signals, night signals are to be used in addition. Engineer Neazor testified that sometimes he could not see more than fifteen feet ahead of the train owing to the storm, and at other times he could see a considerable distance.

It was also for the jury to say if, under the circumstances, the plaintiff would have seen the light of the headlight had it been burning. I must confess, however, that the evidence leaves my mind in a state of doubt on this point, but I take the jury's finding to mean that they were satisfied that he would have seen it.

As it is impossible to tell whether the finding of the jury as to the sounding of the whistle and the ringing of the bell is a finding of fact on the evidence, or was induced on the misdirection of the trial judge, there should be a new trial.

The appeal will be allowed, but without costs. The costs of appeal to the Saskatchewan Court of Appeal and of the abortive trial, shall be in the discretion of the judge at the new trial.

CANNON J. (dissenting)—After having the advantage of reading the opinions carefully prepared by my learned brethren Lamont, Crocket and Davis, I am rather inclined to say that section 308 protects the railway employees at or near a railway intersection with a highway as well as any other person, in view of section 419 (2) of the *Railway Act* which enacts clearly and without restriction to any particular class of persons that,

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. The company shall also be liable for all damage sustained by *any* person by reason of any failure or neglect so to sound the whistle or ring the bell.

I feel that the spirit of our *Railway Act* is better interpreted in the words of Davies J. in *McMullin* v. *Nova Scotia Steel and Coal Co.* (1), than in judgments of English or American courts in cases concerning the application of statutes which may be different from our own legislation. Besides, the action is based, not only on the statutory duty of the respondent, but also on common law negligence and default in obeying the rules of the company.

The train was a special or extra one and the respondent took the risk to run it under difficult circumstances which, it is claimed, prevented the engineer in charge of the locomotive to give the signals provided for by the book of rules of the company, and especially rules 9, 14 (L), 17 and 31, which read as follows:

9. Night signals are to be displayed from sunset to sunrise. When weather or other conditions obscure day signals, *night signals must be used in addition.*

14. *Engine Whistle signals.*

* * *

(L) Approaching public road crossings at grade and at whistle posts [two long and two short sounds].

* * *

A succession of short sounds of the whistle is an alarm for persons or animals on the track.

17. A headlight will be displayed to the front of every train by night * * *

31. Signal 14 (L) *must* be sounded at least 80 rods (½ mile) from every public road crossing at grade, and the engine bell be kept ringing until the crossing is passed.

Signal 14 (L) *must* be sounded at every whistle post.

The company agrees before us that the whistle was not sounded and the bell not rung at the whistle post. It is also common ground before this Court that the appellant would have heard the whistle if sounded within 80 rods from the public road crossing near which the accident happened. These two points were closed to the respondent, said Mr. Tilley.

Now, the rules of the company respondent, in my opinion, are sufficient evidence of the proper care that should be taken in the running of their trains. The jury found that they were not complied with, that this negligence by omission caused the accident. I cannot substitute my

(1) (1907) 39 Can. S.C.R. 593.

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opinion, on this question of fact, to their verdict based on sufficient evidence.

Besides, the fact that the appellant was not told, contrary to custom, by the station agent that an extra train was coming on that morning, would aggravate the imprudence of the company in persisting to run this special freight train in such weather, when it was impossible for the engineer in charge, at times, with the window of the cab down and the front windows all frozen, to see through them.

Under such weather conditions, when the company could not comply with the statute and their own rules, it would have been better to desist from running that special freight train than to run the risk of injuring or killing the appellant who was admittedly rightly at his work inspecting the track. For train movements, Rule 97 says:

> Extra trains must not be run without train orders.

and Rule 106:

> In all cases of doubt or uncertainty the safe course must be taken, and no risks run.

Under those circumstances, I would allow the appeal and restore the judgment of the trial court with all costs against the respondent.

CROCKET J. (dissenting).—I am of opinion, after a perusal of the entire record in this case, that there is sufficient evidence to warrant the jury's findings and that the plaintiff is entitled to hold the judgment which the learned trial Judge ordered thereon.

There seems to be no doubt that, had the locomotive engineer blown the engine whistle at the whistle post or rung the bell as he passed it, the plaintiff would not have been struck, as he was, at a point over 600 feet west of the whistle post and approximately 750 feet east of the level crossing, nor that the plaintiff's injury is directly attributable to the neglect of the engineer to blow the whistle or ring the bell as he approached or passed the whistle post.

The learned counsel for the defendant frankly admitted that the plaintiff was rightfully on the track in the course of his duty as section foreman and that the finding of the jury that the whistle was not blown or the bell rung between the whistle post and the point where the plaintiff was hit was one which upon the evidence could not well

be disturbed. He argued, however, that, although the failure to blow the whistle or ring the bell as the train approached or passed the whistle post was a breach of s. 308 of the *Railway Act* and of Rule 31 of the Railway Company's own printed rules, the defendant owed no duty to the plaintiff to give the required signals at this point, because s. 308 was enacted by Parliament for the protection only of vehicles and persons proceeding along the public highway towards the railway crossing and not for the protection of the employees of the railway or anyone else proceeding along the track unless possibly at its intersection with the highway. He relied mainly on the principle affirmed in the English cases of *Gorris* v. *Scott* (1), *Le Lièvre* v. *Gould* (2) and *Atkinson* v. *Newcastle & Gateshead Waterworks Co.* (3), and the decision of the Supreme Court of the United States in 1929 in *Chesapeake & Ohio Ry. Co.* v. *Mihas* (4), where that court quoted with approval a judgment in 1859 of the Supreme Court of Rhode Island in *O'Donnell* v. *The Providence & Worcester Railroad Co.* (5). This appears to be the principal ground upon which the Appeal Court of Saskatchewan reversed the trial judgment in the case at Bar—this and the fact that in the Appeal Court's opinion the finding as to the headlight could not reasonably be supported by the evidence. Another more recent American decision was also relied upon before us, viz., *Jacobson* v. *Chicago, Milwaukee, St. Paul & Pacific Rd. Co.* (6), where the plaintiff, a section foreman, sought to maintain an action for negligence against that railway company upon the ground that the engineer had not blown the whistle or rung the bell of the locomotive which struck him. There is no doubt that, in the American cases relied upon, the decisions of the United States courts proceeded upon the principle that the railway company owed no duty to its employees in respect of the sounding of train signals required by the public statutes in approaching public highway crossings, but none of the English cases cited go to any such length, and, so far as I can discover, none have ever done so.

(1) (1874) L.R. 9 Ex. 125.
(2) [1893] 1 Q.B. 491.
(3) (1877) 2 Ex. D. 441.
(4) 280 U.S. 102; 50 Sup. Ct. Rep. 42.
(5) 6 R.I. 211.
(6) (1933) 66 Federal Reporter, 2nd series, 688.

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This Court, on the other hand, definitely, in my view, laid it down in *Grand Trunk Ry. Co.* v. *Anderson* (1), that the provision of the *Railway Act,* s. 256, as it then stood in 51 Vict. (Dom.), cap. 29, relating to the sounding of the whistle and the ringing of the bell, which in all material aspects is the same as s. 308 of the present *Railway Act,* was not to be read as being intended exclusively for the protection of vehicles or persons proceeding along the public highway, but that all persons rightfully upon the railway track were entitled to the benefit of that provision. In that case the action was brought, not by an employee of the railway, but by the administrator and administratrix under Lord Campbell's Act, of a passenger who had disembarked from a train at an improvised station, from which no safe and reasonable means of egress were provided to the public highway, and who was struck and killed by a train while walking along the right of way. The action was brought in the Supreme Court of Ontario and was dismissed by Meredith, C.J. The Divisional Court on appeal reversed the trial judgment and this decision was affirmed by the Court of Appeal. The Divisional Court (Armour, C.J., Falconbridge and Street, JJ.) held that the deceased was lawfully upon the railway and that all persons, whether travelling on a highway or not, were entitled to the benefit of the provisions of s. 256 of the *Railway Act* requiring warning by bell or whistle on approaching a highway, and that the neglect of this statutory provision was evidence of negligence. The Divisional Court therefore ordered that judgment should be entered for the plaintiffs for the sum of $3,000.

While this Court, per Gwynne, Sedgewick and Girouard, JJ., allowed the appeal from the Appeal Court of Ontario (Taschereau and King, JJ., dissenting) the majority, as well as the dissenting Judges, distinctly affirmed the principle, enunciated by the Divisional Court, that all persons rightfully travelling upon the railway were entitled to the benefit of the provisions of s. 256 of the *Railway Act.* Sedgewick, J., who wrote the majority judgment, distinctly states:—

(1) (1898) 28 Can. S.C.R. 541.

It must be admitted for the purposes of this case that the provision of the Railway Act, section 256, relating to the sounding of the whistle and the ringing of the bell was not complied with, and that all persons rightfully upon the railway track as well as upon the highway crossing next to the coming train are entitled to the advantage of this provision, and the sole question to be determined in this case is whether or not the deceased Mackenzie at the time he was killed was lawfully walking upon the railway track. In other words whether he was a trespasser or a licensee or invitee of the defendant company.

It was solely upon the question as to whether the evidence shewed the deceased to be a trespasser or an invitee that the appeal was allowed. Taschereau, J., was not disposed to interfere with the judgments of the Divisional Court and the Court of Appeal. King, J., simply stated that he thought the judgment in the court below was free from error and that the appeal should be dismissed.

Later in *McMullin* v. *The Nova Scotia Steel & Coal Co.* (1), this Court (Sir Charles Fitzpatrick, C.J., and Girouard, Davies and Duff, JJ.) held that s. 251 of the *Nova Scotia Railway Act,* enacting that,

whenever any train of cars is moving reversely in any city, town or village, * * * the company shall station on the last car in the train a person who shall warn persons standing on or crossing the track

of its approach, was an enactment for the protection of servants of the company standing on or crossing the track as well as of other persons, and allowed the appeal from the Nova Scotia Supreme Court. I reproduce the following passages from the reasons given by Davies, J., with whom all the other Justices named, concurred:—

With respect to the proper construction to be given to section 251, I am unable to agree with the contention that the section only applies to persons *not* railway servants, and, as to them only "while standing on or crossing the track of the railway" *at a highway crossing.*

There does not appear to me to be any justification arising either from the language of the section itself or from its position in the Act and its relation to its context which would justify the courts in importing such limitations into it. Nothing is said in the section with respect to a "highway crossing." What is said is that "persons standing on or crossing the track of such railway" within the limits of a town, city or village, shall be entitled, so far as trains moving reversely are concerned, to have a certain specified precaution and warning observed. It does seem to be an arbitrary and unreasonable construction to exclude workmen from the benefit of such a prudent and beneficial section as this. In fact, it would seem rather more necessary for the workman's protection than for that of the outside public. Business might occasionally, no doubt, take some of the general public on or across these railway tracks within cities, towns or villages, but, apart from public highways,

(1) (1907) 39 Can. S.C.R. 593.

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the presence of any of the general public would be a rare occurrence on these tracks.

On the other hand, the duties of many of the workmen, trackmen, switchmen, etc., require them to be "on or crossing the track" frequently, and it would seem reasonable to conclude that the section was enacted as much, if not more, for their benefit than for the benefit of the small section of the general public who would legally go "on or across the track." Of course, the section is not for the benefit of trespassers and they, I assume, not to be within it.

The section applies in terms to any and all parts of the company's track within the city or town, and I see as little reason for excluding from the section the grounds of the company itself within such city as the workmen of the company.

These judgments of our own Court I regard as conclusive against the respondent upon this question. Even if they were not, I should not be disposed, in the absence of any authority actually binding upon me, to assent to the proposition that an employee of a railway, who is rightfully walking along the railway track in the course of his duty, is not entitled to rely upon the neglect of the locomotive engineer to blow the engine whistle or ring the bell when approaching a highway crossing at rail level in accordance with the provisions of s. 308 of the *Railway Act* as negligence, if that negligence is the direct cause of injury to him. The railway surely owed a duty to its sectionmen to exercise reasonable care to avoid injury to them.

The evidence here shews clearly to my mind that the plaintiff, when he reached the whistle post, where he knew that the rules of the railway required the blowing of the whistle and the sounding of the bell, relied upon the engineer's compliance with those rules as his protection between the whistle post and the highway crossing. He had a right to assume that, if any train came along, two long and two short blasts of the whistle would be sounded on reaching this point, which it is idle to my mind to suggest, had they been sounded, might not have been heard by him.

Apart from the failure to blow the whistle and ring the bell in pursuance of the statute and the Railway Company's printed rules, the jury found that there was negligence on the part of the defendant also in not using the headlight in the weather conditions which prevailed at the time. They no doubt meant that, had the headlight been on, as it ought to have been, it also would have warned the plaintiff in time to enable him to avoid his injury. That, it seems to me, was a finding upon a straight question

of fact, depending in a very large measure upon the credibility of the testimony of the trainmen that the storm had caused such an accumulation of snow and ice on the glass of the headlight as to render it entirely useless as a train signal, and that for this reason they had turned it off. The jury were surely not bound to accept this evidence of the engineer and fireman at its full face value, simply because it was not specifically contradicted. The jurors had a right to test its credibility by the light of their own experience and knowledge. They may have regarded it as altogether improbable and inconsistent in itself or as inconsistent with indisputable facts or the testimony of the plaintiff and his witnesses, which they believed. As a mater of fact, there was undisputed testimony that another train running over the same track in the opposite direction two hours before used its headlight as a signal. Moreover, it is a matter of common knowledge that railway engine headlights are very powerful and can be seen, where the track is straight, as it was here, for miles in clear weather and that they cast their rays for long distances along the track, so as to serve as a warning of an approaching train, not only to persons walking towards it, but to persons going the other way. With all respect, it seems to me that it was entirely a question for the jury to determine, whether in the weather conditions, as they found them to exist, it was probable or improbable that such a powerful headlight was so obscured by the accumulation of snow and ice on its clear glass front that its reflection would not extend for more than ten feet along the track and consequently to render it completely useless. I should myself rather be disposed to think that, if the weather conditions were such as to make it impossible for the engineer or fireman to see any of the whistle posts along the track or to know whether they were approaching a level highway crossing or not, it was little short of foolhardiness to deliberately turn off the headlight as useless and continue to run the train along a section where the trainmen must have known there were highway crossings at rail level with the likelihood that sectionmen were going along the track in the discharge of their duty.

It was contended that engine headlights are not such signals as fall within the intendment of the railway rule

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No. 9. There may be some force in the argument, but it is clear from the evidence nevertheless that when weather conditions were such as to obscure day signals the engine headlights were in fact used as additional warning signals. Whether the rule itself required their use or not, the question was whether in the existing circumstances it was negligence to turn off the headlight on the engine, which caused the plaintiff's injury. In my view, it is a matter of no consequence that the trial Judge erroneously left, as it is contended he did, the interpretation of railway rules, Nos. 9 and 17, to the jury, instead of directing the jury himself as to their meaning.

It was objected also that the learned trial Judge misdirected the jury as to the effect of s. 308 of the *Railway Act,* and particularly in telling them that they were not free to find anything else than absolute negligence with respect to the engineer's failure to blow the whistle at the whistle post and ring the bell as thereby required. I think this objection is met by *Grand Trunk Railway Co.* v. *Anderson* (1), and the very clear directions of the learned trial Judge to the jury that, before the railway could properly be held to be liable for the plaintiff's injury by reason of the breach of the statutory requirement, they must be satisfied that it was the direct consequence of such negligence. In view of the admission that the jury's finding as regards the failure to blow the whistle at the whistle post and ring the bell in approaching the highway crossing, as required by the statute, could not be disturbed upon the evidence, and there being no doubt that such failure does constitute negligence, if it directly causes injury or damage to any person rightfully on the track, as it is admitted the plaintiff was, the defendant cannot very well be held to have been prejudiced or any substantial wrong or miscarriage occasioned by the alleged misdirection.

As to the point that the action must be treated as founded entirely on the statutory breach of duty, the record, in my opinion, plainly shews that the plaintiff throughout was relying on common law negligence as well as the breach of the particular statutory duty.

(1) (1898) 28 Can. S.C.R. 541.

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I think, for the reasons stated, that this appeal should be allowed and the judgment of the trial court restored with costs throughout.

New trial ordered.

Solicitors for the appellant: *Anderson, McDaniel & Alexander.*

Solicitor for the respondent: *O. S. Black.*

LOUIS MINDEN AND ANOTHER.... APPELLANTS;

AND

HIS MAJESTY THE KING..... RESPONDENT.

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*Nov. 13.
*Nov. 15.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Appeal—Leave to appeal to Supreme Court of Canada—Court of appeal judgment conflicting with judgment of another court of appeal "in a like case"—Judgments must be in criminal matters—The Supreme Court of Canada is a "court of appeal" within section 1025 Cr. C.

Under the provisions of section 1025 of the Criminal Code, a party applying for leave to appeal must show that "the judgment appealed from conflicts with the judgment of any other court of appeal in a like case."

Held that a judgment of a court of appeal "in a like case" must be a judgment rendered in criminal proceedings or upon criminal matters.

Held, also, that the Supreme Court of Canada is comprised among the courts of appeal contemplated in that section.

MOTION under section 1025 of the Criminal Code for leave to appeal to this court from the judgment of the Court of Appeal for Ontario upholding the conviction of the appellants. Leave to appeal was refused by the judgment now reported.

A. N. Lewis K.C. for the motion.

J. Sedgewick K.C. contra.

RINFRET J.—Upon their trial before His Honour Judge Boles, sitting in the County Court Judge's Criminal Court of the county of Wentworth, the appellants were found guilty of having unlawfully, after the presentation of a

* PRESENT:—Rinfret J. in chambers.

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bankruptcy petition against them, condoned and participated in the making and presenting of a false statement to the creditors of Minden's Ltd. for the purpose of obtaining the consent of the creditors or any of them to an agreement accepting fifteen cents on the dollar in full of the debt of Minden's Limited, and of having thereby committed an offence contrary to ss. 191 (*p*) and 201 of the *Bankruptcy Act*.

The Court of Appeal of Ontario confirmed the conviction.

The appellants now apply for leave to appeal from the judgment of the Court of Appeal on the ground that the judgment conflicts with that of the Supreme Court of Canada in the case of *Electric Motor and Machinery Company, Limited* v. *The Bank of Montreal* (1).

To understand the situation, it is necessary to state only a few facts.

Minden, after the presentation of the bankruptcy petition, on the 16th December, 1932, attempted to make an arrangement with the creditors and to obtain a composition from them. To persuade them to accept his offer, he caused to be prepared a statement of assets and liabilities. Both courts found that the statement so prepared to form the basis of the negotiations was fraudulent and falsely represented the true assets, altogether omitting, as it did, a large block of goods which he pretended not to regard as seasonable stock.

The statement was made on the 20th December, 1932. The actual adjudication in bankruptcy did not take place until the 27th December.

One of the questions which the Court of Appeal had to decide was whether a false and fraudulent statement made between the date of presentation of the petition in bankruptcy and the date of the adjudication in bankruptcy may be held an offence under subsection (*p*) of section 191 of the *Bankruptcy Act*.

The Court of Appeal referred to subsection 11 of section 4 of the Act, which reads as follows:—

> 11. The bankruptcy of a debtor shall be deemed to have relation back to and to commence at the time of the presentation of the petition on which a receiving order is made against him.

(1) [1933] S.C.R. 634.

And the Court ruled that the effect of that statutory provision was to make the bankruptcy begin at the time of the presentation of the petition for all purposes.

Accordingly the decision was that the accused must be found to have made the false and fraudulent statement after having been adjudged bankrupt, and contrary to subsection (*p*) of section 191. And the appeal was dismissed.

In the case of *Electric Motor & Machinery Company, Limited* v. *The Bank of Montreal* (1), the Court had to construe subsections (*q*) and (*r*) of section 191 of the *Bankruptcy Act*. The debtor had made an authorized assignment on the 3rd November, 1930. Subsequently, through its trustee, it submitted for approval to the bankruptcy court a proposal for a compromise. The demand of approval was contested by the Bank of Montreal. The bankruptcy court found as a fact that in and during the years 1927, 1928 and 1929, the authorized assignor had knowingly made to the bank three false statements of the character described in subsections (*q*) and (*r*); that these were offences under the subsections mentioned, and that

this being established, the court, under art. 16, parag. 2, of the *Bankruptcy Act*, was bound to refuse the approval of the proposal of compromise.

In the Court of King's Bench (Quebec), that judgment was upheld by the majority of the court (Létourneau and Saint-Germain JJ. dissenting).

Upon appeal to this Court, it was held that the acts dealt with in subsections (*q*) and (*r*) of section 191 are in terms the acts of a person

who has been adjudged bankrupt, or in respect of whose estate a receiving order has been made, or who has made an authorized assignment,

and that, upon the plain meaning of the words, the offences described in the subsections in question had reference to the acts of a person who had already been adjudged bankrupt, etc. Therefore, the acts complained of, committed prior to the bankruptcy, were not criminal acts within the contemplation of subsections (*q*) and (*r*) of section 191.

On the present application it was urged on behalf of the appellants that subsection (*p*) is couched in language similar to that of subsections (*q*) and (*r*), and that, therefore, the judgment sought to be appealed from is in conflict with the judgment of this Court in the *Electric Motor* case (1).

(1) [1933] S.C.R. 634.

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The application is made under section 1025 of the Criminal Code. The appellants must show that

> the judgment appealed from conflicts with the judgment of any other court of appeal in a like case.

Section 1012 of the Criminal Code defines the interpretation to be given to the words "court of appeal" in part 19 dealing with Procedure by Indictment. Those words mean

> the court designated by paragraph (7) of section two of this Act as the court of appeal for the province in which the conviction was had.

If we refer to paragraph (7) of section two, we find that it enumerates the courts of appeal of final resort in each of the nine provinces of Canada and in the Yukon Territory. The Supreme Court of Canada is not mentioned in the enumeration.

Notwithstanding this, I think the Supreme Court of Canada is among the courts contemplated in section 1025 of the Act under the words: "any other court of appeal"; and I think it has always been so regarded, both in the discussion and in the judgments upon applications for leave similar to the present one (See: *Hill* v. *The King*) (1), although perhaps the point was not expressly decided.

The object of the section being to insure uniformity of interpretation and of application of the criminal law throughout the Dominion, it stands to reason that a conflict between the judgment of a provincial court of appeal and that of the Supreme Court of Canada must necessarily have been one which Parliament had in view when it enacted the section. The Supreme Court of Canada is a court to which, by force of the Criminal Code, an appeal may be brought in certain cases involving criminal matters; and, in that respect, it satisfies the language of section 1025: "any other court of appeal."

Therefore, I consider that it was open to the appellants to base their application upon an alleged conflict between the judgment of the Court of Appeal of Ontario in the present case and the judgment of the Supreme Court of Canada in the *Electric Motor* case (2).

But when it comes to the next point raised by counsel representing the Attorney-General of Ontario, the appellants do not fare so well. In *Electric Motor & Machinery Company Limited* v. *The Bank of Montreal* (2), the sub-

(1) [1928] S.C.R. 156. (2) [1933] S.C.R. 634.

ject-matter of the case was not criminal law. As appears by the short statement of the facts made at the beginning of this judgment, the *Electric Motor* case (1) was about the approval of a proposal for a compromise. It was only indirectly and as an incident to the main question that the court was called upon to construe subsections (*q*) and (*r*) of section 191 of the *Bankruptcy Act*. It was not done for the purpose of deciding whether the debtor had to be convicted of the criminal offence covered by the section, but only with the view of adjudicating upon the application for approval of the compromise. Obviously this was not a criminal proceeding.

Under these circumstances, I am of opinion that the judgment in the *Electric Motor* case (1) does not meet the condition required in section 1025 that it should be "the judgment of any other court of appeal in a like case."

Repeating again that the purpose of the section is to render as uniform as possible the administration of the law in criminal matters, *The King* v. *Janousky* (2); *Arcadi* v. *The King* (3), my view is that, when Parliament used the expression "any other court of appeal in a like case," it must be taken to have referred to a court of appeal adjudicating in criminal proceedings or upon criminal matters. Section 1025 is in the Criminal Code; and general language of that kind must be presumed to refer to the subject-matter of the statute where the section is to be found.

For those reasons, I hold that the judgment of this court in *Electric Motor & Machinery Co.* v. *The Bank of Montreal* (1) is not a judgment of another court of appeal in a like case with that of the judgment sought to be appealed from.

I may say further that, even assuming the other points in favour of the appellants, I do not understand the judgment of the Court of Appeal to be in conflict with the judgment of this Court in the *Electric Motor* case (1). The latter judgment, as already stated, decided that, in order to be offences under subss. (*q*) and (*r*) of s. 191, the acts must have been committed by the debtor after he has been adjudged bankrupt. In the present case, the Court of Appeal also expresses the same view in respect to another subsec-

(1) [1933] S.C.R. 634.
(2) [1922] 63 S.C.R. 223, at 225.
(3) [1932] S.C.R. 158, at 160.

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tion of section 191, to wit: subsection (*p*). Then, however, Middleton, J.A., delivering the written judgment of the Court of Appeal, points out:

> The Supreme Court of Canada, in its judgment, did not attempt to discriminate between the date of the presentation of the bankruptcy petition and the date when the person was adjudicated bankrupt, nor was the effect of section 4 (11) considered and that decision cannot be regarded as having any direct bearing upon the present case.

In the *Electric Motor* case (1), that point did not come up, for the false statements complained of had been made and submitted to the creditors long before the date of the presentation of the petition, in fact, several months before and at a time when it might even have been a question whether the debtor was then insolvent. The neat point which the Court of Appeal had to decide in the present case was not present in the other case. So that the two judgments did not turn on the same question.

The application for leave to appeal will, therefore, be dismissed.

Motion dismissed.

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*Oct. 11.
*Nov. 7.

HIS MAJESTY THE KING (PLAINTIFF) ..... } APPELLANT;

AND

MONTREAL STOCK EXCHANGE (DEFENDANT) ..... } RESPONDENT.

HIS MAJESTY THE KING (PLAINTIFF) ..... } APPELLANT;

AND

EXCHANGE PRINTING COMPANY (DEFENDANT) ..... } RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Taxation—War Revenue Act—Stock exchange sheets—Exemption—Whether "newspapers"—Special War Revenue Act, R.S.C., 1927, c. 179, ss. 85, 86, 89.

The daily stock exchange sheets, issued in respect of transactions on the Montreal Stock Exchange and the Montreal Curb Exchange, and the weekly comparative reviews of transactions on the two exchanges fall within the meaning of the word "newspapers" as used in schedule III of the *Special War Revenue Act* and therefore exempt from taxation under the provisions of that Act.

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*PRESENT:—Rinfret, Lamont, Cannon, Crocket and Kerwin JJ.

(1) [1933] S.C.R. 634.

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THE KING v. MONTREAL STOCK EXCHANGE.

THE KING v. EXCHANGE PRINTING CO.

APPEALS from two judgments of the Exchequer Court of Canada (1) dismissing two informations of the Attorney-General for Canada claiming from the Montreal Stock Exchange the sum of $3,431.16 and from the Exchange Printing Company the sum of $2,295.76 being sales tax under the *Special War Revenue Act* in respect of certain printed matter produced and sold by the two respondents.

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

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

L. A. Forsyth K.C. for the respondents.

The judgment of the Court was delivered by

KERWIN J.—The neat point for determination in these appeals is whether the sheets published by the respondents fall within the meaning of the word "newspapers" as used in Schedule III of the *Special War Revenue Act*. While the appellant seeks judgment for certain amounts for sales tax in various years, the provisions of the Act applicable may be taken to be sections 85, 86 and 89 of R.S.C., 1927, c. 179.

Section 85 (*f*) provides that in part XIII of the Act "producer or manufacturer" shall include "any printer, publisher, lithographer or engraver." By section 86, a consumption or sales tax is imposed on the sale price of all goods (*a*) produced or manufactured in Canada payable by the producer or manufacturer. Subsection 1 of section 89 is as follows:—

> The tax imposed by this Part shall not apply to the sale or importation of the articles mentioned in Schedule III of this Act.

Schedule III referred to, includes

> newspapers and quarterly-monthly, by-monthly and semi-monthly magazines and weekly literary papers unbound.

For some years the Montreal Stock Exchange and later the Exchange Printing Company printed, about noon of each day that the Exchange was in session, a sheet showing the transactions on the Exchange during the morning, and in the afternoon a similar record of the transactions for the remainder of the day. In like manner were pub-

(1) [1935] Ex. C.R. 237.

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lished the transactions on the Montreal Curb market. Each week was printed a "comparative review of transactions" on the Exchange and a "comparative review of transactions" on the Curb.

These sheets from time to time contained notices of dividends, annual meetings and the loss of certificates, in connection with companies whose stock was listed on the Exchange. The weekly publications besides summaries of the week's business, contained a tabulation comparing the business of that particular week with the business of the corresponding week in the previous year.

The members of the Exchange formed the greater bulk of the users of these sheets for which they paid on a sliding scale but copies were also exchanged with similar institutions in Canada and the United States. Some were sold to outsiders and the result of the evidence of the acting secretary-treasurer of the Exchange is that any member of the public might become a subscriber.

The term "newspapers" is not defined in the Act and while we were referred to various definitions in other Dominion and provincial statutes, the statement of the present Chief Justice, in delivering the judgment of the Court in *Milne-Bingham Printing Co. Limited* v. *The King* (1) is peculiarly appropriate.

> The usage of that word in other statutes may be looked at, if the other statute happens to be in *pari materia*, but it is altogether a fallacy to suppose that because two statutes are in *pari materia*, a definition in one can be bodily transferred to the other. * * *

In the instant case, the word under discussion is not defined in any statute in *pari materia* and it remains only to give to it the ordinary meaning that it usually bears. Webster's New International Dictionary may be taken as giving a definition of "newspaper" which is expressed in corresponding terms in other well recognized dictionaries:—

> a paper printed and distributed at stated intervals * * * to convey news * * * and other matters of public interest.

The sheets in question meet these requirements; the mere fact that any particular publication is meant to interest only a section of the public does not limit the meaning of the expression as a reference to religious or fraternal pub-

(1) [1930] S.C.R. 282, at 283.

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lications will at once make clear. The sheets in question contain not merely a *record* of transactions on the Exchange or curb market but also *information* to those desiring it as to such transactions; and the other items from time to time included give "tidings, new information, fresh events reported," (*vide* Concise Oxford Dictionary defining "news").

Being of opinion that the publications are newspapers for the purposes of the *Special War Revenue Act*, the respondents have brought themselves within the language of an exempting proviso. *Dominion Press Limited* v. *Minister of Customs and Excise* (1).

The appeals will, therefore, be dismissed with costs.

Appeals dismissed with costs.

Solicitor for the appellant: *W. Stuart Edwards.*

Solicitors for the respondents: *Brown, Montgomery & McMichael.*

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

AND

THE CANADIAN CO-OPERATIVE WHEAT PRODUCERS LIMITED AND OTHERS (DEFENDANTS) ..... RESPONDENTS.

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* Oct. 28

* Nov. 15.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Shipping—Carriage by water—Loss or damage to cargo—Limitation of liability of the owner of the ship—"Fault or privity" of owner—Unseaworthiness—Improper loading—Cause of loss—Merchant Shipping Act, 1894, 57-58 Vict., c. 60, ss. 502, 503, 504—Canada Shipping Act, R.S.C., 1927, c. 186, ss. 452, 457, 459, 903—Water Carriage of Goods Act, R.S.C., 1927, c. 207, ss. 6, 7.

Held, where the owner of a ship, after having been condemned in a previous action to pay damages for loss and damage to a cargo, brings another action in which he claims a limitation of his liability, either under the provisions of section 503 of the *Merchant Shipping Act* or of section 903 of the *Canada Shipping Act*, he must show affirmatively that the damage or loss happened without his actual fault or privity; he must exculpate himself (as distinguished from his servants or

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

(1) [1928] A.C. 340.

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employees) from the responsibility for the loss or damage in respect of which he claims the limitation and the onus is upon him to show that there was no fault or privity of his own.

In the first action for damages against the appellant company, the trial judge, whose judgment had been affirmed by the appellate court and the Privy Council, held that its ship was unseaworthy by reason of overloading or improper loading and that such was "the real cause of the loss."

Held: That the appellant has not succeeded in bringing itself within the exception essentially required to obtain from the courts a limitation of the liability for the loss which occurred as a result of the stranding of its ship and it has failed to discharge the onus cast upon it of proving that the loss happened without its actual fault or privity. The law contemplates a clear duty on the part of the owner of a ship to enforce the observance of the obligation to take all necessary and reasonable precautions in order to prevent a grain cargo from shifting. In the present case, the appellant has failed to show it had taken any means to enforce the observance of the law in that respect. It did not attempt to exculpate itself, except in claiming that it had discharged its duty by supplying a ship properly equipped and appointing a certificated master. According to the evidence, the responsible officials of the appellant company did not apply themselves to the point of precautions at all and, before this Court, they took the stand that the question of loading the ship was one exclusively for the master and one with which they were not concerned. The trial judge found that no instructions were ever given by the company with regard to stowage of grain; and such acts of omission are included in the words "actual fault or privity."

APPEAL from a judgment of the Exchequer Court of Canada, Quebec Admiralty District, P. Demers, L. J. A., refusing the appellant, as owner of the ss. *Sarniadoc,* the right to limit its liability under the provisions of section 503 of the *Merchant Shipping Act,* 1894, and condemning the appellant to pay the costs of such action in limitation of liability. The appellant was the owner of the ss. *Sarniadoc.* At Port Colborne, Ont., on the 28th day of November, 1929, the *Sarniadoc* was loaded with two parcels of grain, the first consisting of 5,091 bushels of barley and 56,594 bushels of wheat, the property of The Canadian Co-operative Wheat Producers Limited, and the second of 37,391 bushels of wheat, the property of Jas. Richardson & Sons Limited. The latter parcel was insured by the Universal Insurance Company. After loading this cargo the *Sarniadoc* proceeded on its voyage to Montreal and on the night of the 29th November, 1929, stranded on Main Duck Island at the eastern end of Lake Ontario where it became a constructive total loss and its cargo was severely damaged. Subse-

quently two actions were instituted against Paterson Steamships Limited, as owners of the *Sarniadoc*. The first by The Canadian Co-operative Wheat Producers Limited for $83,029.03 and the second by Universal Insurance Company, as insurers of Jas. Richardson & Co. Ltd., for $60,573.42. The Canadian Co-operative Wheat Producers' action was heard in the Superior Court for the district of Montreal and judgment was rendered against Paterson Steamships Limited for an amount of $76,911.44. This judgment was appealed to the Court of King's Bench for the province of Quebec where it was confirmed and a further appeal was taken to the Privy Council where the judgments of the courts below were affirmed. The Universal Insurance Company action was stayed pending the outcome of the first action. Shortly after the judgment of the Privy Council, Paterson Steamships Ltd., the present appellant, took action in the Exchequer Court of Canada, Quebec Admiralty District, and asked for limitation of its liability under the provisions of the *Merchant Shipping Act,* 1894. This action was directed against the companies-plaintiffs in the original damage actions and all others interested in the loss of the *Sarniadoc*. The present appellant asked that its total liability in respect of loss and damage arising from the stranding of its vessel the ss. *Sarniadoc* be limited under section 503 of the *Merchant Shipping Act,* 1894, to an amount not exceeding £8 sterling for each ton of the vessel's net registered tonnage with the addition of engine room space deducted for the purpose of ascertaining that tonnage.

V. Lynch-Staunton and *F. Wilkinson* for the appellant.

C. Russell McKenzie K.C. for the respondents.

The judgment of the Court was delivered by

RINFRET, J.—This is an action in limitation of liability.

On or about the 28th day of November, 1929, a cargo of wheat and barley was loaded aboard the ss. *Sarniadoc* belonging to the appellant company, at Port Colborne, province of Ontario, for shipment to the port of Montreal.

On the 30th day of November, at or near Main Duck Island, in Lake Ontario, the vessel struck and stranded

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stern on. She became, to all intents and purposes, a total wreck, being abandoned by her crew thirty-six hours after she struck. As a result of the stranding and wreck, the cargo of wheat and barley was damaged; and the respondents, the Canadian Co-operative Wheat Producers Ltd., and Universal Insurance Company respectively, brought actions in the Superior Court, in Montreal, for the purpose of recovering the damage sustained by each of them in the amount of $83,029.03 for the Co-operative Wheat Producers and $60,573.42 for the insurance company.

The Co-operative Wheat Producers' case proceeded before Mr. Justice Demers, in the Superior Court of Montreal, while the insurance company's case was allowed to stand pending a decision in the former action.

Judgment was delivered in the Co-operative Producers' case, on the 31st day of May, 1932, condemning the appellant to pay to the latter the sum of $76,911.44, with interest since the 14th day of January, 1931, and costs. Mr. Justice Demers found that the appellant

> failed to prove that it had made due diligence to make the ship in all respects seaworthy; that the grain cargo had not been properly secured from shifting by boards or otherwise; that the master could not properly navigate his ship by fear of shifting of the cargo; and that it is the principal reason of the stranding of the ship.

Upon appeal, the judgment was confirmed by the Court of King's Bench of the province of Quebec, and subsequently by the Judicial Committee of the Privy Council.

In view of the fact that the Judicial Committee substantially approved the findings of the Superior Court, it is important carefully to consider the reasons of judgment of Mr. Justice Demers. He quoted section 6 of the *Water Carriage of Goods Act* (R.S.C. 1927, c. 207), which reads as follows:

> If the owner of any ship transporting merchandise or property from any port in Canada exercises due diligence to make the ship in all respects seaworthy and properly manned, equipped and supplied, neither the ship nor the owner, agent or charterer shall become or be held responsible for loss or damage resulting from faults or errors in navigation or in the management of the ship, or from latent defect.

He further quoted section 7 of the same Act, which reads as follows:

> The ship, the owner, charterer, agent or master shall not be held liable for loss arising from fire, dangers of the sea or other navigable waters, acts of God or public enemies, or inherent defect, quality or vice

of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea or from any deviation in rendering such service, or other reasonable deviation, or from strikes, or for loss arising without their actual fault or privity or without the fault or neglect of their agents, servants or employees.

Mr. Justice Demers then pointed out that a ship may be unseaworthy, or unsafe, not only by reason of defective condition of the hull, equipment or machinery, or by reason of undermanning; but also by reason of overloading or improper loading (*Merchant Shipping Act,* 1894, ss. 457 and 459). He referred to section 452 of the Act, which is to the effect that

(1) Where a grain cargo is laden on board any British ship all necessary and reasonable precautions (whether mentioned in this Part of this Act or not) shall be taken in order to prevent the grain cargo from shifting.

(2) If those precautions have not been taken in the case of any British ship, the master of the ship and any agent of the owner who was charged with the loading of the ship or the sending of her to sea, shall each be liable to a fine not exceeding three hundred pounds, and the owner of the ship shall also be liable to the same fine, unless he shows that he took all reasonable means to enforce the observance of this section, and was not privy to the breach thereof.

He stated expressly that the "necessary and reasonable precautions" prescribed in section 452 were not taken in this case.

He then referred to section 696 of the *Canada Shipping Act* (R.S.C. 1927, c. 186) under which ships registered in Canada and trading on the lakes are obliged to secure their grain cargo "from shifting by boards or otherwise"; and, after alluding to the practice which he held to have been proven

that since many years there are no shifting boards on the boats carrying cargoes on the lakes,

he declared that

no usage should prevail against the law. Moreover, no general negligence of a duty is a good answer.

He dismissed the plea based upon the ground of "perils of the sea"; and he wound up his reasons by concluding that the ship

—no precaution having been taken to prevent the shifting of the cargo— was not safe for the voyage and, therefore, was unseaworthy; that she was driven on the rocks on account of bad navigation; and that she was not properly navigated because of improper loading.

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In the judgment of the Privy Council, these findings were summarized as being

(1) that the ship was unseaworthy in that the grain cargo was loaded in bulk and without shifting boards or other precautions to keep it from shifting, and that the owners had not exercised due diligence to make her seaworthy, and (2) that this unseaworthiness was the cause of the loss.

Their Lordships remark that the

"necessary and reasonable precaution to be taken in order to prevent a grain cargo from shifting" can "only be determined as an issue of fact."

They referred to

the practice alleged by the appellant to prevail in the Canadian Lakes grain trade to do nothing but level off the grain in the hold,

and they said that obviously the question whether such practice prevailed was also a question of fact. In their Lordships' opinion, it was

clear that the ship was, according to the findings of the courts below, not merely unseaworthy but unseaworthy in such a way as necessarily to involve some fault or failure within the final words of section 7 of the *Water Carriage of Goods Act*,

that is: a fault or neglect of the owners of the ship or of their responsible servants or agents.

Hence the appellants, Paterson SS. Ltd. could not

avail themselves of the exception of the dangers of the seas, though these dangers caused the loss, because they cannot show that in respect of the unseaworthiness which was also a cause of the loss, and indeed the real cause of the loss, that it existed under conditions entitling them to the benefit of the general words of exception at the end of the section (section 7 just referred to).

It was under those conditions and after the judgment of the Privy Council had confirmed in all material respects the judgment of the Superior Court condemning them to pay to The Canadian Co-operative Wheat Producers Limited the sum of $76,911.44, with interest and costs, that the appellant brought before the local judge in admiralty for the Quebec admiralty district the present action in limitation of its liability as owner of the steamship *Sarniadoc*. The object of the action was to obtain an order staying all proceedings in each of the actions instituted before the Superior Court for the district of Montreal, respectively by the Canadian Co-operative Wheat Producers Limited and the Universal Insurance Company, and to secure a decree that the total liability of Paterson Steamships Limited for the loss and damage resulting from the stranding of the *Sarniadoc* is limited to an amount not exceeding $69,897.84, this being the aggregate amount of

$38.92 (£8) for each ton of the registered tonnage of the ship with the addition of any engine room space deducted for the purpose of ascertaining the tonnage. The amount was tendered into court, together with interest thereon from the date of the stranding, and the further sum of $5,165.66 representing the taxable costs upon the actions hereinbefore described.

The action is based on section 503 of the *Merchant Shipping Act*, 1894, the material parts of which, as they form the main ground of the appellant's argument, may as well be quoted immediately:

503. The owners of a ship, British or foreign, shall not, where all or any of the following occurrences take place without their actual fault or privity; (that is to say)

* * *

(*b*) Where any damage or loss is caused to any goods, merchandise, or other things whatsoever on board the ship;

* * *

be liable to damages beyond the following amounts; (that is to say,)

* * *

(ii) in respect of loss of, or damage to, vessels, goods, merchandise, or other things, whether there be in addition loss of life or personal injury or not, an aggregate amount not exceeding eight pounds for each ton of their ship's tonnage.

(2) For the purposes of this section—

(*a*) The tonnage of a steam ship shall be her registered tonnage with the addition of any engine room space deducted for the purpose of ascertaining that tonnage.

The appellants alleged that the stranding of the *Sarniadoc* occurred "without their actual fault or privity," and, therefore, asked that their total liability to damage in respect of the loss be limited to the amount tendered in court; that all further proceedings in the actions of the respondents before the Superior Court of Montreal be stayed; that all other persons having claims arising out of the said loss or damage be restrained from instituting any proceeding against the appellants or against the ss. *Sarniadoc* and that the fund deposited in the Admiralty Court be distributed ratably among the several claimants, including the respondents.

The action thus brought by the appellants, Paterson Steamships Limited, was dismissed by the local judge in Admiralty, who happened to be the same Mr. Justice Demers who had already adjudicated, while sitting in the Superior Court, upon the action of The Canadian Co-

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operative Wheat Producers Limited, where his judgment was confirmed by the Privy Council. This is an appeal from the above judgment.

For the purpose of our decision, we are willing to assume that the local judge in admiralty had the power to issue an order staying proceedings instituted in the Superior Court, which is the court of general jurisdiction in the province of Quebec (ref. sec. 504 of the *Merchant Shipping Act,* 1894), even if the order is meant to prevent the execution of a judgment of the Privy Council condemning the owner to the payment of a fixed and liquidated sum of money—as in the present case. As no objection seemed to be forthcoming from the respondents' counsel on these points, we are content in merely mentioning that they have not escaped our attention. In view of the result to which we have come, it is not necessary to pass upon them. It is sufficient to say that we will proceed to decide the case without considering these points.

The appellant submitted that the learned trial judge erred in finding that the action was based on section 903 of the *Canada Shipping Act,* instead of section 503 of the *Merchant Shipping Act,* 1894, but we must confess our inability to find wherein, in the premises, any advantage would accrue to the appellant from the application of the section of one Act rather than of the section of the other Act. In so far as the present case is concerned, we fail to see any essential difference. Under both, the ship is the limit of liability, provided the damage or loss was caused without the actual fault or privity of the owner.

In the present case, we have not to speculate as to the cause of the loss or damage. It has been finally determined by the judgment of the Privy Council. The cause was the unseaworthiness of the ship owing to the bad stowage of the cargo of grain. And the Judicial Committee pointed out that, on its face, this must have involved the fault or neglect of the owners, or of their responsible servants or agents.

It remains to be decided—which was not necessary in the first action but is essential in the present case—whether the fault or neglect can be brought home to the owners, or if it was only that of their servants or agents; for, upon

their true construction, the words "without their actual fault or privity," in sections 503 of the *Merchant Shipping Act* or 903 of the *Canada Shipping Act* must exclude the doctrine "respondeat superior." The fault or neglect of their agents, servants, or employees, was sufficient to disentitle the appellants from the benefit of the exception at the end of section 7 of the *Water Carriage of Goods Act*, c. 207, R.S.C. 1927:

> The ship, the owner * * * shall not be liable for loss arising * * * without their fault or privity or without the fault or neglect of their agents, servants or employees.

Such fault or neglect however is not sufficient to disentitle the appellants from the benefit of the sections relating to the limitation of liability. The owners can claim the limitation provided the damage or loss was caused without their own actual fault or privity. In the case of a corporation such as the appellant, the fault or privity must be that of (in the words of Viscount Haldane L.C. in *Lennard's Carrying Company Limited* v. *Asiatic Petroleum Company Limited* (1)).

> somebody for whom the company is liable because his action is the very action of the company itself.

But it should not be forgotten that, in proceedings under sections 503 of the *Merchant Shipping Act* or 903 of the *Canada Shipping Act*, the owner is claiming a limitation of his liability; and it is for him to show affirmatively that the damage or loss happened without his actual fault or privity. It is for him so to speak, to exculpate himself (as distinguished from his servants or employees) from the responsibility for the loss or damage in repect of which he claims the limitation. The onus is upon him to show that there was no fault or privity of his own. He must bring himself within the exception (*Lennard's Carrying Company Limited* v. *Asiatic Petroleum Company Limited* (1); *Corporation of the Royal Exchange Assurance of London* v. *Kingsley Navigation Company Limited* (2)).

In the case now under consideration, the *Sarniadoc* was not equipped with shifting boards; and it is clear that if the use of these boards was the only means of preventing the cargo from shifting, the failure to supply the boards would have involved the direct responsibility of the owner.

(1) [1915] A.C. 705, at 713. (2) [1923] A.C. 235.

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Supplementary evidence made before the local judge in admiralty was directed to prove, however, that the cargo could have been loaded without any danger of shifting notwithstanding the absence of the shifting boards. This allegedly safe method of loading without the boards was not the method adopted by the master of the *Sarniadoc,* nor the practice followed by him on this or on previous occasions—a practice sufficiently established in the evidence, referred to both by the Superior Court and the Privy Council in their judgments in the first action and held to have been bad and defective, indeed to have made the ship unseaworthy and to have been "the real cause of the loss."

Now, it is the well defined duty of the owner to exercise due diligence to make his ship in all respects seaworthy (Sec. 6 of c. 207 of R.S.C. 1927). A ship is not seaworthy, we repeat, if she is improperly loaded; and, as prescribed by sec. 452 of the *Merchant Shipping Act* (N.B.—Sec. 707 of the *Canada Shipping Act* contains similar dispositions)

> Where a grain cargo is laden on board any British ship, all necessary and reasonable precautions (whether mentioned in this Part of the Act or not) shall be taken in order to prevent the grain cargo from shifting;

and if these precautions have not been taken, not only the master of the ship and any agent of the owner who was charged with the loading of the ship or the sending of her to sea is liable to a fine, but the owner of the ship is also liable in the same fine

> unless he shows that he took all reasonable means to enforce the observvance of this (prescription) and was not privy to the breach thereof.

The law, therefore, contemplates a clear duty on the part of the owner to enforce the observance of the obligation to take all necessary and reasonable precautions in order to prevent a grain cargo from shifting.

In the present case, the appellant, owner of the *Sarniadoc,* has utterly failed to show it had taken any means to enforce the observance of the law in that respect. It did not attempt to exculpate itself, except in claiming that it had discharged its duty by supplying a ship properly equipped and appointing a certificated master.

We are unable to agree with that view of the owners' duty under the *Shipping Acts.* The words "actual fault or privity" includes acts of omission (*Royal Exchange*

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Assurance v. *Kingsley* (1)). The fact is that the responsible officials of the appellant company did not apply themselves to the point of precautions at all. Even before this Court, they took the stand that the question of loading the ship was one exclusively for the master and one with which they were not concerned. The trial judge found that no instructions were ever given by the company with regard to stowage of grain and that, in that respect, the company had been disregarding the law for years,

their practice consisting only in levelling off the grain in the hold, a practice which was known, or should have been known and not tolerated by the company.

We think these findings were supported by the evidence. The appellant could not relieve itself of its responsibility by claiming ignorance of the practice. It had means of knowledge which it ought to have used. In this case, the most that can be said is (to paraphrase the words of Lord Parmoor) that it did not avail itself of these means of knowledge. Its omission so to do was a fault, and, if so, "it is an actual fault, and it cannot claim the protection of the section" (*Corporation of the Royal Exchange* v. *Kingsley Navigation Company* (1)).

We think the trial judge rightly held that the appellant had not succeeded in bringing itself within the exception essentially required to obtain from the courts a limitation of its liability for the loss which occurred as a result of the stranding of the *Sarniadoc* on the 30th November, 1929. In our view the appellant has utterly failed to discharge the onus cast upon it of proving that the loss happened without its actual fault or privity.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Weldon & Lynch-Staunton.*

Solicitors for the respondents: *Brown, Montgomery & McMichael.*

(1) [1923] A.C. 235, at 245.

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* Feb. 8, 11.
* Mar. 18.

SWARTZ BROS. LIMITED AND ANOTHER (DEFENDANTS) ..... } APPELLANTS;

AND

AUGUST WILLS (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Motor vehicle—Collision—Damages—Intersection of streets—Right of way—Liability—Statute—Interpretation—The Highway Act, B.C., 1930, c. 24, s. 21.

The respondent, who was driving his car north on Blenheim street in Vancouver, on reaching 14th avenue, looked to his right and saw the appellant's truck about 100 feet away from the intersection and coming towards it. He proceeded to cross the intersection and when nearing the opposite side the rear of his car was struck by the appellant's truck. The driver of the truck testified that he looked to his left, the direction from which the respondent approached the intersection, at a point about 50 feet east of Blenheim street, and did not see the respondent's car. He then looked to his right and did not look again to his left until he had proceeded some distance in the intersection. He then saw the respondent's car at a point just inside the intersection limit and he immediately put on his brakes. The trial judge dismissed the action, but the majority of the Court of Appeal allowed the respondent damages for an amount of $5,663.40. Section 21 of *The Highway Act*, B.C., 1930, c. 24, provides that "the person in charge of a vehicle so drawn or propelled upon a highway shall have the right of way over the person in charge of another vehicle approaching from the left upon an intercommunicating highway and shall give the right of way to the person in charge of another vehicle approaching from the right upon an intercommunicating highway; but the provisions of this section shall not excuse any person from the exercise of proper care at all times."

Held that, upon the evidence, the respondent's action should be dismissed. There is no ambiguity or obscurity in the language of section 21 of *The Highway Act;* the driver approaching an intercommunicating highway is bound to keep a lookout for drivers approaching upon the right upon that highway and to make way for them, and, in doing so, a collision is not only improbable, but hardly possible. The respondent in this case failed in this duty and such neglect of duty was the direct cause of the collision.

Per Duff C.J.—The plain and unmistakeable words of a statute should not be glossed by paraphrases based upon surmises or suppositions as to the purpose of the legislature.

Judgment of the Court of Appeal (49 B.C.R. 140) rev.

* PRESENT:—Duff C.J. and Lamont, Cannon and Davis JJ. and Dysart J. *ad hoc.*

1935

SWARTZ v. WILLS.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), reversing the judgment of the trial judge, Fisher J., and maintaining the respondent's action for $5,663.40 damages.

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

C. W. Craig K.C. for the appellant.

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

DUFF C.J.—I concur with Mr. Justice Cannon.

The statute we have to apply is in these words:

> 21. The person in charge of a vehicle so drawn or propelled upon a highway shall have the right of way over the person in charge of another vehicle approaching from the left upon an intercommunicating highway, and shall give the right of way to the person in charge of another vehicle approaching from the right upon an intercommunicating highway; but the provisions of this section shall not excuse any person from the exercise of proper care at all times. (*The Highway Act*, Stats. of B.C., 1930, ch. 24).

I can perceive no ambiguity or obscurity in this language. The driver approaching an intercommunicating highway is to keep a lookout for drivers approaching upon the right upon that highway and to make way for them. If everybody does this a collision is not only improbable, it is hardly possible. The respondent failed in this plain duty. This neglect of duty was the direct cause of the collision. The learned trial judge has, in effect, so found the facts. There is not the slightest ground for disagreeing with him.

I must add, I feel, that to gloss the plain and unmistakeable words of a statute, by paraphrases based upon surmises or suppositions as to the purpose of the legislature, is, in my humble view, a rash procedure.

The appeal should be allowed and the judgment of the trial judge restored with costs throughout.

The judgment of Lamont, Cannon, Davis JJ. and Dysart J. *ad hoc* was delivered by

CANNON J.—This appeal is submitted from the judgment of the Court of Appeal for British Columbia which, by a majority, reversed the judgment on the trial of Fisher, J.,

(1) (1934) 49 B.C. Rep. 140.

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by which plaintiff's action to recover damages in respect of injuries suffered as a result of a collision between two motor vehicles at a street intersection in Vancouver was dismissed. Macdonald, C.J.B.C., and McPhillips and McQuarrie, JJ.A., allowed the appeal and gave judgment for $5,663.40. Martin, J.A., and Macdonald, J.A., dissented, the first being of opinion that the accident was caused solely by the negligence of the plaintiff; and the second learned justice thought that both plaintiff and defendants were negligent and that the defendants' negligence contributed to the accident to the extent of 40%.

The collision occurred on the 2nd of January, 1934, at the intersection of 14th avenue west and Blenheim street, in the city of Vancouver, at about 12.30 o'clock in the afternoon. The respondent was driving a Nash coach northerly along Blenheim street. The defendant Hudson, in the employ of Swartz Bros. Ltd., was driving his truck westerly along 14th avenue.

According to the plan, both streets are equal in measurements as between street boundary lines, as to width of sidewalk and boulevard allowance, and width of roadway. Each street is sixty-six feet wide between boundary lines. The portion thereof used for sidewalk and boulevard on each street is approximately 20 feet on each side of the roadway; the roadway of each street is 27 feet wide. There are no stop signs at or against either street at this intersection.

At the time of the collision, it was raining and the streets were wet. When the respondent, who was driving at a speed of about twenty miles per hour, reached a point approximately twenty feet from the southerly curb stone of 14th avenue west, he slowed down to an estimated speed of fifteen miles per hour and looked to his right, where he saw the motor truck of the appellants which, he says, was about 100 feet back from the easterly curb stone of Blenheim street and was not proceeding at a dangerous rate of speed. The plaintiff then looked to his left and then to his front, accelerated his speed to proceed across the intersection and was proceeding at the rate of approximately twenty

(1) (1934) 49 B.C. Rep. 140.

miles an hour at the moment of the impact. The defendants' truck approached the intersection at a rate of speed of between 20 and 25 miles per hour. The driver Hudson says that he looked to his left, the direction from which the plaintiff approached the intersection, at a point about fifty feet east of Blenheim street and did not see the plaintiff's car. He then looked to his right, northerly, up Blenheim street. There were some bushes which partially obstructed his vision in that direction. Hudson did not look again to his left until he had proceeded some distance in the intersection and passed the east boundary of Blenheim street. He then saw the plaintiff's car on Blenheim street at a point just inside the intersection limit. He immediately put on his brakes; but it was too late to avoid the accident. The application of the brakes so reduced the speed as to lessen the force of the impact.

Although the versions of the two eye witnesses of the accident differ in some respects, one must say, after a careful perusal of the evidence, that Hudson is a more satisfactory witness than Wills; and the learned trial judge seems to have accepted in the main the facts as recited by the driver of the truck and found that Hudson approached the intersection somewhat earlier than the plaintiff and that, on account of the difference in speed, both arrived at the intersection at the same time. Under those circumstances, it being admitted that there was no excessive speed on the part of the defendant Hudson, and the plaintiff approaching from his left, Hudson was entitled to the right of way. The learned trial judge found that the plaintiff did not keep a proper look out; that he should have seen the defendants' truck approaching and not have attempted to proceed across the intersection before it.

Section 21 of *The Highway Act*, statutes of British Columbia, 1930, ch. 24, is as follows:

> 21. The person in charge of a vehicle so drawn or propelled upon a highway shall have the right of way over the person in charge of another vehicle approaching from the left upon an intercommunicating highway, and shall give the right of way to the person in charge of another vehicle approaching from the right upon an intercommunicating highway; but the provisions of this section shall not excuse any person from the exercise of proper care at all times.

But it is urged that the plaintiff's motor car was struck on the side, at the rear, when six feet of the plaintiff's car

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was passed and clear of the path of the oncoming truck; that the position of the point of impact shows that plaintiff entered the intersection first and should have been allowed to proceed by the defendant Hudson.

The learned Chief Justice, on appeal, by comparing the distances between the different points shown on the map, on the basis that both parties were travelling at that time at the same rate of speed and continued to do so, found that Wills was about 20 feet within the intersection when Hudson reached the boundary line.

This, I believe, is erroneous, as the plaintiff admits that he increased his speed, while the defendant continued to travel at the same rate until he put on his brakes. It would, therefore, seem apparent that the plaintiff travelled a greater distance than the defendant after they entered the intersection, because they were not travelling at the same speed. As my brother Davis remarked during the argument, distances must be translated into time in order to determine what are the rights of the parties. During the argument, it was conceded that the differences in the measurements that were stressed before us, when translated into time, did not amount to more than a quarter of a second of time.

The clear fact emerging from the evidence is that plaintiff, although he had seen the truck approaching, disregarded the law giving to the defendant the right of way, speeded up his automobile and took a chance. Hudson, on the other hand, as soon as he saw the plaintiff, realized the danger at about 20 feet before the impact and put on his brakes. He had the right of way and was entitled to assume that plaintiff would follow the rule.

Lord Atkinson, in *Toronto Railway* v. *King* (1), said:

> * * * traffic in the streets would be impossible if the driver of each vehicle did not proceed more or less on the assumption that the drivers of all other vehicles will do what it is their duty to do, namely, observe the rules regulating the traffic of the streets.

Especially in a case where we have a clear cut statutory duty, it would take more than the unsatisfactory evidence of the plaintiff to set aside the rule and excuse his reckless action in crossing this intersection at an increased speed

(1) [1908] A.C. 260, at 269.

after he had seen the truck, by resorting to more or less reliable calculations of distances and of the respective speed of the two vehicles. From the time that he saw the defendants' truck, the plaintiff, after accelerating his speed and while crossing the intersection, paid no regard whatever to the defendants' truck, never looked at it again until he felt the force of the impact. If he had looked, he might have swerved to the left on that wide street and avoided the collision. He did nothing whatever to prevent the accident, although he says that he was travelling at such a rate that he could have stopped his car within fifteen feet just before entering the street, after he slowed down; and the only reason that he did not do so was that he did not see the defendants' truck which, he admits, he could have seen if he had looked again in that direction before starting to cross the intersection. He says:

Q. Now, then, I ask you again, don't you think that you looked to the right before you ever got to within 20 feet of the curb line?—A. I don't remember.

Q. You don't remember. In any event, almost immediately after you looked to the right you accelerated your speed, didn't you?—A. Yes.

Q. Yes. Now as a matter of fact, when you looked to the right, didn't you see the truck so close that you just had to try to beat it across the intersection?—A. No, it was far enough away that I thought I had time to cross.

Q. I see. You didn't change your course at all before the collision, did you? You just carried on in a straight line?—A. Yes, that is right.

* * *

Q. You did not sound your horn?—A. No.

Q. And you didn't apply your brakes before the collision?—A. No.

Q. In other words, you really didn't do anything at all to avoid the accident?—A. Well, I thought I would get across.

Q. You didn't do anything at all to avoid it, did you?—A. No, I had sufficient time to cross.

Q. Well, that is for his lordship to decide. I ask you just to answer yes or no. You didn't do anything at all to avoid this accident, did you?—A. No.

The only remaining question is whether the defendant, although he had the right of way, exercised proper care. Having observed, when he was 50 feet away from the intersection that there was no traffic approaching from his left, Hudson thought it his duty to watch for traffic on his right, to which he had to yield the right of way. He was entitled to expect that a northerly bound driver on Blenheim street, who had now reached a point 50 feet from the intersection, would keep a proper lookout and observe the rule of the

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road laid down by section 21 of *The Highway Act* above quoted. The presence of the bush obstructing his view to the right was sufficient reason for him to look more carefully and with more insistence in that direction to detect any vehicle which might have approached from there.

Where there is nothing to obstruct the vision and there is a duty to look, it is negligence not to see what is clearly visible. The respondent in this case admits that he did not see the truck after he started to cross. It was then clearly visible; and, unfortunately for the plaintiff, we must reach the conclusion that his injuries resulted from his own negligence in taking a chance to cross the intersection ahead of the truck which clearly had the right of way.

We, therefore, would allow the appeal with costs and restore the judgment of the trial court with costs throughout for the appellant.

Appeal allowed with costs.

Solicitors for the appellant: *Craig & Tysoe.*
Solicitor for the respondent: *W. H. Campbell.*

1935
*Feb. 19.

SAMPSON v. THE KING

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA *in banco*

Criminal law—Evidence—Written confession—Admissibility—Direction to jury.

APPEAL by the accused from a judgment of the Supreme Court of Nova Scotia *in banco* (1), Mellish and Carroll JJ. dissenting, affirming the judgment of the trial judge, Doull J., with a jury, by which the appellant was found guilty of murder.

The appellant was, after trial before a jury, convicted before Mr. Justice Doull of the murder of a young boy at Chain Lakes, Halifax county, on the 17th October, 1934,

*PRESENT:—Duff C.J. and Lamont, Cannon and Davis JJ. and Dysart J. *ad hoc*.

(1) (1934) 8 M.P.R. 328.

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and on the 20th of the same month sentenced to death on the 10th January, 1935.

On the appeal to this Court, after hearing argument of counsel, the Court delivered judgment dismissing the appeal.

Appeal dismissed.

D. K. MacTavish for the appellant.

J. H. MacQuarrie and *R. M. Fielding* for the respondent.

YIP SING AND OTHERS.....APPELLANTS;

AND

HIS MAJESTY THE KING.....RESPONDENT.

1935

* Apr. 30.
* May 1.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law—Assault—Conviction—Appeal—Motion before appellate court for leave to adduce new evidence—Dissenting opinion in the judgment dismissing motion—Conviction unanimously affirmed by appellate court—Whether appeal to Supreme Court of Canada—Section 1023 Cr. C.

The appellants were tried and convicted on a charge of assault occasioning actual bodily harm. On the hearing of their grounds of appeal before the Court of Appeal, the appellants moved also for leave to admit new evidence. This motion was dismissed by a majority of the Court of Appeal, two judges expressing dissenting opinions. Later on, the Court of Appeal rendered judgment affirming unanimously the conviction of the appellants; and such judgment contained also a paragraph mentioning the fact that dissenting opinions had been expressed by two members of the Court on the motion to adduce new evidence.

Held that the dissent in the Court of Appeal on the motion for leave to introduce new evidence is not a dissent of that Court against the affirmance of the appellants' conviction on a question of law within the meaning of section 1023 of the Criminal Code.

MOTION to quash an appeal from the judgment of the Court of Appeal for British Columbia, affirming the judgment of the trial judge, Lampman J., with a jury, by which the appellants had been convicted on the charge that they had unlawfully assaulted one Fong Chan Ten and thereby occasioned him actual bodily harm.

* PRESENT:—Lamont, Cannon, Crocket and Davis JJ. and Dysart J. *ad hoc.*

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

J. Nicholson for the appellants.

Gordon McG. Sloan K.C. for the respondent.

The judgment of the Court was delivered by

LAMONT J.—This is an appeal from a judgment of the Court of Appeal for British Columbia, dated the 8th day of January, A.D. 1935, affirming the conviction of the appellants by His Honour Judge Lampman in the County Court Judges' Criminal Court, in and for the county of Victoria, on the charge that they did, on the 3d day of March, 1934, unlawfully assault Fong Chan Ten and did thereby occasion him actual bodily harm.

The appellants were tried and the conviction was recorded on June 29, 1934. They each filed a notice of appeal to the Court of Appeal for British Columbia on several grounds.

On the hearing of the appeal the appellants moved the Court of Appeal for leave to admit the evidence of two witnesses, who were not called at the trial, and to set aside the conviction and order a new trial on the ground that even though the evidence adduced at the trial might have justified a finding of guilty, the evidence of these two new witnesses raised a doubt as to the appellants' guilt.

The motion to admit the new evidence was refused, on the 29th of October, 1934, by the Court of Appeal, McPhillips and M. A. MacDonald, JJ.A., dissenting. But the conviction was not affirmed until the 8th of January, 1935. The formal judgment of the court affirming the conviction, after properly reciting what had taken place, contains the following:—

> And this Court having ordered, on the 29th October, 1934, that the motion to set aside the conviction and order a new trial on the ground of the discovery of the new evidence, be dismissed, * * * and this Court having directed that this appeal do stand for judgment and upon the same coming on this day for judgment the Court doth order and adjudge that the appeal be and the same is hereby dismissed and the conviction affirmed.

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Lamont J.

There was no dissenting judgment to the affirmance of the conviction, but the formal judgment contains this paragraph:—

> The Honourable Mr. Justice McPhillips and the Honourable M. A. MacDonald dissented from the judgment of this Court on the motion to set aside the conviction and order a new trial on the ground of the discovery of the new evidence.

It is upon these disenting judgments on the motion to admit new evidence that the appellants claim a right to appeal to this Court under section 1023 of the Criminal Code, which provides that any person convicted of any indictable offence, whose conviction has been affirmed by an appeal taken under section 1013, may appeal to the Supreme Court of Canada against the affirmance of such conviction on any question of law on which there has been dissent in the Court of Appeal.

We are all of opinion that the dissent in the Court of Appeal on the motion for leave to introduce new evidence is not a dissent against the affirmance of the appellants' conviction on a question of law within the meaning of section 1023.

This Court has therefore no jurisdiction to entertain the appeal. *Rex* v. *Boak* (1).

The motion to quash will therefore be granted.

Appeal quashed.

SHOPRITE STORES AND ANOTHER (DEFENDANTS) ..... } APPELLANTS;

AND

ROBERT W. GARDINER (PLAINTIFF)...RESPONDENT.

1935

*Feb. 11, 12.

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

Appeal—Practice and procedure—Jury trial—Misdirection—Ground of appeal not stated in the notice of appeal to appellate court—Rule 323 of Alberta—Such ground not open before the Supreme Court of Canada.

Where one of the grounds of appeal to this Court is misdirection by the trial judge in his charge to the jury, such ground should have been stated with reasonable definiteness in the notice of appeal to the

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* PRESENT:—Duff C.J. and Lamont, Cannon and Davis JJ. and Dysart J. *ad hoc.*

(1) [1925] S.C.R. 525.

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appellate court in accordance with rule 323 of Alberta; and if appellant has failed to do so, such ground of appeal will not be open to him in this Court.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta, affirming the judgment of the trial judge, Tweedie J., with a jury and maintaining the respondent's action for damages.

The respondent was a butcher by trade and was employed as such by the appellants in June, 1931. He was dismissed from his employ in August, 1932. The appellant Libin, owner of the Shoprite Stores, in September of the same year, sent to his clientele a circular letter, in which he stated *inter alia* that he had decided to dispense with the respondent's services "because Mr. Gardiner did not conduct the meat department in a sanitary way." The respondent, alleging that these statements were false and malicious, brought an action for libel against the appellants. The trial judge with a jury, maintained the action for $2,000 general damages and $100 special damages, which judgment was unanimously affirmed by the appellate court.

J. B. Barron for the appellants.

O. M. Biggar K.C. and *M. B. Gordon* for the respondent.

The judgment of the Court was delivered orally by

DUFF C.J.—Mr. Barron has, as usual, prepared his case with great industry and has, no doubt, said everything that could be said in support of his client's appeal. Nevertheless, we have had an opportunity of examining the evidence with care and we have come to the conclusion that it is not necessary to call on counsel for the respondent.

We agree with the view of the pleadings taken by the Appellate Division.

As regards the other matters, we do not think it necessary to say whether we do or do not concur with the view of Mr. Justice Tweedie that the publication of the libellous matter—of the libellous communication—to the customers of the meat market would, in the absence of proof of express malice, be protected as privileged communication. All that is necessary to say is that we are quite clear that the appellant has no ground to complain against the ruling of the trial judge on that point.

Then, as to misdirection; first, in respect of privilege. There again we are quite satisfied that the appellant has no ground for complaint. In some respects it may be that matters were put to the jury rather more favourably to him than he was entitled to require.

As to express malice,—when the charge is read as a whole, we think the jury could have been under no misapprehension as to the meaning of the learned trial judge. We think he made it quite clear to them that they must be satisfied of the existence of express malice in order to escape the result of his ruling as to privilege.

There are some other matters of misdirection in respect to which it will be necessary to mention only two. One concerns the plea of justification. The complaint there is that the jury were not told that they might find upon that issue favourably to the appellant, upon circumstantial evidence alone. It is quite clear to us that if a direction of that kind was desired counsel ought to have asked for it.

In addition to that, no complaint was made in respect of any such misdirection in the notice of appeal. We have no doubt that, where one of the grounds of appeal is misdirection, under rule 323, the misdirection must be stated with reasonable definiteness in the notice of appeal. In these circumstances, we consider that particular ground is not open in this Court.

The other matter in respect of which misdirection is charged—the only other matter requiring notice by us—is what the learned trial judge said at the conclusion of his charge upon the failure of the defendant to establish his plea of justification as being something which the jury might take into consideration as matter in aggravation of damages. There again the learned judge's attention was not called to the inaccuracy of his language, and there, also, the matter now complained of is not mentioned in the notice of appeal. In the circumstances, that ground also is not open here.

In the result, we think the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellants: *A. L. Barron.*

Solicitor for the respondent: *J. McKinley Cameron.*

1935
*Oct. 8.

LUCIEN ALBERT (PLAINTIFF)..... APPELLANT;

AND

THE ALUMINUM COMPANY OF CANADA LIMITED (DEFENDANT).. } RESPONDENT.

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

Appeal—Findings of facts by trial judge—Concurred in by appellate court—Onus upon appellant to show errors of courts below.

When, on an appeal to this Court, the findings of facts of the trial judge have been concurred in by the appellate court, this Court will not interfere unless the appellant establishes that the courts below were clearly wrong in the manner in which they disposed of the issues of law or facts raised in the appeal.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec, affirming unanimously the judgment of the trial judge, Marchand J., and dismissing the appellant's action with costs.

The appellant claimed the sum of $23,900 as damages for an illness which he alleged he contracted whilst in the employ of the respondent, between May and September, 1929. The appellant's claim was that his disease (Bright's disease in chronic form) had been caused by his having absorbed gases in respondent's establishment in Shawinigan Falls, and he attributed it to a number of alleged defects in respondent's establishment, absence of or defect in ventilation, faulty handling of material, absence of masks or breathing apparatus, absence of instructions on the dangers, excessive heat, too long hours of work exceeding appellant's and other workmen's strength, exposure to cold after intense heat, bad quality of drinking water, use of metals causing undue danger. The appellant alleged that a great many other workmen who were employed in respondent's establishment became ill as a result of the conditions existing there and that he was suffering permanent incapacity. The respondent pleaded that, if the appellant was affected by any disease, it was not caused by any noxious substances emanating from the metals that he was handling or that were being treated in the company's workshops, but that

*PRESENT:—Duff C.J. and Rinfret, Cannon, Crocket and Kerwin JJ.

his state of health was weak for a long time previous to his employment; that his illness was due to causes absolutely foreign to the work that he performed for the respondent or the things that the respondent had in its care; that many men employed by the respondent remained in its employ for a great many years without suffering any ill-effect, that its establishment was operated in accordance with the law respecting industrial establishments and the law respecting hygiene for the province of Quebec; that its process of manufacture was most modern; that its operations were carried on according to the rules of art and that its establishment was kept in healthy and sanitary conditions, considering the kind of production that has to be done by the respondent; that in the remelting department where the appellant worked there were no gases or metallic evaporation which could cause the illness of which he complained and that the working conditions in that department were normal; that previous to his employment by the respondent, the appellant was in a poor state of health; that he had been weak for many years and suffered from earache; that the disease (Bright's disease) affecting the appellant was not caused by his working conditions when employed with the respondent.

The appellant's action was dismissed by the trial judge, Marchand J., who delivered elaborate reasons for judgment dealing with all the facts of the case; and the judgment was unanimously affirmed by the appellate court.

Louis A. Pouliot K.C. for the appellant.

J. A. Prud'homme K.C. and *Léon Girard* for the respondent.

On the appeal to this Court, after hearing argument of counsel for the appellant, without calling upon the respondent's counsel, the Chief Justice delivered orally the judgment of the Court.

DUFF C.J.—We think, Mr. Prud'homme, it is unnecessary to call upon you. We have had some opportunity of looking into the appeal since it was opened yesterday afternoon and have had the advantage of a very exhaustive and able argument by Mr. Pouliot in which, we are quite

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ALBERT v. ALUMINUM CO. OF CANADA LTD.

Duff C.J.

satisfied, everything that reasonably could be said has been said in support of the appeal.

The appellant's case is put upon article 1054 C.C. as well as on article 1053 C.C. Mr. Pouliot, with frankness and candour, agrees that, in every respect of the case, the onus was upon the plaintiff (now the appellant) to establish causal relation between the faults of the respondents or the plant or something under the care of the respondents and the malady from which the appellant suffers and in respect of which he claims reparation.

The learned trial judge found, not only that the appellant had not acquitted himself of the onus upon him in respect of this issue, but he found that, in fact, the causal relation did not exist. The Court of King's Bench confirmed that finding by the declaration in its formal judgment that there was no error in the judgment of the Superior Court.

In this Court, in view of the concurrent findings of the courts below, we are not called upon to say what we should have done if one of us had been sitting in the place of the trial judge. We say nothing whatever about that. The onus was upon the appellant to establish that the courts below were clearly wrong in the manner in which they disposed of the issue, and, in order to do that, it is necessary that something should be pointed out that is definitely wrong in what they did. Our attention has not been called to any error of law, to any error with respect to the burden of proof, to any material misapprehension of the effect of the evidence, and we are satisfied that, on the whole, this is a case in which we could not properly interfere.

The appeal will be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *Louis A. Pouliot.*

Solicitors for the respondent: *Bigué, Gouin, Girard & Provencher.*

C. G. GRIMALDI (PLAINTIFF).....APPELLANT; 1935

AND

SYDNEY D. PIERCE (DEFENDANT).....RESPONDENT.

* Oct. 7.
* Nov. 7.

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

Sale—Bankruptcy—Deed of sale—Void after bankruptcy—Agreement by trustee with conditions—Whether legal—Duty of the trustee—Section 43 of the Bankruptcy Act—Articles 2058, 2061 C.C.

The appellant brought a petitory action against the respondent for the recovery of an immovable known as the Lord Renfrew Apartments. In September, 1930, the respondent was owner of those apartments and, as security for the loan of $150,000 made to him at that time he hypothecated the apartments in favour of Canada Permanent Mortgage Corporation. The sum of $150,000 was repayable in capital and interest, in equal monthly instalments of $1,300.50 each. A short time later, the apartments were sold by the respondent to the appellant for the sum of $27,851.57 and the deed of sale provided that the purchaser would not be personally responsible for the amount of the hypothec. The appellant was in possession of the property for about a year, when financial difficulties intervened. He did not pay the monthly instalments due to the Mortgage Corporation for some months and allowed municipal taxes to accrue. Finally, he went into bankruptcy. The Mortgage Corporation pressed for payment; and the trustee and inspectors of appellant's bankrupt estate, unable to raise funds or secure a purchaser for the property, secured permission from the Court to sell the property under the formalities of the *Bankruptcy Act* and placed advertisements for its sale in the Quebec *Official Gazette*. The charges against the property at that time consisted of a balance of the loan then in excess of $140,000, the indemnity of 6 per cent due to the lender in case of a forced sale, the taxes due to the city of Montreal of approximately $10,000, the taxes to the Provincial Government of $4,000 and the fees and commission due to the solicitor for the bankrupt estate and the trustee. The trustee valued the property at $360,000, but, being of the opinion that the time was not opportune for a sale in view of the condition of the real estate market and fearing that any equity for the estate would be lost if a forced sale took place, he attempted to secure a delay from the Mortgage Corporation for a period of approximately one year, when he hoped that a more receptive market might be found. Following negotiations, an agreement was reached on March 4, 1932, whereby the Mortgage Corporation gave to the trustee an extension of approximately one year for repayment of the past due portion of the loan. This agreement was made possible by the intervention of respondent who would have been responsible for any deficiency between the sale price of the property and the charges thereon. By the agreement the respondent paid to the Mortgage Corporation the arrears of capital and interest on the loan and also paid the arrears of taxes, the fees and expenses of the trustee and

* PRESENT:—Duff C.J. and Rinfret, Cannon, Crocket and Kerwin JJ.

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solicitors and other incidental expenses. The conditions of the agreement were that the respondent should hold and administer the property until January 25, 1933, but that on that date, or any time prior thereto, the trustee of the appellant's bankrupt estate or his nominee would have the right to resume possession of the property and to keep title by repaying the respondent's disbursements and assuming payment of the debt to the Mortgage Corporation. If the trustee or his nominee failed to do this within the stipulated delay, the property was to be vested in the respondent. The arrangement of the 4th of March, 1932, was previously approved by the inspectors of the estate, and the trustee was authorized to sign the agreement by the registrar in bankruptcy. The appellant was made aware of the negotiations and was informed of the trustee's intention to enter into such agreement. Subsequently the appellant succeeded in having a proposal of composition accepted by his creditors and approved by the bankruptcy court. On the 31st of May, 1932, he secured his discharge, the receiving order was cancelled and the court further ordered that all of the appellant's assets, including any equities of redemption and the interest of the appellant in any property then vested in the trustee, should be returned to him. The trustee re-transferred to appellant his assets and included in the transfer the Lord Renfrew Apartments. On the 27th of July, 1932, and again on the 22nd of November, 1932, the appellant made attempts to comply with the conditions of the agreement of the 4th of March, 1932, and on the latter date the appellant's lawyers wrote to the respondent asking him to furnish them immediately a statement of all disbursements made by him. The respondent answered that he was forwarding such an account to a firm of lawyers who under the agreement had been constituted respondent's attorneys. On January 20, 1933, the appellant instituted a petitory action against the respondent, claiming back the apartments as owner, invoking no other title than the original deed of sale from the respondent to him, dated the 26th of November, 1930. The delay accorded to the trustee or his nominee to retake possession of the property upon repayment of the respondent's disbursements would have expired on the 25th day of January, 1933, or four days after the service of the action. Before the date fixed for the respondent's appearance, the time allowed for repossession of the property by the trustee or his nominee had expired.

Held that the appellant's action should be dismissed. The title deriving to the appellant from the deed of sale of the 26th of November, 1930, ceased to have any effect in his favour from the moment that, by force of the bankruptcy order, the Lord Renfrew Apartments became vested in the trustee; and, by the agreement of the 4th of March, 1932, the respondent became the absolute owner of the apartments, unless, under its terms, the trustee, or his nominee, rendered that agreement of no effect as regards the respondent by complying with the several conditions therein stipulated up to and including the 25th day of January, 1933, or unless the agreement so made between the trustee and the respondent can be set aside on the ground of fraud (and no fraud had been alleged) or illegality. The trustee, or his nominee (the appellant) have never complied with the terms and conditions required to render the agreement of no effect.

Moreover, the agreement of the 4th of March, 1932, was not illegal, as the trustee had the power, under section 43 of the *Bankruptcy Act*, with the permission in writing of the inspectors, to enter into such

agreement. It was the trustee's duty to do everything in order to maintain for the estate any equity that it ought to have in the apartments and to preserve, as far as possible, the rights of the bankrupt estate in that property. The hypothecary claim against the appellant, or his trustee, and its consequential result under articles 2058 and 2061 of the Civil Code may well be regarded as a "claim out of, or incidental to, the property of the debtor made or capable of being made on the trustee by any person" with respect to which the trustee is empowered by subsection (*i*) of section 43 of the *Bankruptcy Act*, with the permission in writing of the inspectors, to "make such *compromise* or other arrangement as may be thought expedient."

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec, reversing a judgment of the Superior Court, De Lorimier J. and dismissing appellant's petitory action.

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

T. Brosseau K.C. for the appellant.

J. L. O'Brien for the respondent.

The judgment of the Court was delivered by

RINFRET J.—The appellant was adjudged bankrupt and a receiving order was made against him on the 24th day of December, 1931. One Frederick Henry Pope was in due course appointed trustee of the bankrupt estate.

Among the assets of the appellant which passed to and vested in the trustee was the apartment house known as "Lord Renfrew Apartments," together with the land on which it was erected.

The appellant had acquired the property in question through a deed of sale from the respondent, dated the 26th November, 1930, for the price of $27,851.57, and for the further consideration that he would pay all taxes and assessments imposed upon the property from the 1st day of September, 1930, as well as his proportion from said date of all taxes for the current year. It was declared in the deed

that said property is affected by a first hypothec of $150,000 in favour of Canada Permanent Mortgage Corporation, under the terms of the deed registered at said registry office under no. 256430, payment whereof is not assumed by the purchaser (Grimaldi).

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The hypothec so declared was the result of a deed of loan by Canada Permanent Mortgage Corporation to the respondent payable in 180 monthly instalments of $1,300.50 each on the twenty-fifth day of each month, during a term of fifteen years, the first of such instalments to be paid on the twenty-fifth day of September, 1930. The hypothec was to secure the reimbursement of the loan and of the instalments, together with any overdue interest. Among other conditions in the deed of loan, it was provided that, in case of default on the part of the borrower to pay the taxes on the property, or to pay the instalments in reimbursement of the loan, or to fulfill any of the conditions stipulated in the deed, the Mortgage Corporation could, if it chose,

> exact the amount of the loan with all interests then accrued; and this without any demand or notice being necessary.

Further, the borrower was to pay all fees, legal and notarial, in respect of the loan and all registration fees.

At the date of the appellant's bankruptcy, default had been made in the payment of several instalments due to the mortgage corporation and also in the payment of taxes and assessments due to the city of Montreal in respect of the property on the 1st October, 1930, and on the 1st October, 1931. It follows that, then and there, Canada Permanent Mortgage Corporation had the right to exact the payment of the full amount of the loan and to bring against the appellant, or subsequently against the trustee of the bankrupt estate, an hypothecary action in enforcement of its claim, or, in default of payment thereof, to compel the surrender of the property, in order that it may be judicially sold.

The respondent was advised by the trustee and by the Mortgage Corporation that the property was threatened with sale. This appeared agreeable to him as the best way out of the situation. However, the trustee and the inspectors for the estate represented to him that they could save the equity of the estate in the property if a judicial sale could be avoided and if he could give them some opportunity to find a purchaser. They had endeavoured to find one who would assume the property for the arrears of mortgage and arrears of taxes, but had been unable to do

so, nor had they been able to borrow the money required. "After a tremendous amount of negotiations," and as "the outcome of interviews proceeding perhaps for weeks or months," the respondent finally consented to take over the administration of the property upon the terms that he would immediately pay to the Mortgage Corporation the arrears of capital and interest owing under the deed of loan, and assume to the exoneration of the trustee all taxes affecting the property. He was also to discharge forthwith certain legal and notarial fees and disbursements, as well as the trustee's fee of $2,000.

As a consideration for these payments and the obligations thus assumed by him, the respondent was to receive $1,000 a year for the administration of the property; and a conditional sale was made to him, to take effect on the 25th of January, 1933, upon which date he would become absolute owner, provided the trustee, or his nominee, had not before then reimbursed to him all disbursements

> on account of interest, taxes, capital, or for repairs or improvements of the property, or the general administration or maintenance thereof,

including the legal and notarial charges paid by him, and in general all *bona fide* out of pocket expenses.

The agreement to the above effect was signed on the 4th March, 1932, between Canada Permanent Mortgage Corporation, the respondent Pierce and the trustee Pope. The document was duly registered on the 12th of May, 1932.

Mr. D. McKenzie Rowat, notary public of Montreal, representing the mortgage corporation, when giving evidence, summed up the situation as follows:

> My opinion was that it was absolutely in good faith, and a concession by us in favour of Mr. Grimaldi, who had defaulted. We could have foreclosed the mortgage at once, but instead of doing that we gave him months, or a year or something of the kind, to redeem it. He owed us. We were collecting the rents. We had power under our mortgage to collect the rents in default of payment of interest. So we thought, and it was clearly understood by all the inspectors at a round table conference which lasted the whole day (at which the solicitor here present was representing some of the parties). There were three or four lawyers there, and myself, and two notaries, and we worked all day on it. It was admitted by everybody that we were making a concession saving Mr. Grimaldi by giving him until January 25, 1933—nearly a year. We could have foreclosed, and cleaned him right out. He was insolvent, and we could have rushed the thing right through and wound it up, but we said: "We will give you nearly a year more to redeem."

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That was the sum and substance of the transaction, and everybody felt we were acting in good faith and in the common interest of everybody.

And the trustee adds:

As I saw it, it seemed to me it would give the estate an opportunity of approximately one year in which to sell the property and to get an equity out of it for the benefit of the creditors.

The arrangement of the 4th March, 1932, was previously approved by the inspectors of the estate, two of whom were lawyers, one a banker, another a real estate operator, and the fifth one a very large creditor. The trustee was authorized to sign the agreement by the registrar in bankruptcy.

The appellant was made aware of the negotiations and was informed of the trustee's intention to enter into the agreement. He was told

It was a question of either signing that agreement or allowing the Canada Permanent Mortgage Corporation to go ahead and foreclose. There was no other alternative.

He made no objection to it. As a matter of fact, he was present at a meeting of the inspectors on March 8, 1932, and then stated

that if the assets were sold, the estate would realize nothing.

On March 11, 1932, in a general letter addressed to the creditors, the trustee stated as follows:

As to the assets we may say that the Lord Renfrew Apartments have been turned over to Mr. A. S. Pierce, in consideration of him paying the arrears of taxes, interest, etc., with the rights of redemption of the property to the estate within one year, which means if we can sell over and above the mortgage and moneys advanced the estate can repossess it immediately at the time of sale, otherwise at the expiration of one year, the ownership will be vested in Mr. Pierce.

The subsequent events were that the appellant Grimaldi succeeded in having a proposal of composition accepted by his creditors and approved by the bankruptcy court. On the 31st of May, 1932, he secured his discharge; the receiving order was annulled and it was ordered

that all the assets of the said debtor (Grimaldi), including any equities of redemption and the interest of the debtor in any property now vested in the said Fred. H. Pope, shall be vested in the debtor, his heirs and assigns.

On the 27th of July, 1932, and again on the 22nd of November, 1932, he made attempts to comply with the conditions of the agreement of the 4th of March; and, declaring that he was

desirous to exercise the rights confirmed to him through Pope by the above deed which shall expire on the 25th day of January, 1933, and

retake possession of said property upon paying (the respondent Pierce) the above charges as mentioned in art. VII of said deed of agreement, he wrote to the respondent asking him to furnish immediately a statement of all disbursements made by him on account of interests, taxes, capital, or for repairs or improvements to the property, or the general administration or maintenance thereof, including any expenses whatsoever relating to the Lord Renfrew property, and including in particular the legal and notarial charges * * * , and in general all *bona fide* out of pocket expenses, and all the rentals which you may have collected during possession of the above property Lord Renfrew.

The appellant was told that Mr. Pierce had not yet been notified by the trustee that the latter had assigned his rights to anyone, or that the appellant had obtained his discharge, but that, at all events, the respondent was having an account prepared of all the amounts disbursed by him during his administration of the property and was forwarding this to a firm of lawyers who, under the agreement of the 4th March, 1932, had been constituted the irrevocable attorneys of the respondent. Nothing further appears to have been done by the appellant until, on the 20th day of January, 1933, he brought this action asking that, by the judgment to intervene, he be declared the owner of the Lord Renfrew Apartment, invoking no other title than the original deed of sale from the respondent to him, dated the 26th of November, 1930, and ignoring altogether the other events (including his bankruptcy) and the subsequent agreements which had taken place in the meantime. The judges of the Court of King's Bench unanimously dismissed the action of the appellant, on the ground that the respondent had legally become the owner of the Lord Renfrew Apartment through the agreement made between him, the Canada Permanent Mortgage Corporation and the trustee Pope, on the 4th day of March, 1932; and the appellant has failed to convince us that he was entitled to succeed in his appeal from that judgment.

It is quite evident that the title deriving to the appellant from the deed of sale of the 26th November, 1930, which is the sole title invoked by him in his petitory action, ceased to have any effect in his favour from the moment that, by force of the bankruptcy order, the Lord Renfrew Apartments became vested in the trustee.

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It is also evident that, by the agreement of the 4th of March, 1932, the respondent became the absolute owner of the Lord Renfrew Apartments, unless, under its terms, the trustee, or his nominee, "rendered that agreement of no effect" as regards the respondent by complying with the several conditions therein stipulated "up to and including the 25th day of January, 1935," or unless the agreement so made between the trustee and the respondent can be set aside on the ground of fraud or illegality.

The trustee, or his nominee (the appellant), have never complied with the terms and conditions required to render the agreement of no effect.

Although fraud was alleged, none was entertained either by the Superior Court or by the Court of King's Bench; and none was proven.

As for illegality, we are of opinion that the trustee had the power, under section 43 of the *Bankruptcy Act,* with the permission in writing of the inspectors, as was done in this case, to enter into the agreement in question.

It was the trustee's duty to do everything in order to maintain for the estate any equity that it might have in the Lord Renfrew Apartment and to preserve, as far as possible, the rights of the bankrupt estate in the said property.

It is true that the appellant had not assumed personally the payment of the loan of $150,000, to secure which the property was affected by a first hypothec. If the appellant, or the trustee, were willing to surrender the property, there would be no personal liability on their part; but as long as they wished to hold it and enjoy the revenue thereof, they had to make the payment of the instalments as they became due. The appellant was fully aware of this obligation on his part and, as a matter of fact, he had made the payments to the Mortgage Company up to the time when his insolvency prevented him from continuing.

The Canada Permanent Mortgage Corporation had against the appellant, or his trustee, an hypothecary action to enforce its claim. The appellant, and subsequently his trustee, held as proprietors the immoveable hypothecated for that claim (Art. 2058 C.C.) and

The object of the hypothecary action is to have the holder of the immoveable condemned to surrender it in order that it may be judicially sold, unless he prefers to pay the debt in principal, interests as secured by registration, and costs. (Art. 2061 C.C.).

The claim against the appellant, or his trustee, and its consequential result under articles 2058 and 2061 of the Civil Code may well be regarded as a

claim arising out of, or incidental to, the property of the debtor, made or capable of being made on the trustee by any person.

with respect to which the trustee is empowered by subsection (*i*) of section 43 of the *Bankruptcy Act,* with the permission in writing of the inspectors, to

make such *compromise* or other arrangement as may be thought expedient.

In our view, the agreement of the 4th March, 1932, was such an arrangement.

In the premises, the trustee got the permission of the inspectors and the authorization of the registrar, as provided for by section 159 of the *Bankruptcy Act* and sections 4 and 5 of the Bankruptcy Rules. The attack, on the ground of illegality, made upon the deed of agreement of the 4th of March, 1932, therefore, fails, and the appeal should be dismissed with costs.

We reach that conclusion quite independently of the argument made by the respondent that, under all the circumstances, the appellant fully acquiesced in the arrangement, and in such a manner as to preclude him from disputing the validity thereof—an argument in regard to which the appellant was certainly unable to find a satisfactory answer.

Appeal dismissed with costs.

Solicitors for the appellant: *Brosseau & Brosseau.*
Solicitors for the respondent: *Audette & O'Brien.*

1935
*June 13.

THE ST. VINCENT DE PAUL CHILDREN'S AID SOCIETY OF TORONTO *v.* SPENCE

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Infant—Custody—Child placed by unmarried mother with a Children's Aid Society, and placed by it in care of defendants—Defendants failing to observe agreement to bring up child in Roman Catholic faith—Child never made a ward of the Society—Issue between Society and defendants to determine right to child's custody—Children's Protection Act, R.S.O. 1927, c. 279.

An unmarried mother of an infant placed him, shortly after his birth, with the plaintiff, a Children's Aid Society approved as such under the *Children's Protection Act*, R.S.O. 1927, c. 279, and the plaintiff placed him in the care of defendants on the agreement that the child should be brought up in the Roman Catholic faith, which agreement the defendants did not observe. When the child was about ten years old, the present action was tried to determine who was entitled to custody of him. The child had never been made a ward of the plaintiff. Kingstone J., and the Court of Appeal for Ontario (by a majority) held in favour of defendants. On appeal to this Court:

Held: (1) The appeal should be dismissed; under said Act the plaintiff had not a legal right to call upon the court *ex debito justitiæ* to deliver to it the custody of the child; and this Court saw no reason to disagree with the views expressed in the Courts below that it was not in the child's interests to deprive defendants of custody of him.

APPEAL by the plaintiff from the judgment of the Court of Appeal for Ontario (1) dismissing (Latchford C.J. dissenting) its appeal from the judgment of Kingstone J.

By an order made in the Supreme Court of Ontario by McEvoy J. on October 18, 1932, it was directed that an issue be tried to determine the party entitled to the custody of the infant in question.

The issue was tried before Kingstone J. who held that the defendants were entitled to the custody of the infant.

The plaintiff is a Society approved by the Lieutenant-Governor in Council as a Children's Aid Society under the provisions of the *Children's Protection Act*, R.S.O. 1927, c. 279, and amendments thereto. The defendants are husband and wife.

* PRESENT:—Duff C.J. and Cannon, Crocket and Davis JJ., and Dysart J. *ad hoc.*

(1) [1934] Ont. W.N. 389.

The following paragraphs are taken from the judgment of Kingstone J. (delivered orally) in which he deals with the facts and questions to be considered.

This is an action arising from an issue directed by the Hon. Mr. Justice McEvoy as to the custody of a young boy of some ten years of age.

It appears that his mother, an unmarried woman, placed him in the plaintiff institution, known as St. Vincent de Paul Children's Aid Society, in Toronto some time in 1923. This is a Catholic society formed and existing under the statute, and has the care and custody of children.

The defendant, Mrs. Spence, who had just lost her own child—her only child at that time—was desirous of adopting a child, and went to see a priest who lived in the vicinity where she and her husband were farming, some time in February, 1923. The priest—Father McReavy I think was the name—wrote a letter to the plaintiff society on the 6th of February, 1923. The letter is directed to Mr. McCabe of the society, and states that the bearer of the letter, Mrs. Spence, wishes to adopt a baby, and further states,—

"I spoke to you over the 'phone concerning this matter. So far as I know, I think that she would be kind and good to the child and would rear it a Catholic. I also met Mr. Spence and I was favourably impressed with him."

No doubt the society relied to a considerable extent on the information contained in the letter. The officials interviewed Mrs. Spence and consented to hand over this child. In my opinion the understanding between them at the time quite clearly was that the child was to be brought up by Mrs. Spence in the Catholic faith, and she undertook to do that.

She also expected—and I think that was part of the understanding between them—that in two years' time, or that in less than two years' time, she was to get adoption papers, all predicated on her bringing the child up in the Catholic faith.

Apparently according to the evidence some conversation took place as to her connection with the Catholic church, and I think she gave them to understand that she had been a member of that church, as she had been, for some four years. She did tell them, that her husband at the time was what she described as a staunch Presbyterian.

She took the custody of the child. The application form was filled out afterwards in typewriting, but taken from notes supplied by Mrs. Spence at the time of the application to the official, whose name at the moment I have forgotten, but I think it fairly accurately represents the information they had from Mrs. Spence as to the family relations. The husband, I see, is described as Non-Catholic and the wife as Catholic. The occupation is described as farming, and so on.

Mrs. Spence apparently stayed for some time in this farming district near Acton, Ontario, where she was at the time she got the child, and moved later on to Hamilton and Burlington. For some time she reported to the society, but when she moved to Burlington and to Hamilton she ceased to do so, and I think from then on lost all interest in bringing the child up in the Catholic faith, as she had represented she was going to do, and on which they relied.

Officers of the society visited her, or made efforts to get in touch with her, from time to time, and finally did see her in Burlington, and I think it was made pretty fairly clear to them then that she was not living

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up to the arrangement as they understood,—in other words, that she was not giving the child, or indeed intending to give the child, the instruction in the Catholic faith that they thought was necessary. They then I think became alarmed as to the situation and desired to get the custody of the child back.

An agreement was entered into on the 21st of June, 1923. That agreement evidently was made prior to her going to Burlington, and was the agreement on which they relied for her carrying out the arrangement and understanding that was come to when she got possession of the child. This agreement provides,—

"It is also agreed that this child shall be instructed in the principles of the Roman Catholic faith, and sent to the Catholic Separate School if there be one in the district."

That was in June, 1923. As I say, that agreement was not observed, and in 1931, in the month of May, another agreement was made. This agreement is very vigorously attacked by Mrs. Spence's counsel, on the ground that it was obtained by undue influence and by threats and so on. I have not the slightest doubt that when this agreement was signed Mrs. Spence had formed a very strong attachment for this child, as she naturally would, and was unwilling to part with it, and that she did, perhaps very grudgingly finally sign the document, but I do not think that any duress or improper influence was exercised. She was paid the sum of $85 at the time she signed this document. It was not signed by her husband apparently. It provided that the plaintiff society should board the boy with the party of the second part, Mrs. Spence, for a period of twelve months. It also provided that the boy should be taken to the nearest separate school on all school days, and to the nearest Catholic church on all Sundays and holy days, and that she should provide the boy with a good and sound home life, and she was to be paid by the society for these services the sum of $20 per month. Each party was given the right to cancel this agreement.

Up to this time the child had never been made a ward of the society under the Children's Protection Act, though an application had been made to Judge Mott. By reason of the fact that Mrs. Spence had moved out of the city of Toronto, the Judge held that he had no jurisdiction to deal with the application, and nothing further was done. As the child was not made a ward of the society no adoption papers were made out.

The result is that the society had, I think, the right to control the custody of this boy in the first instance, but having parted with the possession of the boy, the point arises whether they have the right to insist on re-possessing themselves of this child.

The child under a further agreement signed in June, 1932, was handed over by the Spences to the custody of this society, and they received the sum of $100. The society, having regained possession under the terms of this agreement, boarded the child out with a Mrs. Finnegan. Subsequently in September of the same year the child of its own volition came back to its foster parents on the 20th of September, 1932; and the foster parents then declined to deliver the child up, and these proceedings have resulted.

There is the question of the wardship which the society did not secure, but the most important point, and the ground on which I am going to decide this case, is, what is in the best interests of this child? The welfare and the happiness of the child, as has already been said in many cases, seems to be of paramount importance. Notwithstanding these

agreements what the Court is asked to dispose of is the custody, control and possession of a human being and not a mere chattel. He has a right to live his life. The child is well cared for and is in apparently a congenial and happy home. The home surroundings, I am satisfied from all the evidence, are everything one could reasonably expect. The child is being brought up in another faith—a faith different to that of its mother, and different to that of the society in which the mother placed it.

But is that to be considered of such importance that this child should be taken from the home and surroundings in which he has been brought up, handed back again to the society, and placed out with somebody else where the situation may be quite different?

The boy is now ten years of age. He has obviously formed an affection for his foster parents, and they for him. There are two other children there that have come since, and they all appear to be a very happy family.

Under the law as I understand it, it is my duty to consider, first of all, in a matter of this kind, what is in the best interest of the child. I have made up my mind that the proper thing for me to do, having regard to the child's future welfare, is to direct that the child remain under the custody and control of Mrs. Spence and her husband, and I give judgment accordingly.

The judgment at trial declared that the defendants were entitled to the care, custody and control of the infant; that the plaintiff was not entitled to the issue of a writ of Habeas Corpus in respect of the infant; that the moneys paid into court to the credit of the cause ($185 paid by the plaintiff to the defendant Mrs. Spence and brought into court with the defence for the purpose of having the same repaid to the plaintiff) be paid out to the plaintiff. The court made no order as to costs.

The Court of Appeal received and admitted as further evidence on the appeal certain affidavits and exhibits with regard to matters discovered by the plaintiff since the appeal was first heard.

The Court of Appeal dismissed the appeal with costs (1). The plaintiff appealed to this Court.

W. B. McHenry for the appellant.

R. R. McMurtry for the respondents.

After hearing argument of counsel, the Court delivered judgment orally, dismissing the appeal with costs.

DUFF C.J.—We do not think it necessary to reserve consideration of this appeal.

(1) [1934] Ont. W.N. 389.

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Duff C.J.

In the first place, we are quite satisfied that under the Statute, the *Children's Protection Act,* which has been discussed, the appellant has not a legal right to call upon the court *ex debito justitiæ* to deliver to it the custody of the child.

That disposes of the case, so far as the Statute is concerned.

We express no opinion upon the technical point passed upon by Mr. Justice Fisher—as to whether the Society has any status to make an application. We merely say that under the Statute the Society has no right which the court is bound to recognize *ex debito justitiæ* to have delivered to it the custody of the child.

Then, on the other branch of the case—We have had an opportunity of considering the case and considering the judgments below. We see no reason to disagree with the views upon which Mr. Justice Kingstone and the majority of the Judges in the Court of Appeal acted, to the effect that it is not in the interests of the child that the application of the appellant should be granted.

For these reasons the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *W. B. McHenry.*

Solicitors for the respondents: *Nesbitt, McMurtry & Ganong.*

1935

* Feb. 19, 20
* April 15.

MASON v. SCOTT AND ANDERSON

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA IN BANCO

Contract—Alleged substitution of oral contract for previous written one—Evidence.

APPEAL by the plaintiff from the judgment of the Supreme Court of Nova Scotia *in banco* (1) dismissing (Hall J. dissenting) his appeal from the judgment of Graham J. (2) holding that he was not entitled to recover

* PRESENT:—Duff C.J. and Lamont, Cannon and Davis JJ., and Dysart J. *ad hoc.*

(1) 8 M.P.R. 219; [1934] 3 D.L.R. 769.

(2) 8 M.P.R. 219, at 220-223; [1934] 3 D.L.R. 769, at 769-772.

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the sums payable under the terms of a certain written agreement under seal, on the ground that the parties had subsequently substituted a certain oral agreement for the said written agreement relied on by the plaintiff.

On appeal to the Supreme Court of Canada, after hearing the arguments of counsel, this Court reserved judgment, and on a subsequent day delivered judgment allowing the appeal with costs throughout. Written reasons were delivered by Lamont J., with whom the other members of the Court concurred. These reasons, after discussing the evidence at length, concludes that the evidence does not justify a finding that the parties substituted an oral agreement for the original written one.

Appeal allowed with costs.

W. P. Potter for the appellant.

D. K. MacTavish and *H. C. Moseley* for the respondents.

NICHOLAS MARKADONIS .....APPELLANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

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* Feb. 18, 19.
* Mar. 18.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA *in banco.*

Criminal law—Murder—Evidence by accused—Whether voluntary—Evidence by police officers in rebuttal—Lack of warning—Whether evidence admissible—Prejudicial to accused—Substantial wrong—Miscarriage of justice—New trial—Charge to jury—Misdirection—Section 1014 Cr. C.

The appellant was convicted of murder. Evidence was given at the trial that in the middle of the night, one day after the murder, the accused was removed from his cell and, escorted by three police officers, was taken out a road in search of the revolver that shot the victim. The accused was cross-examined on the incidents of that trip and one police officer testified in rebuttal as to the course of conduct and the conversation of the accused on that occasion.

Held that there should be a new trial. Under the circumstances of the case, such evidence was inadmissible in the absence of proof that the statements made by the accused were voluntary and upon proper warning; and the curative effect of section 1014 (2) of the Criminal

* PRESENT:—Duff C.J. and Lamont, Cannon and Davis JJ. and Dysart J. *ad hoc.*

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Code cannot be applied, as it cannot properly be said that there has been "no substantial wrong or miscarriage of justice."

Judgment of the Supreme Court *in banco* (8 M.P.R. 407) rev.

APPEAL from the judgment of the Supreme Court of Nova Scotia *in banco* (1), affirming the conviction of the appellant upon trial for murder.

The appellant was convicted at Sydney of the murder of one Cleo Markadonis, his brother's wife. She was killed by a 32-calibre revolver bullet. The murder was committed about 4 o'clock p.m. on July 20, 1934.

D. A. Cameron K.C. for the appellant.

J. H. MacQuarrie K.C. and *M. A. Patterson* for the respondent

The judgment of Duff C.J. and Lamont J. and Dysart J. *ad hoc* was delivered by

DUFF C.J.—In his dissenting judgment Mr. Justice Mellish says:

Dealing with ground no. 7 the objection is taken to the part of the charge dealing with the evidence of Hickey in the language set out in said notice when the learned judge comments on the alleged failure of Hickey to see the prisoner come from the back of the house to the garage.

I think the language used suggests that Hickey who was a Crown witness is keeping back further evidence damaging to the accused. I do not think the suggestion is justified. In the interest of the accused it is a dangerous suggestion because at best it has no probative value and it is doubly dangerous because it may not be justified by the facts.

The eighth grounds of complaint is I think justified, and there is considerable evidence I think corroborating the prisoner's evidence that he did walk down Marconi street.

The ninth ground of complaint is to the effect that the learned trial judge expressed his own views as to the prisoner's credibility unfairly in using the words therein set out.

In dealing with the probable effect of these words we should I think look at the precise circumstances under which they were used. The prisoner gave evidence on his own behalf and on his cross-examination he was repeatedly asked in effect what his opinion was as to the veracity of several Crown witnesses. The questions were I think irrelevant and should not have been asked, and it appears surprising that they were not objected to. The answers to such questions might prejudice the accused before the jury, and I cannot conceive of any legitimate reason for asking them. It is a method of cross examination which I think is unfair and should not be resorted to nor allowed especially in a case like the present: *Regina* v.

(1) (1935) 8 M.P.R. 407; 63 Can. Cr. C. 122; [1935] 2 D.L.R. 105.

Bernard (1); *McMillan* v. *Walker* (2); *North Australian Territory Co.* v. *Goldsborough Mort & Co.* (3). Subsequent events I think leave no doubt as to the purpose for which this method was adopted.

The learned judge in dealing with the evidence of the witness Beard remarks: "The prisoner says he is not telling the truth, and he is asking twelve reasonable and intelligent men to believe that Beard came to this court and committed perjury." The learned judge then almost at once expresses his view as to the credibility of the prisoner in the language complained of. I think in view of what had previously been said the jury might have reasonably inferred that they might come to the same conclusion more especially as the prisoner had accused "a responsible and intelligent looking man" of committing perjury, and that they would have to find this charge proven if they believed the prisoner. The tenth ground of objection is to the admission of evidence. The police, when the prisoner was under arrest obtained damaging statements from him which were not shewn to be voluntary and which nevertheless were put in evidence against him. The only justification suggested for putting in such evidence was that it was given in rebuttal. This is in my opinion no real justification for putting in statements which are *prima facie* not voluntary. I am unable to say that the jury would have reached the same conclusion if this evidence had not been admitted. It was obviously, I think, put in to influence the jury and was calculated to influence them to the prisoner's detriment.

I entirely agree in this.

Mr. Justice Carroll in his dissenting judgment says:

There is one ground raised, however, which merits very grave consideration. This concerns the rebuttal evidence given by officer Churchill. I do not think any of the evidence given by Churchill as rebuttal was in fact rebuttal, but the right of the Crown to give evidence other than rebuttal with the permission of the trial judge, after the defence has closed its case, cannot be challenged.

The objection to this evidence is as to its admissibility; that certain statements made by the accused to the officers, while out on the Morien road the night after the tragedy, were in their nature incriminating and therefore could not be admitted as evidence, because the trial judge was not invited to and did not rule that the statements were made voluntarily.

It was argued by counsel for the Crown that these statements were admissions not in the nature of confessions, and not in their nature incriminating and therefore not subject to the rule that decision must be made on their voluntary character before they became admissible. It is rather surprising that if that was the opinion of the learned counsel that he did not tender the evidence as part of the Crown's main case when officer Churchill was first called.

The accused under cross-examination was asked, in reference to his midnight trip over the Morien road with the police officers, "Did you tell the officers that you threw the revolver away on the Morien road?" He did not answer that question directly, but went on to narrate certain circumstances under which he was required to go out on this midnight expedition and of the existence of conditions going over and while there. If those conditions existed and the circumstances narrated are true (and I think officer Churchill practically admits their truth) then no judge

(1) (1858) 1 F. x F. 240, at 249; 40 Cyc. 2509.
(2) (1881) 21 N.B. Rep. 31.
(3) [1893] 2 Ch. D. 381, at 385.

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would admit as voluntary any statement made under those circumstances. Churchill testified: "We asked him why he did not go and find the gun, and he said, *we did not let him go far enough, and he said let us go back a little farther* and when he came back he said we *would have better luck in the day time.*" The learned trial judge told the jury that accused must have known that they were over there looking for the gun that shot Cleo Markadonis.

Now this statement of accused does not amount to what is known as a "plenary" confession but is a statement which gives rise to an inference that he hid the revolver which shot Cleo Markadonis for whose murder he was being tried and a further inference is that he shot her with that revolver. It is a self-harming statement which thrown into the mass of circumstantial evidence would lend much weight and strength to the chain.

I think under the circumstances that the evidence was not admissible. If however by any chance it was rightly admitted, in such case I think there should have been an instruction to the jury as to the weight of that evidence and what his state of mind would be under the circumstances, and whether he made the statement in order to escape a situation which to say the least could not be pleasant to him. If admissible for the reason that an acknowledgment of guilt cannot reasonably be inferred from the language attributed to the accused, then I think the trial judge should caution the jury as to its true effect. *Rex* v. *Christie* (1).

However, I do not think that my brother judges with whom I differ seriously suggest that the evidence of the statement is under the circumstances admissible. Their judgment is based I think on the curative effect of the Criminal Code, section 1014 (2), that notwithstanding the reception of the inadmissible evidence "no substantial wrong or miscarriage of justice has actually occurred" and therefore there should not be a new trial.

This section or its equivalent has been the subject of inquiry and controversy in our own and in English courts. I shall refer to three precedents: *Allen* v. *The King* (2); *Makin* v. *The Attorney-General of New South Wales* (3); and *Maxwell* v. *The Director of Public Prosecutions* (4). In the *Makin* case (3) the Lords of the Privy Council decided that a section of the *Criminal Law Amendment Act* of New South Wales ("Provided that no conviction or judgment thereon shall be reversed, arrested or avoided on any case so stated unless for some substantial wrong or other miscarriage of justice") does not on its true construction empower the court to affirm a conviction where the evidence submitted to the jury was inadmissible and *may have* influenced the verdict. In that case the Lord Chancellor said (pp. 69, 70): "Reliance was of course placed upon the language of the proviso. It was said that if without the inadmissible evidence there was evidence sufficient to sustain the verdict and to show the accused was guilty, there has been no substantial wrong or other miscarriage of justice. It is obvious that the construction contended for transfers from the jury to the court the determination of the question whether the evidence—that is to say what the law regards as evidence—established the guilt of the accused. In their Lordships' opinion substantial wrong would be done to the accused if he were deprived of the verdict of a jury on the facts proved by legal evidence

(1) [1914] A.C. 545.
(2) (1911) 44 Can. S.C.R. 331.
(3) ([1894] A.C. 57.
(4) (1934) 50 T.L.R. 499.

and there were substituted for it the verdict of the court founded merely upon the perusal of the evidence." Then his Lordship pointed out that there is ample scope for the operation of the proviso, where the evidence improperly admitted can have no possible influence on the jury "as for example where some merely formal matter not bearing direct on the guilt or innocence of the accused has been proved by other than legal evidence." In the *Allen* case (1) the Supreme Court of Canada followed the *Makin* case (2) and held that the inadmissible evidence *may have* influenced the verdict of the jury. The Chief Justice in that case said (p. 339): "I cannot agree that the effect of the section is to do more than give the judges on an appeal a discretion which they may be trusted to exercise only where the illegal evidence or other irregularities *are so trivial* that it may safely be assumed that the jury was not influenced by it. If there is any doubt about this the prisoner must get the benefit of the doubt *propter favorem vitæ*."

It should be observed that the proviso in the Canadian Criminal Code is not expressed in the same language as the English statute. It is very important to note that in our Code the proviso requires that a conviction or judgment shall not be quashed except for "some substantial wrong" or some miscarriage of justice.

In *Makin's* case (2), it was said by the Judicial Committee of the Privy Council, speaking through Lord Herschell, that it cannot

properly be said that there has been no substantial wrong or miscarriage of justice where, on a point material to the guilt or innocence of the accused, the jury have, notwithstanding objection, been invited by the judge to consider in arriving at their verdict matters which ought not to have been submitted to them.

The learned trial judge did not, before admitting evidence of what occurred between the accused and the police officers, decide, as it was his duty to do, that what the accused said was voluntary.

Now, it is quite true that evidence wrongfully admitted may be of a character so trivial that it could not affect the result. We agree with the dissenting judges in the view that this cannot be affirmed with regard to the evidence adduced in rebuttal which was objected to. The learned trial judge emphasized with a good deal of vigour the evidence adduced concerning that episode.

We do not think, moreover, in considering the probable effect of the evidence, that the accused was imputing perjury to the witnesses against him as suggested by counsel for the Crown in his questions addressed to the accused,

(1) (1911) 44 Can. S.C.R. 331. (2) [1894] A.C. 57.

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which suggestion was impressively commented upon by the learned trial judge in his charge. Nor should we overlook the circumstance that while the case for the Crown was powerfully presented to the jury in the judge's charge, the considerations weighing in favour of the prisoner were by no means brought out with their full effect.

We think, for the reasons given by the dissenting judges, that there was a mistrial and that the case should be brought before another jury.

There will be a new trial.

CANNON J.—The appellant, convicted of murder and sentenced to be hanged for unlawfully killing, on the 20th July, 1934, Cleo Markadonis, his sister-in-law, appeals from the Supreme Court of Nova Scotia *in banco* on questions of law raised by Mellish J., and Carroll J., dissenting.

The majority of the court found that, even if the alleged irregularities in the judge's charge or the illegal admission of evidence in rebuttal existed, "no substantial wrong or miscarriage of justice had actually occurred," and that the appeal should therefore be dismissed. The formal order ignores the amendment brought by 21-22 Geo. V, ch. 28, section 14, to article 1013 of the Criminal Code and does not "specify any ground or grounds in law on which such dissent is based either in whole or in part." We are therefore compelled to abstract from the opinions of the learned judges the questions which fall within our jurisdiction.

The dissenting judgment of Honourable Mr. Justice Mellish apparently deals with the grounds of appeal numbered 7, 7*a*, 8, 9 and 10, which are as follows:

(7) Because the learned judge, in his general summing up of Hickey's evidence, unduly emphasized the time when Hickey first saw the prisoner to the disadvantage of the prisoner, particularly in the following paragraph:

"The important fact to remember in this man's evidence is that however friendly disposed he was towards the prisoner he did not pretend to say that he saw the prisoner in the garage at the time he heard the shot and that the first time he saw him was after he heard Mrs. Markadonis hollering, and stood up. I again state I think that that is rather an extraordinary story for Hickey to tell, that he did not see the prisoner come from the back of the house into the garage."

(7*a*) Because the whole of the learned judge's charge partook unreasonably of the nature of advocacy against the prisoner, rather than that of impartial presentation of the facts, from the viewpoint of the Crown and the prisoner.

(8) Because in making the following comment on the prisoner's evidence:

"Why did not Trysok and Murrant see him on Marconi street at the time? Why did not Mrs. Murrant see him? It is puzzling to me. If this bright young fellow, Peter Trysok, is telling the truth, then the prisoner never walked down Marconi street that day from the Markadonis house."

the learned judge stated as a fact, that the prisoner never walked down Marconi street that day; whereas he might very well have walked down Marconi street, and Peter Trysok be still telling the truth.

(9) Because the learned judge, in making the following comment:

"I personally have no hesitation in stating that, in my opinion at least, his story is a tissue of lies almost from begininng to end, but you will accept that statement subject to the observaion which I have already made that the facts are for you entirely."

unduly and unfairly prejudiced the prisoner's defence, notwithstanding the qualifying words he used.

(10) Because the evidence of N. W. Churchill, corporal, Royal Canadian Mounted Police, was improperly admitted.

His Lordship Mr. Justice Carroll retained only no. 10 and agreed with the other members of the court that the other points were not sufficient to quash the conviction.

On grounds of appeal 7-7*a*-8-9, Mr. Justice Carroll says:

The trial judge expressed strong opinions on certain matters of fact and evidence which opinions were not favourable to the accused. A trial judge in summing up has that right so long as he makes it clear to the jury that they are the judges of the facts and are not bound to accept his views. This the learned trial judge did and I do not think it can he said that, either in fact or in effect, he withdrew from the consideration of the jury anything material.

I agree with Mr. Justice Carroll and the majority of the appellate court in refusing to grant a new trial on account of the judge's charge to the jury. These alleged misdirections on questions of fact, in view of the repeated warning given to the jury that they were the sole judges of the facts and of the credibility of the witnesses, including the prisoner, could not harm the latter, unless they were accompanied by a misdirection, or constituted a misdirection, on a point of law, which I have been unable to find after a careful perusal of the summing up.

The cardinal point to be determined is the one raised by both the dissenting judges below as to the admissibility in rebuttal of the evidence of sergeant Churchill; and on this I agree with my Lord the Chief Justice that the prisoner's declaration on his night trip to Morien road while under arrest should not have been given to the jury under the

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circumstances; and for the reasons recently given by me *re Chapdelaine* v. *The King* (1), I would order a new trial.

DAVIS J.—In considering whether or not the accused had a fair trial on the charge of murder upon which he was convicted and is under sentence of death, we should observe firstly that there was neither in the evidence at the trial nor in the argument before us the slightest suggestion of any motive that might have prompted the accused in killing his sister-in-law if he was the one who in fact committed the crime; secondly, that the revolver used to commit the crime was not produced and apparently was never found; thirdly, that the accused was only eighteen years of age at the time of the murder.

The theory of the Crown is that the accused fired a shot from an old revolver he had secured and then went out on the Marien road and buried the revolver. Evidence was given at the trial that in the middle of the night (a day after the murder) the accused was removed from his cell and, escorted by three police officers, was taken out the Marien road in search of his revolver. The accused was cross-examined at length on the incidents of that trip and his answers were made the basis for rebuttal evidence. The whole course of conduct and conversation of the accused on that trip was clearly inadmissible in the absence of any proof that the statements made were voluntary and upon proper warning. But quite apart from that, it was inadmissible because it was irrelevant. The evidence of the accused himself and of the Crown witness in rebuttal of all that was said and done on that trip proved nothing relevant to the issue, and was inadmissible from its own lack of evidential value. While it was admitted that the accused protested throughout the trip that he did not have a gun the day of the murder and none was found, the story of that midnight trip to the Marien road was pregnant with suspicion that might readily affect the minds of the jury to the prejudice of the accused. The trial of this lad of so heinous an offence should have been devoid of the story of that trip and no matter upon whom the fault

(1) [1935] S.C.R. 53, at 59.

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lies for its introduction, the very justice of the case requires that there be a new trial.

Moreover, I cannot escape from the view that the charge of the learned trial judge did not present certain aspects of the case in favour of the accused that should have been dealt with and considered. Firstly, the absence of any proof of motive. While it is not the motive but the intent which is essential, proof of motive becomes of importance where the evidence as here against the accused is entirely circumstantial. Secondly, the possibility if not the probability that fear on the part of the lad may have accounted for his staying away from the house after the murder and for some of his actions subsequently to the murder, might well have been considered by the jury. Nothing whatever was said to the jury that would lead them to face the problem of the possible innocence of the accused.

In every view of the case the trial was unsatisfactory and I would grant a new trial.

Appeal allowed, new trial ordered.

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*April 15, 16, 17, 18.
*Oct. 7.

SCHWEYER ELECTRIC AND MANUFACTURING COMPANY (PLAINTIFF) ..... APPELLANT;

AND

NEW YORK CENTRAL RAILROAD COMPANY (DEFENDANT) ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Patent—Alleged infringement—Construction of claims in specification—Description in specification—System contemplated or embraced by the claims—Automatic train control apparatus.

An appeal by the plaintiff from the judgment of Maclean J., President of the Exchequer Court of Canada, [1934] Ex. C.R. 31, dismissing its action for alleged infringement by defendant of a patent of invention of an automatic train control apparatus, was dismissed on the ground that no infringement was established. It was held that the claims sued upon, as regards the devices in the apparatus on the vehicle which respond to the "caution" and "danger" signals, when these claims are properly construed in relation to the specification as a whole, do not contemplate a system which could be effective-

*PRESENT:—Duff C.J. and Cannon, Crocket and Davis JJ. and Dysart J. *ad hoc.*

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ly worked without the use of alternating current circuits; and since defendant employed direct current circuits alone, no infringement was established. Further, the opinion was expressed that, on construction of the specification as a whole, the monopoly contemplated by the claims relied on by plaintiff would not embrace a system in which the responsive inductive device employs cumulative and not opposing fluxes; and that the defendant's system would not be practically operable if a responsive inductive device making use of opposing fluxes were substituted for the device operating with cumulative fluxes which was actually part of its system.

It is the duty of a patentee to describe in unambiguous terms his invention and the manner in which it is to be put into effect.

One cannot by reference import into a claim the description in the specification minus any part of it which describes some essential feature of it.

APPEAL by the plaintiff from the judgment of Maclean J., President of the Exchequer Court of Canada (1), dismissing its action for an injunction and damages and other relief for the alleged infringement of a patent, issued to one Schweyer and assigned to plaintiff, for improvements in automatic train control apparatus. The appeal was dismissed with costs.

O. M. Biggar K.C. and *M. B. Gordon* for the appellant.

W. F. Chipman K.C. and *V. W. Price K.C.* for the respondent.

The judgment of the Court was delivered by

DUFF C.J.—The patentee, in explaining the objects of his invention, describes it as an "Automatic Train Controlling Apparatus" and proceeds:

It is an object of the invention to provide novel inductive devices between the vehicle and track for obtaining clear, caution and danger or other signals or conditions in an efficacious manner when passing the controlling points or stations of the track.

He also says:

A still further object is the provision in such an apparatus of a novel differential induction responsive device for controlling the vehicle equipment or translating means and controlled by suitable inductive devices on the track or adjacent to the path of movement of the responsive device.

Under the head of "Vehicle Equipment," the "translating means" is thus described:

The train part of the apparatus includes the clear electromagnet 17, which when energized maintains clear conditions, and the caution electromagnet 18 which when energized with the magnet 17 deenergized provides

(1) [1934] Ex.C.R. 31.

caution conditions, while when both electromagnets 17 and 18 are de-energized, the equipment will be in danger condition. These electromagnets 17 and 18 therefore control the movement of the train by operating suitable mechanism such as shown in United States Patent No. 1,389,602.

For a general description of the leading essentials of the apparatus for controlling the translating devices (electromagnets 17 and 18), we turn to the outline of the apparatus as given in the patent:

> Briefly outlined, the present apparatus comprises in its main and more important essentials, armatures 16 or magnetic devices on the track or roadway at the control stations or locations, a primary inductor 19 on the vehicle responsively affected whenever passing an armature, control relays or devices on the vehicle for obtaining clear, caution and danger conditions, a controller or switch device 45 on the vehicle controlled by the primary inductor 19 for changing the circuit connections of said control relays or devices whenever passing a control station and initiating a danger condition of said control relays or devices, secondary inductors 68 and 69 and relays 78 and 80 controlled thereby on the vehicle controlling said control relays or devices during such change in circuit connections, controlled inductors 2 and 3 on the track or roadway associated with said armatures for influencing said secondary inductors during such change in circuit connections to avoid the danger conditions and either maintain the existing running condition of the vehicle equipment or changing from a clear to a caution condition, and manually controlled means for restoring clear conditions of the vehicle equipment. The essential apparatus as outlined, with the necessary electrical circuits, is more simple than the complete apparatus as illustrated, such complete apparatus also including several features of safety which are not compulsory.

The patent plainly contemplates that the translating devices (electromagnets 17 and 18) are to be controlled by the combined action of two sequences of apparatus. Of the inductive devices on the vehicle, the inductor 19 is energized by direct current (generator 24), co-operating with the track armature 16, and with one set of contacts on the switch 45, as well as with certain relays, while the right and lefthand "secondary inductors" 68 and 69 are energized by alternating current (generator 76), co-operating with the track inductors 2 and 3, and with a set of contacts on switch 45 through which the "relays" 78 and 80 are controlled by these "secondary inductors." The operation of the secondary inductors 68 and 69, relays 78 and 80 and inductors 2 and 3 admittedly involve the use of alternating current circuits.

The operation of the apparatus, as the patent contemplates it, may be sketched as follows:

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The track armature 16 influences at each control station inductively the primary inductor 18 which deenergizes the relay 33; this causes the switch 45 to fall and, in consequence, the energy is transferred from the circuit operating relays 109 and 110 to another circuit which is controlled by the alternating current relays 78 and 80. The deenergizing of relay 33 produces no effect upon the translating devices (electromagnets 17 and 18) but merely establishes alternative circuits making it possible to energize or deenergize these devices by the operation of the alternating current devices 78 and 80 in accordance with traffic conditions. Under "caution," the co-operation of inductor 3 with coil 70 and coil 68, relay 78 is deenergized immediately as the car passes over inductor 3 and this momentarily opens the contact 86 and leaves closed the alternative circuit.

Under "danger," by means of inductor 2, coil 69, relay 80 is deenergized and contact 85 is opened momentarily and by this means the alternative circuits for both translating devices 17 and 18 are deenergized. The switch 45 rises to its upper position and "clear" or "caution" is maintained until the next controlling station is reached.

The control of the translating devices in the manner disclosed by the patent thus requires two sets of trackway inductors and two trains of mechanism involving in their operation the use of both direct current circuits and alternating current circuits.

The plaintiff selected certain claims as typical of the claims in suit. Of these, claims 12, 37 and 43 state explicitly that the claims are concerned with an apparatus of the character described including specified appliances and devices. Claims 66 and 91, as framed, concern a railway traffic control system in combination. It will be convenient to reproduce these claims in full:

12. An apparatus of the character described including a movably mounted differential inductive device including a core and inductively related coils thereon, an armature adjacent to the path of movement of said device with which said core is inductively cooperable for obtaining magnetic disturbance in said core when passing said armature, soid coils being in direct current energized electrical circuits and creating opposing magnetic flux in said core so that the current in one coil is affected when passing the armature, and translating means controlled by the circuit of said coil.

37. An apparatus of the character described including a movably mounted differential inductive device energized by different direct current circuits, a relay in each of said circuits, and the relay in one circuit controlling the current in the other circuit, translating means controlled by said relays and means adjacent to the path of movement of said device and with which said device is inductively cooperable to affect the currents in said circuits for deenergizing one of said relays.

43. An apparatus of the character described including a movably mounted differential inductive device having direct current energized inductively related coils, one of which produces a magnetic flux weaker than and in opposition to the magnetic flux created by the other coil, a stick relay in series circuit with the coil producing the weaker magnetic flux, inductive means adjacent to the path of movement of said device with which said device is cooperable for reducing the current flowing in the first-named coil to deenergize said stick relay and translating means controlled by said stick relay.

66. In a railway traffic controlling system, the combination, a railway track, magnetic devices on the trackway at intervals, a vehicle on the track, an inductor on the vehicle aligning with said magnetic devices and passing in inductive relation thereover by the movement of the vehicle along the track, a primary circuit including a protection relay connected with said inductor and energized by direct current, a secondary circuit energized by direct current and including a detector relay controlling its own circuit and inductively coupled through said inductor with said primary circuit, said primary circuit being connected to said inductor so as to deenergize said detector relay when said inductor is in inductive relation with said magnetic device, said secondary circuit controlled by said protection relay and a translating device controlled by said detector relay.

91. In a railway traffic controlling system, in combination, a railway track, an armature on said track, a vehicle on said track, an inductor on said vehicle moved by the movement of said vehicle into inductive relation with said armature, a primary coil on said inductor energized by direct current, a secondary coil in a secondary circuit including a relay controlling its own circuit energized by direct current and inductively coupled by said inductor so that said primary coil effectively deenergizes said relay when said inductor is influenced by said armature, an electrically operated braking mechanism on said vehicle, a second relay controlling its own circuit, controlling said braking mechanism and controlled by the relay in said secondary circuit and a manually operated switch for establishing an energizing circuit for said second relay.

In construing these claims they must be read with reference to the earlier part of the specification and, so reading them, it seems to me the conclusion is inevitable—I am convinced this is not putting it too strongly—that, as regards the devices in the apparatus on the vehicle which respond to the "caution" and "danger" signals, these claims do not contemplate a system which could be effectively worked without the use of alternating current circuits. In that view, since the respondents employ direct current circuits alone, no infringement is established.

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Duff C.J.

This is sufficient to dispose of the appeal. But my opinion is, I may add, that the phrase "differential inductive responsive device" in the earlier part of the patent ought to be construed by reference to the language of that part of the specification which is under the heading "Intermittent Responsive Devices," and, so reading it, the phrase seems plainly to imply the use of opposing fluxes.

In claims 12, 37 and 43, opposing fluxes are either implied in the sense indicated, or are explicitly postulated. As regards these claims, at least, it seems to me impossible to aver that the patent has so defined the limits of the monopoly claimed as to embrace, in reasonably clear language, inductive devices with cumulative fluxes. I am inclined also to think that the two remaining typical claims (66 and 91) must be read as importing the essentials of the invention described in the specification. As regards these claims, it appears to me that this may reasonably be said. It is the duty of the patentee to describe in unambiguous terms his invention and the manner in which it is to be put into effect. He has already, in the specification, described his invention and its mode of operation. And the essential features of the invention, and the working of it, so described, as I construe the specification include the use of "differential inductive responsive devices" involving the employment of opposing fluxes. If the description can be imported into these claims by reference then the disclosure is sufficient, but I do not think you can by reference import the description minus any part of it which describes some essential feature of it. In this view, the monopoly contemplated by these claims would not embrace a system in which the responsive inductive device employs cumulative and not opposing fluxes. I think the learned President's finding of fact is well founded that the respondents' system would not be practically operable if a responsive inductive device making use of opposing fluxes were substituted for the device operating with cumulative fluxes which is actually part of their system.

I rest my decision of the appeal, however, upon the first point, viz., that the invention, as described, necessarily involves, as an essential part of it, the employment, in co-

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operation, of direct current circuits and alternating current circuits.

The main contention on behalf of the appellants was that the learned trial judge had not applied his mind to the consideration of the subordinate combinations which they allege are covered by the "typical" claims. As will sufficiently appear from what I have said, in my view that contention is displaced if one accepts the view that the claims in suit, when properly construed in relation to the specification as a whole, do not define any combination not requiring the use of alternating current circuits.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Smart & Biggar.*

Solicitors for the respondent: *Saunders, Kingsmill, Mills & Price.*

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* June 11.
* June 24.

THE ROYAL TRUST COMPANY, ADMINISTRATOR OF THE ESTATE OF SAMUEL WALTER ABBOTT, DECEASED (PLAINTIFF) ..... } APPELLANT;

AND

TORONTO TRANSPORTATION COMMISSION (DEFENDANT) ..... } RESPONDENT.

THE ROYAL TRUST COMPANY, ADMINISTRATOR OF THE ESTATE OF SAMUEL WALTER ABBOTT, DECEASED, AND LOUISA ALEXANDRA ABBOTT (PLAINTIFFS) ..... } APPELLANTS;

AND

TORONTO TRANSPORTATION COMMISSION (DEFENDANT) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Negligence—Street railways—Motor vehicles—Collision at street intersection between street car and automobile—Right of way for street car—Duties of automobile driver and street car motorman—Joint negligence.

An automobile going easterly and defendant's street car going southerly collided at a street intersection in the city of Toronto, causing the

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automobile driver's death. In actions against defendant for damages, the trial judge found that defendant's motorman and the automobile driver were each negligent to the extent of fifty per cent., and gave judgment against the defendant (for one-half the total damages assessed). The Court of Appeal for Ontario held that on the evidence defendant could not be found guilty of any negligence causing the accident, and dismissed the actions. On appeal to this Court:

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

Per Duff C.J., Cannon and Davis JJ. and Dysart J. *ad hoc:* Generally speaking, a street car motorman is entitled to assume that a pedestrian or motorist approaching the track will stop to permit the street car to pass by, and there was in the present case a statutory right of way in favour of the street car; but the existence of a right of way does not entitle the motorman to disregard an apparent danger that confronts him. In the circumstances appearing in the present case, the motorman should have seen the automobile and realized the probability of its driver continuing in his course across the track at the approaching intersection. Had either the motorman or the motorist used due care or caution, the collision would not have occurred.

Per Duff C.J. and Crocket J.: The real effective cause of the collision was the joint negligence of the motorist and motorman. It was the motorman's duty in approaching the street intersection to have his street car under such control as to enable him to stop in order to avoid hitting any person venturing across the street in his path, as it was the duty of the motorist to have his car under similar control. On the evidence, both approached the intersection at such a rate of speed as to create at the intersection a peril which it was then too late for either to avoid.

APPEALS (a consolidation of two appeals) by the plaintiffs from judgments of the Court of Appeal for Ontario allowing the defendant's appeal from judgments of McEvoy J. on the trial.

The actions were brought against defendant in the Supreme Court of Ontario, and arose from a collision between an automobile driven by S. W. Abbott and a street car of defendant on the evening of November 22, 1932, at the intersection of Harbour and Bay streets in the city of Toronto, causing injuries to Mr. Abbott from which he died.

The first action was brought by the administrator of Mr. Abbott's estate to recover damages under the *Fatal Accidents Act,* R.S.O. 1927, c. 183, and the second action was brought by the said administrator to recover damages for medical and nursing expenses and by Mr. Abbott's widow to recover for damages to the automobile which belonged to her.

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The actions were tried together before McEvoy J., who found that defendant (by its motorman) and Mr. Abbott, deceased, were each negligent to the extent of fifty per cent., and in the first action gave judgment for the plaintiff for $10,000, and in the second action gave judgment for the plaintiff administrator for $124.40 and for the plaintiff Mrs. Abbott for $300 (the said sums being in each case one-half the total damages assessed).

The defendant appealed to the Court of Appeal for Ontario in both actions and the appeals were heard together. The Court of Appeal held that on the evidence the defendant could not be found guilty of any negligence causing the accident, and allowed the appeals and dismissed the actions.

The Court of Appeal granted to the plaintiffs special leave to appeal to the Supreme Court of Canada in the second action.

The material facts of the case are sufficiently stated in the judgment of Davis J. now reported. The appeal to this Court was allowed and the judgment of the trial Judge restored, with costs throughout.

D. L. McCarthy K.C. and *G. M. Huycke* for the appellants.

Irving S. Fairty K.C. and *Geo. A. McGillivray* for the respondent.

DUFF C.J.—I concur with the conclusions and the reasons of my brother Crocket and of my brother Davis.

CROCKET J. (Concurred in by Duff C.J.)—I entirely concur in the view of the learned trial Judge that the real effective cause of this unfortunate collision was the joint negligence of the deceased driver of the automobile and of the motorman of the street car. It was the duty of the motorman in approaching the street intersection to have his car under such control as to enable him to stop in order to avoid hitting any person venturing across Bay street in his path, as it was the duty of the driver of the automobile to have his car under similar control. The evidence shows clearly, I think, that both approached the inter-

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section at such a rate of speed as to create at the intersection a peril which it was then too late for either to avoid. With deference, I think it is a clear case for the application of the provisions of the Contributory Negligence Act and would therefore allow the appeal and restore the trial judgment with costs throughout.

DAVIS J. (Concurred in by Duff C.J. and Cannon J. and Dysart J. *ad hoc*).—I cannot escape from the view which I formed during the hearing of this appeal and which is confirmed upon a careful reading of the evidence and a review of the authorities discussed before us, that the motorman on the street car should have seen the automobile and realized the probability of its driver continuing in his course across the street car track at the approaching intersection.

Generally speaking, a motorman on a street car is entitled to assume that a pedestrian or a motorist approaching the street car tracks will stop to permit the street car to pass by and there was in this case a statutory right of way in favour of the street car. But the existence of a right of way does not entitle the motorman on the street car to disregard an apparent danger that confronts him.

The facts are simple and are not in dispute. The collision occurred shortly after eleven o'clock at night at the intersection of Bay and Harbour streets in the city of Toronto at what may be described as the waterfront of the city. It was a clear, cold November night and the pavement was dry. The driver of the automobile was travelling along Harbour street in an easterly direction and the street car was travelling southerly on Bay street. Both streets are asphalt paved and of exceptional width, the width of Bay street being 54 feet from curb to curb and that of Harbour street being 60 feet from curb to curb. There is a street car line on Bay street but none on Harbour street. The view approaching the intersection from any direction is unobstructed by buildings or fences, the only building in the vicinity being the Harbour Commission Building on the north side of Harbour street, 159 feet west of the corner of Bay street. There are no grades of consequence at this point on either street and the intersection and approaches are well lighted. There was only one eye-

witness of the collision called to give evidence. He put the speed of the automobile at between thirty and thirty-five miles an hour and that of the street car prior to it entering the intersection at twenty-two miles an hour. He did not notice any passengers in the street car but at the point of collision he saw the conductor standing "about the joining position of the vestibule and the body of the car." He says the street car came to the intersection without slackening speed and the automobile failed to shew any indication to him of slackening its speed, until in such a position that an accident was inevitable. The headlights of the motor car were burning. The street car struck the motor car square-on, the glass in the headlight of the street car was broken and the door in the middle of the side of the motor car was jammed. The driver of the motor car was alone in his car; he never regained consciousness and died within a week as the direct result of the injuries sustained by him in the collision. That he was himself guilty of negligence is not in dispute. The question is whether the motorman on the street car was negligent. Neither the motorman nor the conductor on the street car was called as a witness and no explanation has been offered for their not being called although the defendant undertook the defence without making any motion for a non-suit at the close of the plaintiff's case. The defence consisted solely in the putting in of a by-law of the City of Toronto requiring all persons on any street to comply with the requirements of every sign erected for the purpose of regulating or directing traffic, and another by-law of the City entrusting to the respondent commission the control, maintenance, operation and management of the street railway system. The absence of any evidence from either the motorman or the conductor on the street car is not without significance, and we are entitled to draw reasonable inferences from such oral testimony as was given at the trial. The learned trial Judge in effect found that each driver was guilty of negligence and that the negligence of each was a direct cause of the accident and, treating the case as one of concurrent negligence, attributed fault equally between the parties. The appellants, who are the widow and the administrator of the estate of the deceased driver of the motor car, did

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not appeal from the judgment in their favour in the amount of one-half the damages assessed by the trial judge. The respondent did appeal from the judgment against it of one-half of the damages assessed and the Court of Appeal for Ontario allowed the appeal and dismissed the actions with costs. One action was by the administrator under the *Fatal Accidents Act* and the other action was brought by the administrator and the widow to recover medical and hospital expenses and damage to the automobile. The actions were tried together and the appeals in the two actions were consolidated by order of the Registrar of this Court. No question was raised as to the quantum of damages. The only question before us was the negligence, if any, of the motorman in the street car.

The learned trial Judge came to the conclusion that the motorman

> should have seen that at some stage as the automobile proceeded along the road there was a certainty that if the street car continued to go as it was going, and if the automobile continued on its course at the rate it was going, there was bound to be a collision. I think there was a time and place where the motorman should have realized that there was going to be an accident if he did not pay some attention to the fact that the driver of the automobile would arrive at the place at which the street car would arrive at such a time, and that it was necessary for him to be careful. I think there was a time—I am not necessarily called upon to say how long a time it was, but looking at the whole picture I think there was a time at which, by taking proper care and caution, the motorman could and ought to have stopped the street car and avoided this calamity.

The test that may well be applied to the facts of this case was stated by Lord Dunedin in the House of Lords in *Fardon* v. *Harcourt-Rivington* (1) in these words:

> The root of this liability is negligence, and what is negligence depends on the facts with which you have to deal. If the possibility of the danger emerging is reasonably apparent, then to take no precautions is negligence; but if the possibility of danger emerging is only a mere possibility which would never occur to the mind of a reasonable man, then there is no negligence in not having taken extraordinary precautions.

In the absence of any evidence from the motorman on the street car it is impossible to find in the evidence when he first saw the motor car or when he first applied his brakes or used sand or attempted to avert the accident. These were all matters of fact upon which the motorman could have thrown very considerable light. But the de-

(1) (1932) 48 Times L.R. 215, at 216.

fendant chose not to call him as a witness and we are left to draw whatever inferences are reasonable and proper from the oral testimony that was given at the trial.

In my view, had either the motorman on the street car or the driver of the automobile used due care or caution, the collision would not have taken place; and that was substantially the view taken by the learned trial Judge. The appeal should be allowed and the judgment of the trial Judge restored with costs throughout.

Appeal allowed with costs.

Solicitors for the appellants: *Osler, Hoskin and Harcourt.*

Solicitor for the respondent: *I. S. Fairty.*

STUART MILNE HUTCHEON BY HIS NEXT FRIEND, ETHEL HUTCHEON, AND THE SAID ETHEL HUTCHEON (PLAINTIFFS) ..... } APPELLANTS;

AND

TAYLOR STOREY (DEFENDANT)..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Negligence—Motor vehicles—Collision between motor car and bicycle—Conflict of evidence as to manner and place of accident—Judgment at trial on jury's findings—New trial ordered by Court of Appeal—Judgment at trial restored by Supreme Court of Canada—Jurisdiction of Supreme Court of Canada challenged on ground that judgment of Court of Appeal was "made in the exercise of judicial discretion" within s. 38 of Supreme Court Act (R.S.C. 1927, c. 35).

A motor car driven by defendant westerly on Q. street, a "through" highway, near the city of Toronto, collided with a bicycle driven by plaintiff who had come southerly on M. avenue. There was conflicting evidence as to the manner and exact place of the accident. Defendant contended that plaintiff came fast down M. avenue and ran into the motor car at the street intersection. It was contended for plaintiff that he had turned off M. avenue and proceeded westerly along Q. street and was struck by the motor car about 50 feet west of M. avenue. Plaintiff's action for damages was tried with a jury, who, in answer to questions, found that defendant had not satisfied the jury that the accident did not arise through any negligence or improper conduct on defendant's part; that defendant's negligence causing the accident was "in not exercising the proper amount of care to avoid striking boy who was on the highway going west";

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that plaintiff could not have avoided the accident by exercising reasonable care; and assessed damages, for which plaintiff was given judgment. The Court of Appeal for Ontario, taking the view that it was "almost impossible to form any opinion as to exactly what had taken place," that the "extraordinary large amount" of damages "could only be justified by a finding of serious permanent injury," that the trial was of a "generally unsatisfactory nature," and that there was "the possibility of the production of more satisfactory evidence at a new hearing," set aside the judgment at trial and ordered a new trial. Plaintiff appealed.

Held: (1) The judgment of the Court of Appeal was not a "judgment or order made in the exercise of judicial discretion" within s. 38 of the *Supreme Court Act* (R.S.C. 1927, c. 35); and an appeal lay to this Court.

(2) The judgment for plaintiff at trial should be restored. There was evidence on which the jury could find as they did; and their conclusions ought not to be disturbed merely because they were not such as judges sitting in courts of appeal might themselves have arrived at (*Toronto Railway Co.* v. *King*, [1908] A.C. 260, at 270; *Mechanical, etc., Co.* v. *Austin*, [1935] A.C. 346, at 375, cited). The reasons expressed by the Court of Appeal (discussed in the judgment of this Court) did not shew grounds to justify a new trial in this case.

APPEAL by the plaintiffs from the judgment of the Court of Appeal for Ontario.

The plaintiffs sued for damages for personal injuries suffered by the infant plaintiff (a boy about 14 years of age) when he and the bicycle on which he was riding were struck, so it was alleged, by a motor car driven by the defendant.

The trial was before Kingstone J. with a jury. On the jury's findings (set out in the judgment now reported), judgment was directed to be entered for the plaintiffs. The Court of Appeal set aside the judgment at trial and ordered a new trial. The plaintiffs appealed to this Court.

The infant plaintiff had sued by his next friend, his mother, who had also sued for herself for hospital, medical and other expenses incurred. The jury had found the damages in one sum, $15,000, which was divided by the trial judge into two sums, one of $669.75 for the adult plaintiff, and one of $14,330.25 for the infant plaintiff. The appeal of the adult plaintiff to this Court was abandoned, the amount in controversy being insufficient to give jurisdiction without special leave.

The material facts of the case are sufficiently stated in the judgment now reported. The appeal by the infant plaintiff

to this Court was allowed and the judgment at trial in his favour restored, with costs throughout.

R. R. McMurtry and *E. J. R. Wright* for the appellants.

J. M. Macintosh for the respondent.

The judgment of the Court was delivered by

DAVIS J.—This action arose out of what may be termed, perhaps inaccurately but for convenience, a collision between a motor car and a bicycle on a public highway at a point a short distance outside the westerly limits of the city of Toronto. The bicycle was being ridden by a boy of fourteen years and he was undoubtedly seriously injured. His widowed mother brought this action, as his next friend, for damages for the injuries sustained by him and she joined personally as a plaintiff in the action to recover payments made by her for medical and hospital services and sundry other expenses incurred by her as a result of the accident. The defendant is the owner and driver of the motor car.

It is common ground that the motor car and the bicycle came into collision on Queen street (which runs east and west) though the exact location of the collision on Queen street having regard to Macdonald avenue (which runs north and south) is highly controversial on the evidence and is in large measure the turning point in the case. Queen street has a paved highway, the concrete being 23 feet 9 inches wide. It is what is called a "through" highway and is a much travelled road. Macdonald avenue has neither a paved road nor sidewalks. A cinder path serves for pedestrians. There is a noticeable incline on Macdonald avenue as it runs southerly into Queen street and there is a "Stop" sign on Macdonald avenue close to the point of its intersection with Queen street.

The defendant was driving his car westerly along Queen street and the boy on the bicycle had come down Macdonald avenue on the cinder path. There were two theories advanced as to the exact location and cause of the accident. The defendant's theory is that the boy on the bicycle came down the cinder path on Macdonald avenue at a fast rate of speed, entered upon Queen street without stopping and ran

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right into the defendant's motor car just as the motor car was passing Macdonald avenue, striking the motor car in the centre of one of the side doors of the car. The other theory, advanced on behalf of the boy, is that he had turned off Macdonald avenue and was at the time of the collision proceeding westerly along Queen street, about 4 or 5 feet from the northerly side of the paved road, when at a point about 50 feet west of Macdonald avenue the motor car overtook him; the right front bumper and fender of the motor car striking the bicycle with such force as to cause the injuries. If the latter theory is correct, the motor car and the bicycle were travelling in more or less parallel lines along Queen street for a distance of some 50 feet. The two theories are obviously irreconcilable. There were very few witnesses of the accident and all persons who had any real knowledge of the facts and circumstances appear to have been called at the trial. In the very nature of a sudden accident of this kind it is not surprising that there was a very considerable conflict in the testimony as to the exact details and measurements. The case, which was essentially one of fact for a jury, was tried with a jury.

The following were the questions submitted to the jury and their answers:

1. Has the defendant, Taylor Storey, satisfied you that the accident in question did not arise through any negligence or improper conduct on his part? Answer yes or no. A. No.

2. If your answer to Question No. 1 is "no," then state fully wherein the driver was guilty of negligence which caused the accident to the plaintiff. A. In not exercising the proper amount of care to avoid striking boy who was on the highway going west.

3. If your answer to Question No. 1 is "no," then state if in your opinion the infant plaintiff could have avoided the accident by exercising reasonable care. Answer yes or no. A. No.

4. If your answer to Question No. 3 is "yes," then state fully what the plaintiff could and should have done which would have avoided the accident. A. (No answer).

5. At what amount do you assess damages? A. $15,000.

6. If your answer to Question No. 1 is "no," and to Question No. 3 your answer is "yes," then state if you find it practicable to apportion the respective degrees of fault as between the driver and the infant plaintiff. Answer yes or no. (No answer).

7. If your answer to Question No. 6 is "yes," then state the respective degrees of fault.

Driver ..... Per cent.
Plaintiff ..... Per cent.

(No answer).

It is plain that the jury accepted the theory advanced on behalf of the boy, in that the jury specifically state that the defendant did not exercise "the proper amount of care to avoid striking the boy who was on the highway going west." Apart from the question of the nature and extent of the physical injuries suffered by the boy, the whole case was developed in evidence and put to the jury upon the two conflicting theories of the collision, and if the jury had accepted the defendant's theory that the boy on the bicycle ran right into the motor car at the intersection of Macdonald avenue with Queen street, they undoubtedly would have said so. Their words "who was on the highway going west" must be taken to express the acceptance by them of the other theory, that the accident did not occur at the intersection but some fifty feet west of the intersection while the boy was proceeding westerly along Queen street. The issue was very fairly, and I think completely, put to the jury by the learned trial judge. In fact he recalled the jury after some discussion with counsel and charged them explicitly thus:

> If you find that the plaintiff was the author of his own misfortune, so to speak: he would be the author of his own misfortune if you came to the conclusion that he came down Macdonald avenue and did not stop at the stop sign and ran into this motor car at that point.

And again,

> I spoke to you about Question No. 3, about his contributing to the negligence, and that is another thing altogether. He may not have been entirely the author of his own misfortune, but he may have, by reason of his not stopping, contributed to the cause of the collision. That is entirely for you to say.
>
> The two points are quite distinct in that sense, and that is the reason you are asked that as a separate question.

Not only did the jury expressly find that the accident was caused by the defendant "not exercising the proper amount of care to avoid striking the boy," but specifically found that the boy "could not have avoided the accident by exercising reasonable care."

There was evidence, and in fact a good deal of evidence, in support of the theory that the defendant struck the boy on the bicycle on Queen street about fifty feet west of Macdonald avenue while the boy was proceeding along Queen street in a westerly direction. It is quite impossible for us to say that the jury could not properly find, viewing

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the whole evidence reasonably, that the place of the accident was where they obviously put it. The evidence was conflicting but the jury was the tribunal entrusted with the duty of determining the issues of fact and their conclusions on such matters are not to be disturbed merely because they are not the conclusions which judges sitting in courts of appeal might themselves have arrived at, to adopt the words of Lord Atkinson in *Toronto Railway Co.* v. *King and another* (1).

Counsel for the defendant very properly urged before us the duty in law that rested upon the boy to stop his bicycle at the foot of Macdonald avenue before entering upon Queen street, a through highway. But that point was thoroughly canvassed in evidence at the trial and the jury, in our view, was properly directed upon it. It is to be observed that the defendant stated in evidence that he was familiar with the district at Queen street and Macdonald avenue; that he knew Macdonald avenue was dangerous and a well used highway; that he would naturally keep a lookout for that particular street; that when he was about forty feet east from Macdonald avenue he observed the boy coming down Macdonald avenue on the bicycle; that he thought the boy's speed was very fast; and that, while he knew the boy should stop at the intersection, he did not think that the boy in fact would be able to stop. It is one thing for a motor car driver to assume that another person will comply with the law and stop before entering upon a through highway and to govern his conduct in relation to that other person on that assumption; it is quite a different thing for the driver of the motor car to admit that he observed the other person and realized not only the unlikelihood but the apparent inability of the other person at the given time and under given circumstances to stop.

Now, as to the injuries to the boy. Dr. McKenzie of Toronto, an outstanding brain specialist, described the injuries to the boy under two headings. There was evidence of local injury to the brain in the back part of the head, and, apart from that, there was evidence of a severe general

(1) [1908] A.C. 260, at 270.

injury to the brain as a whole, a severe concussion. A fragment of bone, probably one and one-half inch, was driven through the covering of the brain into the brain and when that fragment of bone was removed the covering over the brain was badly damaged and the underlying brain was pulped and damaged, and part of it oozed out and had to be removed. There was probability of trouble from injury to the frontal region of the brain and more than a possibility of the boy developing epileptic seizures.

The defendant appealed to the Court of Appeal for Ontario against the judgment in favour of the plaintiffs directed to be entered by the trial judge upon the answers of the jury to the questions submitted. The Court of Appeal unanimously set aside the judgment and directed a new trial. From that judgment the plaintiffs appealed to this Court. It is necessary, therefore, that we examine the written reasons given by the Court of Appeal for their judgment. The Court did not discuss the problem that was presented to the jury at the trial as to which of two theories of the accident was to be accepted or the real effect of the language of the jury as giving expression to the acceptance of one or other of the theories. The judgment does not discuss the evidence except to state as facts that the collision took place "at or near" the intersection and that the plaintiff did not stop before entering the intersection and "apparently struck the front door of the defendant's car with much force denting the door and suffering somewhat severe injury." The Court of Appeal obviously took a view of the evidence that was rejected upon conflicting evidence by the jury. The Court concluded that "it is almost impossible to form any opinion as to exactly what had taken place." Assuming that to be so, then the defendant had not satisfied the statutory obligation, which rested upon him as the owner and driver of the motor car, of establishing that the accident did not arise through his negligence or improper conduct (sec. 42 (1) of the *Highway Traffic Act*, R.S.O. 1927, ch. 251), and that is exactly what the jury said in answer to the first question. Upon that state of fact, the plaintiffs were entitled to judgment. In our view, it was not impossible for the jury to come to a conclusion as to exactly what had

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taken place. There are difficulties in the case, as there are in all these motor collision cases, but that does not mean that the jury is not entitled to accept one of two or more conflicting stories of what in fact took place. The reasons for the judgment appealed against proceed further to state that "the medical evidence was extremely confusing, some of the doctors and the mother" suggesting that the disposition of the boy has been changed as a result of the accident. As a matter of fact there were only two doctors called, and both of these on behalf of the plaintiffs. Dr. McKenzie was the only doctor called to give opinion evidence. Dr. Dalrymple merely spoke of the condition of the boy as he saw and examined him in the hospital. We cannot, with respect, agree that the medical evidence was in any way confusing. The judgment further proceeds to state that "there is no corroboration of the mother's evidence as to the character of the boy before the accident." But there can be no legal consequence to the absence of corroboration of statements by the mother as to the disposition of the boy before and after the accident. The jury saw both the mother and the boy and heard their evidence, and the weight to be attached to their evidence was entirely a matter for the jury. The judgment further states the amount of damages was an "extraordinary large amount" but does not say that in the opinion of the Court the amount was either unreasonable or excessive. The amount is large but not so large as to disclose an entirely wrong principle in its ascertainment or an entirely unreasonable view of the evidence. The Court expressed the view that such damages "could only be justified by a finding of serious permanent injury." In our view, there is much more in the evidence than a mere possibility of a very serious permanent injury. The judgment concluded that the trial already had was of a "generally unsatisfactory nature" and that there was "the possibility of the production of more satisfactory evidence at a new hearing." Neither counsel before us could offer any suggestion as to the possibility of the production of more satisfactory evidence on a new trial than was had on the first trial, and we are at a loss to understand what sort of evidence is now available that was not available and given at the first

trial. There were two affidavits sought to be used by the defendant in the Court of Appeal on an application for a new trial, but as these affidavits were not admitted in that Court and were included in the appeal book, by order of Mr. Justice Middleton, only for convenience if this Court should think they should have been received in the Court below, this Court took the same view as the Court below that these affidavits could not be read.

With the greatest respect, we cannot agree with the view that the trial was of a generally unsatisfactory nature, and in our opinion the Court of Appeal was not justified in directing a new trial upon any of the grounds referred to in the reasons for their judgment or upon any other ground discussed before us. There was, in our view, no "substantial wrong or miscarriage" that would have entitled the Court below under sec. 27 of the Ontario *Judicature Act*, R.S.O. 1927, ch. 88, to grant a new trial. Lord Wright in the House of Lords in the very recent case of *Mechanical and General Inventions Co. Ltd.* v. *Austin* (1) said:

> An appellate court must always be on guard against the tendency to set aside a verdict because the Court feels it would have come to a different conclusion.

The appeal must be allowed and the judgment of the learned trial judge restored in so far as the infant plaintiff recovered against the defendant the sum of $14,330.25 to be paid into court to his credit upon the terms of the judgment.

The defendant having moved to quash the appeal to this Court of the boy's mother as a plaintiff in respect of her recovery at the trial of the sum of $669.75, her counsel abandoned her appeal as being an amount in controversy insufficient to give jurisdiction without special leave, and the judgment of the Court of Appeal therefore stands in respect of the rights of the plaintiff mother.

The defendant raised before us on a substantive motion, which we enlarged to consider on the hearing of the main appeal, the question of the jurisdiction of this Court to entertain the appeal, upon the ground that the order of the Court sought to be appealed from was "a judgment or order made in the exercise of judicial discretion" and

(1) [1935] A.C. 346, at 375.

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HUTCHEON v. STOREY.

Davis J.

therefore not appealable to this Court under sec. 38 of the *Supreme Court Act*. Sec. 36 expressly gives a right of appeal from a judgment "directing a new trial." The reasons given by the Court of Appeal for its order directing a new trial were, as in *Varette* v. *Sainsbury* (1), insufficient grounds in law upon which to justify an order for a new trial, and the subject matter was not one which by special statute or by its very nature was merely a matter of discretion for the Court below. The motion to quash is therefore dismissed.

The costs of the infant plaintiff of this appeal, including the costs of the defendant's motion to quash, and his costs in the courts below, must be paid by the defendant.

Appeal allowed with costs.

Solicitors for the appellants: *Nesbitt, McMurtry & Ganong.*
Solicitors for the respondent: *Macdonald & Macintosh.*

(1) [1928] Can. S.C.R. 72.

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ASSESSMENT AND TAXATION—*Continued*

eer Gold Mines of B.C. Limited was incorporated with a capital stock of $2,500,000 divided into 2,500,000 shares of $1 each. On March 30, 1928, Sloan assigned to the new company his option for 1,600,000 shares in that company. The *Income Tax Act* of British Columbia (Statutes of 1932, c. 53, s. 6) enables the Commissioner of Income Tax to make certain deductions from a mine owner's income on account of depletion of the mines, thus involving the fixing of the costs to the taxpayer of the acquisition of the mines. The Commissioner of Income Tax fixed the acquisition costs to the new company at $100,000. The new company appealed to the Lieutenant-Governor in Council under section 44, subsection 4, of the *Taxation Act* (R.S.B.C. 1924, c. 254) as amended, from the decision of the Minister of Finance, under clause (*p*) of subs. 1 and clause (*a*) of subs. 3 of section 44, fixing the acquisition costs "at too low figure of $100,000 instead of $2,500,000 for the purpose of assessment of the company's income for the year ending March 31, 1931." The appeal was disposed of by an Order in Council, increasing the amount from $100,000 to $200,000. The new company, being still dissatisfied, obtained a writ of *mandamus* from D. A. McDonald, J., commanding the Minister of Finance to ascertain and take into consideration the acquisition costs to the new company of the properties acquired by it under the above agreement of March 30, 1928. Subsection 4 of section 6 of the *Income Tax Act* provides that "an appeal from any decision of the Minister (of Finance) * * * may be taken to the Lieutenant-Governor in Council, who after hearing the parties interested, may either confirm or amend the decision of the Minister and the decision of the Lieutenant-Governor in Council shall be final." The Court of Appeal reversed the judgment of McDonald, J.—*Held,* affirming the judgment appealed from (48 B.C. Rep. 412), that *mandamus* did not lie in this case. Under section 6 (4) of the *Income Tax Act,* the decision by the Minister of Finance was appealable; a competent appeal was taken from it; the appeal was considered by the Lieutenant-Governor in Council in the exercise of his statutory jurisdiction and powers, who pronounced a decision upon the matters in dispute which the Act declares to be final. Such decision was binding upon the Minister of Finance as well as upon the appellant company; and a *mandamus* requiring him to reconsider questions settled by the Order

ASSESSMENT AND TAXATION—*Continued*

in Council would have been a *mandamus* requiring him several months after he became *functus officio,* to commit a breach of the law and to perform an act which, by force of the statute, must necessarily be inoperative. THE KING (ON THE PROSECUTION OF THE PIONEER GOLD MINES OF BRITISH COLUMBIA LTD.) *v.* THE MINISTER OF FINANCE **70**

2——*Crown—Assessment of Halifax Harbour Commissioners for business tax as "occupier" within s. 357 (1) of Halifax City Charter—Occupation for the Crown —The Halifax Harbour Commissioners' Act, 1927, c. 58 (Dom.).*]—The Halifax Harbour Commissioners, who occupy the Crown property of Halifax Harbour for the exercise of their powers under 17 Geo. V. (1927, Dom.), c. 58, are not assessable for business tax as an "occupier" within s. 357 (1) of the Halifax City Charter (1931). The relation of the Commissioners to the Crown in respect of their occupation of the harbour property is of such a character as to constitute that occupation an occupation "for the Crown" in the sense of the principle stated in *The Queen* v. *McCann,* L.R. 3 Q.B. 141, at 145-6, and as elucidated in its application in other cases. (*Coomber* v. *Justices of Berks,* 9 App. Cas. 61, and other cases, cited. *Fox* v. *Government of Newfoundland,* [1898] A.C. 667, and *Metropolitan Meat Industry Board* v. *Sheedy,* [1927] A.C. 899, distinguished, in view of the constitution, duties and powers of the bodies there in question). Provincial legislation to tax the Commissioners as occupier of the harbour property would be *ultra vires;* and the general taxing words of the City Charter should be read as excluding such a tax. CITY OF HALIFAX *v.* HALIFAX HARBOUR COMMISSIONERS **215**

3——*Municipal corporation — Waterpower company—Flooded land—Whether assessable—Actual value—Arts. 503, 585 C.C.—Cities and Towns Act, R.S.Q. 1925, c. 102, ss. 485, 488, 500, 504, 510, 511—Watercourses Act, R.S.Q. 1925, c. 46, ss. 16, 17, 18.*]—Land which had been flooded by a power company in order to raise the level of a river to a certain elevation for the purpose of establishing a power house is assessable and must be given some actual or real value.—Duff C.J., after commenting on the meaning of the words "actual value" when used for the purpose of defining the valuation of property for taxation purposes, was of the opinion, although not dissenting

BANKRUPTCY—*Continued*

respondent did not pursue this further. It offered to return the transfer. Respondent took over the management of the lands, collected rents, and paid thereout certain interest, taxes and insurance premiums. Appellant claimed that respondent had assumed the relation to appellant of *cestui que trust* and was bound to indemnify him against liabilities in connection with the trust property, including liability under appellant's mortgage covenant.—*Held:* The claim for indemnity failed. In view of respondent's position under the *Bankruptcy Act* (provisions of which were considered and discussed in this regard), the equitable rule as to a trustee's right to indemnity from a beneficial owner was not applicable to the case. *Graham* v. *Edge*, 20 Q.B.D. 683, cited. *Hardoon* v. *Belilios*, [1901] A.C. 118, and *Castellan* v. *Hobson*, L.R. 10 Eq. 47, distinguished. —Judgment of the Court of Appeal for Manitoba, 42 Man. R. 69, affirmed. ELLIOTT *v.* CANADIAN CREDIT MEN'S TRUST ASSOCIATION, LTD..... **1**

2——*Motion for leave to appeal—Whether ecclesiastical bodies or institutions within the ambit of the Bankruptcy Act —Whether a "corporation" or "a person"—Bankruptcy Act, section 2 (cc, k. p.).*]—Ecclesiastical bodies or institutions are not included within the ambit of a bankruptcy statute essentially designed for the administration of the property of persons or corporations carrying on business. The *Bankruptcy Act* was never intended to apply to a parish or church or other religious body. SARRAZIN *v.* LES CURÉ *et* MARGUILLIERS DE L'ŒUVRE ET FABRIQUE DE LA PAROISSE DE ST-GABRIEL DE BRANDON..... **419**

3——*Sale—Deed of sale—Void after bankruptcy—Agreement by trustee with conditions—Whether legal—Duty of the trustee—Section 43 of the Bankruptcy Act—Articles 2058, 2061 C.C.*]—The appellant brought a petitory action against the respondent for the recovery of an immovable known as the Lord Renfrew Apartments. In September, 1930, the respondent was owner of those apartments and, as security for the loan of $150,000 made to him at that time he hypothecated the apartments in favour of Canada Permanent Mortgage Corporation. The sum of $150,000 was repayable in capital and interest, in equal monthly instalments of $1,300.50 each. A short time later, the apartments were sold by the respondent to the appellant for the sum of $27,851.57 and the deed of sale provided that the purchaser would not be personally responsible for

BANKRUPTCY—*Continued*

the amount of the hypothec. The appellant was in possession of the property for about a year, when financial difficulties intervened. He did not pay the monthly instalments due to the Mortgage Corporation for some months and allowed municipal taxes to accrue. Finally, he went into bankruptcy. The Mortgage Corporation pressed for payment; and the trustee and inspectors of appellant's bankrupt estate, unable to raise funds or secure a purchaser for the property, secured permission from the Court to sell the property under the formalities of the *Bankruptcy Act* and placed advertisements for its sale in the Quebec *Official Gazette*. The charges against the property at that time consisted of a balance of the loan then in excess of $140,000, the indemnity of 6 per cent due to the lender in case of a forced sale, the taxes due to the city of Montreal of approximately $10,000, the taxes to the Provincial Government of $4,000 and the fees and commission due to the solicitor for the bankrupt estate and the trustee. The trustee valued the property at $360,000, but, being of the opinion that the time was not opportune for a sale in view of the condition of the real estate market and fearing that any equity for the estate would be lost if a forced sale took place, he attempted to secure a delay from the Mortgage Corporation for a period of approximately one year, when he hoped that a more receptive market might be found. Following negotiations, an agreement was reached on March 4, 1932, whereby the Mortgage Corporation gave to the trustee an extension of approximately one year for repayment of the past due portion of the loan. This agreement was made possible by the intervention of respondent who would have been responsible for any deficiency between the sale price of the property and the charges thereon. By the agreement the respondent paid to the Mortgage Corporation the arrears of capital and interest on the loan and also paid the arrears of taxes, the fees and expenses of the trustees and solicitors and other incidental expenses. The conditions of the agreement were that the respondent should hold and administer the property until January 25, 1933, but that on that date, or any time prior thereto, the trustee of the appellant's bankrupt estate or his nominee would have the right to resume possession of the property and to keep title by repaying the respondent's disbursements and assuming payment of the debt to the Mortgage Corporation. If the trustee or his nominee failed to do this within the stipulated delay, the

BANKRUPTCY—*Continued*

property was to be vested in the respondent. The arrangement of the 4th of March, 1932, was previously approved by the inspectors of the estate, and the trustee was authorized to sign the agreement by the registrar in bankruptcy. The appellant was made aware of the negotiations and was informed of the trustee's intention to enter into such agreement. Subsequently the appellant succeeded in having a proposal of composition accepted by his creditors and approved by the bankruptcy court. On the 31st of May, 1932, he secured his discharge, the receiving order was cancelled and the court further ordered that all of the appellant's assets, including any equities of redemption and the interest of the appellant in any property then vested in the trustee, should be returned to him. The trustee re-transferred to appellant his assets and included in the transfer the Lord Renfrew Apartments. On the 27th of July, 1932, and again on the 22nd of November, 1932, the appellant made attempts to comply with the conditions of the agreement of the 4th of March, 1932, and on the latter date the appellant's lawyers wrote to the respondent asking him to furnish them immediately a statement of all disbursements made by him. The respondent answered that he was forwarding such an account to a firm of lawyers who under the agreement had been constituted respondent's attorneys. On January 20, 1933, the appellant instituted a petitory action against the respondent, claiming back the apartments as owner, invoking no other title than the original deed of sale from the respondent to him, dated the 26th of November, 1930. The delay accorded to the trustee or his nominee to retake possession of the property upon repayment of the respondent's disbursements would have expired on the 25th day of January, 1933, or four days after the service of the action. Before the date fixed for the respondent's appearance, the time allowed for repossession of the property by the trustee or his nominee had expired.—*Held* that the appellant's action should be dismissed. The title deriving to the appellant from the deed of sale of the 26th of November, 1930, ceased to have any effect in his favour from the moment that, by force of the bankruptcy order, the Lord Renfrew Apartments became vested in the trustee; and, by the agreement of the 4th of March, 1932, the respondent became the absolute owner of the apartments, unless, under its terms, the trustee, or his nominee, rendered that agreement of no effect as regards the respondent by

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complying with the several conditions therein stipulated up to and including the 25th day of January, 1933, or unless the agreement so made between the trustee and the respondent can be set aside on the ground of fraud (and no fraud had been alleged) or illegality. The trustee, or his nominee (the appellant) have never complied with the terms and conditions required to render the agreement of no effect.—Moreover, the agreement of the 4th of March, 1932, was not illegal, as the trustee had the power, under section 43 of the *Bankruptcy Act*, with the permission in writing of the inspectors, to enter into such agreement. It was the trustee's duty to do everything in order to maintain for the estate any equity that it ought to have in the apartments and to preserve, as far as possible, the rights of the bankrupt estate in that property. The hypothecary claim against the appellant, or his trustee, and its consequential result under articles 2058 and 2061 of the Civil Code may well be regarded as a "claim out of, or incidental to, the property of the debtor made or capable of being made on the trustee by any person" with respect to which the trustee is empowered by subsection (*i*) of section 43 of the *Bankruptcy Act*, with the permission in writing of the inspectors, to "make such *compromise* or other arrangement as may be thought expedient." GRIMALDI *v.* PIERCE.... **643**

4——*Criminal law—Concealing or removing property of bankrupt—Offences under Bankruptcy Act, s. 191—Conviction of employees of bankrupt company—Cr. Code, s. 69—Interpretation Act (Dom.), s. 28*..... **26**

See CRIMINAL LAW 1.

BANKS AND BANKING—*Trusts and trustees — Agency — Negotiable instruments—Estoppel—Coal shipped to dealer under consignment agreement—Proceeds of dealer's sales paid into dealer's bank account—Application of moneys in account towards payment of dealer's indebtedness to bank—Claim by original consignor against bank—Relationship between dealer and its consignor—Course of dealing—Conduct of the parties—Knowledge, bona fides, and rights, of bank.*]—E. Co., a coal dealer, was allowed a revolving line of credit by respondent bank, which held security by way of hypothecation under s. 88 of the *Bank Act* on its coal and a general assignment of book debts. Appellant company shipped coal to E. Co. under a consignment agreement whereby (*inter alia*) the title to and ownership of the coal should remain in appellant until

BANKS AND BANKING—*Continued*

sale thereof by E. Co., E. Co. was to keep appellant's coal separate and apart from other coal, E. Co. was to pay certain freight, insurance and other expenses, it guaranteed the payment for all sales made by it remaining unpaid for 120 days, its compensation for its services and expenditures consisted solely of surplus realized on its sales over appellant's regular circular of prices, and it was to account, with particulars, to appellant at specified times, and make payment in accordance therewith within 7 days thereafter, interest being chargeable on amounts not so paid. By the agreement as finally made, a clause, contained in an earlier document, that appellant's share should be collected first and the funds should not be confused, mixed or commingled with other funds of E. Co., but should be held separately and should immediately be deposited to appellant's account in a bank designated by appellant, was "cancelled and annulled." In practice E. Co. deposited the proceeds of sales of all coal, including appellant's coal, in one account in respondent bank, and made its payments to appellant by cheques upon its general checking account in that bank. Certain moneys and negotiable instruments (drawn or taken in E. Co.'s name) received by E. Co. from sales of appellant's coal and deposited in the bank during a time immediately preceding E. Co.'s going into bankruptcy, were applied by the bank against E. Co.'s indebtedness to it. Appellant claimed that the bank was not entitled to these as against appellant; that the moneys, etc., were in E. Co.'s hands subject to a fiduciary obligation to appellant, that this fiduciary obligation was transmitted to the bank with the moneys, etc., the bank having, it was alleged, received them with notice of the obligation and with knowledge that the application thereof by E. Co. in liquidation of its debt to the bank would be a breach of that obligation. *Held:* Appellant's claim failed.—*Per* Duff C.J., and Crocket J.: Even assuming that the proceeds of sales of appellant's coal were, as between E. Co. and appellant, held subject to a fiduciary obligation to appellant, that the bank had knowledge that the deposits of such proceeds were earmarked, and that the bank manager knew of the existence of a "consignment agreement," yet appellant's conduct precluded it from claiming the moneys as trust moneys; from disputing that, as to the proceeds of sales, the relation between it and E. Co. was that of creditor and debtor and not of *cestui que trust* and trustee. Appellant, in consenting to the deposit of

BANKS AND BANKING—*Continued*

the proceeds of the sales of its coal in E. Co.'s account, mixed with E. Co.'s moneys, combined with E. Co. in representing to the bank that these proceeds, so deposited, were not subject to any trust, but were moneys which E. Co. was authorized to deal with on the footing of moneys loaned to it by appellant. There was nothing in the evidence to displace the presumption that the bank followed the natural course in such circumstances, and treated the moneys as any reasonable person in appellant's position must have expected them to be treated, viz., as moneys placed at the disposition of E. Co.—*Per* Rinfret J.: The agreement between appellant and E. Co. allowed E. Co. to deposit the proceeds of sales in E. Co.'s general account and to use such proceeds (and dispose of them as its own) between the settlement dates, subject only to the obligation of remitting payments to appellant at the specified times; therefore E. Co.'s relation to appellant, as to such proceeds, was not that of agent or trustee, but the relation was that of debtor and creditor. On this ground alone appellant failed. But further, on the evidence in the case, there were no circumstances likely to arouse the bank's suspicion that E. Co. was depositing appellant's money or using its funds without right.—*Per* Cannon J.: Under the agreement E. Co. could, and did, mix with its own moneys the proceeds of sales of the coal supplied by appellant and use such proceeds for the purposes of its own business, provided it made the periodical payments under the agreement. In respect of such proceeds E. Co. was not a trustee but merely a debtor. Therefore, even had the bank been put upon enquiry and become fully acquainted with the arrangement between appellant and E. Co., it could have said that there was no trust which it was bound to recognize. And the evidence did not show any bad faith on the part of the bank.—*Per* Hughes J.: On the evidence it must be taken (and the findings at trial were not sufficient in their extent to contradict) that the bank took the money and negotiable instruments in good faith and for value, and with no knowledge of unauthorized application thereof by E. Co.; and therefore—regardless of whether E. Co. was a debtor or trustee of appellant in respect of the proceeds of sales of appellant's coal—in view of the established rules of law with regard to dealings in money and negotiable instruments between parties in such a position as E. Co. and the bank, the appellant's claim against the bank could not succeed.—*Henry* v. *Hammond* [1913] 2

CONSTITUTIONAL LAW

See ASSESSMENT AND TAXATION 2; INTOXICATING LIQUORS 1.

CONTRACT—*Bond given by employee not to set himself up in like business or work — Consideration — Enforceability — Public policy — Restraint of trade — Rights of employer — Onus.*]—The appellant, after being in the employment of the respondent company for about eleven months in its retail drug business in Flin Flon, signed a bond under seal in the sum of $5,000 which, after reciting that the respondent company had agreed to take him into its employment as a druggist, stated the condition of the bond was that if he should leave or be dismissed from the respondent's services he would not set himself up in like business or work for anyone else within 25 miles from Flin Flon within a period of five years after such leaving or dismissal. The appellant understood that his refusal to execute the covenant would lead to an early termination of his employment. About four years later the respondent company terminated the employment by giving the appellant one month's notice, and soon after his dismissal, the appellant entered service with another drug company which had opened a drug store immediately adjoining the respondent's store. Alleging breach of covenant, the respondent company brought action on the bond for the penal sum of $5,000, and, at the trial, was allowed to ask for additional relief by way of injunction. The trial judge dismissed the action on the ground that there was no consideration for the bond. The majority of the Court of Appeal held that the bond was sufficiently supported by consideration and was otherwise enforceable.—*Held* that there was in this case legal consideration for the bond; but, reversing the judgment of the Court of Appeal ([1934] 2 W.W.R. 298), that, under the circumstances of this case, the bond was unreasonable and unenforceable.—*Per* Davis J.—A master is not permitted to impose restraint outside of reasonable limits upon his servant, after discharge, from turning his skill and knowledge to the best account and the respondent company failed to establish facts and circumstances surrounding the employment of the appellant sufficient for the Court to say that the agreement was reasonable. MAGUIRE *v.* NORTHLAND DRUG CO. LTD. **412**

2——*Rescission—Inability to make restitutio in integrum—Whether relief not based on rescission could be granted in the action—Form of action and conduct of case.*]—The judgment of the Court of Appeal for Ontario, [1935] O.R. 169, held that, while the facts in connection with the transaction in question gave plaintiff a good cause of action for rescission, yet as, through what had since taken place, the circumstances had changed and become such that plaintiff could not make *restitutio in integrum*, its right of action for rescission had gone, and as it had not framed or pursued the action for any relief except relief on the basis of rescission, its action must be dismissed. Plaintiff appealed to this Court.—*Held:* The appeal must be dismissed. By reason of said change in circumstances, the objections to granting relief by way of rescission were insurmountable; and a claim for relief by way of damages (as to damages no evidence had been given), or otherwise except on the basis of the setting aside of the impeached transaction, not having been presented either at the trial or in the Court of Appeal, could not properly be entertained by this Court; defendant should not be called upon in this Court to meet an entirely new case unless, at all events, it rested exclusively upon propositions of law, and unless, moreover, it appeared that he could not be prejudiced by its not having been advanced at an earlier stage. DOMINION ROYALTY CORPORATION LTD. *v.* GOFFATT **565**

3——*Alleged substitution of oral contract for previous written one—Evidence.*]—MASON *v.* SCOTT AND ANDERSON.... **656**

4——*Life insurance — Payment — Person insured in Ontario by United States company—Policy providing for payment of amount of insurance (expressed in "dollars") at company's head office in United States—Premiums on policy paid in Canadian currency—United States dollars worth more than Canadian dollars at time when insurance became payable—Payment of policy—Sufficiency or insufficiency of payment in Canadian dollars to the number of dollars specified in policy—Provisions of policy—Ontario Insurance Act, R.S.O. 1914, c. 183, s. 155; R.S.O. 1927, c. 222, ss. 119-159*..... **461**

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5——*Sale — Bankruptcy of vendee — Agreement by trustee in bankruptcy—Validity of agreement by trustee—Power of trustee — Bankruptcy Act, s. 43 — Articles 2058, 2061 C.C.*..... **643**

See BANKRUPTCY, 3.

6——*See* CONDITIONAL SALE; DAMAGES 1; EVIDENCE 1; MASTER AND SERVANT 1; MUNICIPAL CORPORATION 2.

COURTS—*Judgments — Jurisdiction — Res judicata—Arbitration—Appeal—Action for balance due under contract—Dismissal of application to set aside default judgment and give leave to defend—Appeal dismissed from refusal to set aside judgment, but reference made under terms of contract—Reference, and report of findings—Objection to jurisdiction — Confirmation of report — Appeal therefrom.*]—Plaintiff (appellant) recovered judgment by default against respondent City for $14,432.11, the balance due on a construction contract, which the City had held back as protection against workmen's claims threatened under a wage clause in the contract. An application by the City to open up the judgment was dismissed and the City appealed. The Supreme Court of Nova Scotia *in banco* dismissed its appeal but, the contract having, by agreement, been laid before it, and its attention called to the fact that certain workmen had begun an action against the City on the basis of the said wage clause, it ordered a stay of execution as to $5,000, discontinuance of the workmen's action, and arbitration of the workmen's claims before the City Engineer (as referee named in the contract). Before the Engineer, plaintiff objected to his jurisdiction to proceed, on the ground, *inter alia,* that the contract was merged in the judgment. Before proceeding, the Engineer prepared a stated case for directions, but the Court, on application to fix a date for hearing it, directed him to proceed without delay to hear evidence. He found that $2,879.43 was due by plaintiff to workmen to comply with the contract terms. Plaintiff, treating the report as an award made under the terms of the contract, moved the Court to set it aside on the said jurisdictional ground and on the ground that it purported to set up a new contract between plaintiff and its workmen. The Court referred the matter back to the Engineer for definite findings on a point as to rate of wages. The Engineer filed a supplementary report. The City then moved for an order confirming both reports and to make them a rule of court, and plaintiff moved to set aside the award. The Court, by a majority, granted the City's motion and dismissed plaintiff's motion. From that judgment plaintiff brought the present appeal.—*Held:* The appeal should be dismissed. The jurisdiction of the Engineer to investigate and report depended entirely upon the jurisdiction of the Court *in banco* to make the order of reference; and this order, not having been appealed from at the proper time, could not now be reviewed; plaintiff, therefore, could not now impeach the award on the ground that the rights of

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the parties to the contract had become merged in the default judgment (which ground was the basis of objection to the jurisdiction of the Court *in banco* to make the order and of the Engineer to proceed under it); and there was no uncertainty or manifest error of law on the face of the award.—As to the order of reference of the Court *in banco: Per* Duff C.J.: The Court *in banco* had discretionary authority to set aside the default judgment, and had jurisdiction to grant the stay, and to impose, as a term of its refusal to set aside the judgment, that the amount, if any, found due by the contemplated award should be treated as payment *pro tanto* on account of the judgment; which was in substance the effect of its decision. It is gravely questionable whether this Court had jurisdiction to hear an appeal from that judgment; and whether, if jurisdiction existed, the judgment dismissing the appeal having been acted upon, any appeal would not have been barred *exceptione personali.* But whether appealable or not, it was a judgment of a Court of general jurisdiction, possessing (with some reservations not here material) authority to pronounce conclusively, subject to appeal if the law gave an appeal, upon any question of its own jurisdiction; and, disregarding any question of personal estoppel by acceptance of the judgment, the Court in the subsequent proceedings was bound by its own judgment (*Samejima* v. *The King,* [1932] Can. S.C.R. 640, at 647).—*Per curiam:* Had the City defended the action it would have been entitled under the contract to withhold moneys due by it to plaintiff to make good to workmen any deficiency in the wages found to be payable to them under the wage clause; and the result of the proceedings taken under the order of reference was precisely the same as that which would have followed had the Court set aside the default judgment and allowed the City to defend; and was one which seemed to meet the justice of the case as it was brought before the Court with concurrence of both parties to the contract. SCOTIA CONSTRUCTION CO. LTD. *v.* CITY OF HALIFAX..... **124**

CRIMINAL LAW—*Bankruptcy — Concealing or removing property of bankrupt—Offences enacted by section 191 of the Bankruptcy Act, R.S.C. [1927] c. 11—Persons other than bankrupt convicted—Conviction valid—Criminal Code, R.S.C. [1927], c. 36, s. 69—Interpretation Act, R.S.C. [1927], c. 1, s. 28.*]—The appellants, one being the manager and the other an employee of a bankrupt

CRIMINAL LAW—*Continued*

company, were convicted for having concealed and fraudulently removed goods belonging to the bankrupt, contrary to section 191 (d and e) of the *Bankruptcy Act*. The ground of appeal was that no other person than the bankrupt could be indicted for any offence under that section.—*Held,* affirming that conviction, that the offences created by section 191 of the *Bankruptcy Act* were offences within section 69 of the *Criminal Code;* or, to put it alternatively, by force of section 69, or, by force of the enactments of section 28 of the *Interpretation Act,* section 69 is to be read as if the offences created by section 191 were specifically named therein.—In other words, section 191 must be read and construed on the footing that the provisions of the *Criminal Code* should apply to offences created by that section, as there is nothing in the provisions of that section necessarily or reasonably implying the exclusion of section 69 of the *Criminal Code*. Crocket J. dissenting. SIMCOVITCH *v.* THE KING. **26**

2——*Murder — Poisoning — Jury trial — Misdirections by trial judge—Evidence—Admissibility—Declarations by deceased —Res gestae—Ante mortem—Testimony by brother of accused, an accomplice—Warning given to jury—Illegal comments by trial judge in his charge—Whether "substantial wrong or miscarriage of justice"—New trial—Section 1014 (2) Cr. C.*]—The appellant was tried for the murder of her husband, convicted and sentenced to death, the indictment charging her with the administering of poison (arsenic). The conviction was affirmed by the appellate court, two judges dissenting. The grounds of dissent were based on misdirections by the trial judge in his charge to the jury on the two following matters. First: the Crown brought witnesses who testified to declarations made by the deceased, in the presence of the accused, four or five days before his death and nearly two weeks after the date of the alleged offence, such declarations being to the effect that he was dying from poison given to him by the accused. Counsel for the accused having objected to the admissibility of such evidence, the trial judge held that it could not be admitted "as being a deposition *ante mortem,*" but he allowed it "as being a declaration made by the victim in presence of the accused." But, in his charge to the jury, the trial judge did not restrict himself to instruct the jury accordingly, and, treating these declarations by the deceased as being an important part of the evidence, he proceeded to make an analysis of same and

CRIMINAL LAW—*Continued*

emphasized the statement made by the deceased that he was going to die, and so to give more weight to the truthfulness of the latter's declarations that he had been poisoned by his wife. Secondly: the principal witness for the Crown was one Gédéon Bernard, brother of the accused. At the time of the trial he was serving a sentence of five years' imprisonment following a verdict of manslaughter on an indictment for the murder. He testified that the appellant came to his house and asked him if he had any poison, as she wanted to get rid of her husband, that she agreed to pay him $200; that he gave her some poison; that the appellant, seeing her husband ill but not yet dead, asked him for more poison and he gave it. At the request of counsel for the accused, the trial judge warned the jury of the danger of convicting on the uncorroborated evidence of an accomplice, although it was within their legal province so to do; but he added (translation): "* * * to tell you to take the evidence of Gédéon Bernard as that of an accomplice, I am bound, at the request of the defence, to tell you that he was the aider and not the principal. To be an accomplice, it is necessary that there should be a principal, that another should have committed the crime. If it is absolutely desired that I say to the jurors to regard Gédéon Bernard as an accomplice in the present case, it would be necessary that the principal should be the accused. It is not possible to be the accomplice of one who does not exist. * * * He is not an ordinary accomplice. If he be the accomplice, he is the brother of the accused."—*Held* that the trial judge misdirected the jury upon each of the two grounds of appeal above mentioned and that those material misdirections were so grave as to necessitate a new trial, the Crown having failed to shew that no substantial wrong or miscarriage of justice did not occur owing to such misdirections. Section 1014 (2) Cr. C.—*Held,* also, that the declarations made by the deceased that he had been poisoned by his wife were not admissible as forming part of the *res gestae*. These declarations were made at the hospital nearly two weeks after the date of the alleged offence and four or five days before his death; therefore they were too much separated by time and circumstance from the actual commission of the alleged criminal act. These declarations should have been alluded to only in connection with the attitude of the accused.—*Held,* further (St. Germain J. *ad hoc* expressing no opinion), that the trial judge misdirected the jury

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in his remarks concerning the evidence of the brother of the accused, if considered as an accomplice. The trial judge after having set out to warn the jury of the danger of convicting on the uncorroborated evidence of an accomplice, destroyed in effect by his subsequent remarks the warning given; some jurors may have in view of those remarks considered that the request of the defence was tantamount to an admission of guilt.—*Per* Duff C.J. and Crocket J.—The observations of the trial judge fall within the description "matters which ought not to have been submitted" to the jury for consideration by them "in aiming at their verdict." *Makin* v. *A.G. for N.S.W.*, ([1894] A.C. 70). CHAPDELAINE *v.* THE KING..... **53**

3——*Indictment for murder—Conviction of manslaughter—Offence of counselling abortion — Dying declaration — Admissibility—Sections 69 and 303 Cr. C.*]—The accused was convicted of manslaughter on a charge of murder for having caused the death of V. K. by counselling or procuring G. S. unlawfully to use instruments upon her with intent to procure her miscarriage, contrary to the combined effect of sections 69 and 303 of the Criminal Code. The dying declaration was a lengthy narrative by the deceased which day by day she related to her mother, who wrote down the story; this narrative, which concluded with the words "I wish Carl punished," appeared to have been read over to the deceased shortly before her death and adopted by her at that time as a true statement; a number of questions at the same time were submitted to her by police officers, and her answers with the questions were the subject matter of two separate declarations. The narrative, together with the two short statements containing the questions and answers, were all put before the jury. It was common ground that the case against the accused could not be established without evidence of the dying declaration.—*Held,* reversing the judgment of the Court of Appeal ([1935] 2 W.W.R. 146) that the dying declaration was inadmissible. Therefore the conviction was quashed and a judgment and verdict of acquittal was directed to be entered.—*Per* Lamont and Davis JJ.—Assuming that the indictment could properly be said to be one for homicide (it is apparently one for the statutory offence of abortion), a great part of the narrative and the statements was outside the competence of a dying declaration in that many of the facts alleged and the wish expressed by the

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deceased were irrelevant as no part of the *res gestae,* extending far beyond the immediate circumstances of the death of the declarant, and were most harmful to a fair trial of the accused. Dying declarations are competent only in homicidal cases, and then only in so far as the statements therein could have been given in evidence by the deceased had she lived. To permit an entire statement to go to a jury, with instructions from the trial judge to disregard such portions as he might point out to be irrelevant and inadmissible, may in the case of a simple and short statement be proper, but in a statement in the form of a lengthy narrative it would be highly improper to permit the whole statement to go to the jury notwithstanding instructions from the judge as to the portions which he thought incompetent. In spite of instructions, the jury might easily be influenced against the accused. —*Per* Cannon and Crocket JJ.—In order to obtain the conviction of the accused on the indictment as laid, the Crown had to rely on section 69 (*d*) of the Criminal Code and prove first that he had counselled or procured the abortion. In order to prove this essential element and link the accused to the abortion and killing, the statements contained in the dying declaration could not be used. The accused's alleged relations with the woman G. S. is a subject-matter different from that of the immediate circumstances of the death of V. K. The statement of the deceased may perhaps be used to prove the cause of the death and the intervention of the abortionist's instrument, but could not be used as evidence that the accused had anything to do with the abortionist. Even if the dying declaration may have been admissible as a whole against the woman G. S. (which is at least doubtful) it certainly could not be used to prove circumstances, not directly and immediately connected with the fatal application of instruments which finally brought death.—*Per* Dysart J. (*ad hoc*)—The charge as laid was at most a charge of bringing about the death of V. K. by counselling or procuring G. S. to perform on V. K. an abortion resulting in the death. Under this specific charge, most of the statements contained in the dying declaration, alleging that the accused counselled or procured V. K. herself to bring about or undergo an abortion operation, were irrelevant and therefore inadmissible. The only statement that may have a bearing at all upon the charge as laid could not possibly support a conviction on that charge, and, therefore, ought to have been excluded.

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Thus all parts of the declaration are shown to have been inadmissible. If, however, any portion of it could be thought to be admissible, the admissible parts should have been placed before the jury, separate and apart from the document. SCHWARTZENHAUER *v.* THE KING **367**

4——*Theft — Shipping — Customs Act, R.S.C. 1927, c. 42 (as amended), ss. 207, 151, 2 (o)—Vessel hovering within territorial waters of Canada with dutiable goods on board—Pursuit by police cruiser—Continuity of pursuit—Seizure of vessel on high seas—Forcible escape of vessel—Forfeiture of vessel—Time of forfeiture—Charge of theft against master—Form of charge.*]—The schooner K., of Canadian registry, of which appellant was master, while "hovering within the territorial waters of Canada" off the shores of Cape Breton with a cargo of liquor on board (dutiable in Canada), was approached by a Canadian police cruiser, and proceeded towards the high seas. It was overhauled within the territorial waters and summoned to "heave to in the King's name," but before it could be boarded it resumed its course. The cruiser pursued for a short distance, then turned, picked up its boat which had been lowered for boarding, and hurried towards shore for about eight miles, then took bearings and received instructions by radio, and returned to the pursuit and overhauled and stopped the *K.* on the high seas about 35 miles from shore. Here its officers boarded the *K.*, asked appellant what cargo he had, were told in answer "a bit of liquor," asked to see and did see the manifest and shipping papers, and without further examination took the *K.* in charge and towed it back to a point within three miles of shore, where appellant, on some claim of navigation dangers to his vessel, forcibly took charge of the *K.'s* helm, turned it out of its course, thereby breaking the tow lines, and sailed away. The cruiser did not pursue. At trial appellant was convicted of theft of the schooner and theft of its cargo.—*Held:* The *K.*, at the time when the appellant took it away from the officers, was lawfully under seizure and in control of the officers, and the convictions of theft must stand (Judgment of the Supreme Court of Nova Scotia *en banc*, 9 M.P.R. 97, affirmed). The effect of ss. 207, 151 and 2 (*o*) of the *Customs Act* (R.S.C. 1927, c. 42, as amended), when applied to the facts of this case, is that, by hovering in territorial waters of Canada with dutiable goods on board, the *K.* thereby became forfeited by operation of law. When the presence of liquor in its cargo was established as a fact, the forfeiture related back to the time of the hovering. The forfeiture was the legal unescapable consequence of the commission of the offence. The seizing on the high seas was part of the prolonged or continued act, which, begun within the territorial waters, and there temporarily frustrated by the *K.'s* flight, was consummated on the high seas; and the temporary abandonment of the pursuit was not such an abandonment as broke the continuity of the pursuit.—Objection on the ground that, according to the charge, the vessel taken by appellant was one which had "been seized and detained on suspicion by * * * as forfeited," was rejected. The words, "suspicion," etc., were unnecessary, and when deleted left the allegation as being "seized * * * as forfeited," which phrase falls within the definition "seized and forfeited" within s. 2 (*o*) of the Act. MASON *v* THE KING..... **513**

5——*Appeal — Leave to appeal to Supreme Court of Canada — Court of appeal judgment conflicting with judgment of another court of appeal "in a like case"—Judgments must be in criminal matters—The Supreme Court of Canada is a "court of appeal" within section 1025 Cr. C.*]—Under the provisions of section 1025 of the Criminal Code, a party applying for leave to appeal must show that "the judgment appealed from conflicts with the judgment of any other court of appeal in a like case."—*Held* that a judgment of a court of appeal "in a like case" must be a judgment rendered in criminal proceedings or upon criminal matters.—*Held*, also, that the Supreme Court of Canada is comprised among the courts of appeal contemplated in that section. MINDEN *v.* THE KING..... **609**

6——*Evidence—Written confession—Admissibility—Direction to jury.* SAMSON *v.* THE KING..... **634**

7——*Assault — Conviction — Appeal — Motion before appellate court for leave to adduce new evidence — Dissenting opinion in the judgment dismissing motion — Conviction unanimously affirmed by appellate court—Whether appeal to Supreme Court of Canada—Section 1023 Cr. C.*]—The appellants were tried and convicted on a charge of assault occasioning actual bodily harm. On the hearing of their grounds of appeal before the Court of Appeal, the appellants moved also for leave to admit new evidence. This motion was dismissed by a majority of the Court of

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Appeal, two judges expressing dissenting opinions. Later on, the Court of Appeal rendered judgment affirming unanimously the conviction of the appellants; and such judgment contained also a paragraph mentioning the fact that dissenting opinions had been expressed by two members of the Court on the motion to adduce new evidence.—*Held* that the dissent in the Court of Appeal on the motion for leave to introduce new evidence is not a dissent of that Court against the affirmance of the appellants' conviction on a question of law within the meaning of section 1023 of the Criminal Code. YIP SING *v.* THE KING. **635**

8——*Murder — Evidence by accused — Whether voluntary—Evidence by police officers in rebuttal—Lack of warning—Whether evidence admissible—Prejudicial to accused—Substantial wrong—Miscarriage of justice — New trial — Charge to jury—Misdirection—Section 1014 Cr. C.*]—The appellant was convicted of murder. Evidence was given at the trial that in the middle of the night, one day after the murder, the accused was removed from his cell and, escorted by three police officers, was taken out a road in search of the revolver that shot the victim. The accused was cross-examined on the incidents of that trip and one police officer testified in rebuttal as to the course of conduct and the conversation of the accused on that occasion.—*Held* that there should be a new trial. Under the circumstances of the case, such evidence was inadmissible in the absence of proof that the statements made by the accused were voluntary and upon proper warning; and the curative effect of section 1014 (2) of the Criminal Code cannot be applied, as it cannot properly be said that there has been "no substantial wrong or miscarriage of justice."—Judgment of the Supreme Court *in banco* (8 M.P.R. 407) rev. MARKADONIS *v.* THE KING..... **657**

CROWN—*Liability of, for negligence of its servant "while acting within the scope of his duties or employment upon any public work" (Exchequer Court Act, R.S.C. 1927, c. 34, s. 19 (c))—"Public work"—Alleged negligence of occupants of motor car used in detection and elimination of radio inductive interference.*]—A motor car owned by the Government of Canada, used by the Radio Branch of the Department of Marine in the detection and elimination of radio inductive interference, and specially equipped for that purpose, was, in such use, while returning to headquarters, stopped by its occupants (the driver and a radio electrician) on the highway, and was struck by another car, with fatal result to a passenger in the latter. Damages were claimed from the Crown on the ground that the collision and fatality were due to the negligence of the occupants of the Government car. The case was heard on certain questions of law.—*Held:* The Government car was not a "public work," nor were its occupants acting within the scope of their duties or employment "upon any public work," at the time in question, within the meaning of s. 19 (*c*) of the *Exchequer Court Act* (R.S.C. 1927, c. 34). (Judgment of Maclean J., President of the Exchequer Court of Canada, [1934] Ex. C.R. 195, reversed).—Having regard to the history of the legislation and the judicial decisions upon it (reviewed at length in the judgment), the phrase "public work" in s. 19 (*c*) means a physical thing having a defined area and an ascertained locality, and does not comprehend public service or employment, as such; nor does it include vehicles or vessels. This construction is further supported by the language of the French version of the section.—*Semble*, where there is a "public work" in the sense above indicated, and an injury is caused through the negligence of a servant of the Crown in the execution of his duties or employment in the construction, repair, care, maintenance, or working of such public work, such an injury may come within the scope of s. 19 (*c*), though the servant's negligent act was not committed on the public work in the physical sense. THE KING *v.* DUBOIS..... **378**

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2——*Liability of, for negligence of its servant "while acting within the scope of his duties or employment upon any public work" (Exchequer Court Act, R.S.C. 1927, c. 34, s. 19 (c))—Collision through negligent driving of Crown's motor truck by soldier in Canadian Army Service Corps on returning from delivering military stores to Airport of Royal Air Force.*]—The suppliants claimed damages from the Crown by reason of the death of M., who was fatally injured when a motor truck in which he was riding collided with a motor truck of the Crown, driven (negligently, as found at trial) by K., a private in the Canadian Army Service Corps. K's duties were those "of driver of a mechanical transport vehicle," and he had driven the truck from its garage (which served as a depot for such vehicles) at Kingston, with military stores which were being sent by the Canadian Army

ESTOPPEL—*Accounts for supply of electric current—Accounts rendered for too small amounts—Action for balance—Acts by defendant as result of accounts rendered—Whether defence of estoppel precluded by Public Utilities Act, R.S. N.B., 1927, c. 127—Applicability of estoppel on general principles.*]—Plaintiff, a public utility within the *Public Utilities Act*, R.S.N.B. 1927, c. 127, sold and delivered electric current to the defendant dairy company, which (as known to plaintiff) used it in the manufacture of its products. Through mistake by plaintiff's employees, the amount of current supplied to defendant was wrongly determined on the meter dial readings, so that plaintiff rendered monthly accounts (which were paid) for only one-tenth of the current actually supplied. Defendant bought its cream at prices based on the difference between the market prices of its products and the cost of manufacturing them, and, believing in the correctness of plaintiff's accounts as rendered, relied upon them in reckoning up its cost of manufacture, and consequently paid for cream amounts substantially larger than it would have paid had plaintiff's accounts been correct. Plaintiff was not charged with negligence, nor with knowledge of defendant's method of fixing cream prices. After discovering its error, plaintiff sued for balance of account, and defendant pleaded estoppel. The said *Public Utilities Act*, s. 16, requires that no public utility shall charge a greater or less compensation for any service than is prescribed in established schedules, and the Act provides penalties for "unjust discrimination" or for charging "by any device" more or less than full compensation at scheduled rates.—*Held:* (1) The defence of estoppel was not precluded by the Act (*Burkinshaw* v. *Nicolls*, 3 App. Cas. 1004, and other cases, cited). (2) Estoppel was applicable to the case and afforded an effective defence. Plaintiff must be taken to have intended and expected that defendant would act upon plaintiff's representations in the ordinary course of defendant's business; and defendant did so act, reasonably and in a way that should not be taken as unusual, in the ordinary course of its business, to its detriment, in paying larger amounts for cream than it would otherwise have paid. (Principles of estoppel discussed, and cases referred to).—Judgment of the Supreme Court of New Brunswick, Appeal Division, 8 M.P.R. 67, reversed. GENERAL DAIRIES LTD. *v.* MARITIME ELECTRIC CO. LTD..... **519**

2——*See* AGENCY 1; BANKS AND BANKING 1.

EVIDENCE—*Contract—Admissibility of oral testimony — Transfer of shares — Verbal condition as to their return — Whether a loan or a gift.*]—The respondent, by virtue of a transfer of their rights by two associates to himself, claimed to be the owner and demanded the delivery to him of 30,000 shares of the Siscoe Gold Mines Limited, which he alleged had been lent by way of a transfer by himself and his associates to the appellant company, on the condition that a like number of shares would be returned by the appellate company upon its mining properties being brought into production. The appellant company pleaded that the above transaction was carried out by the president of the company without authority expressed or implied and was never ratified by it, and, in the alternative, that in any event the above shares were not lent as alleged by the respondent, but were given or donated without condition as to their return. On the first point raised by the appellant company, after hearing its counsel, this Court decided that the findings of fact of the trial judge in favour of the respondent, unanimously affirmed by the appellate court, should not be disturbed; but this Court decided to hear the respondent on the question of law, raised by the appellant company in support of its second point, concerning the admissibility of oral evidence to prove the loan of the shares.—*Held* that, under the circumstances of this case, oral testimony was admissible. As both parties were admitting the existence of some contract for the transfer of the shares, parol evidence could be adduced to determine whether the transfer was conditional or unconditional and whether the shares were to be returned to the respondent and his associates as having been merely loaned. *Campbell* v. *Young* (32 Can. S.C.R. 547) foll. SISCOE GOLD MINES LTD. *v.* BIJAKOWSKI..... **193**

2——*Criminal Law—Written confession — Admissibility — Direction to jury.* SAMSON *v.* THE KING..... **634**

3——*Admissibility—Trial for murder by poisoning — Declarations by deceased — Testimony of accomplice—Directions to jury*..... **53**

See CRIMINAL LAW 2.

4——*Admissibility of dying declaration.* **367**

See CRIMINAL LAW 3.

5——*Onus*..... **539**

See TRADE MARK.

6——*Onus*..... **572**

See MOTOR VEHICLES 2.

INSURANCE (CASUALTY) — *Policy indemnifying gas company against liability for damages to property—Interpretation of policy—Break resulting from negligent installation of pipes—Damage by fire following explosion.*]—The appellant, an insurance and indemnity company, issued to the respondent, a gas company, a policy by which it agreed to indemnify the respondent "for any "and all sums which the assured (re- "spondent) shall by law be liable to "pay for (*inter alia*) damages to prop- "erty * * * as a result of any "one accident caused by or arising out "of the operation of natural gas * * * "by or for the assured"; the policy further provided that it was "understood "and agreed that the policy (was) is- "sued to indemnify the assured (re- "spondent) as the result of accidents "caused by, or arising out of, all the "assured's operations in drilling, hand- "ling and distribution of natural gas." While the policy was in force, gas accidentally escaped through a break in the service pipe located under the premises of a customer and caused a conflagration which did extensive damage to the customer's premises, the break resulting from the negligent installation of the pipe by the respondent's servants some years before. For this damage the respondent was adjudged liable, and after satisfying the judgment brought an action against the appellant on the policy for indemnity The service pipe belonged to the owner of the building, but, like all other such pipes in the city, was installed by the respondent for the owner, who paid for it. The respondent's action was maintained by the trial judge, which judgment was affirmed by the appellate court.—*Held* affirming the judgment of the Appellate Division, ([1934] 3 W.W.R. 638), that the liability of the respondent for the damages so arising was one covered by the express terms of the policy. CENTURY INDEMNITY CO. *v.* NORTHWESTERN UTILITIES LTD..... **291**

INSURANCE (FIRE)—*Action to recover for loss—Question whether, in applying for insurance, there was misrepresentation or "fraudulent" omission to communicate material circumstance within statutory condition 1 of The Insurance Act, R.S.O. 1927, c. 222.*]—In statutory condition 1 under s. 98 of *The Insurance Act,* R.S.O. 1927, c. 222, voiding a policy if the applicant for insurance "misrepresents or fraudulently omits to communicate any circumstance which is material * * *," the word "fraudulently" connotes actual fraud.—On an appeal by the insured under certain fire insurance policies, from the judgment of the Court of Appeal for Ontario ([1934] O.R. 273)

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dismissing his appeal from the judgment of Kelly J. (*ibid*) dismissing his actions, it was *held* that said statutory condition did not afford a defence to the respondent insurance companies; the course of the litigation precluded them from relying upon any charge of actual fraud; and, while the plaintiff's (appellant's) agent's partial statement of the facts to the insurance agent (in stating that there were fires "all over the country"; without disclosing that there was a fire in McNish township, which, as known to plaintiff but not to plaintiff's agent, adjoined the township in which was the lumber camp proposed to be insured) might, if calculated to mislead the insurance agent, amount to a misrepresentation, yet this was an issue of fact not suggested by the insurance companies at the trial, and the evidence did not shew that the insurance agent was misled; further, a misrepresentation, to produce a legal effect, must be one influencing the other party to enter the contract, and it did not appear that anything said by the plaintiff's agent influenced the insurance agent in assenting to effect the insurance. (*Smith* v. *Chadwick,* 9 App. Cas. 187, at 195-197, cited). The appeal was allowed and judgment given for the insured. TAYLOR *v.* THE LONDON ASSURANCE CORPORATION ET AL. **422**

INSURANCE (LIFE)—*Insurance Act, R.S.O. 1927, c. 222, ss. 140 (2), 142 (1), 145 (1), 146, 163 (1)—Preferred beneficiaries—Designation of beneficiary by policy—Alteration by will—Effectiveness of alteration—Document accepting participation in Employees' Savings and Profit Sharing Fund—Designation therein of beneficiary in case of death—Whether testamentary in character.*]—M. (now deceased) took out policies of insurance on his life, designating therein his wife as beneficiary. Later by his will he declared that "all insurance policies on my life, now payable to my wife" should be paid to his executor in trust for the use and benefit of his wife and mother upon the same trusts, terms and conditions as if they had formed part of the residue of his estate; and he left the residue of his estate to his executor in trust to divide it into two equal shares to be held as separate trust funds, one for his wife, the other for his mother, during life time, each to receive the net income from her share, with power of encroachment on corpus according to need, in the executor's discretion; the survivor to have the benefit, in the same manner, of the balance of the other's share added

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to her own, and on the survivor's death, the trust to terminate and the whole balance to be paid to M.'s sister C., if living, otherwise to her then surviving issue. By the Ontario *Insurance Act*, where the insured designates as beneficiary or beneficiaries a member or members of the class of "preferred beneficiaries" (which class includes a wife and mother, but not a sister or her issue), a trust is created, and, so long as any member of the class remains, the insurance money apportioned to a preferred beneficiary shall not (except as otherwise provided in the Act) be subject to the control of the insured, or of his creditors, or form part of his estate. Sec. 146 provides that, notwithstanding the designation of a preferred beneficiary or benficiaries, the insured may subsequently restrict, limit, extend or transfer the benefits to any one or more of the class to the exclusion of any or all others of the class, "or wholly or partly to one or more for life or any other term or subject to any limitation or contingency, with remainder to any other or others of the class." Sec. 163 (1) provides for power to appoint trustees.—*Held* (affirming judgment of the Court of Appeal for Ontario, [1934] O.R. 371): While the gift of remainder over to C. or her issue was not competent (as going outside the preferred class), yet the alteration of beneficiaries by the will was not wholly void. The phrase in s. 146 "with remainder to any other or others of the class" is severable and not conditional. Sec. 146 means that it is competent for the insured to transfer absolutely the rights of one preferred beneficiary to another preferred beneficiary, or, within the class. to transfer or leave, as the case may be, a limited estate such as a life estate, an estate for a term, an estate subject to a limitation, or an estate in remainder. The insurance moneys in question should be dealt with as directed in the will, except that, should the mother predecease the widow, the whole balance of the insurance moneys should then belong to the widow absolutely, and should the mother survive the widow, then on the mother's death the whole balance of the insurance moneys should revert to the widow's estate.—M. had joined his employer's "Employees' Savings and Profit Sharing Fund." The plan was intended to furnish to each participating employee (*a*) who served until retirement on account of age, a help to future maintenance, (*b*) who served for an extended period but not until retirement on account of age, a substantial accumulated sum, (*c*) who died while an employee, help towards an income for family or

INSURANCE (LIFE)—*Continued*

dependents. An employee might withdraw at any time, receiving thereupon an amount, or a share of the fund, determined according to length of service. If a participating employee died, a share of the fund was payable to his designated beneficiary or beneficiaries. He might designate the beneficiary by his "Employee's Acceptance" (signed on joining the plan) or by an instrument signed and lodged with the trustees of the fund, or by will, and might from time to time revoke the benefits or change the beneficiaries or divert the money to his own estate. In his "Employee's Acceptance" M. directed the trustees (*a*) upon his withdrawal to pay to him the amount to which he was entitled under the plan, (*b*) on his death to pay the amount to which he was entitled to his wife, or otherwise as he might have last designated by writing lodged with the trustees or by will. There was only one witness to his signature.—*Held* (affirming judgment of the Court of Appeal, *supra*): The "Employee's Acceptance" designating M.'s wife as beneficiary was testamentary in character and, as it had only one witness, was ineffective to make her a beneficiary, and his share in the fund formed part of his estate. (*Cock* v. *Cooke*, L.R. 1 Pro. & Div. 241, at 243; *In the Goods of Baxter*, [1903] P. 12, and other cases, cited). MACINNES *v.* MACINNES. **200**

2——*Person insured in Ontario by United States company—Policy providing for payment of amount of insurance (expressed in "dollars") at company's head office in United States—Premiums on policy paid in Canadian currency — United States dollars worth more than Canadian dollars at time when insurance became payable—Payment of policy—Sufficiency or insufficiency of payment in Canadian dollars to the number of dollars specified in policy—Provisions of policy — Ontario Insurance Act, R.S.O. 1914, c. 183, s. 155; R.S.O. 1927, c. 222, ss. 119-159.*]—Respondent, a foreign life insurance company, with head office at Indianapolis, in the State of Indiana, one of the United States of America, and at all material times duly registered in the Province of Ontario and as fully entitled as any domestic insurance company to transact there the business of life insurance, issued, on August 9, 1917, two policies on the life of W., a resident of Toronto, Ontario, and delivered the policies to him in Toronto. They were executed by respondent at its head office in Indianapolis, and provided for payment on the insured's death of a

INSURANCE (LIFE)—*Continued*

certain number of "dollars" "at the Home Office of the Company, Indianapolis, Indiana." They provided that the premiums be paid "at said Home Office or to an agent of the Company." All the premiums were paid in Canadian moneys. W. died on March 10, 1933. At the time the insurance became due and payable, there was a premium on United States money in terms of Canadian money; and appellants claimed that respondent was bound to pay the value of United States dollars to the number of dollars specified in the policies.—*Held* (Duff C.J. and Davis J. dissenting): Payment in Canadian dollars to the number of dollars specified in the policies, was sufficient to discharge respondent's obligation. Judgment of the Court of Appeal for Ontario, [1934] O.R. 677, affirmed.—*Per* Cannon J.: Any inference in favour of United States dollars that might be drawn from the naming of Indianapolis as a place of payment is rebuttable, and is rebutted in this case by (1) the provisions of *The Ontario Insurance Act* (R.S.O. 1914, c. 183, s. 155; R.S.O. 1927, c. 222, s. 159) and (2) the interpretation put upon the ambiguous contract by the acts of the parties.—*Per* Crocket J. and Dysart J. (*ad hoc*): To assume that in entering into the contract the parties directed their attentions solely to the wording and meaning of the policies, and not in any degree to the provisions and effect of the insurance law of the Province, would do violence to the underlying facts and the background of the case. From the circumstances, it might be assumed that the parties realized they were making a contract in Ontario and subject to the laws of Ontario. While it is well settled law that contracts which are to be performed by payment of money in a designated place or country require that payment shall be made in the legal tender or currency of the place set for payment, yet this is only a *prima facie* rule or presumption, and is rebuttable (*Adelaide Electric Supply Co. Ltd.* v. *Prudential Assurance Co. Ltd.*, [1934] A.C. 122, at 151, 152, 155); and the presumption is rebutted in this case by the statute law of the Province relating to payment of the insurance money (*The Ontario Insurance Act*, R.S.O. 1914, c. 183, s. 155; not changed in substance, as affecting said policies, by R.S.O. 1927, c. 222); by the provisions of the policies relating to the payment of premiums; and by the conduct of the parties (in making and accepting payment of premiums throughout in Canadian currency). (Discussion as to the distinction of this case from others in that the term

INSURANCE (LIFE)—*Concluded*

"dollars" is common both to Canada and the United States and represents a unit or denomination of currency of practically the same value when the dollar is accepted at par in the two countries; and as to the use in the policies of the term "dollars" without any epithet or other qualification; reference to the *Adelaide* case, *supra*, at 152, 155, 148).—*Per* Duff C.J. and Davis J. (dissenting): A contract to pay in a unit of currency *prima facie* means currency according to the meaning of the unit at the place where payment is called for by the contract (the *Adelaide* case, *supra*, at 156). The currency of the place of payment, i.e., Indianapolis, was the currency intended by the contract to govern the payment of the "dollars" stipulated to be paid. On the construction of the contract alone there was no ambiguity—payment was due in United States dollars. The intention of *The Ontario Insurance Act* (R.S.O. 1914, c. 183, s. 155, in force when the contracts were made; not changed in substance, so far as payment is concerned, by R.S.O. 1927, c. 222, in force when the policies matured), was not to fix the amount to be paid as something different from the amount settled by the contract between the parties, but merely to determine the manner in which the amount already fixed by the parties was to be discharged; to make payable within Ontario in lawful money of Canada whatever was the agreed amount of insurance. The amount of insurance to be paid was the value, in lawful money of Canada, of United States dollars to the number of dollars specified in the policies. WEISS v. THE STATE LIFE INSURANCE CO..... 461

3——*See* SUCCESSION DUTY.

INTERNATIONAL LAW
See MINOR 1.

INTOXICATING LIQUORS—*Canada Temperance Act, R.S.C. 1927, c. 196—Liquor Control Act, Ont., 1927, c. 70, as amended—Comparative restrictiveness of Dominion and Ontario legislation—Construction of s. 175 of Canada Temperance Act (first enacted in effect by s. 2 of c. 30, 1917)—Question whether Part II of Canada Temperance Act is in operation in certain counties in Ontario (in which counties the operation of the Act had been suspended prior to passing of Liquor Control Act, Ont.) and, if not, the procedure for bringing said Part II into operation in said counties.*]—By sec. 175 of the *Canada Temperance Act*, R.S.C. 1927, c. 196, which section was first enacted in effect by the

INTOXICATING LIQUORS— *Continued*

statutes of 1917, c. 30, s. 2, it is provided that upon receipt of a petition praying for the revocation of any order in council passed for bringing Part II of the Act into force in any city or county, "if the Governor in Council is of opinion that the laws of the province in which such city or county is situated, relating to the sale and traffic in intoxicating liquors, are as restrictive as the provisions of Parts I to IV, both inclusive, of this Act," the Governor in Council may by order suspend the operation of said Parts of the *Canada Temperance Act* in such city or county, such suspension "to continue as long as the provincial laws continue as restrictive as aforesaid."—Under said provisions (as enacted in 1917, c. 30, s. 2), orders in council were passed in 1920 and 1921, suspending the operation of the *Canada Temperance Act* (theretofore in force in the counties in question) in certain counties in the province of Ontario.—In 1927 the *Ontario Temperance Act,* which was in force in Ontario when said orders in council were passed, was repealed, and other provisions were substituted by *The Liquor Control Act (Ontario),* 1927, c. 70, which Act was materially amended by statutes of Ontario, 1934, c. 26.—The Governor General in Council referred to this Court the following questions: (1) Are the provincial laws respecting intoxicating liquor as restrictive since the coming into force of *The Liquor Control Act* of Ontario, as amended in 1934, as the *Canada Temperance Act?* (2) If the answer to question 1 is in the negative, is Part II of the *Canada Temperance Act* in operation in said counties? (3) If the answer to question 2 is in the negative, what procedure must be adopted to bring the said Part II into operation in said counties?—*Held* (Cannon and Crocket JJ. dissenting), that question 1 be answered in the negative, and question 2 in the affirmative.—*Per* Duff C.J. and Lamont and Davis JJ.: The condition for applying the suspension under said s. 175 is that the laws of the province relating to the sale and traffic in intoxicating liquors shall be as "restrictive" of such sale and traffic as the provisions of Parts I to IV of the *Canada Temperance Act;* and the comparison required for the purposes of applying the condition is a comparison of the laws of the province with the provisions of said Parts of the *Canada Temperance Act;* there is not contemplated a process of measuring the comparative efficacy of two legislative enactments in the suppression or reduction of excessive consumption of liquor; the comparison

INTOXICATING LIQUORS *—Continued*

to be instituted is between the provisions of one statute restricting the sale and traffic in intoxicating liqours and the provisions of another dealing with the same subject. And, comparing the Dominion and Ontario legislation in question, it is clear that, in point of restrictiveness, the Ontario Act makes no attempt to approach the prohibitory provisions of Part II of the *Canada Temperance Act;* the *Canada Temperance Act,* speaking broadly, has for its object the prevention of commercial dealings in intoxicating liquor within the territory in which it is in force; the Ontario *Liquor Control Act,* in its essence, is an Act for regulating the sale and consumption of such liquor, and makes provision for enabling the people to procure such liquor by the purchase of it through Government stores and other agencies. Therefore, the "provincial laws" having ceased to "continue as restrictive" as the *Canada Temperance Act,* the suspension of the operation of Parts I to IV of the *Canada Temperance Act* in the counties in question has ceased. The said words "continue as restrictive as aforesaid" should not be construed as if the words "in the opinion of the Governor in Council" were inserted therein; and no declaration by the Governor in Council is required to effect the cessation of the suspension.—As to the question of the constitutional validity of the *Canada Temperance Act,* raised in argument—Reading the order of reference in light of *Russell* v. *The Queen,* 7 App. Cas. 829, and *Att. Gen. for Ontario* v. *Att. Gen. for the Dominion* (local option reference), [1896] A.C. 348, the questions submitted should not be construed as involving any such question.—*Per* Cannon J. (dissenting): From the nature and provisions of the *Canada Temperance Act,* as a whole, and having regard to ss. 23 and 31 of the *Interpretation Act* (R.S.C. 1927, c. 1), the suspension under said s. 175 can cease only by proclamation to that effect by the Governor General in Council, fixing a date for such cessation of suspension. Part II of the *Canada Temperance Act* is not in operation in the counties in question.—*Per* Crocket J. (dissenting): On the true construction of said s. 175, the question as to whether the laws of any province relating to the sale and traffic in intoxicating liquors are at any time as restrictive as to the provisions of Parts I to IV of the *Canada Temperance Act,* is one for the determination of the Governor in Council and not for a court. Part II of said Act is not in operation in the counties in question. The pro-

MINOR—*Automobile accident — Action in damages—Minor injured, residing in United States—Guardian appointed by court of that country—Authorized by it to take action—Letters of guardianship providing for fyling of a bond before receiving moneys—Bond not fyled—Exception to the form—Private international law—Art. 6 C.C.—Arts. 78, 79 C.C.P.*]—One Ruth Schatz, domiciled in the state of New York, was injured in an automobile accident in Montreal and suffered serious personal injuries. In order to bring an action in damages, being a minor, she had to be represented according to article 78 C.C.P. Accordingly she filed a petition in the Surrogate's Court of the state of New York asking for the appointment of her father, the appellant, as "her general guardian to commence and carry on such action for her." Pursuant to an order from that court granting the petition, letters of guardianship were issued appointing the appellant "limited guardian of the person and estate of the said minor on (his) making, executing and filing with the said Surrogate such bond or application as is required by the statute in such cases made and provided"; the same court in its previous order having stipulated that "until the filing of a bond * * * the guardian (was) restrained from receiving any funds arising from said action." The appellant then brought the present action in damages on his own behalf and as guardian to his minor daughter and, with the return of the writ, he filed duly certified copies of the decree and of the other judicial proceedings in the New York court. The respondent made a motion in the nature of an exception to the form disputing the appellant's capacity and quality to bring his action on behalf of his minor daughter on the ground that he had been appointed limited guardian on "filing with the Surrogate's Court a bond or obligation as is required by statute" which provision had not been complied with by him. The exception to the form was dismissed by the Superior Court; but the appellate court reversed that decision and dismissed the appellant's action as to the damages claimed on behalf of his minor daughter.—*Held*, reversing the judgment of the Court of King's Bench (Q.R. 56 K.B. 520), that, by virtue of his appointment as guardian by the court of the state of New York, the appellant had the quality and the capacity to bring in the province of Quebec an action in damages on behalf of his minor daughter. According to the provisions of article 79 C.C.P. and also in uniformity with the terms of article 6 C.C., all foreign persons may come before the Quebec courts, providing they are authorized to appear in judicial proceedings under the law of their country; the test of their capacity or quality before the Quebec courts being their quality or capacity in the courts of their own country. Although there is in the record no evidence of the New York law by expert witnesses, the decree and the other judicial proceedings in the New York court, duly filed, make *prima facie* proof of the facts therein set forth and they afford the best evidence that the law therein applied is the law in force in the country in which the judgment had been rendered. Therefore, by force of that decree and of the foreign law of which it bears evidence, the appellant was a person duly authorized to appear in judicial proceedings within the meaning of article 79 C.C.P., and it follows that he had the quality and capacity assumed by him in this action. As to the restriction placed upon the appellant's authority to receive the funds arising from the action until he had fyled a bond required by the order appointing him as guardian, it should be held that the letters of guardianship cannot be construed as limiting the authority of the guardian to proceed with the action and that such restriction has to do with nothing else but the final discharge if and when payment would be made; and the Quebec court seized with the case, by force of its inherent power and *proprio motu*, would have the power to stay proceedings at any stage, or at all events, before making its final adjudication, so that the condition imposed in the restriction may be previously complied with: in that way, the court would keep control of the case and would give judgment only after it would be satisfied that the required bond has been approved. SCHATZ *v.* MCENTYRE.... **238**

MINOR—*Concluded*

of the Society—Issue between Society and defendants to determine right to child's custody — Children's Protection Act, R.S.O. 1927, c. 279..... **652**

See INFANT 1.

MISREPRESENTATION

See INSURANCE (FIRE) 1.

MONTREAL CITY CHARTER

See MUNICIPAL CORPORATION 1.

MORTGAGE—*Person becoming registered owner of land, and making mortgage thereon (with covenant for payment), for benefit of company—Transfer from him to company made but not registered — Authorized assignment by company under Dominion Bankruptcy Act—Indemnity claimed by registered owner (as trustee) against company's trustee in bankruptcy (as cestui que trust) against liabilities in connection with land and mortgage*..... **1**

See BANKRUPTCY 1.

MOTOR VEHICLES — *Negligence — Master and servant—Servant disobeying orders in allowing another person to drive car—Duty of servant to keep proper look-out and exercise control over person driving for him—Collision—Liability of master—Quantum of damages.*] The respondent's action arose out of a collision between two motor vehicles on a public highway running easterly from the city of Edmonton through Mundare and Vegreville. The collision occurred about five and one-half miles west of Mundare at a place distant about 72 feet from the common crest of an incline of the highway going westerly and a shorter and steeper incline going easterly. A spreader had gone over the road sometime before the collision and had pushed considerable loose gravel to the northerly half of the road. Apparently both eastbound and westbound traffic had been using the southerly half of the road considerably, and on this half there were two well defined wheel tracks, the southerly one of which was 2½ or 3 feet from the southerly edge of the travelled part of the highway. The appellant company had in its employ as driver the defendant Colby. Sometime before the day of the collision, Colby had, contrary to the instructions of his employer, arranged with the defendant Wilkie, a licensed driver of many years experience and of good record, to come on the truck with him and to help by occasional driving and other work, Colby paying Wilkie from time to time small sums for these

MOTOR VEHICLES—*Continued*

services. Both Colby and Wilkie drove alternately from Edmonton through Mundare to Vegreville and back to Mundare; and Wilkie drove westerly towards Edmonton after leaving Mundare, the wife of Wilkie also occupying the driving seat. As the truck came towards the incline on which the collision occurred, it was proceeding on the southerly half of the road in the wheel tracks, and after passing a horse drawn vehicle, continued up the hill in the southerly wheel tracks. Wilkie testified that, when his truck was approximately 65 feet from the place of the collision, he saw an eastbound car coming very fast and decided to swing the wheels towards the north ditch and had the right front wheel at the north edge of the road and the truck pointing northwesterly when it was struck at the left front by the eastbound motor vehicle which was heading northeasterly and out of control. Colby, in his evidence, stated that it was only when Wilkie pulled the truck towards the ditch at the north side that he, Colby, had the first intimation that a motor vehicle was approaching from the west and that he then shouted to Wilkie to "look out." The eastbound car was owned by the defendant North Star Oil Company and driven by the defendant Hart; in it was one Kuproski as a passenger, who was killed by the force of the collision. The action was brought by the widow of Kuproski against both employers and drivers and against Colby as employee in charge. The trial judge gave judgment against all the defendants in favour of the respondent and her three children for a total sum of $24,100, which judgment was affirmed by the Appellate Division. The appellant company was the only defendant who appealed to this Court.—*Held,* affirming the judgment of the Appellate Division ([1934] 2 W.W.R. 7), that the appellant company was liable. The defendant Colby, in his capacity of employee of the appellant, was present in the front seat of the cab of the motor truck while the defendant Wilkie was driving. It was within the scope of his employment and it was his plain duty to see that the truck was driven with reasonable care; to that end to keep a proper look out and to exercise such control as might be necessary for the purpose of preventing mistakes or faults on the part of Wilkie. His failure to do so constituted negligence in his capacity of servant of the appellant, negligence for which the appellant company is therefore responsible.—*Per* Cannon and Hughes JJ. and Maclean J. *ad hoc.*— As to the contention of the appellant

MOTOR VEHICLES—*Continued*

that, assuming there was negligence on the part of Wilkie, it should have been held that Colby's act in permitting Wilkie to drive was outside the scope of Colby's employment, an unauthorized act to effect a purpose of Colby for which the appellant employer was not liable, *held* that Colby was in charge and in legal control of the truck although the actual driving had been temporarily turned over to Wilkie, and that Colby continued to have, within the scope of his employment, a duty to keep a proper look out and a duty to see that the truck was in the proper side of the road, considering the rights of other traffic; Colby, when he gave the actual driving to Wilkie, did not divest himself of the above duties, which were not outside the scope of his authority merely because it was outside the scope of his authority to permit Wilkie to drive the motor truck. GILLESPIE GRAIN CO. LTD. *v.* KUPROSKI..... **13**

2——*Negligence—Pedestrian struck by motor car—Statutory onus of proof that damage did not arise through driver's negligence (Vehicles and Highway Traffic Act, Alta., 1924, c. 31, s. 66)—Meeting the onus—Effect of establishing contributory negligence.*]—Plaintiff, while walking easterly along the roadway (the sidewalks being in bad condition) of a street in Edmonton, Alberta, at 7.25 p.m. on March 11, 1934, was struck, four or five feet from the south (right hand) curb, by a motor car driven easterly by defendant. The evening was dark and the pavement wet. Defendant had been driving cautiously and watching for pedestrians. To avoid a motor which was meeting him, he turned towards the south curb. The glare of the other car's lights prevented him, for a moment or so, from seeing what was ahead of him. As soon as he was out of the glare he saw plaintiff about eight feet ahead of him. He immediately turned his car to the left, shut off the motor and applied his brakes, but struck her. Plaintiff's action for damages was dismissed by Ford J. ([1935] 2 W.W.R. 47), who found that defendant had satisfied the onus placed upon him by s. 66 of the *Vehicles and Highway Traffic Act* (1924, Alta., c. 31) and, on the evidence, did not in fact cause the accident by his negligence. This judgment was reversed by the Appellate Division, Alta. Defendant appealed.—*Held:* There was ample evidence to support the trial judge's finding; there was no ground upon which his judgment should be set aside; and it should be restored. (*Per* Duff C.J.: There was no ground in

MOTOR VEHICLES—*Continued*

the circumstances for attributing negligence to plaintiff. The real question for the trial judge was whether or not defendant had acquitted himself of the statutory onus. On the record it would seem that defendant had shown that, in the situation which confronted him, he had not failed in that standard of care, skill and judgment which can fairly and properly be required of the driver of a motor vehicle; if there was a mistake of judgment on his part, it was an excusable mistake, and the most unfortunate misadventure was an accident; the standards to be applied are not standards of perfection. In this view, the finding of the trial judge, who had the opportunity of observing defendant under cross-examination, ought not to be disturbed).—*Poole & Thompson Ltd.* v. *McNally,* [1934] Can. S.C.R. 717 (referred to in argument and in the judgments below) discussed and explained. Under the enactment as to onus there dealt with (s. 65 (1) of the Prince Edward Island *Highway Traffic Act,* in substance the same, in the pertinent respects, as that now in question), standing by itself, the defendant may acquit himself of the onus cast upon him, by establishing that the plaintiff's negligence materially contributed to the mishap, and that he could not, in the result, by the exercise of reasonable care, have avoided the consequences of that negligence; or that the mischief was directly caused by the negligence of the plaintiff as well as that of himself co-operating together. The enactment does not itself appear to aim at altering the substantive rules of common law touching the effect of contributory negligence; its purpose seems to be to change the law as to the burden of proof, as explained in *Winnipeg Electric Co.* v. *Geel,* [1931] Can. S.C.R. 443, [1932] A.C. 690, MCMILLAN *v.* MURRAY..... **572**

3——*Collision — Damages — Intersection of streets—Right of way—Liability——Statute—Interpretation—The Highway Act, B.C., 1930, c. 24, s. 21.*]—The respondent, who was driving his car north on Blenheim street in Vancouver, on reaching 14th avenue, looked to his right and saw the appellant's truck about 100 feet away from the intersection and coming towards it. He proceeded to cross the intersection and when nearing the opposite side the rear of his car was struck by the appellant's truck. The driver of the truck testified that he looked to his left, the direction from which the respondent approached the intersection, at a point about 50 feet east of Blenheim street and did not see

MOTOR VEHICLES—*Continued*

the respondent's car. He then looked to his right and did not look again to his left until he had proceeded some distance in the intersection. He then saw the respondent's car at a point just inside the intersection limit and he immediately put on his brakes. The trial judge dismissed the action, but the majority of the Court of Appeal allowed the respondent damages for an amount of $5,663.40. Section 21 of *The Highway Act*, B.C., 1930, c. 24, provides that "the person in charge of a vehicle so drawn or propelled upon a highway shall have the right of way over the person in charge of another vehicle approaching from the left upon an intercommunicating highway and shall give the right of way to the person in charge of another vehicle approaching from the right upon an intercommunicating highway; but the provisions of this section shall not excuse any person from the exercise of proper care at all times."—*Held* that, upon the evidence, the respondent's action should be dismissed. There is no ambiguity or obscurity in the language of section 21 of *The Highway Act;* the driver approaching an intercommunicating highway is bound to keep a lookout for drivers approaching upon the right upon that highway and to make way for them, and, in doing so, a collision is not only improbable, but hardly possible. The respondent in this case failed in this duty and such neglect of duty was the direct cause of the collision.—*Per* Duff C.J.—The plain and unmistakeable words of a statute should not be glossed by paraphrases based upon surmises or suppositions as to the purpose of the legislature.—Judgment of the Court of Appeal (49 B.C.R. 140) rev. SCHWARTZ BROS. LTD. *v.* WILLS..... **628**

4——*Statutes — Insurance — Repeal of provision in statute and enactment at same time in another statute of substantially the same provision—Retrospective construction of latter provision —Injury to passenger in motor car—Action and recovery of judgment by injured person against owner (driver) of car, and subsequent action by injured person against owner's insurer; the actions being taken subsequent to expiry of insurance policy and subsequent to later repeal and enactment of certain respective legislation—Right of injured person to judgment against insurer—S. 87 (4) (repealed September 1, 1932) of The Highway Traffic Act (Ont.) (as amended in 1930, c. 47)—S. 183 (h) (coming into force September 1, 1932) of The Insurance Act (Ont.) (as amended in 1932, c. 25)—"Motor Vehicle Liability Policy"—Time limitation for bringing action*..... **184**

See STATUTES 1.

5——*Negligence—Street railways—Collision at street intersection between street car and automobile—Right of way for street car—Duties of automobile driver and street car motorman—Joint negligence*..... **671**

See NEGLIGENCE 3.

6——*Negligence — Collision between motor car and bicycle—Conflict of evidence as to manner and place of accident—Judgment at trial on jury's findings—New trial ordered by Court of Appeal—Judgment at trial restored by Supreme Court of Canada—Jurisdiction of Supreme Court of Canada challenged on ground that judgment of Court of Appeal was "made in the exercise of judicial discretion" within s. 38 of Supreme Court Act (R.S.C. 1927, c. 35).* **677**

See NEGLIGENCE 4.

7——*See* CROWN 1, 2.

MUNICIPAL CORPORATION — *Quo warranto—Disqualification of alderman —Property owned by alderman, sold to his daughter and leased to the city—Whether alderman "directly or indirectly interested"—Paragraph (g) of s. 25 of the charter of the city of Montreal, 11 Geo. V, c. 112.*]—In the year 1931, the appellant held the office of alderman of the city of Montreal and was re-elected in 1932. Previous to his election he owned lots on Allard street, and, in 1931, he built a three-storey house thereon. Some time in the early part of 1931 the appellant suggested to the chief of police that this house would be suitable for a police substation, alleged to be needed; and, after examination of the premises and reports by officials of the city, on the 23rd of April, 1931, the city's notary received instructions to prepare a lease of the property at $125 per month. On the 27th of April, the appellant transferred his property to his daughter for a sum of $9,500, payable in five years, nothing being paid on account, the appellant reserving his *privilège de bailleur de fonds* and an hypothec on the property for the full amount. On the 6th of June, 1931, a lease was signed between the city and the appellant's daughter for a term of ten years at $125 for the first five years and $150 for the other five years. The city of Montreal paid these rents by cheques to the order of the appellant's daughter; all the cheques down to the 15th of

MUNICIPAL CORPORATION — *Continued*

April, 1932, with only one exception, were endorsed and delivered by her to the appellant, and the latter deposited them in his banking account and gave credit for same amounts on the purchase price of the property. On the 15th of April, 1932, the respondent filed a petition for a writ of *quo warranto* asking the disqualification of the appellant as alderman, alleging that the deed of sale from the appellant to his daughter was simulated and that the property in reality still belonged to the appellant, or that, alternatively, the latter had an indirect pecuniary interest in the contract ostensibly between his daughter and the city of Montreal. Paragraph (*g*) of section 25 of the charter of the city of Montreal enacts that "No person may be nominated for the office of mayor or alderman nor be elected to nor fill such office: (*g*) If he is directly or indirectly a party to any contract or directly or indirectly interested in a contract with the city, whatever may be the object of such contract."—*Held* that the appellant was disqualified as alderman of the city of Montreal, as, according to the facts of the case, he was "directly or indirectly interested" in the lease to which, by its terms, his daughter and the city were the parties.—*Per* Duff C.J. and Rinfret, Crocket and Hughes JJ.—The existence of a common intention and expectation concerning the disposition of the rents, which was acted upon, by the transfer of cheques for rent to the father by the daughter shews that the appellant was interested in the lease within the purview of the statute.—*Per* Cannon J.—The appellant, before and after his election as alderman, had a pecuniary interest in the property leased to the city, and consequently in a contract with the city, contrary to the charter.—*Per* Duff C.J. and Rinfret, Crocket and Hughes JJ.—The language of the statute is not the language of lawyers; the phrase "interested in" has no technical signification; effect must be given to it according to the common usage of men. —*Per* Cannon J.—The nature and extent of such "interest" must be established by the facts in each case; and whenever an alderman finds himself in such a position that he must choose between the interest of the city in a contract and his own, he is instantly disqualified.—*Per* Duff C.J. and Rinfret, Crocket and Hughes JJ.—In this case, there is "concert," within the meaning of the Lord Chancellor's judgment in *Norton* v. *Taylor,* [1906] A.C. 378, between the appellant, as alderman, and his daughter, as a contractor with the city, by which moneys paid by the city under the contract were to be, and in fact were, transferred to the alderman in payment of a debt owing to him by the contractor. ANGRIGNON *v.* BONNIER. **38**

MUNICIPAL CORPORATION — *Concluded*

2——*Assessment and taxation—Exemption—agreement with owner of property —Free cession of soil for street—Property to be considered as land under cultivation until sold as city lots—Nullity—Ultra vires.*]—The municipal corporation respondent agreed, by a notarial deed duly ratified by by-law, with the appellant, owner of certain vacant land situated within the municipality, to consider such land as land under cultivation in consideration of the free cession of the soil of the streets to be made by the owner. Some years later, the appellant, being sued for taxes imposed for construction and maintenance of streets and sidewalks, brought the present action claiming that the by-laws enacting such taxes should be declared illegal and set aside, as far as he was concerned, on the ground that the municipal corporation had agreed to do at its own expenses the works for which the said taxes had been imposed upon him.—*Held* that the judgment appealed from, dismissing the appellant's action, should be affirmed.—*Per* Lamont, Cannon, Crocket and Davis JJ.—The by-law of the municipal corporation respondent, ratifying the agreement with the appellant, was radically null and illegal. Such agreement by the municipal corporation to consider as land under cultivation a property which according to the then existing laws was liable to taxation, was *ultra vires.* A municipal corporation, without special authority granted by the legislature, cannot renounce directly or indirectly its right, nor fail in its duty, to collect from assessable property the funds needed for general administration and for the performance of public works. *Hampstead Land and Construction Co.* v. *La Ville de Hampstead* (Q.R. 44 K.B. 321). TELLIER *v.* LA CITÉ DE SAINT-HYACINTHE.... **578**

3——*Highways—Right of access—Action to compel municipality to permit change in curb to afford owner of adjoining land convenient access to street for purposes of its business—Municipal Act, R.S.O. 1927, c. 233; Local Improvement Act, R.S.O. 1927, c. 235*..... **455**

See HIGHWAYS 1.

4——*See* ASSESSMENT AND TAXATION 3, 4.

NEGLIGENCE—*Claim for damages for injury from alleged escape of gas—Evidence—Directions in charge to jury—Construction of jury's findings — New trial—Absence of fume pipe on boiler—Liability of defendant which installed gas appliances on the other defendant's premises.*]—Plaintiffs sued P. Co. and O. Co. for damages for injury to one of them (wife of the other) alleged to have been caused by escape of gas from P. Co.'s premises (which were in the same building as plaintiffs' premises). O. Co. had, five years before the alleged injury, installed gas appliances in P. Co.'s premises, and it supplied gas to P. Co. At the trial the jury found that plaintiff was injured by gas; that it escaped from gas appliances on P. Co.'s premises; that P. Co. had not satisfied the jury that it was not guilty of negligence causing or contributing to the escape; that O. Co. did not take the precautions it ought to have taken in installing and maintaining the gas appliances; that its failure to take such precautions caused or contributed to the causes of the injury; that O. Co. was guilty of negligence in the installation or maintenance, causing in whole or in part the injury, "in failing to install fume pipe on boiler when said boiler was installed"; that there was a verbal agreement between P. Co. and O. Co. "to install the aforementioned boiler and maintain same in good order"; and that the companies failed to observe the terms of such agreement "by not insisting on the installation of fume pipe on boiler at the time said boiler was installed"; that O. Co.'s failure to observe its agreement caused or contributed to the causes of the injury; and assessed damages. Judgment was given against both defendants. The Court of Appeal for Ontario reversed the judgment and dismissed the action. Plaintiffs appealed.—*Held:* There should be a new trial. Cannon and Hughes JJ., dissenting, would restore the judgment at trial.—Duff C.J. and Smith J., while not entirely satisfied to go as far as the Court of Appeal, held that on the record, including the evidence and the judge's charge to the jury, the trial and its result were so unsatisfactory that the verdict should not stand and there should be a new trial. As to the jury's finding that defendants were both negligent in not insisting upon setting up a fume pipe, they held that this finding meant that it was perfectly well understood on all sides that the installation was incomplete, in that the absence of a fume pipe might have the effect of allowing noxious gases to escape which might do harm; and that the negligence found occurred when the boiler was installed—five years before the alleged injury; and Duff C.J. and Smith J. held that in such circumstances O. Co. would not be responsible. (*M'Alister* v. *Stevenson* [1932] A.C. 562, at 578; *Gregson* v. *Henderson Roller Bearing Co.*, 20 Ont. L.R. 584; *Farr* v. *Butters*, [1932] 2 K.B. 606, at 617; *Caledonian Ry. Co.* v. *Mulholland* [1898] A.C. 216; and *Bottomley* v. *Bannister*, [1932] 1 K.B. 458, at 472-3, referred to).—Rinfret J., while otherwise concurring with Duff C.J. and Smith J., expressed an inclination to hold that the action as against O. Co. should be dismissed—that the effect of the verdict was that its negligence occurred at the time "when said boiler was installed," five years before the alleged injury; and, applying to the verdict the principle laid down in *Dominion Natural Gas Co. Ltd.* v. *Collins*, [1909] A.C. 640, and having regard to the jury's answers with respect to the full knowledge of P. Co. concerning the incomplete nature of the installation, the result was that O. Co. was not legally liable; but, in view of the opinions of the other members of the court, equally divided, he concurred in disposing of the case as proposed by Duff C.J. and Smith J.—Cannon and Hughes JJ., dissenting, were of opinion that there was reasonable support in the evidence for the jury's findings; and that, applying the law to the facts as found by the jury, the judgment at trial against both defendants should be restored. (With regard to the liability of O. Co., reference was made to *M'Alister* v. *Stevenson*, [1932] A.C. 562, at 611-612, 580-581, 595-597; *Dominion Natural Gas Co. Ltd.* v. *Collins*, [1909] A.C. 640, at 646, 647.)

DOZOIS *v.* THE PURE SPRING CO. LTD. AND THE OTTAWA GAS CO..... **319**

NEGLIGENCE—*Continued*

2——*Injury to pianist while playing in auditorium, from bursting of lens of spotlight—Liability of proprietor of auditorium—Relationship between proprietor and pianist—Mere licensee—Extent of proprietor's duty.*]—Defendant rented its auditorium to H. for a musical recital which H. was giving, and permitted H., without charge, to use it for a rehearsal previous to the recital. Plaintiff, H.'s brother, was, for a fee (which also covered his preparatory work), to assist H. as a pianist in the recital. During the rehearsal, while plaintiff was playing a piano on the stage of the auditorium, the lens of a spotlight suspended above the piano burst and a piece of broken glass cut his hand. He sued defendant for damages.—*Held:* Plaintiff was a mere licensee of defendant, without an interest, plaintiff not having entered the auditorium upon business which con-

NEGLIGENCE—*Continued*

cerned defendant upon defendant's invitation, express or implied. In such circumstances plaintiff did not come within the rule applied in *Indermaur* v. *Dames*, L.R. 1 C.P. 274, L.R. 2 C.P. 311, and certain later cases, which treat a licensee with an interest as being entitled practically to the same degree of protection at the hands of the licensor as an invitee in the usual sense. To bring a person within this category it must be shewn that he was upon the premises for some purpose in which he and the proprietor had a common or joint interest (*Hayward* v. *Drury Lane Theatre*, [1917] 2 K.B. 899, at 913; *Addie* v. *Dumbreck*, [1929] A.C. 358, at 371). Even if plaintiff had a substantial financial interest in the success of the recital, this would make no difference in the relationship between defendant and plaintiff and would be quite insufficient to make plaintiff a licensee with a joint or common interest as between him and defendant. Plaintiff being a mere licensee, defendant's only duty to him was not to expose him to a hidden peril or trap, that is, a peril which was not apparent to the licensee but the existence of which was known to the licensor (or which ought to have been known to the licensor, should it be taken from certain dicta in *Addie* v. *Dumbreck*, [1929] A.C. 358, and *Fairman* v. *Perpetual Investment Bldg. Soc.*, [1923] A.C. 74, that the proprietor's duty is recognized as so enlarged; whether so or not, the law still recognizes a distinct line of demarcation between the duty owed to an invitee and that owed to a mere licensee). —*Held*, further: Upon the evidence, the spotlight in question was not a trap or hidden peril within the meaning of the cases.—Dismissal of the action by the Court of Appeal for Ontario (reversing judgment at trial) was affirmed. HAMBOURG *v.* THE T. EATON CO. LTD. **430**

3——*Street railways—Motor vehicles—Collision at street intersection between street car and automobile—Right of way for street car—Duties of automobile driver and street car motorman—Joint negligence.*]—An automobile going easterly and defendant's street car going southerly collided at a street intersection in the city of Toronto, causing the automobile driver's death. In actions against defendant for damages, the trial judge found that defendant's motorman and the automobile driver were each negligent to the extent of fifty per cent., and gave judgment against the defendant (for one-half the total damages assessed). The Court of Appeal for Ontario held

NEGLIGENCE—*Continued*

that on the evidence defendant could not be found guilty of any negligence causing the accident, and dismissed the actions. On appeal to this Court:—*Held:* The appeal should be allowed and the judgment at trial restored.—*Per* Duff C.J., Cannon and Davis JJ. and Dysart J. *ad hoc:* Generally speaking, a street car motorman is entitled to assume that a pedestrian or motorist approaching the track will stop to permit the street car to pass by, and there was in the present case a statutory right of way in favour of the street car; but the existence of a right of way does not entitle the motorman to disregard an apparent danger that confronts him. In the circumstances appearing in the present case, the motorman should have seen the automobile and realized the probability of its driver continuing in his course across the track at the approaching intersection. Had either the motorman or the motorist used due care or caution, the collision would not have occurred.—*Per* Duff C.J. and Crocket J.: The real effective cause of the collision was the joint negligence of the motorist and motorman. It was the motorman's duty in approaching the street intersection to have his street car under such control as to enable him to stop in order to avoid hitting any person venturing across the street in his path, as it was the duty of the motorist to have his car under similar control. On the evidence, both approached the intersection at such a rate of speed as to create at the intersection a peril which it was then too late for either to avoid. THE ROYAL TRUST COMPANY *v.* TORONTO TRANSPORTATION COMMISSION **671**

4——*Motor vehicles—Collision between motor car and bicycle—Conflict of evidence as to manner and place of accident —Judgment at trial on jury's findings—New trial ordered by Court of Appeal—Judgment at trial restored by Supreme Court of Canada — Jurisdiction of Supreme Court of Canada challenged on ground that judgment of Court of Appeal was "made in the exercise of judicial discretion" within s. 38 of Supreme Court Act (R.S.C. 1927, c. 35).* —A motor car driven by defendant westerly on Q. street, a "through" highway, near the city of Toronto, collided with a bicycle driven by plaintiff who had come southerly on M. avenue. There was conflicting evidence as to the manner and exact place of the accident. Defendant contended that plaintiff came fast down M. avenue and ran into the motor car at the street intersection. It was contended for plaintiff that he had turned off M. avenue and proceeded

NEGLIGENCE—*Continued*

westerly along Q. street and was struck by the motor car about 50 feet west of M. avenue. Plaintiff's action for damages was tried with a jury, who, in answer to questions, found that defendant had not satisfied the jury that the accident did not arise through any negligence or improper conduct on defendant's part; that defendant's negligence causing the accident was "in not exercising the proper amount of care to avoid striking boy who was on the highway going west"; that plaintiff could not have avoided the accident by exercising reasonable care; and assessed damages, for which plaintiff was given judgment. The Court of Appeal for Ontario, taking the view that it was "almost impossible to form any opinion as to exactly what had taken place," that the "extraordinary large amount" of damages "could only be justified by a finding of serious permanent injury," that the trial was of a "generally unsatisfactory nature," and that there was "the possibility of the production of more satisfactory evidence at a new hearing," set aside the judgment at trial and ordered a new trial. Plaintiff appealed.—*Held:* (1) The judgment of the Court of Appeal was not a "judgment or order made in the exercise of judicial discretion" within s. 38 of the *Supreme Court Act* (R.S.C. 1927, c. 35); and an appeal lay to this Court.—(2) The judgment for plaintiff at trial should be restored. There was evidence on which the jury could find as they did; and their conclusions ought not to be disturbed merely because they were not such as judges sitting in courts of appeal might themselves have arrived at (*Toronto Railway Co.* v. *King*, [1908] A.C. 260, at 270; *Mechanical, etc., Co.* v. *Austin*, [1935] A.C. 346, at 375, cited). The reasons expressed by the Court of Appeal (discussed in the judgment of this Court) did not shew grounds to justify a new trial in this case. HUTCHEON *v.* STOREY..... **677**

5——*Master and servant—Motor vehicles—Servant disobeying orders in allowing another person to drive car—Duty of servant to keep proper lookout and exercise control over person driving for him—Collision—Liability of master—Quantum of damages*..... **13**
See MOTOR VEHICLES 1.

6——*Motor vehicles—Pedestrian struck by motor car—Statutory onus of proof that damage did not arise through driver's negligence (Vehicles and Highway Traffic Act, Alta., 1924, c. 31, s. 66)—Meeting the onus—Effect of establishing contributory negligence*..... **572**
See MOTOR VEHICLES 2.

NEGLIGENCE—*Concluded*

7——*Railways—Railway employee, while walking on track in course of duty, struck by train between whistling post and highway crossing—Bad weather conditions—Failure to sound whistle and bell in accordance with s. 308 of Railway Act (R.S.C. 1927, c. 170)—Whether employee entitled in law to benefit of s. 308—Railway company's rules—Failure to have headlight burning under stormy conditions in day-time—Evidence—Directions to jury—Findings of jury.* **585**
See RAILWAYS 2.

8——*Motor vehicles—Collision at street intersection—Right of way*..... **628**
See MOTOR VEHICLES 3.

9——*See* CROWN 1, 2.

NEGOTIABLE INSTRUMENTS
See BANKS AND BANKING 1.

NULLITY OF MARRIAGE
See HUSBAND AND WIFE 1.

PATENT—*Alleged infringement—Construction of claims in specification—Description in specification—System contemplated or embraced by the claims—Automatic train control apparatus.*]—An appeal by the plaintiff from the judgment of Maclean J., President of the Exchequer Court of Canada, [1934] Ex. C.R. 31, dismissing its action for alleged infringement by defendant of a patent of invention of an automatic train control apparatus, was dismissed on the ground that no infringement was established. It was held that the claims sued upon, as regards the devices in the apparatus on the vehicle which respond to the "caution" and "danger" signals, when these claims are properly construed in relation to the specification as a whole, do not contemplate a system which could be effectively worked without the use of alternating current circuits; and since defendant employed direct current circuits alone, no infringement was established. Further, the opinion was expressed that, on construction of the specification as a whole, the monopoly contemplated by the claims relied on by plaintiff would not embrace a system in which the responsive inductive device employs cumulative and not opposing fluxes; and that the defendant's system would not be practically operable if a responsive inductive device making use of opposing fluxes were substituted for the device operating with cumulative fluxes which was actually part of its system.—It is the duty of a patentee to describe in unambiguous terms his invention and the manner in

RAILWAYS—*Continued*

to have headlight burning under stormy conditions in day-time—Evidence—Directions to jury—Findings of jury.]—Plaintiff, a section foreman for defendant railway company, while walking westerly on the track in the course of his duty of inspection, about 11 o'clock a.m. on a very cold and stormy winter's day, was struck by a special freight train of defendant coming behind him. He sued for damages. The accident occurred about 250 yards east of a highway level crossing, and west of the whistle post for that crossing. S. 308 of the *Railway Act*, R.S.C. 1927, c. 170, and also defendant's rule 31, required the whistle to be sounded at least 80 rods before reaching the crossing and the bell to be rung continuously from the sounding of the whistle until the engine had crossed the highway. These requirements were apparently (and as the jury found) not observed on the occasion of the accident, the train engineer, though frequently during his journey sounding the whistle and bell, not being able under the stormy conditions to locate exactly the whistling posts. The trial judge charged the jury that the failure to comply with s. 308 was "absolute negligence in law," and that the jury was "not free to find anything else with respect to it." Defendant's rule 17 required that a headlight be displayed to the front of every train by night, and its rule 9 required that "when weather or other conditions obscure day signals, night signals must be used in addition." The engine's headlight had been burning but it was extinguished prior to the accident, the train men regarding it as useless owing to ice and snow on the glass and the storm's severity. The trial judge put the question of the headlight to the jury as a matter for them to deal with on the meaning of the words in defendant's rule book. The jury found that the accident was caused by defendant's negligence in "no sounding of whistle, no bell ringing, no light in headlight of engine." Judgment was entered for plaintiff, which was reversed by the Court of Appeal for Saskatchewan, which dismissed the action ([1934] 2 W.W.R. 24). —*Held:* There should be a new trial (Cannon and Crocket JJ., dissenting, would restore the judgment at trial).—*Per* Duff C.J., Lamont and Davis JJ.: The said charge to the jury as to s. 308 was a misdirection. *Per* Duff C.J. and Davis J.: S. 308 was designed for the protection of persons on, or about to proceed on, a highway crossing at rail level, and was not intended for the protection of persons walking along the tracks mile after mile without any reference to highway crossings, and plaintiff, upon the facts of this case, was not entitled as a matter of law to the benefit of it (*Chesapeake & Ohio Ry. Co.* v. *Mihas*, 280 U.S. 102, and *O'Donnell* v. *Providence & Worcester Rd. Co.*, 6 R.I. 211, cited. *Grand Trunk Ry. Co.* v. *Anderson*, 28 Can. S.C.R. 541, and *McMullin* v. *Nova Scotia Steel & Coal Co.*, 39 Can. S.C.R. 593, explained and distinguished). The jury's finding of negligence in respect of the failure to sound the whistle and bell was obviously based on the breach of s. 308 and said misdirection of the trial judge, and therefore could not be upheld. Their finding of negligence in respect of the headlight might fairly be attributed to the disobedience of defendant's rules; the evidence was merely guesswork as to whether or not the accident would have been avoided had the headlight been burning; and upon the evidence as it stands their finding of negligence in respect of the headlight could not be maintained. But, on the question of whether or not, quite apart from the statute, there was any negligence on defendant's part that caused the accident, the trial was very unsatisfactory, and there should be a new trial.—*Per* Lamont J.: Plaintiff, as an employee on the track in performance of his duty, was one for whose benefit defendant's rules were made (reference made to a "General Notice" in defendant's rule book, that "obedience to the rules is essential to the safety of passengers and employees, and to the protection of property"). As between plaintiff and defendant, the rules were as effective as the statute and were evidence of what defendant considered to be the exercise of due care. Plaintiff was injured through failure of defendant's servants to comply with the rules, and in the absence of a finding of justification or excuse for such failure, he had a right of action. Whether or not what defendant did was a reasonable precaution against accident, whether or not under all the circumstances plaintiff would have heard the whistle and bell if sounded, whether or not he would have seen the headlight if burning, were all for the jury to say. But, as it was impossible to tell whether the jury's finding as to whistle and bell was a finding of fact on the evidence or was induced by the trial judge's misdirection, there should be a new trial.—*Per* Cannon J. (dissenting): S. 308 would seem to protect railway employees as well as other persons (s. 419 (2) referred to in this connection). Besides, the action was based, not only on statutory duty, but also on comomn law negli-

RAILWAYS—*Continued*

gence, and default in obeying defendant's rules; which rules were sufficient evidence of the care that should be taken. The jury's findings that the rules were not complied with, and that such non-compliance caused the accident, were based on sufficient evidence and should not be disturbed. Also the fact that plaintiff was not told, contrary to custom, before starting that day's inspection, that this extra train was coming, would aggravate defendant's imprudence in running it under such difficult weather conditions.—*Per* Crocket J. (dissenting): All persons rightfully upon the railway track were entitled to the benefit of s. 308 (*Grand Trunk Ry. Co.* v. *Anderson,* 28 Can. S.C.R. 541, and *McMullin* v. *Nova Scotia Steel & Coal Co.,* 39 Can. S.C.R. 593, cited); and plaintiff was entitled to rely on failure to sound whistle or bell in accordance with s. 308 as negligence, if that negligence was the direct cause of his injury. Plaintiff had a right to, and on the evidence he did, rely on compliance with defendant's rules as to whistle and bell. It was idle to suggest that, had they been sounded, he might not have heard them. The objection that the trial judge misdirected (as aforesaid) as to the effect of s. 308, was met by *Grand Trunk Ry. Co.* v. *Anderson* (*supra*) and his clear directions to the jury that, before defendant could be held liable through negligence by non-observance of the statutory requirements, they must be satisfied that the injury was the direct consequence of such negligence; and defendant was not prejudiced, nor was any substantial wrong or miscarriage occasioned, by the alleged misdirection. Defendant owed plaintiff a duty to exercise reasonable care to avoid injury to him. The plaintiff relied, throughout the case, on common law negligence as well as breach of statutory duty. The jury's finding of negligence in not using the headlight meant that, had it been on, as it should have been, it also would have warned plaintiff in time to enable him to avoid his injury; this was a finding upon a straight question of fact, depending in very large measure upon the credibility of the trainmen's testimony; which credibility the jurors had a right to test by the light of their own experience and knowledge, or as inconsistent with indisputable facts or other testimony. Whether or not engine headlights are such signals as fall within the intendment of defendant's said rule 9, the evidence shewed that, when weather conditions were such as to obscure day signals, headlights were in fact used as additional warning signals, and the question

RAILWAYS—*Concluded*

was whether in the existing circumstances it was negligence (causing the injury) to turn it off. HESSLER *v.* CANADIAN PACIFIC RY. CO. **585**

3—*Negligence — Street railways — Motor vehicles—Collision at street intersection between street car and automobile—Right of way for street car—Duties of automobile driver and street car motorman—Joint negligence...* **671**

See NEGLIGENCE 3.

RATIFICATION

See AGENCY 1.

REAL PROPERTY—*Land Registry Act, R.S.B.C., 1924, c. 127, ss. 216, 217, 218, 226—Liability of assurance fund—Whether judgment recovered is one for "damages" within meaning of the Act—Certificate of the court shewing award of damages—Mandamus to Minister of Finance—Whether Minister servant of the Crown.*]—The prosecutors, now respondents, had been given judgment on October 27, 1933, in an action in which they alleged that the defendants in that action had fraudulently obtained a deed of conveyance which had been placed in escrow and had fraudulently registered it under the provisions of the *Land Registry Act* and then raised money upon the property by way of mortgage. The charge of fraud was sustained by that judgment, and the land was vested in the prosecutors respondents subject to the mortgage, and the judgment further provided for a reference to the district registrar to ascertain the amount received by the wrongdoers under the mortgage and also rents and profits and that the prosecutors recover "the sum found due on the taking of such account." A certificate of the district registrar on the reference directed by the judgment was dated November 22, 1933. This amount having been so fixed at a sum of $34,730.95, the district registrar, without making any further application to the court, entered judgment on December 30, 1933. Writs of execution having been issued on such judgment and returns of *nulla bona* made thereto, a demand was made upon the Minister of Finance pursuant to section 218 of the *Land Registry Act,* for payment of the amount of the judgment out of the assurance fund provided for by the Act. This demand being refused, the prosecutors obtained from D. A. McDonald J. an order for a writ of *mandamus* commanding him to pay. The Court of Appeal held that the order had been properly made under sections 216 and

218 of the Act.—*Held*, reversing the judgment of the Court of Appeal ([1935] 1 W.W.R. 113), that, upon the facts and circumstances of this case, the Minister of Finance was entitled to refuse the demand made upon him and that a writ of *mandamus* should not have been issued to compel him to pay to the respondents the sum demanded, or in fact any other sum. Upon the analysis of this case, this Court could not ascertain what if any damages were in fact sustained in consequence of the fraudulent registration; and it was precisely in order to avoid questions of fact such as have been raised in the present proceedings that the *Land Registry Act* expressly provides that the certificate of the Court shewing an award of damages, in an action between the lawful owner and the wrongdoer, is a necessary foundation to a proper claim against the Minister of Finance under section 218 of the Act. The alternative would be that this Court would resettle for the Minister the statement of the damages, if any, sustained by the person wrongfully deprived of land in consequence of a fraudulent registration by another person; and the words of the statute completely negative the right of any further tribunal to review the decision in the action.—*Held*, also, that in a proper case a *mandamus* lies against the Minister of Finance to compel payment out of the assurance fund when there is no suggestion that the fund itself is not sufficient to meet the claim without resort to any moneys of the Consolidated Revenue Fund. Distinction must be made between a Minister acting as a servant of the Crown and acting as a mere agent of the legislature to do a particular act. Under the provisions of the statute, a particular fund is established by the legislature and created by the setting aside of a certain proportion of the fees paid by persons registering documents under the *Land Registry Act* so that a fund may be available to compensate those persons who have registered their documents and become deprived of their land or some interest therein in consequence of some fraud by other persons in procuring registration of documents under the Act. The fund is not public money of the Crown by the Minister of Finance for the province has been designated by the legislature to pay out of that fund damages sustained by those persons, upon proof by certificate of the court of certain conditions prescribed by the statute. THE MINISTER OF FINANCE OF BRITISH COLUMBIA *v.* THE KING (AT THE PROSECUTION OF ANDLER ET AL.). **278**

2——*Person becoming registered owner of land, and making mortgage thereon (with covenant for payment), for benefit of company—Transfer from him to company made but not registered—Authorized assignment by company under Dominion Bankruptcy Act—Indemnity claimed by registered owner (as trustee) against company's trustee in bankruptcy (as cestui que trust) against liabilities in connection with land and mortgage.* 1

See BANKRUPTCY 1.

3——*See* MUNICIPAL CORPORATION 2.

RELIGIOUS BODY

See BANKRUPTCY 2.

RES JUDICATA

See COURTS 1.

RESCISSION

See CONTRACT 2.

RESTRAINT OF TRADE

See CONTRACT 1.

SECURITY FRAUDS PREVENTION ACT (B.C. 1930, c. 64)—*Investigation—Delegation of authority—Nature of proceedings—Whether judicial—Right to cross-examine witnesses—Natural justice—Right to injunction—Section 29 as bar—ss. 10, 11.*]—Authority was delegated by the Attorney-General under section 10 of the *Securities Frauds Prevention Act* to the respondent to conduct investigations to ascertain whether any fraudulent act or any offence against the Act or the regulations has been, was being or was about to be committed by Wayside Consolidated Gold Mines Limited, and for that purpose to examine any person, company or thing whatsoever. During the course of the investigation by the respondent, it became apparent that the Vancouver Stock and Bond Company Limited, one of the appellants, had been an underwriter of the securities of the Wayside Company, and the appellant St. John, who was a shareholder and the business manager of the underwriting company, was called upon and did give evidence. The investigation extended over several months, from the date of the respondent's appointment on August 15, 1934, until October 22, 1934, during which time a great deal of evidence was taken, on which last day the appellants issued a writ against the investigator Fraser for an injunction to restrain him from proceeding further with the investigation in so far as it either directly or indirectly related to the conduct of the appellants and from

SECURITY FRAUDS PREVENTION ACT—*Concluded*

making any finding or report to the Attorney-General in connection therewith. The appellants' grounds for an injunction were that the respondent Fraser had not given them notice of the examination of witnesses concerning the appellants' relations with the Wayside Consolidated Gold Mines Limited and that he had not afforded them an opportunity of cross-examining such witnesses, as their status and reputation may be affected by such examination. The trial judge maintained a motion to dissolve the *interim* injunction, which judgment was affirmed by the appellate court.—*Held*, affirming the judgment of the Court of Appeal (49 B.C.R. 502), that the respondent investigator could not be restrained from proceeding with the investigation.—*Per* Lamont, Cannon and Crocket JJ.—Section 29 of the *Securities Act*, which purports to bar actions and proceedings by way of injunction or other extraordinary remedy, relating to investigations by the Attorney-General or his representative under the provisions of the statute constitutes an insuperable barrier to the appellant's claim.—*Per* Lamont, Cannon and Crocket JJ.—The investigation provided for by the *Securities Act* was not a judicial proceeding in any sense of the term but was intended to be conducted by the investigator in private and no person or company should have the right of cross-examining any witness or witnesses brought before the investigator whether the evidence of such witness or witnesses should affect the status or reputation of such person or company or not. Such investigation is in no sense a judicial proceeding for the trial of any offence but merely an enquiry conducted for the information of the Attorney-General in order that the latter may take such proceedings as he may deem advisable in the circumstances for the protection of the public as shown by the provisions of ss. 11 and 12.—*Per* Lamont and Davis JJ.—The investigation provisions of the statute dealing generally with the prevention of fraud by stock brokers were part and parcel of the administrative machinery for the attainment of the general purposes of the statute. The investigator was not a court of law nor was he a court in law. While the investigator was bound to act judicially in the sense of being fair and impartial, that is something quite different from the right asserted by the appellants of freedom of cross-examination of all the witnesses. ST. JOHN AND THE VANCOUVER STOCK AND BOND CO. LTD. *v.* FRASER. **441**

SHIPPING—*Carriage by water—Loss or damage to cargo—Limitation of liability of the owner of the ship—"Fault or privity" of owner—Unseaworthiness—Improper loading—Cause of loss—Merchant Shipping Act, 1894, 57-58 Vict., c. 60, ss. 502, 503, 504—Canada Shipping Act, R.S.C., 1927, c. 186, ss. 452, 457, 459, 903—Water Carriage of Goods Act, R.S.C., 1927, c. 207, ss. 6, 7.*]—*Held*, where the owner of a ship, after having been condemned in a previous action to pay damages for loss and damage to a cargo, brings another action in which he claims a limitation of his liability, either under the provisions of section 503 of the *Merchant Shipping Act* or of section 903 of the *Canada Shipping Act*, he must show affirmatively that the damage or loss happened without his actual fault or privity; he must exculpate himself (as distinguished from his servants or employees) from the responsibility for the loss or damage in respect of which he claims the limitation and the onus is upon him to show that there was no fault or privity of his own.—In the first action for damages against the appellant company, the trial judge, whose judgment had been affirmed by the appellate court and the Privy Council, held that its ship was unseaworthy by reason of overloading or improper loading and that such was "the real cause of the loss."—*Held:* That the appellant has not succeeded in bringing itself within the exception essentially required to obtain from the courts a limitation of the liability for the loss which occurred as a result of the stranding of its ship and it has failed to discharge the onus cast upon it of proving that the loss happened without its actual fault or privity. The law contemplates a clear duty on the part of the owner of a ship to enforce the observance of the obligation to take all necessary and reasonable precautions in order to prevent a grain cargo from shifting. In the present case, the appellant has failed to show it had taken any means to enforce the observance of the law in that respect. It did not attempt to exculpate itself, except in claiming that it had discharged its duty by supplying a ship properly equipped and appointing a certificated master. According to the evidence, the responsible officials of the appellant company did not apply themselves to the point of precautions at all and, before this Court, they took the stand that the question of loading the ship was one exclusively for the master and one with which they were not concerned. The trial judge found that no instructions were ever given by the company with regard to stowage of grain; and such acts

SHIPPING—*Concluded*

of omission are included in the words "actual fault or privity." PATTERSON STEAMSHIPS LTD. *v.* CANADIAN CO-OPERATIVE WHEAT PRODUCERS LTD... **617**

2——*Criminal law—Theft—Customs Act, R.S.C. 1927, c. 42 (as amended), ss. 207, 151 2 (o)—Vessel hovering within territorial waters of Canada with dutiable goods on board—Pursuit by police cruiser—Continuity of pursuit—Seizure of vessel on high seas—Forcible escape of vessel—Forfeiture of vessel—Time of forfeiture—Charge of theft against master—Form of charge*..... **513**

See CRIMINAL LAW 4.

SPECIAL WAR REVENUE ACT

See ASSESSMENT AND TAXATION 5.

STATUTES — *Insurance — Motor vehicles—Repeal of provision in statute and enactment at same time in another statute of substantially the same provision — Retrospective construction of latter provision—Injury to passenger in motor car—Action and recovery of judgment by injured person against owner (driver) of car, and subsequent action by injured person against owner's insurer; the actions being taken subsequent to expiry of insurance policy and subsequent to later repeal and enactment of certain respective legislation—Right of injured person to judgment against insurer—S. 87 (4) (repealed September 1, 1932) of The Highway Traffic Act (Ont.) (as amended in 1930, c. 47)—S. 183 (h) (coming into force September 1, 1932) of The Insurance Act (Ont.) (as amended in 1932, c. 25)—"Motor Vehicle Liability Policy"—Time limitation for bringing action.*]—Appellant insured A. by an automobile insurance policy, dated May 2, 1931, and expiring May 2, 1932. On February 9, 1932, an accident occurred in which respondent, a passenger in A.'s car (driven by A.), was injured. On December 3, 1932, respondent commenced action for damages against A. The action was tried and on March 29, 1933, judgment was given against A. Respondent, not having received payment, commenced, on May 8, 1933, an action against appellant for the amount of the judgment (and taxed costs and subsequent interest), claiming under s. 87 (4) of *The Highway Traffic Act* (Ont.) (as enacted in 1930, c. 47, s. 6) and, or in the alternative, under s. 183 (*h*) of *The Insurance Act* (as enacted by *The (Automobile) Insurance Act, 1932*, c. 25). On September 1, 1932, said s. 87 (4) had been repealed, and on the same date said s. 183 (*h*) had come into force. On a stated case (in which certain facts were admitted) appellant claimed that, in point of law, respondent was not entitled to judgment against it.—*Held*, affirming judgment of the Court of Appeal for Ontario, [1934] O.R. 318, that respondent was entitled to succeed.—*Per* Rinfret, Cannon, Crocket and Hughes JJ.: In view of the repeal on September 1, 1932, of provisions, dealing with certain subject matters, in *The Highway Traffic Act*, and the enactments, taking effect on the same date, introducing into *The Insurance Act* provisions dealing with the same subject matters, and on comparing and considering the provisions repealed and enacted respectively as aforesaid, said s. 183 (*h*), introduced as aforesaid into *The Insurance Act*, between which section and s. 87 (4) (repealed as aforesaid) of *The Highway Traffic Act* there was (as was held) no substantial difference as to the rights of third parties against an insurer, should be construed as retrospective. Such construction was impelled by a consideration of effects of a contrary construction—effects which it was inconceivable that the legislature intended. *Ex parte Todd; In re Ashcroft*, 19 Q.B.D. 186, at 195, cited and applied.—The words "motor vehicle liability policy" in said s. 183 (*h*) are wide enough in form to cover the policy in question. It cannot be said that a motor vehicle liability policy is necessarily the one prescribed by *The (Automobile) Insurance Act, 1932* (amending *The Insurance Act*, and coming into force September 1, 1932) merely because *The Highway Traffic Act, 1932* (c. 32), s. 9, (coming into force September 1, 1932), introduces into *The Highway Traffic Act* s. 87 (1) to the effect that a motor vehicle liability policy shall be in the form prescribed by *The Insurance Act*.—The exclusion, by s. 183 (*d*) of *The Insurance Act* (as enacted by *The (Automobile) Insurance Act, 1932*), from an insurer's liability under an owner's policy or a driver's policy, of a claim by a passenger in the motor vehicle unless the coverage is expressly extended under s. 183 (*f*), did not exclude respondent's claim, as at the time of the accident there was no such exclusion from liability and such liability was in fact provided for by A.'s policy.—As respondent's action against appellant was brought within two months after respondent's judgment against A.—and within two months after respondent's "cause of action arose"—the limitation of one year, either in the statutory conditions in the policy or in the statutory conditions brought into force by *The (Automobile) Insurance Act, 1932*, did not bar respondent from recovering against appellant. TRANS-CANADA INSURANCE CO. *v.* WINTER..... **184**

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39——*R.S.O.* [1927] *c.* 279 *(Children's Protection Act)* **652**
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40——*(Ont.)* 6 *Geo. V, c.* 50 *(The Ontario Temperance Act)*..... **494**
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41——*(Ont.)* 17 *Geo. V, c.* 70 *(The Liquor Control Act (Ontario))*.... **494**
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43——*(Ont.)* 20 *Geo. V, c.* 47 *(The Highway Traffic Amendment Act, 1930).* **184**
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44——*(Ont.)* 22 *Geo V, c.* 25 *(The (Automobile) Insurance Act, 1932)*..... **184**
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45——*(Ont.)* 22 *Geo. V, c.* 32 *(Highway Traffic Act, 1932)*..... **184**
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46——*(Ont.)* 24 *Geo. V, c.* 26 *(The Liquor Control Act, 1934)*..... **494**
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47——*R.S.Q.* [1925] *c.* 46, *ss.* 16, 17, 18 *(Watercourses Act)*..... **304**
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48——*R.S.Q.* [1925] *c.* 102, *ss.* 485, 488, 500, 504, 510, 511 *(Cities and Towns Act)*..... **304**
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49——*(Que.)* 11 *Geo. V, c.* 112, *s.* 25, *par. (g) (Montreal City Charter)*.... **38**
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50——*R.S.A.* [1922] *c.* 97, *s.* 5 *(Distress Act)*..... **408**
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51——*(Alta.)* 14 *Geo. V, c.* 31, *s.* 66 *(The Vehicles and Highway Traffic Act, 1924).* **572**
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52——*R.S.B.C.* [1924] *c.* 127, *ss.* 216, 217, 218, 226 *(Land Registry Act)*.. **278**
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53——*R.S.B.C.* [1924] *c.* 254, *s.* 44 *(Taxation Act)*..... **70**
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54——*(B.C.)* 20 *Geo. V, c.* 24, *s.* 21 *(Highway Act)*..... **628**
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55——*(B.C.)* 20 *Geo. V, c.* 64 *(Security Frauds Prevention Act)*..... **441**
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56——*(B.C.)* 22 *Geo. V, c.* 53, *s.* 6 *(Income Tax Act)*..... **70**
See ASSESSMENT AND TAXATION 1.

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57——*R.S.N.B.* [1927] *c.* 15 *(Succession Duty Act)*..... **133**
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58——*R.S.N.B.* [1927] *c.* 127 *(Public Utilities Act)*..... **519**
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59——*R.S.N.B.* [1927] *c.* 152, *s.* 10 *(Conditional Sales Act)*..... **249**
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60——*(N.S.)* (1931) *Halifax City Charter, s.* 357 (1) *(charter ratified and confirmed by* 21 *Geo. V, c.* 70)..... **215**
See ASSESSMENT AND TAXATION 2.

61——*(P.E.I.)* 20 *Geo. V, c.* 1, *s.* 65 (1) *(The Highway Traffic Act)*..... **572**
See MOTOR VEHICLES 2.

STOCK BROKER
See BROKER.

STOCK EXCHANGE
See ASSESSMENT AND TAXATION 5; BROKER.

STREET RAILWAYS — *Negligence — Motor vehicles—Collision at street intersection between street car and automobile—Right of way for street car—Duties of automobile driver and street car motorman—Joint negligence*..... **671**
See NEGLIGENCE 3.

SUCCESSION DUTY—*Succession Duty Act, R.S.N.B. 1927, c. 15—Construction —Ascertainment of duty—Allowance for debts, etc.—Properties against which allowances made.*]—F. died leaving property of the value of $175,429.11 liable by law to payment of debts, etc. In addition there were insurance policies on his life payable to his wife and children, yielding $184,884.86, and a gift made *inter vivos* to a daughter of $50,000, which policies and gift were, under s. 10 of the *Succession Duty Act,* R.S.N.B. 1927, c. 15 (and amendments), included in "property passing on the death" of F., and, under s. 3, subject to succession duty. His debts, etc., amounted to $331,343.26.—*Held* (Crocket J. dissenting): Under the Act, the amount of the debts, etc., should be deducted from the total of the said sums of $175,429.11, $184,884.86, and $50,000; and succession duty levied only on the difference.—The method of determining "the dutiable value of property" under s. 5, providing for allowance for debts, etc., applies to all property upon which succession duty is imposed, namely, all "property passing on the death of any person" as defined in the Act.—Judgment of the Appeal Division of the Supreme Court of New Brunswick, 7 M.P.R. 367, re-

SUCCESSION DUTY—*Concluded*

versed.—*Per* Crocket J., dissenting: In levying the duty against the insurance moneys and the gift *inter vivos*, there should be no allowance for debts, etc., under s. 5. Under the Act, the duty is to be assessed and levied distributively on the component parts of the property passing in the hands of the individual successors to whom it goes or has gone; and the allowance for debts, etc., is deductible only from such properties as are liable by law for the deceased's debts. FRASER *v.* PROVINCIAL SECRETARY-TREASURER OF NEW BRUNSWICK..... **133**

TAXATION

See ASSESSMENT AND TAXATION.

THEFT

See CRIMINAL LAW 4.

TRADE MARK—*Expunging from register—Alleged resemblance to trade-mark in prior use by others—Danger of deception—Onus.*]—The plaintiff Peggy Sage Inc. was incorporated in January, 1930, for the purpose of acquiring and carrying on the business of Mrs. Sage under her trade-mark "Peggy Sage." Mrs. Sage had established in the city of New York in 1917 the business of manufacturing and selling toilet articles and toilet preparations, and the goods have been sold continuously throughout the United States since 1917 and throughout Canada since 1920, under said trade-mark. The trade-mark was registered with the Secretary of State for New York on February 10, 1927; in the United States Patent Office on July 12, 1932; and in the Canadian Patent Office on June 2, 1933, the application being filed on September 30, 1932, under the provisions of the *Trade Mark and Design Act*, R.S.C. 1927, c. 201. Defendant was incorporated in March, 1932, for the purpose of acquiring and continuing two pre-existing businesses for the sale of toilet articles, and on April 8, 1932, it filed an application to register "Peggy Royal" as a trade-mark, and was granted a certificate as of June 11, 1932 (prior to which date those words had not been used for sale of its goods). Defendant's products were of the same nature as, but were of lower grade and lower priced than, those of plaintiffs. The containers used by defendant were different from those used by plaintiffs. Plaintiffs sued to expunge the latter trade-mark from the register, on the grounds that its use would mislead the public and was an infringement of plaintiffs' trade-mark.—*Held:* (1) The onus was on plaintiffs to satisfy the court that the danger of deception exists, and that consequently the public should be

TRADE MARK—*Concluded*

protected by expunging the trade-mark complained of. The court, in the absence of direct evidence one way or the other, may draw such inferences from the facts proven as those facts *prima facie* warrant. The onus may be shifted. (*Dewar* v. *John Dewar & Sons Ltd.* 17 R.P.C. 341, at 356; *Benj. Edgington Ltd.* v. *J. Edgington & Co.*, 6 R.P.C. 513).—(2) The words "Peggy Royal," as printed on defendant's labels, so nearly resembled the device registered by plaintiff, and sounded so much like it, as to be calculated to deceive, and might induce some of the public to think that defendant's products were manufactured by plaintiff. Even if defendant did not intend to deceive and actual deception had not been proven, defendant's trade-mark should be expunged if, in the court's opinion, by its resemblance to that of plaintiff, it was likely to deceive the public in the course of its legitimate use in the trade. On these grounds defendant's trade-mark should be expunged (*Eno* v. *Dunn*, 15 App. Cas. 252, and other cases, cited). (Judgment of Maclean J., President of the Exchequer Court of Canada, [1935] Ex. C.R. 70, reversed). PEGGY SAGE INC. ET AL. *v.* SIEGEL KAHN COMPANY OF CANADA LTD..... **539**

TRUSTS AND TRUSTEES—*Person becoming registered owner of land, and making mortgage thereon (with covenant for payment), for benefit of company—Transfer from him to company made but not registered—Authorized assignment by company under Dominion Bankruptcy Act—Indemnity claimed by registered owner (as trustee) against company's trustee in bankruptcy (as cestui que trust) against liabilities in connection with land and mortgage*..... **1**

See BANKRUPTCY 1.

2——*See* AGENCY; ASSESSMENT AND TAXATION 4; BANKRUPTCY; BANKS AND BANKING 1.

WILL—*Construction—Intention of the testator—"Advances heretofore made by me to my children"—Whether debts or notes owing by certain children discharged.*]—The will in question in this case devised and bequeathed "all my real and personal estate of which I may die possessed," and, after giving certain specific legacies, contained the following clause: "The balance of my property to be divided between my ten children (naming them), and so that the said Joseph P. Hauck shall receive one thousand dollars less than the shares coming to the other children named, in con-

WILL—*Continued*

sideration of advances previously made to him by me, and with this exception no account shall be taken or had of advances heretofore made by me to any of my children." Four of the sons were indebted to the estate on promissory notes given by them individually to the testator. Joseph P. had received $1,000 from his father in connection with some partnership transaction in land which they had entered into together. Other than the above-mentioned transactions with the five sons, the only advances were wedding presents of not over $100 each to the four daughters.—*Held,* reversing the judgment of the Appellate Division ([1934] 3 W.W.R. 335), that the debts represented by the notes were discharged by reason of the words in the will "and with this exception no account shall be taken or had of advances heretofore made by me to any of my children." According to the intention of the testator, ascertained by a fair construction of the will and under the circumstances of the case, the words being given their usual and ordinary meaning, the moneys covered by the notes ought to be treated as no longer owing. HAUCK *v.* SCHMALTZ..... **478**

2——*Accumulation of income—Postponed distribution of part of estate—Ownership of surplus income accumulated during period of postponement—Accumulations Act, R.S.O. 1927, c. 138, s. 1.*]—The testator died on January 26, 1909. Under directions in his will his executor, on an event which happened in 1912, divided the residue of his estate into two equal parts, one-half going (subject to charge) to the testator's two sons. As to the "other half" (the part now in question) the will directed that it be charged with certain annuities, etc., and that (subject to charges) upon the testator's wife's death (subject to delay in the event of her death before a certain time, which did not happen) it should be distributed in equal shares amongst nine named beneficiaries, with proviso that should any of them predecease her or die before the period of distribution (which will now, under the circumstances, be the testator's wife's death) the deceased beneficiary's child or children living at the date of such distribution should take the share which the parent would have received if then living; but if the deceased beneficiary left no child or children living at the date of distribution, the share should belong to the testator's two sons in equal shares. The testator's widow is still living. This Court has held ([1934] Can. S.C.R. 403) that, on construction of the

WILL—*Concluded*

will, the testator's two sons took, on the testator's death, a vested interest in equal shares in said "other half" (subject to charges), subject to partial defeasance in favour of any of said nine beneficiaries (or, alternatively, their issue) who might be living at the time fixed for distribution. The present question was concerned with the disposal of the surplus income accumulated from the said "other half" of the residue of the estate.—*Held:* The accumulation of surplus income and of income thereon during the 21 years following the testator's death (the period limited for accumulation in such a case by the *Accumulations Act,* R.S.O. 1927, c. 138) is divisible as it existed on January 26, 1930 (the end of said period of 21 years) in the same manner as the corpus, upon the death of the testator's widow; and the accumulation of surplus income and of income thereon after January 26, 1930, and until the testator's widow's death, is distributable as upon an intestacy. The clear implication from the will was that the testator meant to provide for the distribution, on his widow's death, of the fund as it should then stand, including all the accumulation of surplus income and of income thereon. This is also the implication which the law, failing any words indicating the testator's intention to exclude it, would itself annex to the gift, whether the gift be one which vests in the beneficiaries on the testator's death or an executory bequest vesting only on the testator's widow's death (*Wharton* v. *Masterman,* [1895] A.C. 186, at 198, 191-192; *Bective* v. *Hodgson,* 10 H. of L. Cas. 656, at 664-665). But as the accumulations have gone beyond the period allowed by the *Accumulations Act,* to that extent the direction for accumulation is void, so that that portion of the surplus income and the income thereon which has accumulated since January 26, 1930, is distributable as upon an intestacy (s. 1 of the Act)—Judgment of the Court of Appeal for Ontario, [1935] 1 D.L.R. 263, [1935] Ont. W.N. 1, affirmed. *In re* HAMMOND ESTATE..... **550**

3——*Insurance Act, R.S.O. 1927, c. 222, ss. 140 (2), 142 (1), 145 (1), 146, 163 (1)—Preferred beneficiaries—Designation of beneficiary by policy—Alteration by will—Effectiveness of alteration—Document accepting participation in Employees' Savings and Profit Sharing Fund—Designation therein of beneficiary in case of death—Whether testamentary in character*..... **200**

See INSURANCE (LIFE) 1.