1959

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LAW REPORTS

Supreme Court of Canada

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FRANÇOIS des RIVIÈRES, LL.L.

PUBLISHED PURSUANT TO THE STATUTE BY

KENNETH J. MATHESON, Q.C., Registrar of the Court

THE QUEEN'S PRINTER AND CONTROLLER OF STATIONERY
OTTAWA, 1960

JUDGES

OF THE

SUPREME COURT OF CANADA

DURING THE PERIOD OF THESE REPORTS

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

The Honourable ROBERT TASCHEREAU.

The Honourable IVAN CLEVELAND RAND.

The Honourable CHARLES HOLLAND LOCKE.

The Honourable JOHN ROBERT CARTWRIGHT.

The Honourable GÉRALD FAUTEUX.

The Honourable DOUGLAS CHARLES ABBOTT, P.C.

The Honourable RONALD MARTLAND.

The Honourable WILFRED JUDSON.

The Honourable ROLAND A. RITCHIE.

ATTORNEY GENERAL OF CANADA

The Honourable EDMUND DAVIE FULTON, Q.C.

SOLICITOR GENERAL OF CANADA

The Honourable LÉON BALCER, Q.C.

MEMORANDA

On the 27th day of April, 1959, the Honourable Ivan Cleveland Rand, Puisne Judge of the Supreme Court of Canada, upon attaining the age of seventy-five years, retired from the bench pursuant to s.9(2) of the *Supreme Court Act*, R.S.C. 1952, c.259.

On the 5th day of May, 1959, Roland A. Ritchie, one of Her Majesty's Counsel, learned in the law, was appointed a Puisne Judge of the Supreme Court of Canada.

71117-6—1½

ERRATA
in volume 1959

Page 3, in Style of Cause. Read "Plaintiff appellant" and "Defendants respondents".

Page 3, line 9 from bottom. Read "plaintiff, appellant".

Page 3, line 8 from bottom. Read "defendants, respondents".

Page 7, line 1. Read "plaintiff, appellant".

Page 7, line 2. Read "defendants, respondents".

Page 83, line 10. Read "Stiffel v. City of Montreal".

Page 179, line 5. Read "Beatty v. Kozak".

Page 339, line 12. Read "Beatty v. Kozak".

Page 556, line 4 of Caption. Read "1948(Can.)".

Page 613, line 24, Read "par la Cour d'Appel dans *Ville Saint-Michel v. Robert*[2] où".

Page 736, line 5 of Caption. Read "R.S.B.C."

NOTICE

Memorandum 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.

Wakefield Co. v. Oil City Petroleums et al., [1958] S.C.R.361, appeal dismissed with costs, October 7, 1959.

UNREPORTED JUDGMENTS OF THE SUPREME COURT OF CANADA

In addition to the judgments reported in this volume, the Supreme Court of Canada, between December 31, 1958 and November 30, 1959, delivered the following judgments which will not be reported in this publication:

Acme Saw Mills v. Mahinder Singh et al., 14 D.L.R. (2d) 361, appeal dismissed with costs; cross-appeal dismissed without costs, November 3, 1959.

Banque Provinciale du Canada v. Beauchemin, [1957] Que. Q.B. 784, appeal dismissed with costs, February 26, 1959.

Bernier v. The Queen, [1959] Que. Q.B. 527, appeal dismissed, November 25, 1959.

Brulé and Martel v. The Queen, [1958] Que. Q.B. *527*, appeal dismissed, February 18, 1959.

Burns v. M.N.R., [1958] Ex. C.R. 93, appeal dismissed with costs, December 2, 1959.

Canadian Bank of Commerce v. London & Lancashire Guarantee and Accident Co. of Canada, [1958] O.R. 511, appeal dismissed with costs, May 6, 1959.

Cohen v. Mackay & Co., 14 D.L.R. (2d) 196, appeal dismissed with costs, February 13, 1959.

Cohen v. Osler, Hammond & Nanton, 14 D.L.R. (2d) 196, appeal dismissed with costs, February 13, 1959.

Cyr v. Chalifoux, [1958] Que. Q.B. 523, appeal dismissed with costs, October 20, 1959.

Dansereau v. Desjardins (Que.), appeals allowed with costs, June 9, 1959.

de Chavigny v. The Queen, [1958] Que. Q.B. 364, appeal allowed and new trial ordered, February 18, 1959.

Dubé v. Lacombe, [1959] Que. Q.B. 591, appeal dismissed with costs, June 25, 1959.

Eagle Star v. Shell Oil, [1959] Que. Q.B. 432, appeal dismissed with costs, Cartwright J. dissenting, June 25, 1959.

Edouard dit Barrette v. Lapierre, [1959] Que. Q.B. 791, appeal allowed with costs, April 28, 1959.

Ferland v. The Queen, [1958] Que. Q.B. 619, appeal dismissed, February 19, 1959.

Forand v. Benard, [1958] Que. Q.B. 623, appeal allowed with costs throughout, June 25, 1959.

Gallagher v. Green, [1958] O.W.N. 442, appeal dismissed without costs, June 25, 1959.

Granite Bay Timber v. M.N.R., [1958] Ex. C.R. 179, appeal dismissed with costs, November 3, 1959.

Hamelin v. Laplante, [1958] Que. Q.B. 395, appeal dismissed with costs; cross-appeal allowed with costs, April 28, 1959.

Hartin v. The Queen (C.M.A.B.), appeal dismissed, November 30, 1959.

Hawkins Ltd. v. M.N.R., [1958] Ex. C.R. 152, appeal dismissed with costs, May 7, 1959.

Leboeuf v. The Queen, [1959] Que. Q.B. 631, appeal dismissed, November 25, 1959.

Leforestier v. Miron & Frères, [1959] Que. Q.B. 793, appeal dismissed with costs, June 25, 1959.

Leland Publishing Co. v. M.N.R., [1958] Ex. C.R. 87, appeal dismissed with costs, October 21, 1959.

Lessard et al v. Soeurs de Miséricorde de Montréal, (Que.), appeal dismissed with costs, June 25, 1959.

Marien v. Town of St. Laurent, [1958] Que. Q.B. 618, appeal dismissed with costs, November 2, 1959.

Montreal, City of v. Clark. (Que.), appeal dismissed with costs, November 24, 1959.

Ontario Paper Co. v. M.N.R., [1958] Ex. C.R. 52, appeal dismissed with costs, December 2, 1959.

Port Alberni, City of v. MacMillan & Bloedel (Alberni) Ltd., 18 D.L.R. (2d) 134, appeal dismissed with costs, November 2, 1959.

Rodgers v. Fortin, [1957] Que. Q.B. 353, appeal dismissed with costs, April 28, 1959.

Stafechuck et al v. Koutchko, [1957] Que. Q.B. 874, appeal dismissed with costs, October 19, 1959.

Stem Corporation et al v. Koutsogiannopoulos, [1959] Que. Q.B. 421, appeal dismissed with costs, June 3, 1959.

Tillotson Rubber Co. v. Smith. (Que.), appeal dismissed with costs, November 23, 1959.

Watchstraps Inc. v. Rodi and Wiennenberger, [1957] Que. Q.B. 761, appeal dismissed with costs, March 3, 1959.

MOTIONS

Aubé v. The Queen, [1959] Que. Q.B. 712, leave to appeal refused, October 26, 1959.

Baker (J.C.) v. The Queen. (Ont.), leave to appeal refused, March 23, 1959.

Baker (G.) v. The Queen. (Ont.), leave to appeal refused, March 23, 1959.

Boland v. Donahue. (Ont.), motion to quash granted with costs, February 9, 1959.

Boyko v. Jendzyjowsky, 16 D.L.R. (2d) 464, leave to appeal refused with costs, February 23, 1959.

Caimito Gold v. Manitoba. (Man.), motion to quash granted with costs, October 6, 1959.

Caimito Gold v. Manitoba. (Man.), leave to appeal refused with costs, October 6, 1959.

Dairy Supplies v. Fuchs, 18 D.L.R. (2d) 408, leave to appeal refused with costs, October 6, 1959.

Drouin v. Gosselin, [1959] Que. Q.B. 201, leave to appeal refused with costs, March 25, 1959.

Dubé v. The Queen, [1958] Que. Q.B. 274, leave to appeal refused, February 2, 1959.

Favreau v. Cour Municipale de Montréal. (Que.), leave to appeal refused with costs, June 1, 1959.

Gay v. The Queen, 20 D.L.R. (2d) 170, leave to appeal refused with costs, October 26, 1959.

Gayler v. The Queen (Ont.), leave to appeal refused, March 25, 1959.

Halpert & De Pass v. B.A. Oil (Ont.), leave to appeal refused with costs, December 14, 1959.

Hamilton, City of et al. v. Morgan, 19 D.L.R. (2d) 286, leave to appeal refused with costs, November 30, 1959.

Humble v. Brown & Brown, [1959] O.R. 586, leave to appeal refused with costs, December 21, 1959.

Irwin et al v. Crevier (Que.), leave to appeal refused with costs, October 19, 1959.

Jedraski v. Davis (Ont.), leave to appeal refused with costs, June 22, 1959.

Joncas v. Pennock et al., 17 D.L.R. (2d) 60, motion to quash granted without costs, May 18, 1959.

Joncas v. Pennock et al., 17 D.L.R. (2d) 60, leave to appeal refused without costs, May 18, 1959.

Kennedy v. Tomlinson, 20 D.L.R. (2d) 273, the following oral judgment was delivered by the Chief Justice on October 27, 1959: "We are not in agreement with all the reasons for judgment of the Court of Appeal, but, nevertheless, this is not a case in which leave should be granted and the motion [for leave to appeal] is dismissed with costs."

Kerr v. The Queen (Ont.), leave to appeal refused, March 25, 1959.

Klassen v. The Queen, 20 D.L.R. (2d) 406, leave to appeal refused, November 30, 1959.

Mastermet Cobalt Mines v. Northern Ont. Nat. Gas Co. (Ont.), leave to appeal refused with costs, November 16, 1959.

Metalliflex Ltd. v. Rodi et al. (Que.), leave to appeal refused with costs, November 30, 1959.

Mimico, Township of. v. Metropolitan Toronto. (Ont.), motion to quash granted, February 2, 1959.

Minister of Nat. Rev. v. Plimley Auto, [1958] Ex. C.R. 270, motion for consent judgment granted, December 7, 1959.

Murphy v. The Queen, 124 C.C.C. 366, leave to appeal refused, June 8, 1959.

Olafson v. Kroeker, 17 D.L.R. (2d) 138, leave to appeal refused with costs, March 23, 1959.

Parke, Davis & Co. v. Gilbert Surgical Supply Co. (Exch.), motion to quash granted with costs, March 3, 1959.

Quebec, City of v. Eastern Waste Paper. (Que.), leave to appeal refused with costs, December 14, 1959.

Queen, The v. Emslie, 124 C.C.C. 253, leave to appeal refused with costs, December 14, 1959.

Queen, The v. Hyland, 124 C.C.C. 253, leave to appeal refused with costs, December 14, 1959.

Rochon v. The Queen, 30 C.R. 272, leave to appeal refused, February 2, 1959.

Tadoussac, Corporation de v. Brisson, [1959] Que. Q.B. 644, leave to appeal refused with costs, November 30, 1959.

Trudell v. Canadian Petrofina. (Ont.), leave to appeal refused with costs, December 14, 1959.

Van Sickle v. The Queen. (Ont.), leave to appeal refused, November 16, 1959.

Westside Construction v. Saskatchewan Government Insurance Office, 18 D.L.R. (2d) 285, leave to appeal refused with costs, October 6, 1959.

Wherry v. Texaco Canada Ltd. (Ont.), leave to appeal refused with costs, December 14, 1959.

Yolles v. The Queen, 123 C.C.C. 305, leave to appeal refused, April 28, 1959.

A TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME

N

O

P

Q

R

S

T

V

W

Z

A TABLE

OF THE

NAMES OF THE CASES CITED

IN THIS VOLUME

A

B

C

D

E

E—Concluded

H—Concluded

I

J

K

L

M

M—Concluded

N

O

P

P—Concluded

Q

R

S

T

U

V

W

Y

Notice to Members of the Bar

I have been instructed by the Court once again to remind the members of the Bar of the provisions of Rule 30 as to the contents of factums. A notice similar to this appeared in (1953) 2 S.C.R. where attention was called to the fact that as early as 1910 an announcement had been made that the costs of factums not complying with the Rules would be disallowed. It appears to be necessary to stress this matter again.

I have also been instructed to advise the profession that once a list is settled it is expected that appeals will be proceeded with in the order in which they appear on the list.

KENNETH J. MATHESON,
Registrar.

Avis aux membres du Barreau

De nouveau la Cour m'a chargé de rappeler aux membres du Barreau les dispositions de la Règle 30 se rapportant au contenu des factums. Un avis semblable a paru en (1953) 2 R.C.S. attirant l'attention sur le fait que déjà en 1910 une déclaration avait été faite à l'effet que les frais relatifs aux factums non conformes aux Règles seraient refusés. Il semble nécessaire d'insister de nouveau sur ce point.

Je suis également chargé de prévenir les membres de la profession qu'une fois la liste établie, la Cour s'attend à ce que les appels suivent l'ordre dans lequel ils apparaissent sur cette liste.

KENNETH J. MATHESON,
Registraire.

CASES

DETERMINED BY THE

SUPREME COURT OF CANADA
ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

67293-1—1

RUSSELL SHORTT (*Defendant*) .....APPELLANT;

AND

MARGARET MacLENNAN AND JEAN MacLENNAN (*Plaintiffs*) ..... } RESPONDENTS.

1958

*Nov. 3, 4

Dec. 18

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Real property—Sale of land—Innocent misrepresentation by vendor—Contract affirmed by purchaser—Whether contract can be rescinded.

The plaintiff, as purchaser of a farm, sued for rescission of the contract for sale on the ground of alleged fraudulent misrepresentation by the vendors. The agreement was entered into in May 1954 and the deed and a mortgage were duly executed. The plaintiff went into possession in June 1954 and did not bring his action for rescission until January 1956.

The trial judge found that there had been an innocent misrepresentation by the vendors concerning the quantity of water which might be obtained from a disused well on the farm, and maintained the action. On appeal, the action was dismissed by the Court of Appeal.

Held: The appeal should be dismissed; the plaintiff was not entitled to rescission.

It is well-settled law that rescission of an executed contract for the sale of land will not be granted because of innocent misrepresentation—nothing short of fraud will suffice. Furthermore, the whole course of the plaintiff's conduct established on his part an election to affirm the contract. The long lapse of time without complaint or repudiation, and his acts in working the farm and drilling two new wells, showed an intention to affirm the contract and were strong indications that he was not really persuaded by whatever was said by the vendors, and these conversations did not therefore amount to misrepresentation inducing the contract.

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

W. J. S. Knox, for the defendant, appellant.

G. W. Ford, Q.C., and *W. S. Pearson,* for the plaintiffs, respondents.

The judgment of the Court was delivered by

JUDSON J.:—Under an agreement in writing dated May 5, 1954, the plaintiff became the purchaser of a 200-acre farm. He took possession in June 1954 and the transaction was duly completed by the execution of a conveyance from the vendors with the usual convenants, a mortgage

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

[1] [1957] O.W.N. 1, 6 D.L.R. (2d) 431.

1958

SHORTT v. MAC-LENNAN

Judson J.

back from the plaintiff for a substantial part of the purchase price and the payment of the balance in cash. It was not until January of 1956 that the plaintiff brought an action for rescission, alleging a number of fraudulent misrepresentations by the vendors. The learned trial judge rejected all of these allegations with one exception. He found that there was an innocent—not a fraudulent misrepresentation by the vendors concerning the quantity of water which might be obtained from a disused well on the farm. In spite of his finding against fraud, the learned trial judge granted rescission. On appeal[1], this judgment was set aside and the action dismissed on two grounds: first, because there could be no rescission of an executed contract for innocent misrepresentation, and second, because the plaintiff had elected to affirm the contract. The plaintiff now appeals to this Court, seeking the restoration of the judgment at trial. In my opinion the appeal fails and I would confirm the judgment of the Court of Appeal on both grounds.

As pointed out by the Court of Appeal, the judgment at trial overlooks the decisions of this Court in *Cole v. Pope*[2], and *Redican v. Nesbitt*[3], that an executed contract for the sale of an interest in land will not be rescinded for an innocent misrepresentation. Nothing short of fraud will suffice. Even on the facts, *Redican v. Nesbitt* is indistinguishable from the case at bar. In both cases the misrepresentation complained of and alleged to be fraudulent related to the physical state of the property and not to title or encumbrances. In *Redican v. Nesbitt* fraud was rejected by the jury on what this Court held to be a defective charge according to the rule laid down in *Derry v. Peek*[4]. In consequence a new trial was necessary but the necessity arose from inability to grant rescission of a completely executed contract for misrepresentation short of fraud except where there was error *in substantialibus*. It was expressly stated that the principle applied not only to matters of title but also to cases involving the physical state of the property.

[1] [1957] O.W.N. 1, 6 D.L.R. (2d) 431.
[2] (1898), 29 S.C.R. 291.
[3] [1924] S.C.R. 135, 1 D.L.R. 536, 1 W.W.R. 305.
[4] (1889), 14 App. Cas. 337 at 374.

The starting point of the rule enunciated in *Redican v. Nesbitt* is usually taken to be the dictum of Lord Campbell in *Wilde v. Gibson*[1]. This case held that a vendor's silence concerning a right-of-way over property was not a ground for rescission of an executed contract when it was not shown that the vendor knew of its existence. This was a reversal of the decision of Knight-Bruce V.C., who had held that the silence of the vendor together with the physical condition of the property amounted to an assertion that no right-of-way existed. Obviously the case was concerned with matters of title—the extent of the duty of a vendor of land to know his own title, to produce documents of title in his possession and to disclose what he knew about his title. A complicating factor was an allegation of fraud in the pleadings which was abandoned during the course of the argument. On the inferences drawn from the facts and on the principles applied, the decision was severely criticized as early as 1849 by Sugden in his Law of Property, p. 614. Doubts of the authority of the case were expressed in Pollock on Contracts and Fry on Specific Performance from the earliest editions of these works.

In spite of this, the application of the principle was significantly extended in *Seddon v. North Eastern Salt Company, Limited*[2] and *Angel v. Jay*[3]. What had begun as a rule of conveyancing was applied to matters unrelated to title. In *Seddon* rescission was refused of a completed contract for the sale of the controlling shares in a limited company where there was an innocent misrepresentation of the extent of previous trade losses, and in *Angel v. Jay* it was held that there could be no rescission of an executed lease where the misrepresentation related to the physical state of the property. These last two decisions have recently been criticized in the Court of Appeal in England but the criticism formed no part of any *ratio decidendi* and was not concurred in by the majority of the Court.

These doubts and criticisms may indicate an insecure foundation for the rule in England but to the extent that they had been expressed, up to the year 1924, they were considered and rejected in *Redican v. Nesbitt*. Anglin J.

[1] (1848), 1 H.L. Cas. 605, 9 E.R. 897.
[2] [1905] 1 Ch. 326.
[3] [1911] 1 K.B. 666.

1958

SHORTT v. MAC-LENNAN

Judson J.

at p. 150 stated that the doctrine was "too well established to admit of controversy" and it is clear from the judgments that its extension to matters outside the field of conveyancing was not overlooked. The rule has a rational foundation and this was stated in the clearest terms by Duff J. at p. 146:

> The whole point is: At what stage does *caveat emptor* apply?
>
> The vendee may rely after completion upon warranty, contractual condition, error *in substantialibus,* or fraud. Once the conveyance is settled and the estate has passed, it seems a reasonable application of the rule to hold that as to warranty or contractual condition resort must be had to the deed unless there has been a stipulation at an earlier stage which was not to be superseded by the deed, as in the case of a contract for compensation. *Bos v. Helsham,* L.R. 2 Ex. 72 at p. 76. Representation which is not fraudulent, and does not give rise to error *in substantialibus,* could only operate after completion as creating a contractual condition or a warranty. Finality and certainty in business affairs seem to require that as a rule, when there is a formal conveyance, such a condition or warranty should be therein expressed, and that the acceptance of the conveyance by the vendee as finally vesting the property in him is the act which for this purpose marks the transition from contract *in fieri* to contract executed; and this appears to fit in with the general reasoning of the authorities.

The second ground upon which the Court of Appeal found error in the judgment at trial was that the plaintiff had affirmed the contract. Everything in the evidence subsequent to completion pointed to this conclusion. Immediately after taking possession, the plaintiff cleaned out the well and failed to get water. In August and September 1954, he drilled two new wells and again failed to get water. Nevertheless, he remained in possession of the farm and carried on farming operations and not a word was heard from him about the alleged misrepresentation until the institution of this action in January 1956. He was still in possession at the date of the trial. Affirmation of the contract is the irresistible inference from this conduct and also a strong indication that this purchaser, an experienced farmer who had made at least four inspections of the property before he made his contract, was not really persuaded by whatever was said between him and the vendors and that these conversations did not amount to a misrepresentation inducing the contract.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

1958

SHORTT v. MACLENNAN

Judson J.

Solicitor for the defendant, appellant: W. J. S. Knox, Sarnia.

Solicitors for the plaintiffs, respondents: MacEwen & Pearson, Sarnia.

1958

*Nov. 19, 20
Dec. 18

JOHN THOMAS ANDREWS AND ALBERT GAUTHIER (*Defendants*) ..... APPELLANT;

AND

THEODORE CHAPUT (*Plaintiff*) RESPONDENT.

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

Master and servant—Automobile—Accident—Taxi driver using employers' car to drive son to school, on payment of fare—Damages caused to third party—Liability of owner—Art. 1054 of the Civil Code.

A taxi driver asked his employers, the defendants, for permission to use his taxi-cab to bring his son back home for the opening of school. The fare for the trip was fixed in advance and the driver paid 60 per cent. of it to his employers and retained the balance. The driver was usually paid 40 per cent. on fares when working for the defendants. He was involved in an accident and the third party sued him and the defendants. The trial judge allowed the action against the driver and dismissed the action against the defendants. This judgment, however, was reversed by the Court of Appeal, which held that the driver was in the performance of the work for which he was employed.

Held: The appeal should be allowed and the action against the defendants dismissed.

The legal inference which must be drawn from all the facts is that on the day in question the driver was not operating the car as a taxi-cab at the request of a patron and for the benefit of his employers but was using it for his own purposes. This inference can be drawn particularly from the fact that permission to make the trip was sought and obtained from the defendants, in advance, that further permission was obtained from the manager, and that the amount agreed upon was paid to him before the trip was undertaken, and that the driver was given the right to use the car as he saw fit throughout the entire day.

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

1958

ANDREWS AND GAUTHIER v. CHAPUT

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

H. Hansard, Q.C., and *W. S. Tyndale,* for the defendants, appellants.

J. Duchesne, for the plaintiff, respondent.

The judgment of the Court was delivered by

ABBOTT J.:—Respondent's claim is one in damages arising out of a collision between a car owned and driven by respondent and a taxi-cab owned by appellants, being driven at the time of the accident by an employee Disnard.

The facts are not in dispute, the amount of damages, $4,067.50, is not now in issue, and before this Court it was conceded that the accident was due to the fault of appellants' said employee. The sole question in issue here is whether at the time of the accident Disnard was in the performance of the work for which he was employed by appellants within the meaning of art. 1054 of the *Civil Code* so as to engage the vicarious responsibility of appellants.

The facts relevant to the determination of this issue are as follows.

At the time of the accident and for some time prior thereto, Disnard had been employed by appellants as a chauffeur to drive taxi-cabs owned and operated by them in the city of Montreal. He was not paid a salary but received a commission consisting of 40 per cent. of the total receipts from his operation of cars belonging to appellants. The accident occurred near St. Bruno at about 6.45 on a Saturday afternoon in September 1951, when Disnard was returning from Actonvale where he had gone in order to bring his young son back to his home in Montreal for the opening of school. Disnard appears to have left Montreal for Actonvale sometime in the morning, accompanied by two young friends of his son who had gone along for the ride. It is also in evidence that Disnard's wife had contributed $5 towards the cost of the trip.

[1] [1958] Que. Q.B. 425.

The appellant Gauthier testified that at some time prior to making this trip to Actonvale, Disnard had informed him that he wanted to go there in order to bring back his son and that he Gauthier, had told him to go whenever he wished to do so. Gauthier's evidence on this point is as follows:

D. Avant cet accident, avez-vous eu connaissance d'un voyage par monsieur Disnard? R.—Il m'avait parlé qu'il voulait aller chercher son petit garçon. J'ai dit: "Tu iras quand tu voudras, quand cela te fera plaisir."

It was agreed that Disnard would pay Gauthier $10 for the trip, this amount being approximately 60 per cent. of the regular taxi fare on a flat rate basis from Montreal to Actonvale. Prior to leaving for Actonvale Disnard also took the matter up with one Pellerin, a co-driver and appellants' manager (to whom he had also spoken concerning the trip about a week before), obtained his permission to make the trip on the day in question and paid him the $10 agreed upon. The only time limit put on Disnard's use of the taxi-cab appears to have been that he was to return it to his employers' garage in time for the car to be used by the night chauffeur.

The evidence establishes that the regular taxi-cab fare for a trip from Montreal to Actonvale on a flat rate basis is $16.40 and had this been a regular trip, I can see no reason for Disnard having to obtain permission in advance from the appellant Gauthier nor is it likely that in such event payment for the trip would have been made in advance. Moreover, as I read the evidence, the arrangement made by Disnard with his employers was that he, Disnard, would be free to use the car as he pleased during the whole of the day upon payment of the $10 agreed upon, subject only to his returning it to his employers' garage in time for it to be available for use by the night chauffeur.

Upon these facts the learned trial judge held that at the time of the accident Disnard was not in the performance of the work for which he was employed. This finding was unanimously reversed by the Court of Queen's Bench[1] but with respect I am unable to agree with the conclusion reached by the learned judges in the Court below.

[1] [1958] Que. Q.B. 425.

1958

ANDREWS AND GAUTHIER v. CHAPUT

Abbott J.

The legal inference which in my opinion must be drawn from all these facts and in particular from the following facts, namely, (1) the permission to make the trip sought for and obtained in advance from appellants; (2) the further permission obtained from Pellerin and the payment to him in advance of the $10 agreed upon and (3) the respondent's right to use the car as he saw fit throughout the entire day, is that on the day in question Disnard was not operating the car as a taxi-cab at the request of a patron and for the benefit of his employer but was using the car for his own purposes.

For these reasons I would allow the appeal with costs here and below and restore the judgment of the learned trial judge.

Appeal allowed with costs.

Attorneys for the defendants, appellants: Common, Howard, Cate, Ogilvy, Bishop & Cope, Montreal.

Attorneys for the plaintiff, respondent: Page, Beauregard, Duchesne & Renaud, Montreal.

1958

*Oct. 27, 28
Dec. 18

NELLIE GATZ (*Plaintiff*) .....APPELLANT;

AND

HARRY KIZIW (*Defendant*) .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Real property—Whether registered title protects purchaser against claim by adjoining owner based on prior adverse possession—The Land Titles Act, R.S.O. 1950, c. 197, ss. 23(1)(c), 28(1)—The Limitations Act, R.S.O. 1950, c. 207, ss. 4, 15.

The defendant who became the owner of parcel A in 1940 erected a fence to separate his property from parcel B. The fence was erected on parcel B and since that time the defendant has remained in continuous and open possession. Ownership of parcel B was obtained by the plaintiff in 1952. Neither party was a first-registered owner under *The Land Titles Act*.

The trial judge gave judgment in favour of the plaintiff, but this judgment was reversed by the Court of Appeal on the ground that s. 28 of *The Land Titles Act* did not override the *Limitations Act*.

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

Held: The appeal should be allowed. The plaintiff was entitled to a judgment for possession of the strip of encroachment.

Section 28(1) of *The Land Titles Act,* which provides against the acquisition of title by adverse possession, is not, in this case, subject to an exception under s. 23(1)(*c*) of the Act. Clause (*c*) of s. 23(1) refers to a title by possession which the adjoining owner "has acquired" not "may" or "shall" acquire. It appears in Part III of the Act dealing with first registration. The scheme of the Act protects those possessory interests of adjoining owners which may be in existence at the time of first registration and prohibits their subsequent acquisition. Therefore, s. 23(1)(*c*) protects only possessory titles in existence at the date of first registration and s. 28(1) expressly prevents their subsequent acquisition, and the principle of *Belize Estate and Produce Co. Ltd. v. Quilter,* [1897] A.C. 367, has no application in the interpretation of the Ontario Act.

As s. 28(1) prevents the acquisition of the rights here in question, the terms of s. 4 of *The Limitations Act* are negatived thereby.

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

Miss M. A. M. Fraser, Q.C., for the plaintiff, appellant.

W. B. Williston, Q.C., and *J. D. Taylor,* for the defendant, respondent.

The judgment of the Court was delivered by

JUDSON J.:—The judgment under appeal holds that s. 28 of *The Land Titles Act,* R.S.O. 1950, c. 197, which provides against the acquisition of title by adverse possession, is subject to an exception under s. 23(1)(*c*) of the Act where the possessory interest arises between adjoining owners. Although this is the first judicial consideration in Ontario of the interrelation of s. 28 with the other sections of the Act and with ss. 4 and 15 of *The Limitations Act,* R.S.O. 1950, c. 207, the prevailing opinion was, I think, expressed by Armour when he said in the Law of Real Property, 1st ed. 1901, p. 431, and 2nd ed. 1916, p. 467:

> Where land is registered under the *Land Titles Act* no length of possession will defeat the registered title. The intention of this legislation is to make the entry in the books of the office the only and the absolute evidence of title.

There is no dispute that the claim to a possessory title by the respondent arose after the first registration under *The Land Titles Act* of the properties involved in this litigation.

[1] [1957] O.W.N. 313, 8 D.L.R. (2d) 292.

1958

GATZ
v.
KIZIW

Judson J.

The respondent became the owner of parcel 3306 in 1940. The appellant became the owner of parcel 3617 in October 1952. Her certificate of ownership is in the usual form and states that her title is in fee simple with an absolute title, subject to the exceptions and qualifications mentioned in *The Land Titles Act*. But in the spring of 1940 the respondent had fenced in a strip of land adjoining his easterly boundary, a strip of land which is part of the land described in parcel 3617, and since that time he has remained in continuous and open possession. If it is possible to acquire a possessory title against the title registered under the Act, he has done so.

Section 28(1) reads:

> A title to *or any right or interest in* any land adverse to or in derogation of the title of the registered owner shall not be acquired by any length of possession.

The underlined words were added by amendment made in 1952. I agree with the reasons of the Court of Appeal[1] that the 1952 amendment has no bearing upon the decision of this case. Moreover, if the defendant had acquired a possessory title, it was complete by 1950, two years before the amendment.

The only expressed exception in the Act to the principle stated in subs. (1) of s. 28 is in subs. (2) of the same section. It reads:

> This section shall not prejudice, as against any person registered as first owner of land with a possessory title only, any adverse claim in respect of length of possession of any other person who was in possession of the land at the time when the registration of such first owner took place.

I turn now to a consideration of s. 23(1)(*c*) of the Act which the Court of Appeal has held to import another exception to s. 28(1). It reads:

> 23. (1) All registered land, unless the contrary is expressed on the register, shall be subject to such of the following liabilities, rights and interests as for the time being may be subsisting in reference thereto, and such liabilities, rights and interests shall not be deemed encumbrances within the meaning of this Act:
>
> (*c*) any title or lien which, by possession or improvements, the owner or person interested in any adjoining land has acquired to or in respect of the registered land;

[1] [1957] O.W.N. 313, 8 D.L.R. (2d) 292.

Clause (*c*) is only one of many groups of "liabilities, rights and interests" that are listed and which are not deemed to be encumbrances. They have sometimes been referred to as "overriding interests"—interests which are enforceable against the owner of the land, although their existence is not apparent on the title. This case is concerned only with the nature of the interest defined in cl. (*c*). The question is whether it relates only to the possessory title of the adjoining owner at the time of the first registration under the Act or whether it also includes a possessory title subsequently acquired. The Court of Appeal[1] has held that it includes a subsequently acquired possessory title, and in my respectful opinion this is where the error lies in the judgment under appeal.

The clause refers to a title by possession which the adjoining owner "has acquired" not "may" or "shall" acquire. It appears in Part III of the Act dealing with first registration. It is followed by s. 24, which enables the applicant for registration to get a certificate free from this and certain other overriding interests on following a certain procedure. The next three sections, 25, 26 and 27, deal with mortgages and encumbrances or leases existing at first registration, and the concluding section of Part III, s. 28—the one under consideration here—is prospective in operation and provides that a possessory title "shall not be acquired by any length of possession." The scheme of the Part seems to me to be complete and logical in its dealing with the possessory interests of adjoining owners. It protects those in existence at the time of the first registration and prohibits their subsequent acquisition. Consequently, the "overriding" interest to which a transfer is expressed to be subject by s. 41 of the Act, is the one mentioned in cl. (*c*) of s. 23(1), namely, the possessory title of an adjoining owner at the time of first registration and not one subsequently acquired.

I do not take *Farah v. Glen Lake Mining Co.*[2] to indicate any contrary interpretation of the Act. This case holds that an adverse claim to title founded upon rights alleged to have arisen before the land was registered was not included in the list of overriding interests in s. 23(1)

[1] [1957] O.W.N. 313, 8 D.L.R. (2d) 292.
[2] (1908), 17 O.L.R.1.

1958

GATZ v. KIZIW

Judson J.

because it was not within subs. 23(1)(*c*), not being an interest which an owner of adjoining land had "acquired to or in respect of the registered land by reason of possession or improvements." It was, in fact, a claim under an alleged prior patent. There is, further, nothing in the reasons to lead to the conclusion that an overriding interest could be a possessory interest acquired subsequent to registration.

The case of *Belize Estate and Produce Company v. Quilter*[1], cited by the Court of Appeal in support of its conclusion, cannot be applied to the interpretation of the Ontario Act because the Honduras Act there under consideration had no provision expressly exempting lands registered under the Act from the operation of the law of limitations. There was nothing in that Act corresponding to s. 28 of the Ontario Act. Before *The Limitations Act* could be held not to apply, it had to be found as a matter of plain implication that the Honduras Act excluded the operation of *The Limitations Act*. Such an exclusion by implication was impossible. But in the present case it is not a matter of implication. There is an express exclusion of the application of *The Limitations Act* by s. 28 of the Ontario Act.

It is significant as emphasizing the effect of s. 28 in the Ontario Act, that in Alberta, where there is no corresponding section, the acquisition of possessory interests after first registration has secured some degree of recognition. A possessory title may be acquired under the Alberta Act against the registered owner although it may be defeated after its acquisition by a registered transfer from the registered titleholder unless in the meantime the necessary steps for its protection prescribed by the Act are taken. The foundation for this law, which is to be found in *Harris v. Keith*[2] and *Boyczuk v. Perry*[3], is the *Belize* case. On the other hand, in Manitoba the *Belize* case was distinguished because the section corresponding to s. 28

[1] [1897] A.C. 367.
[2] (1911), 3 Alta. L.R. 222, 16 W.L.R. 433.
[3] [1948] 2 D.L.R. 406, 1 W.W.R. 495.

of the Ontario Act was held to exclude in express terms the operation of *The Limitations Act; Smith v. National Trust Co.*[1].

Therefore, my conclusion is that s. 23(1)(*c*) protects only possessory titles in existence at the date of first registration, that s. 28(1) expressly prevents their subsequent acquisition and that the principle of the *Belize* case has no application to the interpretation of the Ontario Act.

The respondent's alternative argument was that even if s. 28(1) of *The Land Titles Act* is effective to prevent the operation of s. 15 of *The Limitations Act* so that the title to the land in question remains in the appellant, s. 28(1) does not negative the terms of s. 4 of *The Limitations Act,* with the result that the appellant, although still remaining the owner of the land, cannot make an entry or bring an action to recover it. He urged that the position he seeks to assert involves no conflict with s. 28(1) because extinction of the appellant's right to make an entry or to bring an action of ejectment does not connote acquisition of title by the respondent. This argument really never gets under way. The contest here is between two adjoining owners. If one has extinguished the right of the other to oust him or to disturb his possession, his rights against the other are commonly and accurately described as a title by possession. The section prevents the acquisition of such rights.

I would allow the appeal and restore the judgment of the learned trial judge. The costs of this appeal will be in accordance with the order made on the application for leave to appeal. The appellant is entitled to her costs in the Court of Appeal and at the trial.

Appeal allowed.

Solicitors for the plaintiff, appellant: Carmichael, Bennett, Hamilton & Nixon, Sault Ste. Marie.

Solicitor for the defendant, respondent: I. A. Vannini, Sault Ste. Marie.

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[1] (1911), 20 Man. R. 522; affirmed 45 S.C.R. 618, 1 D.L.R. 698.

1958

*Oct. 24
Dec. 18

FRANK McRAE (*Plaintiff*) .....APPELLANT;

AND

FORD ELDRIDGE (*Defendant*) .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Trial—Jury—Juror indicating in open Court misapprehension of certain fact—Whether duty of trial judge to redirect jury—No substantial wrong or miscarriage of justice.

While crossing a street in the City of Toronto, the plaintiff, a pedestrain, came into contact with a car driven by the defendant and was injured. After the accident a dent was found in the right front fender of the defendant's car. The jury found the defendant 30 per cent. to blame.

After the charge to the jury by the trial judge, a juror stated in open Court and before the jury retired, that it seemed to him that one part of the testimony was that the "bump" was on the left-hand side of the car and another on the right-hand side. The trial judge answered that it was a matter for the jury and that they were the sole judges of the evidence. Before both the Court of Appeal and this Court the defendant urged that the trial judge should have redirected the jury. By a majority judgment, the Court of Appeal ordered a new trial. The plaintiff appealed to this Court.

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

No objection was taken before either the Court of Appeal or this Court to the adequacy or accuracy of the trial judge's charge. Both the evidence and the charge by the trial judge showed that the juror used the word "bump" to describe the point of impact between the plaintiff and the defendant's car and not to describe the dent in the fender. But even assuming that the juror meant to refer to the dent in the fender, no substantial wrong or miscarriage of justice occurred. The jury's answers contain intrinsic evidence that the supposed misapprehension did not affect the verdict. It seems to be beyond any serious question that the jury concluded that the point of impact between the defendant's car and the plaintiff was on the right-hand side of the defendant's car, and any misapprehension which may at one stage have existed in the mind of the one juror could not have affected the verdict.

APPEAL from a judgment of the Court of Appeal for Ontario[1], reversing a judgment of Danis J. and ordering a new trial. Appeal allowed.

R. E. Holland and *M. J. O'Donohue,* for the plaintiff, appellant.

H. H. Wengle, for the defendant, respondent.

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

[1] [1958] O.R. 128, 12 D.L.R. (2d) 352.

The judgment of the Court was delivered by

CARTWRIGHT J.:—This is an appeal from a judgment of the Court of Appeal for Ontario[1] setting aside the judgment of Danis J. upon the verdict of a jury, whereby the appellant had been awarded $5,082.82 damages, and directing a new trial.

The appellant, a pedestrian, was crossing from the north to the south side of Bloor Street East, a highway in the city of Toronto, at about 9.00 a.m. on June 20, 1956. At the point where he was crossing there was a "pedestrian crossing" indicated by two white lines painted on the pavement 14 feet and 6 inches apart. At this point the width of Bloor Street from curb to curb is 54 feet. Approximately in the centre of the street are street-car tracks for west-bound and east-bound traffic. The distance from the northerly curb of Bloor Street to the most northerly rail is 19 feet.

According to the evidence of the appellant, a line of automobiles was proceeding westerly at a distance of about $1\frac{1}{2}$ feet from the northerly curb when a west-bound automobile stopped at the east side of this pedestrian crossing and the persons in it motioned to him to proceed across. He says that he had walked to the centre of the road and stopped as a street-car proceeding easterly on the southerly track was approaching, that he stepped back "a pace or so" so as not to interfere with this east-bound street-car and that the next thing he remembers was after the accident when he was lying on the pavement.

The respondent's evidence was that he was driving his motor-car westerly with his wheels straddling the most northerly rail, that there was a solid line of west-bound motor vehicles between his car and the north curb of Bloor Street, that these vehicles were stationary, that he was going at about 20 miles per hour, that he did not see the lines indicating a pedestrian crossing and was unaware that such lines existed, although he had driven over this same piece of highway almost daily for some months, that he felt a thud which was caused by his car striking the appellant or, as he suggested, by the appellant walking into the side of his car, that he did not see the appellant before he

[1] [1958] O.R. 128, 12 D.L.R. (2d) 352.

1958

McRAE v. ELDRIDGE

Cartwright J.

heard the thud and that after the accident there was a dent in the right front fender of his car which, he suggested, indicated the point of impact.

The theory of the defence was that the appellant had walked out between two stopped vehicles into, or into the path of, the respondent's vehicle in such a manner that the latter had no chance to avoid the accident. The theories of the plaintiff were (i) that he had reached the centre of the road and stopped there so that the defendant had ample time to see him or, alternatively, (ii) that even if he was struck by the right side of the defendant's vehicle the latter had time to see him and was negligent in failing to do so.

No objection was taken before the Court of Appeal or before this Court to the adequacy or accuracy of the charge of the learned trial judge in the course of which he said:

> After the accident he (the defendant) said he found a dent on the right front fender near the top of the fender three feet back of the headlight.

At the conclusion of the charge the transcript reads as follows:

> A Juror: My lord, it seems to me that one part of the testimony was that the bump was on the left hand side of the car and another on the right hand.
>
> His Lordship: Well, that is a matter for you. You are the sole judges of the evidence. That is a matter for you to make your finding. You can decide what you like. I can't influence you. You are the sole judges of the facts.

The jury then retired.

After the jury had retired, counsel for the respondent made an objection to the charge, with which we are not now concerned as the learned trial judge re-charged the jury in regard to it, and the transcript continues:

> This question that one of the jurymen asked as to the evidence, I think possibly it should have been explained to them, because I do not recall—I may be quite wrong about this—but I do not recall any evidence of a bump on the left side of the defendant's vehicle. Evidently there must have been some misunderstanding.
>
> HIS LORDSHIP: There could have been a bump on the left side and Mr. McRae could have been shot up in the air.
>
> MR. WENGLE: There could have been a bump anywhere on that car.
>
> HIS LORDSHIP: The dent was found on the right side of the car. The defendant said—
>
> MR. WENGLE: There was no evidence of a dent on the left.

HIS LORDSHIP: I did not say there was any evidence.

MR. WENGLE: I am afraid the juror misunderstood that, and I think possibly that part of the evidence should have been clarified for the juryman. That is all I have to say.

The jury answered the questions put to them as follows:

Question 1: Has the defendant Ford Eldridge satisfied you that the accident was not caused by any negligence or improper conduct on his part:

Answer: No.

Question 2: Was there any negligence on the part of the plaintiff Frank McRae which caused or contributed to the accident?

Answer: Yes.

Question 3: If your answer to question number 2 is "Yes" then state fully of what the negligence of the plaintiff Frank McRae consisted. Answer fully.

Answer: Frank McRae did not exercise proper caution when attempting to cross the street.

Question 4: If your answer to question number 1 is "No" and your answer to question number 2 is "Yes", state in percentages the degree of fault or negligence attributable to each:

Defendant Ford Eldridge 30%

Plaintiff Frank McRae 70%

Question 5: Irrespective of how you answer the other questions, at what amount do you assess the total damages sustained by the plaintiff, Frank McRae?

Special Damages .....$ 2,442.75

General Damages $14,500.00

Total Damages $16,942.75

On these answers judgment was entered for 30 per cent. of the damages assessed.

The defendant appealed to the Court of Appeal. The only ground of appeal which was dealt with in the reasons of the Court of Appeal and which was urged before us was stated as follows in the notice of appeal:

The learned trial Judge erred in failing and refusing to direct the Jury on the question of the location of the dent on the fender of the Defendant's automobile when it was apparent to the learned trial Judge from a question asked by a member of the Jury that the said Juryman misheard or misunderstood the evidence, and the learned trial Judge erred in not requiring that part of the evidence which dealt with the said dent to be read back to the Jury.

The majority of the Court of Appeal were of opinion that the remark of the juryman, quoted above, disclosed an error in his mind which it became the duty of the learned trial judge to correct and were not satisfied that his failure to do so had not occasioned some substantial wrong or miscarriage.

1958

McRAE v. ELDRIDGE

Cartwright J.

Schroeder J. A., dissenting, was of opinion that there was no error on the part of the trial judge and alternatively that, if there were, no substantial wrong or miscarriage had been occasioned by the omission complained of and would have dismissed the appeal.

After reading the evidence and the charge of the learned trial judge, it is my opinion that in the remark quoted, the juryman used the word "bump" to describe the point of impact between the appellant and the respondent's vehicle and not the dent in the fender; and that the learned trial judge so understood him appears to me to follow from his statement to Mr. Wengle:

> There could have been a bump on the left side and Mr. McRae could have been shot up in the air.

The words "bump" and "dent" are not synonymous. One of the usual meanings of the former is "collision" and it appears to me that it was in that sense that it was used by both the juryman and the learned trial judge. However, as all the learned Justices of Appeal proceeded on the view that the juryman in using the word "bump" meant to refer to the dent on the fender of the respondent's car, I will deal with the appeal on that assumption.

Proceeding on this assumption, I am in substantial agreement with the reasons of Schroeder J. A. but I wish to rest my judgment on the second ground on which his decision was based, that is that it can safely be affirmed that there was no substantial wrong or miscarriage.

I think it altogether probable that the suggested misapprehension on the part of the one juryman, if it existed, was cleared up by other members of the jury, in the course of their deliberations, but, be that as it may, it appears to me that the jury's answers contain intrinsic evidence that the supposed misapprehension did not affect the verdict. If a juryman mistakenly believed that there was a dent on the left-hand front fender of the defendant's car the tendency of that mistake would be to bring him to accept the first of the theories of the plaintiff as to how the accident had happened to which I have referred above; and, had the jury found that the plaintiff had reached the centre of the road before being struck it seems to me that their answer to question no. 2 would have been differently worded

and that it is extremely unlikely that they would have placed only 30 per cent. of the blame upon the defendant who, on that view, would have been without any excuse or explanation for failing to see the plaintiff before the impact. Counsel for the defendant submits that the jury might have found the plaintiff 70 per cent. to blame even if they accepted the first of his theories because they might have thought that his stepping back "a pace or so" was the chief cause of the accident; but it seems to me that if this had been their view the jury would have said that the plaintiff's negligence consisted in stepping back into, or into the path of, the defendant's car.

When the answers of the jury are considered in the light of the whole evidence and of the charge of the learned trial judge it seems to me to be beyond any serious question that they concluded that the point of impact between the defendant's car and the plaintiff was on the right-hand side of the defendant's car, and, consequently, any misapprehension which may at one stage have existed in the mind of the one juryman cannot have affected the verdict.

I would allow the appeal and restore the judgment of the learned trial judge with costs throughout.

Appeal allowed with costs.

Solicitors for the plaintiff, appellant: O'Donohue & Hague, Toronto.

Solicitors for the defendant, respondent: Tureck & Wengle, Toronto.

CLAUDE ST-PIERRE (*Plaintiff*) .....APPELLANT;

AND

ARMAND TANGUAY (*Defendant*) .....RESPONDENT.

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

Automobiles—Collision—Credibility of witnesses—Inferences from physical facts—Judgment of trial judge reversed on appeal—Art. 1053 of the Civil Code.

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

1958

ST-PIERRE
v.
TANGUAY

An automobile owned and driven by the plaintiff collided with a truck owned by the defendant and driven by his employe, on a straight road. Both drivers, who were the only witnesses, asserted that each was on his own side of the white centre line of the road. The trial judge maintained the plaintiff's action, as he came to the conclusion that the defendant's truck had been on the wrong side of the road. This judgment was reversed by the Court of Appeal.

Held: The plaintiff's action should be dismissed. The judgment of the trial judge was based not on the credibility of the witnesses but on inferences drawn from the physical facts which were ascertained after the collision. The Court of Appeal was in as good a position to appreciate these facts as was the trial judge, and its judgment that the plaintiff was the one driving on the wrong side of the road was warranted by the evidence. In any event, the plaintiff, on whom the burden of proof rested, has failed to establish, by a preponderance of evidence, that the defendant's truck was on the wrong side of the road.

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

A. Laplante, Q.C., for the plaintiff, appellant.

J. DeBilly, Q.C., for the defendant, respondent.

The judgment of the Court was delivered by

FAUTEUX J.:—L'appelant se pourvoit à l'encontre d'une décision unanime de la Cour d'Appel de la province de Québec[1], cassant le jugement de première instance maintenant son action en dommages contre l'intimé.

Le fait donnant lieu à ce litige est une collision intervenue, vers les quatre heures de l'avant-midi, le 13 septembre 1954, sur la route Lévis-Rivière-du-Loup, entre l'automobile de l'appelant conduit par lui dans une direction ouest, et le camion de l'intimé conduit par Labbé, son employé, dans une direction est. A l'endroit de la collision, la route est de niveau, en droite ligne, large de 22 pieds et une ligne blanche en marque le centre. En l'occasion, il n'est d'autres véhicules à cet endroit de la route que ceux des parties.

Tel qu'engagé par les plaidoiries et la conduite subséquente de la cause, le débat ne porte que sur une question de faits, soit celle de savoir lequel, de St-Pierre ou de Labbé, conduisait à gauche du centre de la route.

[1] [1957] Que. Q.B. 844.

Les conducteurs de ces véhicules sont les seuls témoins oculaires de la collision. Leurs versions sont contradictoires et pour les départager, le tribunal de première instance, comme celui de la Cour d'Appel, a été dans la nécessité d'avoir recours à divers faits, constatés après l'accident, dont particulièrement les traces de freinage ou de dérapage apparaissant sur la route, la course poursuivie par chacun des véhicules du point de la collision à celui de l'arrêt, et les dommages constatés sur ces véhicules. Dans le résultat, la Cour supérieure en est venue à la conclusion que c'est Labbé qui conduisait à sa gauche, alors que la Cour d'Appel a jugé que c'est St-Pierre qui avait commis cette illégalité.

Le savant procureur de l'appelant a référé au passage suivant des notes du juge au procès:

> Je crois que dans le présent procès, nous avons de ces faits parlants qui corroborent la version du demandeur et nous justifient d'accorder plus de foi à cette version qu'à celle de Labbé.

Ce commentaire, dit-il, porte sur la crédibilité et invitait conséquemment la Cour d'Appel à adopter l'appréciation de la preuve faite par le juge de première instance. Il convient de noter, cependant, qu'immédiatement après avoir indiqué les faits sur lesquels il s'appuie, le juge de la Cour supérieure ajoute ce qui suit:

> Les indices ci-dessus sont suffisants, dans mon opinion, pour me faire accepter la version du demandeur, ce qui ne veut pas dire que c'est une décision facile à faire, . . .

A mon avis, la prémisse de cette prétention de l'appelant n'est pas fondée; car il apparaît clairement de ces commentaires que, pour se justifier d'accorder plus de foi à la version de l'appelant qu'à celle de Labbé, le juge au procès s'est appuyé sur les déductions qu'il a tirées des faits constatés après l'accident, faits que les juges de la Cour d'Appel ont autrement interprétés. En somme, la décision du juge de première instance ne se fonde pas sur la crédibilité, mais sur une interprétation de faits que les juges de la Cour d'Appel étaient libres et en aussi bonne position d'apprécier.

Faisant ses propres déductions, la Cour d'Appel a jugé unanimement que c'est bien l'appelant qui conduisait à sa gauche. Et c'est là une conclusion que permet la preuve au dossier. De toutes façons, l'appelant, qui avait comme demandeur le fardeau de la preuve, n'a pas établi, comme il

1958

ST-PIERRE v. TANGUAY

Fauteux J.

le devait pour réussir sur son action aussi bien que sur l'appel devant cette Cour, que suivant la prépondérance de la preuve, c'est Labbé, le conducteur du camion, qui conduisait à sa gauche au temps où se produisit la collision.

Je renverrais l'appel avec dépens.

Appeal dismissed with costs.

Attorneys for the plaintiff, appellant: Laplante, Gagné & Trotier, Quebec.

Attorneys for the defendant, respondent: Gagnon & DeBilly, Quebec.

1958

*Nov. 11, 12
Dec. 18

CALGARY POWER LTD. AND L. C. HALMRAST (*Defendants*) ..... APPELLANTS;

AND

CLARENCE COPITHORNE (*Plaintiff*) ...RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Expropriation—Minister of the Crown—Minister empowered by statute to grant power of expropriation to public utility—Whether administrative or judicial decision—Whether obliged to grant hearing and act judicially—Whether right-of-way for power lines interest in land—The Water Resources Act, R.S.A. 1942, c. 65.

The defendant company, a licensee under *The Water Resources Act,* obtained the authorization of the Minister for the expropriation of a right-of-way on the plaintiff's property. The Minister's order was duly filed in the land titles office. The plaintiff received no notice of any of these proceedings, nor was he given any opportunity to be heard by the Minister. The plaintiff's action for a permanent injunction and for damages was dismissed by the trial judge. This judgment was reversed by the Court of Appeal on the ground that the Minister had failed to act judicially.

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

In determining whether or not a body or an individual is exercising judicial or quasi-judicial duties, it is necessary to examine the defined scope of its functions and then to determine whether or not it imposes a duty to act judicially. Under the statute, there is no requirement to give notice or to hold an inquiry in relation to the expropriation itself, although there are specific provisions in relation to the com-

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

pensation procedure. The Minister is given sole authority to decide whether or not lands or any interest therein are necessary for an authorized undertaking. There is no provision for an appeal from his decision. His decision is a policy decision as a Minister of the Crown. It is strictly an administrative act.

The Minister exercised his powers in accordance with the requirements of the statute.

The interest which the defendant company was authorized to expropriate by the ministerial order was an interest in land as defined for the purposes of *The Water Resources Act.*

APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division[1], reversing a judgment of McBride J. Appeal allowed.

J. V. H. Milvain, Q.C., for the defendant Calgary Power Ltd., appellant.

H. J. Wilson, Q.C., for the defendant L. C. Halmrast, appellant.

D. C. Prowse, for the plaintiff, respondent.

The judgment of the Court was delivered by

MARTLAND J.:—This is an appeal from a judgment of the Appellate Division of the Supreme Court of Alberta[1], dated July 18, 1957, which reversed the decision of the trial judge, dated June 12, 1956, in favour of the appellants.

The appellant company is a public utility engaged, in the Province of Alberta, in the generation and transmission of electrical energy. The respondent is a rancher and is the owner of six quarter sections of land west of the city of Calgary, hereinafter referred to as "the lands". In connection with its operations, the appellant company proposed to construct a transmission line from Ghost Park, west of Calgary, to the city of Calgary, following a route which traversed the lands. Negotiations for the acquisition of right-of-way over the lands for this transmission line were conducted between the appellant company and the respondent for some months commencing in February 1955. They failed because the appellant company and respondent were unable to reach agreement as to the consideration to be paid for such right-of-way.

[1] (1957), 22 W.W.R. 406.

1958

CALGARY POWER LTD. *et al.* v. COPITHORNE

Martland J.

On June 14, 1955, the appellant company, without notice to the respondent, applied to the Minister of Agriculture of the Province of Alberta, Mr. L. C. Halmrast, who is an appellant in this appeal, pursuant to subs. (2) of s. 72 of *The Water Resources Act,* R.S.A. 1942, c. 65, for permission to expropriate "the right, license, liberty, privilege and easement for itself and its successors in ownership, to use" a portion of the lands, being a right-of-way fifty feet in width as shown upon a plan which accompanied the application.

On June 22, 1955, the Minister of Agriculture issued an order authorizing the appellant company to effect such expropriation. This order recited that "the Minister has deemed the said right, license, liberty, privilege and easement of the said right-of-way across such lands necessary for the authorized undertaking of the Company".

Conditions were attached to the order providing that the right-of-way should not be fenced, providing for right of access to and the use of the right-of-way by the respondent, except in so far as necessary for the purposes of the appellant company, providing for compensation to the respondent for damage to any building, crops, fences, timber and livestock on the right-of-way by reason of the appellant company's exercise of its rights, and for the restoration of the right-of-way and the removal of its works therefrom by the appellant company upon discontinuing its use of the right-of-way.

No hearing was held prior to the granting of this order and no opportunity was furnished to the respondent to object to its issuance.

The order was filed at the land titles office for the South Alberta Land Registration District by the appellant company on June 28, 1955, pursuant to the provisions of s. 27 of *The Water, Gas, Electric and Telephone Companies Act,* R.S.A. 1942, c. 260.

On or about July 21, 1955, employees of McGregor Construction Company, which was acting on instructions from the appellant company, entered on the lands. The foreman then handed to the respondent a letter from the appellant company, a copy of the ministerial order and a notice of compensation pursuant to s. 28 of *The Water, Gas, Electric*

and Telephone Companies Act, offering compensation for the right-of-way in the amount of $874.40. The area comprised in the right-of-way totalled 14.04 acres.

The respondent subsequently telephoned to the Honourable Mr. Taylor regarding the expropriation order. The matter was then referred to Mr. Halmrast, who, on August 5, 1955, wrote a leter to the respondent, which is as follows:

Dear Mr. Copithorne:

While I was away in the South attending meetings you 'phoned to the Honourable Mr. Taylor expressing to him your concern in that an Expropriation Order has been signed permitting Calgary Power to install their line across your property. As this did not come under Mr. Taylor's jurisdiction, he advised you that I would be back in the City soon and that I would look into this matter upon my return.

I wish to advise that I signed the Expropriation Order on advice given that no suitable settlement could be arranged and that an Arbitration Board would then decide what compensation should be paid to you and other property owners by Calgary Power.

Following my return to the office I dispatched one of my hydraulic engineers to your district to make a personal inspection of the route and to advise me whether or not some alternate route could be selected that would be more suitable for all concerned. The report I have received indicates that the route through your property is the most suitable in that area and, therefore, no change is contemplated there. Further on it may be possible to make one or two diversions that would appear to be satisfactory to both Calgary Power and some of the residents.

Yours very truly,
"L. C. Halmrast"
MINISTER OF AGRICULTURE

On August 17, 1955, the respondent issued a statement of claim against the appellant company and Mr. L. C. Halmrast, asking for an injunction to restrain the appellant company from entering upon the lands, for a declaration that the ministerial order was a nullity and claiming damages. The appellant Mr. Halmrast was made a party so as to be bound by any declaration made by the Court. Statements of defence were filed by both the appellants and the action proceeded to trial.

The learned trial judge decided that the order was properly granted and dismissed the action. On appeal, the Appellate Division of the Supreme Court of Alberta[1], by a majority of two to one, reversed this judgment, declared that the ministerial order was a nullity, granted an injunction restraining the appellant company, its servants, agents,

[1] (1957), 22 W.W.R. 406.

1958

CALGARY POWER LTD. *et al.* *v.* COPITHORNE

Martland J.

employees and contractors from entering upon the lands, and gave judgment for damages to be assessed by a judge of the Trial Division.

It is from this judgment that the present appeal is brought.

The appellants contend that the order in question was properly made in accordance with the relevant provisions of *The Water Resources Act*. These provisions are subs. (1) of s. 63 and subs. (2) of s. 72 and read as follows:

> 63. (1) Any licensee for the purpose of the authorized undertaking may with the consent in writing of the Minister take and acquire by expropriation any lands other than Provincial lands or any interest therein which the Minister may deem necessary for the authorized undertaking.
>
> * * *
>
> 72. (2) In any case in which a licensee desires or proposes to expropriate any land or any interest therein for the purpose of his undertaking, he shall first make application to the Minister for his permission or consent to expropriate the lands or interest therein specified in the application and the Minister may issue an order authorizing the licensee to expropriate such land or interest in land as the Minister by order may designate and may prescribe the terms and conditions of or to be applicable to any such interest in land.

It was admited that the appellant company is a licensee within the meaning of these subsections and was entitled to apply for the right to expropriate.

Reference should also be made to subss. (2a) and (2b) of s. 72 of *The Water Resources Act* and to ss. 27 to 29 of *The Water, Gas, Electric and Telephone Companies Act*, which, by virtue of subs. (2a) of s. 72 of *The Water Resources Act*, are made applicable to the appellant company. These provisions are as follows:

THE WATER RESOURCES ACT

> 72. (2*a*) Sections 4*a*, 10*a* and sections 27 to 30 of The Water, Gas, Electric and Telephone Companies Act, in so far as they are reasonably applicable and not inconsistent with this Act, apply mutatis mutandis to licensees and their works and undertaking.
>
> (2*b*) The order of the Minister may prescribe the terms and conditions of, or to pertain to, any interest in land to be so expropriated and the order shall be filed in the proper Land Titles Office along with the description or plan referred to in section 27 of The Water, Gas, Electric and Telephone Companies Act and shall be deemed to be and constitute a part of the said description or plan, as the case may be, for all the purposes of the said Act and of this Act.

THE WATER, GAS, ELECTRIC AND TELEPHONE COMPANIES ACT

27. If after receiving authorization to expropriate, the company files in the Land Titles Office for the Land Registration District within which the land is situate,—

(*a*) a description of the land by metes and bounds or by reference to existing registered plans or both; or

(*b*) a new plan of survey of the land prepared by a land surveyor, duly licensed for the Province of Alberta;

which description or plan is signed by the president or general manager of the company and countersigned by the Minister of Highways, the land or interest therein shall vest in the company.

28. (1) Upon the filing in the Land Titles Office of the description or plan of land taken pursuant to section 27, the company shall serve or cause to be served by registered mail upon,—

(*a*) the owner of the land or the interest in land taken;

(*b*) all persons shown by the records of the Land Titles Office to be interested in the land taken;

a notice setting forth the compensation which the company is prepared to pay for the lands, or the interest therein, so taken.

(2) If a person entitled to compensation for land or the interest taken is dissatisfied with the amount of compensation offered, he shall notify the company in writing of his dissatisfaction within thirty days from the date of the mailing of the notice by the company and shall set out,—

(*a*) the amount that he claims as compensation for the land or the interest taken;

(*b*) a full statement of the facts in support of his claim.

(3) In the event of no claim for increased compensation being received by the company within the thirty days, the person entitled to compensation shall be deemed to be satisfied with and shall be bound to accept the amount of compensation offered by the company.

29. (1) When the company and the claimant for increased compensation are unable to agree on the compensation to be paid, the company shall proceed to arbitration under the provisions of The Arbitration Act.

(2) The arbitration shall be by two arbitrators one to be appointed by the company and one by the claimant for increased compensation.

(3) The arbitrators shall consider each case where the amount of compensation is disputed and shall fix the amount of compensation which in their opinion is fair and reasonable.

(4) The company shall pay forthwith to the claimant the compensation fixed by the arbitrators.

There are three issues which arise in these proceedings:

1. The respondent contends that the powers granted to the Minister of Agriculture, under the relevant sections of *The Water Resources Act*, are quasi-judicial in character, that consequently the Minister was bound to give notice to the respondent before exercising them and that the respondent was entitled to an opportunity to be heard before an order was made. The appellants argue that the

1958

CALGARY POWER LTD. *et al.* v. COPITHORNE

Martland J.

powers of the Minister are administrative in character and that no provision is made in the Act for any such notice or hearing.

2. The respondent submits that, even if the Minister's powers are administrative, he failed to exercise them in accordance with the requirements of the statute. In this connection he relies upon the contents of Mr. Halmrast's letter to him quoted above. The appellants contend that the powers were properly exercised.

3. The respondent argues that, under subs. (1) of s. 63 of *The Water Resources Act*, the Minister can only give his consent to the expropriation of lands or any interest therein and that the order did not relate to lands or to any interest therein. The appellants submit that the expropriation for which the Minister gave his consent did relate to an interest in land.

With respect to the first point, the respondent submitted that a function is of a judicial or quasi-judicial character when the exercise of it effects the extinguishment or modification of private rights or interests in favour of another person, unless a contrary intent clearly appears from the statute. This proposition, it appears to me, goes too far in seeking to define functions of a judicial or quasi-judicial character. In determining whether or not a body or an individual is exercising judicial or quasi-judicial duties, it is necessary to examine the defined scope of its functions and then to determine whether or not there is imposed a duty to act judicially. As was said by Hewart L.C.J., in *Rex v. Legislative Committee of the Church Assembly*[1]:

> In order that a body may satisfy the required test it is not enough that it should have legal authority to determine questions affecting the rights of subjects; there must be super-added to that characteristic the further characteristic that the body has the duty to act judicially.

This passage was cited with approval by the Judicial Committee of the Privy Council in *Nakkuda Ali v. M. F. DeS. Jayaratne*[2]. In that case the question was whether a writ of *certiorari* should issue to the Controller of Textiles in Ceylon. The appellant had held a textile licence authorizing him to deal in textiles, which licence

[1] [1928] 1 K.B. 411 at 415.

[2] [1951] A.C. 66, [1950] 2 W.W.R. 927.

the Controller had revoked. The Controller, under reg. 62 of the Defence (Control of Textiles) Regulations, 1945, was empowered to revoke a textile licence "where the Controller has reasonable grounds to believe that any dealer is unfit to be allowed to continue as a dealer".

Lord Radcliffe, who delivered the judgment, after referring to the requirement in reg. 62 as to reasonable grounds of belief, says at p. 77:

> But it does not seem to follow necessarily from this that the Controller must be acting judicially in exercising the power. Can one not act reasonably without acting judicially? It is not difficult to think of circumstances in which the Controller might, in any ordinary sense of the words, have reasonable grounds of belief without having ever confronted the licence holder with the information which is the source of his belief. It is a long step in the argument to say that because a man is enjoined that he must not take action unless he has reasonable ground for believing something he can only arrive at that belief by a course of conduct analogous to the judicial process. And yet, unless that proposition is valid, there is really no ground for holding that the Controller is acting judicially or quasi-judicially when he acts under this regulation. If he is not under a duty so to act then it would not be according to law that his decision should be amenable to review and, if necessary, to avoidance by the procedure of certiorari.
>
> Their Lordships have come to the conclusion that certiorari does not lie in this case. It would not be helpful to reconsider the immense range of reported cases in which certiorari has been granted by the English courts: or the reported cases, themselves numerous, in which it has been held to be unavailable as a remedy. It is, of course, a commonplace that its subjects are not confined to established courts of justice, and instances may be found of the quashing of orders or decisions in which the occasion of their making seems only distantly related to a judicial act. It is probably true to say that the courts have been readier to issue the writ of certiorari to established bodies whose function is primarily judicial, even in respect of acts that approximate to what is purely administrative, than to ministers or officials whose function is primarily administrative even in respect of acts that have some analogy to the judicial. But the basis of the jurisdiction of the courts by way of certiorari has been so exhaustively analysed in recent years that individual instances are now only of importance as illustrating a general principle that is beyond dispute. That principle is most precisely stated in the words of Atkin L J. (as he then was) in *Rex v. Electricity Commissioners,* 1924—1 K.B. 171, 205: ". . . the operation of the writs has extended to control the proceedings of bodies who do not claim to be, and would not be recognised as, courts of justice. Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs." As was said by Lord Hewart C.J., in *Rex v. Legislative Committee of the Church Assembly,* 1928—1 K.B. 411, 415, when quoting this passage, "In order that a body may satisfy the required test it is not enough that is should have legal authority to determine questions affecting the rights of subjects; there must be super-added to

1958

CALGARY POWER LTD. *et al.* *v.* COPITHORNE

Martland J.

that characteristic the further characteristic that the body has the duty to act judicially." It is that characteristic that the Controller lacks in acting under reg. 62. In truth, when he cancels a licence he is not determining a question: he is taking executive action to withdraw a privilege because he believes, and has reasonable grounds to believe, that the holder is unfit to retain it. But, that apart, no procedure is laid down by the regulation for securing that the licence holder is to have notice of the Controller's intention to revoke the licence, or that there must be any inquiry, public or private, before the Controller acts. The licence holder has no right to appeal to the Controller or from the Controller. In brief, the power conferred on the Controller by reg. 62 stands by itself on the bare words of the regulation and, if the mere requirement that the Controller must have reasonable grounds of belief is insufficient to oblige him to act judicially, there is nothing else in the context or conditions of his jurisdiction that suggests that he must regulate his action by analogy to judicial rules.

There have been several cases in England relating to the scope of powers conferred on a minister of the Crown affecting property rights under statutes relating to housing and planning. In *Robinson v. Minister of Town and Country Planning*[1], the Court had to consider the extent of such powers in the Minister of Town and Country Planning under the *Town and Country Planning Act,* 1944, regarding the compulsory purchase of land. In the statute in question in that case, unlike the relevant statute in the present case, provision was specifically made for notice by newspaper advertising and for a public inquiry under certain conditions. One of the questions in issue in that case was as to whether the Minister had to act only on the basis of the evidence obtained at such an inquiry. The Court ruled that he was free to have regard to his own views as to general policy and to consider material acquired in his executive capacity. Lord Greene M.R. has this to say at p. 716:

A number of authorities were referred to in which the powers and duties of ministers under statutes dealing in different language with different classes of subject-matter were discussed and observations were made as to their powers and duties when acting in a quasi-judicial capacity. I am basing this judgment on the particular provisions of this statute in their application to this particular subject-matter; and I do not find anything in the decisions cited which either assists or impedes me to such an extent as to make it necessary for me to examine them. As an example of the difference to be found in the subject-matter dealt with in different statutes, I may point out that this case is different from a case where a minister is given the duty of hearing an appeal from an order such as a closing order made by a local authority. This is not the case of an appeal. It is the case of an original order to be made by the

[1] [1947] 1 K.B. 702.

Minister as an executive authority who is at liberty to base his opinion on whatever material he thinks fit, whether obtained in the ordinary course of his executive functions or derived from what is brought out at a public inquiry if there is one. To say that in coming to his decision he is in any sense acting in a quasi-judicial capacity is to misunderstand the nature of the process altogether. I am not concerned to dispute that the inquiry itself must be conducted on what may be described as quasi-judicial principles. But this is quite a different thing from saying that any such principles are applicable to the doing of the executive act itself, that is, the making of the order. The inquiry is only a step in the process which leads to that result and there is, in my opinion, no justification for saying that the executive decision to make the order can be controlled by the courts by reference to the evidence or lack of evidence at the inquiry which is here relied on. Such a theory treats the executive act as though it were a judicial decision (or if the phrase is preferred, a quasi-judicial decision) which it most emphatically is not. . . .

Similar views were expressed by Lord Greene in *B. Johnson & Co. (Builders), Ltd. v. Minister of Health*[1].

Turning to the statutes in question here, it is significant that there is no requirement as to the giving of notice or the holding of any inquiry in relation to the expropriation itself, although there are specific provisions as to notice and as to arbitration proceedings in relation to the determination of the compensation to be paid in respect of the lands or interest in land expropriated. The Minister is given sole authority to decide whether or not lands or any interest therein are necessary for an authorized undertaking. There is no provision for an appeal from his decision. His decision is as a Minister of the Crown and, therefore, a policy decision, taking into account the public interest, and for which he would be answerable only to the Legislature. As the learned trial judge has said, in dealing with this point:

In the case at bar, as I have already pointed out, it was not incumbent on the Minister to hold a formal or informal hearing, or to furnish an opportunity to be heard either to the applicant or to the owner. Nor do we have here a delegation of authority by the Legislature to the Minister requiring by statute any public inquiry or hearing, or the exercise on his part of any other functions which might indicate judicial or quasi-judicial proceedings. Furthermore, there is here no true contest between Calgary Power and plaintiff to be decided by the Minister. Nor has the Legislature required the Minister after consideration to make any decision between them. Nor does the application raise any specific issue as between them which the Minister is required to settle. In brief, none of the hallmarks of judicial or quasi-judicial proceedings are present, and in addition, there is no *lis inter partes*. There is a vast

[1] [1947] 2 All E.R. 395.

1958

CALGARY POWER LTD. *et al.* *v.* COPITHORNE

Martland J.

difference between the position of a Minister of the Crown exercising an authority vested in him by a Legislature to which he is answerable, and the position of some administrative Board (with which so many of the cases cited to me deal) called upon to decide a dispute between parties in particular circumstances, as a result of which the Board concerned is for the time being fulfilling a judicial or quasi-judicial function.

In my view the powers of the Minister, under the statute in question here, were to make an executive order. His functions were not judicial or quasi-judicial. His decision was an administrative decision to be made in accordance with the statutory requirements and to be guided by his own views as to the policy which, in the circumstances, he ought to pursue.

I turn now to the second point, as to whether the Minister failed to exercise his powers in accordance with the requirements of the statute.

On this matter the respondent's position, briefly, is that, whereas the provisions of subs. (1) of s. 63 of *The Water Resources Act* use the words "which the Minister may deem necessary", there was no evidence of any material before the Minister on which he could decide that the land in question here was necessary for the appellant company's undertaking. The respondent contends that the letter written by the Minister to him establishes that the question of necessity was not considered by the Minister.

The question as to whether or not the respondent's lands were "necessary" is not one to be determined by the Courts in this case. The question is whether the Minister "deemed" them to be necessary. In the order which he made he specifically states that he did deem them necessary for the authorized undertaking of the appellant company. There is here no suggestion of bad faith on his part. As Lord Greene M.R. said, immediately following the passage in his judgment already quoted:

> How can this Minister, who is entrusted by Parliament with the power to make or not to make an executive order according to his judgment and acts *bona fide* (as he must be assumed to do in the absence of evidence to the contrary), be called upon to justify his decision by proving that he had before him materials sufficient to support it? Such justification, if it is to be called for, must be called for by Parliament and not by the courts and I can see no ground in the language of the Act, in principle, or in authority for thinking otherwise.

I do not construe the letter of August 5, 1955, from the Minister to the respondent as stating the only grounds on which the Minister's decision was reached, or as demonstrating that he had not, prior to the inspection referred to in the last paragraph of it, deemed the lands necessary for the appellant company's undertaking. Rather it indicates that, out of courtesy to the respondent's objections, the Minister had taken additional steps which confirmed his prior decision.

I, therefore, conclude that the Minister's powers were exercised in accordance with the statutory requirements.

Finally there is the question as to whether that which was authorized to be expropriated constituted an interest in land.

By an amendment to the definition section of *The Water Resources Act* enacted in 1956 (S.A. 1956, c. 61), "lands" means lands within the meaning of *The Land Titles Act.* This provision, although enacted in 1956, is deemed to have been in force at all times on and after April 1, 1931.

The Land Titles Act, R.S.A. 1942, c. 205, defined "lands" as follows:

> "Land" or "Lands" means lands, messuages, tenements and hereditaments, corporeal and incorporeal, of every nature and description, and every estate or interest therein, whether such estate or interest is legal or equitable, together with paths, passages, ways, watercourses, liberties, privileges and easements appertaining thereto and trees and timber thereon, and mines, minerals and quarries thereon or thereunder lying or being, unless any such are specially excepted.

The interest which the appellant company was permitted to expropriate was the right, license, liberty, privilege and easement to use those portions of the defined areas of the respondent's land being a right-of-way fifty feet in width shown upon the plan. This interest was in favour of the appellant company and its successors in ownership of the undertaking for so long as the company and its successors desired to exercise the same. The interest included the right to construct, operate, maintain, inspect, alter, remove, replace, reconstruct and repair an electrical pole transmission line. There was reserved to the respondent a conditional right of access to and use of the defined right-of-way.

1958

CALGARY POWER LTD. *et al.* v. COPITHORNE

Martland J.

The respondent contends that the rights which the appellant company was authorized by the ministerial order to expropriate did not constitute an interest in land. Both the learned trial judge and O'Connor C.J.A., who dissented in the Appellate Division, have held that these rights fell within the definition of land contained in *The Land Titles Act*. No opinion was expressed on this point in the majority decision of the Appellate Division.

The respondent argues that the use of the word "easements" in *The Land Titles Act* definition does not assist the appellant's cause. He says that under that definition easements only assume the character of land if they are held together with land as defined in the earlier portion of the relevant section.

It is, however, to be noted that s. 68(1) of *The Land Titles Act* permitted the registration of a grant to a public utility of a right to carry pipes, wires, conductors or transmission lines upon, over or under a parcel of land and that such a right could, by virtue of subs. (2*a*) of that section, be subjected to a registrable mortgage under *The Land Titles Act*.

It should also be noted, as was pointed out by the learned trial judge, that s. 61 of *The Land Titles Act*, in listing those rights to which land in a certificate of title is, by implication, subject, refers, in subs. (g), to "any right-of-way or other easement granted or acquired under any Act or law in force in the Province".

The Saskatchewan Court of Appeal, in *In re Interprovincial Pipe Line Company*[1], in relation to *The Land Titles Act* of Saskatchewan, which contains the same definition of "land" as that found in the Alberta Act, has held that a grant of rights for the construction of a pipe line, in wording very similar to that used in the ministerial order here, entitled the grantee to obtain a certificate of title in accordance with the estate transferred to the grantee.

Gas pipes and electrical poles, wires and transformers were held by this Court to constitute real property in the case of *Montreal Light, Heat & Power Consolidated v. The City of Westmount*[2], where the question in issue was as

[1] [1951] 1 W.W.R. (N.S.) 479, 2 D.L.R. 187, 67 C.R.T.C. 128.
[2] [1926] S.C.R. 515, 3 D.L.R. 466.

to whether gas mains or pipes and a system of electrical poles and wires located on public streets were taxable as "taxable real estate" and "taxable real property". Anglin C.J.C., who delivered the judgment of the majority of the Court, said at p. 523:

> Real estate comprises all hereditaments. That the pipes, poles, wires and transformers here in question would be hereditaments in English law seems clear. Metropolitan Ry. v. Fowler, 1893 A.C. 416 at 427.

The New Zealand Court of Appeal has held that poles, cross-arms, insulators and wires used by an electric-power board for the transmission of electricity constituted "lands, tenements and hereditaments" because the board's interest in the soil occupied by its lines and that portion above ground so occupied and its right thereto is a corporeal hereditament. *Hutt Valley Electric-power Board v. Lower Hutt City Corporation*[1].

I am of the opinion that the interest which the appellant company was authorized to expropriate by the ministerial order was an interest in land as defined for the purposes of *The Water Resources Act*.

For the foregoing reasons I have concluded that this appeal should be allowed. In accordance with the terms of the order of this Court which granted leave to appeal, the appellants shall pay to the respondent his party and party costs in this Court, including the costs of the application for leave to appeal. The appellants are entitled as against the respondent to costs in the Appellate Division of the Supreme Court of Alberta.

Appeal allowed.

Solicitors for the defendant Calgary Power Ltd., appellant: Chambers, Might, Saucier, Milvain, Peacock, Jones & Black, Calgary.

Solicitor for the defendant Halmrast, appellant: L. A. Justason, Calgary.

Solicitors for the plaintiff, respondent: Fenerty, Fenerty, McGillivray, Robertson, Prowse & Brennan, Calgary.

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[1] [1949] N.Z.L.R. 611.

1958
*Nov. 18, 19
Dec. 18

LA CORPORATION MUNICIPALE DU VILLAGE DE STE-ANNE-DU-LAC (*Defendant*) ..... APPELLANT;

AND

LUCIEN HOGUE ET AL. (*Plaintiffs*) .... RESPONDENTS;

AND

ANITA RAYMOND .....RESPONDENT.

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

Municipal corporations—Waterworks—Municipality granting permit by resolution to erect and operate waterworks system—Whether exclusive franchise—Art. 408 of the Municipal Code.

A resolution by a municipal council authorizing a group of people to build and operate a waterworks system for a period of 25 years does not prevent a municipality from building and operating its own waterworks system. If the municipality purported to grant a permit, competition was not prohibited. If, on the other hand, the municipality purported to grant an exclusive franchise, it could not do so by resolution. By the terms of art. 408 of the *Municipal Code*, a by-law approved by an affirmative vote of the majority in number and in value of the electors who are property-owners and also by the Lieutenant-Governor in Council is required in order to grant an exclusive privilege for a term not exceeding 25 years.

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

P. Massé, Q.C., for the appellant.

A. Feiner and *M. Landry* for the respondents.

The judgment of the Court was delivered by

TASCHEREAU J.:—Les cinq intimés ont formé une société le ler novembre 1941, pour construire et opérer un système d'aqueduc dans les limites du canton Décary, aux droits de qui se trouve l'appelante incorporée subséquemment. Une requête fut présentée dans le temps au conseil municipal,

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

[1] [1958] Que. Q.B. 183

demandant l'autorisation de procéder à la construction de l'aqueduc, et pour y donner suite, la municipalité adopta la résolution suivante, le 3 novembre de la même année:

Il est proposé par François Roy secondé par Aurèle Leduc que suivant la requête présentée par les intéressés et la majorité des résidents dans le village de Ste-Anne-du-Lac demandant au conseil municipal d'accorder un permis de poser un aqueduc dans le village par les suivants mentionnés soit: Lucien Hogue, Charles Bolduc, Arthur Chalifoux, Omer Roy, Jos. Tourangeau, Attendu que la municipalité donne un permis aux ci-haut mentionnés.

Permis de poser un tuyau pour desservir l'eau dans le village Ste-Anne-du-Lac avec toute exemption de taxe de toute nature à échoir pour vingt-cinq années à venir soit jusqu'au ler novembre 1966.

Certifié conforme au livre des délibérations de la Municipalité du Canton Décarie Session du 3 novembre 1941 page du livre 229.

En foi de quoi je Olidor Chalifoux, sec.-trés. donne ce certificat ce 13ème jour de juin 1955.

(Signé) OLIDOR CHALIFOUX,
Sec.-Trés.

Aucun contrat écrit n'intervint entre les parties, et les intimés procédèrent alors à la construction de l'aqueduc et desservirent plusieurs familles du canton. Il arriva cependant que dans l'opinion d'une grande partie de la population, le service fourni par les intimés était inadéquat et insuffisant, et ne répondait pas aux besoins des contribuables. C'est alors qu'en 1949 se forma la nouvelle corporation municipale, l'appelante dans la présente cause, qui décida en 1952 de construire son propre aqueduc. On échangea des pourparlers avec les intimés afin d'acheter leur sysème de distribution d'eau, mais les négociations n'apportèrent aucun résultat concret et l'aqueduc municipal fut construit.

Au mois de février 1954, les intimés instituèrent la présente action, et c'est leur prétention que cette concurrence a fait disparaître l'utilité de leur propre aqueduc, qu'ils avaient obtenu la permission de construire, et qu'ils ont subi des dommages évalués à $42,666.66. Ces dommages comprendraient $15,000 pour la valeur de leur aqueduc, et $27,666.66 pour perte de profits à compter du ler janvier 1953, date où l'aqueduc municipal a commencé ses opérations. Ils allèguent en outre que la défenderesse-appelante est aux droits du canton Décary, et est en conséquence liée par les obligations contractées par ce dernier par les termes mêmes de la résolution passée le 3 novembre 1941.

1958

CORPN. MUNICIPALE DU VILLAGE DE STE-ANNE-DU-LAC v. HOGUE *et al.*

Taschereau J.

L'appelante soutient au contraire qu'aucune franchise exclusive n'a été accordée aux intimés, que le permis de construire n'excluait pas la possibilité d'une concurrence future, que la résolution est illégale et que les dommages sont exagérés.

La Cour supérieure a maintenu l'action et a accordé aux intimés la somme de $12,500, montant que ces derniers auraient été disposés à accepter si l'appelante avait acheté leur entreprise. La Cour du banc de la reine[1] a unanimement confirmé ce jugement.

Avec toute la déférence possible pour les opinions contraires, je crois que le présent appel doit être maintenu et que l'action doit être rejetée. Je crois en effet que le droit conféré aux intimés par la résolution du 3 novembre 1941, pourrait être suffisant pour octroyer un permis, mais non pas un privilège tel que celui qui est réclamé.

Je n'ai pas à me demander s'il s'agit dans l'occurrence d'une *franchise exclusive,* accordée aux intimés pour une péiode de vingt-cinq ans, ou d'un simple permis d'ouvrir les rues du canton Décary pour y poser des tuyaux et desservir le public, car dans l'un ou l'autre cas, les intimés ne peuvent réussir. S'il s'agit d'un simple permis, la concurrence n'est pas prohibée, et l'appelant pouvait construire son système d'aqueduc, quels que soient les dommages soufferts par les intimés. S'il s'agit de l'octroi d'une franchise exclusive, la résolution ne peut la conférer. En effet, l'octroi d'un privilège exclusif n'excédant pas vingt-cinq ans ne peut être accordé que par règlement, et ce règlement doit être approuvé par le vote affirmatif de la majorité en nombre et en valeur des électeurs propriétaires, et aussi par le Lieutenant-Gouverneur en Conseil. Or, ceci n'a pas été fait, et on s'est contenté de passer une *résolution,* qui évidemment n'a aucune valeur légale et ne peut conférer aucun droit aux intimés. L'acte du conseil municipal est frappé d'une nullité absolue, que toutes les parties intéressées peuvent invoquer. L'article 408 du *Code Municipal,* para. 2, est redigé dans les termes suivants:

Art. 408. Toute corporation locale peut faire, amender ou abroger des règlements:

2. Pour accorder à toute compagnie, personne ou société de personnes, *qui se charge de la construction d'un aqueduc,* d'égouts, de puits publics ou de réservoirs, ou qui en prend l'administration, *un privilège exclusif*

[1][1958] Que. Q.B. 183.

n'excédant pas vingt-cinq années pour poser des tuyaux servant à l'approvisionnement d'eau ou aux égouts dans les limites de la municipalité, ou dans toute partie d'icelle; et effectuer un contrat pour l'approvisionnement de telle eau, ou pour l'usage de tels égouts, pour une ou plusieurs années, mais pour une période de pas plus de vingt-cinq années; 16 Geo. V, c. 69, s. 1, (1926).

Tout *réglement* adopté en vertu du présent paragraphe 2 doit, avant d'entrer en vigueur, *être approuvé par le vote affirmatif de la majorité en nombre et en valeur des électeurs propriétaires* qui auront voté sur tel règlement, *et par le lieutenant-gouverneur en conseil.* 20 Geo. V, c. 103, s. 15, (1930).

Dans le cas qui nous occupe, ces formalités n'ont pas été suivies.

L'intimé a cité l'arrêt de *Stuart v. La Corporation du Village de Napierville*[1], décision rendue par la Cour de revision, où il a été décidé ce qui suit:

Une municipalité du village a le droit d'accorder un privilège exclusif de poser des tuyaux dans toutes les rues, aux fins de l'exploitation d'un aqueduc, pendant une période de 25 années.

Lorsqu'un règlement concédant cette franchise ne donne aucun bonus, n'impose aucune taxe et n'oblige pas les contribuables ni les résidents de la municipalité de prendre l'eau de cet aqueduc, il n'est pas nécessaire de le faire approuver par les électeurs municipaux ni par le Lieutenant-Gouverneur en conseil.

Ce jugement n'est pas une autorité qui s'applique au présent cas, et ne peut nous servir de guide pour la détermination du litige. En effet, cet arrêt date de 1916, quatorze ans avant l'entrée en vigueur du paragraphe 2, qui n'a été incorporé à l'art. 408 qu'en 1930 par le statut 20 Geo. V, c. 103, et c'est depuis cette date que l'art. 408 se trouve dans la forme actuelle.

Mais, dans cette cause de *Stuart, supra,* M. le Juge Fortin donnait les raisons pour lesquelles le règlement n'était pas *ultra vires,* et s'exprimait ainsi à la page 409:

Il n'était pas nécessaire non plus de soumettre ce règlement à l'approbation des électeurs municipaux et à l'approbation du lieutenant-gouverneur en conseil. L'art. 637 C.M. (ancien code) en vertu duquel on a procédé n'exige ni l'une ni l'autre de ces conditions.

Mais la loi n'est plus la même, et il est maintenant essentiel que le règlement soit approuvé par le vote de la majorité en nombre et en valeur des électeurs propriétaires, et que la sanction du Lieutenant-Gouverneur soit donnée.

[1] (1916), 50 Que. S.C. 407.

1958

CORPN. MUNICIPALE DU VILLAGE DE STE-ANNE-DU-LAC v. HOGUE *et al.*

Taschereau J.

Il s'ensuit qu'aucune franchise exclusive n'a été accordée légalement aux intimés, et que la municipalité pouvait, sans encourir de responsabilité civile, construire son propre aqueduc comme elle l'a fait. Si la résolution du 3 novembre 1941 n'accordait aux intimés qu'un simple permis, elle n'excluait pas la concurrence municipale.

L'article 14 du *Code Municipal* qui veut que nulle objection faite à la forme, ou fondée sur l'omission de formalités même impératives, ne peut être admise sur une action, poursuite ou procédure concernant ces matières, ne peut venir au secours des demandeurs. Il ne s'agit pas ici, en effet, d'une objection faite *à la forme,* ou *d'omission de remplir des formalités,* mais bien d'une *nullité radicale,* que l'appelante était justifiée d'invoquer pour refuser de reconnaître l'existence légale d'une franchise exclusive, sans que l'annulation de cette procédure ait été préalablement prononcée par la Cour de magistrat, à la demande d'une partie intéressée, en vertu des arts. 430 et 431 du *Code Municipal.* Toute personne recherchée en dommages devant la Cour supérieure, peut invoquer la nullité absolue d'un acte municipal sur lequel est basée une demande.

L'appel doit donc être maintenu et l'action rejetée avec dépens de toutes les Cours.

Appeal allowed with costs.

Attorneys for the appellant: Courtemanche & Dubreuil, Montreal.

Attorney for the respondents: M. Landry, Montreal.

ALFIO MINGARELLI (*Defendant*) .....APPELLANT;

AND

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

1958

*Oct. 9

Dec. 18

ALFIO MINGARELLI (*Defendant*) .....APPELLANT;

AND

GUISEPPE MEZZAPELLA (*Plaintiff*) ...RESPONDENT.

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

Damages—Employee injured—Workmen's compensation paid by employer—Subrogation in favour of employer—Actions by employer and victim against tort-feasor—Apportionment of damages—Workmen's Compensation Act, R.S.Q. 1941, c. 160, ss. 7(3), 8.

The plaintiff M, an employee of the plaintiff company, was injured in the course of his employment when struck by a car owned and driven by the defendant. He was paid compensation under the *Workmen's Compensation Act* by his employer. The employer took action against the defendant by virtue of the subrogation contained in s. 7(3) of the Act, and the plaintiff M, by way of a separate action, sued under s. 8 to recover the additional amount required to constitute, with the amount paid to him under the Act, full compensation for his loss. Both actions were joined for proof and hearing, and were heard together. The trial judge found the defendant solely to blame and apportioned damages between the two plaintiffs. This judgment was affirmed by the Court of Appeal.

In this Court, the plaintiffs' counsel was requested to restrict his argument to the question of apportionment of damages. It had been contended by the defendant that the damages must be allocated without regard to their headings, because the subrogation in favour of the employer operates in regard to all the rights of the victim, whatever the headings under which the damages are claimed may be.

Held: The appeal should be dismissed.

The subrogation in s. 7(3) of the Act is an exception to the general law; it must be strictly interpreted and is only a partial subrogation. It is limited to amounts paid by an employer with respect to those losses for which he is legally liable to pay compensation under the Act and can be applied only to amounts recovered by way of these losses from the tort-feasor. There was evidence upon which the trial

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

1958

MINGARELLI v. MONTREAL TRAMWAYS Co. *et al.*

judge could properly make the apportionment which he did. This apportionment was accepted by both plaintiffs and it is doubtful whether the defendant had any legal interest in questioning it. In any event, it was rightly affirmed by the Court of Appeal.

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

Jean Brisset, Q.C., for the defendant, appellant.

Jules Deschènes, for the plaintiffs, respondents.

The judgment of the Court was delivered by

ABBOTT J.:—The respondent Mezzapella, an employee of the Montreal Tramways Company, was seriously injured while in the course of his employment, as a result of being struck by an automobile owned and operated by the appellant. He was entitled to receive and was paid by the respondent Montreal Tramways Company compensation under the *Workmen's Compensation Act,* R.S.Q. 1941, c. 160, as amended.

Under the provisions of that Act, the respondent, Montreal Tramways Company, sued appellant in virtue of the subrogation contained in s. 7(3) of the Act, and respondent Mezzapella also took a separate action under s. 8 of the Act to recover from appellant an additional amount required to constitute, with the amount paid to him under the Act, compensation for the total loss which he had sustained as a result of his injuries.

Both actions were joined for proof and hearing and were heard and argued together.

The learned trial judge found the appellant solely responsible for the accident. He fixed the total damages suffered by the respondent Mezzapella at $9,302.60, apportioned these $3,134.72 to Mezzapella and $6,167.88 to Montreal Tramways Company, and rendered judgments in the two actions accordingly. With a minor adjustment as to the amount awarded the Montreal Tramways Company which is not relevant to these appeals, these judgments were confirmed by the Court of Queen's Bench[1]. Mr. Justice Martineau, dissenting, would have held the

[1] [1956] Que. Q.B. *620*

respondent Mezzapella in part responsible for the accident and would have reduced the amount awarded for permanent partial incapacity.

At the conclusion of the argument on behalf of appellant, the respondents' counsel was informed by the Court that it desired to hear him only as to the question of the apportionment of damages which had been raised by appellant.

In his factum counsel for appellant submitted that this apportionment should have been based upon the following principle:

> Une fois établis, . . . les dommages doivent être attribués . . . sans tenir compte des chefs en regard desquels ces dommages ont pu être accordés, car la subrogation en faveur de l'employeur opère en regard de tous les droits de la victime, quels que soient les chefs sous lesquels les dommages puissent être réclamés.

In my opinion that submission is not well founded. The rights of the parties depend upon the effect to be given to ss. 7(3) and 8 of the *Workmen's Compensation Act*, which read as follows:

> 7(3) If the workman or his dependents elect to claim compensation under this act, the employer, if he is individually liable to pay it, or the Commission, if the compensation is payable out of the accident fund, as the case may be, shall be subrogated *pleno jure* in the rights of the workman or his dependents and may, personally or in the name and stead of the workman or his dependents, institute legal action against the person responsible, and any sum so recovered by the Commission shall form part of the accident fund. The subrogation takes place by the mere making of the election and may be exercised to the full extent of the amount which the employer or the Commission may be called upon to pay as a result of the accident. Nevertheless, if as a result of this act, the employer or the Commission happen afterwards to be freed from the obligation of paying a part of the compensation so recovered, the sum not used shall be reimbursable within the month following the event which determines the cessation of the compensation.
>
> Agreements or compromises effected between the parties respecting such action or right of action shall be null and void, unless approved and ratified by the Commission, and the payment of the amount agreed upon or adjudged shall be made only in the manner indicated by the Commission.
>
> 8. Notwithstanding any provision to the contrary and notwithstanding the fact that compensation may have been obtained under the option contemplated by subsection 3 of section 7, the injured workman, his dependents or his representatives may, before the prescription enacted in the Civil Code is acquired, claim, under common law, from any person other than the employer of such injured workman any additional sum

1958

MINGARELLI v. MONTREAL TRAMWAYS Co. et al.

Abbott J.

required to constitute, with the above-mentioned compensation, an indemnification proportionate to the loss actually sustained.

The subrogation provided for in subsection 3 of section 7 is an exception to the general law; it must be strictly interpreted and, as Bissonnette J. has pointed out in *Commission des Accidents du Travail de Québec v. Collet Frères Limitée*[1], the section provides only for a partial subrogation. In my opinion that subrogation is limited to amounts paid by the employer with respect to those losses for which the employer is legally liable to pay compensation under the Act and can be applied only to amounts recovered with respect to such losses from the author of the accident. For instance, a workman has no claim against his employer under the Act for damages sustained by him as a result of pain and suffering and, if he claims and recovers such damages from the author of the accident, the employer is not entitled under the subrogation to receive or be paid any portion of such amount.

As was pointed out in the Court below, the provisions of the *Workmen's Compensation Act* giving two rights of action, one to the employer (or the Workmen's Compensation Commission) and another to the workman, do not operate effectively unless either (1) a joint action is taken; (2) the employer or the Commission is brought in as *mise-en-cause* or (3) the two separate actions, if taken, are joined for proof and hearing, as in the present case.

The learned trial judge fixed the amount of the total damages which the respondents had suffered and for which the appellant was held solely responsible, apportioned these damages between the two respondents, and rendered judgment in each of the two actions accordingly. In my opinion there was evidence upon which he could properly make the apportionment which he did. Both respondents accepted the apportionment made and I doubt whether appellant has any legal interest in questioning that appor-

[1] [1958] Que. Q.B. 331 at 334.

tionment. In any event it has been confirmed by the Court below and in my opinion that Court was right in so doing.

I would dismiss both appeals with costs.

Appeals dismissed with costs.

Attorneys for the defendant, appellant: Beauregard, Brisset, Reycraft & Lalande, Montreal.

Attorneys for the plaintiffs, respondents: Létourneau, Quinlan, Forest, Deschènes & Emery, Montreal.

1958
*Nov. 20, 21
Dec. 18

LA CORPORATION DU CANTON DE CHATHAM (*Plaintiff*) ..... RESPONDENT.

THE LIVERPOOL & LONDON & GLOBE INSURANCE COMPANY LIMITED (*Defendant*) ..... APPELLANT;

AND

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

Insurance—Indemnity bond—Secretary-treasurer of municipal corporation—Disappearance of funds—Secretary-treasurer not to blame—Whether defective notice of claim—Whether type of loss contemplated by policy.

By an indemnity bond, the defendant company bound itself jointly and severally with D (the secretary-treasurer of the plaintiff corporation and its tax-collector) as principal, for repayment of up to $4,000 of "les deniers dont le principal peut, dans l'exercise de ses fonctions, être comptable envers la corporation". The bond was to be of no effect if "le principal remplit bien et fidèlement les devoirs de sa charge et rend compte, paie ou remet . . . les deniers dont il deviendra comptable". The bond repudiated liability unless a sworn statement of claim was filed within three months of the discovery of the loss. A sum of money disappeared from the safe in D's office and a claim was made under the bond nearly four months later. There was no suggestion that D had stolen the money, and indeed he was kept in the plaintiff's employ for over a year after the disappearance of the money. The action was dismissed both by the trial judge and by the Court of Appeal.

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

1958

CORPN. DU CANTON DE CHATHAM v. THE LIVERPOOL & LONDON & GLOBE INS. CO. LTD.

Held: The action must fail.

Per Taschereau J.: The claim was defective because it was not filed within the prescribed time. It must also fail because the plaintiff has failed to establish the culpability or the negligence of D.

Per Rand, Fauteux, Abbott and Martland JJ.: The claim must fail, since by the terms of the bond the defendant could not be held liable unless D himself was held liable. The preponderance of evidence was to the effect that the disappearance of the money had been caused by the act of a third party. The plaintiff has failed to establish that D had been guilty of negligence or had violated any provision of the *Municipal Code* involving his liability.

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

P. Legault, Q.C., for the plaintiff, appellant.

J. W. Long, Q.C., for the defendant, respondent.

TASCHEREAU J.:—La demanderesse est une corporation municipale rurale, régie par le *Code municipal* de la province de Québec, et a sa place d'affaires dans le canton de Chatham, comté d'Argenteuil.

Le 6 janvier 1950, la compagnie défenderesse intimée émit un contrat d'assurance de garantie en faveur de la demanderesse, sur la personne de son secrétaire-trésorier, Harold Derouin, le tout conformément aux dispositions des arts. 151 et suivants du *Code municipal*. Cette police était limitée au montant de $4,000, et garantissait à la municipalité appelante le remboursement des montants d'argent, dont le secrétaire-trésorier, dans l'exercise de ses fonctions, pourrait être comptable envers la corporation. Elle devenait nulle si le secrétaire-trésorier remplissait bien et fidèlement les devoirs de sa charge, rendait compte, et payait ou remettait à la corporation ou à ses représentants autorisés, les deniers dont il avait l'administration durant l'exercise de ses fonctions.

On trouve aussi, incorporée à la police, la clause suivante:

La responsabilité de la Caution cessera à l'expiration d'un mois de la connaissance acquise par la Corporation de détournements de fonds, ou acte similaire, de la part du Principal, si ledit Principal est néanmoins maintenu en fonctions sans que la Caution y ait donné son assentiment par écrit.

[1] [1957] Que. Q.B. 41, [1957] I.L.R. 1-254.

Une autre clause importante est ainsi rédigée:

La Caution ne se tient pas responsable des termes du présent cautionnement à moins qu'un rapport assermenté de la réclamation ne soit remis à la Caution par la Corporation *dans les trois mois suivant la découverte d'un tel délit.*

Des certificats de renouvellement ont été émis par la compagnie intimée, d'année en année, jusqu'au 1er mars 1952.

La preuve révèle que lorsque le secrétaire-trésorier est revenu à son bureau le matin du 20 décembre 1950, une somme de $2,157.76 manquait dans la voûte, qui était le produit de la perception de certaines taxes d'eau et d'égout, payées par les contribuables durant les quelques jours précédents. Le maire, de même que les membres du Conseil, en furent avertis sans délai, et l'auditeur appelé par le secrétaire-trésorier, se rendit immédiatement sur les lieux et constata en effet que cette somme était disparue.

Le conseil prit l'attitude qu'en vertu de la police d'assurance émise par l'intimée, celle-ci devait lui rembourser le montant, vu que son secrétaire-trésorier n'avait pas rendu compte de cette somme de $2,157.76. Le 9 avril 1951, les procureurs de la municipalité firent parvenir par lettre enregistrée à l'intimée, un affidavit de son auditeur, établissant ce déficit de $2,157.76 et réclamant de l'intimée cette somme en vertu de la police. Sur refus de l'intimée de payer, une action fut instituée devant la Cour supérieure, qui fut rejetée, et ce jugement fut unanimement confirmé par la Cour du banc de la reine[1].

Dans les limites de la municipalité appelante, il n'y a pas de banque légalement constituée où le secrétaire-trésorier puisse déposer les fonds municipaux, tel que l'exige l'art. 640 C.M., de sorte qu'il lui fallait, à des intervalles de temps plus ou moins longs, se rendre à Lachute, ville voisine, où se trouvait la plus proche succursale d'une banque à charte.

Le 15 décembre précédent, Derouin avait ainsi déposé les argents perçus la semaine précédente, mais de substantiels montans furent payés par des contribuables du 15 au 19 décembre, s'élevant à $2,157.76, et c'est cette somme qui est réclamée de l'intimée.

[1] [1957] Que. Q.B. 41, [1957] I.L.R. 1-254.

1958

CORPN. DU CANTON DE CHATHAM v. THE LIVERPOOL & LONDON & GLOBE INS. CO. LTD.

Taschereau J.

L'auditeur de la corporation, appelé le 20, lors de la découverte du déficit dans la caisse, constata que jusqu'au 15 décembre les livres balançaient parfaitement; il compara les copies de reçus, les entrées des livres, avec les dépôts de banque, et conclut que la somme disparue était bien le produit de la perception des taxes du 15 au 19.

Suivant la coutume, le soir du 19, le secrétaire-trésorier plaça ce montant de $2,157.76 dans la voûte municipale mise à sa disposition par le conseil et dont il avait la clef, et la disparition de l'argent durant la nuit est demeurée inexpliquée. Le secrétaire-trésorier jure qu'il n'est l'auteur d'aucune défalcation, et c'est bien ce que semble avoir compris le conseil lui-même, car il garda Derouin à son emploi, et ce n'est que beaucoup plus tard que ce dernier quitta volontairement la corporation municipale, pour occuper un autre poste plus rémunérateur.

Comme le Juge au procès, et la Cour du banc de la reine, je suis d'opinion que cette action ne peut réussir. J'entretiens cependant des doutes sérieux sur l'un des motifs invoqués par M. le Juge McDougall qui, comme ses autres collègues, rejetterait l'action. Il cite en effet une clause de la police d'assurance qui dit que la responsabilité de la caution *cessera* à l'expiration d'un mois de la connaissance acquise par la corporation de détournements . . ., si le principal (Derouin) est maintenu en fonctions sans que la caution ait donné son assentiment par écrit.

Selon M. le Juge McDougall, cette clause libérerait l'intimée parce qu'elle n'a pas donné son assentiment par écrit avant l'expiration d'un mois. Il est vrai que Derouin est resté à l'emploi de la corporation municipale après la connaissance acquise par l'appelante du déficit, pour une période dépassant un mois, mais il semble que les mots: "La responsabilité de la Caution *cessera*" s'appliquent aux défalcations futures seulement, et non pas à celles qui auraient pu exister préalablement, comme dans le cas qui nous occupe, et pour lesquelles l'appelante réclame.

Mais je retiens deux motifs, qui selon moi, justifient le rejet de l'appel.

En premier lieu, la corporation devait aviser l'intimée par un rapport assermenté *dans les trois mois suivant la découverte du délit*. Or, le déficit a été établi le 20 décembre

1950, et ce n'est que le 9 avril 1951 que l'affidavit de l'auditeur a été transmis à l'intimée, c'est-à-dire *près de quatre mois après sa découverte.* La police veut que la caution ne soit *pas responsable* si la réclamation n'est pas faite dans ce délai de trois mois suivant la découverte du délit.

En second lieu, rien dans la preuve ne justifie la présente réclamation. Ce que l'intimée a garanti, c'était *l'honnêteté,* la *fidélité* de Derouin, et il incombait à l'appelante de démontrer légalement qu'il avait manqué à son devoir. Il n'a pas davantage été établi que le secrétaire-trésorier avait fait preuve de négligence qui aurait pu faciliter le détournement, et comme l'appelante a totalement failli d'établir ces éléments essentiels, il s'ensuit que sa réclamation n'est pas fondée.

L'appel doit donc être rejeté avec dépens.

The judgment of Rand, Fauteux, Abbott and Martland JJ. was delivered by

FAUTEUX J.:—Des faits qui ont donné lieu à ce litige, il est suffisant, je crois, pour disposer de cet appel de référer à ceux qui suivent.

Le 6 janvier 1950 l'intimée signait en faveur de l'appelante un acte de cautionnement dont le texte de l'obligation de substance est libellé comme suit:

> THE LIVERPOOL & LONDON & GLOBE INSURANCE COMPANY LIMITED (ci-après dénommée la Caution), s'engage conjointement et solidairement avec HAROLD DEROUIN . . . (ci-après dénommé le Principal) envers la Corporation Municipale de canton de Chatham . . . (ci-après dénommée la Corporation), au service de laquelle le Principal remplit les fonctions de Secrétaire-Trésorier . . . pour le remboursement des deniers dont le Principal peut, dans l'exercice de ses fonctions, être comptable envers la Corporation, la responsabilité totale de la Caution étant strictement limitée au montant de quatre mille . . . dollars, quel que soit le nombre de défauts du Principal, ou la durée de ce cautionnement. Au cas où plusieurs cautionnements seraient simultanément en vigueur entre les parties, la responsabilité totale de la Caution sera limitée au montant du cautionnement le plus élevé, en vigueur au moment du défaut.
>
> Ce cautionnement sera nul si le Principal remplit bien et fidèlement les devoirs de sa charge et rend compte, paye ou remet à la Corporation, ou à ses représentants autorisés, les deniers dont il deviendra comptable durant l'exercice de sa charge; autrement il demeurera dans toute sa vigueur.

Cette obligation était tenante lorsque, dans l'avant-midi du mercredi vingt décembre 1950 Derouin, le secrétaire-trésorier de l'appelante, constata qu'une somme de

1958

CORPN. DU CANTON DE CHATHAM v. THE LIVERPOOL & LONDON & GLOBE INS. CO. LTD.

Fauteux J.

$2,157.76, dont la plus grande partie avait été perçue par lui dans l'après-midi du samedi précédent et déposée le soir même dans la voûte appartenant à la municipalité et placée dans ses bureaux, en était disparue. Le lundi et le mardi cette somme était dans la voûte; Derouin en avait constaté la présence. Constatant cette disparition, sur-le-champ Derouin alerta les autorités municipales et la Sûreté provinciale. L'enquête faite établit qu'aux bureaux ou sur la voûte on ne put relever aucun indice d'effraction. Pour fermer cette voûte il n'y avait qu'une clé dont Derouin gardait constamment sur lui la possession; mais un expert a démontré, après la disparition, qu'il était possible de l'ouvrir autrement qu'avec une clé, soit par une opération touchant les pentures et l'utilisation d'une broche.

Il est bien évident que cette disparition ne s'explique que par la commission d'un délit criminel. Rien dans la preuve, cependant—et le procureur de l'appelante l'a admis—n'autorise à dire que Derouin fut partie à ce délit. Il a lui-même nié sous serment toute participation et de son côté la municipalité, après enquête, a continué de le maintenir dans ses fonctions jusqu'en avril 1952, alors que de son chef il décida de quitter cet emploi pour assumer une position plus lucrative.

La prépondérance de la preuve établit donc que cette disparition doit être imputée à l'acte d'un tiers.

L'appelante soumet cependant que Derouin aurait été négligent en ce qu'il aurait dû, contrairement à ce qui est le cas, déposer cette somme à la banque plutôt que de la garder à la voûte de la municipalité. Cette négligence engagerait la responsabilité de Derouin et par suite, aux termes de l'acte de cautionnement précité, celle de l'intimée.

La preuve ne permet pas de soutenir cette prétention. Il est avéré que pour se conformer à une résolution du Conseil de la municipalité les argents perçus par le secrétaire-trésorier devaient être déposés au compte d'icelle à la succursale de la Banque de Montréal établie à Lachute, soit à environ cinq milles de St-Philippe où se trouvait le bureau du secrétaire-trésorier. Aucune instruction n'avait été donnée à Derouin quant au jour ou aux jours où il devait faire ses dépôts. Suivant la pratique connue des autorités municipales, ces dépôts étaient faits le samedi. De fait, le samedi

précédant la disparition, Derouin s'était rendu à Lachute pour y déposer les argents perçus durant la semaine. C'est après avoir fait ces dépôts qu'il est revenu à St-Philippe préparer la documentation nécessaire pour aller dans l'après-midi, à Lachute Mills, y percevoir les taxes d'eau et d'égouts. Il en est revenu vers les quatre heures et demie de l'après-midi, alors qu'il entra dans les livres de la municipalité les montants perçus qu'il déposa dans la voûte.

L'appelante n'a pas démontré, dans les circonstances, que Derouin se soit rendu coupable de négligence ou de violation de dispositions du *Code municipal* entraînant sa responsabilité. Au contraire, l'appelante, tel que déjà indiqué, lui a continué sa confiance.

Suivant l'acte de cautionnement précité, l'intimée ne saurait être tenue au remboursement de la somme disparue que si Derouin lui-même pouvait l'être; et comme tel n'est pas le cas, cette raison suffit au rejet de la réclamation de l'appelante et du présent appel.

Je renverrais l'appel avec dépens.

Appeal dismissed with costs.

Attorneys for the plaintiff, appellant: Legault & Legault, Montreal.

Attorney for the defendant, respondent: J. W. Long, Montreal.

ROLAND GADOURY (*Plaintiff*) .....APPELLANT;

AND

MIRON & FRERES LTEE. (*Defendant*) ..RESPONDENT.

1958
*Nov. 27
Dec. 18

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

Motor vehicles—Collision at intersection—Right of way—Whether right abused.

The plaintiff, who was a gratuitous passenger in a vehicle owned and driven by M, was injured when the vehicle collided with a cement-mixer truck owned by the defendant and driven by its employee, at an intersection in Montreal. The vehicle carrying the plaintiff was proceeding east on a street where small islands separate the

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

1958

GADOURY v. MIRON & FRÈRES LTÉE.

traffic in each direction, and the defendant's truck, which was proceeding north, had the right of way. The trial judge found that both drivers were at fault and condemned the defendant jointly and severally with M. The Court of Appeal dismissed the action against the defendant as it found that M alone had been at fault. M did not appeal to the Court of Appeal and therefore there was *res judicata* as to his liability.

The evidence disclosed that the driver of the defendant's truck approached the intersection at a moderate speed, looked to his left, and saw a truck approaching and coming to a stop at the south-west corner. He then looked to his right, and seeing that his way was clear proceeded to cross at a speed of approximately 12 to 15 m.p.h. As he entered the intersection, he again looked to his left and for the first time saw the vehicle driven by M passing the stationary truck. He was unable to stop in time.

Held: The action against the defendant must be dismissed. In the light of the principles enunciated in *Parent and Bélair v. Vachon,* [1958] S.C.R. 703, it cannot be said that the defendant's driver had abused his right of way. Even if it could be said that he should have looked sooner to his left, this objection could not, in the circumstances, establish his liability. It was not shown that if he had looked sooner to his left, he could and should have realized that M's conduct was such as to render the possibility of a danger of collision reasonably apparent and that by taking reasonable precautions he could have avoided the collision.

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

B. Nantel, Q.C., for the plaintiff, appellant.

R. Pinard and *R. Paré,* for the defendant, respondent.

The judgment of the Court was delivered by

FAUTEUX J.:—Dans l'après-midi du 23 septembre 1954, l'appelant, passager gratuit dans une camionnette appartenant à Léo Mainguy et conduite par ce dernier en direction est sur le boulevard Gouin, fut grièvement blessé au cours d'une collision intervenue à l'intersection de la rue Lajeunesse, entre cette camionnette et une bétonnière automobile, propriété de l'intimée et conduite par son employé, Yvon Castonguay, dans une direction nord sur la rue Lajeunesse.

A la suite d'une action prise par l'appelant contre Mainguy et l'intimée, ces deux derniers furent tenus conjointement et solidairement responsables dans une proportion que la Cour supérieure, à la demande des parties, établit à soixante et quarante pour cent, respectivement.

[1] [1958] Que. Q.B. 358.

Seule, l'intimée appela de ce jugement. Dans une décision unanime, la Cour du banc de la reine[1] exprima l'avis que la responsabilité de cet accident reposait uniquement sur Mainguy et accueillit cet appel. D'où le pourvoi de l'appelant devant cette Cour.

Sur la responsabilité de Mainguy, il y a chose jugée. Il a été tenu responsable parce qu'il a violé le droit de passage de Castonguay venant à sa droite, et—suivant les termes du jugment de première instance—"pour s'être avisé de s'introduire dans la traverse de la croisée, malgré qu'il eût aperçu le gros véhicule des Miron, qui montait à seulement 100 pds avant l'intersection, et en jugeant, du reste mal à propos, avoir le temps et l'espace de franchir sans encombres."

De son côté, Castonguay procédait à sa droite, sur la rue Lajeunesse, à une vitesse légale de 20 milles à l'heure, vitesse qu'il réduisit à environ 15 milles pour entrer dans l'intersection. A cette intersection il y a, sur les côtés ouest et est du boulevard Gouin, deux lisières de circulation constituées par la présence d'un îlot sis à peu près au centre, en largeur du boulevard; de sorte que les véhicules y voyageant de l'ouest à l'est—comme c'était le cas pour Mainguy—doivent circuler sur la lisière sud, alors que ceux venant en sens inverse doivent ce faire sur la lisière nord. Procédant vers l'intersection à une vitesse réduite, Castonguay regarda d'abord à sa gauche et vit, sur le boulevard Gouin, un camion approcher la rue Lajeunesse et s'arrêter au coin sud-ouest de l'intersection. Il regarda ensuite à sa droite, comme il le devait pour satisfaire au droit de passage des véhicules susceptibles de venir sur cette lisière nord du boulevard, puis, rentrant dans l'intersection, il regarda à nouveau à sa gauche et aperçut la camionnette de l'appelant doublant le camion mis à l'arrêt pour s'engager dans l'intersection. Immédiatement, il appliqua les freins, tira à l'extrême droite pour éviter, mais vainement, la collision qui se produisit.

Retenant en substance les reproches faits à Castonguay par le juge de première instance, l'appelant soumet que Castonguay a abusé de son droit de passage en ce que, dit-il, conduisant un lourd véhicule, il devait, en droit, "se garder contre toute négligence, conserver sur son véhicule

[1] [1958] Que. Q.B. 358.

1958

GADOURY v. MIRON & FRÈRES LTÉE.

Fauteux J.

une maîtrise lui permettant de parer efficacement à toute éventualité, surtout à un carrefour aussi fréquenté". En fait, soumet-il, Castonguay aurait été négligent en ce qu'il n'aurait pas averti de sa venue, aurait regardé à sa droite alors que de ce côté il n'y avait aucun danger vu qu'aucun véhicule n'avait droit de circuler en direction ouest sur la lisière sud du boulevard, et il aurait ainsi trop tardivement regardé à sa gauche d'où pouvait véritablement provenir le danger.

Ainsi donc, suivant l'appelant, Castonguay devait anticiper que la loi serait observée à sa droite mais violée à sa gauche par la méconnaissance de son droit de passage. Il paraît bien évident qu'on ne peut reprocher à Castonguay d'avoir regardé à sa droite. Au contraire, il en avait le devoir. A la vitesse réduite à laquelle il procédait, il allait quand même, en une fraction de seconde, dépasser la lisière sud pour atteindre la lisière nord où il était obligé de céder le passage à tout véhicule pouvant venir à sa droite.

Sans doute, et ainsi que déclare le savant juge au procès, en s'appuyant sur les décisions de cette Cour dans *Thériault v. Huctwith*[1], *Walker v. Brownlee*[2] *et Provincial Transport v. Dozois*[3], le droit de passage ne permet pas "de pousser à tous risques devant soi comme si, dans ce cas, les règles ordinaires de la prudence étaient abolies." Dans ces décisions, et plus récemment, dans celle de *Parent et al v. Vachon*[4], il est précisé que le titulaire de ce droit n'est pas, en raison d'icelui, relevé de l'obligation de prendre, lorsque la possibilité d'un danger de collision est raisonnablement apparente, des précautions raisonnables aptes à prévenir cette collision. Et, avec justesse, M. le Juge Cartwright, dans ses raisons, ajoute qu'en appliquant cette règle, il est nécessaire de retenir cette déclaration de Lord Atkinson dans *Toronto R. W. Co. v. King*[5]:

> Traffic in the streets would be impossible if the driver of each vehicle did not proceed more or less upon the assumption that the drivers of all the other vehicles will do what it is their duty to do, namely, observe the rules regulating the traffic of the streets.

[1] [1948] S.C.R. 86, 3 D.L.R. 542.
[2] [1952] 2 D.L.R. 450.
[3] [1954] S.C.R. 223.
[4] [1958] S.C.R. 703.
[5] [1908] A.C. 260 at 269.

C'est à la lumière de ces principes qu'il faut considérer si, comme le soumet l'appelant, Castonguay a abusé de son droit. On lui reproche d'avoir trop tardivement regardé à sa gauche. Ce reproche, même si fondé, ne saurait, dans les circonstances de cette cause, établir la responsabilité de Castonguay, à moins qu'il ne soit en plus démontré que si, de fait, il avait regardé plus tôt à sa gauche, (i) il pouvait et devait réaliser qu'en raison de la conduite de Mainguy, la possibilité d'un danger de collision était raisonnablement apparente, et (ii) qu'il pouvait, en prenant des précautions raisonnables, éviter la collision. Or, Mainguy déclare qu'en procédant vers l'intersection, il diminua sa vitesse à 15 milles à l'heure et qu'arrivé à la ligne des piétons, il aperçut le camion de l'intimée à 100 pieds de l'intersection et, pour cette raison, diminua encore sa vitesse. C'est à la suite de ces réductions successives de vitesse qu'il changea soudainement d'idée pour accélérer et entreprendre de traverser l'intersection alors que le véhicule conduit par Castonguay était sur le point d'y entrer. Il ne paraît pas douteux que si Castonguay avait pu et dû observer cette conduite de Mainguy, il eut été justifié d'en déduire que Mainguy avait réalisé qu'il allait entrer dans l'intersection—comme d'ailleurs Mainguy dit l'avoir réalisé—et d'anticiper qu'en raison de ces réductions successives de vitesse, Mainguy adoptait des mesures propres à assurer l'exercice de son droit de passage. Les faits de cette cause sont manifestement différents de ceux sur lesquels cette Cour s'est appuyée pour décider dans *Parent et al v. Vachon, supra,* que, dans ce cas, le titulaire du droit de passage a abusé de son droit. En l'espèce, c'est avec raison que la Cour d'Appel n'a pas adopté une conclusion similaire.

Je rejetterais l'appel avec dépens.

Appeal dismissed with costs.

Attorneys for the plaintiff, appellant: Nantel, Mercure & Surprenant, Montreal.

Attorneys for the defendant, respondent: Pinard, Pigeon, Paré & D'Amour, Montreal.

1957
*Mar. 15
Oct. 1
1958
**Jun. 9, 10
***Dec. 18

VIC RESTAURANT INCORPORATED (*Plaintiff*) ..... APPELLANT;

AND

THE CITY OF MONTREAL (*Defendant*) ..... RESPONDENT.

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

Constitutional law—Municipal corporations—By-laws—Validity—Licensing of restaurants and places of amusement—Licence requiring approval of chief of police—Whether delegation of power of municipality—Charter of the City of Montreal, ss. 299, 299a, 300, 300(c).

Courts—Supreme Court of Canada—Jurisdiction—Mandamus for issuance of licence to operate restaurant—Licence would have expired prior to notice of appeal—Restaurant sold prior to argument in this Court—Whether lis remains between parties.

By-law no. 1862 of the City of Montreal, which provides for the licensing of restaurants and establishments licensed by provincial authorities to sell liquor, and which requires the prior approval of, among others, the director of the police department, is not within the powers of the City under its charter. (Taschereau, Fauteux and Abbott JJ., *contra.*)

The plaintiff company applied to the City of Montreal for a renewal of its permits to sell liquor and to operate a restaurant for the year 1955-56, as required by by-law 1862. The director of police refused his approval and the permits were not granted. The plaintiff applied for a writ of mandamus and contended that the by-law was *ultra vires*. The application was dismissed by the trial judge and by the Court of Appeal.

The appeal to this Court was first argued in March 1957, and a rehearing was ordered in October 1957. The business was sold prior to the second argument in this Court. The restaurant had been permitted to operate without a licence in the years 1955, 1956, 1957, however, some ten charges had been laid against it and were held in abeyance pending the determination of this appeal. Leave to amend was asked for the years 1955-58 inclusive.

Held (Taschereau, Fauteux and Abbot JJ. dissenting): The plaintiff was entitled to an order directing that a permit be issued for the year 1955.

Per curiam: The motion for leave to amend the conclusions of the petition should be dismissed.

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

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

***The Chief Justice, owing to illness, did not take part in the judgment.

Per Rand, Locke, Martland and Judson JJ.: The City of Montreal, in regards to the granting or withholding of licences, has the powers and only the powers vested in it by its charter. That charter does not authorize or purport to authorize the delegation to the director of police or to anyone else of the power to fix the terms upon which permits may be granted. The by-law is therefore in this respect beyond the powers of the council. The good government clause in s. 299 of the charter is no warrant for what is being attempted, since ss. 299 and 300 have granted specific authority to the council in respect of the matter.

The by-law contains no directions to the director of police as to the manner in which he is to exercise the discretion given to him and accordingly he could refuse to give his approval upon any ground which he might consider sufficient. For the council to say that before the licence is to be issued the director, in his discretion, may prevent its issue by refusing approval is not to fix the terms but is rather an attempt to vest in the director power to prescribe the terms upon which the right to a licence depends.

The fact that by-law 247 defines the duties of the members of the city police force to include, *inter alia*, the duty to cause the public peace to be preserved and to see that all the laws and ordinances are enforced cannot assist the position of the city in the matter of the delegation of the power vested in council. Nor is the matter affected by the language of s. 57 of the *Interpretation Act* which provides that "the authority to do a thing shall carry with it all the powers necessary for that purpose" since the power to delegate quasi-judicial functions in the matter of licences was not given to the council.

Bridge v. The Queen, [1953] 1 S.C.R. 8, followed; *Merritt v. Toronto*, 22 O.A.R. 205; *Re Kiely*, 13 O.R. 451; *Re Elliott*, 11 Man. R. 358; *Hall v. Moose Jaw*, 12 W.L.R. 693, and *Rex v. Sparks*, 18 B.C.R. 116, approved.

As the sole ground of the refusal was that the director of police had refused to give his approval, the plaintiff was, as of the date of its application for a writ of *mandamus*, entitled to an order directing that a permit be issued for the year 1955.

The fact that the licence year for which the permit was sought had expired before the appeal came before this Court did not affect its jurisdiction to declare the rights of the plaintiff. *Archibald v. De Lisle*, 25 S.C.R. 1; *Coca-Cola Co. v. Matthews*, [1944] S.C.R. 385; *Regent Taxi & Transport v. Congrégation des Petits Frères de Marie*, [1932] A.C. 295, referred to.

Per Rand and Cartwright JJ.: The portions of the by-law which require approval of the director of police are fatally defective in that no standard, rule or condition is prescribed for the guidance of the director in deciding whether to give or to withhold his approval. The effect of the by-law is to leave it to the director, without direction, to decide whether an applicant should or should not be permitted to carry on any of the numerous lawful callings set out in the by-law. The suggestion that because the director is charged with the duty of maintaining the public peace and enforcing the penal laws of the land he is thereby sufficiently instructed as to the standard to be applied and the conditions to be looked for in deciding whether to grant his approval of an application, cannot be accepted.

1958

VIC RESTAURANT INC. v. CITY OF MONTREAL

The rule that this Court will not entertain an appeal if, *pendente lite*, the subject-matter has ceased to exist or other circumstances have arisen by reason of which the Court could make no order effective between the parties except as to costs, is one of practice which the Court may relax. In the special circumstances of this case, the appeal should be entertained.

Per Taschereau, Fauteux and Abbott JJ., *dissenting:* There was no delegation by the council of its legislative authority. The discretion as to what the by-law shall be should not be confused with the discretion it conferred as to its execution. In order to give full effect to ss. 299 and 300 and to extend and complete the same so as to secure full autonomy for the city and to avoid any interpretation of such sections or their paragraphs which might be considered as a restriction of its powers, the city is authorized by s. 300(*c*) to adopt, repeal or amend and to carry out all necessary by-laws concerning the proper administration of its affairs. This section derogates from the strictness of the principle generally applicable and referred to in *Phaneuf v. Corporation du village de St. Hugues,* 61 Que. K.B. 83.

The by-law gives to each director a precise direction as to the considerations which should guide him in the exercise of the authority conferred and the discharge of the duty imposed upon him by the by-law, and these considerations are none other than the special considerations presiding at the establishment of each department and governing its maintenance and effective operation. It is therefore not open to the director of a department to decide arbitrarily in the case of a request for a permit, and no exception is made in the case of the police department.

There was no conflict between by-law 1862 and the Quebec *Alcoholic Liquor Act.*

The finding of the Courts below that the refusal to approve was not arbitrary, unjust or discriminatory was not shown to have been erroneous.

There was no substance in the objection that the refusal was made by the assistant director of police.

In the present case, the question as to whether this Court should entertain the appeal is not limited to ascertaining whether the Court should adopt the practice followed in cases where there is only a question of costs to be determined but includes as well that of deciding whether the Court has the power to render a judgment different from that which the Court of Appeal could have rendered in similar circumstances. Had the fact of the sale of the restaurant been established before either the Superior Court or the Court of Appeal, as it was before this Court, those Courts would have been powerless to adjudicate on the merits of the original issue.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], affirming a judgment of Prévost J. Appeal allowed, Taschereau, Fauteux and Abbott JJ. dissenting.

J. Ahern, Q.C., for the plaintiff, appellant.

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

L. Tremblay, Q.C., and *T. Lespérance*, for the defendant, respondent.

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

FAUTEUX J. (*dissenting*):—En avril 1955, la compagnie appelante exploitait un café-restaurant au n° 97 est, de la rue Ste-Catherine, à Montréal, ayant droit d'y servir des liqueurs alcooliques suivant un permis émis pour son bénéfice par la Commission des Liqueurs de Québec, au nom de Vincent Cotroni, l'un des directeurs de la compagnie et, à toutes fins pratiques, maître de l'établissement. Avant la fin du mois, date d'expiration des permis annuels exigés et accordés par la cité pour cette exploitation, l'appelante demanda au directeur des finances de l'intimée de nouveaux permis couvrant l'exercice financier 1955-1956, soit (i) le permis exigé par la section 20 du règlement 1862 pour toute personne qui détient un permis de la Commission des Liqueurs pour la vente des liqueurs alcooliques, et qui de fait en vend, pour consommation sur les lieux et (ii) le permis exigé par la section 8 du même règlement pour un restaurant. Cette demande de l'appelante fut accompagnée de l'offre du montant prescrit pour chacun des cas. Le règlement 1862 vise quelque soixante-et-dix cas, exercice d'activités, usage de choses ou garde d'animaux ou d'articles, où la cité exige un permis dont la demande doit, suivant la nature du permis recherché, être soumise à la considération d'un ou plusieurs services établis par la cité, soit les services d'urbanisme, de santé, d'incendie, de police ou de la division des marchés. L'article 2(B) du règlement statue qu'aucun permis ne peut être émis par le directeur des finances à moins qu'il n'obtienne l'approbation écrite de chacun des directeurs des services concernés. Le directeur du service de la police, l'un des services concernés en l'espèce, refusa son approbation et les permis ne purent être accordés.

L'appelante s'est alors adressée à la Cour supérieure par voie de *mandamus*. Alléguant dans sa demande que le règlement est en partie *ultra vires* de la cité, et que ce refus d'approbation du directeur du service de la police était illégal et arbitraire, elle a conclu à ce que le bien-fondé de ces allégations soit reconnu au jugement et qu'il soit

1958

VIC RESTAURANT INC. v. CITY OF MONTREAL

Fauteux J.

enjoint à la cité et à ses officiers d'émettre les permis demandés. La cité plaida particulièrement la validité du règlement et la légalité du refus d'approbation. La Cour supérieure a rejeté les prétentions de l'appelante et cette décision fut confirmée à l'unanimité par la Cour d'appel[1]. D'où le pourvoi devant cette Cour.

A la suite d'une première audition, cette Cour formula trois questions sur lesquelles elle ordonna une réaudition. Cette réaudition eut lieu les 9 et 10 juin derniers. La première se lit comme suit:

> In view of the fact that the licence period in respect of which the *mandamus* was sought would have expired on May 1, 1956, prior to the giving of the notice of appeal to this Court, is there any issue remaining between the parties other than as to costs?

Suivant la jurisprudence citée par M. le Juge Taschereau dans *Switzman v. Elbling and Attorney General of Quebec*[2], aux pages 290 *et seq.*, cette Cour refuse d'entretenir un appel dans les cas où il ne reste autre chose à déterminer entre les parties qu'une simple question de frais; et c'est là la raison d'être de cette première question. La pertinence de cette question est devenue subséquemment encore plus manifeste en raison d'un fait posé par l'appelante elle-même quelque temps seulement avant la réaudition, soit la vente de son exploitation à Pal's Café Inc.

Vu l'avis de la majorité des membres de cette Cour sur ce premier point et que, dans mon opinion, l'appel doit, de toutes façons, être rejeté sur le mérite, je ne vois aucune utilité à discuter de la question. Je dirai, cependant, qu'à mes vues, il ne fait aucun doute qu'entre les parties,—et c'est ce qui doit nous guider dans la détermination de la question,—il ne saurait rester devant la Cour, en raison surtout de l'acte posé par l'appelante elle-même, soit la vente de son établissement, qu'une simple question de frais. Il ne s'agit pas ici d'une référence. Et les questions au mérite, y compris celle de la validité du règlement, sont clairement, dans la présente cause, devenues, entre les parties, des questions purement académiques.

Suivant la *Loi de la Cour Suprême*, S.R., c. 139, cette Cour peut prononcer le jugement et décerner l'adjudication ou autre ordonnance que la Cour, dont le jugement est

[1] [1957] Que. Q.B. 1.
[2] [1957] S.C.R. 285, 7 D.L.R. (2d) 337, 117 C.C.C. 129.

porté en appel, aurait dû prononcer ou décerner. L'art. 541 du *Code de procédure civile* prescrit qu'un jugement doit contenir les causes de la demande et doit être susceptible d'exécution; et l'art. 996, relatif au jugement final en matière de *mandamus,* statue que si la requête est déclarée bien fondée, le juge peut ordonner l'émission d'un bref péremptoire, enjoignant au défendeur de faire l'acte requis. Il me paraît bien évident que si le fait de cette vente s'était présenté et avait été établi, comme il l'a été devant cette Cour, au temps où la Cour supérieure ou la Cour d'appel étaient saisies de cette cause, que ces Cours n'auraient pu adjuger que sur la question de frais. Le fait de cette vente fait disparaître la raison de la demande de *mandamus* et la demande de *mandamus* elle-même. Dans le cas qui nous occupe, la question ne se limite pas à savoir si cette Cour doit adopter la ligne de conduite suivie dans les cas où il n'y a qu'une question de frais à déterminer, mais comprend également celle de savoir si la Cour a le pouvoir de rendre un jugement autre que la Cour d'appel, placée dans les mêmes circonstances, aurait pu rendre.

La situation ici est différente de celle qui se présentait dans la cause de *Switzman v. Elbling and Attorney General of Quebec, supra,* en ce que dans cette dernière, la contestation engagée par l'intervention du Procureur Général sur la validité de la loi attaquée, demeurait sujette à détermination par jugement final.

* * *

Les deux autres questions posées par cette Cour portent sur la validité du règlement et, suivant l'ordre dans lequel elles sont posées, il y sera ci-après référé comme première et deuxième question. Il convient de noter immédiatement que le règlement attaqué vise quelque soixante-dix cas où des permis sont requis, et que, suivant la preuve au dossier, il y a environ soixante-quinze mille demandes de permis faites annuellement à la cité de Montréal.

Ces deux questions sont libellées comme suit:

Does the portion of By-Law 1862 complained of amount to a delegation of legislative authority vested in the City Council to the Director of the Police Department?

If the portion of By-Law 1862 complained of amounts to a delegation of the legislative authority vested in the City Council to the Director of the Police Department, is the by-law *ultra vires* as infringing the principle stated in *Biggar's Municipal Manual,* pp. 238-239; *Meredith*

1958

VIC RESTAURANT INC. v. CITY OF MONTREAL

Fauteux J.

and Wilkinson's Canadian Municipal Manual, at p. 265, and *Robson and Hugg's Municipal Manual,* at p. 347. Argument is requested as to the application of the following cases:—

Re Kiely (1887) 13 O.R. 451, *Reg. v. Webster* (1888) 16 O.R. 187, *Merritt v. City of Toronto* (1895) 22 A.R. 215, *Re Elliott* (1896) 11 M.R. 358, *Taylor v. City of Winnipeg,* 11 M.R. 420, *Hall v. City of Moose Jaw* (1910) 12 W.L.R. 693, *Rex v. Sparks* 18 B.C.R. 116, *Bridge v. The Queen* 1953 1 S.C.R. 8.

La deuxième question ne présente aucun problème. Personne, en effet, n'a songé à contester que si le conseil de la cité a, par le règlement en question, délégué à qui que ce soit une autorité législative dont seul il était nanti par la Législature, le règlement est *ultra vires* du conseil.

De plus, et en toute déférence, j'ajouterai immédiatement que les décisions mentionnées, en fin de cette question, bien que s'appuyant sur des principes généralement applicables en la matière, ne peuvent, à mon avis, avoir sur la première question posée par la Cour, aucun caractère décisif; car, ainsi qu'il apparaîtra ci-après, les dispositions de la charte de la cité de Montréal et celles de l'art. 2(B) du règlement de la cité sont toutes deux fondamentalement différentes des dispositions gouvernant l'autorité législative des municipalités concernées dans ces décisions et des règlements qu'elles ont adoptés.

Aussi bien, la seule question qui doit nous occuper, est-elle de savoir si le conseil de la cité a délégué son pouvoir législatif en édictant cet art. 2(B) du règlement 1862, ou, pour être plus précis, si, aux termes de cet article, le conseil de la cité a délégué aux directeurs des services municipaux l'autorité de faire la loi sur les conditions auxquelles un permis peut être obtenu,—ce qui impliquerait une délégation de la discrétion donnée au conseil par la Législature—ou si, au contraire, aux termes de cet article, le conseil de la cité a lui-même fait la loi sur la question, *i.e.,* indiqué ces conditions et conféré aux directeurs de services une autorité et une discrétion relatives à l'exécution de cette loi dans chaque demande de permis. Ainsi qu'il est opportunément précisé dans McQuillin, Municipal Corporations, 3rd ed., vol. 2, no. 10.40:

> There is a distinction between the delegation of power to make a law, which involves a discretion as to what the law shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done legally, but there is no objection to the latter.

En somme, la discrétion conférée pour faire un règlement ne peut être confondue avec la discrétion que ce règlement accorde aux fins de son exécution.

Il faut donc considérer l'autorité législative, donnée par la Législature de Québec à la cité de Montréal, en tenant compte de toute règle spéciale d'interprétation établie dans la charte par la Législature, et examiner ensuite l'art. 2(B) du règlement, en l'interprétant, non pas isolément, mais à la lumière des autres ordonnances municipales qu'il incorpore par référence expresse, afin de lui donner son sens, son esprit et sa fin véritables.

La charte de la cité.—L'art. 299 de la charte de la cité de Montréal, 62 Vict., c. 58, donne au conseil de la cité la juridiction la plus étendue pour faire des règlements "concernant la paix, l'ordre, le bon gouvernement et le bien-être général de la cité de Montréal et toutes les matières qui intéressent et affectent ou qui pourront intéresser et affecter la cité de Montréal comme cité et comme corporation, pourvu toutefois que ces règlements ne soient pas incompatibles avec les lois de cette province ou du Canada ni contraires à quelque disposition spéciale de cette charte".

L'article 300, section 22, de la charte décrète:

300. Et, sans limiter les pouvoirs et l'autorité conférés au conseil par l'article précédent, le conseil de la cité, pour les fins et pour les objets compris dans l'article précédent ainsi que pour les matières énumérées dans le présent article, a autorité:

* * *

22. Pour prescrire moyennant quel montant, à quelles conditions et de quelle manière sont octroyés les permis non incompatibles avec la loi et sujets aux dispositions de la présente charte, pourvu qu'aucun permis ne soit octroyé pour plus qu'une année;

L'article 300(*c*) décrète:

300*c*. Afin de donner plein effet aux articles 299 et 300, *de les étendre et de les compléter de façon à assurer la complète autonomie de la cité et à éviter toute interprétation de ces articles ou de leurs sous-sections, qui pourrait être considérée comme une restriction de ses pouvoirs,* la cité est autorisée à faire, abroger ou amender et mettre à exécution tous les règlements nécessaires concernant la bonne administration de ses affaires, la paix, l'ordre, la sécurité *ainsi que toutes les matières pouvant intéresser ou affecter de quelque manière que ce soit l'intérêt public et le bien-être des citoyens;* pourvu toutefois que ces règlements ne soient pas incompatibles avec les lois du Canada ou de cette province, ni contraires à quelque disposition spéciale de cette charte.

1958

VIC RESTAURANT INC. v. CITY OF MONTREAL

Fauteux J.

Les dispositions de cet article, sur lesquelles s'appuie particulièrement le jugement de la Cour d'Appel, dérogent manifestement de la rigueur du principe généralement applicable et auquel Sir Mathias Tellier, alors juge en chef de la province de Québec, référait dans *Phaneuf v. Corporation du Village de St-Hugues*[1], dans les termes suivants:

> En matière de législation, les corporations municipales n'ont de pouvoirs que ceux qui leur ont été formellement délégués par la Législature; et ces pouvoirs, elles ne peuvent ni les étendre ni les excéder.

Dans aucune des décisions, mentionnées en fin de la deuxième question soumise par cette Cour, appert-il que les municipalités dont les règlements furent attaqués aient reçu un semblable pouvoir de la Législature. C'est là une particularité distinguant fondamentalement le pouvoir législatif de la cité de Montréal de celui de ces municipalités. La Législature de Québec ne pouvait en termes plus clairs manifester l'intention d'assurer l'autonomie complète de la cité et de prohiber toute interprétation restrictive du pouvoir législatif conféré.

Le règlement.—L'article 2(B) du règlement 1862 se lit comme suit:

> Art. 2(B) Toute personne désirant un permis en vertu du présent règlement doit faire sa demande au directeur des finances sur la formule requise. Avant l'émission d'un permis, le directeur des finances est requis d'obtenir l'approbation écrite de chacun des directeurs des services concernés. Si cette approbation écrite n'est pas donnée par tous les directeurs concernés, ledit directeur des finances informera le demandeur, par écrit, que le permis ne sera pas émis.

A la suite de l'art. 2(M), apparaît un groupe de sections numérotées de 1 à 70. Chacune d'elles mentionne soit l'exercice d'une activité, soit l'usage ou la garde d'une chose ou d'un animal, où un permis est exigé, et indique le ou les services concernés en l'espèce.

Les services dont il est question dans ces sections sont tous des services municipaux, établis sous l'autorité de la charte de la cité, soit les services de l'urbanisme, des incendies, de police, de santé ou de la division des marchés.

Ce qu'il faut entendre par les expressions "services concernés" ou "directeurs concernés", mentionnées en l'article 2(B), est très clair. Tel que généralement défini, le mot "concerné" et le mot "concerned", apparaissant respectivement dans la version française et dans la version anglaise,

[1] (1936), 61 Que. K.B. 83 at 90.

signifient "intéressé", "affecté", "interested", "affected". C'est là le sens que la Cour d'Appel d'Ontario a donné à ce mot dans *Nichol School Trustees v. Maitland*[1]. Que, dans la réglementation qui nous occupe, les expressions "services concernés" ou "directeurs concernés" signifient "services et directeurs intéressés et affectés", résulte clairement de cette relation qui, en raison des divers hasards, risques ou dangers que peut, suivant l'expérience, comporter, dans la métropole, l'exercice d'une activité déterminée, et en raison du service particulier établi pour y parer, apparaît généralement dans ces sections, entre la nature de l'activité assujettie à un permis et le service particulier qui est déclaré concerné par la demande de ce permis. C'est ainsi que pour le commerce en gros ou en détail de bois, charbon ou huile de chauffage, le conseil prescrit que les services concernés sont ceux de l'urbanisme, d'incendie et de police; et que pour l'exercice des diverses activités où entrent des produits alimentaires, c'est le service de la santé à qui l'autorité et le devoir d'enquêter sur la demande de permis sont donnés et imposés, respectivement.

Il faut attribuer un sens et donner un effet à cette sélection et à cette raison sur laquelle elle se fonde. L'intérêt qu'un service, déclaré intéressé ou affecté par une demande de permis, peut avoir en celle-ci, ne peut être autre que celui pour la promotion duquel ce service est institué et maintenu en opération sous l'autorité de la charte et des règlements où sont définies ses responsabilités propres.

Saisi d'une demande de permis, où le service des incendies et celui de la santé sont déclarés concernés, le directeur du service des incendies comprendra sûrement que, pour donner un sens et un effet à cette réglementation, c'est au regard des responsabilités propres à son service, et non à celles qui sont propres au service de la santé, qu'il doit considérer la demande aux fins de l'approbation recherchée de lui-même.

Le règlement donne donc à chaque directeur de service une direction précise quant aux considérations qui doivent le guider dans l'exercice de l'autorité conférée et l'accomplissement du devoir imposé par ce règlement, considérations qui ne sont autres que celles qui président à

[1] (1899), 26 O.A.R. 506.

1958

VIC RESTAURANT INC. v. CITY OF MONTREAL

Fauteux J.

l'institution, au maintien et à l'effective opération du service. En somme, cette direction, donnée par le réglement au directeur du service concerné, est de ne pas approuver la demande de permis si l'approuver serait promouvoir la réalisation de ces hasards, risques ou dangers que le service qu'il dirige a précisément pour mission de prévenir ou combattre. C'est là une condition que le conseil de la cité avait, en vertu des pouvoirs à lui donnés par la Législature, l'autorité d'imposer pour l'obtention d'un permis.

Aussi bien me paraît-il impossible d'admettre qu'en vertu de cette réglementation,—fondamentalement différente, dans sa structure et ses termes, des réglementations considérées dans les causes citées en fin de la deuxième question posée par la Cour,—il soit loisible à un directeur de service de décider arbitrairement de la demande d'un permis. Ce directeur est lié par la directive du conseil et, s'il s'en écarte, il n'exerce plus ni la discrétion ni la juridiction qui lui ont été conférées, et la décision qu'il prétend rendre reste assujettie au pouvoir de contrôle des tribunaux, sinon au pouvoir de contrôle du conseil de la cité sur ses propres officiers.

Le conseil de la cité a non seulement le droit d'émettre des licences, mais il a aussi celui de prélever des argents par l'imposition de taxes; et rien ne s'oppose à ce que ces deux droits soient exercés simultanément dans un même règlement. De fait, le règlement mentionne certains cas d'exercice d'activités, usage ou garde d'animaux ou d'articles, n'offrant aucun de ces risques, hasards ou dangers. Dans ces cas particuliers, il est bien évident que si on applique le règlement tel qu'ici interprété, la demande de permis, vu l'absence de ces risques, hasards ou dangers, devra nécessairement être approuvée. Aussi bien, et en tout respect, je ne vois pas que la mention au règlement de ces cas particuliers puisse justifier le rejet de cette interprétation dans tous les autres cas où—comme dans celui qui nous occupe—ces risques, hasards ou dangers sont présents et où c'est au directeur du service institué pour les conjurer ou les combattre, que doit être soumise la demande d'approbation.

A la vérité, l'appelante a admis la validité des dispositions de l'article 2(B) et des sections 8 et 20, en ce qu'elles exigent l'approbation des directeurs de tous les services y mentionnés, sauf en ce qui concerne celle du directeur du service de la police. Ce service, soumet-elle,—et c'est là, sur la question de délégation, le seul grief invoqué par elle devant toutes les Cours,—n'est l'objet d'aucun contrôle par règlement, contrairement à ce qui est le cas pour les autres services; le conseil de la cité aurait ainsi abandonné à l'arbitraire du directeur du service de la police la détermination des conditions d'obtention de permis.

Rien dans l'article 2(B) n'autorise d'en varier l'interprétation suivant qu'il s'agisse du service de la police ou d'un autre service municipal.

Comme les autres services, celui de la police est établi sous l'autorité de la charte. La section 2 du règlement no 247, règlement qui établit ce service, prescrit en partie ce qui suit, en ce qui concerne le directeur de ce service:

> Il sera de son devoir de faire maintenir la paix publique, d'assurer la protection de la propriété et de voir à ce que les lois et ordonnances soient observées et mises en vigueur. Et chaque fois que quelque infraction à une de ces lois ou ordonnances viendra ou sera portée à sa connaissance, il en fera faire une plainte régulière et verra à ce que les témoignages nécessaires soient produits pour établir la culpabilité des contrevenants ou inculpés.

L'exécution de ce devoir de maintenir la paix publique et de protéger la propriété commence, évidemment, avant que ne soient actuellement violés la paix publique et le droit de propriété. Ce devoir spécifique a donc, en particulier, autant que celui qui est imposé au directeur du service des incendies et à celui du service de santé, un caractère préventif. Et, comme c'est le cas pour les directeurs des autres services, le directeur du service de la police est, en ce qui regarde l'examen et la décision d'une demande de permis, soumis à la même directive quant aux considérations dont il doit tenir compte dans l'exercice de l'autorité et du devoir qui lui sont assignés par le règlement.

Aussi bien, la prétention que le règlement ferait, quant à lui, une exception, et lui permettrait de disposer arbitrairement et à sa convenance des demandes de permis qui lui sont référées par le règlement lui-même, me paraît intenable. Dans l'exercice de son pouvoir discrétionnaire,

1958

VIC RESTAURANT INC. v. CITY OF MONTREAL

Fauteux J.

il se peut, dans son cas comme dans celui des autres directeurs de services, qu'il abuse de son pouvoir; mais cet abus ne va pas à la validité de l'établissement de ce pouvoir.

Pour terminer, sur ce point, je dois ajouter que la décision rendue par cette Cour dans *Bridge v. The Queen*[1] n'est, à mon avis, d'aucune assistance à la solution de la question qui nous occupe. Dans cette cause, le conseil de la cité de Hamilton, assumant agir sous l'autorité des arts. 82(3) et 82(*a*) d'une loi intitulée *The Factory, Shop and Office Building Act*, R.S.O. 1937, c. 194, adopta un règlement aux termes duquel il fut particulièrement décrété que le greffier de la cité devait omettre de la liste des ayants-droit de certains permis, ceux qui, "*according to evidence satisfactory to the city clerk*", avaient omis de tenir leurs établissements ouverts, tel qu'autorisé. Considérant les arts. 82(3) et 82(*a*) de la loi précitée, cette Cour a conclu à l'invalidité et M. le Juge Cartwright, parlant pour la majorité, s'en est exprimé comme suit:

> It is within the powers of the Council to prescribe a state of facts the existence of which shall render an occupier ineligible to receive a permit for a stated time; but express words in the enabling Statute would be necessary to give the Council power to confer on an individual the right to decide, on such evidence as he might find sufficient, whether or not the prescribed state of facts exists and there are no such words.

Si, pour donner à l'art. 2(B) du règlement de la cité, comme ci-dessus indiqué, son sens, son esprit et sa fin véritables, on doit adopter l'interprétation précitée, il s'ensuit que le conseil de la cité de Montréal a effectivement indiqué la situation dans laquelle un directeur de service ne doit pas donner son approbation à une demande de permis. Le conseil confère à ce dernier le droit de vérifier, dans chaque cas, si cette situation existe et la décision a prendre doit reposer "on such evidence as is sufficient" et non pas "on such evidence as he might find sufficient." De toutes façons, les dispositions des arts. 82(3) et 82(*c*) de *The Factory, Shop and Office Building Act, supra*, ne donnent, contrairement à ce qui est le cas à l'art. 300(*c*) de la charte de la cité de Montréal, aucune autorité aux cités, villes et villages ayant droit de se prévaloir de cette loi, d'étendre et de compléter l'autorité législative conférée et l'autorité de faire les règlements nécessaires pour assurer

[1] [1953] 1 S.C.R. 8, 104 C.C.C. 170, 1 D.L.R. 305

la bonne administration de leurs affaires. Aussi bien, le *ratio decidendi* dans *Bridge v. The Queen, supra,* ne saurait trouver d'application en la présente cause. Je ne crois pas qu'il y ait lieu de s'attarder à démontrer que, pour assurer la bonne administration de ses affaires et pour rendre possible l'application de ce règlement relatif à l'émission des permis, et disposer annuellement de 75,000 demandes de permis, il était nécessaire pour le conseil de la cité de conférer aux directeurs des services concernés l'autorité pour en disposer conformément à la directive donnée au règlement.

L'appelante a prétendu de plus que la section 20 du règlement 1862 subordonne l'exercice du droit lui résultant du permis de la Commission des Liqueurs, à l'approbation du directeur du service de la police et que pour autant la section est *ultra vires* du conseil de la cité vu que seule, suivant la *Loi des Liqueurs Alcooliques de Québec,* S.R.Q. 1941, c. 255, la Commission des Liqueurs de Québec a le droit d'accorder et d'annuler ce permis et d'en régir les conditions d'exploitation. L'appelante ne conteste pas, cependant, le pouvoir du conseil de la cité de réglementer et contrôler, au point de vue de l'urbanisme, de la santé et de la protection contre l'incendie, comme il l'a fait en la section 20, les restaurants bénéficiant d'un permis de la Commission des Liqueurs. Rien ne paraît justifier l'adoption d'une position différente en ce qui concerne le pouvoir du conseil de la cité de réglementer ces restaurants, au point de vue de la paix, l'ordre public, ou autres autorisés par la charte. La charte de la cité de Montréal et la *Loi des Liqueurs Alcooliques de Québec* ont été édictées par la même Législature. Il serait étonnant que la *Loi des Liqueurs Alcooliques de Québec* ait l'effet de soustraire le détenteur du permis qu'elle autorise, à la réglementation que la Législature autorise les municipalités d'adopter.

Si l'appelante avait raison, il s'ensuivrait que la Commission des Liqueurs pourrait imposer l'établissement de magasins de liqueurs alcooliques dans les quartiers résidentiels de la cité.

La proposition que le refus d'approbation serait arbitraire, partial et injuste a été rejetée par les deux Cours inférieures et le mal fondé de ce rejet n'a pas été démontré.

1958

VIC RESTAURANT INC. v. CITY OF MONTREAL

Fauteux J.

L'appelante a également invoqué le fait que ce n'est pas le directeur mais l'assistant-directeur du service de la police qui a considéré la demande des permis sollicités. Le deuxième paragraphe de l'art. 1 du règlement 1862 pourvoit spécifiquement qu'en ce qui a trait à l'approbation préalable d'un directeur de service pour l'émission d'un permis, l'autorité donnée au directeur du service s'étend à toute personne dûment autorisée à le remplacer ou à agir en son nom. La preuve démontre que le directeur Leggett avait autorisé l'assistant-directeur Plante à agir en son nom.

Au mérite, étant d'avis, comme le Juge de première instance et les Juges de la Cour d'Appel, que la requête en *mandamus* est mal fondée, je renverrais l'appel avec dépens.

Quant à la motion faite par l'appelante pour amender les conclusions originaires de sa requête en *mandamus,* et à celle de Pal's Café Inc., pour obtenir la permission d'intervenir, rien n'autorisant de les accorder, je les rejetterais avec dépens.

RAND J:—For the reasons given by my brothers Locke and Cartwright I would allow the appeal and dispose of the matter as proposed by them.

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

LOCKE J.:—The charter of the City of Montreal, certain of the terms of which are to be considered in determining this appeal, is c. 58 of the Statutes of Quebec, 1899, as amended by subsequent legislation.

By s. 1 the word "council", where it appears in the statute, means the council of the City, and by the opening clause of s. 299 it is provided that it shall be lawful for such council:

> to enact, repeal or amend, and enforce by-laws for the peace, order, good government, and general welfare of the city of Montreal, and for all matters and things whatsoever that concern and affect, or that may hereafter concern and affect the city of Montreal as a city and body politic and corporate, provided always that such by-laws be not repugnant to the laws of this Province or of Canada, nor contrary to any special provisions of this charter.

By the same section it is declared that the authority and jurisdiction of the council extends, *inter alia,* to "licences for trading and peddling."

Subsection 22 of s. 300 provides that, for the purposes and objects included in s. 299, the city council shall have authority, *inter alia*:

To fix the amount, terms and manner of issuing licences, not inconsistent with the law and subject to the provisions of this charter, provided that no licence shall be issued for a longer time than one year.

Subsection 79 of s. 300 declares the power of the council:

To license, regulate or prohibit musical saloons or establishments where intoxicating liquors are sold and wherein instrumental and vocal music are used as a means of attracting customers.

Section 300*c*. reads:

In order to give full effect to articles 299 and 300 and to extend and complete the same, so as to secure full autonomy for the city and to avoid any interpretation of such articles or their paragraphs which might be considered as a restriction of its powers, the city is authorized to adopt, repeal or amend and carry out all necessary by-laws concerning the proper administration of its affairs, peace, order and safety as well as all matters which may concern or affect public interest and the welfare of the citizens; provided always that such by-laws be not inconsistent with the laws of Canada or of this Province, nor contrary to any special provisions of this charter.

Under the powers thus vested in the council, by-law 1862 was enacted, providing, *inter alia,* that no person shall operate any industry, business or establishment or carry on any trade within the limits of the city without having previously applied for and obtained from the Director of Finance of the City a permit to do so and paying a stipulated amount for such permit. By subs. (*b*) of art. 2 of the by-law, it is provided that every applicant for a new permit must make an application to the Director of Finance and that, prior to issuing such permit, the director is required to secure the written approval from each of the directors of the department concerned, and that:

If such written approval is not given by all the directors concerned the said Director of Finance shall inform the applicant in writing that the permit will not be issued.

For the operation of a restaurant and of premises where alcoholic liquors are sold by a person holding a permit from the Quebec Liquor Commission, the approval is required from, amongst others, the Director of the Police Department.

1958

VIC RESTAURANT INC. v. CITY OF MONTREAL

Locke J.

The appellant company, at the time of the commencement of these proceedings, operated a restaurant on St. Catherine Street East in the city of Montreal. Vincent Cotroni, for the benefit of the appellant company, obtained a permit to sell alcoholic liquors on the premises in question from the Quebec Liquor Commission under the provisions of the *Alcoholic Liquor Act*, R.S.Q. 1941, c. 255, for the licence years 1954-55 and 1955-56. The appellant obtained from the respondent a restaurant permit issued under the terms of s. 8-A of the above mentioned by-law and a permit to sell alcoholic liquors under s. 20 of the by-law for the licence year 1954-55. By its terms that licence would expire on May 1, 1955.

On April 18, 1955, the appellant applied for a renewal of such permits for a further period of one year. These applications were made on forms apparently prescribed by the respondent and upon each of the original applications there appears the following endorsement:

"23 Avr. 1955 refused. P. P. Plante. Police."

By letter dated June 7, 1955, the Director of Finance of the respondent wrote the appellant saying:

> The Director of Department has not given his written approval to the above mentioned application. In conformity with the procedure set forth in By-Law 1862 this permit will not be issued.

The blank before the word "Department" was not filled in but the department referred to was that of the police, as is made clear by the endorsement upon the application.

The proceedings were commenced by an application for a writ of *mandamus* directed against the City of Montreal, directing the City and its competent officers to issue the permits referred to in ss. 8 and 20 of the by-law on the grounds that those portions of the by-law making it a condition of the granting of the licences that the approval of the Director of Police be obtained are illegal and beyond the powers of the respondent, in that they constitute a delegation of the powers given to the respondent and constitute a restraint of trade and of free enterprise. The further declaration was asked to the effect that the refusal of the respondent to issue the permits was arbitrary and unjustified.

The defence asserted the power of the City to prescribe conditions upon which licences should issue, that it was the duty of the Director of Police and the police officers under him to maintain public order, and that the director, in performing the function prescribed by the by-law, was acting in a ministerial and quasi-judicial capacity and that, accordingly, no *mandamus* to the director would lie. It was denied that the provisions of the by-law referred to amounted to a delegation of power by the council and asserted that the applicant had been guilty, *inter alia*, of breaches of the closing laws and permitted prostitutes on the premises and continually violated the law.

At the trial, Leggett, the Director of Police Service, and Plante, the Assistant Director, gave evidence, the latter, of alleged breaches of the law in the above mentioned respects by the applicant, and the former to the effect that he considered these factors in refusing the approval of the application.

The matter came on for hearing before Prévost J. and the application was dismissed.

The present appellant appealed and that appeal was dismissed by the unanimous judgment of a Court[1] consisting of St. Jacques, Hyde and Owen JJ.

While the appellant sought a direction that the permits be issued, the Director of Finance, the person designated by the by-law as the official by which the same were to be issued, was not made a party to the proceedings. It was, no doubt, considered unnecessary to join the Director of the Police Department since it was the appellant's contention that the delegation of authority to that official was *ultra vires*. I mention these circumstances since they are to be considered in determining whether the proceedings taken by way of *mandamus* were appropriate if the appellant should be found to be entitled to the relief asked.

Unless the language above quoted from the first clause of s. 299 of the charte and that of subs. 22 of s. 300 distinguishes the present matter from many cases decided under various municipal Acts in other parts of Canada, the decision of the Court of Appeal in the present matter conflicts with the decisions in Ontario, Manitoba,

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

1958

VIC RESTAURANT INC. v. CITY OF MONTREAL

Locke J.

Saskatchewan and British Columbia and, in my opinion, with the judgment of this Court delivered by Cartwright J. in *Bridge v. The Queen*[1].

As to the first clause of s. 299 giving general power to the City council to enact by-laws for the peace, order, good government and general welfare of the City, this is in effect the so-called good government clause which appears in the municipal Acts of the other provinces above mentioned. A provision to the same effect has been part of all municipal Acts in Ontario since 1858 and for varying periods of time in Manitoba, Saskatchewan and British Columbia. If, as I think to be the case, the authority sought to be vested in the Director of Police by by-law 1862 amounts to a delegation by the council of the authority vested in it by the charter, the good government clause is no warrant for what is being attempted since the Act has granted specific authority in respect of the matter by the provisions of ss. 299 and 300 above referred to: *Merritt v. Toronto*[2], *per* MacLennan J.A.; *Taylor v. People's Loan and Savings Corporation*[3], *per* Middleton J.A.

It will be seen from an examination of the by-law that the Director of Finance, by whom both permits would be issued, is forbidden to do so without the written approval of the directors mentioned. It should be said that no question arises as to the requirement that approval of the City Planning and the Health Department was not obtained. The whole controversy relates to the failure to obtain the approval of the Director of Police. As to that official, while the council was authorized to fix the "terms and manner of issuing licences", the by-law contains no directions whatever to the Director of Police as to the manner in which the discretion given to him to approve or refuse to approve applications for licences was to be exercised. Thus, the director might refuse his approval upon any ground which he considered sufficient.

In Meredith and Wilkinson's Canadian Municipal Manual, at p. 265, it is said:

> The exercise of a discretionary power vested in a council cannot, in the absence of statutory authority, be delegated.

[1] [1953] 1 S.C.R. 8 at 13, 104 C.C.C. 170, 1 D.L.R. 305.
[2] (1895), 22 O.A.R. 205 at 215, 216.
[3] (1928), 63 O.L.R. 202 at 209. [1929] 1 D.L.R. 160.

A council may, however, delegate to an officer or functionary merely ministerial matters.

In Robson and Hugg's Municipal Manual, at p. 347, the following appears:

Discretion confided to council or to the Board of Commissioners of Police cannot be delegated to others, as for example, requiring an applicant for a licence to get the consent of certain persons. *Re Kiely* (1887) 13 O.R. 451; *Rex v. Webster* (1888) 16 O.R. 187.

In my opinion, these are accurate statements of the law.

In *Re Kiely*[1], the validity of a by-law purporting to have been passed under the provisions of the *Consolidated Municipal Act 1883* of Ontario (46 Vict., c. 18) as amended by s. 9 of 49 Vict., c. 37, was questioned. By that section it was provided that the Board of Commissioners of Police might regulate and license, *inter alia,* the owners of livery stables and that the council of any city, in which there was no Board of Commissioners of Police, might exercise by by-law all the powers conferred by the section. Despite the fact that the matter was thus committed to the Board of Commissioners and that there was such a board in the City of Toronto, the council of that City passed a by-law whereby it was declared that it should not be lawful for any person to establish or keep a livery stable until he had procured the consent in writing of the majority of the owners and lessees of real property situate within an area of 500 ft. of the proposed site for such stable. Wilson C.J., by whom the motion to quash was heard, while holding that the by-law was *ultra vires* the council, said that if this were not so it was objectionable:

because it requires, as a condition precedent to the granting of a licence, that the applicant shall procure the consent of a number of persons in the neighbourhood, thus constituting these persons the judges of the right he asks, and divesting the commissioners of the power which they are required personally to exercise.

In *Regina v. Webster*[2], Ferguson J. referred to and adopted this statement of the law by Wilson C.J. in *Kiely's* case.

In *Merritt v. City of Toronto, supra,* a by-law of the city made under the provisions of s. 286 of the *Municipal Act of 1892,* which granted to the council power to require

[1] (1887), 13 O.R. 451. [2] (1888), 16 O.R. 187.

1958

VIC RESTAURANT INC. v. CITY OF MONTREAL

Locke J.

any person exercising any trade or calling to obtain a licence, provided that no one might obtain a licence as an auctioneer unless his character should be first reported on and approved by the police.

The statute under which the by-law was passed did not vest in the council any power to require such approval as a condition precedent to the granting of a licence. Speaking generally on the powers of municipal corporations, Osler J.A. said in part (p. 207):

> Municipal corporations, in the exercise of the statutory powers conferred upon them to make by-laws, should be confined strictly within the limits of their authority, and all attempts on their part to exceed it should be firmly repelled by the Courts. *A fortiori* should this be so where their by-laws are directed against the common law right, and the liberty and freedom, of every subject to employ himself in any lawful trade or calling he pleases.
>
> The corporation has chosen to enact, first, that no one shall carry on the respectable business of an auctioneer without a license, and, second, that no one shall have a license to carry on such business unless his character shall be first reported on and approved by the police. The first is within their power; the latter as clearly is not.

The portion of the by-law requiring the approval of the police was considered to be *ultra vires*.

In *Re Elliott*[1], a by-law of the City of Winnipeg passed under the provisions of s. 599 of the *Municipal Act*, R.S.M. 1891, c. 100, as amended by s. 17 of c. 20 of the Statutes of 1894, was considered. By that section, the council of every municipality was empowered to pass by-laws for licensing, inspecting and regulating vendors of milk and dairies and providing that it should be a condition of any such licence that the licensee should submit to the inspection of his dairy by an officer to be appointed by the council. Purporting to act under this authority, the City of Winnipeg passed a by-law which authorized the inspection of dairies by the health officer or veterinary inspector and said:

> if satisfactory to him in all respects he shall direct a licence to issue to such cow keeper, dairyman or purveyor of milk.

upon payment of a specified fee. As to this proviso, Bain J. said (p. 363):

> The inspection of dairies, etc., is purely ministerial work, and may, of course, be performed by the officials employed by the Council for that purpose. But this section hands over to the health officer a duty

[1] (1896), 11 Man. R. 358.

that is more than ministerial. It authorizes him to direct the issue of a licence without any report of the result of the inspection, or any further reference, to the Council; and an official is thus enabled arbitrarily to decide whether an applicant is to receive a license or not. This, it seems, to me, is a delegation of authority that cannot be justified; for the Council has really delegated to an official the judgment and discretion that the Legislature intended and expected that it would exercise itself.

referring, *inter alia,* to *Webster's* case above referred to.

In *Re Taylor and City of Winnipeg*[1], where the same by-law was considered, Taylor C.J. adopted the rule of construction as to the powers of municipal corporations as stated by Osler J.A. in *Merritt's* case but did not refer to the question of delegation though, as indicated by the report, that matter was argued.

In *Hall v. City of Moose Jaw*[2], the by-law considered was passed by the city under s. 95 of the Municipal Ordinance of 1903 which, by s. 95(34) empowered the council of every municipality to pass by-laws licensing, *inter alia,* hackmen. In purported exercise of this power, the by-law provided that:

no license shall be granted to any driver unless the same has been previously recommended by the chief of police for the city, he certifying to the good conduct and ability of the applicant to fill the position of hack driver.

This proviso, which was added by way of amendment to a by-law passed in 1904, was passed in pursuance of the powers thought to have been vested in the city council by ss. 184 and 187 of the *Cities Act of 1908* (c. 16). Section 184 empowered the council to make regulations and by-laws for the peace, order, good government and welfare of the city and for the issue of licences and payment of licence fees in respect of any business.

Section 187 read:

The power to license shall include power to fix the fees to be paid for licenses, to specify the qualifications of the persons to whom and the conditions to regulate the manner in which any licensed business shall be carried on, to specify the fees or prices to be charged by the licenses, to impose penalties upon unlicensed persons or for breach of the conditions upon which any license has been issued or of any regulations made in relation thereto and generally to provide for the protection of licensees; and such power shall within the city extend to persons who carry on business within and partly without the city limits.

[1] (1896), 11 Man. R. 420.
[2] (1910), 3 S.L.R. 22, 12 W.L.R. 693.

1958

VIC RESTAURANT INC. v. CITY OF MONTREAL

Locke J.

Hall applied for a hack licence, tendering the fee prescribed by the by-law, but the chief of police reported against the application and it was refused on this ground. Johnstone J., by whom the action was tried, said in part (p. 697):

> Section 17 of by-law 64 and sec. 37 of by-law 357 impose upon the inspector or chief of police, as the case may be, a judicial duty. Upon the report of either of these officers depends the issue of a license. No licenses can be granted unless and until the inspector in one case, and the chief of police in the other, has reported favourably. These officials are empowered arbitrarily to decide whether an applicant is to receive his license or not. This is clearly a delegation of authority that cannot be justified. The council has clearly delegated to these officials named the judgment and discretion that the legislature intended and expected the council should exercise.

and referred, *inter alia,* to the cases of *Webster, Elliott* and *Merritt.*

In *Rex v. Sparks*[1], an application for a writ of prohibition to issue to the police magistrate at Victoria to prohibit the enforcement of a conviction made on an information laid against Sparks for acting as a hack driver without a licence was considered by Murphy J. By s. 3 of an Act relating to the City of Victoria (c. 46, 7 Edw. VII), the council of the city was empowered to make by-laws licensing and regulating hacks, cabs and every vehicle plying for hire and the chauffeurs and drivers thereof. The by-law passed by the city provided that all such drivers must have licences obtained from the chief of police and Sparks' application was refused on the asserted ground that he was not of good character. Murphy J. said in part (p. 118):

> One would hesitate to hold that in common understanding the regulating of the business of hack driving requires that absolute discretion be conferred upon the chief of police to prohibit anyone whom he considered not to be of good moral character from engaging therein; and if this view be correct, I think the sections of the by-law in question invalid under the principles laid down in *Merritt v. Toronto* (1895) 22 A.R. 205. The business of hack driving is not *per se* an unlawful calling. Any individual has a common law right to engage therein, and such right is in no way dependent on his previous character. If the Legislature intended to confer the power here contended for, it would (sic) easily have done so by express words. Where it has intended to confer power to prevent or prohibit the doing of certain acts, it has used apt and clear language, as appears by the words employed in subsection 2 of section 3 of the Act under discussion, being the subsection immediately preceding the one herein relied upon. Further, in said subsection 3, certain conditions are set out which may be imposed as requisites for obtaining a licence. Good moral character, as determined by the absolute discretion of the chief of police, is not amongst such conditions.

[1] (1913), 18 B.C.R. 116, 10 D.L.R. 616, 3 W.W.R. 1126.

In *Bridge v. The Queen*[1], a by-law of the City of Hamilton passed under the provisions of ss. 82 (3) and 82(*a*) of the *Factory, Shop and Office Building Act*, R.S.O. 1937, c. 194 as amended, was attacked. The by-law in question provided that all gasoline stations should be closed at specified hours but provided that the City Clerk, on the recommendation of the Property and License Committee, might issue permits to remain open during times specified in the permit. A term of the by-law said that the occupiers of such shops should be entitled to extension permits "except those occupiers who, according to evidence satisfactory to the City Clerk, have failed to keep their gasoline shops open during the whole of the time or times so authorized by such permits." A further section of the by-law said that the occupiers of gasoline shops should be entitled to emergency service permits, except those who, according to evidence satisfactory to the City Clerk, have failed to keep their shops open for emergency service only during the whole of the time or times authorized by such permits, etc. As to these provisions, our brother Cartwright, who wrote the opinion of the majority of the Court, said in part (p. 13):

> It is next submitted that the provisions in sections 7(2) and 8(2) of the by-law that the clerk shall omit from the list of those entitled to permits such occupiers as have "according to evidence satisfactory to the City Clerk" failed to keep their shops open as authorized, are invalid. With this submission I agree. It is within the powers of the Council to prescribe a state of facts the existence of which shall render an occupier ineligible to receive a permit for a stated time; but express words in the enabling Statute would be necessary to give the Council power to confer on an individual the right to decide, on such evidence as he might find sufficient, whether or not the prescribed state of facts exists and there are no such words.

While our brother Rand dissented, he agreed on this point that a delegation such as this could not be supported.

From the fact that no reference was made to any of the cases decided in other provinces in the reasons for judgment delivered by the trial judge and by the judges of the Court of Appeal[1], I assume that they were not brought to their attention.

[1] [1953] 1 S.C.R. 8, 104 C.C.C. 170, 1 D.L.R. 305.

1958

VIC RESTAURANT INC. v. CITY OF MONTREAL

Locke J.

It is not suggested that the rules of law for the interpretation of statutes such as those incorporating cities and municipalities differ in the Province of Quebec from those which apply in the other provinces of Canada. The decision of the present matter is, therefore, of general importance throughout this country.

The language of the charter upon which the respondent principally relies is that contained in subs. (22) of s. 300 under which the city has the power:

to fix the amount, terms and manner of issuing licences.

While reference has been made to subs. 79 declaring the power to prohibit establishments where intoxicating liquors are sold and wherein instrumental and vocal music are used as a means of attracting customers, it was not in the exercise of these powers that the licences in question were refused but, as I have stated, simply by reason of the refusal of approval by the Director of Police.

The manner in which the licences are to be issued has been fixed by the by-law by vesting the ministerial act of issuing them in the Director of Finance. The power to fix the terms upon which they are to be issued has been vested in the city council. For that body to say that before the Director of Finance may issue a licence, the Director of Police, in his discretion, may prevent its issue by refusing approval is not to fix the terms, but is rather an attempt to vest in the Chief of Police power to prescribe the terms, or some of the terms, upon which the right to a licence depends. In this case, granted the necessary power had been given to the council by the charter, the by-law might, as pointed out in the judgment of this Court in *Bridge's* case, have prescribed a state of facts the existence of which should render a person ineligible to receive a permit, as by providing that none such shall be granted to persons who were guilty of repeated infractions of the city by-laws as to hours, or of the provisions of the *Quebec Liquor Act* or who permitted prostitutes to congregate on their premises or who were otherwise persons of ill repute. Nothing of this nature appears in this by-law but, as in the cases to which I have referred in the other provinces,

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

it has been left without direction to the Chief of Police to decide whether the applicant should or should not be permitted to carry on a lawful calling.

As pointed out by Murphy J. in *Rex v. Sparks, supra,* any individual has a common law right to engage in any lawful calling, subject to compliance with the laws of the jurisdiction in which it is carried on and such right is in no way dependent on his previous character.

It is pointed out in the judgment of the Court of Queen's Bench in *Stiffel v. City Montreal*[1], that the function of the police official under a by-law such as this is not merely ministerial but quasi-judicial. This was said as a ground for holding that *mandamus* would not lie against such an official. But that is not the point in the present case where the appellant contends that the portion of the by-law purporting to vest this quasi-judicial function in the Chief of Police is *ultra vires.*

Evidence was given at length at the trial as to the reasons which impelled the director and the assistant director of police to refuse the licences in the present matter. This was undoubtedly relevant to the issue that their conduct in refusing their approval was arbitrary and unjustified, but it was quite irrelevant to the legal question as to whether the portions of the by-law relied upon were *ultra vires.*

The powers conferred upon the council by subs. (22) of s. 300 cannot be distinguished from those conferred the council of the City of Moose Jaw by s. 187 of the *Cities Act* in *Hall's* case. They are no more extensive in my opinion than the powers given to the various councils by the Ontario, Manitoba and British Columbia statutes mentioned in the cases to which I have referred. The point in those cases, as in this, is that the power was not exercised by the council but delegated to some one else.

It is suggested that some support is to be gained for what is, in my opinion, clearly an attempted delegation of power from the fact that by-law no. 247 defines the duties of the Superintendent of Police and the members of the city police force. These include, *inter alia,* the duty to cause the public peace to be preserved and to see that

[1] [1945] Que. K.B. 258.

1958

VIC RESTAURANT INC. v. CITY OF MONTREAL

Locke J.

all the laws and ordinances are enforced, but these are duties imposed either by statute or under powers given by statute upon police officers in all of the provinces to which I have referred and I am unable, with great respect, to understand how it can be suggested that this assists the position of the respondent in the matter of the delegation of the council's power.

It is further suggested that some further powers are given to the council by s. 57 of the *Interpretation Act*, R.S.Q. 1941, c. 1, which reads:

> The authority to do a thing shall carry with it all the powers necessary for that purpose.

A like provision appears in subs. (b) of s. 28 of the *Interpretation Act of Ontario*, R.S.O. 1950, c. 184, which reads:

> where power is given to any person, officer or functionary to do or to enforce the doing of any act or thing, all such powers shall be understood to be also given as are necesary to enable the person, officer or functionary to do or enforce the doing of the act or thing.

The word "person" is defined to include corporation.

This is merely a restatement of a long established principle of the law which is described in Maxwell on Statutes, 10th ed., p. 361, in the following terms:

> Where an Act confers a jurisdiction, it impliedly also grants the power of doing all such acts, or employing such means, as are essentially necessary to its execution. *Cui jurisdictio data est, ea quoque concessa esse videntur, sine quibus jurisdictio explicari non potuit.*

This is an argument that does not appear to have been advanced in any of the cases to which I have referred in the other provinces where the question to be considered has arisen. It cannot, however, assist the position of the respondent since the question is what was the power vested in the council. Since, in my opinion, the power to delegate quasi-judicial functions in the matter of licences was not given to the council, the language of the article does not affect the matter. I may add that if, contrary to the opinion expressed by Murphy J. in *Sparks'* case, the council might without statutory authority provide by by-law that no person having a bad reputation could obtain a licence to carry on business in the city of Montreal, there is no difficulty whatever in amending the by-law to say so in unmistakable terms.

As a matter of interest, I would point out that in the jurisdiction in which *Sparks'* case was decided the charter of the City of Vancouver in the matter of trade licences vests power in the city council to pass by-laws:

for prohibiting the granting of such licence to any applicant who, in the opinion of the council, is not of good character or whose premises are not suitable for the business.

The Winnipeg charter (c. 87 S.M. 1956) by s. 652(*f*) provides that the power to license or to regulate includes the power:

to require as a condition precedent to the issue of a license such qualifications on the part of the applicant as to character, fitness, equipment, previous residence in the city or other matter as the council shall prescribe.

This appeal was argued before five members of this Court on March 15, 1957, and judgment was reserved. It was thereafter decided that since none of the cases above mentioned decided in the Courts of other provinces had been referred to in the argument or considered in the Courts below that the case should be re-argued before the full Court. The foregoing portion of my reasons was dictated after the hearing in March of 1957 and before it was decided that there should be a rehearing.

It was contended on behalf of the respondent during the first argument that to give to the Director of the Police Department the right to decide whether or not a permit should be issued did not amount to a delegation of the powers vested in the council and that question has been raised again in the second argument. For the reasons above stated I consider it must be rejected. I agree with what was said by Wilson C.J., Osler J.A., Bain J. and Johnstone J. in the cases I have mentioned.

It was not contended on behalf of the respondent that these cases decided in other provincial Courts were wrong in law. While it was attempted to distinguish them and the judgment of this Court in *Bridge v. The Queen,* the argument completely failed to do so in my opinion. The City of Montreal is a municipal corporation and the council in respect of the granting and withholding of licences to persons engaged in certain classes of business has the powers and only the powers vested in it by its statute of incorporation. That statute does not authorize or purport to

1958

VIC RESTAURANT INC. v. CITY OF MONTREAL

Locke J.

authorize the council to delegate the power to fix the terms upon which permits may be granted vested in it by ss. 299 and 300 to the Director of the Police Department or to anyone else. It is idle to suggest that such power is merely administrative. I agree with the statement of the law applicable to the construction of such statutes as it is stated by Osler J.A. in *Merritt's* case which I have above quoted. The by-law is therefore in this respect beyond the powers of the council.

As the sole ground upon which the permit of the appellant to operate its restaurant was refused was that the Director of the Police Department had refused his approval, the applicant was, as of the date of its application for a writ of *mandamus*, entitled to an order directing that a permit be issued for the year 1955.

The order of this Court directing the re-argument was made on October 1, 1957, and a further order made on November 15, 1957, required the parties to file new factums by February 1, 1958, and to be prepared to submit oral argument, including, *inter alia*, a discussion of the cases decided in the other provinces of Canada which are above referred to.

On February 17, 1958, the respondent moved before us for leave to adduce evidence by affidavit to show that on July 18, 1957, some four months after the matter had been argued before us, the appellant had sold the restaurant in question to a company named Pal's Restaurant Inc. and the latter company had taken possession and was carrying on a restaurant business on the premises and there selling liquor under a permit from the Quebec Liquor Commission.

On the same date the appellant moved for leave to amend the conclusions of its petition for a *mandamus* by asking that the judgment to be rendered should direct the City to issue permits for the restaurant for the years 1955 to 1958 inclusive on payment of the required fees. This application was supported by an affidavit showing that while the City had refused to issue licences for the years 1955, 1956 and 1957, the restaurant had been permitted to operate. Ten charges, however, had been laid in the Recorder's Court in Montreal against the applicant in respect of such operations, but these procedings had

been held in abeyance apparently pending the determination of this appeal. At the same time Pal's Cafe Inc. applied to this Court for leave to intervene in the appeal on the ground that it had succeeded to the interest of the appellant in respect of the operation of the restaurant and that it contended that the portion of the by-law above discussed was *ultra vires* the Council. Apparently the respondent had also refused a permit to the last-named company for the operation of the restaurant.

Leave was given to the respondent to adduce the further evidence above mentioned and the applications of the appellant and of the proposed intervenant were adjourned to be heard upon the further argument which was directed. The order for such argument directed that the parties be prepared to discuss the further question as to whether, in the circumstances disclosed, there was any matter remaining in dispute between the original parties to the litigation and as to whether the appeal should, on that account, be further considered.

It is necessary in dealing with this question to bear in mind that on the hearing of the application evidence was given for the respondent by the Director and the Assistant Director of the Police Department explaining the grounds upon which the permit for the year 1955 had been refused. It appears that the liquor licence for the premises was held in the name of Vincent Cotroni, a director of the appellant company, on its behalf, and according to the evidence of Plante, the Assistant Director of the Police Department, Cotroni had between the years 1928 and 1938 been convicted of various criminal offences and this fact was apparently one of the reasons which led to the refusal of the permit.

The rights of a petitioner for an order of *mandamus* are, as are the rights of the plaintiff in an action generally, to be tested as of the date of the commencement of the proceedings. Matters of defence arising, however, after proceedings are instituted, but before the answer or defence is entered may be pleaded and matters of defence arising thereafter may, with permission of the Court, be raised.

1958

VIC RESTAURANT INC. v. CITY OF MONTREAL

Locke J.

The sale of the restaurant had not taken place when this appeal was argued before us in March 1957. At that time it was not contended that the appeal should not be entertained on the ground that the year for which the permit was sought, *i.e.*, 1955, had expired. As to this it may be further said that the year had expired before the judgment of the Court of Queen's Bench was delivered.

It is my opinion that this objection to the disposition of this appeal on its merits should not be entertained. The appellant, in my opinion, has an interest in the subject-matter of this appeal other than as to the costs of the proceedings. I may add that I do not assent to the view that even if its only interest was as to costs this Court has not jurisdiction to hear the appeal or that it should not exercise it in certain circumstances. The question of law as to whether or not the portion of the by-law requiring the consent of the Director of the Police Department was within the powers of the City Council and as to whether the appellant was entitled in the circumstances to a permit for the year 1955 are questions upon which the appellant was entitled to have the opinion of the Courts.

The appellant company, it must be assumed, is one which is entitled to carry on the business of a restaurant keeper and vendor of liquors in the City of Montreal and the evidence for the respondent to which I have referred makes it evident that so long as Cotroni remains a director and officer of the appellant a restaurant licence would not be issued to it for operations in that city. In addition, while the appellant applied for permits for the years 1956 and 1957, these were refused and 10 prosecutions are pending in the Recorder's Court in Montreal against the appellant for operating without a licence in the years 1955, 1956 and 1957. These, as I have stated, have been held in abeyance pending the disposition of this appeal and if the appeal is dismissed convictions will inevitably follow.

The question is not one in my opinion which goes to the jurisdiction of the Court, rather is it a matter of discretion and one to be decided in each case upon the facts

disclosed. In *Archibald v. DeLisle*[1], Taschereau J., who delivered the judgment of the Court, referring to the cases of *Moir v. Huntingdon*[2] and *McKay v. The Township of Hinchinbroke*[3], said (p. 14):

> What we held in those cases is that where the state of facts upon which a litigation went through the lower courts has ceased to exist so that the party appealing has no actual interest whatsoever upon the appeal but an interest as to costs and where the judgment upon the appeal, whatever it may be, cannot be executed or have any effect between the parties except as to costs, this Court will not decide abstract propositions of law merely to determine the liability as to costs.

In *The King v. Clark*[4], an application for leave to appeal from a judgment of the Court of Appeal for Ontario was refused by this Court. The proceedings were in the nature of *quo warranto* for an order that the respondents show cause why they did unlawfully exercise or usurp the office, functions and liberties of a member of the Legislative Assembly of Ontario during and since the month of February 1943. Since the date of the judgment of the Court of Appeal, the Legislative Assembly had been dissolved. Duff C.J., in delivering the judgment of the Court refusing leave, said that since the Legislative Assembly had been dissolved a judgment in the appellant's favour could not be executed and "could have no direct and immediate practical effect as between the parties except as to costs" and said that it was one of those cases where the sub-stratum of the litigation had disappeared.

In the same year in the case of *Coca Cola Company v. Matthews*[5], the appeal was brought by leave of the Court of Appeal for Ontario on the appellant undertaking to pay to the respondent in any event the amount of the judgment and the costs of the trial, the appeal to the Court of Appeal and of the appeal to this Court. The judgment refusing to entertain the appeal was delivered by Rinfret C.J. The ground may be shortly stated as being that this Court will not decide abstract propositions of law even if to determine liability as to costs. The learned Chief Justice referred in his judgment to the decision of

[1] (1895), 25 S.C.R. 1, 15 C.L.T. 355.
[2] (1891), 19 S.C.R. 363.
[3] (1894), 24 S.C.R. 55.
[4] [1944] S.C.R. 69, 1 D.L.R. 495.
[5] [1944] S.C.R. 385, [1945] 1 D.L.R. 1.

1958

VIC RESTAURANT INC. v. CITY OF MONTREAL

Locke J.

the House of Lords in *Sun Life Assurance Company v. Jervis*[1], where it was a term of the leave granted by the Court of Appeal that the appellant should pay the costs as between solicitor and client in the House of Lords in any event and not to ask for a return of the moneys which had been paid. Viscount Simon L.C. said (p. 113) that in his opinion the Court should decline to hear the appeal on the ground that there was no issue to be decided between the parties and said further:

> I do not think that it would be a proper exercise of the authority which this Court possesses to hear appeals if it occupies time in this case in deciding an academic question which cannot affect the respondent in any way.

In *Regent Taxi & Transport Limited v. Congrégation des Petits Frères de Marie*[2], an appeal from this Court was, by leave, brought before the Judicial Committee. It was a term of the leave granted that the appellants should pay forthwith the damages and costs to the respondent in the Courts, the same in no event to be recoverable and to pay the respondent's costs of the appeal in any event and the damages and costs awarded below had all been paid. Notwithstanding this, the Judicial Committee considered the question whether the claim of the respondent was one to which the period of prescription provided by art. 2261 of the *Civil Code* applied and decided that it did and that the action should have been dismissed, reversing the judgment of this Court.

It does not appear that this decision was brought to the attention of the Court in the case of *The King v. Clark* or the *Coca Cola* case since it is not mentioned in either.

In the present matter it is my opinion that the appellant company was entitled as of right to a declaration that the by-law in the respect mentioned was beyond the powers of the city council and to an order directing that a permit be issued for the operation of the restaurant for the year 1955. While the restaurant has been sold by it, I am further of the opinion that in view of the 10 pending prosecutions for breaches of the by-law in operating it without a licence and further by reason of its right to operate another restaurant in the City of Montreal subject

[1] [1944] A.C. 111, 113 L.J. K.B. 174.
[2] [1932] A.C. 295, 2 D.L.R. 70, 53 Que. K.B. 157.

to the provisions of the portions of the by-law which are within the power of the council the appellant has an "actual interest" within the meaning of that expression as used in *Archibald v. Delisle* and that it cannot be said that the judgment will have no "direct and immediate practical effect" between the parties except as to costs as that expression was used by Sir Lyman Duff in *The King v. Clark.*

My opinion that the matter is one for the exercise of our discretion appears to me to be supported by the language used by the Lord Chancellor in *Sun life Assurance Company v. Jervis.* The question, as I have said, is one of general public interest to municipal institutions throughout Canada. The decisions in the cases of *Kiely* and *Merritt,* the first of which was made more than 80 years ago, have been followed in the three western provinces to which I have referred and adopted, as I have pointed out, in the recognized text books on municipal law. The decision in the present case conflicts with these judgments and, in my opinion, it is in the interest of the due administration of justice that this Court should now pronounce upon the matter. Even if the only issue were as to the costs of the proceedings, it would be my opinion that in this case we should exercise the jurisdiction which we undoubtedly have.

I would allow this appeal and set aside the judgment of the Court of Queen's Bench and of Prévost J. The appellant should have its costs throughout, other than those dealt with in the succeeding paragraph.

I would dismiss the application of Pal's Restaurant Inc. to intervene, with costs, and the application of the appellant for leave to amend the conclusions of its petition, with costs, to be set off against those awarded against the respondent.

CARTWRIGHT J.:—The facts out of which this appeal arises and the course of the litigation are set out in the reasons of my brothers Locke and Fauteux, which I have had the advantage of reading.

The question arises *in limine* whether we should entertain the appeal in view of the facts that the licence the issue of which the appellant sought to compel by *mandamus* would have expired on May 1, 1956, prior to the giving of

1958

VIC RESTAURANT INC. v. CITY OF MONTREAL

Cartwright J.

notice to appeal to this Court and that prior to the second argument in this Court the appellant had sold the restaurant in respect of which the licence was required.

It is a rule that this Court will not entertain an appeal if, *pendente lite*, the subject-matter of the litigation has ceased to exist or other circumstances have arisen by reason of which the Court could make no order effective between the parties except as to costs. A recent illustration of the application of the rule is *The Queen ex rel. Lee v. Estevan*[1], in which the oral reasons of the Court are not reported. In that case the Court of its own motion declined to hear the appeal as the licence in respect of which a *mandamus* was sought would have expired some months previously.

However, the rule is, in my opinion, one of practice which the Court may relax. In the case at bar the appeal is brought under s. 36(*b*) of the *Supreme Court Act*, the appeal being from a final judgment of the highest Court of final resort in the province in proceedings for *mandamus*, so that the right of appeal is not dependent on the amount or value of the matter in controversy in the appeal, and no question of jurisdiction arises. The question of law raised for decision is an important one, as is stressed in the reasons of the learned judges in the Courts below, and there have been two arguments, the second of which was called for by the Court after it was apparent that the licence period had already expired. In these special circumstances I agree with the conclusion of my brother Locke that we should entertain the appeal.

The portions of by-law no. 1862 with which we are directly concerned are as follows:

Article 2.—Dispositions générales.

A) Aucune personne ne possédera ou n'exploitera une industrie, un commerce ou un établissement, ne pratiquera ou n'exercera une profession, un commerce ou une activité, n'utilisera un véhicule, un appareil ou une chose, ou ne gardera un animal ou un article ci-après mentionnés dans les limites de la cité de Montréal, à moins d'avoir préalablement demandé et obtenu du directeur des finances un permis à cet effet et payé audit directeur le montant apparaissant en regard de l'activité, de l'animal ou de la chose assujetti à un permis.

[1] [1953] 1 D.L.R. 656.

B) Toute personne désirant un permis en vertu du présent règlement doit faire sa demande au directeur des finances sur la formule requise. Avant l'émission d'un permis, le directeur des finances est requis d'obtenir l'approbation écrite de chacun des directeurs des services concernés. Si cette approbation écrite n'est pas donnée par tous les directeurs concernés, ledit directeur des finances informera le demandeur, par écrit, que le permis ne sera pas émis.

* * *

D) Nonobstant toute disposition contraire, le directeur des finances, sur paiement de l'honoraire requis, peut renouveler tout permis en vigueur à la fin de l'exercice précédent, à moins qu'avis ne soit reçu le ou avant le 1er avril ou avant l'émission du permis de l'un des directeurs concernés dans chaque cas, que ce permis ne doit pas être renouvelé.

Penalties are provided for breaches of any provision of the by-law.

The by-law sets out 70 sections some of which contain numerous sub-divisions. In these sections the nature of the activity or thing in respect of which a licence is required and the "departments concerned" are specified.

The appellant applied for licences under clause (*a*) of s. 8 and under s. 20 of the by-law. These read as follows:

Section 8.

a) Restaurant, établissement de produits alimentaires, épicerie en détail, établissement de détail où l'une quelconque des marchandises suivantes est vendue: bonbons, tabac, cigares, cigarettes, produits alimentaires de quelque genre que ce soit et/ou breuvages non alcooliques.

Approbation: urbanisme,
police, santé
Période: annuellement
Transportable: oui
Honoraire: $10.00

* * *

Section 20.

Toute personne qui détient un permis de la Commission des Liqueurs de Québec pour la vente de liqueurs alcooliques, et qui de fait en vend, pour consommation sur les lieux.

Approbation: urbanisme,
incendie, police, santé
Période: annuellement
Transportable: oui
Honoraire: $200.00

Both applications were refused on the ground that the approval of the Director of the Police Department had not been secured.

1958

VIC RESTAURANT INC. v. CITY OF MONTREAL

Cartwright J.

The appellant in its *requête* asked the Court, in part:

AUTORISER l'émission d'un bref d'assignation mandamus dirigé contre la Cité de Montréal; sur le mérite DÉCLARER que les mots suivants du paragraphe 2, du règlement 1862 de la cité intimée se lisant comme suit:

"Si cette approbation écrite n'est pas donnée par tous les directeurs concernés, ledit directeur des Finances informera le défendeur que le permis ne sera pas accordé."

et les mots dans le paragraphe 8a dudit règlement:
"Approbation: police";
et les mots dans le paragraphe 20 dudit règlement:
"Approbation: police".

sont nuls, illégaux, *ultra vires* des pouvoirs de l'intimée en ce qu'ils constituent une délégation du pouvoir donné à l'intimée par la loi d'imposer des conditions et restrictions sur l'émission des permis; et comme constituant une entrave au commerce et à la libre entreprise; ORDONNER à la Cité intimée et à ses officiers compétents en la matière d'émettre à la requérante, Vic Restaurant Incorporé, les permis prévus par les sections 8 et 20 dudit règlement 1862, dont elle a demandé l'émission . . .

In view of the manner in which the appeal was presented it seems to me that there is only one question upon which we should express an opinion, that is whether the portions of the by-law which require, as a condition precedent to the issue of permits of the sort applied for by the appellant, the approval of the Director of the Police Department are *ultra vires* of the Council. The argument of the appeal appeared to me to proceed on the assumption that the impugned portions, if *ultra vires,* were severable from the remainder of the by-law and that the provisions requiring the approval of the Directors of the other departments mentioned in s. 8(*a*) and s. 20 were valid. I wish to make it clear that I express no opinion as to the correctness of either of these assumptions.

Turning to the merits of the point which we are called upon to decide, it will be observed that the learned judge of first instance, Prévost J., after examining *Bridge v. The Queen*[1], *Cité de Montréal v. Savich*[2] and certain passages in McQuillin on Municipal Corporations, 3rd Edition, reaches the conclusion that there is no invalid delegation of the authority of the Council because the rules by which the Director of the Police Department is to be guided in

[1] [1953] 1 S.C.R. 8, 104 C.C.C. 170, 1 D.L.R. 305.
[2] (1938), 66 Que. K.B. 124

granting or withholding his approval are stated with sufficient particularity in by-law no. 247 of the respondent concerning the Police Department and in "toutes les lois pénales du Canada et de la Province ainsi que toutes les ordonnances municipales relatives à l'ordre public ou aux bonnes mœurs". The learned judge goes on to hold that it is unnecessary to recite all such laws in the by-law as it is implicit in its terms that the Director shall be guided by them. He says in part:

> Il suffit, dans l'opinion de cette Cour, d'exiger dans le règlement l'approbation du directeur de police pour, par le fait même, dire qu'il doit dans l'octroi ou le refus de son approbation, considérer si celui qui sollicite le permis opère ou non l'entreprise dans le respect des lois et de l'ordre public.

In the Court of Queen's Bench[1], all three of the learned justices wrote reasons in which after the examination of a number of authorities they reached the conclusion that *Cité de Montréal v. Savich, supra,* was rightly decided and that there was nothing in the subsequent jurisprudence which permitted the Court to depart from that decision.

The *Savich* case dealt with by-law no. 432 of the City of Montreal, the predecessor of by-law no. 1862 from which it does not appear to differ in any particular material to the question which we have to decide. The case was decided by a Court composed of Sir Mathias Tellier C.J. and Bernier, Galipeault, St-Jacques, and Barclay JJ. One of the considérants in the judgment of the Court reads as follows:

> Considérant que cette disposition du règlement numéro 432 adopté par la cité de Montréal, qui décrète qu'aucun permis (licence) ne sera accordé par le trésorier de la Cité pour les salles de danse, de concert, de réunions, de représentations théâtrales, d'exhibitions de vues animées, et tout lieu d'amusement quelconque, à moins d'une recommandation écrite du surintendant de police et de l'inspecteur des bâtiments conjointement, ne comporte pas de délégation d'un pouvoir discrétionnaire qu'il appartient au conseil de la Cité d'exercer lui-même;

In the course of his reasons Tellier C.J. says in part:

> Il est incontestable qu'un conseil municipal n'a pas le droit de déléguer ses pouvoirs discrétionnaires, soit en tout soit en partie; il doit les exercer lui-même.
>
> Mais je ne vois aucune délégation de pouvoir dans la disposition citée ci-dessus.
>
> Tout ce qui y est prescrit, c'est que le trésorier de la Cité ne devra pas accorder de permis, sans une recommandation, c'est-à-dire sans un rapport favorable, du surintendant de police et de l'inspecteur des bâtiments.

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

1958

VIC RESTAURANT INC. v. CITY OF MONTREAL

Cartwright J.

La raison de cette recommandation ou de ce rapport favorable se conçoit facilement: l'intérêt public veut qu'il ne soit accordé de permis, pour une salle de danse, une salle de concert, une salle de réunions, une salle de théâtre, qu'à des personnes recommandables et pour des salles ayant la sécurité et les conditions hygiéniques voulues.

Pas de permis, de la part du trésorier, sans une recommandation ou un rapport favorable. Mais le conseil n'a rien abdiqué de ses pouvoirs. Rien ne l'empêche, lui, le maître, de s'enquérir des raisons de ses deux officiers ou préposés, quand ceux-ci ont cru devoir ne pas accorder la recommandation demandée.

St-Jacques J. says in part:

La licence n'a pu être émise par le trésorier, qui est l'officier désigné par le règlement à cette fin, parce que le chef de police a refusé de donner un certificat d'approbation.

Cette condition imposée par le règlement ne me paraît pas comporter une délégation de pouvoirs qui appartiennent au conseil ou au comité exécutif seulement.

It should be noted, however, that both of these learned judges and Bernier J., who agreed with Barclay J., also based their decision on the ground that the respondent had not asked for the annulment of the impugned provisions of the by-law.

Barclay J., with whom Galipeault J. agreed, says in part:

The learned trial Judge found that this by-law was *ultra vires* and that the City had no right to confer any discretionary power on the Chief of Police. With great respect, I do not agree in that conclusion.

While, in principle, municipal corporations cannot delegate their administrative or constitutional powers, there are exceptions to this rule. Owing to the increasing complexity of modern society and the multiplicity of matters which require a municipality's attention, it has become practically impossible to provide in laws and ordinances specific rules and standards to govern every conceivable situation. To require the recommendation of a building inspector or of a director of police is not in reality a delegation of authority but a matter of legitimate prudence. I am more at ease in thus deciding because this very provision has been before the Court of Review in a case of *Waller v. City of Montreal,* 45 S.C. 15. The then Mr. Justice Greenshields dissented, but not on the ground that the by-law was *ultra vires.* He has since stated in a case of *Jaillard v. City of Montreal* 72 S.C. 112, that he had no fault to find with the delegation to the Chief of Police of the discretionary power to recommend the isue of a licence. There is a similar decision by the late Sir François Lemieux in *Paré v. City of Québec,* 67 S.C. 100.

In *Waller v. Cité de Montréal*[1], an application was made for *mandamus* to compel the issue of a licence for a second-hand dealer. The by-law provided: "qu'aucun tel permis ne sera accordé à moins d'une recommandation écrite du

[1] (1913), 45 Que. S.C. 15.

surintendant de police." The judgments again stress the point that the by-law was not attacked. de Lorimier J. says in part:

La validité du règlement de l'intimée n'est pas mise en question par le requérant.

* * *

Quant au règlement, je le crois extrêmement sage et de tout point valide.

* * *

Il est possible que le règlement aille trop loin, qu'il soit opportun de le changer et les moyens de le faire ne font pas défaut, mais, encore une fois, tant qu'il reste en force, il doit recevoir son application.

Tellier C.J. says in part:

Mais laissant de côté cette question de forme, il faut reconnaître que le règlement de la cité est parfaitement raisonnable dans ses dispositions et spécialement dans celles qui exigent un certificat du surintendant de police. Il est juste, il est sage qu'on soit renseigné sur les mœurs et la conduite de celui qui veut exercer le négoce dont il s'agit dans cette cause et personne n'est mieux qualifié pour donner ce renseignement que le fonctionnaire désigné au règlement.

The majority were of opinion that the refusal of approval by the superintendent of police was not shown to be arbitrary. Greenshields J. dissenting was of opinion that the refusal was arbitrary and that a *mandamus* should be granted.

In *Jaillard v. City of Montreal*[1], Greenshields C.J. appears to have assumed the validity of the by-law and his reasons deal only with the question whether the refusal of approval was arbitrary.

In *Paré v. City of Quebec*[2], the validity of a by-law similar to the one with which we are concerned was attacked. Sir François Lemieux C.J. says in part:

Les corporations municipales n'ont pas, non plus, le pouvoir de déléguer et de se dépouiller de leurs fonctions gouvernementales ou constitutionnelles, de manière à perdre le contrôle sur tels pouvoirs, car il est de principe que les corporations municipales ne doivent jamais perdre le contrôle sur tels pouvoirs.

Mais les corporations municipales, pour leur bon fonctionnement, pour l'administration de leurs affaires, dans l'intérêt de la paix et de la moralité publiques, ont droit de déléguer à leurs officiers les pouvoirs ministériels, ceux de simple administration ou de police.

La délégation de tels pouvoirs s'impose et ne peut être restreinte, surtout dans les cas où il s'agit de la paix et de la moralité publiques.

[1](1934), 72 Que. S.C. 112. [2](1928), 67 Que. S.C. 100.

1958

VIC RESTAURANT INC. v. CITY OF MONTREAL

Cartwright J.

Si la loi contraignait les corporations municipales à exercer, comme corps, tous les pouvoirs ministériels, ceux de simple administration, ou de police, il en résulterait des inconvénients, des retards préjudiciables à l'intérêt public.

La délégation à des officiers compétents, dans les cas ci-dessus, n'est pas irrévocable, ni absolue, car la corporation municipale n'ayant pas le pouvoir de perdre le contrôle de ses pouvoirs administratifs, a toujours le droit de révoquer les décisions ou actes faits par ses officiers, en vertu de la délégation. Ce pouvoir de révocation est une garantie contre toute décision absolue ou arbitraire de la part des officiers.

In *Stiffel v. Cité de Montréal*[1], referred to in the reasons of St. Jacques J., once again the validity of the delegation to the Director of Police was assumed.

Galipeault J. says at p. 259:

Et il n'est pas soutenu non plus que la Cité, parlant par son conseil, n'avait pas le droit de déléguer en l'espèce les pouvoirs qu'exerce chez elle d'une façon particulière le directeur du service de la police.

On ne contredit pas non plus que ce dernier exerce plus que des pouvoirs ministériels et qu'il jouit de discrétion pour accorder ou refuser un permis relatif à la tenue d'une salle de billard.

I have examined all the cases referred to in the reasons of the learned justices in the Courts below and it is clear that the validity of the delegation with which we are concerned has been decided in some of them and assumed in others. In none of these cases does the decision appear to have turned on the peculiar wording of the charter of the City of Montreal. All of them appear to me to assume the validity and the application to the council of the City of Montreal of the general rule stated by Tellier C.J. in *Cité de Montréal v. Savich, supra,* at p. 128, in the passage which I have already quoted:

Il est incontestable qu'un conseil municipal n'a le droit de déléguer ses pouvoirs discrétionnaires, soit en tout soit en partie; il doit les exercer lui-même.

For varying reasons, some of which appear in the passages I have quoted above, they hold that the rule does not invalidate those portions of by-law no. 1862 which require the approval of the Director of the Police Department as a condition precedent to the issue of certain licences. With the greatest deference, I find myself unable to agree that any of the reasons assigned are sufficient to prevent the application of the general rule.

[1] [1945] Que. K.B. 258.

The applicable rule of law is, in my opinion, correctly stated in the following passages in McQuillin on Municipal Corporations, 3rd ed., vol. 9, p. 138:

> The fundamental rules that a municipal legislative body cannot delegate legislative power to any administrative branch or official, or to anyone, that it cannot vest arbitrary or unrestrained power or discretion in any board, official or person, or in itself, and that all ordinances must set a standard or prescribe a rule to govern in all cases coming within the operation of the ordinance and not leave its application or enforcement to ungoverned discretion, caprice or whim are fully applicable to the administration and enforcement of ordinances requiring licenses or permits and imposing license or permit fees or taxes.

and at pp. 141 and 142:

> Administrative, fact-finding, discretionary and ministerial functions, powers and duties as to licenses, permits, fees or taxes in connection therewith can be and usually are delegated by ordinances to boards and officials. But as stated in the preceding section, any discretion vested in them must be made subject to a standard, terms and conditions established by the licensing ordinance, which must govern the board or official in granting or denying the license or the permit.

These principles accord with the judgment of this Court in *Bridge v. The Queen, supra,* in which the delegation, by by-law, of certain powers to the City clerk was upheld only because the council had provided with sufficient particularity how that official was to proceed in issuing the permits. I refer particularly to the following passage in the report at pages 13 and 14:

> The Council has laid down in the by-law (i) the times during which the permits shall authorize occupiers of gasoline shops to remain open (ii) the proportion of total occupiers who shall make up the groups entitled to receive permits for each Sunday and for each week (iii) that the permits shall be issued to such groups in rotation (iv) that all occupiers shall be entitled to receive permits except those who have failed to remain open in accordance with the permits received by them (v) that the occupiers so failing shall cease to be entitled to permits for a time defined in the by-law. The Council has thus provided with sufficient particularity for the issuing of permits and, in my opinion, the duties imposed upon the City Clerk, (i) to select the occupiers to make up the respective groups, and (ii) to arrange the order of rotation are administrative and are validly imposed.

The impugned provisions of by-law no. 1862 appear to me to be fatally defective in that no standard, rule or condition is prescribed for the guidance of the Director of the Police Department in deciding whether to give or to withhold his approval. It is expressly provided that if that approval is withheld no licence shall issue in respect

1958

VIC RESTAURANT INC. v. CITY OF MONTREAL

Cartwright J.

of the activities or things comprised in 41 sections of the by-law, many of which contain a number of subparagraphs which in turn include numerous activities.

I am unable to accept the suggestion that because the Director of Police is charged with the duty of maintaining the public peace and enforcing the penal laws of Canada, of the Province and of the municipality he is thereby sufficiently instructed as to the standard to be applied and the conditions to be looked for in deciding whether to grant his approval of an application.

Out of the hundreds of activities and things for the exercise or possession of which a licence is required the right to which depends on securing the approval of the Director of Police I will mention a few at random with the number of the section in which they are found: a wholesale dealer in coal (10(*a*)), a dealer in canaries (11(*a*)), an itinerant musician (12(*f*)), a second-hand dealer (18(*a*)), an operator of a practice golf range (25(*b*)), a pawn-broker (30), a real estate broker (34), a rooming-house (39), a laundry agent (41), a barber shop (45), an embalmer (49), a phrenologist (57), a common-carrier (61), a bicycle (68).

Any general standard or rule which could be arrived at inductively from a consideration of the multifarious activities and things enumerated in the 41 sections referred to in association with the duties resting upon the Director of the Police Department under by-law no. 247 and the penal laws mentioned above would of necessity be so wide and vague as to be valueless.

The difficulty of formulating any such rule from the suggested sources is illustrated by the differing views expressed in several of the cases to which I have referred above as to what the duties of the Director are. Of these, I will refer to only two.

In the case at bar, Prévost J. in the passage already quoted from his reasons would state the rule by which the Director should be guided as follows:

il doit dans l'octroi ou le refus de son approbation, considérer si celui qui sollicite le permis opère ou non l'entreprise dans le respect des lois et de l'ordre public.

With this may be contrasted the words of Galipeault J. in *Stiffel v. Cité de Montréal, supra,* at p. 259:

> Cest à tort que le demandeur soutient que toute la discrétion du chef de police se limite à la personne du tenancier, et qu'il ne saurait être question pour lui d'empêcher un requérant de bonnes mœurs n'ayant pas de dossier judiciaire l'incriminant, d'ouvrir et de maintenir une salle de billard dans une zone ou un territorie où les commerces ne sont pas prohibés.
>
> Il est bien certain, comme on l'a décidé bien des fois, que les lois et règlements de police d'une cité ne se limitent pas au caractère de l'individu requérant; ses devoirs de police consistent bien à assurer l'ordre et la paix publique, mais ils incluent aussi la protection de la santé publique, la suppression des nuisances, l'assurance du bien-être, du confort et de la tranquillité de la population.

In my respectful opinion neither of these passages states a rule sufficiently definite to be of value, but my purpose in quoting them is to indicate the impossibility of formulating from the available sources, any clear or certain rule. I agree with my brother Locke that the effect of the by-law is to leave it to the Director of the Police Department, without direction, to decide whether an applicant should or should not be permitted to carry on any of the lawful callings set out in the 41 sections referred to above.

For these reasons I am of opinion that the impugned provisions of by-law no. 1862 are invalid.

I would allow the appeal, set aside the judgment of the Court of Queen's Bench and that of Prévost J. and direct that the respondent pay the costs of the proceedings throughout other than the costs of the appellant's motion to amend the conclusions of its petition, which motion should be dismissed with costs. I would dismiss the application of Pal's Restaurant to intervene with costs.

Appeal allowed with costs, Taschereau, Fauteux and Aboott JJ. *dissenting.*

Attorneys for the appellant: Hyde & Ahern, Montreal.

Attorneys for the respondent: Berthiaume & Seguin, Montreal.

1958
*May 19
Dec. 18

ROSS J. PRATT, Executor, and ANNA GUDMUNDSON, ROSA PETERSON and MARGARET PETERSON ..... APPELLANTS;

AND

SIGRIDUR JOHNSON, GUDRUN JOHNSON, FREDA PALMER, JONINA HALLGRIMSON, and MESSRS. BATTEN, FODCHUK and BATTEN, Barristers, representing the Estate of HELGA BJORNSON, deceased ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Wills—Joint will by husband and wife—Interpretation on death of husband—Subsequent transfer of all assets to surviving wife—Whether trust on wife by virtue of agreement leading to joint will—Beneficiaries named in joint will—Whether wife can add other beneficiaries by her will—Whether previous interpretation of joint will was res judicata.

A and J, husband and wife, made a joint will in 1945, providing that their respective estates should be held by the survivor "during his or her life to use as such survivor may see fit", and upon the death of the survivor the property was to be divided equally among five named beneficiaries. A died in 1947, without having made any other will. On an application for directions, it was found by an order made in 1948 that the agreement between A and J in the joint will was to the effect that the survivor should have complete right to use the estate of the other and that only such portion of it as might remain at the time of the death of the survivor should go to the named beneficiaries. J was then given possession of A's estate. In 1952, J made a will by which bequests were made to three beneficiaries in addition to the five beneficiaries named in the joint will.

On an application for directions, it was held that the executor of J's will must distribute the estate in the manner provided for by the joint will, as all the property which the two spouses held at the date of A's death was impressed with a trust under the terms of the joint will. This judgment was affirmed by a majority in the Court of Appeal. The three new beneficiaries appealed to this Court.

Held (Rand and Cartwright JJ. dissenting): The assets received by J from the estate of her husband, which remained in her possession as of the date of her death and those which were her separate property as of that same date, were subject to a trust in favour of the five beneficiaries named in the joint will.

Per Kerwin C.J. and Locke and Martland JJ: It was clear from the terms of the joint will and from the evidence supplied by the first affidavit in the 1948 proceedings, that A and J had intended that upon the death of one of them the survivor should enjoy the use of both the estate of the survivor and of the deceased, in his or her

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

lifetime, but that upon the death of the survivor what then remained of the estate in the hands of the survivor should be divided equally among the five named beneficiaries. The second affidavit made by J showed that it had been agreed between the husband and the wife that these five beneficiaries should benefit by the will.

Although the three beneficiaries added by J to her will were not parties to the application made in 1948, their rights were affected by the order then made to the extent that it declared that a trust had been created by the joint will.

Dufour v. Pereira, 1 Dick. 419; *Walpole v. Orford,* 3 Ves. 402; *Gray v. Perpetual Trustee Co.,* [1928] A.C. 391; *Stone v. Hoskins,* [1905] P. 194; *Re Green,* [1950] 2 All E.R. 913, and *Re Oldham,* [1925] Ch. 75, referred to.

Per Rand and Cartwright JJ., *dissenting*: The application to the Court in 1948 raised only the question of the construction of the joint will in so far as it was the will of A, and the question whether J had agreed not to revoke the joint will in so far as it was her will was not *res judicata*. The interest of J in the estate of A was a life estate with a power to take for herself all or any part of the corpus, with a gift over to the five beneficiaries on her death of so much of the estate as she had not in her lifetime taken for herself. As J effectively took over as her own absolute property the whole of A's estate, the five beneficiaries ceased to have any interest therein and could take nothing under A's will. Since neither the wording of the joint will nor anything in the material filed established an agreement by J not to revoke her will made jointly with A, her estate was not therefore held in trust for the five beneficiaries, and should be distributed under the terms of her will made in 1952.

APPEAL from a judgment of the Court of Appeal for Saskatchewan[1], affirming a judgment of Graham J. Appeal dismissed, Rand and Cartwright JJ. dissenting.

H. C. Rees, Q.C., for the appellants.

No one appeared for the respondents.

The judgment of Kerwin C.J. and Locke and Martland JJ. was delivered by

LOCKE J.:—The proceedings in this matter were commenced by a notice of motion given by the executor of the late Johanna Johnson for advice and directions with respect to the administration of her estate. The application was made, I assume, under the provisions of s. 72 of the *Trustee Act,* R.S.S. 1953, c. 123. Certain of the questions arising in relation to the estate of Arni Johnson, the husband of Johanna, who predeceased her, might more appropriately have been disposed of in an action but, as

[1] (1957), 21 W.W.R. 289, 8 D.L.R. (2d) 221, *sub nom. Re Johnson.*

1958

PRATT *et al.* v. JOHNSON *et al.*

Locke J.

the propriety of the proceedings has not been questioned and all interested parties were given notice of them, these issues may properly be dealt with on this appeal.

It should be said at the outset that no question of interpretation arises in connection with the will of Johanna Johnson made on November 17, 1952, or the codicil to that will. The matter to be determined is rather as to whether the assets received by her from the executor of the estate of her deceased husband which remained in her possession and those which were her separate property as of the date of her death were subject to a trust in favour of the beneficiaries named in the joint will executed by her and by her husband on April 7, 1945. If so, her will, by which she bequeathed part of these assets to other persons, was without effect.

It is common ground that the questions decided by Chief Justice Brown by his order dated July 6, 1948, are *res judicata* as between the estate of Arni Johnson, the estate of his widow and the beneficiaries named in the will of January 19, 1948: Freda Palmer, Jonina Hallgrimson, Helga Bjornson, Sigridur Johnson and Gudrun Johnson. As to the other beneficiaries named by Johanna Johnson in her will of November 17, 1952, they were not parties to the application made to the Court in 1948 but their rights may be affected by the order then made, to the extent that it declared the terms upon which Johanna Johnson received the assets of her husband's estate and held the assets which were owned by her as of the date of her husband's death and of her own.

The terms of the joint will of April 7, 1945, the will of Johanna Johnson made on January 19, 1948, following her husband's death, the notice given of the motion considered by Chief Justice Brown, the reasons given by that learned judge and the operative part of the order made by him are stated in the reasons for judgment of my brother Cartwright.

The language of the joint will which requires consideration reads:

> We desire that all property real and personal of which we may die possessed at the time of the decease of either of us shall be held by the survivor during his or her life to use as such survivor may see fit.

Upon the decease of the survivor it is our desire that our property both real and personal shall be divided as follows:—

To (the above named persons) equally amongst them share and share alike.

The first will made by Mrs. Johnson following her husband's death was dated January 19, 1948, and bequeathed all her property in equal shares to the legatees named in the joint will. On the same date she made an affidavit, apparently for use upon the application to construe her late husband's will which was heard before Brown C.J., the concluding paragraph of which read:

I further say that in executing the said Joint Will it was my intention and understood by me that the survivor as between my husband and myself was to have the full right to dispose of the whole of the property and to enjoy full rights of ownership over the same and that the beneficiaries thereafter named should receive only such portion of the said property as remained upon the death of my said husband and myself.

On May 4, Mrs. Johnson made a further affidavit for use upon the application, stating that at the time of the making of the joint will she was the owner of a substantial amount of property in her own right, that the will had been prepared on the instructions of her husband and that it was her intention to make a disposition in favour of him under which he would receive the whole of the beneficial interest without any restriction, and that she believed it was his intention to make a similar disposition of his own property in her favour.

Paragraph 4 read:

In the discussions of the matter between my said late husband and myself it was agreed that the relatives of my said husband and myself, who are named in the said will, should receive benefits only subject to the complete and unrestricted rights over the property by the survivor of us and it still is my intention that the persons so named should receive benefits at my death and I have executed a new will of my own to insure that such disposition will be made of all the property of which I may die possessed including that of my late husband.

The learned Chief Justice, in the reasons for judgment delivered by him, said in part:

I think it clear that these parties each intended that the survivor should have the complete and unrestricted right to use the estate of the other, both real and personal, both income and corpus, as he or she should wish and that only such portion of it as might remain at the time of the death of the survivor should go to the named beneficiaries.

1958

PRATT *et al.* v. JOHNSON *et al.*

Locke J.

The widow has already made a will disposing of her estate to the named beneficiaries, a copy of which has been put in evidence, and thus she has carried out what was intended by both husband and wife.

It was then said that it would be in order for the executor to transfer to the widow without restriction all the estate of the deceased, both real and personal, upon her written request.

The formal order repeated the last mentioned portion of the reasons and said further:

> It is further ordered that the widow shall have the complete and unrestricted right to use the estate both real and personal, both income and corpus as she may wish and that only such portion of the estate as may remain at the time of her death shall go to the named beneficiaries.

I see no ambiguity in the language of the joint will and, in my opinion, that portion of the affidavit of Mrs. Johnson in which she stated that it was her intention in executing the will, and equally the intention of her husband, that the survivor should receive "the whole of the beneficial interest without any restriction whatever" was inadmissible. This appears to me to directly contradict that portion of the will which declares the desire of both that on the death of the survivor "our property both real and personal" should be divided among the five named beneficiaries. It is apparent that Brown C.J. did not accept this evidence since both the reasons given and the formal order declare that such portion of both estates as remained in the hands of the survivor at the date of her death should go to the said beneficiaries. This is quite inconsistent with the idea that she might deprive them of the whole or any part of such property by her will. I agree with Graham J. and with the majority of the judges of the Court of Appeal[1] that Johanna Johnson held such portion of the assets of her husband as remained in her hands at the time of her death and her own assets both real and personal as of such date in trust for the five beneficiaries named in the joint will.

The question to be decided is, in my opinion, not as to whether there was evidence of an agreement between the husband and wife not to make a disposition of the property referred to in the joint will in a manner inconsistent with its terms, but rather whether there was

[1] (1957), 21 W.W.R. 289, 8 D.L.R. (2d) 221, *sub nom. Re Johnson.*

evidence of an agreement between them that the property in the hands of the survivor at the time of his or her death should go to the said five beneficiaries and, since nothing was done by Johanna Johnson to alter the terms of the joint will until after the death of her husband, the property received by her from the executor of her husband's estate and such estate of her own of which she died possessed were impressed with a trust in favour of the five named beneficiaries. If the answer to this question is in the affirmative, it must then be decided whether the five named beneficiaries are estopped by the order of Brown C.J. from asserting their rights under the joint will.

While not contained in the printed case, the proceedings leading up to the grant of probate of the will of Arni Johnson and that of Johanna Johnson are before us and disclose that, as of the death of the former, his estate consisted of 11 pieces of farm lands, farm machinery, bonds, a considerable amount of cash and some miscellaneous assets and was valued at a sum in excess of $71,000. Following the making of the order by Brown C.J. the widow, Johanna Johnson, requested the executor to transfer all of these assets to her and this was done and a release given by her to the executor in connection with his administration of the estate. On the death of Johanna Johnson on October 19, 1955, the papers show the value of her estate, which included what remained of the assets received from her husband's executor, as being in value approximately $57,000. The inventory of her estate would indicate that the farm lands had been sold by her and other investments made but it is impossible from the information available to determine what portion of the assets possessed by her as of the date of her death were received from the executor of her deceased husband.

It appears to me to be quite clear from the terms of the joint will and from the evidence supplied by the first affidavit that Johnson and his wife intended that upon the death of one of them the survivor should enjoy the use both of the estate of the survivor and of the deceased in his or her lifetime but that, upon the death of the survivor, what then remained of the estate in the hands of the survivor should be divided equally among the five

1958

PRATT *et al.* v. JOHNSON *et al.*

Locke J.

named beneficiaries. It seems to me to be impossible to sustain an argument that the right of the survivor to use the entire estate gave to such survivor the right to deal with it by will in a manner inconsistent with the concluding paragraph of the will. The second affidavit made by Mrs. Johnson on the application for the interpretation of the joint will where it is said in part:

> it was agreed that the relatives of my said husband and myself, who are named in the said will, should receive benefits only subject to the complete and unrestricted rights over the property by the survivor of us *and it still is my intention that the persons so named should receive benefiits at my death.*

suggests, if it does not state, that the agreement was that the five named persons should simply receive some portion of the remaining estate and not the undivided one-fifth portion given to them by the joint will. If this was intended, it is clearly an attempt to contradict the express language of the will.

It seems to be equally clear that Chief Justice Brown, while being of the opinion that the widow was entitled to possession of the assets of the estate of Arni Johnson and the right to their use, including the right to dispose of at least portions of it for her own purposes, found that it was the intention of both parties that such portion of the estate as remained in the possession of Johanna Johnson as of the date of her death was to go to the five named beneficiaries. Only the first of the two wills made by Johanna Johnson was in existence at the time of the application before Brown C.J. and, referring to that will, he said:

> The widow has already made a will disposing of her estate to the named beneficiaries, a copy of which has been put in evidence, and thus she has carried out what was intended by both husband and wife.

The affidavit of the widow made on May 4, 1948, does suggest that either party might after the death of one of them dispose by will of the assets of either of them in a manner stated in the provisions of the joint will. That view was clearly rejected by the learned Chief Justice.

The question, as I have said, is not one of construction but rather of determining the nature of the obligation imposed upon Johanna Johnson by the terms of the joint will in these circumstances. This must be decided by the application of equitable principles.

In Snell's Equity, 24th ed., p. 156, the following appears:

> Where two persons make an arrangement as to the disposal of their property and execute mutual wills in pursuance thereof, the one who predeceases the other without having departed from the arrangement dies with the implied promise of the survivor that it shall hold good . . . The arrangement will not be presumed from the simultaneous execution of virtually identical wills but must be proved by independent evidence of an agreement not merely to make indentical wills but to dispose of the property in a particular way. Until the death of the first to die either may withdraw from the arrangement, but thereafter it is irrevocable, at least if the survivor accepts the benefits conferred on him by the other's will.

This passage is based upon the author's appreciation of what was decided in *Dufour v. Pereira*[1]; *In re Oldham*[2]; *Gray v. Perpetual Trustee Co. Ltd.*[3] and *Stone v. Hoskins*[4].

The passage from Snell does not distinguish between a joint will such as that which was considered in the leading case of *Dufour v. Pereira* and separate wills made at the same time by husband and wife, as was the case in *re Oldham* and in *Gray v. Perpetual Trustee Co. Ltd.* It is, however, in my opinion, unnecessary to decide in this case whether there is any distinction to be drawn between the two, in view of the evidence of the agreement between husband and wife afforded by the affidavit of Mrs. Johnson and the finding made by Chief Justice Brown.

In *Dufour's* case, according to the short report in 1 Dick. 419, the husband and wife had agreed to make what is referred to as a mutual will and this was signed by both. Upon the death of the husband the wife proved the will and afterwards made another, inconsistent with the terms of the joint will. Camden L.C. said in part (pp. 420-1):

> Consider how far the mutual will is binding, and whether the accepting of the legacies under it by the survivor, is not a confirmation of it. I am of opinion it is.
>
> It might have been revoked by both jointly; it might have been revoked separately, provided the party intending it had given notice to the other of such revocation.

[1] (1769), 1 Dick. 419, 21 E.R. 332.
[2] [1925] Ch. 75, 94 L.J. Ch. 148.
[3] [1928] A.C. 391.
[4] [1905] P. 194.

1958

PRATT *et al.* v. JOHNSON *et al.*

Locke J.

But I cannot be of opinion that either of them could, during their joint lives, do it secretly; or that after the death of either it could be done by the survivor by another will.

It is a contract between the parties which cannot be rescinded but by the consent of both. The first that dies carries his part of the contract into execution. Will the Court afterwards permit the other to break the contract? Certainly not.

The defendant Camilla Rancer hath taken the benefit of the bequest in her favour by the mutual will; and hath proved it as such; she hath thereby certainly confirmed it; and therefore I am of opinion the last will of the wife, so far as it breaks in upon the mutual will, is void.

There is a more complete report of the judgment in this case in vol. 2 of Hargrave's Juridical Arguments commencing at p. 304, contained in an article by the learned author on the decision in the case of *Walpole v. Orford*[1]. At p. 310, Lord Camden is stated to have said:

The parties by the mutual will do each of them devise, upon the engagement of the other, that he will likewise devise in manner therein mentioned.

The instrument itself is the evidence of the agreement; and he, that dies first, does by his death carry the agreement on his part into execution. If the other then refuses, he is guilty of a fraud, can never unbind himself, and becomes a trustee of course. For no man shall deceive another to his prejudice. By engaging to do something that is in his power, he is made a trustee for the performance, and transmits that trust to those that claim under him.

I have perhaps given myself more trouble than was necessary upon this point; because, if it could be doubtful, whether after the husband's death his wife could be at liberty to revoke her part of the mutual will, it is most clear, that she has estopped herself to this defence, by an actual confirmation of the mutual will,—not only by proving it, but by accepting and enjoying an interest under it. She receives this benefit, takes possession of all her husband's estates, submits to the mutual will as long as she lives, and then breaks the agreement after her death.

In *Stone v. Hoskins,* a husband and wife agreed to make mutual wills and did so and the wife during the lifetime of her husband revoked her will and made another disposing of her property in a manner contrary to the arrangement. Gorell Barnes P., holding that she was entitled to do so, referred to what had been said by Lord Camden in *Dufour v. Pereira* as reported by Hargrave and said (p. 197):

If these two people had made wills which were standing at the death of the first to die, and the survivor had taken a benefit by that death, the view is perfectly well founded that the survivor cannot depart from

[1] (1797), 3 ves. 402, 30 E.R. 1076.

the arrangement on his part, because, by the death of the other party, the will of that party and the arrangement have become irrevocable; but that case is entirely different from the present, where the first person to die has not stood by the bargain and her "mutual" will has in consequence not become irrevocable.

In *re Green*[1], the husband and wife executed wills in identical form, *mutatis mutandis*, the wills each containing a recital that it was agreed between the spouses that if the survivor of them had the use of the other's property during his or her lifetime, he or she would provide in his or her will for carrying out the wishes expressed in the will of the other. Vaisey J. referred to the passage from the judgment of Sir Gorell Barnes P. in *Stone v. Hoskins* which I have quoted above and adopted it and found that the husband who survived his wife received the portion of her estate affected by the will on the trust declared by it, saying (p. 919):

> As I have held that para. 6(c) of the first will took effect in conscience—"compact" is the word Lord Camden, L.C., used in *Dufour v. Pereira*—giving rise to a trust, it follows, I think, that effect must be given to the various provisions under cl. 6(c) out of the fund available for their implementation.

In *Birmingham v. Renfrew*[2], the principles declared in *Dufour v. Pereira* were applied by Latham C.J. I refer to the comments of that learned judge upon that case and *Gray v. Perpetual Trustee Co. Ltd.*, at pp. 675 and 676.

Much reliance was placed by the appellant upon the decision of Astbury J. in *re Oldham*. In that case, a husband and wife made mutual wills in the same form in pursuance of an agreement so to make them, but there was no evidence of any further agreement in the matter. Each gave his or her property to the other absolutely with the same alternative provisions in case of lapse. The wife survived and accepted her husband's property and then made a fresh will, ignoring the provision of her own will. It was held that there was no implied trust preventing the wife disposing of her property as she pleased. Astbury J. referred amongst others to the authorities above mentioned and distinguished *Stone v. Hoskins* on the ground that there the agreement to dispose of their properties was

[1] [1950] 2 All E.R. 913. [2] (1937), 57 C.L.R. 666.

1958

PRATT *et al.* v. JOHNSON *et al.*

Locke J.

made out in the wills and decided that the mere fact of the execution of the mutual wills was insufficient to establish such an agreement.

This portion of the judgment in *re Oldham* was referred to with approval by Viscount Haldane delivering the judgment of the Judicial Committee in *Gray v. Perpetual Trustee Co. Ltd.* The head note, which accurately reports what was decided, reads in part:

> The fact that a husband and wife have simultaneously made mutual wills, giving each to the other a life interest with similar provisions in remainder, is not in itself evidence of an agreement not to revoke the wills; in the absence of a definite agreement to that effect there is no implied trust precluding the wife from making a fresh will inconsistent with her former will, even though her husband has died and she has taken the benefits conferred by his will.

Neither of these cases affect the present matter in my opinion, where the question is as to whether an agreement between the parties should be implied from the terms of the joint will or found to have been made, in view of the statement made by Mrs. Johnson in the second affidavit where, referring to what had taken place between her husband and herself, she swears that "*it was agreed* that the relatives of my said husband and myself who are named in the said will should receive benefits." While the following portion of the clause, in so far as it might be construed as contradicting the terms of the will, should, I consider, be held to have been inadmissible, the statement appears to me to substantiate the fact that there was in truth an antecedent agreement in the terms of the will. Gordon J.A., with whom the Chief Justice of Saskatchewan and McNiven J.A. agreed, was of the opinion that the judgment of Brown C.J. should be construed as holding that an agreement had been made between the two spouses, a conclusion with which I also respectfully agree.

I am unable, with respect for differing opinions, to understand what bearing it has upon the matter that, in the reasons for judgment delivered by that learned judge, he mentioned the case of *Re Shuker's Estate*[1]. In that case, it was held that by the terms of the will in question the widow was given a life interest and a general power of appointment over the testator's estate. No question of

[1] [1937] 3 All E.R. 25.

the obligations imposed upon testators by a will such as the joint will in this case was involved or considered. If, as I think to be the case, the estates of both Arni and Johanna Johnson were affected by a trust in favour of the five beneficiaries to the extent above indicated, no question of the widow having a general power of appointment which she might exercise without restriction in her own favour during her lifetime can arise.

I would dismiss the appeal. In the circumstances, I would direct that the costs of all parties be payable out of the estate.

The judgment of Rand and Cartwright JJ. was delivered by

CARTWRIGHT J. (*dissenting*):—This is an appeal from a judgment of the Court of Appeal for Saskatchewan[1] dismissing an appeal from a judgment of Graham J., whereby it was declared, (i) that the late Johanna Johnson "was bound by trust to leave her estate including all assets received by her from Arni Johnson, deceased, in accordance with the joint will of herself and the said Arni Johnson, deceased"; (ii) "that the provisions of the will of Johanna Johnson, deceased, insofar as they are contrary to the provisions of the said joint will are void"; and (iii) "that Ross J. Pratt, as executor of the estate of Johanna Johnson, deceased, is fixed with the resulting trust and must distribute the assets of the estate of Johanna Johnson, deceased, in the manner provided for in the said joint will." Procter and Culliton JJ.A., dissenting, would have allowed the appeal.

The application to Graham J. was made by the appellant Pratt,

as Executor of the estate of Johanna Johnson, deceased, for advice and directions from the said Judge with respect to the administration of the said estate and the distribution of the assets of the estate amongst the beneficiaries named in the last Will and Testament of the said Johanna Johnson, deceased, dated the 17th day of November 1952 and the codicil thereto dated the 8th day of March A.D. 1955, and whether all named in the said Will are to share in the Estate or only those named as beneficiaries in the last will of Arni Johnson, deceased.

[1] (1957), 21 W.W.R. 289, 8 D.L.R. (2d) 221, *sub nom. Re Johnson.*

1958

PRATT *et al.* v. JOHNSON *et al.*

Cartwright J.

Arni Johnson and Johanna Johnson were husband and wife. The former died on April 25, 1947, and the latter on October 19, 1955. On April 7, 1945, they executed a joint will reading as follows:

KNOW ALL MEN BY THESE PRESENTS that we ARNI JOHNSON and JOHANNA JOHNSON, Husband and Wife of the Post Office of Leslie in the Province of Saskatchewan, do make, publish and declare this instrument to be jointly as well as severally our last Will and Testament. HEREBY REVOKING all former Wills.

WE NOMINATE AND APPOINT Bogi Peterson of the Post Office of Wynyard in the Province of Saskatchewan to be the executor of this our last Will and Testament.

WE DESIRE that all property real and personal of which we may die possessed at the time of the decease of either of us shall be held by the survivor during his or her life to use as such survivor may see fit.

UPON THE DECEASE of the survivor it is our desire that our property both real and personal shall be divided as follows:—

To Jonina Johnson, Helga Bjornson, Sigridur Bjornson, Gudrun Bjornson all of Cavalier in the state of North Dakota, one of the United States of America and Fred Paulson of Grafton in the said State of North Dakota one of the United States of America equally amongst them share and share alike.

On January 19, 1948, proceedings were commenced by way of originating notice. The notice was headed "In the Matter of the Estate of Arni Johnson Deceased". The notice reads in part as follows:

TAKE NOTICE that you are required to attend before the presiding Judge in King's Bench Chambers at the Court House at the City of Saskatoon, in the Province of Saskatchewan, on Friday the 26th day of March, A.D. 1948 at the hour of ten o'clock in the forenoon, or so soon thereafter as there may be a Judge in Chambers and the Application can be heard on the hearing of an Application on the part of *BOGI PETERSON,* of WYNYARD, Saskatchewan, Farmer, Executor of the Will of the above named *ARNI JOHNSON* deceased, for an Order,

(a) Determining the nature of the interest of *JOHANNA JOHNSON,* widow of the said *ARNI JOHNSON,* deceased, in the estate of the said *ARNI JOHNSON* under the terms of a certain WILL made jointly by the said Johanna Johnson and the said Arni Johnson deceased, dated 7th April, A.D. 1945, Probate of which said WILL was granted by the Surrogate Court of the Judicial District of WYNYARD on the 11th day of August, A.D. 1947 and particularly where (sic) such interest comprises to the said Johanna Johnson an Estate for life.

(*b*) Determining the interest in the said Estate of the other beneficiaries named in the said Will.

AND FURTHER TAKE NOTICE that in support of the said Application, will be read, this Originating Notice with Proof of Service thereof, the original Letters Probate granted to the said *BOGI PETERSON,* exhibiting the said Will, and the several Affidavits of the said Bogi Peterson and the said Johanna Johnson, an inventory of the property

of the said Estate as presented to the Inspector of Succession Duty for the Dominion of Canada and such further and other material as Counsel may advise and the court permit.

The notice was addressed to, and served upon, Johanna Johnson and the five persons named in the fourth paragraph of the joint will. The motion was heard by Brown C.J.K.B. who, on July 6, 1948, delivered the following reasons:

This is an application for the interpretation of the will of the deceased Arni Johnson made jointly with his wife Johanna Johnson.

I do not see any purpose in reviewing the various authorities that have been cited to me in connection with this application by Mr. Rees and which have been very helpful as well as his argument bearing on same and especially do I refer to the case of Re Shuker's Estate (1937) All E.R. Volume 3, page 25.

In my opinion the affidavit of the widow filed herein indicating the intention of the husband and wife when the will was made gives a fair interpretation that should be put upon the will. I think it clear that these parties each intended that the survivor should have the complete and unrestricted right to use the estate of the other, both real and personal, both income and corpus, as he or she should wish and that only such portion of it as might remain at the time of the death of the survivor should go to the named beneficiaries. The widow has already made a will disposing of her estate to the named beneficiaries, a copy of which has been put in evidence, and thus she has carried out what was intended by both husband and wife. It will therefore be quite in order for the executor to transfer to the widow without restriction all the estate of the deceased both real and personal upon a written request from the widow to him that such be done.

Pursuant to these reasons a formal order was taken out, the operative part of which reads as follows:

It is hereby ordered that it will be in order for the Executor to transfer to the widow, Johanna Johnson, without restriction, all the estate of the deceased, both real and personal upon a written request from the widow to him that such be done.

It is further ordered that the widow shall have the complete and unrestricted right to use the estate both real and personal, both income and corpus as she may wish and that only such portion of the Estate as may remain at the time of her death shall go to the named beneficiaries. Costs of both parties to be paid out of the Estate.

The Will made by Johanna Johnson on January 19, 1948, and referred to in the reasons of the learned Chief Justice reads:

This is the Last Will and Testament of me, Johanna Johnson, of the Town of Wynyard, in the Province of Saskatchewan, Widow, hereby revoking all former Wills and Testamentary dispositions by me at any time heretofore made and declare this only to be and contain my last Will and Testament.

1958

PRATT *et al.* v. JOHNSON *et al.*

Cartwright J.

I direct payment of all my just debts, funeral and testamentary expenses and appoint Bogi Peterson, as and to be Executor of this my Will.

I devise and bequeath all my property, real and personal, whatever situate, in equal shares to:

Freda Palmer, former widow of my deceased brother.
Jonina Hallgrimson, sister of my deceased husband.
Helga Bjornson, my sister.
Sigridur Johnson, my sister.
Gudrun Johnson, my sister.

On November 18, 1952, Johanna Johnson made a further will reading as follows:

This is the Last Will and Testament of me Johanna Johnson of the Town of Wynyard in the Province of Saskatchewan, widow of Arni Johnson late of Leslie in the said Province, deceased, hereby revoking all former wills and testamentary dispositions by me at any time made and declaring this only to be and contain my last Will and Testament.

I direct payment of all my just debts, funeral and testamentary expenses and appoint Bogi Peterson of Wynyard, Saskatchewan, Farmer, as and to be sole executor of this my will.

I direct my said executor to convert the whole of my estate into money and to pay the same in equal shares to the following persons, namely: Jonina Johnson, Helga Bjornson, Sigridur Bjornson, Gudrun Bjornson, Freda Palmer, all of the state of North Dakota, Anna Gudmundson of Elfros, Saskatchewan, Rosa Peterson of Wynyard, Saskatchewan and the said Bogi Peterson and for the said purpose I devise and bequeath the whole of my estate in trust to my said executor.

In the event of the said Rosa Peterson predeceasing me I direct that the gift to her under this my will shall not lapse but shall be paid in equal shares to her children in her stead.

In the event of the said Bogi Peterson predeceasing me I direct that the gift to him under my will shall not lapse but shall be paid to his widow in his stead.

On March 8, 1955, Johanna Johnson executed a codicil to her will of November 18, 1952, reciting the death of Bogi Peterson and appointing the appellant, Pratt, executor in his stead. Probate of the last mentioned will and codicil was granted to the appellant, Pratt, on December 23, 1955.

The judgment of Graham J., which has been affirmed by the Court of Appeal, proceeds on the view that Johanna Johnson was bound by an agreement not to revoke her will as contained in the joint will and that while this, of course, did not prevent her later will revoking the former one, her executor under the later will holds all her property in trust for the five beneficiaries named in the former will.

In both Courts below, it was assumed that the question which Graham J. was called upon to decide, was *res judicata* by reason of the judgment of Brown C.J.K.B. and that the task of the Court was simply to interpret that judgment. With the greatest respect I think that this was a misconception.

When a plea of *res judicata* is raised, to decide what questions of law and fact were determined in the earlier judgment the Court is entitled to look not only at the formal judgment but at the reasons and the pleadings. The cases dealing with this question are collected in Halsbury, 3rd ed., vol. 15, pp. 184, 207 and 208; and I think it necessary to refer only to the following passage in the judgment of the Court of Appeal delivered by Slesser L.J. and concurred in by Clauson L.J. and du Parcq L.J. in *Marginson v. Blackburn Borough Council*[1]:

> In our view, however, Lewis J. was entitled to have regard to the reasons given by the learned county court judge, and we have not hesitated to avail ourselves of that assistance. We are dealing here not so much with what has been called estoppel by record, but with the broader rule of evidence which prohibits the reassertion of a cause of action which has been litigated to a finish-estoppel by res judicata. In such a case the question arises, what was the question of law or fact which was decided? And for this purpose, it may be vital in many cases to consider the actual history of the proceedings. Thus, in *In re Graydon,* on a question whether a judgment of the county court constituted an estoppel, Vaughan Williams J. refers to an inference to be drawn from the observations of the learned county court judge when asked for leave to appeal; and in *Ord v. Ord,* also on a question of res judicata, references to proceedings before the judge were considered by Lush J.. But, even if there were no authority to show that this had in fact been done, we can see in principle no objection, when the question before the Court is what was actually decided at an earlier trial, to have recourse to that information which is to be derived from reading a record of the proceedings.

In the case at bar, it appears from the terms of the originating notice that the application before Brown C.J.K.B. dealt solely with the estate of Arni Johnson and with the interpretation of his will.

In my opinion the following passage in Halsbury, 2nd ed., vol. 34, para. 12, pp. 17 and 18 correctly states the nature and operation of a joint will:

> A joint will is a will made by two or more testators contained in a single document, duly executed by each testator, disposing either of their separate properties, or of their joint property. It is not, however,

[1] [1939] 2 K.B. 426 at 437.

1958

PRATT *et al.* v. JOHNSON *et al.*

Cartwright J.

recognised in English law as a single will. It operates on the death of each testator as his will disposing of his own separate property, and is in effect two or more wills.

I do not pause to inquire whether, under the Saskatchewan practice, the question whether a living person is contractually bound to dispose of her estate in a certain way can be determined on originating notice, as I think it clear that that question was not raised in the proceedings before Brown C.J.K.B.

There is, however, no doubt that the questions determined in the judgment of Brown C.J.K.B. as to the construction of the will of Arni Johnson are *res judicata* in the present proceedings; and it becomes necessary to interpret that judgment. That this task is not an easy one is evident from the differences of opinion in the Courts below.

The questions raised in the notice of motion were as to the nature of the interest of Johanna Johnson in the estate of Arni Johnson, particularly whether such interest was an estate for life, and the interest in the said estate of the other five beneficiaries, now represented by the respondents. The possible answers to these questions would seem to be as follows:

(i) There is a gift of a life estate to Johanna Johnson with a gift over on her death to the five beneficiaries.

(ii) There is a gift of the whole estate to Johanna Johnson with all the rights incident to absolute ownership, but added to this is a gift over to the five beneficiaries of that part of the estate which remains in specie at her death. It has been said that a gift over of this nature cannot be made. See the judgment of Middleton J.A. in *Re Walker*[1].

(iii) There is a gift of a life estate to Johanna Johnson with a power in her unfettered discretion to take for herself, during her lifetime, all or any part of the corpus, with a gift over to the five beneficiaries on her death of so much of the estate as she has not in her life-time taken for herself.

On this branch of the matter, I am in substantial agreement with the reasons of Procter J.A. and of Culliton J.A., and agree with their conclusion that Brown C.J.K.B., adopting alternative (iii) set out above, has

[1] (1925), 56 O.L.R. 517 at 522.

construed the will of Arni Johnson as having the same effect as that dealt with by Simonds J., as he then was, in *Re Shuker's Estate, Bromley v. Reed*[1]; had it been otherwise, and had the learned Chief Justice considered that the assets of the estate of Arni Johnson after being handed over to Johanna, would remain impressed with a trust in favour of the five beneficiaries, it appears to me most unlikely that he would have authorized the executor to turn over the whole estate to Johanna "without restriction". The difficulty in adopting this interpretation arises from the concluding words of the formal judgment "and that only such portion of the estate as may remain at the time of her death shall go to the named beneficaries"; but I have concluded that on their true construction these words describe such portion of the estate as may remain in the hands of Arni Johnson's executor at the time of Johanna's death, or as may, at that time, remain in the estate of Arni Johnson in the sense of not having been taken by Johanna as her absolute property.

I agree with Procter J.A. and Culliton J.A. that Johanna Johnson effectively took over as her own absolute property the whole of the estate of Arni Johnson and that from the time of her doing so the five beneficiaries ceased to have any interest therein.

It follows from this that the respondents take nothing under the will of Arni Johnson; but the question remains whether Johanna Johnson was bound by an agreement not to revoke her will contained in the joint will. If she was so bound then the appellant Pratt would hold her estate in trust for the respondents.

While I have stated my view that this question was not raised or decided in the proceedings before Brown C.J.K.B., it was raised before Graham J., and falls to be determined on the material which was before him, which I take to have included the material filed on the application before Brown C.J.K.B. On this branch of the matter I am again in agreement with Procter J.A. and Culliton J.A. that neither the wording of the joint will nor anything in the material filed establishes an agreement by Johanna Johnson not to revoke her will of April 7, 1945. In particular,

[1][1937] 3 All E.R. 25.

1958

PRATT *et al.* v. JOHNSON *et al.*

Cartwright J.

I agree with the views that they express as to the application of the decisions in *In re Oldham*[1] and *Gray v. Perpetual Trustee Company*[2].

I have carefully considered the cases of *re Hackett*[3], *Re Payne*[4], *Re Kerr*[5] and *Re Fox*[6], referred to in the reasons of the learned Chief Justice of Saskatchewan. In the last mentioned case there was a written agreement that the mutual wills should, except as to certain specified items, be irrevocable. In so far as any of these cases decide that the mere circumstance of two persons making a joint will or making mutual wills is in itself evidence of an agreement not to revoke the wills they are, in my opinion, in conflict with the principles stated in *re Oldham, supra,* and in *Gray v. Perpetual Trustee Company, supra,* and ought not to be followed.

The question to be decided is not whether Arni Johnson and Johanna Johnson agreed to make their wills in identical terms *mutatis mutandis*—it may be assumed that they did—but rather whether the evidence establishes an agreement that the wills so made should not be revoked. I agree with the submission of counsel for the appellants, founded on the two last mentioned cases, that the fact that the two wills were made in one document and in identical terms does not necessarily connote any agreement beyond that of so making them; and I am unable to find any other evidence on which the Court could hold that there was an agreement that the provisions for the respondents contained in the joint will should be irrevocable. The passages in the affidavits of Johanna Johnson relied upon by the respondents as furnishing such evidence appear to me to depose only to the terms of an agreement as to the nature of the interests to be given to Arni and Johanna and the nature of the provisions to be made for the respondents, which agreement was carried out when the joint will was executed. As has been pointed out above, the question whether there was any agreement not to revoke the wills was not before Brown C.J.K.B.; if, in spite of this, the material filed before him and used on

[1] [1925] Ch. 75, 94 L.J. Ch. 148. [2] [1928] A.C. 391.
[3] (1927), 32 O.W.N. 331.
[4] (1930), 39 O.W.N. 314, 40 O.W.N. 87.
[5] [1948] O.R. 543, 3 D.L.R. 668. [6] [1951] O.R. 378, 3 D.L.R. 337.

1958

PRATT *et al.* v. JOHNSON *et al.*

Cartwright J.

the application before Graham J. had disclosed the making of an agreement not to revoke, I do not suggest that the Court should not act upon it, but, as I have already said, I can find no such evidence in the affidavits.

For these reasons, I would allow the appeal, set aside the judgments below and direct that judgment be entered declaring that the estate of the late Johanna Johnson should be distributed in accordance with the terms of her will dated November 18, 1952, and the codicil thereto dated March 8, 1955. The costs of all parties in the Courts below and in this Court should be paid out of the estate, those of the executor as between solicitor and client.

Appeal dismissed, Rand and Cartwright JJ. *dissenting.*

Solicitors for the appellants: Rees, Reynolds & Schmigelsky, Saskatoon.

Solicitors for the respondents: Batten, Fodchuk & Batten, Humboldt.

1958

*Jun. 2, 3, 4, 5, 6

1959

Jan. 27

FRANK RONCARELLI (*Plaintiff*) .....APPELLANT;

AND

THE HONOURABLE MAURICE DUPLESSIS (*Defendant*) ..... RESPONDENT.

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

Crown—Officers of the Crown—Powers and responsibilities—Prime Minister and Attorney-General—Quebec Liquor Commission—Cancellation of licence to sell liquor—Whether made at instigation of Prime Minister and Attorney-General—The Alcoholic Liquor Act, R.S.Q. 1941, c. 255—The Attorney-General's Department Act, R.S.Q. 1941, c. 46—The Executive Power Act, R.S.Q. 1941, c. 7.

Licences—Cancellation—Motives of cancellation—Done on instigation of Prime Minister and Attorney-General—Whether liability in damages—Whether notice under art. 88 of the Code of Civil Procedure required.

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

1959

RONCARELLI v. DUPLESSIS

The plaintiff, the proprietor of a restaurant in Montreal and the holder of a licence to sell intoxicating liquor, sued the defendant personally for damages arising out of the cancellation of his licence by the Quebec Liquor Commission. He alleged that the licence had been arbitrarily cancelled at the instigation of the defendant who, without legal powers in the matter, had given orders to the Commission to cancel it before its expiration. This was done, it was alleged, to punish the plaintiff, a member of the Witnesses of Jehovah, because he had acted as bailsman for a large number of members of his sect charged with the violation of municipal by-laws in connection with the distribution of literature. The trial judge gave judgment for the plaintiff for part of the damages claimed. The defendant appealed and the plaintiff, seeking an increase in the amount of damages, cross-appealed. The Court of Appeal dismissed the action and the cross-appeal.

Held (Taschereau, Cartwright and Fauteux JJ. dissenting): The action should be maintained and the amount awarded at trial should be increased by $25,000. By wrongfully and without legal justification causing the cancellation of the permit, the defendant became liable for damages under art. 1053 of the *Civil Code*.

Per Kerwin C.J.: The trial judge correctly decided that the defendant ordered the Commission to cancel the licence, and no satisfactory reason has been advanced for the Court of Appeal setting aside that finding of fact.

Per Kerwin C.J. and Locke and Martland JJ.: There was ample evidence to sustain the finding of the trial judge that the cancellation of the permit was the result of an order given by the defendant to the manager of the Commission. There was, therefore, a relationship of cause and effect between the defendant's acts and the cancellation of the permit.

The defendant was not acting in the exercise of any of his official powers. There was no authority in the *Attorney-General's Department Act*, the *Executive Power Act*, or the *Alcoholic Liquor Act* enabling the defendant to direct the cancellation of a permit under the *Alcoholic Liquor* Act. The intent and purpose of that Act placed complete control over the liquor traffic in the hands of an independent commission.

Cancellation of a permit by the Commission, at the request or upon the direction of a third party, as was done in this case, was not a proper and valid exercise of the powers conferred upon the Commission by s. 35 of the Act.

The defendant was not entitled to the protection provided by art. 88 of the *Code of Civil Procedure* since what he did was not "done by him in the exercise of his functions". To interfere with the administration of the Commission by causing the cancellation of a liquor permit was entirely outside his legal functions. It involved the exercise of powers which in law he did not possess at all. His position was not altered by the fact that he thought it was his right and duty to act as he did.

Per Rand J.: To deny or revoke a permit because a citizen exercises an unchallangeable right totally irrelevant to the sale of liquor in a restaurant is beyond the scope of the discretion conferred upon the Commission by the *Alcoholic Liquor Act*. What was done here was not competent to the Commission and *a fortiori* to the government or the defendant. The act of the defendant, through the instrumentality of the Commission, brought about a breach of an implied public statutory duty toward the plaintiff. There was no immunity in the defendant from an action for damages. He was under no duty in relation to the plaintiff and his act was an intrusion upon the functions of a statutory body. His liability was, therefore, engaged. There can be no question of good faith when an act is done with an improper intent and for a purpose alien to the very statute under which the act is purported to be done. There was no need for giving a notice of action as required by art. 88 of the *Code of Civil Procedure,* as the act done by the defendant was quite beyond the scope of any function or duty committed to him so far so that it was one done exclusively in a private capacity however much, in fact, the influence of public office and power may have carried over into it.

Per Abbott J.: The cancellation of the licence was made solely because of the plaintiff's association with the Witnesses of Jehovah and with the object and purpose of preventing him from continuing to furnish bail for members of that sect. This cancellation was made with the express authorization and upon the order of the defendant. In purporting to authorize and instruct the Commission to cancel the licence the defendant was acting, as he was bound to know, without any legal authority whatsoever. A public officer is responsible for acts done by him without legal justification. The defendant was not entitled to avail himself of the exceptional provision of art. 88 of the *Code of Civil Procedure* since the act complained of was not "done by him in the exercise of his functions" but was an act done when he had gone outside his functions to perform it. Before a public officer can be held to be acting "in the exercise of his functions" within the meaning of art. 88, it must be established that at the time he performed the act complained of such public officer had reasonable ground for believing that such act was within his legal authority to perform.

Per Taschereau J., *dissenting*: The action cannot succeed because the plaintiff did not give the notice required by art. 88 of the *Code of Civil Procedure* to the defendant who was a public officer performing his functions. The failure to fulfil this condition precedent was a total bar to the claim. That failure may be raised by exception to the form or in the written plea to the action, and the words "no judgment may be rendered" indicate that the Court may raise the point *propio motu*. Even if what was said by the defendant affected

1959

RONCARELLI v. DUPLESSIS

the decision taken by the Commission, the defendant remained, nevertheless, a public officer acting in the performance of his duties. He was surely a public officer, and it is clear that he did not act in his personal quality. It was as legal adviser of the Commission and also as a public officer entrusted with the task of preventing disorders and as protector of the peace in the province, that he was consulted. It was the Attorney-General, acting in the performance of his functions, who was required to give his directives to a governmental branch. It is a fallacious principle to hold that an error, committed by a public officer in doing an act connected with the object of his functions, strips that act of its official character and that its author must then be considered as having acted outside the scope of his duties.

Per Cartwright J., *dissenting*: The loss suffered by the plaintiff was *damnum sine injuria*. Whether the defendant directed or merely approved the cancellation of the licence, he cannot be answerable in damages since the act of the Commission in cancelling the licence was not an actionable wrong. The Courts below have found, on ample evidence, that the defendant and the manager of the Commission acted throughout in the honest belief that they were fulfilling their duty to the province. On the true construction of the *Alcoholic Liquor Act*, the Legislature, except in certain specified circumstances which are not present in the case at bar, has not laid down any rules as to the grounds on which the Commission may decide to cancel a permit; that decision is committed to the unfettered discretion of the Commission and its function in making the decision is administrative and not judicial or quasi-judicial. Consequently, the Commission was not bound to give the plaintiff an opportunity to be heard and the Court cannot be called upon to determine whether there existed sufficient grounds for its decision. Even if the function of the Commission was quasi-judicial and its order should be set aside for failure to hear the plaintiff, it is doubtful whether any action for damages would lie.

Per Fauteux J., *dissenting*: The right to exercise the discretion with respect to the cancellation of the permit, which under the *Alcoholic Liquor Act* was exclusively that of the Commission, was abdicated by it in favour of the defendant when he made the decision executed by the Commission. The cancellation being illegal, imputable to the defendant, and damageable for the plaintiff, the latter was entitled to succeed on an action under art. 1053 of the *Civil Code*.

As the notice required by art. 88 of the *Code of Civil Procedure* was not given, the action, however, could not be maintained. The failure to give notice, when it should be given, imports nullity and limits the very jurisdiction of the Court. In the present case, the defendant was entitled to the notice since the illegality reproached was committed "in the exercise of his functions". The meaning of this expression in art. 88 was not subject to the limitations attending expres-

sions more or less identical appearing in art. 1054 of the *Civil Code*. The latter article deals with responsibility whereas art. 88 deals with procedure. Article 88 has its source in s. 8 of *An Act for the Protection of Justices of the Peace,* Cons. Stat. L.C., c. 101, which provided that the officer "shall be entitled" to the protection of the statute although "he has exceeded his powers or jurisdiction, and has acted clearly contrary to law". That section peremptorily establishes that, in *pari materia,* a public officer was not considered as having ceased to act within the exercise of his functions by the sole fact that the act committed by him might constitute an abuse of power or excess of jurisdiction, or even a violation of the law. An illegality is assumed under art. 88. The jurisprudence of the province, which has been settled for many years, is to the effect that the incidence of good or bad faith has no bearing on the right to the notice.

The illegality committed by the defendant did not amount to an offence known under the penal law or a delict under art. 1053 of the *Civil Code*. He did not use his functions to commit this illegality. He did not commit it on the occasion of his functions, but committed it because of his functions. His good faith has not been doubted, and on this fact there was a concurrent finding in the Courts below.

APPEALS from two judgments of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], reversing a judgment of Mackinnon J. Appeals allowed, Taschereau, Cartwright and Fauteux JJ. dissenting.

F. R. Scott and *A. L. Stein,* for the plaintiff, appellant.

L. E. Beaulieu, Q.C., and *L. Tremblay, Q.C.,* for the defendant, respondent.

THE CHIEF JUSTICE:—No satisfactory reason has been advanced for the Court of Queen's Bench (Appeal Side)[1] setting aside the finding of fact by the trial judge that the respondent ordered the Quebec Liquor Commission to cancel the appellant's licence. A reading of the testimony of the respondent and of the person constituting the commission at the relevant time satisfies me that the trial judge correctly decided the point. As to the other questions, I agree with Mr. Justice Martland.

The appeals should be allowed with costs here and below and judgment directed to be entered for the appellant against the respondent in the sum of $33,123.53 with interest from the date of the judgment of the Superior Court, together with the costs of the action.

[1] [1956] Que. Q.B. 447.

1959

RONCARELLI v. DUPLESSIS

TASCHEREAU J. (*dissenting*):—L'intimé est Premier Ministre et Procureur Général de la province de Québec, et il occupait ces hautes fonctions dans le temps où les faits qui ont donné naissance à ce litige se sont passés.

L'appelant, un restaurateur de la Cité de Montréal, et porteur d'un permis de la Commission des Liqueurs pour la vente des spiritueux, lui a réclamé personnellement devant la Cour supérieure la somme de $118,741 en dommages. Il a allégué dans son action qu'il est licencié depuis de nombreuses années, qu'il a toujours respecté les lois de la Province se rapportant à la vente des liqueurs alcooliques, que son restaurant avait une excellente réputation, et jouissait de la faveur d'une clientèle nombreuse et recherchée.

Il a allégué en outre qu'il faisait et fait encore partie de la secte religieuse des "Témoins de Jéhovah", et que parce qu'il se serait rendu caution pour quelque 390 de ses coreligionnaires, traduits devant les tribunaux correctionnels de Montréal et accusés de distribution de littérature, sans permis, l'intimé serait illégalement intervenu auprès du gérant de la Commission pour lui faire perdre son permis, qui d'ailleurs lui a été enlevé le 4 décembre 1946. Ce serait comme résultat de l'intervention injustifiée de l'intimé que l'appelant aurait été privé de son permis, et aurait ainsi souffert les dommages considérables qu'il réclame.

La Cour supérieure a maintenu l'action jusqu'à concurrence de $8,123.53, et la Cour du banc de la reine[1], M. le Juge Rinfret étant dissident, aurait pour divers motifs maintenu l'appel et rejeté l'action.

L'intimé a soulevé plusieurs moyens à l'encontre de cette réclamation, mais je n'en examinerai qu'un seul, car je crois qu'il est suffisant pour disposer du présent appel. Le *Code de procédure civile* de la province de Québec contient la disposition suivante:

Art. 88 C.P.—Nul officier public ou personne remplissant des fonctions ou *devoirs publics* ne peut être poursuivi pour dommages à raison d'un acte par lui fait *dans l'exercice de ses fonctions,* et *nul verdict ou jugement ne peut être rendu contre lui à moins qu'avis de cette poursuite* ne lui ait été donné au moins un mois avant l'émission de l'assignation.

Cet avis doit être par écrit; il doit exposer les causes de l'action, contenir l'indication des noms et de l'étude du procureur du demandeur ou de son agent et être signifié au défendeur personnellement ou à son domicile.

[1] [1956] Que. Q.B. 447.

1959

RONCARELLI v. DUPLESSIS

Taschereau J.

Le défaut de donner cet avis peut être invoqué par le défendeur, soit au moyen d'une exception à la forme ou soit par plaidoyer au fond. *Charland v. Kay*[1]; *Corporation de la Paroisse de St-David v. Paquet*[2]; *Houde v. Benoit*[3].

Les termes mêmes employés par le législateur dans l'art. 88 C.P.C., *"nul jugement ne peut être rendu"* contre le défendeur, indiquent aussi que la Cour a le devoir de soulever d'office ce moyen, si le défendeur omet ou néglige de le faire par exception à la forme, ou dans son plaidoyer écrit. La signification de cet avis à un *officier public, remplissant des devoirs publics,* est une condition préalable, essentielle à la réussite d'une procédure judiciaire. S'il n'est pas donné, les tribunaux ne peuvent prononcer aucune condamnation en dommages. Or, dans le cas présent, il est admis qu'aucun avis n'a été donné.

Mais, c'est la prétention de l'appelant que l'intimé ne peut se prévaloir de ce moyen qui est une fin de non recevoir, car, les conseils ou avis qu'il aurait donnés et qui auraient été la cause déterminante de la perte de son permis, ne l'ont pas été en raison d'un acte posé par lui *dans l'exercice de ses fonctions.*

La preuve révèle que l'appelant était bien licencié de la Commission des Liqueurs depuis de nombreuses années, que la tenue de son restaurant était irréprochable, et que dans le cours du mois de décembre de l'année 1946, alors qu'il était toujours porteur de son permis, celui-ci lui a été enlevé parce qu'il se rendait caution pour plusieurs centaines de ses coreligionnaires, distributeurs de littérature que l'on croyait séditieuse.

C'était avant le jugement de cette Cour dans la cause de *Boucher v. Le Roi*[4], alors que la conviction était profondément ancrée parmi la population, que les "Témoins de Jéhovah" étaient des perturbateurs de la paix publique, des sources constantes de trouble et de désordre dans la Province. On jugeait leur mouvement dangereux, susceptible de soulever une partie de la population contre l'autre, et de provoquer de sérieuses agitations. On parlait même de conspiration séditieuse, et ce n'est sûrement pas sans

[1] (1933), 54 Que. K.B. 377. [2] (1937), 62 Que. K.B. 140.
[3] [1943] Que. K.B. 713.
[4] [1951] S.C.R. 265, 2 D.L.R. 369, 11 C.R. 85, 99 C.C.C. 1.

1959

RONCARELLI v. DUPLESSIS

Taschereau J.

cause raisonnable, car cette opinion fut plus tard unanimement confirmée par cinq juges de la Cour du Banc de la Reine dans l'affaire *Boucher v. Le Roi*[1], et également par quatre juges dissidents devant cette Cour (*Boucher v. Le Roi* cité *supra*).

M. Archambault, alors gérant général de la Commission des Liqueurs, soupçonnait fortement que le "Frank Roncarelli" qui par ses cautionnements aidait financièrement ce mouvement qu'il croyait subversif, était détenteur d'un permis de restaurateur pour la vente de liqueurs alcooliques. Il pensait évidemment qu'il ne convenait pas que les bénéfices que Roncarelli retirait de son permis de la Commission, soient utilisés à servir la cause d'agitateurs religieux, dont les enseignements et les méthodes venaient en conflit avec les croyances populaires. Il en informa l'intimé, procureur général, qui en cette qualité est l'aviseur légal officiel de la province pour toutes les affaires juridiques.

Au cours d'une première conversation téléphonique, M. Archambault suggéra à l'intimé que le permis de Roncarelli lui soit enlevé, ce que d'ailleurs il avait personnellement le droit de faire, en vertu de l'art. 35 de la *Loi des Liqueurs*, qui est ainsi rédigé:

> 35.—La Commission peut *à sa discrétion* annuler un permis en tout temps.

Or, comme l'exécutif de la Commission des Liqueurs ne se compose que d'un gérant général qui était M. Archambault, cette discrétion reposait entièrement sur lui.

L'intimé lui suggéra la prudence, et lui proposa de s'enquérir avec certitude si le Roncarelli, détenteur de permis, était bien le même Roncarelli qui prodiguait ses cautionnements d'une façon si généreuse. Après enquête, l'affirmative ayant été établie, M. Archambault communiqua de nouveau avec l'intimé, et voici ce que nous dit M. Archambault dans son témoignage au sujet de ces conversations:

> Q. Maintenant, ce jour-là où vous avez reçu une lettre, le 30 novembre 1946, avez-vous décidé, ce jour-là, d'enlever la licence?
>
> R. *Certainement*, ce jour-là, j'avais appelé le Premier Ministre, en l'occurrence le procureur général, lui faisant part des constatations, c'est-à-dire des renseignements que je possédais, *et de mon intention d'annuler le privilège*, et le Premier Ministre m'a répondu de prendre mes précautions, de bien vérifier s'il s'agissait bien de

[1] [1949] Que. K.B. 238.

la même personne, qu'il pouvait y avoir plusieurs Roncarelli, et coetera. Alors, quand j'ai eu la confirmation de Y3 à l'effet que c'était la même personne, j'ai appelé le Premier Ministre pour l'assurer qu'il s'agissait bien de Frank Roncarelli, détenteur d'un permis de la Commission des Liqueurs; et, là, le Premier Ministre m'a autorisé, il m'a donné son consentement, son approbation, sa permission, et son ordre de procéder.

Voici maintenant la version de l'intimé:

Probablement, à la suite du rapport que l'indicateur Y-3 a fait, le rapport qui est produit, M. le Juge Archambault m'a téléphoné et m'a dit: 'On est sûr, c'est cette personne-là.' Et comme dans l'intervalle j'avais étudié le problème et parcouru les statuts depuis l'institution de la Commission des Liqueurs et tous les amendements qui avaient eu lieu, et j'avais consulté, j'en suis arrivé à la conclusion qu'en mon âme et conscience, mon impérieux devoir c'était d'approuver la suggestion très au point du Juge et d'autoriser la cancellation d'un privilège que cet homme-là ne méritait pas, à mon sens, et dont il n'était pas digne.

Et:

Après avoir mûrement délibéré et conscient et sûr de faire mon devoir, j'ai dit à M. Archambault que j'approuvais sa suggestion d'annuler le permis, d'annuler le privilège.

Et, plus loin:

. . . j'ai dit au Juge Archambault que j'étais de son opinion, que je ne croyais pas que Roncarelli fût digne d'obtenir des privilèges de la province après son attitude que j'ai mentionnée tout à l'heure.
. . . et lorsque le Juge Archambault m'a dit, après vérification, que c'était la même personne, j'ai dit: 'Vous avez raison, ôtez le permis, ôtez le privilège.'

Quand on demande à l'intimé s'il a donné un ordre à M. Archambault, voici ce qu'il dit:

Non, je n'ai pas donné un ordre à M. Archambault, je viens de conter ce qui s'est passé.

Que le permis ait été enlevé à Roncarelli comme conséquence de la seule décision de M. Archambault, ce qu'il avait le droit de faire à sa discrétion, ou que cette discrétion ait été influencée par les paroles de l'intimé, n'a pas je crois d'effet décisif dans la détermination de la présente cause. Je demeure convaincu que même si les paroles de l'intimé ont pu avoir quelque influence sur la décision qui a été prise, ce dernier demeurait quand même un *officier public, agissant dans l'exercice de ses fonctions,* et qu'il était essentiel de lui donner l'avis requis par l'art. 88 C.P.C. L'absence de cet avis interdit aux tribunaux de prononcer aucune condamnation.

1959

RONCARELLI v. DUPLESSIS

Taschereau J.

L'intimé est sûrement un *officier public,* et il me semble clair qu'il n'a pas agi *en sa qualité personnelle.* C'est bien comme aviseur légal de la Commission des Liqueurs, et aussi comme *officier public* chargé de la prévention des troubles, et gardien de la paix dans la province, qu'il a été consulté. C'est le Procureur Général, agissant dans l'exercice de ses fonctions, qui a été requis de donner ses directives à une branche gouvernementale dont il est l'aviseur. Vide: *Loi concernant le Département du Procureur Général,* R.S.Q. 1941, c. 46, art. 3, *Loi des liqueurs alcooliques,* S.R.Q. 1941, c. 255, art 138.

Certains, à tort ou à raison, peuvent croire que l'intimé se soit trompé, en pensant qu'il devait, pour le maintien de la paix publique et la suppression de troubles existants, et qui menaçaient de se propager davantage, conseiller l'enlèvement du permis de l'appelant. Pour ma part, je ne puis admettre le fallacieux principe qu'une erreur commise par un *officier public,* en posant un acte qui se rattache cependant à l'objet de son mandat, enlève à cet acte son caractère officiel, et que l'auteur de ce même acte fautif cesse alors d'agir dans *l'exécution de ses fonctions.*

Parce que l'appelant ne s'est pas conformé aux exigences de l'art. 88 C.P.C., en ne donnant pas l'avis requis à l'intimé qui est un *officier public, agissant dans l'exercice de ses fonctions,* je crois que l'action ne peut réussir. Le défaut de remplir cette condition préalable, constitue une fin de non recevoir, qui me dispense d'examiner les autres aspects de cette cause.

Je crois donc que l'appel principal, de même que l'appel logé pour faire augmenter le montant accordé par le juge de première instance, doivent être rejetés avec dépens de toutes les Cours.

The judgment of Rand and Judson JJ. was delivered by

RAND J.:—The material facts from which my conclusion is drawn are these. The appellant was the proprietor of a restaurant in a busy section of Montreal which in 1946 through its transmission to him from his father had been continuously licensed for the sale of liquor for approximately 34 years; he is of good education and repute and the restaurant was of a superior class. On December 4 of that year, while his application for annual renewal was

before the Liquor Commission, the existing license was cancelled and his application for renewal rejected, to which was added a declaration by the respondent that no future license would ever issue to him. These primary facts took place in the following circumstances.

For some years the appellant had been an adherent of a rather militant Christian religious sect known as the Witnesses of Jehovah. Their ideology condemns the established church institutions and stresses the absolute and exclusive personal relation of the individual to the Deity without human intermediation or intervention.

The first impact of their proselytizing zeal upon the Roman Catholic church and community in Quebec, as might be expected, produced a violent reaction. Meetings were forcibly broken up, property damaged, individuals ordered out of communities, in one case out of the province, and generally, within the cities and towns, bitter controversy aroused. The work of the Witnesses was carried on both by word of mouth and by the distribution of printed matter, the latter including two periodicals known as "The Watch Tower" and "Awake", sold at a small price.

In 1945 the provincial authorities began to take steps to bring an end to what was considered insulting and offensive to the religious beliefs and feelings of the Roman Catholic population. Large scale arrests were made of young men and women, by whom the publications mentioned were being held out for sale, under local by-laws requiring a licence for peddling any kind of wares. Altogether almost one thousand of such charges were laid. The penalty involved in Montreal, where most of the arrests took place, was a fine of $40, and as the Witnesses disputed liability, bail was in all cases resorted to.

The appellant, being a person of some means, was accepted by the Recorder's Court as bail without question, and up to November 12, 1946, he had gone security in about 380 cases, some of the accused being involved in repeated offences. Up to this time there had been no suggestion of impropriety; the security of the appellant was taken as so satisfactory that at times, to avoid delay when he was absent from the city, recognizances were signed by him in blank and kept ready for completion by

1959

RONCARELLI v. DUPLESSIS

Rand J.

the Court officials. The reason for the accumulation of charges was the doubt that they could be sustained in law. Apparently the legal officers of Montreal, acting in concert with those of the Province, had come to an agreement with the attorney for the Witnesses to have a test case proceeded with. Pending that, however, there was no stoppage of the sale of the tracts and this became the annoying circumstance that produced the volume of proceedings.

On or about November 12 it was decided to require bail in cash for Witnesses so arrested and the sum set ranged from $100 to $300. No such bail was furnished by the appellant; his connection with giving security ended with this change of practice; and in the result, all of the charges in relation to which he had become surety were dismissed.

At no time did he take any part in the distribution of the tracts: he was an adherent of the group but nothing more. It was shown that he had leased to another member premises in Sherbrooke which were used as a hall for carrying on religious meetings: but it is unnecessary to do more than mention that fact to reject it as having no bearing on the issues raised. Beyond the giving of bail and being an adherent, the appellant is free from any relation that could be tortured into a badge of character pertinent to his fitness or unfitness to hold a liquor licence.

The mounting resistance that stopped the surety bail sought other means of crushing the propagandist invasion and among the circumstances looked into was the situation of the appellant. Admittedly an adherent, he was enabling these protagonists to be at large to carry on their campaign of publishing what they believed to be the Christian truth as revealed by the Bible; he was also the holder of a liquor licence, a "privilege" granted by the Province, the profits from which, as it was seen by the authorities, he was using to promote the disturbance of settled beliefs and arouse community disaffection generally. Following discussions between the then Mr. Archambault, as the personality of the Liquor Commission, and the chief prosecuting officer in Montreal, the former, on or about November 21, telephoned to the respondent, advised him of those facts, and queried what should be done. Mr. Duplessis answered that the matter was serious and that the identity of the

person furnishing bail and the liquor licensee should be put beyond doubt. A few days later, that identity being established through a private investigator, Mr. Archambault again communicated with the respondent and, as a result of what passed between them, the licence, as of December 4, 1946, was revoked.

In the meantime, about November 25, 1946, a blasting answer had come from the Witnesses. In an issue of one of the periodicals, under the heading "Quebec's Burning Hate", was a searing denunciation of what was alleged to be the savage persecution of Christian believers. Immediately instructions were sent out from the department of the Attorney-General ordering the confiscation of the issue and proceedings were taken against one Boucher charging him with publication of a seditious libel.

It is then wholly as a private citizen, an adherent of a religious group, holding a liquor licence and furnishing bail to arrested persons for no other purpose than to enable them to be released from detention pending the determination of the charges against them, and with no other relevant considerations to be taken into account, that he is involved in the issues of this controversy.

The complementary state of things is equally free from doubt. From the evidence of Mr. Duplessis and Mr. Archambault alone, it appears that the action taken by the latter as the general manager and sole member of the Commission was dictated by Mr. Duplessis as Attorney-General and Prime Minister of the province; that that step was taken as a means of bringing to a halt the activities of the Witnesses, to punish the appellant for the part he had played not only by revoking the existing licence but in declaring him barred from one "forever", and to warn others that they similarly would be stripped of provincial "privileges" if they persisted in any activity directly or indirectly related to the Witnesses and to the objectionable campaign. The respondent felt that action to be his duty, something which his conscience demanded of him; and as representing the provincial government his

1959

RONCARELLI v. DUPLESSIS

Rand J.

decision became automatically that of Mr. Archambault and the Commission. The following excerpts of evidence make this clear:

M. DUPLESSIS:

R. . . . Au mois de novembre 1946, M. Edouard Archambault, qui était alors le gérant général de la Commission des Liqueurs m'a appelé à Québec, téléphone longue distance de Montréal, et il m'a dit que Roncarelli qui multipliait les cautionnements à la Cour du Recorder d'une façon désordonnée, contribuant à paralyser les activités de la Police et à congestionner les tribunaux, que ce nommé Roncarelli détenait un privilège de la Commission des Liqueurs de Québec. De fait, Votre Seigneurie, un permis est un privilège, ce n'est pas un droit. L'article 35 de la Loi des Liqueurs alcooliques, paragraphe 1, a été édicté en 1921 par le statut II, Geo. V, chap. 24, qui déclare ceci:

"La Commission peut, à sa discrétion annuler le permis en tout temps."

* * *

"Je vais m'en informer et je vous le dirai." J'ai dit au Juge: "Dans l'intervalle, je vais examiner la question avec des officiers légaux, je vais y penser, je vais réfléchir et je vais voir ce que devrai faire." Quelques jours après, et pendant cet intervalle j'ai étudié le problème, j'ai étudié des dossiers, comme Procureur Général et comme Premier Ministre, quelques jours après le Juge Archambault, M. Edouard Archambault, m'a téléphoné pour me dire qu'il était certain que le Roncarelli en question, qui paralysait les activités de la Cour du Recorder qui accaparait dans une large mesure les services de la force constabulaire de Montréal, dont les journaux disaient avec raison qu'elle n'avait pas le nombre suffisant de policiers, était bien la personne qui détenait un permis. Je lui ai dit: "Dans ces circonstances, je considère que c'est mon devoir, comme Procureur Général et comme Premier Ministre, en conscience, dans l'exercice de mes fonctions officielles et pour remplir le mandat que le peuple m'avait confié et qu'il m'a renouvelé avec une immense majorité en 1948, après la cancellation du permis et après la poursuite intentée contre moi, j'ai cru que c'était mon devoir, en conscience, de dire au Juge que ce permis-là, le Gouvernement de Québec ne pouvait pas accorder un privilège à un individu comme Roncarelli qui tenait l'attitude qu'il tenait."

* * *

J'ai dit: "Il y a peut-être de pauvres personnes, de bonne foi, plus riches d'idéal que d'esprit, de jugement, ces personnes-là sont probablement à la merci de quelques-uns qui les exploitent, je vais donner une entrevue pour attirer l'attention de tout le monde sur l'article 69 du Code Criminel, qui déclare que les complices sont responsables au même titre que la personne qui a commis l'offense."

* * *

D. Vous n'avez pas reçu d'autres documents, c'est seulement les communications téléphoniques de M. le Juge Archambault?

R. Oui, certainement, un message du Juge Archambault, un autre téléphone au Juge Archambault, des examens de la situation, on en a même parlé au Conseil des Ministres, j'ai discuté le cas, j'ai consulté

des officiers en loi et en mon âme et conscience j'ai fait mon devoir comme Procureur Général, j'ai fait la seule chose qui s'imposait, si c'était à recommencer je ferais pareil.

D. Monsieur le Premier Ministre, le 8 février 1947, dans le journal *La Presse*, paraissait un article intitulé: "Roncarelli subit un second refus". Le sous-titre de cet article se lit comme suit: "L'honorable M. Duplessis refuse au restaurateur, protecteur des Témoins de Jéhovah, la permission de poursuivre la Commission des Liqueurs." Vous trouverez, monsieur le Premier Ministre, presque à la fin de ce rapport, les mots suivants:

> "C'est moi-même, à titre de Procureur Général, et de responsable de l'ordre dans cette province, qui ai donné l'ordre à la Commission des Liqueurs d'annuler son permis référant à Roncarelli."

Je vous demande, monsieur le Premier Ministre, si c'est un rapport exact de vos paroles à cette conférence de presse?

R. Ce que j'ai dit lors de la conférence de presse, c'est ce que je viens de déclarer. Je ne connaissais pas Roncarelli, je ne savais pas que Roncarelli avait un permis, . . . lorsqu'il a attiré mon attention sur la situation absolument anormale d'un homme bénéficiant d'un privilège de la province, et multipliant les actes de nature à paralyser les tribunaux de la province et la police municipale de Montréal, c'est là que j'ai approuvé sa suggestion et que j'ai dit, comme Procureur général . . .

LA COUR:—C'est une autre question que l'on vous pose, Monsieur le Premier Ministre. Voulez-vous relire la question. (La demande précédente est alors relue.)

R. Ce que j'ai dit à la presse, c'est ce que je viens de dire tout à l'heure. L'article tel que produit n'est pas conforme textuellement à ce que j'ai dit. Ce que j'ai dit, ce que je répète, c'est que le Juge Archambault, gérant de la Commission des Liqueurs m'a mis au fait d'une situation que j'ignorais et comme Procureur Général, pour accomplir mon devoir, j'ai dit au Juge Archambault que j'étais de son opinion, que je ne croyais pas que Roncarelli fut digne d'obtenir des privilèges de la province après son attitude que j'ai mentionnée tout à l'heure.

* * *

D. Les mots que je viens de vous lire tout à l'heure, c'est censé être textuellement les mots que vous avez donnés, parce que c'est précédé d'une indication d'un rapport textuel:

> "Nous n'avons fait qu'exercer en ce faisant un droit formel et incontestable, nous avons rempli un impérieux devoir. Le permis de Roncarelli a été annulé non pas temporairement mais bien pour toujours."

LE TÉMOIN:—Si j'ai dit cela?

L'AVOCAT:—Oui.

R. Oui. Le permis de Roncarelli a été annulé pour ce temps-là et pour toujours. Je l'ai dit et je considérais que c'était mon devoir et en mon âme et conscience j'aurais manqué à mon devoir si je ne l'avais pas fait.

D. Avec ces renseignements additionnels diriez-vous que les mots: "C'est moi-même, à titre de Procureur Général et de responsable de l'ordre dans cette province qui ai donné l'ordre à la Commission des Liqueurs d'annuler son permis." Diriez-vous que c'est exact?

1959

RONCARELLI v. DUPLESSIS

Rand J.

R. J'ai dit tout à l'heure ce qui en était. J'ai eu un téléphone de M. Archambault me mettant au courant de certains faits que j'ignorais au sujet de Roncarelli. Vérification, identification pour voir si c'était bien la même personne, étude, réflexion, consultation et décision d'approuver la suggestion du gérant de la Commission des Liqueurs d'annuler le privilège de Roncarelli.

* * *

LA COUR:

D. M. Stein veut savoir si vous avez donné un ordre à M. Archambault?

R. Non, je n'ai pas donné un ordre à M. Archambault, je viens de conter ce qui s'est passé. Le juge Archambault m'a mis au courant d'un fait que je ne connaissais pas, je ne connaissais pas les faits, c'est lui qui m'a mis au courant des faits. Je ne sais pas comment on peut appeler ça, quand le Procureur Général, qui est à la tête d'un département, parle à un officier, même à un officier supérieur, et qu'il émet une opinion, ce n'est pas directement un ordre, c'en est un sans l'être. Mais c'est à la suggestion du Juge Archambault, après qu'il eut porté à ma connaissance des faits que j'ignorais, que la décision a été prise.

* * *

D. Monsieur le Premier Ministre, excusez-moi si je répète encore la question, mais il me semble que vous n'avez pas répondu à la question que j'ai posée. Il paraît, non seulement dans ce journal, mais aussi dans d'autres journaux, et cela est répété exactement dans les même paroles, dans le *Montreal Star,* en anglais, dans la *Gazette,* en anglais, dans *Le Canada,* en français et aussi dans *La Patrie,* en français, textuellement les mêmes mots: "C'est moi-même, à titre de Procureur Géneral, chargé d'assurer le respect de l'ordre et le respect des citoyens paisibles qui ai donné à la Commission des Liqueurs, l'ordre d'annuler le permis." Je vous demande si c'est possible que vous ayez employé presque exactement ces mots en discutant l'affaire avec les journalistes, ce jour-là?

R. Lorsque les journalistes viennent au bureau pour avoir des entrevues, des fois les entrevues durent une demi-heure, des fois une heure, des fois une heure et demie; quels sont les termes exacts qui sont employés, on ne peut pas se souvenir exactement des termes. Mais la vérité vraie c'est ce que j'ai dit tout à l'heure, et c'est cela que j'ai dit aux journalistes, comme Premier Ministre et comme Procureur Général, je prends la responsabilité. Si j'avais dit au Juge Archambault: "Vous ne le ferez pas", il ne l'aurait probablement pas fait. Comme il me suggérait de le faire et qu'après réflexion et vérification je trouvais que c'était correct, que c'était conforme à mon devoir, j'ai approuvé et c'est toujours un ordre que l'on donne. Quand l'officier supérieur parle, c'est un ordre que l'on donne, même s'il accepte la suggestion de l'officier dans son département, c'est un ordre qu'il donne indirectement. Je ne me rappelle pas des expressions exactes, mais ce sont les faits.

* * *

D. Référant à l'article contenue dans la *Gazette* du 5 décembre, c'est-à-dire le jour suivant l'annulation du permis, vous trouvez là les mots en anglais:

"In statement to the press yesterday, the Premier recalled that: 'Two weeks ago, I pointed out that the Provincial Government had the firm intention to take the most rigorous and efficient measures possible to get rid of those who under the names of Witnesses of Jehovah, distribute circulars which in my opinion, are not only injurious for Quebec and its population, but which are of a very libellous and seditious character. The propaganda of the Witnesses of Jehovah cannot be tolerated and there are more than 400 of them now before the courts in Montreal, Quebec, Three Rivers and other centers.'

'A certain Mr. Roncarelli has supplied bail for hundreds of witnesses of Jehovah. The sympathy which this man has shown for the Witnesses, in such an evident, repeated and audacious manner, is a provocation to public order, to the administration of justice and is definitely contrary to the aims of justice.'"

D. Je vous demande, monsieur le Premier Ministre, si ce sont les paroles presque exactes ou exactes que vous avez dites à la conférence de presse?

R. Que j'ai dit ici: "A certain Mr. Roncarelli has supplied bail for hundreds of witnesses of Jehovah. The Sympathy which this man has shown for the Witnesses, in such an evident, repeated and audacious manner, is a provocation to public order, to the administration of justice and is definitely contrary to the aims of justice." Je l'ai dit et je considère que c'est vrai.

* * *

M. ARCHAMBAULT:

D. Maintenant, ce jour-là où vous avez reçu une lettre, le 30 novembre 1946, avez-vous décidé, ce jour-là, d'enlever la licence?

R. Certainement, ce jour-là, j'avais appelé le Premier Ministre, en l'occurrence le procureur général, lui faisant part des constatations, c'est-à-dire des renseignements que je possédais, et de mon intention d'annuler le privilège, et le Premier Ministre m'a répondu de prendre mes précautions, de bien vérifier s'il s'agissait bien de la même personne, qu'il pouvait y avoir plusieurs Roncarelli, et coetera. Alors, quand j'ai eu la confirmation de Y3 à l'effet que c'était la même personne, j'ai rappelé le Premier Ministre pour l'assurer qu'il s'agissait bien de Frank Roncarelli, détenteur d'un permis de la Commission des Liqueurs; et, là, le Premier Ministre m'a autorisé, il m'a donné son consentement, son approbation, sa permission, et son ordre de procéder.

In these circumstances, when the *de facto* power of the Executive over its appointees at will to such a statutory public function is exercised deliberately and intentionally to destroy the vital business interests of a citizen, is there legal redress by him against the person so acting? This calls for an examination of the statutory provisions governing the issue, renewal and revocation of liquor licences and the scope of authority entrusted by law to the Attorney-General and the government in relation to the administration of the Act.

1959

RONCARELLI v. DUPLESSIS

Rand J.

The liquor law is contained in R.S.Q. 1941, c. 255, entitled *An Act Respecting Alcoholic Liquor*. A Commission is created as a corporation, the only member of which is the general manager. By s. 5

> . The exercise of the functions, duties and powers of the Quebec Liquor Commission shall be vested in one person alone, named by the Lieutenant-Governor in Council, with the title of Manager. The remuneration of such person shall be determined by the Lieutenant-Governor in Council and be paid out of the revenues of the Liquor Commission. R.S. 1925, c. 37, s. 5; 1 Ed. VII (2), c. 14, ss. 1 and 5; 1 Geo. VI, c. 22, ss. 1 and 5.

The entire staff for carrying out the duties of the Commission are appointed by the general manager—here Mr. Archambault—who fixes salaries and assigns functions, the Lieutenant-Governor in Council reserving the right of approval of the salaries. Besides the general operation of buying and selling liquor throughout the province and doing all things necessary to that end, the Commission is authorized by s. 9 (e) to "grant, refuse or cancel permits for the sale of alcoholic liquors or other permits in regard thereto and to transfer the permit of any person deceased". By s. 12 suits against the general manager for acts done in the exercise of his duties require the authority of the Chief Justice of the province, and the Commission can be sued only with the consent of the Attorney-General. Every officer of the Commission is declared to be a public officer and by R.S.Q. 1941, c. 10, s. 2, holds office during pleasure. By s. 19 the Commission shall pay over to the Provincial Treasurer any moneys which the latter considers available and by s. 20 the Commission is to account to the Provincial Treasurer for its receipts, disbursements, assets and liabilities. Sections 30 and 32 provide for the issue of permits to sell; they are to be granted to individuals only, in their own names; by s. 34 the Commission "may refuse to grant any permit"; subs. (2) provides for permits in special cases of municipalities where prohibition of sale is revoked in whole or part by by-law; subs. (3) restricts or refuses the grant of permits in certain cities the Council of which so requests; but it is provided that

> . . . If the fyling of such by-law takes place after the Commission has granted a permit in such city or town, the Commission shall be unable to give effect to the request before the first of May next after the date of fyling.

Subsection (4) deals with a refusal to issue permits in small cities unless requested by a by-law, approved by a majority vote of the electors. By subs. (6) special power is given the Commission to grant permits to hotels in summer resorts for five months only notwithstanding that requests under subss. (2) and (4) are not made. Section 35 prescribes the expiration of every permit on April 30 of each year. Dealing with cancellation, the section provides that the "Commission may cancel any permit at its discretion". Besides the loss of the privilege and without the necessity of legal proceedings, cancellation entails loss of fees paid to obtain it and confiscation of the liquor in the possession of the holder and the receptacles containing it. If the cancellation is not followed by prosecution for an offence under the Act, compensation is provided for certain items of the forfeiture. Subsection (5) requires the Commission to cancel any permit made use of on behalf of a person other than the holder; s. 36 requires cancellation in specified cases. The sale of liquor is, by s. 42, forbidden to various persons. Section 148 places upon the Attorney-General the duty of

> 1. Assuring the observance of this Act and of the Alcoholic Liquor Possesion and Transportation Act (Chap. 256), and investigating, preventing and suppressing the infringements of such acts, in every way authorized thereby;
> 2. Conducting the suits or prosecutions for infringements of this Act or of the said Alcoholic Liquor Possession and Transportation Act. R.S. 1925, c. 37, s. 78a; 24 Geo. V, c. 17, s. 17.

The provisions of the statute, which may be supplemented by detailed regulations, furnish a code for the complete administration of the sale and distribution of alcoholic liquors directed by the Commission as a public service, for all legitimate purposes of the populace. It recognizes the association of wines and liquors as embellishments of food and its ritual and as an interest of the public. As put in Macbeth, the "sauce to meat is ceremony", and so we have restaurants, cafés, hotels and other places of serving food, specifically provided for in that association.

At the same time the issue of permits has a complementary interest in those so catering to the public. The continuance of the permit over the years, as in this case, not only recognizes its virtual ncessity to a superior class

1959

RONCARELLI v. DUPLESSIS

Rand J.

restaurant but also its indentification with the business carried on. The provisions for assignment of the permit are to this most pertinent and they were exemplified in the continuity of the business here. As its exercise continues, the economic life of the holder becomes progressively more deeply implicated with the privilege while at the same time his vocation becomes correspondingly dependent on it.

The field of licensed occupations and businesses of this nature is steadily becoming of greater concern to citizens generally. It is a matter of vital importance that a public administration that can refuse to allow a person to enter or continue a calling which, in the absence of regulation, would be free and legitimate, should be conducted with complete impartiality and integrity; and that the grounds for refusing or cancelling a permit should unquestionably be such and such only as are incompatible with the purposes envisaged by the statute: the duty of a Commission is to serve those purposes and those only. A decision to deny or cancel such a privilege lies within the "discretion" of the Commission; but that means that decision is to be based upon a weighing of considerations pertinent to the object of the administration.

In public regulation of this sort there is no such thing as absolute and untrammelled "discretion", that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute. Fraud and corruption in the Commission may not be mentioned in such statutes but they are always implied as exceptions. "Discretion" necessarily implies good faith in discharging public duty; there is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption. Could an applicant be refused a permit because he had been born in another province, or because of the colour of his hair? The ordinary language of the legislature cannot be so distorted.

To deny or revoke a permit because a citizen exercises an unchallengeable right totally irrelevant to the sale of liquor in a restaurant is equally beyond the scope of the discretion conferred. There was here not only revocation of the existing permit but a declaration of a future, definitive disqualification of the appellant to obtain one: it was to be "forever". This purports to divest his citizenship status of its incident of membership in the class of those of the public to whom such a privilege could be extended. Under the statutory language here, that is not competent to the Commission and *a fortiori* to the government or the respondent: *McGillivray v. Kimber*[1]. There is here an administrative tribunal which, in certain respects, is to act in a judicial manner; and even on the view of the dissenting justices in *McGillivray,* there is liability: what could be more malicious than to punish this licensee for having done what he had an absolute right to do in a matter utterly irrelevant to the *Liquor Act*? Malice in the proper sense is simply acting for a reason and purpose knowingly foreign to the administration, to which was added here the element of intentional punishment by what was virtually vocation outlawry.

It may be difficult if not impossible in cases generally to demonstrate a breach of this public duty in the illegal purpose served; there may be no means, even if proceedings against the Commission were permitted by the Attorney-General, as here they were refused, of compelling the Commission to justify a refusal or revocation or to give reasons for its action; on these questions I make no observation; but in the case before us that difficulty is not present: the reasons are openly avowed.

The act of the respondent through the instrumentality of the Commission brought about a breach of an implied public statutory duty toward the appellant; it was a gross abuse of legal power expressly intended to punish him for an act wholly irrelevant to the statute, a punishment which inflicted on him, as it was intended to do, the destruction of his economic life as a restaurant keeper within the province. Whatever may be the immunity of the Commission or its member from an action for damages, there

[1] (1915), 52 S.C.R. 146, 26 D.L.R. 164.

1959

RONCARELLI v. DUPLESSIS

Rand J.

is none in the respondent. He was under no duty in relation to the appellant and his act was an instrusion upon the functions of a statutory body. The injury done by him was a fault engaging liability within the principles of the underlying public law of Quebec: *Mostyn v. Fabrigas*[1], and under art. 1053 of the *Civil Code*. That, in the presence of expanding administrative regulation of economic activities, such a step and its consequences are to be suffered by the victim without recourse or remedy, that an administration according to law is to be superseded by action dictated by and according to the arbitrary likes, dislikes and irrelevant purposes of public officers acting beyond their duty, would signalize the beginning of disintegration of the rule of law as a fundamental postulate of our constitutional structure. An administration of licences on the highest level of fair and impartial treatment to all may be forced to follow the practice of "first come, first served", which makes the strictest observance of equal responsibility to all of even greater importance; at this stage of developing government it would be a danger of high consequence to tolerate such a departure from good faith in executing the legislative purpose. It should be added, however, that that principle is not, by this language, intended to be extended to ordinary governmental employment: with that we are not here concerned.

It was urged by Mr. Beaulieu that the respondent, as the incumbent of an office of state, so long as he was proceeding in "good faith", was free to act in a matter of this kind virtually as he pleased. The office of Attorney-General traditionally and by statute carries duties that relate to advising the Executive, including here, administrative bodies, enforcing the public law and directing the administration of justice. In any decision of the statutory body in this case, he had no part to play beyond giving advice on legal questions arising. In that role his action should have been limited to advice on the validity of a revocation for such a reason or purpose and what that advice should have been does not seem to me to admit of any doubt. To pass from this limited scope of action to

[1] 98 E.R. 1021.

that of bringing about a step by the Commission beyond the bounds prescribed by the legislature for its exclusive action converted what was done into his personal act.

"Good faith" in this context, applicable both to the respondent and the general manager, means carrying out the statute according to its intent and for its purpose; it means good faith in acting with a rational appreciation of that intent and purpose and not with an improper intent and for an alien purpose; it does not mean for the purposes of punishing a person for exercising an unchallengeable right; it does not mean arbitrarily and illegally attempting to divest a citizen of an incident of his civil status.

I mention, in order to make clear that it has not been overlooked, the decision of the House of Lords in *Allen v. Flood*[1], in which the principle was laid down that an act of an individual otherwise not actionable does not become so because of the motive or reason for doing it, even maliciously to injure, as distinguished from an act done by two or more persons. No contention was made in the present case based on agreed action by the respondent and Mr. Archambault. In *Allen v. Flood*, the actor was a labour leader and the victims non-union workmen who were lawfully dismissed by their employer to avoid a strike involving no breach of contract or law. Here the act done was in relation to a public administration affecting the rights of a citizen to enjoy a public privilege, and a duty implied by the statute toward the victim was violated. The existing permit was an interest for which the appellant was entitled to protection against any unauthorized interference, and the illegal destruction of which gave rise to a remedy for the damages suffered. In *Allen v. Flood* there were no such elements.

Nor is it necessary to examine the question whether on the basis of an improper revocation the appellant could have compelled the issue of a new permit or whether the purported revocation was a void act. The revocation was *de facto*, it was intended to end the privilege and to bring about the consequences that followed. As against the respondent, the appellant was entitled to treat the breach of duty as effecting a revocation and to elect for damages.

[1] [1898] A.C. 1.

1959

RONCARELLI v. DUPLESSIS

Rand J.

Mr. Scott argued further that even if the revocation were within the scope of discretion and not a breach of duty, the intervention of the respondent in so using the Commission was equally a fault. The proposition generalized is this: where, by a statute restricting the ordinary activities of citizens, a privilege is conferred by an administrative body, the continuance of that enjoyment is to be free from the influence of third persons on that body for the purpose only of injuring the privilege holder. It is the application to such a privilege of the proposition urged but rejected in *Allen v. Flood* in the case of a private employment. The grounds of distinction between the two cases have been pointed out; but for the reasons given consideration of this ground is unnecessary and I express no opinion for or against it.

A subsidiary defence was that notice of action had not been given as required by art. 88 C.C.P. This provides generally that, without such notice, no public officer or person fulfilling any public function or duty is liable in damages "by reason of any act done by him in the exercise of his functions". Was the act here, then, done by the respondent in the course of that exercise? The basis of the claim, as I have found it, is that the act was quite beyond the scope of any function or duty committed to him, so far so that it was one done exclusively in a private capacity, however much in fact the influence of public office and power may have carried over into it. It would be only through an assumption of a general overriding power of executive direction in statutory administrative matters that any colour of propriety in the act could be found. But such an assumption would be in direct conflict with fundamental postulates of our provincial as well as dominion government; and in the actual circumstances there is not a shadow of justification for it in the statutory language.

The damages suffered involved the vocation of the appellant within the province. Any attempt at a precise computation or estimate must assume probabilities in an area of uncertainty and risk. The situation is one which the Court should approach as a jury would, in a view of

its broad features; and in the best consideration I can give to them, the damages should be fixed at the sum of $25,000 plus that allowed by the trial court.

I would therefore allow the appeals, set aside the judgment of the Court of Queen's Bench and restore the judgment at trial modified by increasing the damages to the sum of $33,123.53. The appellant should have his costs in the Court of Queen's Bench and in this Court.

The judgment of Locke and Martland JJ. was delivered by

MARTLAND J.:—This is an appeal from a judgment of the Court of Queen's Bench, Appeal Side, for the Province of Quebec[1], District of Montreal, rendered on April 12, 1956, overruling the judgment of the Superior Court rendered on May 2, 1951, under the terms of which the appellant had been awarded damages in the sum of $8,123.53 and costs.

The appellant had appealed from the judgment of the Superior Court in respect of the amount of damages awarded. This appeal was dismissed.

The facts which give rise to this appeal are as follows:

The appellant, on December 4, 1946, was the owner of a restaurant and café situated at 1429 Crescent Street in the City of Montreal. At that time he was the holder of a liquor permit, no. 68, granted to him on May 1, 1946, pursuant to the provisions of the *Alcoholic Liquor Act* of the Province of Quebec and which permitted the sale of alcoholic liquors in the restaurant and café. The permit was valid until April 30, 1947, subject to possible cancellation by the Quebec Liquor Commission (hereinafter sometimes referred to as "the Commission") in accordance with the provisions of s. 35 of that Act. The business operated by the appellant had been founded by his father in the year 1912 and it had been continuously licensed until December 4, 1946. The evidence is that prior to that date the appellant had complied with the requirements of the *Alcoholic Liquor Act* and had conducted a high-class restaurant business.

[1] [1956] Que. Q.B. 447.

1959

RONCARELLI v. DUPLESSIS

Martland J.

The appellant was an adherent of the Witnesses of Jehovah. From some time in 1944 until November 12, 1946, he had, on numerous occasions, given security for Witnesses of Jehovah who had been prosecuted under City of Montreal By-laws numbered 270 and 1643 for minor offences of distributing, peddling and canvassing without a licence. The maximum penalty for these offences was a fine of $40 and costs, or imprisonment for 60 days. The total number of bonds furnished by the appellant was 390. These security bonds were accepted by the City attorney and the Recorder of the City of Montreal without remuneration to the appellant. None of the accused who had been bonded ever defaulted. Subsequently the appellant was released from these bonds at his own request and new security was furnished by others.

As a result of a change of procedure in the Recorder's Court in Montreal by the Attorney in Chief of that Court, the appellant was not accepted as a bondsman in any cases before that Court after November 12, 1946.

Up to November 12, 1946, the security bonds furnished by the appellant were accepted without question. These bonds were based upon the value of the appellant's immovable property containing the restaurant. The appellant did not give any security in any criminal case involving a charge of sedition.

About the 24th or 25th of November 1946 the pamphlet "Quebec's Burning Hate" began to be distributed in the Province of Quebec by the Witnesses of Jehovah. The Chief Crown Prosecutor in Montreal, then Mtre. Oscar Gagnon, K.C., decided that the distribution of this pamphlet should be prevented. There is no evidence that the appellant was at any time a distributor of this pamphlet and his restaurant and café in Montreal was not used for the distribution or storage of these pamphlets by himself or by anyone else. The appellant had ceased to be a bondsman before the distribution of this pamphlet in the Province of Quebec had commenced.

On November 25, 1946, a number of pamphlets was seized in a building in the City of Sherbrooke owned by the appellant and leased from him, as a place of worship, by Witnesses of Jehovah under the control of the local

minister Mr. Raymond Browning. There is no evidence that the appellant was in any way responsible for the activities of this congregation, or that he knew that the pamphlet "Quebec's Burning Hate" was in those premises.

In the course of his inquiries about the distribution of this pamphlet, Mr. Gagnon learned that the appellant had been giving bail in a large number of cases in the Recorder's Court and also that he was the holder of the liquor permit for his restaurant. These facts were brought by Mr. Gagnon to the attention of Mr. Edouard Archambault, then Chairman of the Quebec Liquor Commission and subsequently Chief Judge of the Court of Sessions of the Peace. Mr. Archambault then interviewed Recorder Paquette, who informed him that the appellant held a licence from the Quebec Liquor Commission; that he was furnishing bail in a large number of cases of infractions of municipal by-laws; that these were so numerous that a great part of the police of Montreal had been taken from their duties as a consequence and that his Court was congested by the large number of cases pending before it.

Subsequent to the receipt of this information, Mr Archambault communicated by telephone with the respondent. The discussion which took place on that occasion and on the occasion of a subsequent telephone call will be reviewed later. Following the two telephone conversations between Mr. Archambault and the respondent, Mr Archambault, as manager of the Quebec Liquor Commission, issued an order for the cancellation of the appellant's permit without any prior notice to the appellant. All the liquor in the possession of the appellant on his restaurant premises was seized and was taken into the custody of the Commission.

The appellant carried on his restaurant business without a liquor licence for a period of approximately six months, after which, finding that the business could not be thus operated profitably, he closed it down and later effected a sale of the premises.

The appellant commenced action against the respondent on June 3, 1947, claiming damages in the total sum of $118,741. He alleged that the respondent, without legal or statutory authority, had caused the cancellation of his liquor permit as an act of reprisal because of his having

1959

RONCARELLI v. DUPLESSIS

Martland J.

acted as surety or bondsman for the Witnesses of Jehovah in connection with the charges above mentioned. He alleged that the permit had been arbitrarily and unlawfully cancelled and that, as a result, he had sustained the damages claimed.

By his defence the respondent alleged that the Witnesses of Jehovah, in the years 1945 and 1946, had, with the consent and encouragement of the appellant, organized a propaganda campaign in the Province of Quebec, and particularly in the City of Montreal, where they had distributed pamphlets of a seditious character. The respondent referred to the fact that the appellant had acted as surety for a number of persons under arrest and thus permitted them to repeat their offences and to continue their campaign. He alleged that in his capacity as Attorney-General of the Province of Quebec, after becoming cognizant of the conduct of the appellant and of the fact that he held a permit issued by the Quebec Liquor Commission, he had decided, after careful reflection, that it was contrary to public order to permit the appellant to enjoy the benefit of the privileges of this permit and that he, the respondent, had recommended to the manager of the Quebec Liquor Commission the cancellation of that permit. It was alleged that the permit did not give any right, but constituted a privilege available only during the pleasure of the Commission. He alleged that in the matter he had acted in his quality of Prime Minister and Attorney-General of the Province of Quebec and, accordingly, could not incur any personal responsibility. He further pleaded the provisions of art. 88 of the *Code of Civil Procedure* and alleged that he had not received notice of the action as required by the provisions of that article.

The case came on for trial in the Superior Court before MacKinnon J., who made findings of fact and reached conclusions in law as follows:

1. that the respondent gave an order to the manager of the Commission, Mr. Archambault, to cancel the appellant's permit and that it was the respondent's order which was the determining factor in relation to the cancellation of that permit;

2. that the Commission had acted arbitrarily when it cancelled the permit and had disregarded the rules of reason and justice;

3. that the respondent had failed to show that, in law, he had any authority to interfere with the administration of the Commission, or to order it to cancel a permit;

4. that the respondent was not entitled to receive notice of the action pursuant to art. 88 of the *Code of Civil Procedure* because his acts which were complained of were not done in the exercise of his functions.

Damages were awarded in the total amount of $8,123.53.

From this judgment the respondent appealed. The appellant cross-appealed in respect of the matter of damages, asking for an award in an increased amount.

The respondent's appeal on the issue of liability was allowed and the appellant's appeal was dismissed. Rinfret J. dissented in respect of the allowance of the respondent's appeal.

Various reasons were given for the allowance of the appeal by the majority of the Court[1]. They may be summarized as follows:

Bissonnette J. reached the conclusion that, upon the evidence, the decision to cancel the permit had been made by Mr. Archambault before taking the respondent's advice. He also held that, according to the strict interpretation of the *Alcoholic Liquor Act,* the Commission was not obliged to justify before any Court the wisdom of its acts in cancelling a liquor permit.

Pratte J. allowed the appeal of the respondent on the first ground advanced by Bissonnette J., finding that there was no relationship of cause and effect as between the acts of the respondent and the cancellation of the permit because Mr. Archambault had already made his decision to cancel before consulting with the respondent.

Casey J. was of the same view with respect to this point. He also held that, although the discretion of the Commission to cancel a permit should not be exercised

[1] [1956] Que. Q.B. 447.

1959

RONCARELLI v. DUPLESSIS

Martland J.

arbitrarily or capriciously, no individual has an inherent right to engage in the business regulated by the Act and the continuance of a permit was conditional upon the holder being of good moral character and a suitable person to exercise that privilege. In his view the chairman of the Commission had reasonable grounds for believing that the Witnesses of Jehovah were engaged in a campaign of libel and sedition and that the appellant, an active member of the sect, was participating in the group's activities. His view was that, in the light of this, the Commission could properly cancel the permit.

Martineau J., like the other majority judges in the Court, found that there was no relationship of cause and effect as between what the respondent had done and the cancellation of the permit, also holding that Mr. Archambault had decided to cancel it before communicating with the respondent. He was also of the view that a Minister of the Crown is not liable if, in the exercise of powers granted to him by law, he makes an erroneous decision upon reliable information. He also held that, while the Commission's discretion to cancel a permit was not absolute and had to be exercised in good faith, the discretion is not quasi-judicial but "quasi-illimited" and only restricted by the good faith of its officers. He was of the opinion that the good faith of both the respondent and Mr. Archambault could not be doubted. He found that no order to cancel the permit had been given by the respondent to Mr. Archambault. He also held that, even if an order had been given and had been the determining factor in procuring the cancellation of the permit, there would be no liability upon the respondent, in view of the appellant's participation in the propaganda of the Witnesses of Jehovah.

Rinfret J., who dissented and who would have dismissed the respondent's appeal, in general agreed with the conclusions reached by the trial judge.

In view of the foregoing, it appears that there are four main points which require to be considered in the present appeal, which are as follows:

1. Was there a relationship of cause and effect as between the respondent's acts and the cancellation of the appellant's permit?

2. If there was such a relationship, were the acts of the respondent justifiable on the ground that he acted in good faith in the exercise of his official functions as Attorney-General and Prime Minister of the Province of Quebec?

3. Was the cancellation of the appellant's permit a lawful act of the Commission, acting within the scope of its powers as defined in the *Alcoholic Liquor Act?*

4. Was the respondent entitled to the protection provided by art. 88 of the *Code of Civil Procedure*?

It is proposed to consider each of these points in the above sequence.

With respect to the first point, after reviewing the evidence, I am satisfied that there was ample evidence to sustain the finding of the trial judge that the cancellation of the appellant's permit was the result of instructions given by the respondent to the manager of the Commission.

Two telephone calls were made by Mr. Archambault to the respondent. According to the evidence of the respondent, Mr. Archambault telephoned him in November 1946 "et il m'a dit que Roncarelli qui multipliait les cautionnements à la Cour du Recorder d'une façon désordonnée, contribuant à paralyser les activités de la police et à congestionner les tribunaux, que ce nommé Roncarelli détenait un privilège de la Commission des Liqueurs de Québec."

In reply the respondent says that he said to Mr. Archambault:

> C'est une chose très grave, êtes-vous sûr qu'il s'agit de Roncarelli qui a un permis de la Commission des Liqueurs?

Mr. Archambault then replied that he would inform himself and would communicate with the respondent.

Some time after the first telephone conversation, and apparently about November 30 or December 1, 1946, Mr. Archambault again telephoned the respondent to say:

> qu'il était certain que le Roncarelli en question, qui paralysait les activités de la Cour du Recorder, qui accaparait dans une large mesure les services de la force constabulaire de Montréal, dont les journaux disaient avec raison qu'elle n'avait pas le nombre suffisant de policiers, était bien la personne qui détenait un permis.

1959

RONCARELLI v. DUPLESSIS

Martland J.

To this the respondent replied:

> Dans ces circonstances, je considère que c'est mon devoir, comme Procureur Général et comme Premier Ministre, en conscience, dans l'exercice de mes fonctions officielles et pour remplir le mandat que le peuple m'avait confié et qu'il m'a renouvelé avec une immense majorité en 1948, après la cancellation du permis et après la poursuite intentée contre moi, j'ai cru que c'était mon devoir, en conscience, de dire au Juge que ce permis-là le Gouvernement de Québec ne pouvait pas accorder un privilège à un individu comme Roncarelli qui tenait l'attitude qu'il tenait.

The respondent further says that he told Mr. Archambault:

> Vous avez raison, ôtez le permis, ôtez le privilège.

In February 1947 the respondent, in an interview with the press, stated that the appellant's permit had been cancelled on orders from him. His statement on this point appeared in a news dispatch to the Canadian Press from its Quebec correspondent:

> It was I, as Attorney-General of the Province charged with the protection of good order, who gave the order to annul Frank Roncarelli's permit.
>
> Mr. Duplessis said:
>
> By so doing, not only have we exercised a right but we have fulfilled an imperious duty. The permit was cancelled not temporarily but definitely and for always.

It seems to me that the only reason Mr. Archambault could have had for telephoning the respondent in the first place, after his receipt of the information given by Mr. Gagnon and Recorder Paquette, was to obtain the respondent's direction as to what should be done. I find it difficult to accept the proposition that there was no relationship of cause and effect as between what the respondent said to Mr. Archambault and the cancellation of the permit. While it is true that in his evidence Mr. Archambault states that he had decided to cancel the permit on the day he received the written report from his secret agent Y3, dated November 30, 1946 (which was subsequent to the first telephone conversation), he goes on to say:

> D. Maintenant, ce jour-là où vous avez reçu une lettre, le 30 novembre 1946, avez-vous décidé, ce jour-là, d'enlever la licence?
>
> R. Certainement, ce jour-là, j'avais appelé le Premier Ministre, en l'occurrence le procureur général, lui faisant part des constatations, c'est-à-dire des renseignements que je possédais, et de mon intention d'annuler

le privilège, et le Premier Ministre m'a répondu de prendre mes précautions, de bien vérifier s'il s'agissait bien de la même personne, qu'il pouvait y avoir plusieurs Roncarelli, et coetera. Alors, quand j'ai eu la confirmation de Y3 à l'effet que c'était la même personne, j'ai rappelé le Premier Ministre pour l'assurer qu'il s'agissait bien de Frank Roncarelli, détenteur d'un permis de la Commission des Liqueurs; et, là, le Premier Ministre m'a autorisé, il m'a donné son consentement, son approbation, sa permission, et son ordre de procéder.

I conclude from this evidence that any "decision" of Mr. Archambault's was at most tentative and would only be made effective if he received direction from the respondent to carry it out. I would doubt that, if the respondent had advised against the cancellation of the permit, Mr. Archambault's decision would have been implemented.

The respondent appears to have shared this view because in his evidence he states as follows:

Si j'avais dit au Juge Archambault: "Vous ne le ferez pas", il ne l'aurait probablement pas fait. Comme il me suggérait de le faire et qu'après réflexion et vérification je trouvais que c'était correct, que c'était conforme à mon devoir, j'ai approuvé et c'est toujours un ordre que l'on donne. Quand l'officier supérieur parle, c'est un ordre que l'on donne, même s'il accepte la suggestion de l'officier dans son département, c'est un ordre qu'il donne indirectement. Je ne me rapelle pas des expressions exactes, mais ce sont les faits.

I, therefore, agree with the learned trial judge that the cancellation of the appellant's permit was the result of an order given by the respondent.

The second point for consideration is as to whether the respondent's acts were justifiable as having been done in good faith in the exercise of his official function as Attorney-General and Prime Minister of the Province of Quebec.

In support of his contention that the respondent had so acted, we were referred by his counsel to the following statutory provisions:

THE ATTORNEY-GENERAL'S DEPARTMENT ACT,
R.S.Q. 1941, c. 46

* * *

3. The Attorney-General is the official legal adviser of the Lieutenant-Governor, and the legal member of the Executive Council of the Province of Quebec.

4. The duties of the Attorney-General are the following:

1. To see that the administration of public affairs is in accordance with the law;

1959

RONCARELLI v. DUPLESSIS

Martland J.

2. To exercise a general superintendence over all matters connected with the administration of justice in the Province.

5. The function and powers of the Attorney-General are the following:

1. He has the functions and powers which belong to the office of Attorney-General of England, respectively, by law or usage, insofar as the same are applicable to this Province, and also the functions and powers, which, up to the Union, belonged to such offices in the late Province of Canada, and which, under the provisions of the British North America Act, 1867, are within the powers of the Government of this Province;

2. He advises the heads of the several departments of the Government of the Province upon all matters of law concerning such departments, or arising in the administration thereof;

* * *

7. He is charged with superintending the administration or the execution, as the case may be, of the laws respecting police.

THE EXECUTIVE POWER ACT, R.S.Q. 1941, c. 7

* * *

5. The Lieutenant-Governor may appoint, under the Great Seal, from among the members of the Executive Council, the following officials, who shall remain in office during pleasure:

1. A Prime Minister who shall, ex-officio, be president of the Council.

THE ALCOHOLIC LIQUOR ACT, R.S.Q. 1941, c. 255

DIVISION XII

INVESTIGATION AND PROSECUTION OF OFFENCES

148. The Attorney-General shall be charged with:

1. Assuring the observance of this act and of the Alcoholic Liquor Possession and Transportation Act (Chap. 256), and investigating, preventing and suppressing the infringements of such acts, in every way authorized thereby;

2. Conducting the suits or prosecutions for infringements of this act or of the said Alcoholic Liquor Possession and Transportation Act.

I do not find, in any of these provisions, authority to enable the respondent, either as Attorney-General or Prime Minister, to direct the cancellation of a permit under the *Alcoholic Liquor Act*. On the contrary, the intent and purpose of that Act appears to be to place the complete control over the liquor traffic in Quebec in the hands of an independent commission. The only function of the Attorney-General under that statute is in relation to the assuring of the observance of its provisions. There is no evidence of any breach of that Act by the appellant.

However, it is further argued on behalf of the respondent that, as Attorney-General, in order to suppress or to prevent crimes and offences, "He may do so by instituting legal proceedings; he may do so by other methods." This amounts to a contention that he is free to use any methods he chooses; that, on suspicion of participation in what he thinks would be an offence, he may sentence a citizen to economic ruin without trial. This seems to me to be a very dangerous proposition and one which is completely alien to the legal concepts applicable to the administration of public office in Quebec, as well as in the other provinces of Canada.

In my view, the respondent was not acting in the exercise of any official powers which he possessed in doing what he did in this matter.

The third point to be considered is as to whether the appellant's permit was lawfully cancelled by the Commission under the provisions of the *Alcoholic Liquor Act*. Section 35 of that Act makes provision for the cancellation of a permit in the following terms:

> 35. 1. Whatever be the date of issue of any permit granted by the Commission, such permit shall expire on the 30th of April following, unless it be cancelled by the Commission before such date, or unless the date at which it must expire be prior to the 30th of April following.
>
> The Commission may cancel any permit at its discretion.

It is contended by the respondent, and with considerable force, that this provision gives to the Commission an unqualified administrative discretion as to the cancellation of a permit issued pursuant to that Act. Such a discretion, it is contended, is not subject to any review in the Courts.

The appellant contends that the Commission's statutory discretion is not absolute and is subject to legal restraint. He cites the statement of the law by Lord Halsbury in *Sharp v. Wakefield*[1]:

> An extensive power is confided to the justices in their capacity as justices to be exercised judicially; and "discretion" means when it is said that something is to be done within the discretion of the authorities that that something is to be done according to the rules of reason and justice, not according to private opinion: Rooke's Case; according to law, and not humour. It is to be, not arbitrary, vague, and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man competent to the discharge of his office ought to confine himself.

[1] [1891] A.C. 173 at 179.

1959

RONCARELLI v. DUPLESSIS

Martland J.

That was a case dealing with the discretionary powers of the licensing justices to refuse renewal of a licence for the sale of intoxicating liquors. This statement of the law was approved by Lord Greene M.R. in *Minister of National Revenue v. Wrights' Canadian Ropes, Limited*[1].

The appellant further contends that, in exercising this discretion, the rules of natural justice must be observed and points out that no notice of the intention of the Commission to cancel his permit was ever given to the appellant, nor was he given a chance to be heard by the Commission before the permit was cancelled.

With respect to this latter point, it would appear to be somewhat doubtful whether the appellant had a right to a personal hearing, in view of the judgment of Lord Radcliffe in *Nakkuda Ali v. Jayaratne*[2]. However, regardless of this, it is my view that the discretionary power to cancel a permit given to the Commission by the *Alcoholic Liquor Act* must be related to the administration and enforcement of that statute. It is not proper to exercise the power of cancellation for reasons which are unrelated to the carrying into effect of the intent and purpose of the Act. The association of the appellant with the Witnesses of Jehovah and his furnishing of bail for members of that sect, which were admitted to be the reasons for the cancellation of his permit and which were entirely lawful, had no relationship to the intent and purposes of the *Alcoholic Liquor Act*.

Furthermore, it should be borne in mind that the right of cancellation of a permit under that Act is a substantial power conferred upon what the statute contemplated as an independent commission. That power must be exercised solely by that corporation. It must not and cannot be exercised by any one else. The principle involved is stated by the Earl of Selborne in the following passage in his judgment in *Spackman v. Plumstead Board of Works*[3]:

> No doubt, in the absence of special provisions as to how the person who is to decide is to proceed, the law will imply no more than that the substantial requirements of justice shall not be violated. He is not a judge in the proper sense of the word; but he must give the parties an opportunity of being heard before him and stating their case and their view. He must give notice when he will proceed with the matter, and he must act honestly and impartially and not under the dictation of

[1] [1947] A.C. 109 at 122. [2] [1951] A.C. 66.
[3] (1885), 10 App. Cas. 229 at 240.

some other person or persons to whom the authority is not given by law. There must be no malversation of any kind. There would be no decision within the meaning of the statute if there were anything of that sort done contrary to the essence of justice.

While the Earl of Selborne is here discussing the rules applicable to a quasi-judicial tribunal, that portion of his statement which requires such a tribunal to act honestly and impartially and not under the dictation of some other person or persons is, I think, equally applicable to the performance of an administrative function.

The same principle was applied in respect of the performance of an administrative function by Chief Justice Greenshields in *Jaillard v. City of Montreal*[1].

In the present case it is my view, for the reasons already given, that the power was not, in fact, exercised by the Commission, but was exercised by the respondent, acting through the manager of the Commission. Cancellation of a permit by the Commission at the request or upon the direction of a third party, whoever he may be, is not a proper and valid exercise of the power conferred upon the Commission by s. 35 of the Act. The Commission cannot abdicate its own functions and powers and act upon such direction.

Finally, there is the question as to the giving of notice of the action by the appellant to the respondent pursuant to art. 88 of the *Code of Civil Procedure,* which reads as follows:

ACTIONS AGAINST PUBLIC OFFICERS

88. No public officer or other person fulfilling any public function or duty can be sued for damages by reason of any act done by him in the exercise of his functions, nor can any verdict or judgment be rendered against him, unless notice of such action has been given him at least one month before the issue of the writ of summons.

Such notice must be in writing; it must state the grounds of the action, and the name of the plaintiff's attorney or agent, and indicate his office; and must be served upon him personnally or at his domicile.

The contention of the respondent is that, as Attorney-General, he was a public official whose function was to maintain law and order in the Province; that he acted as he did in the intended exercise of that function and that

[1] (1934), 72 Que. S.C. 112.

1959

RONCARELLI v. DUPLESSIS

Martland J.

he is not deprived of the protection afforded by the article because he had exceeded the powers which, in law, he possessed.

The issue is as to whether those acts were "done by him in the exercise of his functions." For the reasons already given in dealing with the second of the four points under discussion, I do not think that it was a function either of the Prime Minister or of the Attorney-General to interfere with the administration of the Commission by causing the cancellation of a liquor permit. That was something entirely outside his legal functions. It involved the exercise of powers which, in law, he did not possess at all.

Is the position altered by the fact that apparently he thought it was his right and duty to act as he did? I do not think that it is. The question of whether or not his acts were done by him in the exercise of his functions is not to be determined on the basis of his own appreciation of those functions, but must be determined according to law. The respondent apparently assumed that he was justified in using any means he thought fit to deal with the situation which confronted him. In my view, when he deliberately elected to use means which were entirely outside his powers and were unlawful, he did not act in the exercise of his functions as a public official.

The principle which should be applied is stated by Lopes J. in *Agnew v. Jobson*[1]. That was an action for assault against a justice of the peace who had ordered a medical examination of the person of the plaintiff. There was no legal authority to make such an order, but it was admitted that the defendant bona fide believed that he had the authority to do that which he did. The defendant relied on absence of notice of the action as required by 11 & 12 Vic., c. 44. Section 8 of that Act provided that "no action shall be brought against any justice of the peace for anything done by him in the execution of his office" unless within six calendar months of the act complained of. Section 9, the one relied on by the defendant, provided that "no such action shall be commenced against any such justice" until a month after notice of action. Lopes J.

[1] (1877), 47 L.J.M.C. 67, 13 Cox C.C. 625.

held that "such justice" in s. 9 referred to a justice in execution of his office in s. 8. He held that s. 9 did not provide a defence to the defendant in these words (p. 68):

> I am of opinion tnat the defendant Jobson is not entitled to notice of action. There was a total absence of any authority to do the act, and although he acted bona fide, believing he had authority, there was nothing on which to ground the belief, no knowledge of any fact such a belief might be based on.

Similarly here there was nothing on which the respondent could found the belief that he was entitled to deprive the appellant of his liquor permit.

On the issue of liability, I have, for the foregoing reasons, reached the conclusion that the respondent, by acts not justifiable in law, wrongfully caused the cancellation of the appellant's permit and thus cause damage to the appellant. The respondent intentionally inflicted damage upon the appellant and, therefore, in the absence of lawful justification, which I do not find, he is liable to the appellant for the commission of a fault under art. 1053 of the *Civil Code*.

I now turn to the matter of damages.

The learned trial judge awarded damages to the appellant in the sum of $8,123.53, made up of $1,123.53 for loss of value of liquor seized by the Commission, $6,000 for loss of profits from the restaurant from December 4, 1946, the date of the cancellation of the permit, to May 1, 1947, the date when the permit would normally have expired, and $1,000 for damages to his personal reputation. No objection is taken by the appellant in respect of these awards, but he contends that he is also entitled to compensation under certain other heads of damage in respect of which no award was made by the learned trial judge. These are in respect of damage to the good will and reputation of his business, loss of property rights in his permit and loss of future profits for a period of at least one year from May 1, 1947. Damages in respect of these items were not allowed by the learned trial judge because of the fact that the appellant's permit was "only a temporary asset."

The appellant contends that, although his permit was not permanent, yet, in the light of the long history of his restaurant and the continuous renewals of the permit previously, he had a reasonable expectation of renewal in

1959

RONCARELLI v. DUPLESSIS

Martland J.

the future, had not the cancellation been effected in December 1946. He contends that the value of the good will of his business was substantially damaged by that cancellation.

His position on this point is supported by the reasoning of Duff J. (as he then was) in *McGillivray v. Kimber*[1]. That was an action claiming damages for the wrongful cancellation of the appellant's pilot's licence by the Sydney Pilotage Authority. At p. 163 he says:

> The statement of defence seems to proceed upon the theory that for the purpose of measuring legal responsibility the consequences of this dismissal came to an end with the expiry of the term and that I shall discuss; but for the present it is sufficient to repeat that the dismissal was an act which being not only calculated, but intended to prevent the appellant continuing the exercise of his calling had in fact this intended effect; and the respondents are consequently answerable in damages unless there was in law justification or excuse for what they did. Per Bowen L.J., Mogul S.S. Co. v. McGregor, 23 Q.B.D. 598.

The statement by Bowen L.J. to which he refers appears at p. 613 of the report and is also of significance in relation to the appellant's right of action in this case. It is as follows:

> Now, intentionally to do that which is calculated in the ordinary course of events to damage, and which does, in fact, damage another in that other person's property or trade, is actionable if done without just cause or excuse.

The evidence establishes that there was a substantial reduction in the value of the good will of the appellant's restaurant business as a result of what occurred, apart from the matter of any loss which might have resulted on the sale of the physical assets. It is difficult to assess this loss and there is not a great deal of evidence to assist in so doing. The appellant did file, as exhibits, income tax returns for the three years prior to 1946, which showed in those years a total net income from the business of $23,578.88. The profit-making possibilities of the business are certainly an item to be considered in determining the value of the good will.

However, in all the circumstances, the amount of these damages must be determined in a somewhat arbitrary fashion. I consider that $25,000 should be allowed as damages for the diminution of the value of the good will and for the loss of future profits.

[1] (1915), 52 S.C.R. 146, 26 D.L.R. 164.

I would allow both appeals, with costs here and below, and order the respondent to pay to the appellant damages in the total amount of $33,123.53, with interest from the date of the judgment in the Superior Court, and costs.

CARTWRIGHT J. (*dissenting*):—This appeal is from two judgments of the Court of Queen's Bench (Appeal Side) for the Province of Quebec[1], of which the first allowed an appeal from a judgment of MacKinnon J. and dismissed the appellant's action, and the second dismissed a cross-appeal asking that the damages awarded by the learned trial judge be increased.

The respondent is, and was at all relevant times, the Prime Minister and Attorney-General of the Province of Quebec.

The appellant on December 4, 1946, was the owner of an immovable property, known as 1429 Crescent Street in the City of Montreal, where he had for many years successfully carried on the business of a restaurant and cafe. He was the holder of liquor permit no. 68 granted to him on May 1, 1946, for the sale of alcoholic liquors in his restaurant and cafe pursuant to the provisions of the *Alcoholic Liquor Act*, R.S.Q. 1941, c. 255, hereinafter referred to as "the Act". This permit would normally have expired on April 30, 1947. The business carried on by the appellant had been founded by his father in 1912 and had been licensed uninterruptedly from that time until 1946. Prior to December 4, 1946, the appellant had complied with all the requirements of the Act and had carried on his restaurant business in conformity with the laws of the Province.

The appellant was at all relevant times a member of a sect known as "The Witnesses of Jehovah" and from some time in 1944 up to November 12, 1946, had on about 390 occasions, acted as bailsman for numbers of his co-religionists prosecuted under by-laws of the City of Montreal for distributing literature without a licence. None of those for whom he acted as bailsman defaulted in appearance, and all of them were ultimately discharged upon the by-laws under which they were charged being held to be invalid.

[1] [1956] Que. Q.B. 447.

1959

RONCARELLI v. DUPLESSIS

Cartwright J.

About the 24th or 25th of November 1946 members of the sect commenced distributing copies of a circular entitled "Quebec's burning hate for God and Christ and Freedom is the shame of all Canada". Copies of this circular are printed in the record, the English version being exhibit D7 and the French version exhibit D11. The then senior Crown Prosecutor in Montreal, Mtre Oscar Gagnon, formed the opinion that the circular was a seditious libel and that its distribution should be prevented. It results from the judgment of this Court in *Boucher v. The King*[1] that the learned Crown Prosecutor was in error in forming the opinion that the circular could be regarded as seditious. It, however, can hardly be denied that it was couched in terms which would outrage the feelings of the great majority of the inhabitants of the Province of Quebec; and the same may be said of a number of other documents circulated by the sect, copies of which form part of the record in the case at bar.

The evidence does not show that the appellant took part in the distribution of any of the circulars mentioned or that he was a leader or chief of the sect. He did not act as bailsman for any member of the sect charged in connection with the distribution of the circular, "Quebec's burning hate".

On November 25, 1946, pamphlets, including copies of "Quebec's burning hate" were seized in a building in the City of Sherbrooke owned by the appellant and leased by him to a congregation of Witnesses of Jehovah as a "Kingdom Hall" or place of worship. The appellant was not aware that the pamphlets were in this building.

From his investigations and the reports which he received M. Gagnon concluded that the distribution of the pamphlets "convergeait autour de M. Roncarelli ou de personnes qui étaient près de lui" and he so informed M. Edouard Archambault, the manager of the Quebec Liquor Commission. It may well be that M. Gagnon reached the conclusion mentioned on insufficient evidence. M. Gagnon also informed M. Archambault that the appellant had acted as bailsman for a great number of Witnesses of Jehovah.

[1] [1951] S.C.R. 265, 2 D.L.R. 369, 11 C.R. 85, 99 C.C.C. 1.

On receiving this information from M. Gagnon, M. Archambault read the circular, "Quebec's burning hate" and had a conversation with M. Paquette, the Recorder-in-Chief at Montreal, who confirmed the statements as to the appellant furnishing bail.

At this point M. Archambault formed the opinion that he should cancel the permit held by the appellant, but before taking any action he telephoned the respondent at Quebec, told him what information he had received and that he proposed cancelling the permit. The respondent told him to be careful to make sure that the Roncarelli who had furnished bail was in fact the appellant. M. Archambault satisfied himself as to this through the report of an agent "Y3", in whom he had confidence, and thereupon, according to his uncontradicted evidence, decided to cancel the permit. The reasons which brought him to this decision were stated by him as follows:

D. Alors, à ce moment-là, vous aviez déjà décidé d'enlever cette licence?

R. Oui.

D. Vous basant, je suppose, sur les rapports que vous aviez déjà reçus de monsieur Oscar Gagnon et du recorder-en-chef Paquette que monsieur Roncarelli avait fourni des cautionnements?

R. Oui; et, à part de cela, de la littérature que j'avais lue.

D. Et le pamphlet auquel vous avez référé: "Quebec's Burning Hate"?

R. Oui, monsieur.

M. Archambault then telephoned the respondent. The substance of the two telephone conversations between M. Archambault and the respondent is summarized by the former as follows:

D. Maintenant, ce jour-là où vous avez reçu une lettre, le 30 novembre 1946, avez-vous décidé, ce jour-là, d'enlever la licence?

R. Certainement, ce jour-là, j'avais appelé le Premier Ministre, en l'occurrence le procureur général, lui faisant part des constatations, c'est-à-dire des renseignements que je possédais, et de mon intention d'annuler le privilège, et le Premier Ministre m'a répondu de prendre mes précautions, de bien vérifier s'il s'agissait bien de la même personne, qu'il pouvait y avoir plusieurs Roncarelli, et coetera. Alors, quand j'ai eu la confirmation de Y3 à l'effet que c'était la même personne, j'ai rappelé le Premier Ministre pour l'assurer qu'il s'agissait bien de Frank Roncarelli, détenteur d'un permis de la Commission des Liqueurs; et, là le Premier Ministre m'a autorisé, il m'a donné son consentement, son approbation, sa permission, et son ordre de procéder.

1959

RONCARELLI v. DUPLESSIS

Cartwright J.

The evidence of the respondent is also that the suggestion of cancelling the permit was made by M. Archambault, and there is no evidence to the contrary.

There has been a difference of opinion in the Courts below as to whether what was said by the respondent to M. Archambault amounted to an order to cancel or merely to an "approbation énergique" of a decision already made. I do not find it necessary to choose between these conflicting views as I propose to assume for the purposes of this appeal that what was said by the respondent was so far a determining factor in the cancellation of the permit as to render him liable for the damages caused thereby to the appellant if the cancellation was an actionable wrong giving rise to a right of action for damages.

All of the Judges in the Courts below who have dealt with that aspect of the matter have concluded that the respondent acted throughout in the honest belief that he was fulfilling his duty to the Province, and this conclusion is supported by the evidence.

The opinion of M. Archambault and of the respondent appears to have been that a permit to sell liquor under the Act is a privilege in the gift of the Province which ought not to be given to, or allowed to continue to be enjoyed by, one who was actively supporting members of a group of persons who were engaged in a concerted campaign to vilify the Province and were persistently acting in contravention of existing by-laws. Once it is found, as I think it must be on the evidence, that this opinion was honestly entertained, I have reached the conclusion, for reasons that will appear, that the Court cannot inquire as to whether there was sufficient evidence to warrant its formation or as to whether it constituted a reasonable ground for cancellation of the permit.

The permit was cancelled on December 4, 1946, without any prior notice to the appellant and without his being given any opportunity to show cause why it ought not to be cancelled. It is clear that the appellant suffered substantial financial loss as a result of the cancellation.

In determining whether the cancellation of the permit in these circumstances was an actionable wrong on the part of the commission or of M. Archambault, its manager, it is necessary to consider the relevant provisions of the Act. These appear to me to be as follows:

S.5 A Commission is by this act created under the name of "The Quebec Liquor Commission", or "Commission des liqueurs de Québec", and shall constitute a corporation, vested with all the rights and powers belonging generally to corporations.

The exercise of the functions, duties and powers of the Quebec Liquor Commission shall be vested in one person alone, named by the Lieutenant-Governor in Council, with the title of manager. The remuneration of such person shall be determined by the Lieutenant-Governor in Council and be paid out of the revenues of the Liquor Commission.

* * *

S.9 The function, duties and powers of the Commission shall be the following:

* * *

d. To control the possession, sale and delivery of alcoholic liquor in accordance with the provisions of this act;

e. To grant, refuse, or cancel permits for the sale of alcoholic liquor or other permits in regard thereto, and to transfer the permit of any person deceased;

* * *

S.32 No permit shall be granted other than to an individual, and in his personal name.

The application for a permit may be made only by a British subject, must be signed by the applicant before witnesses, and must give his surname, Christian names, age, occupation, nationality and domicile, the kind of permit required and the place where it will be used, and must be accompanied by the amount of the duties payable upon the application for the permit. The applicant must furnish all additional information which the Commission may deem expedient to ask for.

If the permit is to be used for the benefit of a partnership or corporation, the application therefore must likewise be accompanied by a declaration to that effect, and duly signed by such partnership or corporation. In such case, the partnership or corporation shall be responsible for any fine and costs, to which the holder of the permit may be condemned; and the amount thereof may be recovered before any court having jurisdiction, without prejudice to imprisonment, if any.

All applications for permits must be addressed to the Commission before the 10th of January in each year, to take effect on the 1st of May in the same year.

* * *

S.34 1. The Commission may refuse to grant any permit.

2. The Commission must refuse to grant any permit for the sale of alcoholic liquor in any municipality where a prohibition by-law is in force.

1959

RONCARELLI v. DUPLESSIS

Cartwright J.

Subsections 2 to 6 of s. 34 enumerate special cases in which the Commission must refuse a permit.

S.35 1. Whatever be the date of issue of any permit granted by the Commission, such permit shall expire on the 30th day of April following, unless it be cancelled by the Commission before such date, or unless the date at which it must expire be prior to the 30th of April following.

The Commission may cancel any permit at its discretion.

2. Saving the provisions of subsection 4 of this section, the cancellation of a permit shall entail the loss of the privilege conferred by such permit, and of the duties paid to obtain it, and the seizure and confiscation by the Commission of the alcoholic liquor found in the possession of the holder thereof, and the receptacles containing it, without any judicial proceedings being required for such confiscation.

The cancellation of a permit shall be served by a bailiff leaving a duplicate of such order of cancellation, signed by three members of the Commission, with the holder of such permit or with any other reasonable person at his domicile or place of business.

The cancellation shall take effect as soon as the order is served.

* * *

S.35 4. If the cancellation of the permit be not preceded or followed by a conviction for any offence under this act committed by the holder of such permit while it was in force, the Commission shall remit to such holder.

a. Such part of the duties which such person has paid upon the granting of such permit, proportionate to the number of full calendar months still to run up to the 1st of May following;

b. The proceeds of every sale by the Commission, after the seizure and confiscation thereof, of beer having an alcoholic content of not more than four per cent, in weight, less ten per cent of such proceeds;

c. The value, as determined by the Commission, of the other alcoholic liquor seized and confiscated, less ten per cent of such value.

5. Save in the case where a permit is granted to an individual on behalf of a partnership or corporation, in accordance with section 32, the Commission must cancel every permit made use of on behalf of any person other than the holder.

S.36 The Commission must cancel a permit:

1. Upon the production of a final condemnation, rendered against the permit-holder, his agent or employee, for selling, in the establishment, alcoholic liquor manufactured illegally or purchased in violation of this act;

2. Upon the production of three final condemnations rendered against the permit-holder for violation of this act;

3. If it appears that the permit-holder has, without the Commission's authorization, transferred, sold, pledged, or otherwise alienated the rights conferred by the permit.

On a consideration of these sections and of the remainder of the Act I am unable to find that the Legislature has, either expressly or by necessary implication, laid down

any rules to guide the commission as to the circumstances under which it may refuse to grant a permit or may cancel a permit already granted. In my opinion the intention of the legislature, to be gathered from the whole Act, was to enumerate (i) certain cases in which the granting of a permit is forbidden, and (ii) certain cases in which the cancellation of a permit is mandatory, and, in all other cases to commit the decision as to whether a permit should be granted, refused or cancelled to the unfettered discretion of the commission. I conclude that the function of the commission in making that decision is administrative and not judicial or quasi-judicial. The submission of counsel for the respondent, made in the following words, appears to me to be well founded:

> Under the Statute, no one has a pre-existing right to obtain a permit, and the permit being granted under the condition that it may be cancelled at any time, and no cause of cancellation being mentioned and no form of procedure being indicated, the cancellation is a discretionary decision of a purely administrative character.

I accept as an accurate statement of the distinction between a judicial and an administrative tribunal that adopted by Masten J.A. in giving the judgment of the Court of Appeal for Ontario in *re Ashby et al*[1]:

> The distinction between a judicial tribunal and an administrative tribunal has been well pointed out by a learned writer in 49 Law Quarterly Review at pp. 106, 107 and 108:
>
> "A tribunal that dispenses justice, i.e. every judicial tribunal, is concerned with legal rights and liabilities, which means rights and liabilities conferred or imposed by 'law'; and 'law' means statute or long-settled principles. These legal rights and liabilities are treated by a judicial tribunal as pre-existing; such a tribunal professes merely to ascertain and give effect to them; it investigates the facts by hearing 'evidence' (as tested by long-settled rules), and it investigates the law by consulting precedents. Rights or liabilities so ascertained cannot, in theory, be refused recognition and enforcement, and no judicial tribunal claims the power of refusal.
>
> In contrast, non-judicial tribunals of the type called 'administrative' have invariably based their decisions and orders, not on legal rights and liabilities, but on policy and expediency.
>
> *Leeds (Corp.) v. Ryder* (1907) A.C. 420, at 423, 424, per Lord Loreburn L.C.; *Shell Co. of Australia v. Federal Commissioner of Taxation* (1931) A.C. 275, at 295; *Boulter v. Kent* JJ., (1897) A.C. 556, at 564.
>
> A judicial tribunal looks for some law to guide it; an 'administrative' tribunal, within its province, is a law unto itself."

[1] [1934] O.R. 421 at 428, 3 D.L.R. 565, 62 C.C.C. 132.

1959

RONCARELLI v. DUPLESSIS

Cartwright J.

In *re Ashby* the Court found that the statute there under consideration set up certain fixed standards and prescribed conditions on which persons might have their certificates revoked by the board, and accordingly held its function to be quasi-judicial; in the case at bar, on the contrary, no standards or conditions are indicated and I am forced to conclude that the Legislature intended the commission "to be a law unto itself".

If I am right in the view that in cancelling the permit M. Archambault was performing an administrative act in the exercise of an unfettered discretion given to him by the statute it would seem to follow that he was not bound to give the appellant an opportunity to be heard before deciding to cancel and that the Court cannot be called upon to determine whether there existed sufficient grounds for his decision. If authority is needed for this conclusion it may be found in the judgment of the Judicial Committee, delivered by Lord Radcliffe, in *Nakkuda Ali v. M. F. De S. Jayaratne*[1] and in the reasons of my brother Martland in *Calgary Power Limited et al v. Copithorne*[2]. The wisdom and desirability of conferring such a power upon an official without specifying the grounds upon which it is to be exercised are matters for the consideration of the Legislature not of the Court.

If, contrary to my conclusion, the function of the commission was quasi-judicial, it may well be that its decision to cancel the permit would be set aside by the Court for failure to observe the rules as to how such tribunals must proceed which are laid down in many authorities and are compendiously stated in the following passage in the judgment of the Earl of Selborne in *Spackman v. Plumstead Board of Works*[3]:

> No doubt, in the absence of special provisions as to how the person who is to decide is to proceed, the law will imply no more than that the substantial requirements of justice shall not be violated. He is not a judge in the proper sense of the word; but he must give the parties an opportunity of being heard before him and stating their case and their view. He must give notice when he will proceed with the matter, and he must act honestly and impartially and not under the dictation of some other person or persons to whom the authority is not given by

[1] [1951] A.C. 66.
[2] [1959] S.C.R. 24, 16 D.L.R. (2d) 241.
[3] (1885), 10 App. Cas. 229 at 240.

law. There must be no malversation of any kind. There would be no decision within the meaning of the statute if there were anything of that sort done contrary to the essence of justice.

But even if it were assumed that the function of the commission was quasi-judicial and that its order cancelling the permit should be set aside for failure to observe the rules summarized in the passage quoted, I would be far from satisfied that any action for damages would lie.

If that question arose for decision it would be necessary to consider the judgments delivered in this Court in *McGillivray v. Kimber*[1], the cases cited in Halsbury, 2nd ed., vol. 26, pp. 284 and 285, in support of the following statement:

> Persons exercising such quasi-judicial powers . . . in the absence of fraud, collusion, or malice, are not liable to any civil action at the suit of any person aggrieved by their decisions . . .

and the judgment of Wilmot C.J., concurred in by Gould J. and Blackstone J., in *Bassett v. Godschall*[2]:

> The legislature hath intrusted the justices of peace with a discretionary power to grant or refuse licences for keeping inns and alehouses; if they abuse that power, or misbehave themselves in the execution of their office or authority, they are answerable criminally, by way of information, in B.R. I cannot think a justice of peace is answerable in an action to every individual who asks him for a licence to keep an inn or an alehouse, and he refuses to grant one; if he were so, there would be an end of the commission of the peace, for no man would act therein. Indeed he is answerable to the public if he misbehaves himself, and wilfully, knowingly and maliciously injures or oppresses the King's subjects, under colour of his office, and contrary to law: but he cannot be answerable to every individual, touching the matter in question, in an action. Every plaintiff in an action must have an antecedent right to bring it; the plaintiff here has no right to have a licence, unless the justices think proper to grant it, therefore he can have no right of action against the justices for refusing it.

For the above reasons I have reached the conclusion that the heavy financial loss undoubtedly suffered by the appellant was *damnum sine injuria*. The whole loss flowed directly from the cancellation of the permit which was an act of the commission authorized by law. I have formed this opinion entirely apart from any special statutory protection afforded to the commission or to its manager, M. Archambault, as, for example, by s. 12 of the Act.

[1] (1915), 52 S.C.R. 146, 26 D.L.R. 164.
[2] (1770), 3 Wils. 121 at 123, 95 E.R. 967.

1959

RONCARELLI v. DUPLESSIS

Cartwright J.

The case of *James v. Cowan*[1] relied upon by counsel for the appellant as supporting the existence of a right of action for damages seems to me to be clearly distinguishable. In that case the right of action asserted was for damages for the wrongful taking of the plaintiff's goods. The only justification put forward was an order held to be *ultra vires* and therefore void. It may be mentioned in passing that if, contrary to my view, the decision of the commission in the case at bar was made in the exercise of a judicial function, its failure to follow a rule of natural justice would appear to render the order voidable but not void; *Dimes v. Grand Junction Canal Proprietors*[2].

Having concluded that the act of the commission in cancelling the permit was not an actionable wrong, it appears to me to follow that the respondent cannot be answerable in damages for directing or approving, as the case may be, the doing of that act.

As it was put by Bissonnette J.[3]:

> D'où il découle, en saine logique, que si dans l'exercice de son pouvoir discrétionnaire, il (M. Archambault) ne commettait ni faute, ni illégalité, personne n'est justifié à chercher à atteindre, au delà de sa personne, un conseiller, voire un chef ou supérieur politique, pour le motif que sans la faute du premier, celle qu'on veut imputer au second ne peut exister.

On this branch of the matter, I should perhaps mention that there is, in the record, no room for any suggestion that the respondent coerced an unwilling Commission into making a decision contrary to the view of the latter as to what that decision should be.

For the above reasons it is my opinion that the appeal fails and it becomes unnecessary for me to consider the alternative defence as to lack of notice of action, based upon art. 88 of the *Code of Civil Procedure* or the question of the quantum of damages.

The appeal, as to both of the judgments of the Court of Queen's Bench, should be dismissed with costs.

[1] [1932] A.C. 542.
[2] (1852), 3 H.L. Cas. 759, 10 E.R. 301.
[3] [1956] Que. Q.B. 447 at 457.

1959

RONCARELLI v. DUPLESSIS

FAUTEUX J. (*dissenting*):—L'appelant se pourvoit à l'encontre de deux décisions majoritaires de la Cour du banc de la reine[1], dont la première infirme un jugement de la Cour supérieure condamnant l'intimé à lui payer une somme de $8,123.53 à titre de dommages-intérêts, et dont la seconde rejette l'appel logé par lui-même pour faire augmenter le quantum des dommages ainsi accordés.

Les faits donnant lieu à ce litige se situent dans le cadre des activités poursuivies dans la province de Québec, au cours particulièrement des années 1944, 1945 et 1946, par la secte des Témoins de Jéhovah. Ces activités prenaient forme d'assemblées, de distribution de circulaires, de pamphlets et de livres, et de sollicitation, dans les rues et à domicile. Dirigée ouvertement contre les pratiques des religions professées dans la province et, plus particulièrement, de la religion catholique, les enseignements de cette secte étaient diffusés dans un langage manifestement, sinon délibérément, insultant et, par suite, provoquèrent dans les cités et les villages où ils étaient propagés, des troubles à la paix publique. Il y eut bris d'assemblées, assauts de personnes et dommages à la propriété. De plus, et partageant l'opinion généralement acceptée que cette campagne provocatrice était l'œuvre de la licence et non de la liberté sous la loi, plusieurs autorités civiles refusaient d'accorder la protection recherchée par les membres de la secte ou adoptaient des moyens pour paralyser ces activités considérées comme une menace à la paix publique. L'intimé, comme Procureur Général, eut en son ministère, où des plaintes nombreuses affluèrent, tous les échos de cette situation. Devant les tribunaux, actions ou poursuites se multiplièrent. A Montréal, les arrestations pour distribution de littérature, sans permis, atteignirent et dépassèrent plusieurs centaines. Devant la Cour du Recorder, où furent traduits ceux qu'on accusait de violer le règlement municipal, on plaidait l'invalidité ou l'inapplication du règlement et attendant le prononcé d'un tribunal supérieur sur le bien-fondé de ces prétentions, on ajournait les causes. C'était l'appelant, l'un des membres de la secte, qui, dans la plupart de ces arrestations, à Montréal, fournissait le cautionnement garantissant la comparution des accusés. Une entente était même intervenue entre lui et les avocats

[1] [1956] Que. Q.B. 447.

1959

RONCARELLI
v.
DUPLESSIS

Fauteux J.

chargés des poursuites, suivant laquelle on le considérait en quelque sorte comme la caution officielle des membres de la secte. L'appelant continua d'agir comme caution jusqu'au 12 novembre 1946 alors que les autorités de la Cour du Recorder, s'inquiétant de la congestion du rôle des causes résultant de la progressive multiplication des arrestations, aussi bien que du fait que le temps de nombre de constables était absorbé par ces enquêtes et ces poursuites, au préjudice de leurs autres devoirs, tentèrent de décourager les activités de la secte en exigeant des cautionnements en argent et plus substantiels, soit de $100 à $300.

Deux semaines après cette décision, apparut dans la province une nouvelle publication de la secte, intitulée: "La haine ardente du Québec pour Dieu, le Christ et la liberté." Ce livre, publié en français, en anglais et en ukrainien, étant, dans les termes les plus provocateurs, une attaque dirigée particulièrement contre les pratiques religieuses de la majorité de la population et contre l'administration de la justice dans la province, fut soumis par la police à la considération de l'avocat en chef de la Couronne, à Montréal, Me Gagnon, c.r., lequel émit l'opinion que cette publication constituait, au sens de la loi criminelle, un libelle séditieux.

Ajoutons immédiatement que le mérite de cette opinion fut par la suite judiciairement considéré avec le résultat qui suit. Un certain Aimé Boucher, distributeur de ce livre dans le district judiciaire de St-Joseph de Beauce, fut accusé sous les articles 133, 134 et 318 du *Code Criminel* et fut trouvé coupable par un jury dont le verdict fut confirmé par une décision majoritaire de la Cour du banc du roi en appel[1]. Sur un pourvoi subséquent devant cinq des membres de cette Cour, une majorité, trouvant justifiés les griefs fondés sur l'adresse du juge au procès, mais étant d'opinion qu'il était loisible à un jury légalement dirigé de juger cette publication séditieuse, ordonna un nouveau procès. Sur une seconde audition du même appel,—cette fois devant les neuf Juges de cette Cour[2]—ces vues furent partagées par

[1] [1949] Que. K.B. 238.

[2] [1951] S.C.R. 265, 2 D.L.R. 369, 11 C.R. 85, 99 C.C.C. 1.

quatre des membres de cette Cour. Les cinq autres, d'autre part, acquittèrent l'accusé, en déclarant en substance, suivant le sommaire fidèle du jugé, qu'en droit:

> Neither language calculated to promote feelings of ill-will and hostility between different classes of His Majesty's subjects nor criticizing the courts is seditious unless there is the intention to incite to violence or resistance to or defiance of constituted authority.

En somme, la majorité écarta, comme étant la loi en la matière, la définition de l'intention séditieuse, donnée à la page 94 de la 8e édition de Stephen's Digest of Criminal Law, dans la mesure où cette définition différait de la loi telle que précisée au sommaire ci-dessus. *Boucher v. His Majesty the King*[1]. Ainsi appert-il que l'opinion émise par le représentant du Procureur Général à Montréal lors de l'apparition de ce livre en fin de 1946, fut par la suite partagée par une majorité de tous les juges qui eurent à considérer la question mais rejetée par ce qui constitue, depuis 1951, le jugement de cette Cour sur la question.

Ayant donc formé l'opinion que cette publication constituait un libelle séditieux, Me Gagnon participa à l'enquête faite pour en rechercher les distributeurs et les traduire en justice. Vers le même temps, la police saisissait en la cité de Sherbrooke, un nombre considérable de pamphlets, livres, y compris le livre en question, dans un établissement appartenant à l'appelant et par lui loué aux membres de la secte. Un examen de la situation et du rôle joué par l'appelant dans les procédures mues devant la Cour du Recorder à Montréal, amena Me Gagnon à conclure à sa participation dans la distribution. Apprenant, en la même occasion, que ce dernier était propriétaire d'un restaurant et détenteur de permis de la Commission des Liqueurs pour y vendre des spiritueux, il communiqua les faits ci-dessus à M. Archambault, alors gérant général de la Commission des Liqueurs. Après avoir conféré avec le recorder en chef de la cité de Montréal et Me Gagnon, M. Archambault téléphona au Procureur Général pour lui faire part de ces agissements des membres de la secte, et de l'appelant en particulier, et de son intention d'annuler le permis en faveur de l'appelant. L'intimé demanda à M. Archambault de bien s'assurer que le détenteur du permis était bien la même personne qui, au dire de M. Archambault, "multipliait les cautionnements à la Cour du Recorder de façon désordonnée, contribuait à désorganiser les activités de la

[1] [1951] S.C.R. 265, 2 D.L.R. 369, 11 C.R. 85, 99 C.C.C. 1.

1959

RONCARELLI v. DUPLESSIS

Fauteux J.

police et à congestionner les tribunaux". Et l'intimé ajouta:—"Dans l'intervalle, je vais examiner les questions avec des officiers légaux, je vais y penser, je vais réfléchir et je vais voir à ce que je devrai faire." M. Archambault vérifia l'identité de l'appelant et, de son côté, le Procureur Général étudia le problème, la *Loi de la Commission des Liqueurs* et ses amendements, discuta de la question au Conseil des Ministres et avec des officiers en loi de son ministère. Quelques jours plus tard, M. Archambault téléphona au Procureur Général confirmant l'identité du détenteur de permis et, témoigne M. Archambault, "là, le Premier Ministre m'a autorisé, il m'a donné son consentement, son approbation, sa permission et son ordre de procéder".

A la suite de cette conversation téléphonique, le permis fut annulé et tous les spiritueux du restaurant furent confisqués. En raison de la perte d'opérations résultant de l'absence de permis, l'appelant, quelques mois plus tard, vendait ce restaurant, licencié pour vente de spiritueux depuis nombre d'années et exploité par son père, d'abord, et lui, par la suite. C'est alors que l'appelant institua la présente action en dommages contre l'intimé personnellement, invoquant en substance que, dans les circonstances, le fait de cette annulation constituait, suivant les dispositions de l'art. 1053 du *Code Civil,* un fait dommageable, illicite et imputable à l'intimé et, dès lors, donnant droit à réparation.

En défense, et en outre des moyens plaidés sur le mérite de l'action, l'intimé invoqua spécifiquement le défaut de l'appelant de s'être conformé aux prescriptions de l'art. 88 du *Code de procédure civile,* lequel conditionne impérativement l'exercice du droit d'action contre un officier public à la signification d'un avis d'au moins un mois avant l'émission de l'assignation.

Après considération attentive de la question et pour les motifs donnés ci-après, je suis arrivé à la conclusion que ce moyen est bien fondé. Il convient de dire, cependant, que n'eût été ce défaut de l'appelant, j'aurais, au mérite, conclu au bien-fondé de son action et ce, pour des raisons qu'il suffit, dans les circonstances, de résumer comme suit. Personne ne met en doute que le fait invoqué au soutien de l'action en dommages, c'est-à-dire l'annulation du permis, ait constitué un fait dommageable pour l'appelant. De

plus, et suivant la preuve au dossier, il est manifeste que ce fait est imputable, et exclusivement imputable, à l'intimé. Sans doute, lorsque le gérant général de la Commission des Liqueurs téléphona au Procureur Général pour le mettre au courant des faits ci-dessus, il lui indiqua au même temps son intention d'annuler le permis. Il y a loin, cependant, de l'indication d'une intention à la réalisation de cette intention; et à la vérité, dès cette première conversation téléphonique, c'est le Procureur Général qui prit l'entière responsabilité. Tel que déjà indiqué, il demanda à M. Archambault de vérifier l'identité de personne, l'avisant que, pendant ce temps-là, il étudierait le problème et verrait ce que lui devait faire. C'est d'ailleurs précisément pour décider de l'action à prendre qu'il examina la loi et discuta de l'affaire au Conseil des Ministres et avec ses officiers en loi. Lorsque, subséquemment, M. Archambault le rappela pour lui affirmer qu'il s'agissait de la même personne, "c'est là", dit le gérant général, que le Procureur Général "m'a autorisé, il m'a donné son consentement, son approbation, sa permission et son ordre de procéder". Le Juge de la Cour supérieure et tous les Juges de la Cour d'Appel n'ont jeté, et je crois avec raison, aucun doute sur la bonne foi du Procureur Général, pas plus qu'on n'en saurait avoir sur celle du gérant général de la Commission des Liqueurs. Ni l'un ni l'autre n'ont agi malicieusement. Mais, en témoignant que l'intimé l'avait autorisé, lui avait donné son consentement, son approbation, sa permission et son ordre de procéder, le gérant général de la Commission a bien indiqué, à mon avis, que, dans un esprit de subordination, il avait, dès la première conversation téléphonique, abdiqué, en faveur du Procureur Général s'en chargeant, le droit d'exercer la discrétion, qu'à l'exclusion de tous autres, il avait suivant l'esprit de la *Loi des Liqueurs Alcooliques*. Il a exécuté, mais non rendu, une décision arrêtée par le Procureur Général. D'ailleurs, ce dernier ne s'en est pas caché; il s'en est ouvert au public par la voix des journaux. En prenant lui-même cette décision, comme Premier Ministre et Procureur Général, il s'est arrogé un droit que lui nie virtuellement la *Loi des Liqueurs Alcooliques;* il a commis une illégalité. Dans l'espèce, l'annulation du permis est exclusivement imputable à l'intimé et précisément pour

1959

RONCARELLI v. DUPLESSIS

Fauteux J.

cette raison, constitue, dans les circonstances, un acte illicite donnant droit à l'appelant d'obtenir réparation pour les dommages lui en résultant.

L'article 88 du *Code de procédure civile.*—Cet article se lit comme suit:

> Nul officier public ou personne remplissant des fonctions ou devoirs publics ne peut être poursuivi pour dommages à raison d'un acte par lui fait dans l'exercice de ses fonctions, et nul verdict ou jugement ne peut être rendu contre lui, à moins qu'avis de cette poursuite ne lui ait été donné au moins un mois avant l'émission de l'assignation.
>
> Cet avis doit être par écrit; il doit exposer les causes de l'action, contenir l'indication des noms et de l'étude du procureur du demandeur ou de son agent et être signifié au défendeur personnellement ou à son domicile.

Vu la forme prohibitive de la disposition et la règle de droit édictée en l'art. 14 du *Code Civil,* le défaut de donner cet avis, lorsqu'il y a lieu de ce faire, emporte nullité. Cette règle de droit est ainsi exprimée:

> 14. Les lois prohibitives emportent nullité, quoiqu'elle n'y soit pas prononcée.

De plus, et en raison de la prescription que ". . .nul verdict ou jugement ne peut être rendu . . .", ce défaut limite la juridiction même du tribunal. Aussi bien, non seulement, comme il a été reconnu au jugement de première instance, ce défaut peut-il être soulevé dans les plaidoiries, mais la Cour elle-même doit agir *proprio motu* et se conformer à la prescription.

En l'espèce, il est admis qu'aucun avis ne fut donné au Procureur Général. L'intimé a plaidé spécifiquement ce moyen dans sa défense et il l'a invoqué tant en Cour supérieure et en Cour d'Appel que devant cette Cour. Le juge au procès en disposa dans les termes suivants, dont les soulignés sont siens:

> Defendant is not entitled to avail himself of this exceptional provision as the acts complained of were not "done by him in the exercise of his functions", but they were acts performed by him when he had gone outside his functions to perform them. They were not acts "in the exercise of" but "on the occasion of public duties". Defendant was outside his functions in the acts complained of.

En Cour d'Appel[1], seul le Juge dissident, M. le Juge Rinfret, se prononce sur la question. S'inspirant, je crois, de l'interprétation donnée par la jurisprudence à l'expression "dans

[1] [1956] Que. Q.B. 447.

l'exécution de ses fonctions", apparaissant à l'art. 1054 C.C. et plus particulièrement du critère indiqué dans *Plumb v. Cobden Flour Mills*[1], il prononce d'abord comme suit, sur le mérite même de l'action:

> L'action du défendeur, on l'a vu, ne peut pas être classifiée parmi les actes permis, par les statuts, au procureur général, ni au premier ministre; elle ne peut pas être considérée comme ayant été faite dans l'exercice ou dans l'exécution de ses fonctions comme telles; elle entre dans la catégorie des actes prohibés, des actes commis hors les limites des fonctions, et comme telle, elle engendre la responsabilité personnelle.

puis, précisant que l'art. 88 C.P.C. pose comme condition que le défendeur soit poursuivi "à raison d'un acte par lui fait dans l'exercice de ses fonctions", déclare que l'art. 88 n'a pas d'application en l'espèce.

Les juges de la majorité ont référé à ce moyen sans cependant s'y arrêter vu que dans leur opinion l'action, de toutes façons, était mal fondée.

D'où l'on voit que le droit de l'intimé à l'avis dépend uniquement, dans la présente cause, de la question de savoir si l'acte reproché a été fait par lui "dans l'exercice de ses fonctions" au sens qu'il faut donner à ces expressions dans le contexte de l'art. 88 C.P.C., et suivant l'esprit et la fin véritables de cet article.

L'article 1054 C.C. prescrit que les maîtres et les commettants sont responsables du dommage causé par leurs domestiques ou ouvriers *dans l'exécution des fonctions auxquelles ces derniers sont employés.* On est dès lors porté à donner aux expressions, plus ou moins identiques, apparaissant à l'art. 88 C.P.C., le même sens que donne la jurisprudence sur l'art. 1054 C.C. La règle d'interprétation visant la similarité des expressions n'établit qu'une présomption; cette présomption étant que les expressions similaires ont le même sens lorsqu'elles se trouvent,—ce qui n'est pas le cas en l'espèce,—dans une même loi. On accorde, d'ailleurs, peu de poids à cette présomption. Maxwell, On Interpretation of Statutes, 9e ed., p. 322 *et seq.* Les considérations présidant à l'établissement, la fin et la portée de l'art. 88 C.P.C., d'une part, et de l'art. 1054 C.C., d'autre part, sont totalement différentes. Sanctionnant la doctrine *Respondeat superior,* l'art. 1054 C.C. établit la responsabilité du commettant pour l'acte de son préposé, ce dernier étant considéré le continuateur de la personne juridique du

[1] [1914] A.C. 62.

1959

RONCARELLI v. DUPLESSIS

Fauteux J.

premier. L'intimé, agissant en sa qualité de Procureur Général, n'est le préposé de personne. Il n'a pas de commettant. La fonction qu'il exerce, il la tient de la loi. L'article 88 C.P.C. n'affecte en rien la question de responponsabilité. Il accorde, en ce qui concerne la procédure seulement, un traitement spécial au bénéfice des officiers publics en raison de la nature même de la fonction. Les motifs apportés par la jurisprudence pour limiter le champ de l'exercice des fonctions, quant à la responsabilité édictée en l'art. 1054 C.C., sont étrangers à ceux conduisant la Législature à donner, quant à la procédure seulement, une protection aux officiers publics. Aussi bien, et en toute déférence, je ne crois pas que la portée de cette protection soit assujettie aux limitations de la responsabilité frappant les dispositions de l'art. 1054 C.C. L'article 8 du c.101 des Statuts Refondus du Bas Canada, loi-source de l'art. 88 C.P.C., établit péremptoirement à mon avis que, *in pari materia,* un officier public n'est pas tenu comme ayant cessé d'agir dans l'exercice de ses fonctions du seul fait que l'acte reproché constitue un excès de pouvoir, ou de juridiction, ou une violation à la loi. La version française de cette loi n'étant pas en disponibilité, je cite de la version anglaise qu'on trouve dans *Consolidated Statutes, Lower Canada,* 1860, l'art. 8:

Protection to extend to the magistrate only etc., and in what cases to him.

8. The privileges and protection given by this Act, shall be given to such justice, officer or other person acting as aforesaid, only, and to no other person or persons whatever, and any such justice, officer and other person shall be entitled to such protection and privileges in all cases where he has acted *bona fide* in the execution of his duty, although in such act done, he has exceeded his powers or jurisdiction, and has acted clearly contrary to law.

L'article 88 C.P.C. assume que ceux au bénéfice desquels il est établi se sont rendus coupables d'une illégalité pour laquelle ils doivent répondre. Tout doute qu'on pourrait avoir sur le point est dissipé par le texte même de l'art. 429 C.P.C. lequel, pourvoyant à un changement de venue dans le cas du procès d'un officier public, édicte:

429. Dans toute poursuite en dommages contre un officier public, *à raison de quelque illégalité dans l'exécution de ses fonctions,* le juge peut ordonner que le procès ait lieu dans un autre district, s'il est démontré que la cause ne peut être instruite avec impartialité dans le district où l'action a été portée.

On doit donc se garder d'associer au droit à l'avis toute idée de justification pour l'acte reproché ou de déduire du seul fait que l'officier public doive au mérite d'être tenu personnellement responsable, qu'il ait perdu tout droit à l'avis. Dans *Beattey v. Kozak*[1], où la nécessité d'éviter cette confusion se présentait, une semblable observation est faite par notre collègue M. le Juge Rand. Il faut ajouter, cependant, que cette décision n'est d'aucune autre assistance sur la question qui nous intéresse; le litige portait, en droit, sur l'interprétation d'une loi différente et fut décidé en donnant effet à la jurisprudence d'un droit également différent sur l'incidence, en la matière, du rôle de la bonne foi.

L'incidence du rôle de la bonne foi de l'officier public dans la commission d'un acte reproché, en ce qui concerne la portée de l'art. 88 C.P.C., et non en ce qui a trait au mérite de l'action, a fait, dans la province de Québec, depuis le jour où la disposition fut établie par l'art. 22 du *Code de procédure civile* de 1867, dont les termes sont reproduits à l'art. 88 du Code de 1897, l'objet d'un conflit dans la jurisprudence. Suivant certains jugements, la bonne foi conditionnait le droit à l'avis et dès que la déclaration contenait une allégation de mauvaise foi, le défendeur se voyait privé du droit d'invoquer le défaut de l'avis, même si, au mérite, la preuve, révélant que cette allégation était mal fondée, on devait alors rejeter l'action parce que l'avis n'avait pas été donné. Suivant d'autres jugements, on tenait le droit à l'avis absolu dans tous les cas. La bonne foi, disait-on, en s'appuyant sur le principe sanctionné par l'art. 2202 C.C., est toujours présumée et cette présomption ne peut être écartée par une simple allégation mais par une preuve de mauvaise foi. On jugeait qu'une simple allégation aux plaidoiries ne pouvait virtuellement abroger le droit au bénéfice de l'art. 88. Considérant que cet article conditionnait l'exercice même du droit d'action, on décidait que ce droit d'action devait être nié *ab initio* et non à la fin du procès. Ce conflit n'existe plus. Depuis plus de vingt-cinq ans, la Cour d'Appel y a mis fin en décidant que l'incidence de la bonne ou de la mauvaise foi n'a aucune portée sur le droit à l'avis et que, dans tous les cas, il doit être donné. Acceptant les arguments déjà exprimés en ce sens, la Cour d'Appel s'est particulièrement basée sur la source

[1] [1958] S.C.R. 177 at 188, 13 D.L.R. (2d) 1, 120 C.C.C. 1.

1959

RONCARELLI v. DUPLESSIS

Fauteux J.

historique de cette disposition et sur la modification qui y fut apportée lors et par suite de son insertion au *Code de procédure civile*. Les sources de l'article sont indiquées dans *Dame Chaput v. Crépeau*[1] par M. le Juge Bruneau et les modifications faites à la situation antérieure par l'insertion de l'article dans le Code, afin d'en généraliser l'application à tous les officiers publics, sont indiquées dans cette jurisprudence définitivement arrêtée par la Cour d'Appel dans *Charland v. Kay*[2]; *Corporation de la Paroisse de St-David-de-l'Auberivière v. Paquette et autres*[3] et *Houde v. Benoît*[4].

En somme, et comme le note M. le Juge Hall dans *Corporation de la Paroisse de St-David-de-l'Auberivière v. Paquette et autres, supra,* l'art. 22 du *Code de procédure* de 1867, prédécesseur de l'art. 88 du Code de 1897, a sa source dans la *Loi pour la protection des juges de paix,* c.101 des Status Refondus du Bas Canada. Le premier article de cette loi prescrivait l'avis d'action, alors que dans les autres dispositions, d'autres privilèges étaient établis, y compris celui fixant la prescription à six mois. L'article 8 conditionnait le droit aux privilèges y accordés, à la bonne foi. Lors de la confection du *Code de procédure,* la disposition ayant trait à l'avis fut extraite de la loi pour devenir l'art. 22 du *Code de procédure* et être déclarée applicable à tous les officiers publics. Dans le procédé, cependant, on laissa la disposition touchant la bonne foi dans la *Loi pour la protection des juges de paix* et on évita de l'inclure dans l'art. 22 C.P.C. comme condition de l'opération de cet article. D'autres considérations, tel, par exemple, le changement apporté par la Législature, le 4 août 1929, à l'art. 195 C.P.C. par la Loi 19 George V, c. 81, ayant pour effet de prohiber toute ordonnance de preuve avant faire droit qui jusqu'alors réservait au mérite les questions soulevées par l'inscription en droit, militent en faveur de ces vues. C'est ce changement, je crois, qui a provoqué l'occasion amenant la Cour d'Appel à fixer définitivement la jurisprudence. Les motifs déjà mentionnés suffisent pour partager les vues exprimées par la Cour d'Appel dans les causes précitées et pour conclure, comme M. le Juge Dorion dans *Charland v. Kay, supra,* qu'il faut s'en tenir au texte de la loi et lui donner son effet.

[1] (1917), 57 Que. S.C. 443.
[2] (1933), 50 Que. K.B. 377.
[3] (1937), 62 Que. K.B. 143.
[4] [1943] Que. K.B. 713.

En assumant l'exercice d'un pouvoir discrétionnaire conféré au gérant général par la loi, l'intimé a commis une illégalité mais aucune offense connue de la loi pénale et aucun délit au sens de l'art. 1053 C.C. Il a fait ce qu'il n'avait pas le droit de faire, fermement et sincèrement convaincu, a-t-il affirmé sous serment, que non seulement il en avait le droit, mais qu'il y était tenu pour s'acquitter de ses responsabilités comme Procureur Général chargé de l'administration de la justice, du maintien de l'ordre et de la paix dans la province et de ses devoirs comme conseiller juridique du gouvernement de la province. Il n'a pas pris occasion de sa fonction pour commettre cette illégalité. Il ne l'a pas commise à l'occasion de l'exercice de ses fonctions. Il l'a commise à cause de ses fonctions. Sa bonne foi n'a pas été mise en doute, et sur ce fait, les Juges de la Cour d'Appel, qui ont considéré la question, sont d'acord avec le Juge de première instance. Suivant les décisions considérées par cette Cour dans *Beatty v. Kozak, supra,* on retient, sous un droit différent de celui de la province de Québec, l'incidence de la bonne foi lorsque celle-ci se fonde sur l'erreur de fait, ou sur l'erreur de fait et de droit à la fois, sinon uniquement sur l'erreur de droit, pour décider du caractère exculpatoire de l'illégalité commise, voire même du droit à l'avis. Exclusivement compétente à légiférer sur la procédure civile, la Législature de Québec, par l'art. 88 C.P.C., n'a pas voulu assujettir le droit à l'avis d'action à l'incidence de la bonne ou de la mauvaise foi. Dans les circonstances de cette cause, je suis d'opinion que l'illégalité commise par l'intimé l'a été dans l'exercice de ses fonctions et que, de plus, ce serait faire indirectement ce que l'art. 88 C.P.C. ne permet pas, suivant l'interprétation de la Cour d'Appel, que de s'appuyer sur la bonne ou la mauvaise foi, que ce soit au sens vulgaire ou technique du mot, pour conclure que l'intimé est sorti de l'exercice de ses fonctions, au sens qu'ont ces expressions dans l'art. 88 C.P.C., et qu'il ait perdu le droit à l'avis d'action.

Pour ces raisons, l'appelant aurait dû être débouté de son action. Je renverrais les appels avec dépens.

ABBOTT J.:—In his action appelant claimed from respondent the sum of $118,741 as damages alleged to have been sustained as a result of the cancellation of a licence or permit for the sale of alcoholic liquors held by appellant.

1959

RONCARELLI v. DUPLESSIS

Abbott J.

The action was maintained by the learned trial judge to the extent of $8,123.53. From that judgment two appeals were taken, one by respondent asking that the action be dismissed in its entirety, the other by appellant asking that the amount allowed as damages be increased by an amount of $90,000. The Court of Queen's Bench[1] allowed the respondent's appeal, Rinfret J. dissenting, and dismissed the action. The appeal taken by appellant to increase the amount of the trial judgment was dismissed unanimously. The present appeals are from those two judgments.

The facts are these. On December 4, 1946, appellant was conducting a restaurant business in the City of Montreal, a business which he and his father and mother before him had been carrying on continuously for some thirty-four years prior to that date. The restaurant had been licensed for the sale of alcoholic beverages throughout the entire period.

In 1946 and for many years prior thereto, persons operating establishments of this kind and selling alcoholic beverages had been required to obtain a licence or permit under the *Alcoholic Liquor Act*, R.S.Q. 1941, c. 255. Unless granted for a shorter period, these were annual licences and expired on April 30 in each year. Moreover, s. 35, subs. 1., of the Act provides as follows:

> The Commission may cancel any permit at its discretion.

The Commission referred to is the "Quebec Liquor Commission" established as a corporation under the Act in question and, generally speaking, it has been entrusted by the Legislature with the responsibility of directing and administering the provincial monopoly of the sale and distribution of alcoholic beverages.

On December 4, 1946, without previous notice to the appellant, his licence to sell alcoholic beverages was cancelled by the Quebec Liquor Commission, and at about 2 p.m. on that date the stock of liquor on his premises was seized and removed. The licence was not restored and after operating for some months without such a licence, in 1947 appellant sold the restaurant and the building in which it was located.

[1] [1956] Que. Q.B. 447.

Appellant learned from press reports either in the afternoon of December 4 or early the following day, that his licence had been cancelled and the stock of liquor seized because he was an adherent of a religious sect or group known as the Witnesses of Jehovah. It soon became clear from statements made by the respondent to the press and confirmed by him at the trial as having been made by him, that the cancellation of the licence had been made because of the appellant's association with the sect in question and in order to prevent him from continuing to furnish bail for members of that sect summoned before the Recorder's Court on charges of contravening certain city by-laws respecting the distribution of printed material.

It might be added here that in December 1946 and for some time prior thereto the Witnesses of Jehovah appear to have been carrying on in the Montreal district and elsewhere in the Province of Quebec, an active campaign of meetings and the distribution of printed pamphlets and other like material of an offensive character to a great many people of most religious beliefs, and I have no doubt that at that time many people believed this material to be seditious.

The evidence is referred to in detail in the Courts below and I do not propose to do so here. I am satisfied from a consideration of this evidence: First: that the cancellation of the appellant's licence was made for the sole reason which I have mentioned and with the object and purpose to which I have referred; Second: that such cancellation was made with the express authorization and upon the order of the respondent; Third: that the determining cause of the cancellation was that order, and that the manager of the Quebec Liquor Commission would not have cancelled the licence without the order and authorization given by the respondent.

There can be no question as to the first point. It was conceded by respondent in his evidence at the trial and by his counsel at the hearing before us. As to the second and third points, I share the view of the learned trial judge and of Rinfret J. that both were clearly established.

The religious beliefs of the appellant and the fact that he acted as bondsman for members of the sect in question had no connection whatever with his obligations as the

1959

RONCARELLI v. DUPLESSIS

Abbott J.

holder of a licence to sell alcoholic liquors. The cancellation of his licence upon this ground alone therefore was without any legal justification. Moreover, the religious beliefs of the appellant and his perfectly legal activities as a bondsman had nothing to do with the object and purposes of the *Alcoholic Liquor Act,* and the powers and responsibilities of the manager of the Quebec Liquor Commission are confined to the administration and enforcement of the provisions of the said Act. This may be one explanation of the latter's decision to consult the respondent before taking the action which he did to cancel appellant's licence.

At all events a careful reading of the evidence and a consideration of the surrounding circumstances has convinced me that without having received the authorization, direction, order, or "approbation énergique" of the respondent —however one chooses to describe it—the manager of the Quebec Liquor Commission would not have cancelled the licence.

The proposition that in Canada a member of the executive branch of government does not make the law but merely carries it out or administers it requires no citation of authority to support it. Similarly, I do not find it necessary to cite from the wealth of authority supporting the principle that a public officer is responsible for acts done by him without legal justification. I content myself with quoting the well known passage from Dicey's "Law of the Constitution", 9th ed., p. 193, where he says

> . . . every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen. The Reports abound with cases in which officials have been brought before the courts, and made, in their personal capacity, liable to punishment, or to the payment of damages, for acts done in their official character but in excess of their lawful authority. A colonial governor, a secretary of state, a military officer, and all subordinates, though carrying out the commands of their official superiors, are as responsible for any act which the law does not authorize as is any private and unofficial person.

In the instant case, the respondent was given no statutory power to interfere in the administration or direction of the Quebec Liquor Commission although as Attorney-General of the Province the Commission and its officers could of course consult him for legal opinions and legal advice. The Commission is not a department of government in the

accepted sense of that term. Under the *Alcoholic Liquor Act* the Commission is an independent body with corporate status and with the powers and responsibilities conferred upon it by the Legislature. The Attorney-General is given no power under the said Act to intervene in the administration of the affairs of the Commission nor does the *Attorney-General's Department Act,* R.S.Q. 1941, c. 46, confer any such authority upon him.

I have no doubt that in taking the action which he did, the respondent was convinced that he was acting in what he conceived to be the best interests of the people of his province but this, of course, has no relevance to the issue of his responsibility in damages for any acts done in excess of his legal authority. I have no doubt also that respondent knew and was bound to know as Attorney-General that neither as Premier of the province nor as Attorney-General was he authorized in law to interfere with the administration of the Quebec Liquor Commission or to give an order or an authorization to any officer of that body to exercise a discretionary authority entrusted to such officer by the statute.

It follows, therefore, that in purporting to authorize and instruct the manager of the Quebec Liquor Commission to cancel appellant's licence, the respondent was acting without any legal authority whatsoever. Moreover, as I have said, I think respondent was bound to know that he was acting without such authority.

The respondent is therefore liable under art. 1053 of the *Civil Code* for the damages sustained by the appellant, by reason of the acts done by respondent in excess of his legal authority.

Respondent also contended that appellant's action must fail because no notice of such action was given under art. 88 of the *Code of Civil Procedure,* which reads as follows:

88. No public officer or other person fulfilling any public function or duty can be sued for damages by reason of any act done by him in the exercise of his functions, nor can any verdict or judgment be rendered against him, unless notice of such action had been given him at least one month before the issue of the writ of summons.

Such notice must be in writing; it must state the grounds of the action, and name of the plaintiff's attorney or agent, and indicate his office; and must be served upon him personally or at his domicile.

1959

RONCARELLI v. DUPLESSIS

Abbott J.

None of the learned judges constituting the majority in the Court of Queen's Bench has given as a reason for dismissing appellant's action, the failure to give such notice. The learned trial judge and Rinfret J. held that respondent is not entitled to avail himself of this exceptional provision since the act complained of was not "done by him in the exercise of his functions" but was an act done by him when he had gone outside his functions to perform it. I am in agreement with their views and there is little I need add to what they have said on this point. In this connection, however, reference may usefully be made to the decision of the Court of Appeal in *Lachance v. Casault*[1]. In that case a bailiff had attempted to take possession of books and papers in the hands of a judicial guardian without preparing a procès-verbal of the articles seized, as called for by the order of the Court requiring the guardian to give up possession to the seizing creditor. When the bailiff's action was resisted by the guardian as being unauthorized, the bailiff caused the guardian to be arrested. The charge having been subsequently dismissed, the bailiff was sued in damages for false arrest and malicious prosecution. It was held that, even assuming such bailiff was a public officer within the meaning of art. 88 C.C.P., he was not entitled to notice under the said article since at the time the act complained of was committed, he was not "dans l'exercice légal de ses fonctions".

In my opinion before a public officer can be held to be acting "in the exercise of his functions", within the meaning of art. 88 C.C.P., it must be established that at the time he performed the act complained of such public officer had reasonable ground for believing that such act was within his legal authority to perform; *Asselin v. Davidson*[2]. In the instant case, as I have said, in my view the respondent was bound to know that the act complained of was beyond his legal authority.

[1] (1902), 12 Que. K.B. 179 at 202.
[2] (1914), 23 Que. K.B. 274 at 280.

I now deal with the second appeal asking that the amount awarded to appellant by the trial judge be increased by an amount of $90,000. This amount is claimed under three heads, namely:

Damages to goodwill and reputation of business	$50,000
Loss of property rights in liquor permit	$15,000
Loss of profits for a period of one year, May 1st, 1947 to May 1st, 1948	$25,000
	$90,000

The licence to sell alcoholic beverages was, of course, only an annual licence subject to revocation at any time and the renewal of which might have been properly refused for a variety of reasons. Nevertheless, in my view, appellant could reasonably expect that so long as he continued to observe the provisions of the *Alcoholic Liquor Act* his licence would be renewed from year to year, as in fact it had been for many years past.

There can be no doubt that cancellation of appellant's licence without legal justification resulted in a substantial reduction in the value of the goodwill and profit making possibilities of the restaurant business carried on by him at 1429 Crescent St., Montreal, and in a pecuniary loss to him for which in my opinion he is entitled to recover damages from respondent.

The restaurant business is probably no less hazardous than most other businesses, and damages of this sort are obviously difficult to assess, the amount being of necessity a more or less arbitrary one. The learned trial judge awarded appellant the sum of $6,000 as loss of profits for the period from December 4, 1946, to May 1, 1947, the date on which the licence would have expired, and this would appear to be supported by the evidence. I have reached the conclusion that the amount awarded to the appellant by the learned trial judge should be increased by an amount of $25,000, as damages for diminution in the value of the goodwill of the business and for loss of future profits.

In the result, therefore, I would allow both appeals with costs here and below, and modify the judgment at the trial by increasing the amount of the damages to $33,123.53 with interest from the date of the judgment in the Superior Court.

1959

RONCARELLI v. DUPLESSIS

Abbott J.

Appeals allowed with costs, Taschereau, Cartwright *and* Fauteux J. J. *dissenting.*

Attorneys for the plaintiff, appellant: A. L. Stein and F. R. Scott, Montreal.

Attorneys for the defendant, respondent: L. E. Beaulieu and Edouard Asselin, Montreal.

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THE CANADIAN BROADCASTING CORPORATION ..... APPELLANT;

AND

THE ATTORNEY-GENERAL FOR ONTARIO ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Crown—Sunday observance—Information under the Lord's Day Act, R.S.C. 1952, c. 171, s. 4, laid against the Canadian Broadcasting Corporation—Whether Act binding on Her Majesty—Whether Act binding on Corporation—Immunity of Sovereign—Writ of prohibition to prevent further proceedings—The Canadian Broadcasting Corporation Act, R.S.C. 1952, c. 32—The Interpretation Act, R.S.C. 1952, c. 158, s. 16—The Criminal Code, 1953-54 (Can.), c. 51, s. 2(15).

The Canadian Broadcasting Corporation was charged before a magistrate with violating the *Lord's Day Act* by operating a broadcasting station on the Lord's Day. The corporation applied before a judge in chambers for a writ of prohibition to prevent any further proceedings and to quash the summons on the ground that the Act did not apply to Her Majesty and therefore did not apply to the corporation, being an agent of Her Majesty. The application was refused by the Chief Justice of the High Court, and his judgment was affirmed by the Court of Appeal.

Held (Taschereau, Abbott and Judson JJ. dissenting): The *Lord's Day Act* did not apply to the Canadian Broadcasting Corporation, therefore the corporation was entitled to the writ of prohibition as applied for.

Per Rand, Cartwright and Fauteux JJ.: The Act did not expressly affect the rights of Her Majesty. To interpret the definition of the word "person" in s. 2(15) of the *Criminal Code,* which definition is incorporated in the *Lord's Day Act,* as drawing the Crown or its agent within the ambit of any prohibitory or punitive provision of the Act, would be repugnant to the principle of the immunity of the Crown. The mention of certain Crown services by s. 11 of the Act as being

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

exempt from the statute's application was to be taken as *ex abundantia cautela*. Consequently, as the Sovereign was free to broadcast on Sundays, its agent, the corporation, was immune to prosecution.

Per Locke J.: Construed in the manner required by s. 15 of the *Interpretation Act*, it was implicit in the language of s. 8 of the *Canadian Broadcasting Act*, that the broadcasting activities to be carried on by the corporation were to be those of a character suited to a national system. Parliament did not contemplate that these activities should be restricted to week-days. Before arriving at the conclusion that the activities were unlawful, it was necessary to show that the prohibitory legislation was clear beyond question and capable of no other reasonable or sensible interpretation. *The King v. Bishop of Salisbury*, [1901] 1 Q.B. 573, and *River Wear Commissioners v. Adamson*, [1877] 2 App. Cas. 743, applied. The interpretation to be given to the word "person" in the *Criminal Code* was that the word included the Sovereign only as one of those against whose person and property various criminal offences could be committed by others. By the amendment of 1950, declaring that the corporation was for all purposes an agent of Her Majesty, the same immunity was conferred on the Canadian Broadcasting Corporation.

Per Taschereau, Abbott and Judson JJ., *dissenting:* The Act applied to the corporation, an agent of Her Majesty, who, by statute, agreed to be bound. There was no ambiguity in the section of the *Lord's Day Act* which purported to bind the Crown. The Act must be read as if the word "person", as defined in s. 2(15) of the *Criminal Code*, were a part of the Act itself, and therefore meant Her Majesty in relation to the acts and things she was capable of doing or owning. The very terms of s. 2(15) ruled out the proposition that the Crown was included only when it was the victim of a criminal act.

APPEAL from a judgment of the Court of Appeal for Ontario[1], affirming a judgment of McRuer C.J.H.C. Appeal allowed, Taschereau, Abbott and Judson JJ. dissenting.

W. B. Williston, Q.C., and *P. M. Troop*, for the appellant.

C. F. H. Carson, Q.C., C. R. Magone, Q.C., and *J. B. S. Southey*, for the respondent.

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

TASCHEREAU J. (*dissenting*):—The appellant the Canadian Broadcasting Corporation was prosecuted by the Attorney-General for Ontario, and the information dated March 19, 1957, reads as follows:

This is the information of Roy Elmhirst, of the City of Toronto in the County of York, secretary hereinafter called "the informant".

The informant says that he has reasonable and probable cause to believe and does believe that the Canadian Broadcasting Corporation

[1] [1958] O.R. 55, 27 C.R. 165, 120 C.C.C. 84.

1959

CANADIAN BROADCASTING CORPN. v. ATTY.-GEN. FOR ONTARIO

Taschereau J.

did on the Lord's Day Seventeenth of March Nineteen Hundred and Fifty Seven carry on the business of its ordinary calling by operating a broadcasting station contrary to the Lord's Day Act.

"R. H. Elmhirst"
Signature of Informant

A motion was made before Chief Justice McRuer of the High Court of Justice of Ontario to prohibit Magistrate T. S. Elmore from taking any further proceedings on the above information, and for an order quashing the summons issued pursuant to the information laid.

The contention on behalf of the Canadian Broadcasting Corporation is that it is by statute an agent of Her Majesty and as such, it is not bound by the provisions of the *Lord's Day Act*.

The relevant provision of the *Lord's Day Act*, R.S.C. 1952, c. 171, is the following:

4. It is not lawful *for any person on the Lord's Day*, except as provided herein, or in any provincial Act or law now or hereafter in force, to sell or offer for sale or purchase any goods, chattels, or other personal property, or any real estate, *or to carry on or transact any business of his ordinary calling*, or in connection with such calling, or for gain to do, or employ any other person to do, on that day, any work, business, or labour.

The only question which has to be resolved now is: Does s. 4 of the *Lord's Day Act* apply to the Canadian Broadcasting Corporation which is by statute an agent of Her Majesty? If the answer is affirmative, as decided by the learned Chief Justice of the High Court of Ontario, whose judgment was confirmed by the Court of Appeal[1], the case will proceed, and it will of course then be open to the appellant to raise the defence of "mercy and necessity" as provided in s. 11 of the Act. If the answer is negative, then the case will have come to an end.

Section 4 of the *Canadian Broadcasting Corporation Act*, R.S.C. 1952, c. 32, provides:

4.(1) The Corporation is a body corporate having capacity to contract and to sue and be sued in the name of the Corporation.

(2) The Corporation is for all purposes of this Act *an agent of Her Majesty* and its powers under this Act may be exercised only as an agent of Her Majesty.

(3) Actions, suits or other legal proceedings in respect of any right or obligation acquired or incurred by the Corporation on behalf of Her Majesty, whether in its name or in the name of Her Majesty may be

[1] [1958] O.R. 55, 27 C.R. 165, 120 C.C.C. 84.

brought or taken by or against the Corporation, in the name of the Corporation in any court that would have jurisdiction if the Corporation were not an agent of Her Majesty.

There is no doubt that at common law the Crown is not bound by a statute, unless expressly named or bound by necessary implication. Halsbury, 3rd ed., vol. 7, p. 246.

As it has been said by Lord Alverstone in *The Hornsey Urban District Council v. Hennell*[1]:

> In our opinion, the intention that the Crown shall be bound, or has agreed to be bound must clearly appear either from the languages used or from the nature of the enactments . . .

It is unnecessary to cite all the authorities that have been referred to us on the matter except perhaps the cases of *Weymouth v. Nugent*[2], *The Attorney General for Quebec v. The Attorney General for Canada* (Silver Brothers case)[3] and *Bombay v. Bombay*[4], which are leading authorities on the matter, and particularly the last of these three cases in which it was held by the Judicial Committee that it is the general principle in England that in deciding whether the Crown is bound by a statute, it must be expressly named, or be bound by necessary implication. This appears to me to be now the settled law, and it has not been challenged by the parties in the present case and is accepted by both of them.

Under the *Interpretation Act,* R.S.C. 1952, c. 158, s. 16, it is provided:

> 16. No provision or enactment in any act affects, in any manner whatsoever, the rights of Her Majesty, her heirs or successors, unless *it is expressly stated therein that Her Majesty is bound thereby.*

Furthermore, the *Lord's Day Act,* s. 4, applies to *any person* and s. 2(d) of the same Act defines the word "person" as follows:

> 2.(d) "person" has the meaning that it has in the Criminal Code.

The *Criminal Code,* s. 2(15), defines the word "person" as follows:

> 2.(15) "every one", "*person*", "owner", and similar expressions *include Her Majesty* and public bodies, bodies corporate, societies, companies and inhabitants of counties, parishes, municipalities or other districts in relation to the acts and things that they are capable of *doing and owning respectively.*

[1] [1902] 2 K.B. 73 at 80, 71 L.J.K.B. 479, 86 L.T. 423.
[2] (1865), 6 B. & S. 22, 34 L.J.M.C. 81, 11 L.T. 672.
[3] [1932] A.C. 514.
[4] [1947] A.C. 58.

1959

CANADIAN BROADCASTING CORPN. v. ATTY.-GEN. FOR ONTARIO

Taschereau J.

It is the contention of the appellant corporation that Parliament will not infringe rights or depart from the general system of law by ambiguous language found in a definition section. The intention to make such changes must appear with irresistible clearness. In support of this proposition, counsel for the appellant has cited among others the following statement of Earl Halsbury in *Leach v. Rex*[1]:

> If you want to alter the law which has lasted for centuries, and which is almost ingrained in the English Constitution, . . . to suggest that that is to be dealt with by inference, and that you should introduce a new system of law without any specific enactment of it, seems to me to be perfectly monstrous.
>
> The result is that I entirely concur with the judgment of the Lord Chancellor, and particularly with that part of it in which he said that such an alteration of the law as this ought to be by definite and certain language.

And also what has been said by Lord Goddard in *National Assistance Board v. Wilkinson*[2]:

> . . . it may be presumed that the legislature does not intend to make a substantial alteration in the law beyond what it expressly declares. In *Minet v. Leman* (1855) 20 Beav. 269, Sir John Romilly M.R. stated as a principle of construction which could not be disputed that "the general words of the Act are not to be so construed as to alter the previous policy of the law, unless no sense or meaning can be applied to those words consistently with the intention of preserving the existing policy untouched."

No one, of course, will challenge these propositions, and I fully agree with the appellant's contention that what is deep-seated in the common law of the country can only be overturned by a clear, definite and positive enactment, and not by some ambiguous reference to other statutes (*Leach v. Rex supra*), but when the enactment is clear, the statute overrides the common law, and may even, in some cases, affect the prerogatives of the Crown.

I cannot find any ambiguity in the section of the *Lord's Day Act* which purports to bind the Crown. It is my opinion that the combined effect of the *Lord's Day Act* and of the relevant sections of the *Criminal Code,* is to import and incorporate into the *Lord's Day Act,* the definition of the word "person" found in the *Criminal Code.*

[1] [1912] A.C. 305 at 311.

[2] [1952] 2 Q.B. 648 at 658.

The *Lord's Day Act* must be read as if the word "person" as defined in the *Criminal Code* were a part of the Act itself, and therefore meant Her Majesty, in relation to the acts and things she is capable of *doing and owning*. A meaning must be given to these words, and I find it impossible to ignore them, and not give them the full effect that Parliament, I think, intended to give them.

It has been argued that the word "person" includes the Crown only when it is a victim of a criminal act. The very terms of s. 2(15) of the *Criminal Code,* which applies to the *Lord's Day Act,* rule out this proposition, because in most unambiguous language, the section states that "person" includes Her Majesty in relation to the acts that she is capable of *doing and owning*.

I fully admit that the rule that the Crown is bound when a statute says it in unequivocal terms, may lead to very serious consequences. I can easily visualize cases, particularly in criminal matters, where it would be *repugnant* to the common law to hold Her Majesty liable. Many reasons would outweigh all that could be said in support of the binding effect of the Act. What is *repugnant and leads to an absurdity* must be considered as inoperative.

It has often been said that no modification of the language of a statute is ever allowable in construction, except to avoid an absurdity, which appears to be so, not to the mind of the expositor merely, but to that of the legislature, that is, when it takes the form of a *repugnancy* (Maxwell on Interpretation of Statutes, 10th ed., p. 252).

In the case of *Warburton v. Loveland*[1], Burton J. says:

> However, it is, for the present, sufficient to say, that no necessity for adopting it is shown; and I apprehend it is a rule in the construction of statutes, that, in the first instance, the grammatical sense of the words is to be adhered to. If that is contrary to, or inconsistent with any expressed intention, or any declared purpose of the statute; or if it would involve any absurdity, repugnance, or inconsistency in its different provisions, the grammatical sense must be modified, extended, or abridged, so far as to avoid such an inconvenience, but no farther.

This judgment of Mr. Justice Burton was confirmed by the House of Lords[2].

[1] (1828), 1 Hud. & B. 623. [2] 6 E.R. 806.

1959

CANADIAN BROADCASTING CORPN. v. ATTY.-GEN. FOR ONTARIO

Taschereau J.

In *Abel v. Lee*[1], Mr. Justice Willes says:

> No doubt the general rule is that the language of an Act of Parliament is to be read according to its ordinary grammatical construction, unless so reading it would entail some *absurdity, repugnancy or injustice.*

At page 372 it is said that in case of absurdity we ought to modify the language of the Act.

In *Cox v. Hakes*[2], Lord Field said:

> Now the admitted rule of construction, from which I am not at liberty to depart, lay down that I cannot infer an intention contrary to the literal meaning of the words of a statute, unless the context, or the consequences which would ensue from a literal interpretation, justify the inference that the Legislature has not expressed something which it intended to express, or unless such interpretation (in the language of Parke B. in *Becke v. Smith* (2 M. & W. 191, 195)) leads to any manifest *"absurdity or repugnance"* . . .

In *Cristopherson v. Lotinga*[3], Justice Willes said:

> I am not disposed to differ from the opinion expressed by my Lord and my Brother Williams, though I must confess I should have thought we might have arrived at a satisfactory conclusion by acting upon the rule laid down by Lord Wensleydale in *Becke v. Smith* 2 M. & W. 191, 195, upon the authority of Burton J., in *Warburton v. Love land d. Ivie,* 1 Hudson & Brooke, 623, 648, where he says: "It is a very useful rule in the construction of a statute, to adhere to the ordinary meaning of the words used, and to the grammatical construction, unless that is at variance with the intention of the legislature, to be collected from the statute itself, or leads to any manifest absurdity or repugnance, in which case the language may be varied or modified, so as to avoid such inconvenience, but no farther". I subscribe to every word of that, assuming the word "absurdity" to mean no more than "repugnance".

In *Motteram v. The Eastern Counties Rly Co.*[4], Willes J. expressed his views as follows:

> Even if that were not the true grammatical construction of the statute, I apprehend it would nevertheless be necessary so to construe it; because, if the giving a strict grammatical construction to a statute leads to any repugnance or absurdity,—in the sense of being contrary to the mind and intention of the framers of the act,—we are bound so to read the words as to avoid that result.

The above principles might surely apply in criminal matters, for it would be an absurdity, and a repugnancy to the laws of the land, to hold that His or Her Majesty, the "fountain of justice", who is incapable of doing a "wrong act" could be guilty of some of the crimes found in the *Criminal Code.*

[1] 1871), L.R. 6 C.P. 365, 23 L.T. 844.
[2] (1890), 15 App. Cas. 502 at 542.
[3] (1864), 15 C.B. N.S. 808, 143 E.R. 1003 at 1004-5.
[4] (1859), 7 C.B. N.S. 58, 141 E.R. 735 at 744.

But here, we are not dealing with the *Criminal Code,* but with the *Lord's Day Act* and with a particular case, where an agent of the Crown is alleged to have committed a violation of the statute. It is only the definition of the word "person", which includes the Crown, that is imported from the *Criminal Code.* I can see no absurdity, repugnance or inconsistency with any other existing laws, written or unwritten, in the fact of the Attorney General of Ontario in the rights of Her Majesty the Queen, prosecuting the appellant, a federal agent of Her Majesty, who by statute has agreed to be bound.

The principle that the Crown is indivisible is not an absolute one. There is no legal obstacle to prevent the federal Government in the rights of Her Majesty, to enforce its rights before the Courts of the country, against a provincial Government also in the rights of Her Majesty, and vice versa. The Crown operates through distinct instrumentalities in respect of its several governments. (Halsbury, 3rd ed., vol. 5, p. 459).

As Lord Dunedin said in *Silver Brothers, supra,* at p. 514:

> Quoad the Crown in the Dominion of Canada the Special War Revenue Act confers a benefit, but quoad the Crown in the Province of Quebec it proposes to bind the Crown to its disadvantage. It is true that there is only one Crown, but as regards Crown revenues and Crown property by legislation assented to by the Crown there is a distinction made between the revenues and property in the Province and the revenues and property in the Dominion. There are two separate statutory purses. In each the ingathering and expending authority is different.

If the appellant corporation were right in its submissions, it would mean as pointed out by the learned Chief Justice of the High Court, that it could breach the provisions of the *Canadian Broadcasting Act* which prohibits dramatized political broadcasting without the announcement of the names of the sponsor or sponsors, and political broadcasts on any Dominion, provincial or municipal election day and on the two days immediately preceding such election day.

I am quite satisfied that it never entered the mind of Parliament that C.B.C. could not be reached by the statute, while all the other private stations, not agents of the Crown, and which are now on an equal footing with the appellant, would be amenable to the law.

1959

CANADIAN BROADCASTING CORPN. v. ATTY.-GEN. FOR ONTARIO

Taschereau J.

For the above reasons as well as for those given by Roach J. A. in the Court of Appeal, with which I am in substantial agreement, I am of the opinion that this appeal fails and that it should be dismissed.

The judgment of Rand, Cartwright and Fauteux JJ, was delivered by

RAND J.:—At common law admittedly the Sovereign could not be impleaded in his courts; they were established by him to administer the law of the land between subjects; but, as Bracton laid it down and as Coke admonished James I, he himself was under the law, a law which brooded over England encompassing all persons and, among other things, created the powers of the Sovereign, the residue of which today we call the prerogative.

In the language of the early commentators and Courts that immunity was associated with qualities attributed to him: he was the fountain of justice and of honour; the writs commanded in his name; through his Attorney-General he guarded the public interest against violators; and something more, he could do no wrong. The view advanced today is that this affirmation derived from that lack of jurisdiction, which I take to mean as distinct from affecting the quality of an act done, and not from the impossibility, in existing legal contemplation, of attributing wrong to him.

To the penal law of England all persons were subject and no mandate or order from any state officer up to and including the Sovereign could render lawful an act prohibited as a crime; this excluded obviously any executive act within the prerogative. May a statute in general words apply so as to stigmatize the act as done by the Crown an offence without affecting the Crown's immunity from proceedings? Is liability to punishment in all cases essential to criminal quality of an act? Is an act forbidden the Crown excluded from attribution to the Crown for all purposes including accessorial liability of an agent? Answers to these questions may not be essential to a decision here but their consideration is not irrelevant.

Some light is thrown on them by the judgment in *Cain v. Doyle*[1]. There an officer of the Crown was charged with "aiding and abetting" in the dismissal of an employee of

[1] (1946), 72 C.L.R. 409.

the Crown contrary to a regulation made applicable to the Crown, and in general language providing a penalty for violation. Notwithstanding that the regulation as a directive bound the executive, for the breach of which, apparently, civil remedies against the Crown would lie, it was held that the penalty did not so extend and that the officer could not be convicted as charged although his act appears to have brought about the termination of employment. As he was not an "employer" he could not be held liable as principal; as the penalty was not incurred by the Crown, not as accessory. That I take to be the effect of the majority reasons of Dixon J. (now Chief Justice). The language of application was that "unless the contrary intention appears" the word "employer" included the Crown; and the "contrary intention" was found in the principle of immunity. Notwithstanding that the act was not null and void, that it was effective in one aspect, the same result was reached as from the conception that the Crown is incapable of wrong, that there was no criminal quality in what was done.

The act there is distinguishable from that here in several respects: it was in contractual relations; it could be done only by or for an employer; and the Crown was forbidden to do it. Here the act is wholly criminal, it can be done by a subject, who, if the act is forbidden to the Crown, would be liable as principal if purporting to act for the Crown. If the statute extends to the Crown neither in relation to the act nor to liability, there can be no doubt of its lawfulness.

The offence has been created by the *Lord's Day Act*, R.S.C. 1952, c. 171, s. 4:

> It is not lawful for any person on the Lord's day, except as provided herein, or in any provincial Act or law now or hereafter in force, to sell or offer for sale or purchase any goods, chattels, or other personal property, or any real estate, or to carry on or transact any business of his ordinary calling, or in connection with such calling, or for gain to do, or employ any other person to do, on that day, any work, business, or labour.

1959

CANADIAN BROADCASTING CORPN. v. ATTY.-GEN. FOR ONTARIO

Rand J.

By s. 2(d) of that Act, " 'person' has the meaning given in the *Criminal Code*". Section 2(15) of the Code defines "person" as

> "every one," "person," "owner," and similar expressions include Her Majesty and public bodies, bodies corporate, societies, companies and inhabitants of counties, parishes, municipalities or other districts in relation to the acts and things that they are capable of doing and owning respectively;

The enactment is met at the threshold by s. 16 of the *Interpretation Act*:

> No provision or enactment in any Act affects, in any manner whatsoever, the rights of Her Majesty, her heirs or successors, unless it is expressly stated therein that Her Majesty is bound thereby.

Does, then, the *Lord's Day Act* expressly affect the rights of Her Majesty?

The definition of the Code is to be taken as incorporated in the *Lord's Day Act* but its interpretation in each case must be the same; the purpose of its incorporation was undoubtedly to make the application of the new offences to "persons" uniform with that of the general law and we are remitted to its meaning in the Code.

To say that it intends and has effect to include the Crown as an ordinary subject of the prohibitory or the penal provisions of the Code is repugnant to the principle of immunity in both aspects. If such a fundamental change had been intended it would not have been effected by a clause of general definition. There is ample matter for legitimate application to Her Majesty, the obvious one being that of a "person" who is the victim of criminality, not its perpetrator: in such and other instances it is used in the description of a factual situation. The definition is to be read distributively and wherever a person so designated can properly be brought within the substantive provisions, that is, in the light of their intendment, of the underlying basic ideas and assumptions of the common law, two of which are that the King can do no wrong and that he cannot be impleaded, and within the punishment prescribed, then that "person" is intended to be designated as one against whom the prohibition is directed and on whom the penalty can be imposed. The application of the word to corporations, societies, companies, and the other legal entities enumerated must clearly be made on those considerations.

So interpreted, I am unable to agree that the definition expressly draws the Crown within the ambit of any prohibitory or punitive provision of the *Lord's Day Act*. The mention of certain Crown services by s. 11 as exempt from the statute's application is, as Laidlaw J. held, to be taken as *ex abundantia cautela*.

The situation of the Crown, then, is this: by the *Canadian Broadcasting Act*, R.S.C. 1952, c. 32, ss. 4 and 8, the appellant, as agent of Her Majesty "shall carry on a national broadcasting service within Canada." No limit or restriction of time is prescribed for furnishing that service; and in the absence of an express and contrary enactment by Parliament, that time is unlimited. The effect of s. 16 of the *Interpretation Act* is to render the Crown under the *Broadcasting Act* as unrestricted as if the *Lord's Day Act* had not been passed. If the Sovereign is free to broadcast on Sunday, those who do the acts necessary to that service are immune from prosecution because the act they do is the lawful act of the Sovereign, attributable to him and untainted with criminal character.

I would, therefore, allow the appeal, set aside the judgment and order below, and direct a prohibition to issue as applied for.

LOCKE J.:—By an information laid before a justice of the peace of the Province of Ontario on March 20, 1957, the Canadian Broadcasting Corporation was charged with carrying on "the business of its ordinary calling by operating a broadcasting station, contrary to the *Lord's Day Act*". The corporation moved before a judge of the Supreme Court of Ontario, sitting in chambers, for an order to be directed to Magistrate T. S. Elmore, senior magistrate of the County of York, before whom it was proposed that the charge be heard, that he:

> be prohibited from taking any further proceedings in this matter and more particularly from convicting the Canadian Broadcasting Corporation of the charge.

That motion was dismissed by a judgment of the Chief Justice of the High Court and the appeal taken by the broadcasting corporation from that judgment was in turn dismissed by the Court of Appeal[1]; Laidlaw and F. G. Mackay JJ. A. dissenting. Pursuant to leave granted by this Court, the present appeal was brought.

[1] [1958] O.R. 55, 27 C.R. 165, 120 C.C.C. 84.

1959

CANADIAN BROADCASTING CORPN. v. ATTY.-GEN. FOR ONTARIO

Locke J.

It is to be noted that the charge laid was not that the corporation carried on broadcasting of any particular kind or nature on Sunday. It was simply a charge that the corporation violated the Act by operating a broadcasting station. While the information does not say so, presumably the broadcasting station referred to was one operated in the Province of Ontario.

While broadcasting as a national enterprise was undertaken several years earlier in England, it was first so undertaken in 1932 when the *Canadian Radio Broadcasting Act* was passed (c. 51, Statutes of 1912). That Act established the Canadian Radio Broadcasting Commission which was declared to be a body corporate, with capacity to contract and to sue and be sued in its own name and to hold property. By s.8 power was given to the commission to regulate and control broadcasting in Canada carried on by any person, including His Majesty in the right of the province or of the Dominion. Section 9 gave to the commission power to carry on the business of broadcasting in Canada and, *inter alia,* to construct broadcasting stations and to make operating agreements with private stations for the broadcasting of national programs.

The 1932 Act was repealed by the *Canadian Broadcasting Act 1936* (c. 24). This statute established the corporation which is the present appellant and prescribed the manner in which its activities should be directed. Section 8 declares that the corporation "shall carry on a national broadcasting service within the Dominion of Canada". For that purpose the corporation may, *inter alia,* maintain and operate broadcasting stations, equip such stations with the requisite plant and machinery, originate programs, collect news relating to current events in any part of the world and in any manner that may be thought fit, and do all such other things as the corporation may deem incidental or conducive to the attainment of any of the objects or the exercise of any of the powers of the corporation. To the extent that its revenues are insufficient, the moneys required for its activities are provided by grants authorized by Parliament.

By s. 5 of c. 51 of the Statutes of 1950, s. 4 of the 1936 Act, which declared that the corporation shall be a body corporate having capacity to contract and to sue and be sued in its own name, was amended by adding the following:

(2) the corporation is for all purposes of this Act an agent of His Majesty and its powers under this Act may be exercised only as an agent of His Majesty.

A further amendment provided that actions, suits and other legal proceedings in respect of any right or obligation acquired or incurred by the corporation on behalf of His Majesty might be brought by or against it.

The Act now appears as R.S.C. 1952, c. 32.

It is to be noted that the language imposing upon the corporation the obligation to carry on a national broadcasting service is imperative. While the power to maintain and operate broadcasting stations is permissive in form, in this context this and other powers, the exercise of which is necessary for carrying on an effective national service, being coupled with a duty should be construed as imperative: *Julius v. Bishop of Oxford*[1]; *The King v. Mitchell*[2].

The *Lord's Day Act* was first enacted by Parliament as c. 27 of the Statutes of 1906 and subs. (b) of s. 1 then read:

"Person" has the meaning which it has in the *Criminal Code 1892*.

It was apparently passed in consequence of the finding of the Judicial Committee in *Attorney General of Ontario v. The Hamilton Street Railway*[3], that the *Lord's Day Act* of Ontario, R.S.O. 1897, c. 246, was *ultra vires*. The early history of this latter statute is described in the judgment of Mr. Justice Laidlaw[4].

In the present statute, R.S.C. 1952, c. 171, subs. (d) of s. 2 reads:

"Person" has the meaning that it has in the *Criminal Code*.

The *Criminal Code*, when first enacted in 1892, by subs. (t) of s.2 differed only in an immaterial manner from subs. (15) of s.2 of the new *Criminal Code* which reads:

"every one," "person," "owner," and similar expressions include Her Majesty and public bodies, bodies corporate, societies, companies and inhabitants of counties, parishes, municipalities or other districts in relation to the acts and things that they are capable of doing and owning respectively.

1 (1880), 5 App. Cas. 214, 42 L.T. 546, 49 L.J.Q.B. 577.
2 [1913] 1 K.B. 561, 108 L.T. 76, 23 Cox C.C. 273.
3 [1903] A.C. 524.
4 [1958] O.R.. 55 at 64.

1959

CANADIAN BROADCASTING CORPN. v. ATTY.-GEN. FOR ONTARIO

Locke J.

Section 4 of the *Lord's Day Act* declares that, subject to defined exceptions, it is not lawful for any person on the Lord's Day "to carry on or transact any business of his ordinary calling or in connection with such calling". The ordinary calling of the Canadian Broadcasting Corporation is broadcasting from stations situate at various places in Canada and, if the Act applies, any broadcasting of any nature appears to be prohibited unless such activities can be brought within some of the exceptions to be found in s.11. That section appears under a sub-heading "Works of Necessity and Mercy Excepted." These exceptions, with a slight change, immaterial in the present matter in subs. (s) appeared in the Act when it was first enacted. Of necessity, since broadcasting was unknown in 1906, none of the exceptions refer to the business of broadcasting, whatever the purpose. Subsection (t) excepts "work done by any person in the public service of Her Majesty while acting therein under any regulation or direction of any department of the government", as being one of the works of necessity referred to in the sub-heading. The Canadian Broadcasting Corporation does not fall within this exception since, while all its activities are carried on as the agent of Her Majesty, it does not act under any regulations or directions of any department of the government. Thus, if the Act applies, there was jurisdiction in the magistrate to entertain the charge.

The penal provisions of the *Lord's Day Act* of 1906 have not been changed, but times have changed. It is now sought to apply them in circumstances that were never contemplated by the Parliament which passed the Act.

The *Canadian Broadcasting Act* is to be construed in the manner required by s. 15 of the *Interpretation Act,* R.S.C. 1952, c.158, and receive:

> such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act . . . according to its true intent, meaning and spirit.

In my opinion, it is implicit, in the language of s.8 of the Act, that the broadcasting activities to be carried on were to be those of a character suited to a national broadcasting system, with all that this implied. The broadcasting of news, of music and of various other material was

commenced as a national undertaking in England prior to 1926 and has been carried on exclusively by the British Broadcasting Corporation since that year. In Canada, the Canadian Broadcasting Commission of the 1932 Act and the corporation established in 1932 were created, in my opinion, in order to supply to the people of this country the same general kind of service as was then being given in England. The activities of the British Broadcasting Corporation in distributing news and performing other useful public services were never restricted to week days. Parliament did not contemplate in 1932 and 1936 that they would be so restricted in this country, in my opinion.

The institution of broadcasting provided a means whereby news could be communicated to all of the people of Canada with a speed theretofore unknown. Formerly, newspapers, the telephone, the telegraph and the mail afforded the only means of such communication. The transmission of telephone and telegraph messages is one of the exceptions to the prohibition provided by s.11: the publication of newspapers on Sunday is, however, still forbidden.

For more than 25 years past, the agency set up by Parliament has kept the Canadian people informed by radio of world events within hours of their occurrence, and that this should be done on every day of the week has become an accepted part of our way of life. In addition, services have been rendered daily which are of great value in the preservation of life and property in navigation and agriculture, of which weather forecasts and storm warnings are examples. Other broadcasting such as that of church services and religious music on Sunday, for the benefit of the sick and the disabled and those living in places where access to churches is difficult or impossible, is carried on throughout the week. This is, I am sure, regarded as of inestimable benefit by great numbers of Canadian people. The exceptions provided by s. 11 of the *Lord's Day Act* do not appear to cover any such activities and, accordingly, they are unlawful if the respondent's contention is to be accepted.

Before arriving at any such conclusion, it is necessary, in my judgment, that the prohibitory legislation be clear beyond question and capable of no other reasonable or sensible interpretation.

1959

CANADIAN BROADCASTING CORPN. v. ATTY.-GEN. FOR ONTARIO

Locke J.

The point to be determined is as to the meaning to be assigned to the language of subs. (15) of s.2 of the *Criminal Code,* in so far as it relates to Her Majesty. It reads that "person" includes Her Majesty. Does this mean that the Sovereign may be charged with any of the multitude of offences described in the *Criminal Code* which she, as an individual, is capable of committing and summoned to appear before a tribunal charged with the duty of determining the guilt or innocence of persons infringing the crimnal laws and, if guilty, imposing punishment?

The definition of "person" in substantially its present form, as has been stated, appeared when the *Criminal Code* was first enacted in 1892. At that time and at present the state of the law in relation to the liability of the Sovereign to criminal proceedings appears to me to be accurately stated in Halsbury, 3rd ed., vol. 7, p. 223, in the following terms:

> The person of the Sovereign is inviolable, since it is declared by statute to be the undoubted and fundamental law of the kingdom that neither the peers of this realm nor the Commons, nor both together, either in Parliament or out of Parliament, nor the people collectively or representatively, nor any other persons whatsoever, ever had, have, or ought to have any coercive power over the persons of the Kings of this realm.
>
> So also the person of the Sovereign is immune from all suits and actions at law, either civil or criminal.
>
> There is no power or authority within her dominions capable of binding the Sovereign, save only the Sovereign herself in Parliament, and then only by express mention or clear implication.

I do not think that it is any longer right to say that the Queen can do no wrong, though in earlier times the immunity was so stated: Holdsworth's History of English Law, vol. 3, p. 458.

The true ground appears to me to be correctly stated in the following passage from Russell on Crime, 11th ed., p. 103:

> Notwithstanding the words of Hale "the law presumes, the king will do no wrong, neither indeed can do any wrong"; and of Blackstone, who carried this further by stating that the law "ascribes to the king, in his political capacity, absolute perfection" and that he "is not only incapable of doing wrong, but even of thinking wrong," the doctrine of regal immunity really rests upon the fact that no British tribunal has jurisdiction under which the sovereign can be tried.

The matter is similarly dealt with in Kenny's Outline of Criminal Law, 17th ed., p. 69.

The consent of the Sovereign to all legislation in the Parliament of Canada is given on her behalf by her representative, the Governor General, and that assent was, of necessity, given when the *Criminal Code* was first enacted. The question, however, is: was it intended to depart from the long standing principle of law which had existed in England since prior to Bracton's time and subject the Sovereign personally to criminal prosecution in the Courts of this country?

In my opinion, the language should not be so interpreted. Rather, should it be construed as meaning that "person" includes the Sovereign as one of those against whose person and property various criminal offences may be committed by others. In *The King v. Bishop of Salisbury*[1], Wills J. said that, where an affirmative statute is open to two constructions, that construction ought to be preferred which is consonant with the common law. I would apply that rule in the present matter. I am further of the opinion that the remarks of Lord Blackburn in *River Wear Commissioners v. Adamson*[2], are applicable.

In my view, support is to be found for this construction in the fact that Parliament in 1950 added to the *Canadian Broadcasting Act* an express declaration that in all its activities the corporation acts as agent of the Sovereign. It was apparently considered desirable that the broadcasting corporation should not be controlled by and be subject to the direction of a department of the federal Government. Had that been done, its activities would have been exempt under subs. (t) of s.11 of the *Lord's Day Act*. In lieu of that, the status of the corporation was declared to be that of an agent of Her Majesty and its activities as being carried on on her behalf which, I consider, conferred the same immunity.

I would allow this appeal and direct that a writ of prohibition issue.

Appeal allowed, Taschereau, Abbott *and* Judson JJ. *dissenting.*

[1] [1901] 1 Q.B. 573 at 577.
[2] (1877), 2 App. Cas. 743 at 764-5, 37 L.T. 543.

1959

CANADIAN BROADCASTING CORPN. v. ATTY.-GEN. FOR ONTARIO

Locke J.

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

Solicitor for the respondent: *The Attorney-General for Ontario, Toronto.*

1958

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LE SYNDICAT CATHOLIQUE DES EMPLOYES DE MAGASINS DE QUEBEC INC. (*Plaintiff*) ..... APPELLANT;

AND

LA COMPAGNIE PAQUET LTEE. (*Defendant*) ..... RESPONDENT.

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

Labour—Collective agreement—"Rand Formula"—Whether compulsory check-off clause a "condition de travail"—Whether valid in the Province of Quebec—The Labour Relations Act, R.S.Q. 1941, c 162A, as amended—The Professional Syndicates' Act, R.S.Q. 1941, c. 162, as amended—Articles 1028, 1701 of the Civil Code.

A clause in a collective bargaining agreement between an employer and a union certified as a bargaining agent whereby the employer is to withhold from the wages of all his employees, whether union members or not, a sum equal to the union dues fixed by the union for its members, and to remit the same to the union, is valid and binding in the Province of Quebec (Taschereau, Locke and Fauteux JJ., *contra.*)

The plaintiff, a labour union incorporated under the *Professional Syndicates' Act* and duly certified as a bargaining agent under the *Labour Relations Act,* sued the defendant to recover certain sums of money which had been withheld by the latter from the wages of a number of non-union employees and which had not been remitted to the union as provided for under a check-off clause in the collective bargaining agreement between the parties. The defendant alleged that it had deposited the money in a special bank account because these employees had objected to the withholding; and further pleaded that the check-off clause was null as being unlawful. The trial judge dismissed the action and held the check-off clause to be null and void since it could not be considered as a "condition de travail". This judgment was affirmed by the Court of Appeal.

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

Held (Taschereau, Locke and Fauteux JJ. dissenting): The plaintiff union was entitled to recover the sum withheld from the non-union members and not remitted to the union.

Per Kerwin C.J. and Cartwright, Abbott and Judson JJ.: The compulsory check-off clause here in question was a "condition de travail" within the meaning of the Quebec legislation. There was nothing in the legislation to justify the subdivision made by the trial judge into conditions "en soi", which did not need the assent of the employees, and conditions "conventionnelles", requiring such assent. Once the union and the employer agreed upon the clause, it became as much regulatory of the employer-employee relationship as any other clause in the agreement. Being a regulation of the contract of labour to that extent, it could not be rejected as being something outside the scope of the Act. The test must be its real connection with the contract of labour, and assent or non-assent of the individual member of the unit was immaterial.

By virtue of its incorporation and certification, the union negotiates as the compulsory statutory representative of the whole group of employees whether members of the union or not. This leaves no room for private negotiation between the employer and employee on the matters covered in the agreement. The agreement tells the employer on what terms he must conduct his master and servant relations. As to the employees, they are put to their election either to accept the terms or seek other employment.

The compulsory check-off was not prohibited by any law. Section 17 of the *Professional Syndicates' Act,* which limits the right of the union to three months' dues from a member who resigns, did not affect the non-union employees. It did not affect the right of the union and the employer to contract for a compulsory check-off as a condition of employment.

There was nothing in the legislation which disclosed any intention to make the law of mandate applicable to the situation contemplated by the Act. The status conferred upon the union resulted from the legislation and not from a contractual relation of mandate.

Per Taschereau and Locke JJ., *dissenting*: The withholding by the employer for remittance to the union of part of the salary of an employee objecting to such withholding was not a "condition de travail" within the meaning of the legislation. It related only to the financial administration of the union and had no relation to the conditions under which an employee must or must not work. Such a clause was not included within the restricted limits of s. 2(*e*) of the *Labour Relations Act* or s. 21 of the *Professional Sydicates' Act*. The objecting employees could be bound only by the conditions envisaged by the legislation.

It seemed indisputable that the Legislature never had the intention of considering the compulsory check-off as a "condition de travail". The check-off made its appearance in Quebec a long time after the enactment of the Quebec legislation and could bind the parties only by consent.

The plaintiff union could not rely upon the provisions of arts. 1028 and 1029 of the *Civil Code*.

1959

SYNDICAT CATHOLIQUE DES EMPLOYÉS DE MAGASINS DE QUÉBEC v. CIE PAQUET LTÉE.

Per Fauteux J., *dissenting*: The clause was not a "condition de travail" within the meaning of the legislation, and hence could not be the object of a collective agreement and must be held invalid.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], affirming a judgment of Choquette J. Appeal allowed, Taschereau, Locke and Fauteux JJ. dissenting.

L. P. Pigeon, Q.C., and *Roger Thibaudeau*, for the plaintiff, appellant.

J. M. Guérard, Q.C., and *J. H. Gagné, Q.C.*, for the defendant, respondent.

The judgment of Kerwin C. J. and Cartwright, Abbott and Judson JJ. was delivered by

JUDSON J.:—The judgment under appeal[1] holds that a certain clause in the collective bargaining agreement made between the appellant and the respondent is null and void. The clause in full is as follows:

> The employer shall withhold from the wages of each regular employee covered by this agreement a sum equal to the union dues fixed by the Syndicate for its members and shall within the first ten days of the ensuing month remit the amount so withheld to the Syndicate's authorized representative.

The object of the clause is well-known and obvious. It is to throw upon all employees, whether members of the union or not, equal responsibility for the financial upkeep of the union on the theory that the gains achieved by the union on behalf of all employees must, at least to the extent of financial support, be paid for by all. For the union the advantages and convenience of a compulsory check-off are equally obvious.

The appellant is a labour union incorporated under the *Professional Syndicates' Act*, R.S.Q. 1941, c. 162. It was duly certified as a bargaining agent under the *Labour Relations Act*, R.S.Q. 1941, c. 162A, by decisions of the Quebec Labour Relations Board dated December 6, 1950, and May 20, 1954. The collective agreement, which contains the impugned clause, is dated March 24, 1955. It was made between the appellant and the respondent following a strike of the respondent's employees. Immediately after the signing of the agreement all the employees were

[1] [1958] Que. Q.B. 275.

notified in writing of the existence of the clause by a circular prepared by the union but distributed by the company. With the week ending April 9, 1955, the company began to deduct fifty cents per week from the wages of all employees whether members of the union or not. Shortly afterwards, on April 22, 1955, a number of employees, who were almost all non-members of the union, expressed their dissent by signing the following document:

> I, the undersigned, hereby declare that I do not authorize the Compagnie Paquet Limitée to withhold from my weekly wages the sum of $0.50 by application of the "Rand formula" from this date to the end of the present contract.

Ultimately, 254 out of 607 employees covered by the agreement expressed this dissent. Of the remainder, 230 union members authorized the deduction and 123 employees gave no authorization but made no objection. The company nevertheless continued to withhold the fifty cents per week from all employees but instead of remitting the amounts collected from the 254 dissenting employees, deposited this money in a special bank account and notified the union of its action. After intermediate negotiations and proceedings under the agreement, which are of no significance in the determination of this matter, the union began this action in the Superior Court to claim from the company the amount collected. The Superior Court held that this compulsory check-off was null and void. This judgment was affirmed by the unanimous decision of the Court of Queen's Bench[1]. The union now appeals to this Court.

The main reason given for the rejection of the clause was that it was not a "condition de travail" within the meaning of the *Professional Syndicates' Act* and the *Labour Relations Act* and that consequently, it was outside the scope of the contracting power of the union and company when they made their collective labour agreement. I therefore turn immediately to an examination of the relevant provisions of these two enactments. The *Professional Syndicates' Act,* enacted in 1924, authorizes the incorporation of these associations and provides for the negotiation of collective labour agreements, which agreements are enforceable contracts. "Any agreement respecting the conditions of labour (les conditions du travail) not prohibited by law may form the object of a collective

[1] [1958] Que. Q.B. 275.

1959

SYNDICAT CATHOLIQUE DES EMPLOYÉS DE MAGASINS DE QUÉBEC v. CIE PAQUET LTÉE.

Judson J.

labour agreement" (s. 21). It is apparent that a collective agreement may be of wide scope. There are only two limiting factors. The terms of this agreement must relate to conditions of labour (conditions du travail) and must not be prohibited by law.

This Act did not provide for compulsory collective bargaining. This came with the *Labour Relations Act* in 1944, which compelled an employer to recognize as the collective representative of his employee "the representatives of any association comprising the absolute majority of his said employees and to negotiate with them, in good faith, a collective labour agreement" (s. 4). "Collective Agreement" is defined as

> Any arrangement respecting conditions of employment (conditions de travail) entered into between persons acting for one or more associations of employees, and an employer or several employers or persons acting for one or more associations of employers. (s. 2(e))

Section 19(a) provides that the Act applies "to a collective agreement entered into under the *Professional Syndicates' Act*. . . ."

The *Professional Syndicates' Act* was enabling only, not compulsory, and the right of representation of the syndicate was confined to its members. Theoretically it was possible to have a collective agreement under this Act which left untouched the position of employees who were not members of the syndicate. The change made by the *Labour Relations Act* in 1944 was profound. The collective representative with the necessary majority acquired the right of representation for all the employees, whether members or not, and the employer became obligated to negotiate in good faith with that collective representative. Failure to agree might result in conciliation proceedings and eventually in the appointment of a council of arbitration.

The legal problem under consideration in this litigation has to be determined with this compulsory aspect of the legislation in mind. Nowhere do the two Acts attempt to define "conditions de travail", "conditions of labour" or "conditions of employment". The differences in phraseology between the French and English versions of the two Acts leap to the eye but the reasons of the learned trial judge and of the Court of Queen's Bench, rightly, in my respectful opinion, decline to make these differences a governing

factor in their decisions. Whatever the phrase may be, "conditions de travail", "conditions of labour" or "conditions of employment", all three deal with the same general concept and in one language the terminology is uniform.

Why has the impugned clause been rejected as a "condition de travail" and consequently as being beyond the proper scope of a collective agreement? The learned trial judge subdivided "conditions de travail" into two classes, "conditions de travail en soi" and "conditions de travail conventionnelles" and in doing so doubtless accepted the suggestion put forward in Beaulieu, Les Conflits de Droit dans les Rapports Collectifs du Travail. The first type of condition, he held, was a true "condition de travail" and could be inserted in a collective agreement without the individual assent of the employees, and the second, in his opinion, required such assent. The ratio of his judgment on this point is expressed in the following extract from his reasons:

qu'il y a lieu, en effet, de distinguer entre conditions de travail *en soi*, ou clauses normatives des conditions de travail, et conditions de travail *conventionnelles* stipulées en marge des premières (Me M. L. Beaulieu, Conflits de droit dans les rapports collectifs du travail, pp. 360, 366, 368, 370); que seules les premières peuvent faire l'objet d'une convention collective, sans qu'il soit nécessaire d'obtenir l'assentiment individuel des employés représentés; que les secondes, au contraire, exigent cet assentiment;

I can find nothing in this legislation which would justify this subdivision nor any guide for the doing of it. It is obvious that one may have a collective agreement which is satisfactory to the parties without this clause. When, however, the parties have agreed upon it, it is to me just as much regulatory of the employer-employee relationship as any other clause in the agreement. It is directly concerned with the right to hire and the right to retain employment, for without accepting this term a person cannot be hired, or, if he is already an employee, cannot retain his employment. If it is a regulation of the contract of labour to this extent, and it clearly is, how can it be rejected as being something outside the authorization of the Act? A term either is or is not a "condition de travail". The test must be its real connection with the contract of labour, and

1959

SYNDICAT CATHOLIQUE DES EMPLOYÉS DE MAGASINS DE QUÉBEC v. CIE PAQUET LTÉE.

Judson J.

assent or absence of assent of the individual member of the bargaining unit seem to me to be matters that have no relevancy in the determination of the question.

In the Court of Queen's Bench[1] the clause was variously described as being solely in the interest of the union at the expense of the employees; as being directed against the freedom of the employer in his hiring of employees, and as being in no way concerned with the work of the employee. Consequently, it was rejected as a "condition de travail". I cannot accept this characterization of the clause. It is easy to see its convenience and advantage to the union. Nevertheless, the union is negotiating as the compulsory statutory representative of the whole group of employees—whether members of the union or not. How can one validly infer that a compulsory check-off clause is not a necessary incident of employer-employee relations or is not the proper concern of those who are negotiating about these relations? It is not an assumption that would be made by one of the parties. The other party that now attacks the clause signed the agreement. The clause is one that has been used in collective agreements for some considerable time. This, in itself, is some indication that it has been found useful to and is accepted as desirable by those who are the interested parties in these agreements and I have already indicated that in my opinion, it is directly concerned with the regulation of employer-employee relations. This, I think, prevents any judicial inference that it is outside the scope of the collective agreement as not being a "condition de travail".

The union is, by virtue of its incorporation under the *Professional Syndicates' Act* and its certification under the *Labour Relations Act,* the representative of all the employees in the unit for the purpose of negotiating the labour agreement. There is no room left for private negotiation between employer and employee. Certainly to the extent of the matters covered by the collective agreement, freedom of contract between master and individual servant is abrogated. The collective agreement tells the employer on what terms he must in the future conduct his master and servant relations. When this collective agreement was made, it then became the duty of the employer to modify

[1] [1958] Que. Q.B. 275.

his contracts of employment in accordance with its terms so far as the inclusion of those terms is authorized by the governing statutes. The terms of employment are defined for all employees, and whether or not they are members of the union, they are identical for all. How did this compulsory check-off of the equivalent of union dues become a term of the individual employee's contract of employment? They were told by the notice that in future this deduction would be a term of their contract of employment. They were put to their election at this point either to accept the new term or seek other employment. They made their election by continuing to work and the deductions were actually made. It is admitted that all these employees were employees at will and no question arises as to the right of the employer to make or impose new contracts or of the length of notice that may be required to bring this about. It was not within the power of the employee to insist on retaining his employment on his own terms, or on any terms other than those lawfully inserted in the collective agreement.

I now turn to the question whether the compulsory withholding is prohibited by law. The learned trial judge stated that it was clearly unlawful against non-union members on the ground that it infringed s. 17 of the *Professional Syndicates' Act*. The Act authorizes the imposition of an annual assessment upon the members. Section 17 provides:

> 17. The members of a professional syndicate may resign voluntarily, without prejudice to the syndicate's right to claim the assessment for the three months following such resignation.
>
> They shall not be personnally liable for the debts of the syndicate.
>
> The syndicate shall not claim from a member ceasing to adhere thereto the assessment of more than three months.

How does this make the collection of the equivalent of union dues from non-members unlawful? It deals only with the position of members and limits the right of the syndicate to three months' dues from a member who resigns. If this section were not in the Act, it would be possible, by by-law, to compel payment of dues for a longer period even after resignation. The non-union employee is not affected in any way by this section. As long as he retains his employment he is subjected to a compulsory check-off of the equivalent of union dues but if he resigns his employment, as he is free to do at any time, he pays no more. The only

1959

SYNDICAT CATHOLIQUE DES EMPLOYÉS DE MAGASINS DE QUÉBEC v. CIE PAQUET LTÉE.

Judson J.

effect of s. 17 is to limit the right of the union to collect dues from its members after their resignation. It does not affect the right of the parties to contract for a compulsory check-off as a condition of employment.

Next, it is said both in the reasons of the learned trial judge and in certain of the reasons of the Court of Queen's Bench that by virtue of the provisions of ss. 4 and 9 of the *Labour Relations Act* the union became a mandatary of the members of the bargaining unit and that this precluded it from inserting a term in the collective agreement in its own interest. Section 4, which I have already referred to, deals with the compulsory recognition of a union comprising the absolute majority of the employees, and s. 9 states that

"The Board shall issue, to every recognized association, a certificate specifying the group which it is entitled to represent." There is nothing in the legislation which discloses any intention to make the law of mandate applicable to the situation contemplated by the Act. There is only a legislative recognition and certification of a union as the collective representative of the employees, provided the union comprises the absolute majority of the employees. When this situation arises the employer must negotiate and contract with the collective representative and the collective representative represents all employees, whether union members or not, not because of a contractual relation of mandate between employees and union but because of a status conferred upon the union by the legislation.

If the relation between employee and union were that of mandator and mandatary, the result would be that a collective agreement would be the equivalent of a bundle of individual contracts between employer and employee negotiated by the union as agent for the employees. This seems to me to be a complete misapprehension of the nature of the juridical relation involved in the collective agreement. The union contracts not as agent or mandatary but as an independent contracting party and the contract it makes with the employer binds the employer to regulate his master and servant relations according to the agreed terms.

Planiol and Ripert Droit Civil (1932) vol. 11, no. 882, in discussing the nature of the collective agreement, defined by the law of France in terms indistinguishable from those of the Quebec legislation under consideration here, reject the legal theory of mandate in this situation in these words:

> C'est ainsi qu'on ne peut l'expliquer par un *mandat* que l'ouvrier donnerait au syndicat de fixer les conditions du travail dans un accord passé à son profit avec le patron, l'adhésion au syndicat ne permettant pas de supposer l'existence de ce mandat.

The learned authors in their second edition (1954) vol. 11, no. 881, adhere to this opinion:

> Dès cette époque il apparaissait cependant que la convention collective n'était pas destinée à créer directement entre les employeurs et les salariés des relations de travail, mais à préciser les conditions auxquelles les contrats individuels devaient être conclus.

Durand and Jussand, Traité de droit du travail, t. 1, no. 106, p. 130, are of the same opinion.

What the learned authors have to say about the impossibility of explaining the collective agreements by the theory of mandate as far as union members are concerned seems to me to apply with all the more force to non-union employees, whose only connection with the collective representative is by virtue of the *Labour Relations Act.* Apart from the judgment under appeal, we were referred to no authority to justify the application of the doctrine to the novel situation contemplated by the *Labour Relations Act.* The collective agreement is a recent development in our law and has a character all of its own. To attempt to engraft upon it the concepts embodied in the law of mandate, would, in my opinion, effectively frustrate the whole operation of the Act.

My conclusion therefore is that the clause under consideration is a "condition de travail" within the meaning of the Quebec legislation and that it is not prohibited by any law. I would allow the appeal and declare the clause valid and binding and enter judgment for the appellant for the sums withheld from the 254 employees and not remitted to the appellant. The appellant is entitled to its costs throughout.

1959

SYNDICAT CATHOLIQUE DES EMPLOYÉS DE MAGASINS DE QUÉBEC v. CIE PAQUET LTÉE.

The judgment of Taschereau and Locke JJ. was delivered by

TASCHEREAU J. (*dissenting*):—Il est inutile de relater de nouveau tous les faits de cette cause, qui l'ont été déjà par mon collègue M. le Juge Judson. Il me suffira d'en signaler quelques-uns seulement.

Pour solutionner le problème qui se présente, il est important de retenir deux lois statutaires, qui ont été discutées et analysées par les cours inférieures et par les procureurs des deux parties. La première est la *Loi des syndicats professionnels de la province de Québec,* S.R.Q. 1941, c. 162 et amendements, en vertu de laquelle l'appelant est incorporé, et la seconde est la *Loi des relations ouvrières,* S.R.Q. 1941, c. 162A et amendements, qui édicte entre autres choses que tout employeur est tenu de reconnaître comme représentant collectif des salariés à son emploi, les représentants d'une association groupant la majorité absolue desdits salariés, et de négocier de bonne foi avec eux, une *convention collective de travail.* La loi définit la "convention collective" comme étant une entente relative aux *conditions de travail,* conclue entre les personnes agissant pour une ou plusieurs associations de salariés, et un ou plusieurs employeurs ou personnes agissant pour une ou plusieurs associations d'employeurs.

Le 24 mars 1955, une "convention collective" a été signée entre l'appelant, qui est l'agent négociateur pour représenter les employés de l'employeur, et l'intimée, et la clause 2.01 qui est à la base du présent litige se lit ainsi:

ARTICLE 2.01—L'employeur retiendra sur la paie de chaque employé régulier, assujetti à la présente convention, une somme égale à la cotisation fixée par le syndicat pour ses membres, et remettra dans les dix premiers jours du mois suivant, au représentant autorisé du syndicat, le prélèvement ainsi perçu.

A cette date du 24 mars 1955, la compagnie intimée avait à son emploi au delà de 600 employés affectés par le certificat de reconnaissance syndicale de l'appelant, mais 230 membres seulement du syndicat appelant autorisèrent la compagnie à déduire de leurs salaires le montant de la cotisation syndicale, 123 ne donnèrent aucune autorisation mais ne s'objectèrent pas à l'application de la clause, et 254 employés, non membres du syndicat, refusèrent de reconnaître l'application de la clause 2.01, et interdirent à la compagnie intimée de faire aucune déduction. L'intimée a quand

même retenu les cotisations des employés non membres du syndicat, et en a déposé le produit dans un compte de banque "In Trust", en attendant une adjudication finale, et le syndicat en a été avisé.

Le 13 septembre 1955, vu qu'aucun règlement n'était intervenu, ni par conciliation ni autrement, l'appelant a institué les présentes procédures, et a réclamé de la défenderesse-intimée la somme de $3,000, représentant les cotisations des employés protestataires, déposées dans le compte "In Trust".

L'intimée a invoqué plusieurs moyens de défense, mais je crois qu'il est nécessaire de n'en retenir qu'un seul, car il est à mon sens suffisant pour disposer de ce litige.

En vertu de la *Loi des relations ouvrières,* arts. 4 et 19(*a*), tout employeur, c'est-à-dire l'intimée dans la présente cause, est tenu de reconnaître comme représentant collectif des salariés à son emploi, les représentants d'une association groupant la majorité absolue desdits salariés, et de négocier de bonne foi avec eux, une *convention collective de travail.* La *Loi des relations ouvrières* s'applique à une *convention collective de travail* conclue sous la *Loi des syndicats professionnels* par une association qui est reconnue à compter de la date du dépôt de cette convention au bureau du ministre du Travail, conformément à la *Loi des syndicats professionnels.* Comme ce dépôt a été fait au bureau du ministre du Travail le 29 mars 1955, la convention a donc pris effet à partir de cette date.

Il est certain qu'en vertu de la *Loi des relations ouvrières,* tous les employés de la Compagnie Paquet, l'intimée, sont liés en ce qui concerne les *conditions de travail,* par la convention collective signée entre les parties. Je suis bien d'avis que la détermination des heures de travail, des congés, des vacances, des salaires, des droits d'ancienneté ou des congédiements, comporte essentiellement des *conditions de travail,* pour lesquelles le syndicat, en vertu de la loi, peut stipuler pour le bénéfice des employés, et lier ainsi l'employeur qui signe la convention. Mais je ne puis admettre que la retenue hebdomadaire par l'employeur d'une partie du salaire d'un employé protestataire, pour remise au syndicat, soit une *condition de travail* au sens de la loi. Il ne s'agit alors que d'une affaire

1959

SYNDICAT CATHOLIQUE DES EMPLOYÉS DE MAGASINS DE QUÉBEC v. CIE PAQUET LTÉE.

Taschereau J.

d'administration financière du syndicat, qui veut évidemment faciliter ainsi la perception des cotisations, et qui n'a aucun rapport aux conditions dans lesquelles un employé doit ou ne doit pas travailler. Ce n'est que lorsque les *conditions de travail* telles que prévues par les statuts, sont affectées, que le syndicat peut exercer son recours. L'article 4 de la *Loi des relations ouvrières* et l'art. 2 para. (*e*) de la même loi qui définissent la *convention collective* me semblent assez clairs pour éliminer tout doute sur ce point.

Il est certain, que la retenue du salaire peut être une *condition de travail* dont dépend le droit d'un employé de travailler. Mais la question est de savoir si une semblable condition est comprise dans le cadre restreint de l'art. 2(*e*) de la *Loi des relations ouvrières,* ou de l'art. 21 de la *Loi des syndicats professionnels.* Je ne le crois pas. Toutes les conditions ne sont pas prévues aux statuts. Ce ne sont que celles que la loi envisage qui puissent lier les dissidents. Ainsi, une clause stipulant que seules les personnes appartenant à une religion ou une race particulière, auraient le droit d'être employées à un travail quelconque, pourrait être, *dans un sens,* considérée comme une *condition de travail,* mais personne ne peut suggérer sérieusement que la Législature ait jamais songé qu'un syndicat représentant des employés, pourrait les lier légalement par une telle clause.

Il me semble aussi indiscutable que la Législature dans la rédaction de ses lois ouvrières, n'a jamais eu l'intention de considérer la retenue d'une partie des salaires des groupes dissidents comme une *condition de travail.* Le "check-off", comme on est convenu de l'appeler, n'a été mis en évidence dans la province de Québec qu'en 1946, quand mon collègue, M. le juge Rand, nommé arbitre pour régler un différend survenu à la compagnie Ford, le suggéra, bien longtemps après la législation de Québec. Il s'agissait alors d'un compromis proposé par M. le juge Rand, que les parties s'étaient d'avance engagées à reconnaître, où le "close shop" et le "union shop" entre autres, ont été refusés, et le "check-off" accordé. La formule Rand ne peut lier les parties que par consentement, ce qui n'existe pas ici. Seule la loi spéciale

invoquée dans la présente cause pourrait autoriser la retenue de partie des salaires des employés non syndiqués, si elle s'appliquait.

Pour les raisons données par la Cour du banc de la reine[1], je suis d'opinion qu'on ne peut invoquer le bénéfice des arts. 1028 et 1029 C.C., pour donner effet à la présente réclamation.

Comme je suis clairement d'opinion que la retenue syndicale n'est pas une *condition de travail,* au sens de la loi, je crois, comme la Cour supérieure et comme la Cour du banc de la reine, que la clause 2.01 de la convention est *ultra vires.*

L'appel doit donc être rejeté avec dépens.

FAUTEUX J. (*dissenting*):—Les raisons données par M. le Juge Pratte, de la Cour d'Appel[1], démontrent clairement, à mon avis, que l'engagement relatif à la retenue du salaire, dont le syndicat demande l'exécution, ne porte pas sur une condition de travail au sens de la législation considérée et que, partant, il ne pouvait faire l'objet d'une convention collective et doit être tenu pour invalide.

Je renverrais l'appel avec dépens.

Appeal allowed with costs, Taschereau, Locke *and* Fauteux JJ. *dissenting.*

Attorneys for the plaintiff, appellant: Germain, Pigeon & Thibaudeau, Quebec.

Attorneys for the defendant, respondent: Jean-Marie Guérard and Jean-H. Gagné, Quebec.

PARKE, DAVIS & COMPANY .....APPELLANT;

AND

FINE CHEMICALS OF CANADA, LIMITED .....RESPONDENT.

1958
*Oct. 30, 31

1959
Jan. 27

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Patents—Compulsory licence—Power of Commissioner of Patents to grant licence—Patent covering both process and substance—Product having therapeutic value— Product to be sold in bulk by licensee—Infringement—Market already served—Royalty—The Patent Act, R.S.C. 1952, c. 203, s. 41.

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

[1] [1958] Que. Q.B. 275.

1959

PARKE, DAVIS & CO. v. FINE CHEMICALS OF CAN. LTD.

The appellant holds a patent covering both the process for manufacturing a chemical compound marketed under the trade name "Benadryl", which was described as being new and having therapeutic value, and also the product itself when produced by the patented process. The respondent manufactures chemical products in bulk, and was granted, by the Commissioner of Patents, a licence under s. 41(3) of the Patent Act to manufacture the product for sale. A royalty of 10 per cent. of its net selling price was to be paid by the licensee, whose stated intention was to sell in bulk form only. The order of the commissioner was affirmed by the Exchequer Court. The patentee appealed to this Court and contended that (1) the commissioner had no authority under s. 41(3) to grant the licence because the licensee would not be producing a medicine and because the licence covered both the process and the product, (2) the commissioner should have seen "good reason" not to grant the licence because the licensee had infringed the patent and because the market was already adequately served, and (3) the royalty was inadequate.

Held: The appeal should be allowed in respect of the adequacy of the royalty, which question should be referred back to the commissioner. In other respects, the appeal should be dismissed.

Per curiam: The evidence was quite inadequate to enable the commissioner to arrive at a royalty which would give due weight to all relevant considerations.

Per Rand and Abbott JJ.: Section 41(3) applied to a case where the patent covered both the process and the substance produced. The subsection was to be taken to include any new process for producing a new substance, and since the product depended on the process and as its invention involved the new process, a licence for the process necessarily involved the right to produce the substance: the process necessarily produced the product.

Per Locke, Cartwright and Martland JJ.: The word "medicine" as used in s. 41 should be interpreted broadly, and the product was a medicine within the meaning of the section, even when it was in bulk form.

Construing s. 41 as a whole, the commissioner had authority to grant the licence for the use of the invention. In terms, subs. (3) applied to "any patent" if such a patent is for "an invention intended for or capable of being used for the preparation or production of food or medicine".

The decision as to whether the commissioner should have seen "good reason to the contrary" was his to make, and it could not be said, on the evidence, that his decision was manifestly wrong.

APPEAL from a judgment of Thurlow J. of the Exchequer Court of Canada[1], affirming an order of the Commissioner of Patents granting a licence under s. 41(3) of the *Patent Act*. Appeal allowed in part.

J. J. Robinette, Q.C., and *J. Godfrey, Q.C.*, for the appellant.

[1] [1957] Ex. C.R. 300, 16 Fox Pat. C. 173, 27 C.P.R. 117.

G. H. Henderson, Q.C., and *D. Watson,* for the respondent.

The judgment of Rand and Abbott JJ. was delivered by

RAND J.:—The facts in this appeal are these. The appellant, to be called the "Company", holds a patent on both a process for making and the substance itself called Benadryl. The Company manufactures the chemical in the United States and ships it in bulk to a subsidiary in Canada by which it is prepared in dosage form with or without other ingredients for the treatment of allergies, colds or motion sickness. The respondent manufactures chemical products in bulk and applied for a license under s. 41(3) of the *Patent Act,* R.S.C. 1952, c. 203, as amended, to manufacture Benadryl for sale to manufactureres of pharmaceutical substances. The Commissioner of Patents granted the license and fixed the royalty at 10 per cent. of the net wholesale price of the licensee.

Section 41 is as follows:

41.(1) In the case of inventions relating to substances prepared or produced by chemical processes and intended for food or medicine, the specification shall not include claims for the substance itself, except when prepared or produced by the methods or processes of manufacture particularly described and claimed or by their obvious chemical equivalents.

(2) In an action for infringement of a patent where the invention relates to the production of a new substance, any substance of the same chemical composition and constitution shall, in the absence of proof to the contrary, be deemed to have been produced by the patented process.

(3) In the case of any patent for an invention intended for or capable of being used for the preparation or production of food or medicine, the Commissioner shall, unless he sees good reason to the contrary, grant to any person applying for the same, a licence limited to the use of the invention for the purposes of the preparation or production of food or medicine but not otherwise; and, in settling the terms of such licence and fixing the amount of royalty or other consideration payable the Commissioner shall have regard to the desirability of making the food or medicine available to the public at the lowest possible price consistent with giving to the inventor due reward for the research leading to the invention. . . .

Two questions are raised: first, does subs. (3) apply to a case where the patent covers both the process and the substance produced, and secondly, is the royalty allowed unreasonably small?

1959

PARKE, DAVIS & CO. v. FINE CHEMICALS OF CAN. LTD.

Rand J.

The section is seen to deal with substances prepared or produced by chemical processes and intended for food or medicine and its provisions are exclusive in relation to their subject-matter. Their interpretation has been considered in this Court in two cases, *F. Hoffmann-LaRoche & Co. Ltd. v. Commissioner of Patents*[1] and *Commissioner of Patents v. Winthrop Chemical Company Incorporated*[2]. In the former the Exchequer Court was confirmed in holding that subs. (1) permitted the issue of a patent for a new substance only when it was associated with a new process at the same time patented. In the latter a claim for a new substance produced by an old process was held to be bad and the substance unpatentable. Mr. Robinette argues that the language of subs. (3) limits its application to the case of a patented process only and that where both the process and the product are within the monopoly, a licence under the section is not authorized. He stresses the words "for the purposes of the preparation or production of food or medicine" as being referable only to the active agency or process.

The legislative policy underlying the subsection to be gathered from its special terms and the section as a whole is obvious: all new substances, apart and as distinguished from processes, are, in the public interest, to be free from legalized monopoly, the conclusive evidence of which is the fact that no new substance may alone be patented; all unpatented processes are open to be used to produce the substance patented with its new process, with only the new process protected. Admittedly a licence can issue at once for the new process where the substance is old; but, on the argument made, where the substance is also new and patented both are to continue under monopoly unless, after three years, under s. 67, in case of an abuse of the exclusive right, a licence is granted. If, for example, the Salk vaccine and its process were patented, in the absence of another process the public would be denied the benefit of immediate licence and until s. 67 might become available; whereas a new, patented process for making the vaccine would be available for licence at once. This means that a new proc-

[1] [1955] S.C.R. 414, 15 Fox Pat. C. 99, 23 C.P.R. 1.
[2] [1948] S.C.R. 46, 7 Fox Pat. C. 183, 7 C.P.R. 58, 2 D.L.R. 561.

ess is to be held to be of more importance to the public than a new substance, however vital the latter may be for health. In this patent a number of new processes are included and the view advanced might defeat completely the purposes of the subsection through the possible exhaustion of efficient methods of production by the patent. Such a view contradicts the most significant fact that a new substance, however original and ingenious the idea behind it, cannot be patented alone. Subsection (3) is to be taken to include any new process for producing a new substance, and since the product is process dependent, and as its invention involves the new process, a licence for the latter necessarily involves the right to produce the former: the process necessarily produces the product. The case in which a licence is to be issued is "of any patent for an invention intended for or capable of being used for the preparation of production of food or medicine"; Benadryl is a substance of medicine and the patented process is intended for its production: *In re Glaxo*[1]. One consequence and an important one in extending the patent to the substance would be its pertinence to the ascertainment of a royalty.

The evidence before the commissioner on damages was quite inadequate to enable him intelligently to arrive at a royalty which would give due weight to all relevant considerations. Where the monopoly in such inventions is so considerably restricted in scope, we should be free from doubt that the royalty allowed is commensurate with the maintenance of research incentive and the importance of both process and substance. That does not appear to me to have been possible on the meagre evidence presented to the commissioner. The case should be referred back to the commissioner to enable further matter to be adduced. For that purpose it is not sufficient for the patentee to sit back and, if they only are available, keep important facts undisclosed as being private and confidential; once the commissioner decides the case to be one for licence, it lies with the patentee, by whatever means are open to him, to present substantial support for the royalty which he claims; in the absence of that he will be in a weak position to complain of any holding by the commissioner.

[1] (1941), 58 R.P.C. 12.

1959

PARKE, DAVIS & CO. v. FINE CHEMICALS OF CAN. LTD.

Rand J.

I would, therefore, allow the appeal and refer back to the commissioner the matter of royalty; in other respects the appeal should be dismissed. In the circumstances there should be no costs to any party in this or the Exchequer Court.

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

MARTLAND J.:—This is an appeal from a judgment of Thurlow J. in the Exchequer Court[1], which dismissed the appellant's appeal from an order made by the Commissioner of Patents for the granting of a compulsory licence to the respondent with respect to the use of Canadian Patent 466,573, pursuant to subs. (3) of s. 41 of the *Patent Act*, R.S.C. 1952, c. 203, as amended.

The patent is entitled "Process for the Manufacture of Amino Ethers" and was issued on July 11, 1950, to the appellant as assignee of the inventor. It covers both the process for manufacturing a chemical known as diphenhydramine hydrochloride, also known as Benadryl, and also that product itself when produced by the patented process. The first sentence of the patent states: "The invention relates to a new class of chemical compounds of therapeutic value." The appellant manufactures this chemical in the United States of America and ships it in bulk to Parke, Davis & Company Limited, a Canadian company, which prepares the bulk chemical in dosage forms or combines it with other ingredients to produce preparations for allergies, for colds and for motion sickness.

The respondent is a Canadian company which manufactures pharmaceuticals and pharmaceutical chemicals. The licence granted to it by the Commissioner of Patents authorized it to manufacture, in its own establishment only, products according to the patented process with the consequent right to sell the products, subject to certain stated terms and conditions, including payment to the appellant of a royalty of 10 per cent. of its net selling price to others of the product. The stated intention of the respondent is to sell the product in bulk form only.

[1] [1957] Ex. C.R. 300, 16 Fox Pat. C. 173, 27 C.P.R. 117.

The provisions of the *Patent Act* requiring consideration in this appeal are subs. (1), (2) and (3) of s. 41, which provide as follows:

41.(1) In the case of inventions relating to substances prepared or produced by chemical processes and intended for food or medicine, the specification shall not include claims for the substance itself, except when prepared or produced by the methods or processes of manufacture particularly described and claimed or by their obvious chemical equivalents.

(2) In an action for infringement of a patent where the invention relates to the production of a new substance, any substance of the same chemical composition and constitution shall, in the absence of proof to the contrary, be deemed to have been produced by the patented process.

(3) In the case of any patent for an invention intended for or capable of being used for the preparation or production of food or medicine, the Commissioner shall, unless he sees good reason to the contrary, grant to any person applying for the same, a licence limited to the use of the invention for the purposes of the preparation or production of food or medicine but not otherwise; and, in settling the terms of such licence and fixing the amount of royalty or other consideration payable the Commissioner shall have regard to the desirability of making the food or medicine available to the public at the lowest possible price consistent with giving to the inventor due reward for the research leading to the invention.

Three contentions were raised by the appellant:

1. That the Commissioner of Patents was not authorized under subs. (3) to grant the licence because:

(*a*) the respondent would not be producing a medicine within the meaning of that subsection;

(*b*) a licence can be granted under that subsection only in respect of a patented process and not where a patent covers both the process and the product created by that process.

2. Even if the Commissioner of Patents had authority to issue a licence, he should have seen "good reason to the contrary" in considering this application because:

(*a*) it was alleged that there had been infringement of this patent by the respondent;

(*b*) the Canadian market was already adequately served by Parke, Davis & Company Limited.

3. In any event the royalty fixed by the Commissioner of Patents for the use of the invention was inadequate.

With respect to the first point, it was contended that the respondent would only be producing Benadryl in bulk form, and not bottled or labelled for sale for individual consumption, and that in bulk form it did not constitute a medicine.

1959

PARKE, DAVIS & CO. v. FINE CHEMICALS OF CAN. LTD.

Martland J.

Reference has already been made to the first sentence in this patent, stating that it relates to a new class of chemical compounds of therapeutic value. Furthermore, the specifications also state:

> The compounds may be administered to humans as the hydrochloride or other salts or the free bases. They may be given orally, parenterally, rectally or as a vapour or mist. The more active compounds of the invention, such as Compound 1, are indicated for therapeutic use in humans for allergic conditions (asthma, urticaria, histamine cephalgia, anaphylactic shock), smooth muscle spasm (biliary spasm, dysmenorrhea).
>
> Compound 1 may be orally administered in dosage of 5 grains and given intravenously in amount of 150 mg.

It is also noted that the product claims in this patent are in the form specified in subs. (1) of s. 41 of the Act, which relates exclusively to inventions of substances prepared or produced by chemical processes and intended for food or medicine. From the evidence it appears that the product in question has no uses other than therapeutic uses.

I agree with Thurlow J. that the word "medicine", as used in s. 41 of the Act, should be interpreted broadly and I am of the opinion that the product Benadryl is a medicine within the meaning of that section, even when it is in bulk form.

It was also contended that the authority to grant a licence under subs. (3) of s. 41 was limited to a licence for the use of a patented process only and where there was no added claim for the product produced by that process. Reference was made to two decisions of this Court in respect of s. 41 of the Act; namely, *The Commissioner of Patents v. Winthrop Chemical Company Incorporated*[1] and *F. Hoffman-LaRoche & Co. Ltd. Co. v. The Commissioner of Patents*[2].

The earlier case decided that a claim cannot be entertained for a substance falling within subs. (1) of s. 41 unless a claim is also made in respect of the process by which it is produced. The latter case decided that the inventor of a new process for the manufacture of a product which is not new cannot obtain a patent for the product even on the basis of a process dependent product claim.

[1] [1948] S.C.R. 46, 7 Fox Pat. C. 183, 7 C.P.R. 58, 2 D.L.R. 561.
[2] [1955] S.C.R. 414, 15 Fox Pat. C. 99, 23 C.P.R. 1.

It was argued that, construing subs. (3) of s. 41 in the light of these decisions, it could only have been intended to relate to an invention of the process only and not to relate to a case where the product produced by the process had also been claimed. Emphasis was placed on the following words of the subsection: "a licence limited to the use of the invention for the purposes of the preparation or production of food or medicine but not otherwise". It was urged that such a licence could not permit the sale of the product, but only the use of the process. If the invention relates only to the process, then a sale of the product would not infringe the patent, but, if the product also is patented, then the sale would involve an infringement and the licence cannot, under the wording of the subsection, authorize such a sale. Therefore it was contended that the subsection was not intended to apply to such a patent.

In my opinion subs. (3) is not to be interpreted in this narrow manner. In terms it applies to "any patent" if such patent is for "an invention intended for or capable of being used for the preparation or production of food or medicine". The words of limitation of the licence appearing in the subsection, namely, "a licence limited to the use of the invention for the purposes of the preparation or production of food or medicine but not otherwise", are inserted because the subsection applies not only to inventions intended for the preparation or production of food or medicine, but also to inventions *capable* of being used for the preparation or production of food or medicine. There may be inventions capable of such use and also of other uses. The licence which may be granted under this subsection is limited to the use of the invention for the preparation or production of food or medicine.

It seems to me that s. 41 must be construed as a whole. Subsection (1) applies to inventions relating to substances prepared or produced by chemical processes and intended for food or medicine. Subsection (3) goes somewhat further and also applies to any patent for an invention capable of being used for the preparation or production of food or medicine. If subs. (3) were to be construed in the manner suggested by the appellant, it would eliminate from its

1959

PARKE, DAVIS & CO. v. FINE CHEMICALS OF CAN. LTD.

Martland J.

operation inventions which fell within the operation of subs. (1). I do not think that such a meaning was intended and the wording of subs. (3) does not indicate that it must be so construed. The subsection relates to the use of any invention intended for or capable of being used for the preparation of food or medicine and the provisions as to royalty clearly contemplate the sale of the product produced by such use, for they refer to the making of the food or medicine available to the public at the lowest possible price consistent with giving to the inventor due reward for his research.

I am, therefore, of the opinion that the Commissioner of Patents had authority, under subs. (3) of s. 41 of the *Patent Act,* to grant a licence for the use of the invention in question.

As to whether he should have seen "good reason to the contrary" regarding the application for this licence, it would seem that this is a matter for the judgment of the Commissioner of Patents. The wording in question is "the Commissioner shall, unless he sees good reason to the contrary, grant to any person applying for the same . . ." In this case the commissioner did not see such good reason. The decision is his to make and it cannot be said, on the evidence, that his decision was manifestly wrong, bearing in mind that one of the main considerations before him is that of the public interest.

With respect to the matter of the adequacy of the royalty provided in the commissioner's order, I agree with my brother Rand that the evidence before the commissioner was inadequate to enable him intelligently to arrive at a royalty which would give due weight to all the relevant considerations. The monopoly in such inventions is considerably restricted in scope and the royalty allowed should be commensurate with the maintenance of research incentive and the importance of both process and substance. In the present case the respondent proposes to manufacture the product Benadryl in bulk form only. The provision in the commissioner's order as to royalty fixes the 10 per cent. royalty upon the net selling price to others of the product.

The royalty as fixed is, therefore, to be determined upon the wholesale price and has no relationship to the ultimate selling price of the medicines to the consumer.

I am, therefore, of the opinion that in respect of this matter only the appeal should succeed.

I would, therefore, allow the appeal in respect of the matter of the adequacy of the royalty and refer the matter back to the commissioner. In other respects the appeal should be dismissed. There should be no costs to either party in this or the Exchequer Court.

Appeal allowed in part.

Solicitors for the appellant: Arnoldi, Parry & Campbell, Toronto.

Solicitors for the respondent: Gowling, MacTavish, Osborne & Henderson, Ottawa.

THE MINISTER OF AGRICULTURE OF THE PROVINCE OF BRITISH COLUMBIA ..APPELLANT;

1958
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AND

CANADIAN NATIONAL RAILWAY COMPANY, CANADIAN PACIFIC RAILWAY COMPANY, THE RAILWAY ASSOCIATION OF CANADA, NORTHERN ALBERTA RAILWAY COMPANY, ESQUIMALT AND NANAIMO RAILWAY COMPANY, PROVINCE OF ALBERTA, PROVINCE OF SASKATCHEWAN, PROVINCE OF MANITOBA, UNITED GRAIN GROWERS LIMITED, SASKATCHEWAN WHEAT POOL, ALBERTA WHEAT POOL, MANITOBA TRANSPORTATION COMMISSION AND ALBERTA FEDERATION OF AGRICULTURE .....RESPONDENTS.

ON APPEAL FROM THE BOARD OF TRANSPORT COMMISSIONERS FOR CANADA

Railways—Duty of Board of Transport Commissioners to equalize freight traffic of same description—Whether carriage for domestic traffic and for export traffic is of same description within the meaning of s. 336 of the Railway Act, R.S.C. 1952, c. 234, as enacted by 1951 (Can.), c. 22.

*PRESENT: Taschereau, Rand, Locke, Cartwright, Fauteux, Martland and Judson JJ.

1959

MINISTER OF AGRICULTURE FOR B.C. v. C.N.R. *et al.*

The Minister of Agriculture of British Columbia applied to the Board of Transport Commissioners for an order to reduce the tolls for the carriage of grain and grain products to and from all points within the Province of British Columbia when the said grain or grain products were to be used for consumption within the said province on the ground, *inter alia*, that grain or grain products shipped from the Prairie Provinces for export through Pacific Coast ports in British Columbia were carried for lower tolls.

The application was dismissed by the Board. Leave to appeal to this Court was granted upon three questions of law which are to be found at p . . . of this judgment.

Held: The appeal should be dismissed; and it was unnecessary to answer the questions propounded.

The national policy of equalization declared in s. 336(1) of the *Railway Act* applied only to freight traffic of the same description. As the carriage of grain from the Prairie Provinces to British Columbia or from places in British Columbia to other places in that Province was not traffic of the same description as the carriage of grain from the Prairie Provinces to the western seaports for export, there was no obligation on the railways to charge the same tolls, and consequently no duty imposed upon the Board of Transport Commissioners to require them to do so.

APPEAL from a judgment of the Board of Transport Commissioners[1], dismissing an application for a reduction of tolls. Appeal dismissed.

C. W. Brazier, Q.C., and *R. J. McMaster*, for the appellant.

C. F. H. Carson, Q.C., *K. D. M. Spence, Q.C.*, and *Allan Findlay, Q.C.*, for the Canadian Pacific Railway Company, respondent.

J. W. G. Macdougall, Q.C., for the Canadian National Railway Company, respondent.

J. J. Frawley, Q.C., for the Attorney-General for the Province of Alberta, the Attorney-General for the Province of Saskatchewan, and the Attorney-General for the Province of Manitoba, respondents.

R. A. MacKimmie, Q.C., for the Alberta Wheat Pool and United Grain Growers Limited, respondents.

The judgment of Taschereau and Locke JJ. was delivered by

LOCKE J.:—This is an appeal taken pursuant to leave granted under the provisions of s. 53 of the *Railway Act*, R.S.C. 1952, c. 234, from that portion of order 89032 of

[1] 74 C.R.T.C. 113.

the Board of Transport Commissioners[1] which dismissed the application of the Minister of Agriculture for an order directing reductions in the rates on grain and grain products carried from the Prairie Provinces to British Columbia for domestic consumption and on such products to and from all points within the said Province, where they are to be used for consumption within its limits.

The questions of law upon which leave to appeal was sought on behalf of the Minister and as stated in the order granting such leave are as follows:

1. Does the Board of Transport Commissioners for Canada have a discretion under Section 336, subsections (2) and (3) of "The Railway Act", Chapter 234, R.S.C. 1952, to permit railway companies subject to its jurisdiction to charge different rates or tolls in respect of freight traffic of the same description and carried on or upon like kind of cars or conveyance to different persons?

2. Does the Board of Transport Commissioners for Canada have a discretion under Section 336, subsection (4) (g) of the said Act to exempt export and import traffic through Canadian ports from the National Freight Rates Policy if such rates do not bear a fixed and longstanding relationship with rates on similar traffic through ports in the United States of America?

3. If the answer to (2) is in the affirmative, did the said Board of Transport Commissioners exercise such discretion judicially in the present case?

The grounds for the application to the board, in addition to claiming that the then existing rates unjustly discriminated against shippers of grain and grain products to British Columbia where the shipments originated in other provinces of Canada, as well as when such shipments originated in the province, include the following:

Grain and grain products are carried for lower tolls on the said lines or railway in and upon like kind of cars or conveyances, passing over the same line or route and under the same or substantially similar circumstances and conditions.

As the record indicates, the grain referred to is grain shipped from the Prairie Provinces for export through Pacific Coast ports in British Columbia and the basis of the complaint is the interpretation placed by the appellant upon s. 336 of the *Railway Act*.

Both of these complaints were argued before the board and are dealt with in the reasons for judgment delivered by the former Chief Commissioner, Mr. Justice Kearney. When

[1] 74 C.R.T.C. 113.

1959

MINISTER OF AGRICULTURE FOR B.C. v. C.N.R. *et al.*

Locke J.

the matter came before this Court however, the matter of the alleged unjust discrimination was not argued, the appellant restricting its argument to the second ground which is above quoted.

Section 336, as it now reads, was introduced into the *Railway Act* by c. 22 of the Statutes of 1951. The matters which led up to the passage of this amendment are described in the judgment of the board which, following its enactment, dealt with the equalization of class rates[1].

Subsection (1) of s. 336 which, in my view, is the only portion of the section which requires consideration in dealing with this appeal, reads:

> 336. (1) It is hereby declared to be the national freight rates policy that, subject to the exceptions specified in subsection (4), every railway company shall, so far as is reasonably possible, in respect of all freight traffic of the same description, and carried on or upon the like kind of cars or conveyances, passing over all lines or routes of the company in Canada, charge tolls to all persons at the same rate, whether by weight, mileage or otherwise.

Following the amendment to s. 336, the board, in addition to dealing with the equalization of class rates generally, held hearings and dealt with domestic mileage rates on grain and grain products in Western Canada. The reasons for the judgment of the board dealing with the latter matter are reported[2].

Subsection (1) declares the national freight rates policy to be that, subject to the exceptions specified in subs. (4), every railway company shall, so far as is reasonably possible, *in respect of all freight traffic of the same description* carried upon the like kind of cars or conveyances, charge tolls at the same rate. If the carriage of grain from the Prairie Provinces to British Columbia or from places in British Columbia to other places in that Province is not traffic of the same description as the carriage of grain from the Prairie Provinces to the Western sea ports for export, the questions of law propounded do not arise in these proceedings.

The carriage of goods of whatever description to Canadian ports for export is properly described as export traffic, and the carriage of goods imported through such sea ports to their destination in Canada as import traffic. These descriptions are used in subs. (4)(*b*) which declares one of the

[1] 72 C.R.T.C. 1. [2] 72 C.R.T.C. 257.

exceptions to the policy of equalization of rates. As contrasted with these descriptions of traffic, the carriage of goods of whatever nature by rail where the shipments commence and terminate within Canada is properly described as domestic traffic. For the purpose of rate fixing, the Board of Railway Commissioners, and their successors the Board of Transport Commissioners, have always differentiated between these two classes or descriptions of traffic for reasons which are explained at length in the judgment of the Chief Commissioner in the present matter, and in the judgment delivered in the General Freight Rates Investigation[1].

The national policy declared in subs. (1) of s. 336 applies only to freight traffic of the same description. There is thus no obligation on the railway companies to charge the same tolls in respect of these different descriptions of traffic and, consequently, no duty imposed upon the board to require them to do so.

The appeal, therefore, fails. As to answer the questions propounded is unnecessary for the disposition of the appeal, I express no opinion as to any of them. In the circumstances, any answers made would be simply *obiter*.

I would dismiss this appeal with costs.

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

RAND J.:—This appeal arises out of s. 336 of the *Railway Act*, R.S.C. 1952, c. 234, enacted in 1951, which is as follows:

336. (1) It is hereby declared to be the national freight rates policy that, subject to the exceptions specified in subsection (4), every railway company shall, so far as is reasonably possible, in respect of all freight traffic of the same description, and carried on or upon the like kind of cars or conveyances, passing over all lines or routes of the company in Canada, charge tolls to all persons at the same rate, whether by weight, mileage or otherwise.

(2) The Board may, with a view to implementing the national freight rates policy, require any railway company

(*a*) to establish a uniform scale of mileage class rates applicable on its system in Canada, such rates to be expressed in blocks or groups, the blocks or groups to include relatively greater distances for the longer than for the shorter hauls;

[1] (1927), 33 C.R.C. 127.

1959

MINISTER OF AGRICULTURE FOR B.C. v. C.N.R. *et al.*

Rand J.

(*b*) to establish for each article or group of articles for which mileage commodity rates are specified, a uniform scale of mileage commodity rates applicable on its system in Canada, such rates to be expressed in blocks or groups, the blocks or groups to include relatively greater distances for the longer than for the shorter hauls; and

(*c*) to revise any other rates charged by the company.

(3) The Board may disallow any tariff or any portion thereof that it considers to be contrary to the national freight rates policy, and may require the company, within a prescribed time, to substitute a tariff satisfactory to the Board in lieu thereof, or may prescribe other tolls in lieu of the tolls so disallowed.

(4) Subsections (1), (2) and (3) are subject to subsection (6) of section 328 of this Act and to the *Maritime Freight Rates Act*, and do not apply in respect of

(*a*) joint international rates between points in Canada and points in the United States of America;

(*b*) rates on export and import traffic through Canadian ports, where in practice such rates bear a fixed and longstanding relationship with rates on similar traffic through ports in the United States of America;

(*c*) competitive rates;

(*d*) agreed charges authorized by the Board under Part IV of the *Transport Act;*

(*e*) rates over the White Pass and Yukon route;

(*f*) rates applicable to movements of freight traffic upon or over all or any of the lines of railway collectively designated as the "Eastern lines" in the *Maritime Freight Rates Act* as amended by *The Statute Law Amendment (Newfoundland) Act*, chapter 6 of the statutes of Canada, 1949;

(*g*) where the Board considers that an exception should be made from the operation of this section.

The submission of Mr. Brazier can be stated thus. Subsections (1) and (2) require the board to equalize the domestic mileage commodity rates on grain from the Prairie Provinces to British Columbia points with the export rates on the same commodity from the same points to the export ports of the Province. To Vancouver, for example, the domestic rate from Calgary is 54c per 100 lbs. and the export rate 20c. The commodity rates result from the equalization required by the board under subs. (2)(*b*). This equalization is country-wide and it can at once be seen that the acceptance of the contention would have repercussions of a most drastic and unpredictable nature. Conversely, if, instead of lowering the domestic rate to the export level, the export rates to British Columbia, which are taken by all parties not to be within subs. (4)(*b*),—a matter on which I express no opinion—were, to any extent,

raised in an equalization with the domestic basis, it would mean that, as the eastern export rates by the subsection remain fixed, shipments of grain through Vancouver would cease. That either consequence could be taken to have been within the contemplation of Parliament can, without any hesitation, be rejected.

Prior to the enactment of the section in 1951 and for nearly 40 years before that, the level of domestic class and commodity rates in western Canada, because of what were considered to be different circumstances and conditions, was substantially higher than that in the east; and in the several general investigations by the board beginning with that of 1914, the *Western Rates Case,* there had been a progressive reduction of the spread between them. Finally, a Royal Commission was appointed to enquire into equalization throughout the Dominion, the report of which was made to the government in 1950. It is the recommendations of that report that underlie the enactment of the section in 1951.

By s. 331 of the Act the issue of freight tariffs is dealt with and four classes of rates are recognized: (*a*) class, (*b*) commodity, (*c*) competitive, and (*d*) special arrangement, rates. Class rates are on a mileage basis related to classes of commodities as set forth in a formal classification, and by subs. (2)(*a*) they may be directed by the board to be equalized. Commodity rates are, as the expression indicates, related to named commodities, and may be on a mileage scale applicable between points generally, the equalization of which may also be directed under subs. (2)(*b*); or they may apply only to and from specified points, carrying specific rates related to significant factors of each case, cost of service, promotion of traffic, interests of industry and the public, among them; or they may be export and import rates in general related to competing United States lines and ports, and to export and import trade, which, as indicated by the examples given to Vancouver, are ordinarily, and in many cases, substantially lower than domestic commodity rates.

Apart from those on a mileage basis within subs. (2)(*b*), commodity rates are gathered up by subs. (3). They are to be dealt with by the board, in carrying out the national

1959

MINISTER OF AGRICULTURE FOR B.C. v. C.N.R. et al.

Rand J.

policy, in such manner and on such considerations as, in its opinion, will achieve most nearly the object sought. The reason for the difference is clear; in mileage rates there is a determinative factor, a unit of distance, which except in special instances can be extended to the entire field of the traffic. In specific and export-import commodity rates there is no such controlling factor; they are the product of judgment in the individual case, and although in making them mileage will, generally, be a factor, in some cases it plays an insignificant part or none directly at all.

By subs. (4)(*b*) certain export and import rates are excluded from the application of the section, rates which in practice "bear a fixed and long-standing relation with rates on similar traffic through ports in the United States". This is a provision within which, as mentioned, the export rates to British Columbia ports are assumed by all parties not to come.

At the threshold of the discussion, Mr. Carson takes the ground that export traffic in grain is not "traffic of the same description" as traffic in grain under domestic commodity rates, as the words appear in subs. (1). Mr. Brazier's argument is that the word "traffic" refers exclusively to the commodity; that neither export-import traffic nor its rates are of a recognized class for the purposes of classification or tariffs; and that domestic commodity rates on grain, on whatever basis they may be, must be equalized with rates on export shipments through Pacific ports regardless of ultimate destination, competition or other circumstance or condition affecting the latter.

"Traffic" is defined by s. 2(33) as "the traffic of passengers, goods and rolling stock". As given in the Oxford dictionary, the word in its substantive sense means the transportation of goods in trade, and more widely, trade itself, communication, dealings, the passing to and fro of persons or vehicles, the amount of business done by a railway in the transport of passengers and goods; nowhere is it said to designate merely the things carried.

Subsections (1) and (2) provide for two sets of classes or categories, those of traffic and those of rates. A class of the former is of "traffic" of the same description, and the nature of the latter is exemplified in subss. (2)(*a*) and (*b*).

Is, then, "traffic" mere "commodity"? Subsection (4)(*b*), in speaking of "export and import traffic", recognizes a class of traffic and negates such a meaning. Those adjectives introduce a special element into the concept which, through long established railway practice, has become the determinant of a new class or description of traffic. The same words are used also to characterize the corresponding rate class, "export and import rates", uniformly used in tariffs for export and import traffic. The official classification of freight traffic adds various characteristics to commodities, for example, bulk shipment as against shipment in containers, different sizes and kinds of containers, different minimum weights in carload traffic, to which mileage class rates are directly related and for the purposes of equalization under subs. (2)(*a*), the classes of the classification determine the "traffic of similar description". By their nature commodity rates are not so related; but these examples show that traffic characteristics may be part of the description of traffic. So in export and import; the special features that the carriage of such goods is only a portion of the total transportation from origin to ultimate destination, that the traffic, particularly export, bears little or no element of competition with domestic business, and that it is related to various national trade and transportation interests and policies, have come to differentiate the traffic category of the same commodity.

Subsection (1) provides for equality of rate basis only within each traffic class in the application of each rate class: to equalize different traffic classes or different rate categories as between themselves would reduce both groups to one class each, and disrupt wholesale the country's economy. As subss. (*a*) and (*b*) demonstrate, each traffic class in relation to each rate class is to be put as near as reasonably possible on the same basis; but the classes *inter se* are to remain intact.

The categories of rates and classes of traffic are the creations of railway practice over generations, and it is in relation to them that the legislation is intended to operate. The reference in subs (4)(*b*) to "similar traffic" is to a similar "class" of traffic and is indistinguishable in its effect from that of "traffic of the same description" in

1959

MINISTER OF AGRICULTURE FOR B.C. v. C.N.R. et al.

Rand J.

subs. (1). That these rates have always been dealt with as relating to a separate and distinct traffic category is put beyond doubt by the judgments of the board over the years.

The scheme of the section thus meets the obvious demand to put all sections of the country on an equality in the transportation of goods while preserving the structure of classification of traffic and rates as it has been built up in the course of a century. In each traffic class all are to be served alike or substantially so; those who in British Columbia bring in grain from the prairies for domestic use will face the same basis of charges as grain shipped to Ontario for similar use; and export through Vancouver, as between that port and other ports, subject to the effect of subs. (4)(*b*), will enjoy a like parity. Several rate classes may, of course, be related to each traffic class, but each of both groups maintains its identity.

This legislation places upon the board the highly responsible duty of carrying out a national policy. The policy is expressed in subs. (1), necesarily, in broad, general terms. So far as reasonably possible, specific direction was made as in subss. (2)(*a*) and (*b*). But subs. (4)(*g*) recognizes that in such a complicated and interwoven structure built up over many years to serve the country's economy, the resultant of many factors, competition, cost of service, return to the railways, national, commercial and other policies, directions, general or specific, can never become absolute. The duty of the board is, in the words of subs. (1) "so far as is reasonably possible", to see that tolls on the groups of the classified traffic shall bear equally, in a relative sense, upon all. Underlying this responsibility, subs. (4)(*g*) reserves to the board an ultimate discretion to be exercised in unique situations that have been overlooked or cannot reasonably be fitted into a strict or rigid scheme. But the question whether or not the matter here could be brought within that subsection is obviated by the interpretation I have given to the section.

1959

MINISTER OF AGRICULTURE FOR B.C. v. C.N.R. *et al.*

Rand J.

The conclusion reached renders it unnecessary to answer either question, and I would, therefore, dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: C. W. Brazier, Vancouver.

Solicitor for the Canadian Pacific Railway Company, respondent: K. D. M. Spence, Montreal.

Solicitor for the Canadian National Railway Company, respondent: J. W. G. Macdougall, Moncton.

Solicitor for the Province of Alberta, respondent: The Attorney-General of Alberta.

Solicitor for the Province of Saskatchewan, respondent: The Attorney-General of Saskatchewan.

Solicitor for the Province of Manitoba, respondent: The Attorney-General of Manitoba.

Solicitors for the Alberta Wheat Pool and United Grain Growers Limited, respondents: Allen, MacKimmie, Matthews & Wood, Calgary.

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THE NORTH-WEST LINE ELEVATORS ASSOCIATION AND UNITED GRAIN GROWERS, LIMITED ..... APPELLANTS;

AND

CANADIAN PACIFIC RAILWAY COMPANY, CANADIAN NATIONAL RAILWAYS AND THE CANADIAN CAR DEMURRAGE BUREAU ..... RESPONDENTS.

ON APPEAL FROM THE BOARD OF TRANSPORT COMMISSIONERS FOR CANADA

Railways—Demurrage charges—Whether Board of Transport Commissioners has power to refuse to allow demurrage charges—Whether charges contravene s. 328(6) of the Railway Act, R.S.C. 1952, c. 234.

The Board of Transport Commissioners having approved with modifications a tariff of demurrage charges on bulk grain consigned for unloading at public and semi-public terminal elevators at Fort William,

*PRESENT: Taschereau, Rand, Locke, Cartwright, Fauteux, Martland and Judson JJ.

1959

NORTH-WEST LINE ELEVATORS ASSOCN. *et al.* v. C.P.R. AND C.N.R. *et al.*

Port Arthur, Churchill and Pacific Coast ports, the appellants obtained leave to appeal to this Court on the following questions of law: (1) did the Board err in law in ruling that it had no power to refuse to allow any demurrage to be charged in respect of cars of grain? and (2) did the order of the Board contravene s. 328(6) of the *Railway Act*?

Held: The appeal should be dismissed; the Board had no power to refuse to allow any demurrage to be charged, and its order was not in conflict with s. 328(6) of the *Railway Act*.

APPEAL from a judgment of the Board of Transport Commissioners[1] approving a tariff of demurrage charges. Appeal dismissed.

H. Hansard, Q.C., for North-West Line Elevators Association, appellant.

G. R. Hunter, Q.C., for United Grain Growers, Limited, appellant.

H. A. V. Green, Q.C., and *K. D. M. Spence, Q.C.,* for Canadian Pacific Railway Company, respondent.

J. W. G. Macdougall, Q.C., for Canadian National Railways, respondent.

The judgment of the Court was delivered by

RAND J.:—This is an appeal on questions of law from a judgment of the Board of Transport Commissioners[1] by which the board approved with modification a tariff of demurrage charges on bulk grain consigned for unloading at public and semi-public terminal elevators at Fort William, Port Arthur, Churchill and Pacific coast ports.

The questions are:

1. Did the Board err in law in ruling that it had no power to refuse to allow any demurrage to be charged in respect of cars of grain?
2. Does the order of the Board contravene s. 328(6) of the Railway Act?

The considerations presented to us by Mr. Hansard and Mr. Hunter were in substance these: that the board was wrong in holding that where, as here, because of the absence of elevator space, it was physically impossible to unload the grain from the cars, it was without authority to disallow *in toto* the imposition of the demurrage charges; that it was wrong in holding that it could not disallow a tariff without substituting another for it; and finally that the charges violated s. 328(6) of the *Railway Act* which

[1] 77 C.R.T.C. 181.

continues the rates of grain and flour covered by the provisions of what is known as the Crow's Nest Pass Agreement of 1897.

The first two of these contentions are simply different aspects of the same issue and will be dealt with together. The primary function of the board is regulation. The Act assumes the continuing operations of dominion railways as in substance they were in 1903 both at common law and under existing statute law and vests in the board jurisdiction as an administrative body as well as a court of record to make such orders and declarations and to give such directions as it may deem proper to compelling observance by the railways subject to its control of the laws and regulations applicable to their construction, maintenance and operation. It is not a managing board nor does it normally initiate action. Reasonableness in all the circumstances in the public services is its guiding principle. Every such service is entitled to compensation and no one has as yet suggested the contrary. The different classes of rates and tolls with all their sub-classifications have long been differentiated in terms of those services, and they are indicated in the definition in s. 2(32):

"toll," or "rate," when used with reference to a railway, means any toll, rate, charge or allowance charged or made either by the company, or upon or in respect of a railway owned or operated by the company, or by any person on behalf or under authority or consent of the company, in connection with the carriage and transportation of passengers, or the carriage, shipment, transportation, care, handling or delivery of goods, or for any service incidental to the business of a carrier; and includes any toll, rate, charge or allowance so charged or made in connection with rolling stock, or the use thereof, or any instrumentality or facility of carriage, shipment or transportation, irrespective of ownership or of any contract, expressed or implied, with respect to the use thereof; and includes also any toll, rate, charge or allowance so charged or made for furnishing passengers with beds or berths upon sleeping cars, or for the collection, receipt, loading, unloading, stopping over, elevation, ventilation, refrigerating, icing, heating, switching, ferriage, cartage, storage, care, handling or delivery of, or in respect of, goods transported, or in transit, or to be transported; and includes also any toll, rate, charge or allowance so charged or made for the warehousing of goods, wharfage or demurrage, or the like, or so charged or made in connection with any one or more of the above-mentioned objects, separately or conjointly;

1959

NORTH-WEST LINE ELEVATORS ASSOCN. *et al.* *v.* C.P.R. AND C.N.R. *et al.*

Rand J.

Prior to c. 61 of the Statutes of Canada, 1908, demurrage charges were not expressly mentioned in that definition which as s. 2(30), R.S.C. 1906, c. 37, read:

> (30) "toll" or "rate" means and includes any toll, rate or charge made for the carriage of any traffic, or for the collection, loading, unloading or delivery of goods, or for warehousing or wharfage, or other services incidental to the business of a carrier;

But within the concluding words they were undoubtedly embraced. That they had been imposed long before that year is unquestionable. They were recognized as being in force by the board in its first order on car service charges made on January 25, 1906. This order, cancelling existing tariffs, prescribe the free time allowances for loading and unloading freight and fixed the charges for delay. It is of interest that by Rule 2(c) only 24 hours' free time was allowed for loading grain in those portions of Canada to which the *Manitoba Grain Act,* (1900) applied, that is, the province of Ontario lying west of and including the then district of Port Arthur, the province of Manitoba and the North-West Territories. It is unnecessary to trace their original use on railways in North America, but the principle of exaction for delay in loading and unloading in water transportation has been known and applied for centuries: Carver, 10th ed., Carriage of Goods by Sea, p. 901. Its appropriateness to railway carriage can be assumed to have been recognized and acted upon both in England and in North America certainly from the middle of the nineteenth century.

Delay in loading or unloading cars of freight violates the implied understanding when equipment is placed at the disposal of shipper or consignee that no more than reasonable time shall be taken for either purpose. The profitable and efficient use of equipment is an important item of the costs reflected in the freight rates charged and is an essential in good railway management. That a railway is to supply expensive equipment in order to furnish, gratis, a storage means for shippers and consignees, reveals, on its mere statement, its own absurdity.

Under the Act the board has no jurisdiction in effect to compel a railway to give a service or suffer an economic detriment of such a nature without appropriate compensation; and although that tribunal may cancel tariffs of rates

and tolls, it does so only on the ground that they are unreasonable, either too high or too low, or are unjustly discriminatory; and if it does not substitute rates of its own the carrier is entitled to submit other rates and have them passed upon until the unreasonableness or unjust discrimination is found to be eliminated.

The Chief Commissioner was therefore right in assuming that the board had no such power and the suggestion that the board did not consider the charges shown by the tariff in question to be just and reasonable is unwarranted.

It is urged that it was wrong to hold the consignee liable who cannot, because of lack of physical capacity in the elevators, take delivery. The demurrage charge attaches against the person responsible for the delay; if the consignee is in the position described, all he need do is to reject the shipment or forbid the shipper in advance to consign to him. If the shipper is to blame, the question between him and the consignee is not one in which the railway is particularly interested. The mere fact that for years the railways have not collected demurrage on the grain traffic is irrelevant; so long as there was no unjust discrimination and no suggestion that the omission produced an unreasonable factor in the total freight rate body, the action by the railways was unassailable. But that detracted not a whit from their right, in appropriate circumstances, to impose the charges and enforce their collection.

Then it is contended that the allowance is in conflict with s. 328(6). The *Crow's Nest Pass Act*, c. 5, Statutes of Canada, 1897, provides a subsidy to the Canadian Pacific Railway on certain conditions. One was that an agreement between the Dominion government and the company should be entered into containing, among others, two covenants: first, "that a reduction shall be made in the general rates and tolls of the Company as now charged" upon certain classes of merchanise carried westbound from and including Fort William to all points west on the company's main line or to those points from any railway in Canada owned or operated on the account of the company and whether shipped by all rail or by lake and rail. These classes included fruits, reduced 33⅓ per cent., coal oil, 20 per cent., cordage and binder twine, agricultural implements, iron of all kinds,

1959

NORTH-WEST LINE ELEVATORS ASSOCN. *et al.* *v.* C.P.R. AND C.N.R. *et al.*

Rand J.

wire, window glass, paper for building or roofing, felt for roofing, paints, oils, livestock, wooden ware and household furniture, the reduction on which was 10 per cent. The second covenant was that on eastbound grain and flour,

> . . . there shall be a reduction in the Company's present rates and tolls on grain and flour from all points on its main line, branches, or connections, west of Fort William to Fort William and Port Arthur and all points east, of three cents per one hundred pounds, to take effect in the following manner:— . . .; and that no higher rates than such reduced rates or tolls shall be charged after the dates mentioned on such merchandise from the points aforesaid;

The purpose behind these two provisions is obvious; it was to extend to the army of settlers then beginning to people the west under a policy of broad dimensions a measure of assistance in reducing the transportation costs of commodities in the nature of necessities to the settlers and of what was expected to be their primary production.

An examination of this language shows unequivocally that what were in mind were the rates payable for transportation strictly, "general rates and tolls", rates which were expressed in terms of cents "per 100 pounds". These were the normal charges for the carriage of commodities between points. In the ordinary and uncomplicated case no other charges arise. They have nothing to do with incidental charges to meet circumstances not normal for which special terms are provided; they refer to charges payable when the basic service is furnished along with the correlative observance of the reasonable requirements laid upon the shippers and consignees. They do not include demurrage charges; these are not related to the weight of the commodity; they are concerned with the unreasonable detention of railway equipment.

The language of s. 328(6) that "rates on grain and flour shall be governed by the provisions of the Crow's Nest Pass Act" uses the words in the same sense, the anomalies resulting from any other interpretation of which are too obvious to be considered. The present definition of "toll" or "rate" in the *Railway Act* appears to be comprehensive enough to extend to charges for every service or accommodation that can be furnished in respect of freight and passenger carriage. But in particular applications the scope of either word will depend upon the sense indicated by the

context. This is the case whenever we are dealing with broad and general definitions enumerative of a number of differing applications of the same word or words.

I would, therefore, answer the questions as follows:

Question No. 1:

Construing the question to be limited to the power of banning the imposition by the railways of any demurrage whatever, regardless of reasonableness or any other considerations, my answer is, No;

Question No. 2:

No.

I would, therefore, dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for North-West Line Elevators Association, appellant: Common, Howard, Cate, Ogilvy, Bishop, Cope, Porteous & Hansard, Montreal.

Solicitors for United Grain Growers, Limited, appellant: Pitblado, Hoskin, Bennest, Drummond-Hay, Pitblado, McEwen, Alsaker, Hunter & Sweatman, Winnipeg.

Solicitor for Canadian Pacific Railway Company and The Canadian Car Demurrage Bureau, respondent: K. D. M. Spence, Montreal.

Solicitor for Canadian National Railways and The Canadian Car Demurrage Bureau, respondents: J.W.G. Macdougall, Moncton.

BEATTY BROS. LIMITED (*Defendant*) ..APPELLANT;

AND

LOVELL MANUFACTURING COMPANY AND MAXWELL LIMITED (*Plaintiffs*) ..... RESPONDENTS.

1958

*Dec. 9

1959

Jan. 27

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Patents—Action for infringement—Pleadings—Reference to foreign patent—Motion to strike out—Whether irrelevant—Exchequer Court Rule 114.

The plaintiff, in an action for infringement of its Canadian patents, sought, under Rule 114 of the Exchequer Court, to strike out certain paragraphs of the statement of defence and particulars of objection,

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

1959

BEATTY BROS. LTD. v. LOVELL MFG. CO. et al.

which alleged that the plaintiff was bound by the amendments, admissions, interpretations and statements made by it in the prosecution of its American patents claiming the same invention as its Canadian patents, on the ground of irrelevancy. The application was allowed in part and the defendant appealed to this Court submitting that it should be permitted to adduce statements or admissions made by the plaintiff in proceedings before the United States Patent Office.

Held: The appeal should be allowed. The question of the admissibility of the evidence in question ought to be left to the decision of the trial judge as and when the evidence is tendered, and that question was still entirely open.

APPEAL from a judgment of Dumoulin J. of the Exchequer Court of Canada[1], allowing in part a motion to strike out paragraphs of the defence. Appeal allowed.

W. B. Williston, Q.C., and *R. D. Wilson*, for the defendant, appellant.

H. G. Fox, Q.C., and *D. F. Sim*, for the plaintiffs, respondents.

The judgment of the Court was delivered by

CARTWRIGHT J.:—This is an appeal brought, pursuant to leave granted by my brother Abbott from an order of Dumoulin J.[1] striking out paragraphs 4, 5, 6 and 7 of the statement of defence filed by the appellant.

The action is brought by the respondents, the registered owner and exclusive licensee respectively, for infringement of four Canadian patents. The appellant denies that it has infringed these patents and in addition contests their validity.

Paragraph 4 of the statement of defence is typical of those which were struck out. It reads as follows:

4. The Defendant states that said Letters Patent No. 399,972 discloses and claims the same invention as described and claimed in United States of America Letters Patent No. 2,202,778 dated May 28th, 1940, owned by the Plaintiff Lovell Manufacturing Company and that the said Plaintiffs are bound by the amendments, admissions, interpretations and statements made and submitted by the applicant for the said letters and by the agents for the applicant and for the Plaintiff Lovell Manufacturing Company in prosecuting the said applications for the said patents before the Canadian and the United States Patent Offices to obtain the allowance

[1] (1958), 29 C.P.R. 1.

of the claims in the said Letters Patent No. 399,972 and in particular claims 1,2,6,12,13 and 14 of both of the said patents, which amendments, admissions, interpretations and statements have the effect of limiting the said claims to the specific wringer construction described and disclosed in the specification for carrying out the purposes set forth therein by the applicant. The Defendant at the trial of the action will refer to the proceedings before the Canadian and the United States Patent Offices in respect to the application for the said patents and the prior patents cited therein.

The motion before Dumoulin J. was brought pursuant to Rule 114 of the Exchequer Court to strike out the paragraphs mentioned "as being impertinent and irrelevant and tending to prejudice, embarrass or delay the fair trial of this action". It does not appear that the paragraphs were objected to on the ground that the defendant was pleading evidence contrary to the opening sentence of Rule 88:

> Every pleading shall contain as concisely as may be a statement of the material facts on which the party pleading relies, but not the evidence;

In his reasons for judgment Dumoulin J. states the question to be determined as being:

> . . . whether or not statements made and evidence attempted before an alien Board, exercising quasi judicial powers, and its ultimate decisions, may have any binding force whatever, as alleged, before a Canadian Court.

and goes on to hold that this question must be answered in the negative. Counsel for the appellant made it plain that he does not seek to rely on any decision of a foreign tribunal; his submission is that he should be permitted to adduce in evidence statements or admissions made by the plaintiff or its agents in the course of the proceedings in that country.

It developed during the course of the argument before us that neither counsel contended that the question of the admissibility of such statements or admissions should be decided on an interlocutory application; but counsel for the appellant was apprehensive that if the paragraphs in question were struck out the judge presiding at the trial might feel himself bound by the order of Dumoulin J. to

1959

BEATTY BROS. LTD. v. LOVELL MFG. CO. et al.

Cartwright J.

exclude the evidence; and, conversely, counsel for the respondent wished to guard against the judge at the trial feeling bound, if the paragraphs were restored, to admit it.

In my respectful opinion the question of the admissibility of evidence of the sort referred to above ought to be left to the decision of the judge presiding at the trial as and when the evidence is tendered. I wish to make it clear that the order which I propose should be made leaves that question entirely open.

I incline to the view that neither the motion nor the appeal was strictly necessary in order to keep open the question of admissibility of evidence referred to above; and, indeed, I understood counsel to be of the view that both the motion and the appeal were made *ex abundanti cautela.*

I would allow the appeal and set aside the order of Dumoulin J. but in all the circumstances I would order that the costs in this Court including those of the application for leave to appeal should be costs in the cause.

Appeal allowed.

Solicitors for the defendant, appellant: Riches & Rest, Toronto.

Solicitors for the plaintiffs, respondents: McCarthy & McCarthy, Toronto.

1958

*Dec.10

1959

Jan. 27

CLARA M. WILLIAMS (*Plaintiff*) .....APPELLANT;

AND

STEVEN FEDORYSHIN (*Defendant*) ....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Motor vehicles—Pedestrian injured—Statutory onus of driver—The Highway Traffic Act, R.S.O. 1950, c. 167, s. 51.

The plaintiff was injured by an automobile owned and driven by the defendant. The plaintiff was crossing a highway 21 feet wide and was about 2 feet from the other side when she was struck by the

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

right front fender of the car. The area was well illuminated. The plaintiff testified that she looked in both directions before crossing the highway but did not see the car. The driver testified that he saw the plaintiff commencing to cross when he was about 150 feet away and travelling at approximately 45 m.p.h. The trial judge found the defendant 75 per cent. to blame. This judgment was reversed by the Court of Appeal which held that the plaintiff was solely responsible for the accident.

Held: The judgment at trial should be restored. This was a case in which s. 51 of *The Highway Traffic Act,* the "onus" section, was applicable. In the light of the evidence, the trial judge had been properly entitled to reach the conclusion that the defendant had failed to satisfy the onus placed upon him of proving that the loss or damage had not arisen as a result of his negligence. He was aware of the plaintiff's intention to cross the highway, he failed to sound his horn, and he made no attempt to turn to his right although this could have been done safely. He failed to prove that the plaintiff placed herself in his way in such a manner that he could not reasonably have avoided her. The plaintiff, under the circumstances, was not the sole proximate cause of her damages.

The apportionment of blame, as found by the trial judge, should not be varied.

APPEAL from a judgment of the Court of Appeal for Ontario, reversing a judgment of Treleaven J. Appeal allowed.

W. B. Williston, Q.C., and *H. L. Schreiber,* for the plaintiff, appellant.

F. R. Murgatroyd, Q.C., and *W. N. Callaghan,* for the defendant, respondent.

The judgment of the Court was delivered by

MARTLAND J.:—This is an appeal from a judgment of the Court of Appeal for Ontario, which set aside the judgment at the trial of Treleaven J. and dismissed the appellant's claim against the respondent.

The action arose out of an accident which occurred shortly after 6.00 p.m. on December 12, 1955. The appellant, a widow, 69 years of age, was struck by an automobile, owned and driven by the respondent, when she had nearly crossed provincial highway no. 8 at a place on the highway about one-half a mile east of the Village of Stoney Creek in the County of Wentworth.

The road in question is paved. It is 21 feet wide, running east and west, and was straight for a considerable distance in each direction from the place where the accident occurred.

1959

WILLIAMS v. FEDORYSHIN

Martland J.

There was evidence that it was dry. The appellant was walking across it from north to south and the respondent was driving east at approximately 45 miles an hour. She was about two feet from the south edge of the road when she was struck by the right front fender of the respondent's car. This vehicle was a new Meteor, having been purchased in August 1955. It was in good mechanical condition, including the brakes and headlights.

On the south side of the road, toward which the appellant was walking, there were two gas stations, a restaurant and other places of business located about 50 feet south of the south side of the road. There is a gravelled area in front of these buildings level with the highway, which extended for about 300 feet west from the place where the accident occurred, which was opposite the restaurant. The lights from these places of business illuminated the road as far as its north side.

The respondent testified that there were ridges of ice, about three feet south of the south edge of the highway, about two feet in height, which blocked access to the gravelled area, except for two entrances about 15 to 30 feet in width. The police constable who investigated the accident and the appellant's son both gave evidence that there were no ridges which would prevent a car from being driven off the road on to the gravelled area at any point along the portion of the road adjoining that area.

In her evidence the appellant stated that she looked both toward the east and the west before crossing the road and did not see the respondent's car. The respondent says that he first saw the appellant when she was on the north shoulder of the road. He saw her commencing to cross the road. He states that he was approximately 150 feet west of her when he first observed her.

When he saw the appellant the respondent applied his brakes hard and proceeded straight east down the highway to the point of impact. He did not sound his horn or attempt to swerve either to the right or to the left. He stated that an approaching vehicle made it impossible for him to make a turn toward his left. Following the accident there were skid marks on the road 37 feet in length running

straight back from the point where the respondent's automobile had stopped. At the place where it stopped, approximately parallel to the south edge of the road, the right front wheel was about two feet north of the south edge of the road.

The appellant suffered serious injuries. The learned trial judge decided that the respondent was 75 per cent. to blame for the accident and gave judgment in favour of the appellant for $8,903.55 with costs. The Court of Appeal unanimously held that the appellant was solely responsible for the accident on the basis that if she had looked in a prudent and careful manner she should have seen the respondent's vehicle approaching, would then have realized the danger of proceeding across the road and, if she had waited until the respondent's car had passed, the accident would not have occurred. It was held that her negligence was the sole cause of her damages. It is from this judgment that the present appeal is brought.

This is a case in which the "onus" section, s. 51, of *The Highway Traffic Act*, R.S.O. 1950, c. 167, is applicable. The respondent had the burden of proving that the appellant's loss or damage did not arise through his negligence. The learned trial judge found that the respondent had failed to satisfy that onus.

In my opinion he was properly entitled to reach that conclusion in the light of the evidence adduced. The respondent was aware of the appellant's intention to cross the highway from the moment that she commenced to walk on to the road. He was then at least 150 feet away, driving a new car in good mechanical condition and equipped with good brakes. He says that his speed was approximately 45 miles per hour. He failed to sound his horn to warn her of his approach. He made no attempt to turn to his right, though there was evidence to show that this could have been done safely. He proceeded in a straight line down the highway until he collided with her.

The learned trial judge went on to find that there was some contributory negligence on the part of the appellant, which finding is not questioned on this appeal. He stated that it could not be said how far away the respondent's car was when she started to cross the road. He was inclined

1959

WILLIAMS v. FEDORYSHIN

Martland J.

to think that it was a little further back than the respondent had said and it was closer than the appellant had said. He concluded that the appellant either did not look or failed to look carefully enough. He said that it would have been the part of prudence to wait until the car had passed, but that the appellant had the right to assume that, at the distance it was, the respondent would let her get across the road in safety.

In his well known judgment in *Winnipeg Electric Company v. Geel*[1], Lord Wright, in discussing how a defendant might meet the onus imposed by s. 62 of the *Manitoba Motor Vehicles Act*, says:

> This the defendant may do in various ways, as for instance, by satisfactory proof of a latent defect, or by proof that the plaintiff was the author of his own injury; for example, by placing himself in the way of the defendant's vehicle in such a manner that the defendant could not reasonably avoid the impact, or by proof that the circumstances were such that neither party was to blame, because neither party could avoid the other.

In the present case the respondent has not proved that the appellant placed herself in the way of his vehicle in such a manner that he could not reasonably avoid her.

The Court of Appeal took the position that the appellant was the sole proximate cause of her damage, because, if she had waited until the respondent's car had passed, there would have been no damage. While it is obvious that there would not have been an accident if the appellant had waited until the respondent's car had passed, I do not think it follows that she was, therefore, the sole proximate cause of the damage she sustained. The point is that, although erroneously as it turned out, she believed that she could proceed safely across the road. Having started to cross the road, the respondent then had a duty to take all reasonable means to avoid colliding with her. He did run into her and thereby the onus rested upon him to establish that he could not have reasonably avoided the impact. From the moment she started to cross the road the appellant had been seen by the respondent, who then took no steps to warn her of his approach, or, save by the application of his brakes, to avoid striking her. He failed to satisfy the onus placed upon him.

[1] [1932] A.C. 690 at 695.

The respondent stated in his notice of appeal to the Court of Appeal that, if that Court held he had not met the statutory onus, he did not appeal in respect of the percentage of negligence assessed against him. On the present appeal he contended that, if he were liable at all, the percentage should be reduced. Objection was not taken to the submission of argument on this point before this Court. Assuming that the respondent is entitled to raise this issue at this stage (and I do not think he was so entitled), I would say that the learned trial judge has made his finding on this point and in the light of the evidence there does not appear to be any reason why his conclusions in that regard should be varied.

No question was raised on this appeal as to the quantum of damages.

In the result I would allow the appeal with costs in this Court and in the Court of Appeal and direct that the trial judgment be restored.

Appeal allowed with costs.

Solicitor for the plaintiff, appellant: Henry L. Schreiber, Hamilton.

Solicitors for the defendant, respondent: Murgatroyd & Callaghan, Hamilton.

CALVAN CONSOLIDATED OIL & GAS COMPANY LIMITED (*Plaintiff*) .. APPELLANT;

1958
*Nov. 7, 10, 11

AND

M. E. MANNING (*Defendant*) .....RESPONDENT.

1959
Jan. 27

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Contracts—Mines and minerals—Agreement to develop oil areas—Terms of letter to be embodied in formal agreement to follow—Unsettled matters to be arbitrated—Whether enforceable contract—Whether binding contract—The Arbitration Act, R.S.A. 1955, c. 15.

PRESENT: Rand, Locke, Cartwright, Abbott and Judson JJ.

1959

CALVAN CONSOL OIL & GAS CO. LTD. v. MANNING

The defendant made an offer in writing to the plaintiff to exchange a 20 per cent. interest in a petroleum and natural gas development permit he held for a 20 per cent. interest in a similar permit held by the plaintiff. The offer was accepted unconditionally. The letter authorized the plaintiff to dispose of or deal with its permit on behalf of both parties as it saw fit. Should the plaintiff wish to develop the land instead of farming it out or selling it, an operating agreement was to be drawn up the disputed clauses of which could be arbitrated. The contents of the letter were to be reduced to a formal agreement the terms of which were likewise to be settled by arbitration if the parties failed to agree on them. The plaintiff entered into a "farmout agreement" with a third party; the defendant refused to ratify it and refused to sign a formal agreement pursuant to the original agreement.

The plaintiff, in its action, sought a declaratory order that there never had been a contract. The trial judge held that there never was a binding contract. This judgment was reversed by the Court of Appeal.

Held: The appeal should be dismissed. The claim for a declaration that the contract was void for uncertainty failed.

The original agreement made all the necessary provisions to enable the plaintiff to enter into any "farmout agreement" that it might choose. Up to this point, the parties had provided for co-ownership and a complete or partial disposition of the property, and had expressed their intention with precision. The only remaining contingency was the retention, exploration, and development of the property by the parties themselves. In an agreement of this kind, it seemed virtually impossible for the parties at that stage to set out in full what the terms of operation would be if the land were to be developed by one of the parties. There was every reason why the parties here introduced an arbitration clause to deal with this point. The contract was, therefore, not void for uncertainty. The parties knew what they were doing and they expressed their intentions with certainty and a complete lack of ambiguity.

The parties were bound immediately on the execution of the informal agreement, the acceptance was unconditional and all that was necessary to be done by the parties or the arbitrator was to embody the precise terms, and no more, of the letter in a formal agreement. This was a case of an unqualified acceptance with a formal contract to follow. Whether the parties intended to hold themselves bound until the execution of a formal agreement was a question of construction. There was no doubt that such was the case here.

APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division[1], reversing a judgment of Egbert J. Appeal dismissed.

C. E. Smith, Q.C., and *W. M. Mackay*, for the plaintiff, appellant.

M. E. Manning, in person.

The judgment of the Court was delivered by

[1] (1958), 25 W.W.R. 641, (1959), 16 D.L.R. (2d) 27.

JUDSON J.:—The contract which is under litigation in this action is concerned with Province of British Columbia petroleum and natural gas permits. The respondent, M. E. Manning, was the holder of permit 153 and the appellant, Calvan Consolidated Oil & Gas Company Limited, the holder of permit 120. They entered into negotiations for the exchange of partial interests in these permits and on February 20, 1953, Manning made an offer in writing to exchange a 20 per cent. interest in his permit 153 for a 20 per cent. interest in Calvan's permit 120. On the same day Calvan gave an unconditional acceptance of the offer. Four days later an additional term was agreed to in the same way. The two substantial questions now are, first, whether because of vagueness or uncertainty in the terms, there is an enforceable contract, and second, whether these two documents constitute an immediately binding contract even though there is provision for a formal agreement to follow. Calvan was the plaintiff in the action and sought a declaratory order that there never had been a contract. The learned trial judge granted the order as asked. The Court of Appeal[1], however, held that there was an enforceable contract and dismissed the action. Calvan now appeals to this Court.

I set out in full Manning's letter of February 20, 1953, and the letter of modification dated February 24, 1953:

February 20, 1953.

Calvan Consolidated Oil & Gas Company Limited,
624 Ninth Avenue West,
Calgary, Alberta.
Gentlemen:

This will confirm the arrangement we have made with respect to B.C. Permit 153, which I hold in my name, and Permit 120, which is in the name of Calvan Consolidated Oil & Gas Company Limited.

In principle, I am trading Calvan Consolidated Oil & Gas Company Limited, 20% in return for 20% of Permit 120.

It is agreed that you are to have the right to dispose of, or deal with Permit 120 on behalf of us both in such manner as you see fit. If the Permit is sold, then you will account to me and my partners for 20% of the proceeds of the sale. If the Permit is not sold, then the 20% interest is a working interest, which will be reduced proportionately as Calvan's interest is reduced, should a farmout be negotiated.

If Calvan desires to develop this land instead of farming it out, or otherwise disposing of it to a third party, then development by Calvan is to be subject to an operating agreement, which will be drawn up.

[1] (1958), 25 W.W.R. 641, (1959), 16 D.L.R. (2d) 27.

1959

CALVAN CONSOL OIL & GAS CO. LTD. v. MANNING

Judson J.

The terms of the operating agreement will be mutually agreed upon; and if agreement cannot be reached on any particular clause, then the clause in question will be arbitrated by a single arbitrator, pursuant to The Arbitration Act of Alberta.

You are to have a 20% beneficial interest in Permit 153, the understanding being that a syndicate agreement will be prepared providing for a majority vote on all future action.

Each of us agrees to keep his Permit in force until the end of the third year. It is also agreed that a formal agreement will be drawn up as soon as possible.

Yours very truly,
"M. E. Manning"
M. E. Manning

ACCEPTED by Calvan Consolidated
Oil & Gas Company Limited.

"F. L. Fournier"
F. L. Fournier, Vice-President.

24th February, 1953.

The following is agreed to as an addition to the agreement dated 20th February, 1953 between Calvan Consolidated Oil & Gas Company, Limited and M. E. Manning, re B. C. Permits 153 and 120.

"IT IS AGREED THAT the terms of the formal agreement are to be subject to our mutual agreement, and if we are unable to agree, the terms of such agreement are to be settled for us by arbitration by a single arbitrator, pursuant to The Arbitration Act of the Province of Alberta."

"M. E. Manning"

CALVAN CONSOLIDATED OIL & GAS CO., LTD.,
per: "Frank L. Fournier"

There are two dealings with these permits that I should mention before proceeding to an examination of the terms of the documents. In the spring of 1953, soon after the negotiation of this agreement, Manning made an agreement with Union Oil Company of California for the development of the land comprised in his permit no. 153. He received the sum of $25,000 from Union Oil Company and properly accounted to Calvan for 20 per cent. of this sum. There was no difficulty of any kind with this agreement either on its terms or the accounting given by Manning. On the other side, in January 1955, Calvan made what has been called a "farmout agreement" with Imperial Oil Limited concerning its permit 120. It is unnecessary to deal in detail with the discussions that took place between Manning and Calvan about the Imperial Oil agreement

before it was actually signed. Manning was obviously reluctant to have Calvan enter into this agreement and did not know that it had actually been made until March of 1955. Briefly, his objections were that although under his agreement with Calvan, Calvan had the right to dispose of or deal with permit 120 on behalf of both parties as it might see fit, it could only do so subject to the preservation of his 20 per cent. interest as a "working interest" and the observance of certain obligations arising from the fact that he and Calvan were co-owners of the permit. He complained that the agreement was objectionable on both grounds.

Calvan ultimately asked Manning to sign an elaborate formal agreement pursuant to the clause in the original agreement and at the same time to ratify the Imperial Oil agreement, which was appended as a schedule to the proposed formal agreement. I have no doubt that the proposed formal agreement went far beyond the terms of the original agreement and that Manning was justified in refusing to sign it. He also refused to ratify the Imperial Oil agreement. After much discussion and correspondence between the parties Calvan, in November of 1956, commenced these proceedings.

I now go on to analyse the terms of the impugned agreement and to relate them to the problem of uncertainty. The first provision is for an exchange of interests. If the agreement had stopped at this point, there could be no question of uncertainty and no doubt that legal consequences would follow. It would simply have made provision for the co-ownership of undivided interests in these permits, with nothing said about disposition or operation. There is nothing vague, uncertain or unenforceable about such a legal position.

Next, the agreement provides for three possibilities that may arise in connection with permit 120. These are:

(*a*) an out-and-out sale to a third party;

(*b*) a "farmout agreement" to a third party; and

(*c*) the retention and development of the property by Calvan.

1959

CALVAN CONSOL OIL & GAS CO. LTD. v. MANNING

Judson J.

The out-and-out sale offers no difficulty. Calvan has complete control of the terms, subject to the expressed terms of the contract and its duty to its co-owner, whatever that may be. I am deliberately refraining from expressing any opinion on the nature and extent of Calvan's duty to Manning arising from co-ownership of the permit. The question before this Court is whether or not there is a contract between the two and not one of performance—whether Calvan has fallen short of its duty. If Manning is not satisfied with the conduct of Calvan in making a disposition of this property he will have to litigate that matter in properly constituted proceedings.

The next possible disposition of permit 120 is a "farmout" agreement. The Imperial Oil agreement, to which Manning objected, was in fact such an agreement. Both Manning and Calvan were fully experienced in this line of business and I have no doubt that they knew exactly what they meant by a "farmout" agreement. It involves the transfer of an interest in the property to a third party in consideration of that party doing a certain amount of work at its own expense and possibly making a certain payment in money. The percentage interest which the third party gets in the property must come proportionately from Calvan and Manning. This is covered by the agreement. Again, Calvan has full power of decision in a case of this kind subject only to its duty to preserve Manning's interest as a working interest, to account to him for his proper share of the proceeds of the deal and to observe its duty to him as a co-owner. There is no uncertainty here. There could, of course, have been an endless variation in the type of "farmout" agreement that might have been negotiated by Calvan but this was entirely a matter for Calvan's determination subject to the limitations that I have mentioned. With respect, I am unable to accept the conclusion of the learned trial judge that the parties, when they made their agreement in February of 1953, contemplated that the formal agreement which was to be made later would set out the provisions of any "farmout" agreement that might be made. On the contrary, in my opinion, the original agreement made all the provision that was necessary to enable Calvan to enter into any "farmout" agreement that it might choose.

Up to this point then the parties have provided for co-ownership and a complete or partial disposition of the property. If my analysis is correct, there can be no question of uncertainty on these matters. On the contrary, they have expressed their intention with precision and a commendable economy in the use of words. The only remaining contingency was the retention, exploration and development of the property by the parties themselves. In an agreement of this kind, where the lands may be first of all sold or made subject to a farmout agreement, it seems to me virtually impossible for the parties at that stage of the proceedings to set out in full what the terms of operation would be if Calvan were to develop the land itself. Here are two co-owners who do not know at the point of time when co-ownership is established what they will do with the land. They realize that they may eventually have to develop it themselves. It is a situation that all co-owners may have to face and if nothing more is said between them, they must agree on the terms of the development. If they cannot agree they are at a standstill and must put up with this situation or wind up their association in some way. There is every reason, therefore, why the parties here introduced an arbitration clause into their agreement to deal with this particular point.

The learned trial judge was of the opinion that the provision for arbitration in relation to a possible operating agreement was meaningless and unenforceable. If this were so, the consequence would be that contracting parties in the position of Calvan and Manning who do not know what their ultimate intentions may be if they retain the property must provide in detail for a contingency that may never arise unless they wish to run the risk of having the rest of their contractual efforts invalidated and declared unenforceable. I agree with the opinion of the Court of Appeal that such a situation may be dealt with by an agreement to arbitrate and I can see no legal or practical difficulty in the way. No more could the learned author of Russell on Arbitration, 17th ed., p. 10, when he said:

> Since an arbitrator can be given such powers as the parties wish, he can be authorised to make a new contract between the parties. The parties to a commercial contract often provide that in certain events their contract shall be added to or modified to fit the circumstances then

1959

CALVAN CONSOL OIL & GAS CO. LTD. v. MANNING

Judson J.

existing, intending thereby to create a binding obligation although they are unwilling or unable to determine just what the terms of the new or modified agreement shall be. To a court such a provision is ineffective as being at most a mere "agreement to agree"; but a provision that the new or modified terms shall be settled by an arbitrator can without difficulty be made enforceable.

Even if this were not so, I would accept the view of the Court of Appeal that failure of a term such as this would not invalidate the transfer of property interests and the rest of the agreement, the terms of which had been completely settled.

The remaining two paragraphs of the agreement deal first with the preparation of a syndicate agreement and the obligation of each party to keep his permit in force until the end of the third year. There was no suggestion of difficulty on either of these two points.

My conclusion therefore is that this contract is not void for uncertainty. There is no need here to invoke the principle of a "fair" and "broad" construction of this contract as mentioned by Lord Wright in *Hillas and Co., Limited v. Arcos Limited*[1]. The parties knew what they were doing and they expressed their intentions with certainty and a complete lack of ambiguity.

Only two questions remain to be considered and these arise from the provision in the amending agreement for arbitration on the terms of the formal agreement. The questions are, first, whether this indicates an intention not to be bound until the formal agreement is executed, and, second, what terms may be incorporated in the formal agreement by the arbitrator. My opinion is that the parties were bound immediately on the execution of the informal agreement, that the acceptance was unconditional and that all that was necessary to be done by the parties or possibly by the arbitrator was to embody the precise terms, and no more, of the informal agreement in a formal agreement. This is not a case of acceptance qualified by such expressed conditions as "subject to the preparation and approval of a formal contract", "subject to contract" or "subject to the preparation of a formal contract, its execution by the parties and approval by their solicitors". Here we have an unqualified acceptance with a formal contract to follow.

[1](1932), 147 L.T. 503 at 514.

Whether the parties intend to hold themselves bound until the execution of a formal agreement is a question of construction and I have no doubt in this case. The principle is well stated by Parker J. in *Hatzfeldt-Wildenburg v. Alexander*[1], in these terms:

> It appears to be well settled by the authorities that if the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain, or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not recognise a contract to enter into a contract. In the latter case there is a binding contract and the reference to the more formal document may be ignored.

Whether or not it is relevant, I am fully satisfied that the parties thought they were bound until very close to the institution of this action. There was substantial performance on both sides, by Manning in making a disposition of permit 153 to Union Oil Company of California and by Calvan in its contract with Imperial Oil concerning permit 120. Neither party felt the necessity of a formal agreement when they were dealing in a very serious way with the subject-matter of their contract and there was no difficulty. The trouble arose when Manning was not satisfied with what had been done.

The appeal should be dismissed with costs. The result is that Calvan's claim for a declaration that this contract is void for uncertainty fails and that is all that is being decided in this litigation. The Court of Appeal quite properly declined to consider Calvan's alternative claim for advice on the propriety of its conduct in entering into the Imperial Oil contract and I would do the same here. If Manning is not satisfied with the provisions of this contract, he must seek his remedy in the usual way with the proper

[1] [1912] 1 Ch. 284 at 288-9, 81 L.J. Ch. 184.

1959

CALVAN CONSOL OIL & GAS CO. LTD. v. MANNING

Judson J.

parties before the Court, and nothing in these reasons should be taken as expressing any opinion or decision on the rights of the parties in such litigation.

Appeal dismissed with costs.

Solicitors for the plaintiff, appellant: Williamson, Mackay & Thomson, Calgary.

Solicitors for the defendant, respondent: Maclean & Dunne, Edmonton.

1958

*Nov. 6, 7

1959

Jan. 27

NICK FEDIUK (*Plaintiff*) .....APPELLANT;

AND

NICK LASTIWKA (*Defendant*) .....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Husband and wife—Defendant committed adultery with plaintiff's wife—Action for damages for adultery joined with action for loss of consortium and enticement—Wife continued to reside with husband—Measure of damages—The Domestic Relations Act, R.S.A. 1942, c. 300, ss. 13, 14, 32, 33—The Limitation of Actions Act, R.S.A. 1942, c. 133.

The plaintiff brought an action against the defendant under ss. 32 and 33 of the *Domestic Relations Act* alleging that the defendant had persuaded his wife to leave him against his will whereby he was deprived of her consortium. Among the particulars of enticement, he alleged that the defendant had committed adultery with her. The action was dismissed by the trial judge on the ground that no case for loss of consortium had been proved, this having been the narrow ground on which the plaintiff had elected to sue. This judgment was affirmed by a majority in the Court of Appeal.

Held: The action should succeed and, in the circumstances, damages in the amount of $2,000 should be awarded.

Section 13 of the Act provides for a cause of action by a husband against a person who has committed adultery with his wife. The plaintiff did not elect to limit his claim to one for loss of consortium. He was not obliged, as a matter of law, to make an election, and he was entitled to claim in the same action both for loss of consortium and the adultery committed with his wife; this fact was pleaded in the action. The plaintiff pleaded enticement by, *inter alia*, the commission of adultery. The pleadings go on to assert that by reason of these matters the consortium of the wife was lost and damage was

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

suffered. These allegations, while pleading an action for enticement, were sufficient to allege a cause of action under s. 13 of the Act which, on the findings of fact made by the trial judge, was proved. The defendant was not misled. The claim was not barred by the *Limitation of Actions Act.*

It was unnecessary to consider whether the claim for loss of consortium was also proved, as the damages sustained in respect of that cause of action would in this case be the same as those arising out of the cause of action under s. 13.

In an action of this kind, the damages are to compensate for the actual value of the wife to the husband and for the injury to his feelings, honour, and family life. Consideration must be given to the wife's ability and assistance in the home as well as to her character and abilities as a wife.

APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division[1], affirming a judgment of Primrose J. Appeal allowed.

J. W. K. Shortreed, for the plaintiff, appellant.

T. T. Nugent, for the defendant, respondent.

The judgment of the Court was delivered by

MARTLAND J.:—The appellant and the respondent are both farmers residing in the general vicinity of Andrew in the Province of Alberta. Both are married men. According to the evidence of the appellant's wife, the respondent committed adultery with her on a number of occasions during a period commencing in December 1950 and continuing until 1955. The respondent admitted the commission of adultery on two occasions. The learned trial judge found that there was adultery at other times.

In April 1955 the respondent's wife, in the presence of the appellant and his wife, accused the appellant's wife of having had immoral relations with the respondent. This was admitted by the appellant's wife. On the day following this accusation she went to her mother's home, but returned to the appellant's house the same day. On the following day she went to Edmonton for two days and then returned to the appellant's house.

Except for these two occasions, she remained with the appellant in his home and performed the usual household duties of a wife. After hearing the accusation made by

[1] (1958), 12 D.L.R. (2d) 421.

1959

FEDIUK v. LASTIWKA

Martland J.

the respondent's wife, the appellant ceased to have sexual intercourse with his wife, although she stated that she would not refuse to have such intercourse with him.

A number of love notes written by the appellant's wife to the respondent were entered as exhibits. These were deposited from time to time by her at an agreed place, to be picked up by him.

Action was commenced by the appellant against the respondent on January 18, 1956. The material portions of the statement of claim are as follows:

1. The plaintiff was married on the 27th day of November, 1938, to Dora Fediuk and at all times material was the husband of the said Dora Fediuk as the defendant at all times material well knew.

2. In the early part of 1951, the defendant knowingly and wilfully persuaded the said Dora Fediuk, to leave the plaintiff against the plaintiff's will, whereby the plaintiff was deprived of the society and comfort of his wife.

3. The defendant, without lawful excuse, knowingly detained the wife of the plaintiff against the will of the plaintiff.

4. Particulars of the said enticement and detaining are as follows:—

(*a*) In or about the year 1950, the plaintiff and his wife moved to the area of Andrew, Alberta, to farm the lands owned by the plaintiff;

(*b*) The defendant resides at and has since 1950 resided upon lands neighbouring that of the plaintiff;

(*c*) The defendant commenced visiting the house of the plaintiff at times when the plaintiff was absent thereupon;

(*d*) About the month of December, 1950, the defendant committed adultery with the said Dora Fediuk;

(*e*) From that time, the defendant continually and continuously enticed, persuaded, procured and detained the said Dora Fediuk against the will of the plaintiff and in secrecy;

(*f*) The said Dora Fediuk gave birth to twins in the year 1952;

(*g*) Subsequent to the birth of the said children the defendant persuaded, procured and detained the said Dora Fediuk upon the premises of a neighbouring farm.

5. By reason of these said matters the plaintiff has been deprived of the consortium of his said wife and has suffered loss and damage

The defence was a general denial, which was later amended so as to plead *The Limitation of Actions Act*, R.S.A. 1942, c. 133, and amendments thereto.

The learned trial judge in his judgment stated that the appellant would have had a good cause of action under s. 13 of *The Domestic Relations Act*, R.S.A. 1942, c. 300, unless there was connivance or collusion, neither of which he was prepared to find. However, he decided that the

appellant had elected to sue on the narrow ground for loss of consortium and that a case had not been proved under s. 31 or 32 of *The Domestic Relations Act*, which deal with actions of that kind.

The relevant sections of *The Domestic Relations Act* provide as follows:

13. A husband may either by an action for judicial separation or in an action limited to such object only, recover damages from any person who has committed adultery with his wife, and the Court may direct in what manner such damages shall be paid or applied, and may direct that the whole or any part thereof shall be settled for the benefit of the children, if any, of the marriage, or as a provision for the maintenance of the wife.

14. (1) The Court shall dismiss any such action if it finds that,—

(*a*) the plaintiff during the marriage has been accessory to or conniving at the adultery of his wife;

(*b*) the plaintiff has condoned the adultery complained of;

(*c*) the action has been presented or prosecuted in collusion with the wife.

(2) The Court may dismiss any such action if it finds that the plaintiff has been guilty of,—

(*a*) adultery during the marriage;

(*b*) unreasonable delay in presenting or prosecuting the action;

(*c*) cruelty towards his wife;

(*d*) having deserted or wilfully separated himself from his wife before the adultery complained of without reasonable excuse; or

(*e*) wilful neglect or misconduct which has conduced to the adultery.

PART V

Loss of Consortium

31. A person who, without lawful excuse, knowingly and wilfully persuades or procures a woman to leave her husband against the latter's will, whereby the husband is deprived of the society and comfort of his wife, shall be liable to an action for damages by the husband.

32. A husband shall also have a right of action for damages against any person who, without lawful excuse, knowingly receives, harbours and detains his wife against his will.

33. No such action as that provided for in the last preceding section will lie if either,—

(*a*) the plaintiff and his wife were living apart by agreement, or were judicially separated, when the act of the defendant took place; or

(*b*) the plaintiff has been guilty of cruelty to his wife, and the defendant harbours the wife from motives of humanity; or

(*c*) the defendant has reasonable grounds for supposing that the husband has been guilty of cruelty to his wife, and harbours the wife from motives of humanity.

1959

FEDIUK v. LASTIWKA

Martland J.

The appellant's appeal from this judgment was dismissed by the Appellate Division[1] by a majority of three to two. It is from that judgment that the present appeal is brought.

Two main points were argued by the appellant:

1. That he was entitled to succeed in a claim under s. 13 of *The Domestic Relations Act,* there having been no election by him as to his cause of action which would preclude such a claim.

2. That ss. 31 to 33 of *The Domestic Relations Act* do not constitute a code of the law regarding loss of consortium; that the rules of the common law are still applicable and that a claim for loss of consortium had been proved.

Dealing with the first point, s. 13 of *The Domestic Relations Act* provides for a cause of action by a husband against a person who has committed adultery with his wife. This replaced the earlier action for criminal conversation, which latter action had existed previously in Alberta by virtue of s. 18 of the *Supreme Court Act,* 1907 (Alta.), c. 3, which provided as follows:

> The Court shall have jurisdiction to entertain an action for criminal conversation. The law applicable to such actions shall be as the same was in England prior to the abolition of such action in England, and the practice shall be the same as in other actions in the Court so far as the same are applicable.

This section was repealed by *The Domestic Relations Act,* 1927 (Alta.), c. 5, which statute enacted the provisions of s. 13, which has been cited previously.

Did the appellant elect to limit his claim to one for a loss of consortium? It seems clear that he was not obligated as a matter of law to make an election and that he was entitled to claim in the same action both for loss of consortium and for the adultery committed with his wife. The possibility of joining both claims was recognized implicitly by Ford J.A., who delivered the judgment of the Appellate Division of the Supreme Court of Alberta in *Williamson v. Werner*[2]. There are a number of cases in Ontario in which

[1] (1958), 12 D.L.R. (2d) 421. [2] [1946] 2 D.L.R. 603.

both claims have been embodied in the one action. The two causes of action are not the same and they are not mutually exclusive.

The question then arises as to whether the appellant did, in fact, plead a claim under s. 13 of The *Domestic Relations Act*. The respondent argues that he did not and points out that paras. 2 and 3 of the statement of claim are in the terms of ss. 31 and 32 of *The Domestic Relations Act* governing claims for loss of consortium and that the only allegation as to adultery is contained in subpara. (*d*) of para. 4 as one of the particulars of "enticement and detaining".

I do not think that the phraseology of paras. 2 and 3 of the statement of claim, although they follow the wording of the sections of the Act dealing with loss of consortium, necessarily preclude a claim under s. 13. In *King v. Bailey*[1], which was an action for criminal conversation, Gwynne J., who delivered the judgment of the Court, at p. 339 refers to the pleadings in that action as follows:

> The cause of action first set out in the statement of claim in this case is the old action on the case for criminal conversation expressed in the language of the modern formula of pleading, and, as so stated, is in substance simply that in the year 1885 (it should have been 1886), upon the request of the defendant, the plaintiff's wife left the home of the plaintiff with the defendant, and that they went together to the City of Toronto, in the province of Ontario, where ever since their arrival they have lived, and still, at the time of the commencement of this action, do live together in adulterous intercourse, whereby the plaintiff has been deprived of the comfort and enjoyment of the society of his wife, and her affections have been alienated from the plaintiff, and he has been deprived of the assistance which he formerly derived from her and to which he was entitled.
>
> To this is added a paragraph asserting a cause of action for wrongfully enticing the plaintiff's wife from the plaintiff and procuring her to absent herself from him for some time from the year 1885 (should be 1886), to the time of the commencement of this action.

The appellant here has pleaded enticement by the respondent of the appellant's wife to leave him against his will by, *inter alia*, the commission of adultery with her in December 1950, thereby depriving him of his wife's society and comfort. Paragraph 5 of the statement of claim goes on to assert that by reason of these matters the plaintiff has been deprived of the consortium of his said

[1] (1901), 31 S.C.R. 338.

1959

FEDIUK v. LASTIWKA

Martland J.

wife *and has suffered loss and damage.* These allegations, while pleading an action for enticement, are, I think, sufficient also to allege a cause of action under s. 13 of *The Domestic Relations Act.*

But then it may be contended that there are specific defences to a claim under s. 13 of the Act, which are set out in s. 14 of the Act, and that the respondent may have been misled into thinking that he had only to meet a claim for loss of consortium and was thus prevented from raising these defences at the trial. This, however, does not appear to have been the case. At the conclusion of the evidence for the appellant at the trial, counsel for the respondent moved for a nonsuit. While his argument dealt mainly with the claim for loss of consortium, he also submitted argument in respect of a claim for adultery under s. 13. He claimed that collusion had been proved, which was a defence to such an action by virtue of s. 14.

Following the argument the learned trial judge expressly stated that he did not find that there was any collusion between the parties.

I have concluded that the appellant has pleaded matters sufficient to found a claim against the respondent, under s. 13 of *The Domestic Relations Act,* for the adultery committed with his wife.

With respect to such a claim the learned trial judge said:

> I am satisfied also that there was adultery at other times and the plaintiff would have a good cause of action under Section 13 of The Domestic Relations Act, Chap. 300 R.S.A. 1942, the old action for criminal conversation, unless, of course, there was connivance or collusion, neither of which I am prepared to find.

He dismissed the appellant's action against the respondent only because he reached the conclusion that the appellant had elected to sue only on the narrow ground for loss of consortium.

In the Appellate Division, Johnson J.A., who delivered one of the two majority judgments and with whom Macdonald J.A. concurred, said:

> Section 14 of The Domestic Relations Act (R.S.A. 1955 Chap. 89) gives to the husband a right of action for damages against a person who commits adultery with his wife and on the evidence of this case, there would appear to be no doubt that if the action had been brought under that section, the plaintiff would have succeeded.

The reference made in this quotation is to the relevant section of *The Domestic Relations Act* in the 1955 revision, which is in the same terms as s. 13 of the Act in the 1942 revision. Johnson J.A. goes on to say, however, that the action was brought under ss. 32 and 33 under a Part of the Act headed "Loss of Consortium". The two dissenting judges in the Appellate Division would have allowed the appellant's appeal from the trial judgment.

I agree that a cause of action under s. 13 of *The Domestic Relations Act* was, on the findings of fact made by the learned trial judge, proved and for the reasons previously expressed I think that the appellant was entitled to succeed in such an action in this case as against the respondent.

It has been noted that the respondent raised a defence under *The Limitation of Actions Act,* R.S.A. 1942, c. 133. This claim, however, does not fall within any of the specific claims described in paras. (*a*) to (*i*) inclusive of subs. (1) of s. 5 of that Act and must, therefore, fall within para. (*j*), which covers any other type of action not specifically provided for in the Act. Accordingly the limitation period is six years after the cause of action arose. The adultery alleged in the statement of claim is stated to have occurred in December 1950. The appellant's wife testified to adultery in that month and continuing thereafter. Action was commenced on January 18, 1956, which is within the six year limitation period.

Having reached the conclusion that an action was established under s. 13 of *The Domestic Relations Act,* it is not necessary to go on to consider whether the claim for loss of consortium was proved, since the essence of the damage for which the appellant claims is in relation to the adultery committed by the respondent with the appellant's wife. Practically the whole of the evidence at the trial related to that subject. Even if an action for loss of consortium could be held to lie, the damages recoverable by the appellant would necessarily be damages flowing from the commission of the adultery. In other words, the damages sustained in respect of that cause of action would, in this particular case, be the same as those arising out of the cause of action under s. 13.

1959

FEDIUK v. LASTIWKA

Martland J.

This brings me to the question of damages. At the conclusion of the argument before this Court, counsel were asked whether, in the event that the appeal were successful, they were agreeable to an assessment of damages being made in this Court instead of sending the matter back for the assessment of damages. Both have agreed to this course.

No finding was made as to damages by the learned trial judge. The minority judgment in the Appellate Division would have awarded damages in the amount of $5,000, the full amount which the appellant had claimed in his statement of claim.

In an action of this kind the damages awarded are not to be exemplary or punitive, but are to compensate for the actual value of the wife to the husband and for the injury to his feelings, honour and family life. The value of a wife has a pecuniary aspect and a consortive aspect. In connection with the pecuniary aspect, consideration must be given to her ability and assistance in the home. In connection with the consortive aspect, consideration must be given to her character and abilities as a wife.

In this case the circumstances are somewhat peculiar in that the appellant's wife has continued to live in the same house with him and to perform her usual household duties. With regard to her character as a wife, while she testifies that her relations with the respondent initially were reluctantly accepted by her, it is clear from the notes which she wrote to him that at least later during the course of their relationship she became a willing partner.

Taking into account all the circumstances of this case, I would assess the damages at $2,000 and would direct, pursuant to s. 13 of *The Domestic Relations Act,* that these be paid to the appellant. I would allow this appeal with costs in this Court and in the Courts below and direct that judgment be entered against the respondent for damages in the amount of $2,000.

Appeal allowed with costs.

Solicitors for the plaintiff, appellant: Shortreed, Shortreed & Stainton, Edmonton.

Solicitors for the defendant, respondent: Main, Nugent & Forbes, Edmonton.

A. L. PATCHETT & SONS LTD. (*Plaintiff*) ..... APPELLANT;

AND

PACIFIC GREAT EASTERN RAILWAY COMPANY (*Defendant*) ..... RESPONDENT.

1958
*May 14, 16
1959
Jan. 27

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Railways—Carriage of goods—Statutory duty of railway—Duty to supply cars and pull loaded cars from siding—Union picketing shipper's non-union plant—Refusal of railway's employees to cross picket line—Damages to shipper—Whether breach of statutory duty—Nature of duty—The Railway Act, R.S.B.C. 1948, c. 285, ss. 203, 222.

The plaintiff owned and operated a planing mill on lands adjoining the right of way of the main line of the defendant company at Quesnel, British Columbia. A spur line, the switch for which was on the main line, led onto the plaintiff's premises. The International Woodworkers of America, a union of loggers and mill workers, called a strike in the area and, although none of the plaintiff's employees were members of the union, placed pickets at or around the switch used for the spur line. The members of the railway unions were ordered by their officers not to cross the picket lines, and as a result the railway employees refused to spot cars and to pull loaded cars on the siding as required by the plaintiff. They also refused to accept or sign bills of lading for loaded cars.

The plaintiff sued the defendant company for damages alleging failure on the part of the defendant to perform its statutory duties as set forth in ss. 203 and 222 of the *Railway Act*. The action was maintained by the trial judge, who found that it was not fear of violence from the strikers but rather the orders given by the railway union officers that caused the railway employees to refuse to discharge their duties and those of the defendant company. The company had failed to discharge its statutory duty. This judgment was reversed by a majority in the Court of Appeal.

Held (Locke and Cartwright JJ. dissenting): The action must fail. No liability attached to the defendant railway company.

Per Rand J.: The duty imposed by s. 203(1)(*c*) of the *Railway Act* upon a carrier to furnish facilities and to accept goods, is not an absolute duty. That duty is qualified by a characteristic of reasonableness and depends upon all the circumstances. Furthermore, to the duty of the railway to furnish services there is a correlative obligation on the customer to furnish reasonable means of access to his premises.

In the light of all the circumstances, it could not be said that the Court of Appeal was clearly wrong in finding the defendant not liable for the damages claimed. The primary responsibility was on the plaintiff

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

1959

PATCHETT & SONS LTD. v. PACIFIC GREAT EASTERN RY. CO.

to free its premises of trespassers whose presence was, falsely, a sign of a labour clash and constituted a virtual nuisance *vis-a-vis* the defendant's employees. These trespassers, in fact, prevented reasonable access to the plaintiff's premises to which the defendant was entitled as a condition of furnishing its services. This obstruction could have been removed by the plaintiff with a minimum of delay and inconvenience. Within the few days of interruption no damage suffered by the plaintiff could be attributed to a breach of duty toward it by the defendant.

Per Abbott J.: The statutory duty imposed upon the defendant was not an absolute duty but was only a relative one to provide services so far as it was reasonably possible to do so. The defendant was under no obligation to ascertain whether the picketing was illegal or not. When an industrial plant is illegally picketed, the primary responsibility for taking legal action to have the pickets removed rests upon the owners of the plant whose operations are those primarily affected. By endeavouring by methods of persuasion to overcome the difficulties and to avoid resort to legal proceedings, the defendant acted reasonably.

Per Judson J.: Since the plaintiff's plant was the primary object of the attention of the pickets, the primary responsibility for the removal of the obstruction rested with the plaintiff. The statutory obligation under s. 203(1)(c) was not an absolute but a relative one.

Per Locke and Cartwright JJ., *dissenting*: The duty imposed upon the railway by ss. 203 and 222 of the *Railway Act* is absolute. The obligation to provide adequate and suitable accommodation is not qualified, and is enacted for the protection of the public requiring the services of these carriers.

On the evidence in this case, there was no defence to the action. The union officers ordered their members to disobey the lawful orders of their employer and to commit breaches of their duties under s. 295 of the *Railway Act*. They directed them to take part in actions which were criminal in their nature and contrary to s. 518 of the *Criminal Code;* this order was not dependent on their being prevented by violence or threats of violence from doing their duty, or whether or not there was a strike at the plant where cars were to be delivered. The conclusion reached by the trial judge that it was not fear but the order of the union officers which was the reason for the refusal to pass the so-called picket line was completely supported by the evidence and should not have been set aside in the Court of Appeal.

There was no evidence that the pickets trespassed on the plaintiff's property. According to the uncontradicted evidence, they trespassed on the main line of the railway at or near to the switch and there interferred with the railway operations.

The nature of the railway's statutory obligations was completely misconceived by the defendant's officers, who appeared to have thought that the company was helpless. It was upon the defendant that the statutory duty lay and upon its property that the so-called pickets trespassed and impeded or prevented the operations of the railway; it was, therefore, upon the defendant to take steps to prevent the interference with its operations. The plaintiff's right of action cannot be affected by its failure to commence an action to compel the

defendant to discharge its duty or to prosecute the pickets for trespass, or under s. 518 of the *Criminal Code*. *Groves v. Wimborne* (1898), 2 Q.B. 403.

It is not the law in British Columbia, and it never has been, that the employees of railway companies may decide for themselves whether, and under what circumstances, they will discharge their obligations under s. 295 of the *Railway Act* and under their contracts of employment. The statutory duty rests upon the company to provide the facilities and upon the employees to render the services necessary to comply with that duty.

There was no threat of a strike by the railway employees, and had there been, it would not have afforded any answer to the plaintiff's claim. *Hackney Borough Council v. Doré,* [1922] 1 K.B. 437. The defendant must accept responsibility for the conduct of its employees. *Lochgelly Iron and Coal Co. v. McMullan,* [1934] A.C. 1.

Even if the duty of the railway was merely to make reasonable efforts to furnish the facilities, the evidence disclosed a complete failure to make such efforts.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], reversing a judgment of Manson J. Appeal dismissed, Locke and Cartwright JJ. dissenting.

A. W. Johnson, for the plaintiff, appellant:

J. A. Clark, Q.C., for the defendant, respondent.

RAND J:—The case made against the respondent is based on the sections of the provincial *Railway Act* dealing with facilities and the acceptance, carriage and delivery of goods: R.S.B.C. 1948, c. 285, ss. 203 and 222. The precise duty is declared by para. (c) of the former:

> (c) without delay, and with due care and diligence, receive, carry, and deliver all such traffic;

Mr. Johnson puts his argument in this fashion: the duty to furnish facilities, so far as conduct of employees may affect that, is absolute; and just as the employer is liable for the negligent act of his employee, positive or negative, as for a failure by the employer in his personal duty under the statute, so is he for a deliberate refusal to work by any of them. The question is whether that absoluteness can be attributed to the language of the statute and if not, what, if any, excuse is there when the performance of a public carrier breaks down through cessation or refusal of work by employees because of a labour dispute circumstance.

[1] (1958), 23 W.W.R. 147, 11 D.L.R. (2d) 52, 76 C.R.T.C. 27.

1959

PATCHETT & SONS LTD. v. PACIFIC GREAT EASTERN RY. CO.

Rand J.

In the case of a general strike of a group of essential employees, since that cessation, assuming appropriate conditions to be present, is a lawful act, it would be out of the question to interpret the Act as creating a liability for not doing what, in the nature of the situation, a carrier is, for the time being, unable to do, and no one has ever suggested it. Would the result be different if the cessation was illegal as in violation of law or in breach of contract?

Whether a strike, say of all trainmen, in sympathy with that of other employees, of the same employer or another, between whom there is no common interest beyond what is viewed as the general interest of workmen, would be within ss. 498 or 518 of the former *Criminal Code* is beyond our enquiry. Assuming it to be illegal, no civil remedy could effect directly a compulsion to work, and damages, if available, would take much time and involve many difficulties. The illegality could be declared and, in a proper case, criminal prosecution invoked; but that also would take time, during which to hold a railway bound to an absolute obligation would, for the reasons about to be stated, involve a regulation of public services by private agencies toward patrons which, in my opinion, our law does not permit. Under the present conceptions of social organization, apart from criminal law, the settlement of such a dispute must result from the pressure of the interests or necessities of the strikers or the employer or the force of public opinion. In this view I confine myself to the duty of a carrier to furnish facilities and to accept goods: where the carriage has actually begun other considerations may have to be taken into account with which we are not here concerned.

Apart from statute, undertaking a public carrier service as an economic enterprise by a private agency is done on the assumption that, with no fault on the agency's part, normal means will be available to the performance of its duty. That duty is permeated with reasonableness in all aspects of what is undertaken except the special responsibility, of historical origin, as an insurer of goods; and it is that duty which furnishes the background for the general language of the statute. The qualification of reasonableness is exhibited in one aspect of the matter of the present

complaint, the furnishing of facilities: a railway, for example, is not bound to furnish cars at all times sufficient to meet all demands; its financial necessities are of the first order of concern and play an essential part in its operation, bound up, as they are, with its obligation to give transportation for reasonable charges. Individuals have placed their capital at the risk of the operations; they cannot be compelled to bankrupt themselves by doing more than what they have embraced within their public profession, a reasonable service. Saving any express or special statutory obligation, that characteristic extends to the carrier's entire activity. Under that scope of duty a carrier subject to the Act is placed.

The examples of these extreme situations furnish guidance for the solution of partial cessations of work associated with labour controversy. The duty being one of reasonableness how each situation is to be met depends upon its total circumstances. The carrier must, in all respects, take reasonable steps to maintain its public function; and its liability to any person damaged by such a cessation or refusal of services must be determined by what the railway, in the light of its knowledge of the facts, as, in other words, they reasonably appear to it, has effectively done or can effectively do to meet and resolve the situation. In weighing the relevant considerations, time may be a controlling factor.

Here the failure commenced on October 28 and continued until the end of November 4, a period of eight days. Within that time what effective steps could the respondent have taken which would have avoided the damages claimed? Admittedly, no measures were taken against the recalcitrant employees; its directing officers, not distinguishing the particular circumstances from those of strikes generally, acting under a vague notion that this was a "strike" which meant marking time, acquiesced in the refusal of service even though the superintendent paid lip service to the demands of the appellant by repeated orders to the train crew to "switch the siding" which they as repeatedly ignored.

1959

PATCHETT & SONS LTD. v. PACIFIC GREAT EASTERN RY. CO.

Rand J.

It was urged that the railway should have applied for an injunction against its own employees; but whatever might be said for that, there was a preliminary question between the railway and the company with which I shall deal in a moment and the determination of which would have obviated any such step.

There was the threat of violence made to the conductor. It is easy to minimize the effect of this in the apparent light of what happened subsequently: but we know too well how vengeance can be wreaked on individuals by ruffians in a community from which a determined public attitude and adequate public protection are absent. To compel an employee so threatened to carry out orders on penalty of dismissal or suspension for refusal might, whether warrantedly or not, have aroused the brotherhood; and, in the circumstances, it would be asking the respondent unnecessarily to face a further real danger of disrupting its services throughout the district.

There is also the question of time. Time is frequently the arbiter of these collisions. Whatever legal action might have been taken, the ordinary course of the mill work including the siding services would have been interfered with and interrupted. As has been aptly remarked, a strike is not a tea-party and it may have consequential impacts on associated interests which cannot be met or disposed of overnight; and it is difficult if not impossible, with these doubtful issues raised, and the possibilities of further complications, to say when the situation would have been cleared up.

That the respondent was able to move against the pickets is doubtful; that they were not on railway property was assumed in the submission of Mr. Johnson; certainly there was no interference with operation on the main line; and if there was a picket line it was across the private siding, which, for the purposes of operation, was the property of the appellant. Even if there was a trespass on railway lands, the imaginary barrier was around the plant, and that brings me to what I consider the primary and decisive factor.

To the duty of the railway to furnish services there is a correlative obligation on the customer to furnish reasonable means of access to his premises. There was, in fact, no labour dispute between the I.W.A. and the appellant and the picketting was illegal. That fact was the appellant's, not the respondent's, and on it only the former could, with confidence, act. The appellant thus tolerated on or about its property a disruptive presence which it was known was exerting an obstructive effect on the employees of the railway and the siding operation. The obstacle presented by the pickets was to outbound shipments with inbound deliveries by highway permitted. In these circumstances the first and obvious step was to get rid of the intruders; but the appellant, rather than involve itself with the I.W.A. in litigation, in effect called upon the respondent to take steps against its own employees or the trespassers or both.

If the appellant had asserted its unquestioned rights, the root of the trouble would have been removed as it was by the immediate and voluntary withdrawal of the pickets when on November 4 an interim injunction against the respondent was obtained; a direct move against the pickets by the appellant could not have had less effect than that indirect action. Would the duty on the respondent to service the siding have given it a standing in law to move for an injunction against persons illegally encircling another's property with a symbolic barrier? If the appellant was content to suffer a picket line affecting its own premises, an illegal *de facto* interference with its rights in carrying on its business, would any court have acted to remove it at the request of another having no interest in the premises, and only a qualified duty in relation to them? At the highest it is extremely doubtful that it would do so; it is not the function of a Railway to clear away obstructions to operations on private premises when the owner acquiesces in them.

In all these circumstances, in the light of the controlling facts as they appeared to the respondent, I am unable to say that the Court of Appeal[1] was clearly wrong in finding

[1] (1958), 23 W.W.R. 147, 11 D.L.R. (2d) 52, 76 C.R.T.C. 27.

1959

PATCHETT & SONS LTD. v. PACIFIC GREAT EASTERN RY. CO.

Rand J.

the respondent not liable for the damage claimed. The primary responsibility lay with the appellant to free its premises of trespassers whose presence was, falsely, a sign of a labour clash, and constituted a virtual nuisance *vis-à-vis* the employees of the railway. They prevented, in fact, reasonable access to the appellant's premises to which the railway was entitled as a condition of furnishing its services, and the obstruction they presented could have been removed by the appellant with a minimum of delay and inconvenience. Rather than take that course the appellant sought to place on the respondent the entire burden of breaking up the impasse, entailing the uncertainties and risks of any course of action attempted. Whatever an indefinite continuance of the situation might have called for, within the eight days of interruption no damage suffered by the appellant can be attributed to a breach of duty toward it by the respondent. Had the picketting under the law of the Province been legal, a different situation would have been presented but with that we are not here concerned.

It should not be necessary, but to prevent any misconception of implication from these reasons, I add this: the only question dealt with is the duty of the railway toward the company in the precise situation presented. As between these parties, on whom did the responsibility lie to take the initiative against the *de facto* obstruction to the ordinary operation of the company's private siding? And my conclusion is as stated.

I would therefore dismiss the appeal with costs.

LOCKE J. (*dissenting*):—This is an appeal from a judgment of the Court of Appeal for British Columbia[1] which allowed the appeal of the present respondent, the defendant in the action, from the judgment delivered at the trial by Manson J. awarding damages to the present appellant. The appeal was heard by a Court of three members and of these Davey J.A. dissented and, while considering that the damages awarded should be reduced, would have otherwise dismissed the appeal.

[1] (1958), 23 W.W.R. 147, 11 D.L.R. (2d) 52, 76 C.R.T.C. 27.

The case raises questions which are of great importance not only to the communities through which the lines of the respondent company pass in British Columbia and industries operating there, but to shippers of freight, the transcontinental railways and to railway unions throughout Canada.

The action was brought to recover damages for the alleged failure of the respondent to comply with its statutory obligations under ss. 203 and 222 of the *Railway Act* of British Columbia, R.S.B.C. 1948, c. 285. The respondent was incorporated by a special Act of the Legislature of British Columbia, Statutes of 1912, c. 36, and its operations do not extend beyond the boundaries of the province.

Section 203 reads in part:

(1) The company shall, according to its powers:—

(*a*) Furnish, at the place of starting, and at the junction of the railway with other railways, and at all stopping-places established for such purpose, adequate and suitable accomodation for the receiving and loading of all traffic offered for carriage upon the railway:

(*b*) Furnish adequate and suitable accomodation for the carrying, unloading, and delivering of all such traffic:

(*c*) Without delay, and with due care and diligence, receive, carry, and deliver all such traffic; and

(*d*) Furnish and use all proper appliances, accomodation, and means necessary for receiving, loading, carrying, unloading, and delivering such traffic.

(2) Such adequate and suitable accomodation shall include reasonable facilities for the junction of private siding or private branch railways with any railway belonging to or worked by the company, and reasonable facilities for receiving, forwarding, and delivering traffic upon and from those sidings or private branch railways, together with the placing of cars and moving them upon and from such private sidings and private branch railways.

Subsection (7) of s. 203 declares that any person aggrieved by the neglect or refusal of the company to comply with the section shall have a right of action against it.

Section 222 which appears under the heading "Traffic Facilities" in part 29 of the *Railway Act* expresses the obligation though in slightly different terms. So far as it needs consideration, it reads:

(1) All companies shall, according to their respective powers, afford to all persons and companies all reasonable and proper facilities for the receiving, forwarding, and delivering of traffic upon and from their several railways, for the interchange of traffic between their respective railways, and for the return of rolling-stock.

1959

PATCHETT & SONS LTD. v. PACIFIC GREAT EASTERN RY. CO.

Locke J.

The difference between this and subs. (1) of s. 203 is to be noted. The former states the obligation to furnish adequate and suitable accomodation in absolute terms. Whether subs. (2) qualifies this absolute obligation is, in my opinion, a debatable question.

The action raises questions which have not heretofore been dealt with by the Courts of this country. My consideration of the evidence leads me to the conclusion that there is no defence to this action. With great respect, I disagree with the judgments delivered by the majority of the members of the Court of Appeal, both as to the facts which are disclosed by the evidence and as to the law applicable to the obligation of the respondent under the statute.

Most of the evidence given on behalf of the defendant at the trial directed to the issue of liability was, in my opinion, irrelevant. However, as a contrary view has been taken by the learned judges of the Court of Appeal, I propose to refer in detail to all of the evidence given at the trial.

The appellant company at the time in question owned and operated a planing mill on lands adjoining the right-of-way of the main line of the respondent at Quesnel. It was also the owner and operator of two lumber mills situated elsewhere and the lumber there produced and lumber purchased from other mills operating in the territory was planed and made ready for market at the planing mill in Quesnel. A spur line constructed by the respondent leading onto the appellant's said premises, for which an annual rental was paid, afforded means of access by rail from the planing mill to the respondent's main line. Cars were switched by the respondent from its main line onto the appellant's premises and, when loaded and ready for shipment, bills of lading were issued and the cars removed by the respondent and carried to their destination, either upon the respondent's railway lines or to transcontinental railway lines to the north at Prince George or to the south at Vancouver. Eighty per cent. of the total production of the mill was sold for export to the United States.

The length of time that these facilities had been enjoyed by the appellant does not appear. It is, however, common ground that at the relevant times the delivery of cars upon the spur track and the removal of cars therefrom after they were loaded were reasonable facilities to which the appellant was entitled under the sections of the *Railway Act* to which reference has been made.

At some time around October 1, 1953, there were strikes called in certain lumber mills operating at Stoner and Red Rock by the International Woodworkers of America, hereinafter referred to as the I.W.A., and, I would infer from the evidence, at Prince George. These places are served by the respondent railway and lie respectively 60,67 and 81 miles north of Quesnel. There were 12 mills manufacturing lumber or lumber products operating at the time at Quesnel. On or about October 26 the I.W.A. called strikes in 2 or 3 of these plants.

None of the employees of the appellant were members of the union and, according to the evidence of W.A. Stewart, the superintendent of the respondent, there was no strike at the mills of 9 or 10 other lumber companies at Quesnel.

On October 8, D.L. Irvine, a conductor employed by the defendant, was in charge of a train and had received instructions to move certain cars from lumber mills at Stoner and Red Rock. He gave evidence that, when they attempted to move certain cars at Stoner, six pickets posted by the striking union armed with clubs made threatening gestures towards the crew, whereupon the train was withdrawn. Later on that day they had the same experience at a mill at Red Rock.

On October 16, 1953, Donald F. Robinson, a locomotive engineer employed by the respondent who described himself as the general chairman of the Brotherhood of Locomotive Firemen and Enginemen, was working on the run between Lillooet and Williams Lake. Early in October he said that he had received complaints from men under his jurisdiction working on the subdivision between Williams Lake and Prince George regarding trouble with pickets of the striking mill employees and that they had asked him for instructions as to what they were to do. They apparently referred to what had happened at Stoner and

1959

PATCHETT & SONS LTD. v. PACIFIC GREAT EASTERN RY. CO.

Locke J.

Red Rock. On that date he issued what he described as a general circular which was sent to all firemen on the subdivision and which read:

Lillooet, B.C.
Oct. 16th, 53

To all Firemen Prince George Sub.

Article 16, section 2, Clause F, page 216 of the Brotherhood of Locomotive Firemen and Enginemen's constitution states,

> Where a picket line is established by any nationally recognized organization our members will not be required to pass through such picket lines.

The I.W.A. is a nationally recognized organization and their pickets will be respected.

Yours fraternally
"D. F. Robinson"
G.C.B.L.F. & E.P.G.E. Rly.

Copy to J. Morris
Pres. I.W.A.
W. A. Stewart Supt.
Pacific Great Eastern Railway

On October 19, 1953, G. E. Harris, the general chairman of the Brotherhood of Railway Trainmen, circulated a message among the members of his union employed by the railway and sent to the superintendent the following message:

Squamish, B.C.
October 19, 1953

Dear Sir and Brothers:

Please find enclosed copy of telegram from L. C. Malone, Vice-President.

"WHERE A LEGAL STRIKE OF ANY NATIONALLY RECOGNIZED LABOR ORGANIZATION IS IN EFFECT AND PICKET LINES ESTABLISHED, CONSTITUTING A SUBSTANTIAL PRESENT OR POTENTIAL THREAT OF DANGER TO OUR MEMBERS OR THEIR FAMILIES OUR MEMBERS ARE WITHIN THEIR RIGHTS IN DECLINING TO ENTER THE TERRITORY DIRECTLY EFFECTED."

SIGNED
L. C. MALONE

Great care should be taken that picket lines should not be crossed, and that picket lines are established in the proper place.

Pickets picketing cars on Company property, such as team tracks, should not be recognized, it is up to the strikers in this case to prevent the loading of cars, once the car is loaded the Railway is required to accept the billing, and the Railway will in turn require our trainmen to handle loaded cars.

I am going to Vancouver today and will have further instructions for you. I will contact the I.W.A., also General Chairman on C.N.R.

Fraternally yours,
"G. E. Harris"
G. E. Harris,
General Chairman

On or about October 21 Robinson went to Vancouver and interviewed Anthony Egan, the acting general manager of the road, and Stewart, the superintendent. According to him, the company's officials claimed that the pickets were not properly established and that the railway employees did not have to recognize them. Robinson disagreed with this and told them that the union adhered to the stand expressed in the message of October 16 and that the men would refuse to pass the picket lines and said that he was satisfied that, if they did so, they would suffer harm after they went off duty. While the evidence is not clear, it appears that the railway officials said that if the men refused they would have to lay them off or dismiss them, to which he replied that if they did they would exhaust the supply of available men, all of whom would refuse. Referring to the trainmen who were members of the union, the headquarters of which are in Cleveland, Ohio, he said that the men had asked him to make a ruling as to what they should do and that that ruling was to be found in its constitution and he considered himself to be bound by it. Robinson did not concern himself as to what the law of British Columbia was and said that no one pointed out to him that the article of the constitution was in conflict with the law. In answer to a question reading:

As soon as it was established that the IWA was nationally recognized, then no trainman—no, excuse me—firemen or enginemen would be permited to cross the picket lines?

Robinson said:

As far as the engineers—you see, we have two organizations, and all I could legislate for or instruct were the firemen; the engineers had a separate constitution.

While some engineers were members of his union, he said he could not give instructions to them.

On October 23 Robinson went to Quesnel. At that time it appears that there was no strike in any of the plants at that place. From there he proceeded on the day following

1959

PATCHETT & SONS LTD. v. PACIFIC GREAT EASTERN RY. CO.

Locke J.

to Prince George and, on October 25, went to the mill at Stoner where the strike was in progress. While no attempt was made by the railway to move cars from the plant while he was there, he said that he saw 15 or 20 men who had clubs or rocks in their hands outside the plant and he thought that these were pickets of the I.W.A. Later that day he went to Red Rock, where the mill was shut down. Whether the place was picketed at that time, the witness did not say. He then went to Prince George where he met one of the train crews and says that, as a result of his discussion with them, he decided it would be very unsafe for the men to "go up against the pickets or pass through the picket line". On that day or the day following, he returned to Quesnel where he met Egan but what transpired between them is not stated.

Egan, who had formerly been employed for a long period of years with the Canadian National Railway, was acting as general manager of the respondent company from September to December 1953. He had been employed earlier in a temporary capacity to look after the accounting for the road and was merely filling in as general manager, following the retirement of the former occupier of that office and until the appointment of his successor. Following his meeting with Robinson in Vancouver, he went to Stoner, Red Rock and Prince George to endeavour to arrange the resumption of railway service for the mills where the men were on strike. He had seen Robinson's message of October 16 and that from Harris of October 19. At Stoner he found about 40 pickets at the plant where the strike was in progress, which he referred to as that of White Brothers. There, he said, there were about 40 pickets on the edge of the right-of-way outside the plant, who appeared to be armed with clubs and rocks. He said that the appearance of the pickets convinced him that if he had pressed the matter any further with the railway employees, the only thing he could have done was to lay off the crews that refused to cross the picket line. From there he had gone to Red Rock where he found a situation similar to that at Stoner outside the premises of the Scott Sash and Door Company. He then went on to Prince George where he interviewed two officials of the I.W.A. and tried to get

them to release certain cars of material tied up at Stoner and Red Rock. Later, on the same day, he said that another official of the I.W.A. agreed to remove the pickets from the plants at these two places until the following Tuesday, so that the loaded cars which were there could be removed. What Egan did not say but what was disclosed by Stewart when he gave evidence was that, in consideration of this, Egan had agreed that the respondent company would not "spot" any more empty cars in the "affected area" and gave instructions to this effect. None of the unions whose members operated the trains of the respondent threatened to strike and none were laid off as a result of their refusal to pass the picket lines at Stoner and Red Rock.

The property in question lies between the main line of the respondent and a highway to the east of it running approximately north and south. There are two entrances from the highway into the property and, on the morning of October 28, two motor cars appeared, one of which was stationed opposite each of the entrances. Each contained two men. One of the cars bore a sign which read "I.W.A. This plant on strike". The statement was untrue, a fact which was made known promptly to these men who have been referred to in the evidence as pickets.

On that day, two railway cars loaded with lumber from the appellant's mill were standing on the siding, together with some other railway cars which the respondent had theretofore supplied. On that afternoon, a train crew of the respondent in charge of E. L. McNamee went with an engine along the main line adjoining the appellant's property, intending to remove the loaded cars. Immediately to the south of the appellant's planing mill there is a roadway which leads from the highway to a crossing over the respondent's main line and which affords access to the farm of one Johnson, whose property lies west of the railway line. To obtain entrance to the private siding of the appellant from the main line, it is necessary to operate a switch which is upon the right-of-way of the main line a few feet to the north of the said railway crossing. According to McNamee, and his is the only evidence on the point, when the engine reached the vicinity, two pickets were at the switch and told the crew that they were not to throw

1959

PATCHETT & SONS LTD. v. PACIFIC GREAT EASTERN RY. CO.

Locke J.

the switch. These men were trespassers upon the railway premises. The engine crew made no effort to use the switch or enter the siding and took the engine away.

McNamee was aware that the employees of the appellant were not members of the I.W.A. and that there was no strike at their plant. He said that one of the so-called pickets was a man whose name he did not know but who had warned him in Quesnel on October 26, when he was off duty, not to cross the picket line or they would damage his home. He said that this had frightened him and that he was alarmed for the safety of his family living in Quesnel. Neither the engineer or fireman in charge of the engine were called to give evidence but they were under the direction of McNamee and withdrew, apparently on his instructions.

It had been the practice in dealings between the appellant and the respondent to have bills of lading for cars furnished by the respondent prepared at the appellant's office and taken for signature to the railway office at Quesnel. On October 29, Leif Rye, the yard foreman of the appellant, went with a bill of lading so prepared to the station and requested the station agent, Sidsworth, to issue it. The document related to one of the loaded cars then standing on the siding, but Sidsworth refused to sign it, saying that he had orders not to do so. Rye left the bill of lading with him. A written request was made for two empty cars to be placed on the siding on October 30 and it was shown that it was usually the case that cars were placed on the siding the day following such a request. None were delivered on the siding until November 5.

On October 29 McNamee went up with a train crew for the purpose of removing loaded cars and says that, while they had no conversation with the pickets, two of them were at the crossing near the switch.

John Zamluk, an accountant employed by the appellant, went on the same day to one Lehman, apparently the organizer in the area of the I.W.A., to protest the picketing. Lehman replied that the I.W.A. was an international union and allowed to picket anywhere. Later in the day,

apparently McNamee and Sidsworth went to the strike committee of the I.W.A. at Quesnel and obtained a document addressed to "I.W.A. pickets" which said that:

> The bearer P.G.E. yard crew has the permission of the local Strike Committee to cross the picket line. Please arrange to pass him through the picket line on above date only.

The permit stated that it was granted for the purpose of removing Canadian Pacific Railway car no. 248675 and C. & O. 3717. These cars were removed on October 30 and the damage suffered mitigated to some extent.

While the evidence does not deal with the matter in any detail, it appears that an injunction restraining the action of the pickets at the mill of the White Company at Stoner had been obtained some time shortly prior to October 29. On that day, Robinson sent the following message to F. R. Gibson, the assistant superintendent of the respondent at Squamish:

> Marguerite
> Oct 29th/53
>
> F. R. Gibson,
> Asst. Supt.
> Squamish, B.C.
>
> All mills within strike area Prince George to Quesnel have been declared hot pending settlement by IWA and are classed as such by all its affiliates. If men under my jurisdiction were to service these mills serious consequences could occur while on duty and off the job. The copy of injunction received does not guarantee the safety of the men. It only orders the IWA to refrain from preventing movement of cars. This does not take in the hot heads that may come under jurisdiction of the IWA and unless the PGE Rly can personally guarantee the safety of the men and are prepared to look after their families in the event they get hurt in any accident off duty that could be caused by strikers I cannot consider ordering men under my jurisdiction to service these mills pickets or no pickets. All firemen to be governed by rule 108 of the uniform code of operating rules.
>
> D. Robinson.

The expression "declared hot" is a familiar one in labour disputes and, in the present case, meant simply that the members of Robinson's union would not handle any traffic to or from any of the mills at Quesnel until the owners of the mills at the points to the north and at Quesnel, where the men were on strike, reached an agreement with the I.W.A. There is no evidence as to the identity of the two or three mills at Quesnel where the employees were on strike.

1959

PATCHETT & SONS LTD. v. PACIFIC GREAT EASTERN RY. CO.

Locke J.

This unwise message and the equally unwise messages circulated by Robinson and Harris to the members of their union on October 16 and 19 were directly responsible for the refusal of McNamee and the train crews under his charge to handle the cars to and from the appellant's plant. It is to be regretted that these men, who presumably thought that the actions which they advised were lawful under the laws of the Province, did not take legal advice as to their position, the position of their unions and that of the men refusing to comply with the lawful instructions of the railway company. It is equally unfortunate that the respondent, whose interests were vitally affected and whose employees were directly and personally concerned, did not inform them that their actions were contrary to the law and that the action of the pickets in obstructing the operations of the railway was criminal.

As the evidence showed, McNamee was not only willing but anxious to hide behind the instructions received by the train crews from the officers of their unions. On one occasion, which was apparently November 2, T. P. Jennison, an employee of the appellant, overheard a conversation between McNamee and the pickets who apparently had not been visible as the engine approached the switch, when McNamee said:

> You fellows had better be out here where we can see you.

On November 2, a meeting of the members of the Brotherhood of Railway Trainmen, the Brotherhood of Locomotive Engineers and the Brotherhood of Locomotive Firemen and Enginemen was held at Squamish. Following this, the three general chairmen of these unions sent the following letter to the general manager of the railway company:

> Squamish, B.C.
> 2nd Nov. 53.
>
> Mr. A. C. Egan,
> General Manager,
> Pacific Great Eastern Railway,
> Pender at Abbott,
> Vancouver, B.C.
> Dear Sir:
>
> We the undersigned representing Engineers, Firemen & Trainmen, who have been threatened on and off the job to the extent of bodily harm and as long as these threats exist to our members we will be obliged not to pick up or set out cars in the restricted area.

Copy of injunction received does not guarantee the safety of the men.

This does not take into consideration the fanatics that may come within the jurisdiction of the striking union unless the Pacific Great Eastern Railway Company can guarantee the safety of the men and are prepared to look after their families in the event that they do get hurt in any accident off duty that could be caused by strikers we cannot consider ordering men under our jurisdiction to service the mills. Picket or no pickets.

This letter is for the safety and protection of our members.

Yours truly

G. E. Harris
Gen. Chmn. B.R.T.

S. F. Laycock
Gen. Chmn. B.L.E.

D. F. Robinson
Gen. Chmn. B. L. F. & E.

According to Stewart, the railway management made no answer to the messages from the union officers of October 16, 19, 29 and November 2. Speaking generally, he said that every day they had instructed their train crews to render service as required by the various mills. Asked as to the attitude adopted by the employees, he said that the stand taken by them appeared to him to be reasonable, but this appears to have referred to the crews who had been stopped at Stoner and Red Rock by the pickets of the striking mill workers.

Egan apparently did not distinguish between the position of plants where the employees were on strike and those such as that of the appellant where there was no strike and the pickets merely law breakers, as the following passages from his evidence indicate:

Q. You knew before you went on this northern trip, from the communications you had received from the Unions, what their position was?

A. That's right.

Q. That is your Railway Unions I am talking about.

A. Yes.

Q. And you knew that all Unions you had to deal with would refuse to cross any picket lines established?

A. That's right.

Q. Whether the picket lines were lawfully or unlawfully established, your Unions would not cross them?

A. According to the exhibits put in I knew that we couldn't force them to move these cars over picket lines.

1959

PATCHETT & SONS LTD. v. PACIFIC GREAT EASTERN RY. CO.

Locke J.

The exhibits referred to were the letters from Robinson and Harris of October 16 and 19 above quoted.

THE COURT: Q. Well, Mr. Egan what about plants that were not legally picketed?

A. Our instructions were to lift any cars ordered and I don't think there was any plants that weren't picketed.

Q. Patchett's wasn't a union plant. They had no business in the world to picket it.

A. It wasn't a question of a union plant. It was a question of it being picketed whether they were union or not.

Q. You were prepared to permit your employees to refuse to cross an illegal picket line. Is that the position that you, as General Manager, took?

A. Well, my position was my employees' actions (sic) which I couldn't force any further.

The refusal of the respondent to furnish facilities to the appellant continued until November 5, 1953. On the day previous, the writ in the present action was issued and an interim mandatory order made by Clyne J. at Vancouver. The relevant portions of this order read:

THIS COURT DOTH ORDER that the Defendant, its officers, servants and agents do forthwith according to the Defendant's powers without delay and with due care and diligence receive, carry and deliver all traffic, including manufactured lumber, offered by the Plaintiff for carriage upon the Defendant's railway;

AND THIS COURT DOTH FURTHER ORDER that the Defendant do forthwith according to its powers afford to the Plaintiff all reasonable and proper facilities for the receiving, forwarding and delivering of traffic, including the Plaintiff's manufactured lumber, upon and from the Defendant's railway;

AND THIS COURT DOTH FURTHER ORDER that the Defendant, its officers, servants and agents and anyone on its behalf be restrained from making a difference in treatment in the receiving, loading, forwarding, unloading or delivery of goods of similar character against the Plaintiff.

It will be observed that the order did nothing more than to order the railway company to perform its statutory duty under ss. 203 and 222 of the *Railway Act*. Promptly on the order being made, the crews of the respondent carried out their duty, removing the cars from the siding, and thereafter facilities were furnished as they had been theretofore. The so-called pickets had disappeared and were not thereafter seen.

In their present form, ss. 203 and 222 of the *Railway Act* first appeared in British Columbia as ss. 201 and 221 of the Revised Statutes of 1911. Similar provisions in a slightly different form first appeared in the *Railway Act* of

Canada as s. 253 of c. 58 of the Statutes of 1903. Both sections appear to have their origin in s. 2 of the *Railway and Canal Traffic Act of 1854*, 17-18 Vict., c. 31 (Imp.).

In *Robinson v. Canadian Northern Railway*[1], damages were awarded against a railway company for depriving a shipper of reasonable and proper facilities under the section of the Act of 1903. The judgment against the railway company was affirmed in this Court[2] and in the Judicial Committee[3]. In that case the facilities of which the Robinson company had been deprived had been found by the Board of Railway Commissioners to be reasonable and proper facilities within the meaning of the section in the Act of 1903.

In the present case, there has been no such finding but the fact that the siding had been built into the appellant's premises and leased to it, and traffic received and delivered for some period of time there, puts it beyond question that the facilities were such as the appellant was entitled to be afforded under ss. 203 and 222 of the *Railway Act*, and no question is raised as to this.

The only other reported case in Canada, based upon the section of the Dominion Act which corresponds to s. 203 of the British Columbia *Railway Act* is *Bright v. C.N.R.*[4]. In that case the railway company refused to undertake the carriage of a shipment of lobster from Pictou, N.S. to Chicago, Ill. or issue a bill of lading, in the absence of a Pure Food Certificate which was required by the Customs Regulations of the United States to permit entry of the shipment into that country. The proposed shipper failed to produce such a certificate and the goods remained in the railway company's warehouse where they were destroyed by fire. The whole point in the case was whether the company held the goods *qua* carrier or *qua* bailee. It was held that its liability was that of a bailee only and, in the absence of evidence of any negligence, the action failed. It was never the case at common law that a common carrier was liable for refusing to undertake a contract of

[1] (1909), 19 Man. R. 300.
[2] (1910), 43 S.C.R. 387, 11 C.R.C. 304.
[3] [1911] A.C. 739, 13 C.R.C. 412, 31 W.L.R. 624.
[4] (1949), 63 C.R.C. 279, 1 D.L.R. 713.

1959

PATCHETT & SONS LTD. v. PACIFIC GREAT EASTERN RY. CO.

Locke J.

carriage which was impossible of fulfilment and it was held that no such liability arose under s. 312 of the *Railway Act* upon the above stated facts.

The respondent contends that in some way this decision assists its position. In my opinion it does not touch the question to be decided.

There are no reported cases, other than the present one, in which a claim for refusal to furnish facilities based upon s. 203 has been advanced.

In Leslie's Law of Transport by Railway, 2nd ed., p. 558, dealing with the origin of the legislation in England, it is said that the railway companies, numbers of which had been incorporated by special Acts prior to 1854, had well nigh driven their competitors by road out of business and had obtained a monopoly without corresponding duties being imposed upon them by their statutes of incorporation. Parliament, therefore, by the Act of 1854, laid upon them the general duty of affording reasonable facilities for the receiving, forwarding and delivering of traffic. The decision as to what is reasonable has never since 1873 been left to the Courts of law, though between 1854 and 1873 jurisdiction was given to the Court of Common Pleas. The railway commissioners appointed by the Act of 1873 were succeeded by the Railway and Canal Commission created by the *Railway and Canal Traffic Act, 1888.*

It is to be remembered that cases dealing with the liability of a railway company to safely deliver goods entrusted to it for transport have nothing to do with the matter to be decided here. The respondent in the present case refused to accept merchandise for transport or to furnish the facilities by which the material could be moved. Cases such as *Taylor v. Great Northern Railway Company*[1], where the question was as to the liability of the railway company under an implied contract of carriage for delay in the delivery of goods caused by an obstruction to its line, are, in my opinion, aside from the point.

The respondent relies further on *Hick v. Raymond*[2] and *Sims v. Midland Railway*[3]. Both of these cases deal with the question as to what matters may be considered in

[1] (1866), L.R. 1 C.P. 385. [2] [1893] A.C. 22.
[3] [1913] 1 K.B. 103.

determining what is a reasonable time for delivery of goods by a carrier when the contract of carriage is silent as to the time for such delivery. In *Hick's* case delay was caused in discharging a cargo due to a strike of dock labourers not employed by the defendant. In *Sim's* case, delivery was delayed by a general strike of the railway's employees. In both cases it was held that the fact of such strikes was a matter to be considered in determining what was a reasonable time. But these questions related to liability under contracts of carriage and not to that resulting from the breach of a statutory duty. Neither case touches the question to be decided in determining this case, in my opinion.

We have not been referred to, and I have not discovered any, reported case under the Act of 1854 which deals with a refusal to afford reasonable facilities under circumstances resembling those in the present case.

Both ss. 203 and 222 in the British Columbia Act declare that the company shall, "according to its powers," furnish reasonable and proper facilities. These words appear in s. 2 of the Act of 1854 and have been interpreted in England as referring to the powers granted to the company by statute. *Rishton Local Board v. Lancashire and Yorkshire Railway*[1]. It has been held that the facilities which a company may be required to furnish are confined within the limits of the rights and duties of a company under its private Act. *Tharsis Sulphur Co. v. L. & N.W. Ry.*[2]

It is to misconceive the nature of the statutory duty to say that a company is required merely to make reasonable efforts to furnish the required facilities. That is not the language of either of the sections. The obligation to provide adequate and suitable accommodation is not qualified. In subs. (2) of that section and in subs. (1) of s. 222 the word "reasonable" precedes and qualifies the word "facilities". It is the facilities that are to be afforded that must be reasonable facilities.

The cases under the English Act go no farther than to say that they are such as can reasonably be required of the railway company after making due allowance for the

[1] (1893), 7 Ry. & Can. Tr. Cas. 74 at 80.
[2] (1881), 3 Ry. & Can. Tr. Cas. 455, 458.

1959

PATCHETT & SONS LTD. v. PACIFIC GREAT EASTERN RY. CO.

Locke J.

degree in which the company has made provision for the accommodation of the goods traffic of the place, taken as a whole, and must be such as it is within the power of the company to grant. *Newry Navigation Co. v. Great Northern Railway Co.*[1]; Lipsett and Atkinson on Carriage by Railway, p. 56. The question as to the liability of a railway company, where it is prevented from affording such facilities by forces entirely beyond its control, has not been considered in any case in England which I have found.

It is unnecessary to decide questions such as this in the present matter, where nothing of this nature affects the question. The disobedience or negligence of employees has never afforded an employer an answer to a claim for the breach of a statutory duty.

In *Groves v. Wimborne*[2], the action was by a worker in a factory for damages for injuries suffered by him, due to the failure of his employer to comply with a section of the *Factory and Workshop Act, 1891,* which required all dangerous parts of machinery to be securely fenced. It was contended for the defendant that the statute did not give a right of action to the plaintiff but merely subjected the employer to a fine, and a further defence raised was that the injury had resulted from the negligence of a fellow servant and the doctrine of common employment was sought to be invoked. Rigby L.J. said in part (p. 411):

> Where a duty of this kind is cast upon a person, he cannot be heard to say that he has delegated the performance of it to some other person, and that the failure to perform it arose through the negligence of that other person.

In the judgment of A. L. Smith L.J. it was pointed out that there being an unqualified statutory obligation imposed upon the defendant it was no answer to an action for breach of that duty to say that it was caused by his servant's negligence, the defendant being unable to shift his responsibility for the performance of a statutory duty to another person.

That a person upon whom a statutory duty is imposed cannot escape liability by saying that he had employed another competent person to discharge it, is shown by such

[1] (1889), 7 Ry. & Can. Tr. Cas. 176.
[2] [1898] 2 Q.B. 402, 67 L.J. Q.B. 862, 79 L.T. 284.

cases as *Hole v. Sittinghourne and Sheerness Ry. Co.*[1], *per* Pollock C.B.; *Hardaker v. Idle District Council*[2]; *Watkins v. Naval Colliery Co.*[3] and *Lochgelly Iron and Coal Co. v. McMullan*[4].

In the latter case, damages were claimed in respect of the death of a miner, through the failure of his employer to comply with certain requirements of the *Coal Mines Act* designed to insure the safety of such workmen. It was held by the House of Lords that the failure of the employer to comply with the Act disclosed a case of personal negligence of the employer, so that the remedy was not confined to the provisions of the *Workmen's Compensation Act* and Lord Atkin said (p. 8):

> in an action founded on a breach of such a duty the doctrine of common employment has no application, for the duty is imposed upon the employer, and it is irrelevant whether his servants had disregarded his instructions or whether he knew or not of the breach.

Lord Wright said in part (p. 23):

> In such a case as the present the liability is something which goes beyond and is on a different plane from the liability for breach of a duty under the ordinary law apart from the statute, because not only is the duty one which cannot be delegated but, whereas at the ordinary law the standard of duty must be fixed by the verdict of a jury, the statutory duty is conclusively fixed by the statute.

At the time of these events, s. 518 of the *Criminal Code* read:

> Every one is guilty of an indictable offence and liable to two years' imprisonment who, by any act or wilful omission, obstructs or interrupts, or causes to be obstructed or interrupted, the construction, maintenance or free use of any railway or any part thereof, or any matter or thing appertaining thereto or connected therewith.

The so-called pickets were also guilty of a succession of trespasses on the right-of-way of the railway company and liable to prosecution and punishment under the terms of s. 4 of the *Trespass Act,* R.S.B.C. 1948, c. 343.

Section 295 of the *Railway Act* declares that any person acting for or employed by a railway company who does, causes or permits anything to be done, or omits to do any

[1] (1861), 6 H. & N. 488 at 497, 30 L.J. Ex. 81, 3 L.T. 750.
[2] (1896), 1 Q.B. 335, 65 L.J.Q.B. 363, 74 L.T. 69.
[3] [1912] A.C. 693.
[4] [1934] A.C. 1.

1959

PATCHETT & SONS LTD. v. PACIFIC GREAT EASTERN RY. CO.

Locke J.

matter or thing required to be done on the part of the company shall be guilty of an offence against the Act. Section 296 declares that any such refusal or failure shall be held to be an offence committed by the company. Penalties may be imposed for such breaches of the statute.

When McNamee and the engineer and fireman approached the switch on the afternoon of October 28, they already had their instructions from the chairman of the unions of which they were members. They had been told by the messages of October 16 and 19 that they were not required to pass and were not to pass through any picket line established by the I.W.A. and Harris' message had told them that:

> Great care should be taken that picket lines should not be crossed and that picket lines are established in the proper place.

These were orders to the men from their union officers. On October 29, Robinson had sent the message to the superintendent at Squamish and which, it may properly be assumed, was communicated to the members of his union that all mills in Quesnel had been "declared hot". This included the appellant's and the other 8 or 9 mills at Quesnel, where there was no strike. All that McNamee and the train crew did was to establish the fact that there were men sent there by the I.W.A. as pickets, and then, in pursuance to their instructions, they retired. There is no evidence that there was any violence at Quesnel at any time.

The messages sent on October 16 and 19 by the chairman of the two unions instructed their members to commit acts which were in breach of the provisions of s. 295 of the *Railway Act*. These instructions were given in reference to the situation existing at Stoner and Red Rock, as there was no strike at Quesnel when they were sent, but they were understood and acted upon as applying to Quesnel. Robinson's message of October 29 went farther.

In view of the long established reputation in Canada of the international unions representing the running trades for fidelity to their contracts and obedience to the law, it must be assumed that these officers thought that the portion of the constitution quoted by Robinson was not contrary to the law of Canada. This may be accounted for by the fact that the headquarters of that particular

union are in Cleveland, Ohio, and, as is shown by the judgment of Van Oosterhout J. in the case of *Meier and Pohlmann Furniture Co. v. Gibbons et al*[1], there is a provision in the *Labour Management Relations Act* of the United States which specifically recognizes the right of an employee to refuse to cross a picket line legally established against an employer other than his own, where his contract of employment so provides. That is not the law of Canada in the case of employees of railways employed in the operation of trains. There is no evidence as to the terms of the employment agreements between the respondent company and these unions which were in effect at the time but, as any agreement by the railway company which would purport to limit in any way its statutory obligations under ss. 203 and 222 of the *Railway* Act would be invalid, Wills Jr. in *Rishton v. Lancashire, supra,* it may safely be assumed that there was none.

I would add further that it should be assumed in favour of Robinson and Harris that they were not aware that the action of the so-called pickets in interfering with railway operations was a criminal offence for which the offenders might be sent to the penitentiary.

I have said that most of the evidence tendered for the respondent in this case was, in my opinion, irrelevant. The situation would have been different had the respondent company, as it might have been advised to do, taken third party proceedigs against McNamee and the crew who refused to do their duty, the I.W.A. pickets, Robinson and Harris who directed and counseled McNamee and the train crew to disregard their obligations to their employers under their contracts of employment and under s. 295 of the *Railway Act,* the unions concerned if they were legal entities and, if they were not, after obtaining an order for representation under Order 16, Rule 9, against those persons who were members of the union at the time of these events, for indemnity against any damages and costs awarded against the respondent, and for any costs incurred

[1] (1956), 233 Fed. 296 at 301.

1959

PATCHETT & SONS LTD. v. PACIFIC GREAT EASTERN RY. CO.

Locke J.

by reason of the action. An order of this nature was made against members of a trade union in *Cotter v. Osborne*[1] and in *Tunney v. Orchard*[2].

But there is no such claim. The only matter with which the case is concerned is the occurrences at Quesnel between October 28 and November 5, and the evidence as to what occurred at Stoner and Red Rock merely obscures the issue. The only relevance of the evidence as to threatened violence at these places 60 miles and more distant and at an earlier date was to explain the actions of the union officers in issuing these ill-advised instructions to the members of their unions. To the issues in this action it was completely irrelevant, in my opinion.

I have reviewed all of the evidence, both relevant and irrelevant, in much greater detail than has been done in the reasons delivered in the Court of Appeal, so that the exact nature of the issues to be determined may be made abundantly clear.

The obligations imposed upon railways in British Columbia by ss. 203 and 222 of the provincial *Railway Act* and upon the transcontinental railways by s. 312 of the *Railway Act* of Canada were enacted for the protection of the interests of the general public who require the services of these carriers. They were not enacted for the benefit of the railway companies or their employees. This fact seems to have been ignored in the present matter by the respondent, as well as by the officers of the unions concerned.

All of the shares of the respondent company are owned by the Crown in the right of the Province, and its directors are the nominees of the provincial Government. I would assume that the serious situation which existed at Quesnel was not referred to or considered by the directors. The matter was apparently left in the hands of Egan. One would think, to read the evidence, that there had been a general breakdown in the administration of justice in the Cariboo country in October 1953. Nothing could be further from the truth.

[1] (1909), 18 Man. R. 471.
[2] (1953), 9 W.W.R. (N.S.) 625, 631.

Thus, we find Egan asking the officers of the I.W.A. for their permission to enable the respondent to discharge its statutory duty to the mills at Stoner and Red Rock and agreeing that, if their pickets would cease to commit the criminal offence defined by s. 518 of the *Criminal Code* "until Tuesday", the railway company would refuse to deliver cars to the mills at those places.

Speaking of this arrangement, Coady J.A. said:

> It is true that having observed these conditions he negotiated with the I.W.A. for the removal of certain cars of loaded lumber from one mill, but this cannot be considered as a surrender but rather the prudent and common sense thing to do in the circumstances.

I am unable, with respect, to agree with this statement. It appears to me to be clear that in making it the learned judge had not considered the effect of s. 518 of the *Criminal Code.*

As I have pointed out, Egan failed to disclose in his evidence the fact that he had agreed with the I.W.A. that, if they would cease to obstruct the railway operations at the mills in Stoner and Red Rock for a short period, the railway would thereafter cease to spot empty cars there. Consequently, full details of that arrangement are lacking. It was Stewart, the superintendent, who gave evidence later in the case, who disclosed that such an agreement had been made.

If it was either an express term of the arrangement or if it was one that should be implied that, in consideration of the union pickets ceasing their unlawful activities for a time, the company would not prosecute them for the criminal offences that they had committed earlier, the agreement was one to compound a felony—in 1953 a criminal offence at common law. *R. v. Burgess*[1]. The offence is now made criminal by s. 121 of the new Code. If there was no such agreement to refrain from prosecuting, either express or implied, at the very least the arrangement constituted a very grave dereliction of duty on the part of the acting general manager.

The question does not affect any issue in the present case and anything said as to it, either in the Court of Appeal or in this Court, is *obiter.* However, lest some

[1] (1885), 16 Q.B.D. 141, 55 L.J.M.C. 97, 53 L.T. 918.

1959

PATCHETT & SONS LTD. v. PACIFIC GREAT EASTERN RY. CO.

Locke J.

railway official in the future might think that it is the law of Canada that offences of this nature may be compounded, I have thought well to state what the law is.

The evidence as to what occurred at these places, while otherwise irrelevant, at least serves to demonstrate how completely this senior officer of the railway company misconceived the nature of its statutory obligations. He appears to have thought that the company was helpless when by the messages of October 16 and 19 Robinson and Harris ordered the employees to disobey the lawful orders of the company and to commit breaches of their duties under s. 295 of the *Railway Act*. The orders given to the men were to refuse to cross any picket line established by a nationally recognized union. This was not dependent on their being prevented by violence or threats of violence from doing their duty or whether or not there was a strike at the plant where cars were to be delivered. When Robinson by his message of October 29 "declared hot" all of the mills in Quesnel as well as elsewhere in the area, Egan did nothing, though he knew that no strike existed at 8 or 9 of the plants in Quesnel. We are not really concerned with his actions at Stoner and Red Rock, but he apparently failed to consider the situation at Quesnel apart from the occurrences 60 miles and more distant.

As to the actions taken by the union officers, the effect of the messages of October 16, 19 and 29 was not merely to advise but to order their members to disobey the orders of their employer and to ignore their duty under the *Railway Act*. Harris' message of October 19 not merely gave this order but instructed the men to see that "picket lines are established in their proper places", which in this case was at the switch on the main line of the Pacific Great Eastern Railway Company. This was directing them to take part in actions which were criminal in their nature and contrary to s. 518 of the *Criminal Code*. As the message of October 16 sent by Robinson discloses on its face, a copy of it was sent to the president of the I.W.A. and as the message from Harris of October 19 shows, he intended to advise the I.W.A. what they were doing, thus informing the union, which was responsible for the unlawful acts

committed at Quesnel a few days thereafter, that the railway employees intended to support them in the strike. The three chairmen who signed the message of November 2 sent to Egan, informed the respondent that, even though the injunction granted, presumably to the White company at Stoner, enjoined the picketing of the plant, the men would not discharge their duty. Evidently, there was a change of heart as to this as they did so, promptly, three days later when the *mandamus* was made in this action by Clyne J. As to McNamee, he not only obeyed the instructions of the union officers not to pass what he apparently thought was a picket line, but collaborated with the so-called pickets in seeing that they were in their "proper position" on the right-of-way of the main line of the respondent company. No doubt McNamee thought, in view of his instructions from the union officers, that these were lawful actions, but he was mistaken.

Quesnel is a town of some 1,500 inhabitants and there is a local registry of the Supreme Court of British Columbia at that place where process may be issued. Had an action been commenced by the railway company to restrain the illegal interference with its operations on October 28, an application could readily have been made in Vancouver on that day or, at the latest, the day following, for an *interim* order. The area is policed by the Royal Canadian Mounted Police. The arrest of the pickets upon a charge under s. 518 of the *Criminal Code* would have immediately stopped the interference with the respondent's operations. When the appellant obtained a *mandamus* on November 5, directing the respondent to carry out its statutory duties, the pickets disappeared. There are competent lawyers practising in Quesnel who could have advised the railway officers immediately on October 28 of the unlawful nature of the actions of the I.W.A. pickets. All these facilities were available but the respondents' officers folded their hands and did nothing.

In the reasons for judgment delivered by Coady J.A. the following appears:

> Counsel for the respondent has urged that there was no reasonable effort made in the present case to give the service. He submits that it was the duty of the railway company to have taken proceedings for an injunction against these picketers who were preventing the appellant from

1959

PATCHETT & SONS LTD. v. PACIFIC GREAT EASTERN RY. CO.

Locke J.

rendering the service which the statute imposed. I think it can be said with much greater force and much greater cogency that a greater duty fell upon the respondent to obtain such an injunction. It was the respondent's positive right that was being interfered with; the right to ship its products over the appellant's lines. The appellant's right to an injunction may be very doubtful. The picketing was on the spur line on the respondent's property, and the appellant could only apply for an injunction on the ground that these pickets were preventing the appellant from rendering a service which the statute imposed.

With great respect, the statement that the picketing was on the spur line on the respondent's property is directly contrary to the evidence. A photograph, exhibit 1, filed at the hearing, was marked by the witness Zamluk to show the location of the switch where the spur line, part of which was on the appellant's property, jointed the main line of the respondent's railway. Of necessity, this switch was at the point on the main line right-of-way where this junction was made and the spur line ran from this point along the right-of-way on to the appellant's property where the planing mill stood, and continued for a short distance past that mill. McNamee, who was the only witness for the respondent that gave evidence on the point, said that when on October 28 he and the train crew proposed to take the engine into Patchett's property the two pickets were at the switch. In answer to a question by the trial judge, he said that on October 31 they were "at the switch, near the switch" and that on November 2 the pickets were standing near the crossing, right near the switch. On cross-examination, he said that he first recognized the men as being pickets when they walked over to the switch and that always, when with an engine they came from the south towards Quesnel, these pickets would be standing waiting for the train at the switch. The witness Rye said that he saw the pickets crossing over to the railway crossing nearly every day, usually when there was a train or a switching engine going by. Jennison said that on November 4 they were at a point 20 feet from the track south of the switch. Evidence was given that on one occasion the crew of the planing mill went over to speak to these pickets, apparently to protest against their presence, and met them at the railway crossing, There is no evidence to support the statement that the pickets stationed themselves on the appellant's property at any time.

In the passage I have quoted, the learned judge, considering that the pickets had stationed themselves on the respondent's property, said that the appellant's right to an injunction might be doubtful. While this is *obiter* and deals with a situation that did not exist, I respectfully express my dissent from this statement. On the contrary, had the pickets stood on that portion of the spur line situate on the appellant's property and impeded the operation of the engine, the railway company's right to an injunction would be, in my opinion, unquestionable.

It has been said in argument before us that, for some reason, it was for the appellant to take steps to enjoin the interference with its operations. It was, however, upon the respondent that the statutory obligation lay and it was upon its property that the so-called pickets trespassed and impeded or prevented the operation of the engine. It is the respondent that is charged with breaches of its statutory duty and to say that the right of action of the appellant is affected by its failure for a week to commence an action to compel the respondent to discharge its duty or to prosecute the pickets for the trespass on the right-of-way or under s. 518 of the *Criminal Code* is the equivalent of saying that the action of *Groves against Lord Wimborne* should have failed because the former had not brought an action to compel his employer to install the guard required by the provisions of the *Factory Act,* and that, for the like reason, the action of *McMullan against the Lochgelly Iron and Coal Company* should have failed because the employee had not taken steps to compel the employer to comply with the safety provisions of the *Mines Act.* If, as apparently was thought in the Court below, the pickets had been trespasing on the Patchett property, the argument that it was for the appellant to restrain that trespass might have had some validity, apart from the criminal aspect of the matter. But when the facts are proven to be as above stated, that these unlawful acts took place upon the right-of-way of the main line of the railway, the contention is not arguable, in my opinion. It, at least, has the distinction of being unique as no such argument has ever been advanced in any reported case in Canada or England that I have been able to discover.

1959

PATCHETT & SONS LTD. v. PACIFIC GREAT EASTERN RY. CO.

Locke J.

Upon this evidence the learned trial judge made the following findings of fact:

The defendant takes the position that it instructed its crew to spot empties at the plant of the plaintiff and pull loaded cars therefrom but that its crew refused to obey instructions and that it anticipated that if it dismissed its crew for disobedience it would have had to dismiss the replacing crew for similar disobedience, and that, in the end, it would have had a general strike of the Running Brotherhoods on its hands. The clear fact is that it never put the matter to the test. The disobedient employees were not dismissed. The evidence does not warrant the conclusion that the railway crew were in real fear or that anything was done by the crew or any one on behalf of the defendant to dissuade the I.W.A. from doing that which it had no right to do. There was no general strike by the I.W.A. They did not picket all the plants in the relevant area. The Court is not concerned with evidence of violence or threatened violence at plants fifty or sixty miles to the North.

In my view the evidence does not justify the conclusion that the Quesnel railway crew was motivated by fear of violence at the plant of the plaintiff on the part of the I.W.A. pickets nor does the evidence justify the conclusion that the Chairman of the Running Brotherhoods were in fear of violence to members of the railway crew at Quesnel. The real truth of the matter is that the railway men wanted to give support to another "nationally recognised organization", see Ex. 2. In other words, the Railway Brotherhoods went on a sympathetic strike, that is a local or partial one.

The defendant did not take any steps to obtain an injunction to restrain intimidation or violence of which there was some at plants some sixty miles to the North which might have interfered with the fulfilment by the defendant of its statutory duties, nor did the mill operators. The attitude of the defendant and of the operators was a lamb-like one, except for the plaintiff who did take proceedings. The fact that the law was being broken was seemingly of no importance to the defendant.

Robinson's letter of October 16 (Ex. 2), after quoting Article 16, Section 2, clause F of the Constitution of the Brotherhood of Locomotive Firemen and Enginemen which does not purport to be limited in its operation to cases where firemen are in fear of violence, contains the clear cut declaration that the I.W.A. is a nationally recognized organization and that their pickets will be respected. A copy of that letter was sent to the president of the I.W.A. That very fact is significant. In effect it was an intimation to the I.W.A. that in respect of the mills the firemen would strike in sympathy with the I.W.A.

Malone was inviting the trainmen to desist from servicing the mills despite the orders of their employer on the assumption that there would be a breach of the law. On the same assumption Harris instructed that picket lines should not be crossed if pickets were in the "proper place". The phrase "proper place" was said to mean in a place sufficiently close to enable recognition of them as pickets. He recognizes the duty of trainmen to move loaded cars which have been billed by the railway company and warns that it is up, to the strikers to prevent the loading of the cars. Nothing could be clearer than that it was no real fear of

violence that was motivating the railway brotherhoods. The real motive was to give active cooperation to the I.W.A. in the conduct of its strike, "Pickets or no picket" (vide Exs. 4 & 31A).

The defendant employer must accept responsibility for the conduct of its employees. It was not for the defendant to hoist the white flag and surrender at the behest of its employees. As pointed out above it never made any pretence of testing out the situation. It confined itself to issuing instructions which the railwaymen simply ignored.

The defendant did not according to its powers and within a reasonable time spot empties and pull loaded cars of the plaintiff. It evaded giving bills of lading within a reasonable time on loaded cars. Furthermore, in spotting empties and pulling loaded cars of Western Plywood Co. Ltd. while it failed to do so for the plaintiff it was guilty of discriminatory conduct. Althogether, it failed to discharge its clear statutory duties as set forth in the sections of the Railway Act above quoted.

Davey J.A., quoting from the reasons delivered by the trial judge finding that it was not fear of violence that induced the Quesnel railway crew to disobey their orders and that the real truth of the matter was that the railway men wanted to give support to another nationally recognized organization, and further, that "nothing could be clearer than that it was not fear of violence that was motivating the railway brotherhoods", was of the opinion that these findings should not be disturbed.

Neither of the learned judges who considered that the appeal from the judgment at the trial should be allowed referred to the orders given by Robinson and Harris to the members of their unions or to the fact that the actions of the so-called pickets were criminal in their nature and punishable under s. 518 of the *Criminal Code*. Coady J.A., who considered that these pickets had been conducting their operations on the appellant's property, was of the opinion that, if there was a duty to take action to enjoin the activities of the pickets, that duty lay upon the present appellant, and said that the railway company's right to an injunction might be very doubtful. But this opinion was expressed on the footing that, contrary to the evidence, the pickets were not actively trespassing on the main line of the railway at the switch and at the crossing at the Johnson Road, as proven by the evidence of McNamee and Zamluck. Sheppard J.A., who did not deal with the evidence in detail, said:

On the facts the plaintiff has not established that the defendant railway has failed to act reasonably or within a reasonable time under the circumstances.

1959

PATCHETT & SONS LTD. v. PACIFIC GREAT EASTERN RY. CO.

Locke J.

When all of the facts proven in evidence are, as I have attempted to do, stated in detail, they appear to me to demonstrate the accuracy of the findings of fact made by the learned trial judge. Indeed, when the evidence is analyzed, the defence is reduced to this: that because McNamee said that he was frightened in consequence of a remark made to him upon the streets of Quesnel by an unindentified person who subsequently appeared as one of those contravening s. 518 of the *Criminal Code* on the morning of October 29, and remained presumably in a state of fear, the respondent was excused from the performance of its statutory duty. As pointed out by Sankey J. in *Hackney Borough Council v. Doré*[1], fear is a term relative to the courage or embarrassment of the person who experiences it. We are not told what caused the engineer and fireman to retire from the appellant's premises on the morning of October 28 or, if they were afraid, what they were afraid of. Presumably McNamee, who was the yard foreman, instructed them to take the engine away. The learned trial judge has found that it was not fear but the orders from the respective chairman of the unions, including the message of October 29 sent by Robinson, that was the reason for the refusal of the train crew to pass this so-called picket line. Far from finding anything in this record to raise any doubt as to the accuracy of that conclusion, it is completely supported by the evidence. Once McNamee ascertained that the men were I.W.A. pickets, he at once withdrew and, when the pickets were not in their proper position to impede the operation of the railway, he chided them for their failure to be there.

It is well, in my opinion, that this case should have been brought before this Court so that the law, as it affects railway companies, their employees and trade unions of which the employees are members, in circumstances such as these should be declared. It is not the law of British Columbia, and it never has been, that the employees of railway companies may decide for themselves whether and under what circumstances they will discharge their obligations under s. 295 of the *Railway Act* and under their contracts of employment. Trade unions in which

[1] [1922] 1 K.B. 431 at 437, 91 L.J.K.B. 109, 126 L.T. 375.

such employees are organized may not decide that their members will not move railway equipment necessary for the fulfilment by their employers of the obligation to furnish reasonable facilities through picket lines established around premises where a strike is in progress. The statutory duty rests upon the company to provide such facilities and upon the employees to render the services necessary to comply with that duty. The right of the public to insist upon such facilities is not to be limited or taken away either by any action of the employees or by the lack of resolution of the officers directing the railway companies' operations. The obligation is imposed upon both by the legislature of the province and it is only that body that can change the law.

It is said that, if the respondent had insisted upon the men doing their duty, there would have been a strike called by the unions, but there is nothing in the record to support this. There was no threat of a strike. Had there been such a threat, it would not have afforded any answer to the appellant's claim. It was held in *Hackney Borough Council v. Doré, supra*, that the threat of a strike or the apprehension of a strike did not excuse the council for a failure to supply electricity where the order imposing liability excused performance when prevented by *force majeure*. Is it to be said that such a threat—if there had been one—or such apprehension—if such existed—excused the failure to discharge a statutory duty? The conduct of the men in this case was of the same character as that found to be "wilful misconduct" within the meaning of that expression in the Standard Terms and Conditions of Carriage 1927 in *Young v. British Transport Commission*[1]. Since when has the wilful misconduct of employees in disobeying lawful orders afforded an excuse to an employer for failure to discharge a statutory duty? If it does, Lord Atkins erred in his statement of the law in the *Lochgelly Iron* case which I have quoted.

Even were the obligation imposed upon the railway merely to make reasonable efforts to afford the facilities—which is not the language of the statute—the evidence discloses a complete failure to make such efforts, in my opinion.

[1] [1955] 2 Q.B. 177, 2 All E.R. 98.

1959

PATCHETT & SONS LTD. v. PACIFIC GREAT EASTERN RY. CO.

Locke J.

I would allow this appeal with costs in this Court and in the Court of Appeal and direct that judgment be entered against the respondent for damages in the amount suggested by Davey J.A.

CARTWRIGHT J. (*dissenting*):—I agree with the reasons and conclusion of my brother Locke and have little to add.

If, contrary to my view, the duty of the respondent under the relevant sections of the *Railway Act* of British Columbia were only to make reasonable efforts to furnish the facilities required by the appellant and consequently the test of liability were, as put by Coady J.A., "whether or not every reasonable effort was made to supply the service in the circumstances", I would none the less, for the reasons given by my brother Locke and those given by Davey J.A., reject the respondent's defence, on the ground that the evidence shows that it did not make reasonable efforts in the circumstances.

In this regard, I wish to stress particularly the failure of the respondent's responsible officers to make it plain to Robinson that in issuing the circulars of October 16 and October 19, quoted in the reasons of my brother Locke, he was counselling the members of his union to commit, and was himself committing, breaches of s. 295 of the *Railway Act* of British Columbia and of s. 518 of the *Criminal Code*. There is, as is pointed out by Lord Atkin in *Evans v. Bartlam*[1], no presumption that everyone knows the law, and the evidence of Robinson is that he was not aware that the instructions he had given counselled a breach of these sections. The Court cannot presume that Robinson would have persisted in the course he followed if he had realized its illegality. I think it probable that had his attention been directed to the statutory provisions mentioned above he would have consulted the legal advisers of the union and have desisted from directing breaches of the law. It is conceivable that such an attempt to persuade Robinson to observe the law would have been without result; but I do not think that the respondent can be heard to say that it "made every reasonable effort" when its responsible officers did not even make the attempt suggested.

[1] [1937] A.C. 473 at 479.

The argument that the appellant cannot succeed because it had it in its power to remove the obstruction to the giving of the service and failed to take appropriate action, should, in my opinion, be rejected for the reasons given by my brother Locke and particularly on the ground that such obstruction as did exist was neither in fact nor in law a sufficient cause for the respondent's failure to "spot" the cars as requested, even on the assumption that its duty was limited to making every reasonable effort to do so. Indeed the argument comes close to being reduced to an absurdity when it is observed that the only action which was eventually taken by the appellant, and which proved immediately effective, was to apply to the Court for an order requiring the respondent to perform its statutory duty. Other considerations might well arise if in fact there had existed an obstruction to the giving of service, insurmountable so long as it continued, which it was in the power of either or both of the parties to remove.

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

ABBOTT J.:—The facts and the relevant statutory provisions are set out in the reasons to be delivered by other members of the Court and I need not repeat them.

I am in agreement with the views expressed by Coady and Sheppard JJ.A. in the Court below[1] and by my brother Rand that the statutory duty imposed upon the respondent is not an absolute duty but is only a relative one to provide service so far as it is reasonably possible to do so.

The evidence makes it abundantly clear that in the autumn of 1953 a very disturbed labour relations situation existed in central British Columbia affecting the lumber operators situated on the line of the respondent railway company running south from Prince George to Quesnel. Many concerns in that area were strike bound—although some were not affected—and it is also clear that the union concerned, the I.W.A., and its sympathizers were engaging in illegal picketing, intimidation and other objectionable and illegal practices.

[1] (1958), 23 W.W.R. 147, 11 D.L.R. (2d) 52, 76 C.R.T.C. 27.

1959

PATCHETT & SONS LTD. v. PACIFIC GREAT EASTERN RY. CO.

Abbott J.

The officers of the railway company were aware of the situation, had been keeping in constant touch with developments and had also been in contact with the officers of the railway brotherhoods of which its employees were members.

The picketing operations at the appellant's plant unquestionably interfered with the discharge by the respondent of its statutory duty to provide cars to appellant for the transportation of its products and it may be that the circumstances were such that the respondent railway company, as well as the appellant, would have been entitled to invoke the assistance of the law to prevent these illegal practices. In my opinion, however, the respondent was under no obligation to ascertain whether or not picketing against a particular firm was or was not illegal. When an industrial plant is picketed in an illegal manner, I agree with the view expressed by Coady J.A. and by my brother Rand that the primary responsibility for taking such legal action as may be necessary to have the pickets removed rests upon the owners of the plant whose operations are those primarily affected.

The evidence makes it clear to me that during the seven or eight days that the appellant's plant was picketed, the officers of the railway company endeavoured by methods of persuasion to overcome the difficulties and to avoid resort to legal proceedings. In my opinion they were acting reasonably in so doing. Had appellant felt that a comparatively short delay in effecting the shipment of its products was injurious to its interests, it was on the spot, in possession of all the relevant facts and, as I have said, had a primary responsibility to take such legal proceedings as might be necessary to enforce its rights.

I would dismiss the appeal with costs throughout.

JUDSON J.:—I agree with the conclusions of my brothers Rand and Abbott that this appeal should be dismissed. While it is obvious that there was interference with the switching operations into the appellant's plant by the mere presence of the pickets at or around the switch, coupled with union instructions to the railway employees not to pass them, nevertheless it was the appellant's plant that was the primary object of the attention of the pickets and,

in the circumstances, I think that the primary responsibility for the removal of the obstruction must rest with the appellant. It is also my opinion that the railway's statutory obligation under s. 203(1)(*c*) is not an absolute but a relative one, as defined in the reasons of my brother Rand.

I would dismiss the appeal with costs.

Appeal dismissed with costs, Locke *and* Cartwright JJ. *dissenting.*

Solicitor for the plaintiff, appellant: A. W. Johnson, Vancouver.

Solicitors for the defendant, respondent: Clark, Wilson & Co., Vancouver.

THE CANADIAN CREDIT MEN'S TRUST ASSOCIATION LIMITED as Trustee in Bankruptcy for T. L. Cleary Drilling Company Ltd. (*Defendant*) ..... APPELLANT;

1958
*Nov. 12, 13
1959
Jan. 27

AND

BEAVER TRUCKING LIMITED (*Plaintiff*) ..... RESPONDENT;

AND

THE CALIFORNIA STANDARD COMPANY (*Garnishee*).

ON APPEAL FROM THE COURT OF APPEAL FOR THE PROVINCE OF MANITOBA

Bankruptcy—Garnishment—Monies paid into Court—Rights of garnishor and trustee in bankruptcy—Whether garnishor a "secured creditor"—The Bankruptcy Act, R.S.C. 1952, c. 14, ss. 2(r), 41(1), 42(2), 43(2), 86, 95(2).

Section 41(2) of the *Bankruptcy Act* provides that every receiving order and every assignment "takes precedence over all . . . garnishments . . . except such as have been completely executed by payments to the creditor or his agent, and except also the rights of a secured creditor".

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

1959

CANADIAN CREDIT MEN'S ASSOC. LTD. v. BEAVER TRUCKING LTD. *et al.*

The plaintiff caused to be served a garnishing order upon the garnishee who paid the money into court. The defendant subsequently made a voluntary assignment in bankruptcy, and the trustee in bankruptcy and the plaintiff each claimed the money which was still in court. The trustee's claim was dismissed by a local judge in chambers whose decision was affirmed by a judge of the Court of Queen's Bench. This judgment was in turn affirmed by a majority in the Court of Appeal, which held that the plaintiff was a "secured creditor". The trustee appealed to this Court.

Held: The appeal should be allowed and payment out of the monies in court should be made to the trustee. The plaintiff did not fall within either of the exceptions to s. 41(1) of the *Bankruptcy Act*.

Per Locke J.: The meaning to be assigned to s. 41, as it applies to the present case, is plain. In the clearest terms, it is provided that the assignment shall take precedence over a garnishment, except where such has been completely executed by payment to the creditor or his agent. Here, no such payment was made. If the service of a garnishing order creates an equitable charge upon the debt in favour of the garnishing creditor, and if such a charge falls within the definition of a secured creditor in s. 2(*r*) of the Act, it must be taken that since the rights of garnishing creditors have already been dealt with they are not included in the expression "the rights of a secured creditor" in the concluding words of s. 41(1). *Galbraith v. Grimshaw*, [1910] 1 K.B. 343.

Per Cartwright, Fauteux, Martland and Judson JJ.: The provisions of s. 41(1) are clear, and even a literal interpretation does not lead to the conclusion reached by the majority in the Court of Appeal. The compelling inference is that whoever the secured creditor may be whose rights are excepted from the operation of the section, he is not the attaching or garnisheeing creditor whose position has already been fully dealt with. The intention is to ensure the distribution of the debtor's property in accordance with the Act and not according to the execution procedures mentioned in the section, all of which are brought to an end when bankruptcy supervenes unless they have been completed by payment. It must be concluded, therefore, that judgment creditors who have made use of the execution procedures set out in s. 41(1) are subject to the provisions of the Act unless they have been paid, that they do not come within the class of secured creditors mentioned in the exception, and that they are not secured creditors under the Act as defined in s. 2(*r*).

APPEAL from a judgment of the Court of Appeal for Manitoba[1], affirming a judgment of Monnin J. Appeal allowed.

J. S. Lamont, Q.C., and *N. H. Layton*, for the defendant, appellant.

No one appeared for the plaintiff, respondent.

LOCKE J.:—This is an appeal from a judgment of the Court of Appeal for Manitoba[1], pursuant to leave granted by that Court from its judgment dismissing the appeal

[1] (1958), 25 W.W.R. 669, 37 C.B.R. 60.

taken by the present appellant from an order of Monnin J. by which an appeal from an order of His Honour Judge Buckingham, local judge for the Western Judicial District, was dismissed. The Chief Justice of Manitoba, with whom Schultz J.A. agreed, dissented and would have allowed the appeal.

The facts to be considered in dealing with the matter are as follows:—On November 5, 1956, the respondent commenced an action against T. L. Cleary Drilling Co. Ltd. for the recovery of the sum of $2,282.50 and caused to be served a garnishing order upon the California Standard Company, a debtor of the Cleary company. On February 9, 1957, the garnishee paid into the Court of Queen's Bench at Brandon the sum of $2,282.50. On May 13, 1957, default judgment was signed in the action against the Cleary company for the amount claimed and taxed costs. On June 18, 1957, that company made a voluntary assignment in bankruptcy, in the statutory form, to the Canadian Credit Men's Trust Association Ltd.

On November 18, 1957, the trustee applied for payment out of the amount so paid by the garnishee and which was then in court and, contemporaneously, the present respondent made an application for payment out to it and both motions were by consent heard together by the local judge. By an order dated December 16, 1957, the application by the trustee was dismissed and it was ordered that the amount in court be paid out to the Beaver Trucking Co. Ltd.

Proceedings were stayed on this order, pending an appeal to a judge of the Court of Queen's Bench by the present appellant and, as stated, that appeal was dismissed by Monnin J. on February 28, 1958, in a considered judgment. The reasons for judgment of the majority of the Court of Appeal were delivered by Tritschler J.A.

Section 41 of the *Bankruptcy Act*, R.S.C. 1952, c. 14, so far as it is relevant to the present appeal, reads:

> Every receiving order and every assignment made in pursuance of this Act takes precedence over all judicial or other attachments, garnishments, certificates having the effect of judgments, judgments, certificates of judgment, judgments operating as hypothecs, executions or other process against the property of a bankrupt, except such as have been completely executed by payment to the creditor or his agent, and except also the rights of a secured creditor.

1959

CANADIAN CREDIT TRUST ASSOC. LTD. v. BEAVER TRUCKING LTD. et al.

Locke J.

(2) Notwithstanding subsection (1), one solicitor's bill of costs, including sheriff's fees and land registration fees, shall be payable to the creditor who has first attached by way of garnishment or lodged with the sheriff an attachment, execution or other process against the property of the bankrupt.

It is in reliance upon the first of these subsections that the trustee claims that the moneys in court should be paid to it for distribution among the creditors. The position taken by the garnishing creditor is that, by reason of the service of the garnishing order upon the California Standard Company in advance of the assignment in bankruptcy, it is a secured creditor within the meaning of that expression in s. 41 and, as such, has priority over the trustee's claim.

The expression "secured creditor" is defined in s. 2(*r*) of the Act to mean:

a person holding a mortgage, hypothec, pledge, charge, lien or privilege on or against the property of the debtor or any part thereof as security for a debt due or accruing due to him from the debtor, or a person whose claim is based upon, or secured by, a negotiable instrument held as collateral security and upon which the debtor is only indirectly or secondarily liable.

By Rule 526 of the Queen's Bench Rules, the Court is empowered in the matter of a claim such as that of the present respondent to make an order that all debts, obligations and liabilities owing, payable or accruing due from any person who is indebted or liable to the debtor shall be attached. A form of the order which may be made appears as form 74 in the Appendix to the Rules. The nature of the order, in so far as it might concern the present matter, does not differ from the orders *nisi* authorized by Order 45, Rule 1 of the Rules of the Supreme Court 1883 in England. That rule authorizes the making of an order that all debts owing or accruing due from a third person to the debtor shall be attached to answer the judgment or order.

I refer to these rules since in certain of the cases decided in Manitoba it has been held that a garnishing creditor is, by virtue of the service of a garnishing order, a secured creditor within the meaning of s. 41(1) of the *Bankruptcy*

Act, In re Doyle, (a bankrupt)[1], and on appeal[2], though, as pointed out by Adamson C.J.M., the decision did not turn upon that point.

While, in my opinion, it is unnecessary to decide this question in dealing with the present appeal, I think it should be noted that *Ex parte Joselyne*[3], relied upon in coming to the above conclusion, dealt with a bankruptcy matter under the *Bankruptcy Act 1869,* (Imp.). It was there decided that a judgment creditor who before the filing of the bankruptcy petition had obtained a garnishee order *nisi* attaching debts due to the debtor was a secured creditor within the meaning of ss. 12 and 15 of that Act. Neither in the sections referred to nor elsewhere in the Act of 1869 is there any provision such as that portion of s. 41 which expressly states that an assignment takes precedence over all judicial or other attachments and garnishments and, with great respect, I think the decision does not affect the question to be decided here.

In my opinion, the meaning to be assigned to s. 41, as it applies to the present case, is plain. In the clearest terms it is provided that the assignment shall take precedence over a garnishment, except where such has been completely executed by payment to the creditor or his agent. Here, no such payment was made. The moneys were paid into court to the credit of the cause and remain there.

If, as is stated by Farwell L.J. in *Galbraith v. Grimshaw*[4], the service of a garnishing order creates an equitable charge upon the debt in favour of the garnishing creditor and, if such a charge falls within the definition of a secured creditor in the *Bankruptcy Act,* it must be taken that, since the rights of garnishing creditors have already been dealt with, they are not included in the expression "the rights of a secured creditor" in the concluding words of the subsection.

If there were ambiguity in the language of the first subsection of s. 41, and I think there is none, it would be necessary for us to construe it in the manner directed by

[1] (1957), 22 W.W.R. 651, 36 C.B.R. 141.
[2] (1958), 23 W.W.R. 661, 36 C.B.R. 134.
[3] (1878), 8 Ch. D. 327, 38 L.T. 661.
[4] [1910] 1 K.B. 339 at 343.

1959

CANADIAN CREDIT TRUST ASSOC. LTD. v. BEAVER TRUCKING LTD. *et al.*

Locke J.

s. 15 of the *Interpretation Act,* R.S.C. 1952, c. 158, and to give to it such interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit. The purpose of the *Bankruptcy Act* and of all bankruptcy legislation in Canada and in England is to assure that, in the case of insolvent debtors, their assets shall be divided fairly among their creditors, having due regard to the position of persons such as mortgagees who, having advanced moneys upon the security of assets of the debtor, are to be afforded the rights of secured creditors, and to those claims which are by statute entitled to preference.

Section 86 and those sections immediately following it declare the position of secured creditors and define the extent to which they are entitled to priority. Subject to such rights and to preferences to which other claims such as those of the Crown may be declared to be entitled and the costs and expenses of the trustee, it is the purpose of the Act that the creditors shall rank *pari passu* upon the estate. The construction of the Act contended for by the respondent in the present matter would mean that a creditor sufficiently alert to bring an action and attach moneys owing to a debtor on the brink of insolvency may thereby obtain preference over other creditors who refrain from bringing actions, for the amount of his claim in full and not merely for his costs, as provided by s. 41(2). This, in my opinion, is directly contrary to the intent and purpose of the *Bankruptcy Act,* and any such contention should be rejected unless the language of the Act should require it in the clearest terms.

I would allow this appeal with costs against the respondent in the proceedings before the local judge and before Monnin J. and the Court of Appeal. In the circumstances, the trustee's costs of this appeal should be paid out of the moneys paid into court by the garnishee and no order for costs be made against the respondent. The balance remaining in court should be paid to the appellant.

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

JUDSON J.:—A judgment creditor and the trustee in bankruptcy of the judgment debtor are in competition here for monies in court paid in pursuant to a garnishee order issued by the judgment creditor. When the bankruptcy occurred the plaintiff already had a default judgment, the money had been paid into court by the garnishee but no move had been made for payment out. When the plaintiff moved after the bankruptcy of the judgment debtor, it was met with a counter-motion by the trustee, who claimed that the bankruptcy had precedence over the attachment under the terms of s. 41 of the *Bankruptcy Act*, R.S.C. 1952, c. 14, subs. (1) of which reads:

> Every receiving order and every assignment made in pursuance of this Act takes precedence over all judicial or other attachments, garnishments, certificates having the effect of judgments, judgments, certificates of judgment, judgments operating as hypothecs, executions or other process against the property of a bankrupt, except such as have been completely executed by payment to the creditor or his agent, and except also the rights of a secured creditor.

The trustee in bankruptcy is the appellant before this Court from a judgment awarding the money to the judgment creditor.

Until the concluding phrase of the section "and except also the rights of a secured creditor", words could not be plainer. The claim of the trustee prevails over that of the judgment creditor under any of the execution procedures mentioned unless there has been payment to the creditor or his agent. It is not sufficient that the fund may have been stopped in the hands of the garnishee or that it may be in court subject to further order or even subject to payment-out on an order already issued. Nor does it matter when the money was attached or paid into court or what the status of the action may have been when bankruptcy supervened. The only question is—has the execution procedure been completed by payment to the creditor or his agent?

In the judgment under appeal, the Court of Appeal[1] has held that the section has no such operation because a judgment creditor who has caused a garnishee order to

[1] (1958), 25 W.W.R. 669, 37 C.B.R. 60.

1959

CANADIAN CREDIT TRUST ASSOC. LTD. v. BEAVER TRUCKING LTD. et al.

Judson J.

be served is a secured creditor. After specific and clear directions concerning the rights of the garnisheeing creditor and the trustee in bankruptcy, it is held that the section has said nothing because the creditor whose position and rights are defined and limited in the first part of the section is the same creditor who is removed from its scope and put within the exception.

Only the plainest language could compel an interpretation which produces this conclusion and I do not think that this compulsion exists in the present case. With all respect to the majority opinion in the Court of Appeal, I agree with the dissenting opinion expressed by Adamson C.J., that the provisions of the section are clear and that even a literal interpretation does not lead to the conclusion reached by the majority. To me the compelling inference is that whoever the secured creditor may be whose rights are excepted from the operation of the section, he is not the attaching or garnisheeing creditor, whose position has already been fully dealt with. The intention that I find plainly expressed is to ensure the distribution of the debtor's property in accordance with the *Bankruptcy Act* and not according to the execution procedures mentioned in the section, all of which are brought to an end when bankruptcy supervenes unless they have been completed by payment.

There are subsequent sections which carry out this intention and reinforce my conclusion. These sections, also, would be without meaning if the judgment under appeal is correct. Although under s. 41(1) the execution creditor must give way to the trustee in bankruptcy, by the next subsection the one who has first attached by way of garnishment or lodged a writ of execution with the sheriff gets his solicitor's bill of costs paid and this is done in accordance with the priorities established in s. 95(*g*). Next there is provision in s. 42(2) for delivery to the trustee of any property of the bankrupt under execution or attachment, and finally, by s. 43(2), the trustee is enabled to have himself registered as the owner of any land "free of all the encumbrances or charges mentioned in s. 41(1)".

My conclusion, therefore, is that judgment creditors who have made use of the execution procedures set out in s. 41(1) are subject to the provisions of the *Bankruptcy Act* unless they have been paid, that they do not come within the class of secured creditors mentioned in the exception, and that they are not secured creditors under the *Bankruptcy Act* as defined in s. 2(*r*).

The same conclusion is involved in *Royal Bank of Canada v. Larue*[1], which held, affirming a judgment of this Court[2], that a judicial hypothec upon the real property of the bankrupt was postponed to an authorized assignment under the *Bankruptcy Act*. When *Larue* was decided, the exception which has given rise to difficulty in the present litigation had already come into the Act, having been enacted by 1921, 11-12 Geo. V., c. 17, s. 10. I cannot find any distinction between the present s. 41(1) and the legislation upon which the decision in *Larue* was founded, which would in any way impair the authority of that case. There was no suggestion either in the judgment of this Court or in the reasons of the Privy Council that the exception took the Bank as holder of a judicial hypothec outside the scope of the first part of the section. The result was that the priority of the trustee in bankruptcy, established by the section, attached for all purposes, including distribution of the proceeds according to the priorities established by the *Bankruptcy Act*. The recent decision of the Saskatchewan Court of Appeal in *Re Sklar and Sklar (Bankrupt)*[3] upon the present s. 41(1) is to the same effect. These two judgments had to do with the position of a judgment creditor who had issued execution against land but under the terms of the section, there is, in my opinion, no possible distinction between the result that must follow from this procedure and procedure by way of attachment or garnishment of debts.

I am also in respectful agreement with Adamson C.J. that there was no authority in the Province of Manitoba which bound the Court of Appeal to hold that a judgment creditor who had served a garnishee order was a secured creditor under the *Bankruptcy Act*. This finding is based

[1] [1928] A.C. 187.
[2] [1926] S.C.R. 218, 7 C.B.R. 285, 2 D.L.R. 929.
[3] (1958), 26 W.W.R. 529, 15 D.L.R. (2d) 750.

1959

CANADIAN CREDIT TRUST ASSOC. LTD. v. BEAVER TRUCKING LTD. et al.

Judson J.

upon the judgment in *Kare v. North West Packers Limited et al*[1], which was not a bankruptcy case and involved no determination of rights under s. 41(1) of the *Bankruptcy Act*. The contest there was between a garnisheeing creditor and a receiver appointed by a group of bondholders, seeking to enforce a floating charge. The judgment of the Court of Appeal awarded the money to the garnisheeing creditor on the ground that he was a secured creditor under the Queen's Bench rules at the time when the floating charge crystallized.

The next case was *McCurdy Supply Company Limited v. Doyle*[2], affirmed without reasons[3], which gave priority to a judgment creditor who had garnisheed a mortgage debt over a subsequent assignee of the mortgage. Again, no question concerning the effect of s. 41(1) of the *Bankruptcy Act* was involved but this matter did come up when Doyle went into bankruptcy a short time later. There were then three parties competing for the money, the garnisheeing creditor, the assignee of the mortgage and the trustee in bankruptcy of Doyle; *Re Doyle (A bankrupt): McCurdy Supply Company Ltd.*[4] and on appeal[5]. The mortgage had been assigned for full value prior to bankruptcy and no attack was made on the propriety of that transaction. Therefore, whatever the position of the garnisheeing creditor may have been, whether that of secured creditor or not, there was a much more serious obstacle in the way of the trustee in bankruptcy. There was no property to pass to him because the bankrupt had made a complete assignment of the mortgage prior to bankruptcy. As pointed out by Adamson C.J. in his reasons in the present case, anything said about the position of the garnisheeing creditor was *obiter* and unnecessary to the decision, and the prior assignment of the mortgage was a complete answer to the trustee's claim.

In litigation concerned solely with the position of the garnisheeing creditor under s. 41(1) of the *Bankruptcy Act* it is unnecessary to enquire further into the authority

[1] (1955), 63 Man. R. 16, 14 W.W.R. (N.S.) 251, 2 D.L.R. 412.
[2] (1957), 64 Man. R. 289.
[3] (1957), 64 Man. R. 365.
[4] (1957), 22 W.W.R. 651, 36 C.B.R. 141.
[5] (1958), 23 W.W.R. 661, 36 C.B.R. 134.

1959

CANADIAN CREDIT TRUST ASSOC. LTD. v. BEAVER TRUCKING LTD. et al.

Judson J.

of *Kare v. North West Packers Limited* as a determination of rights between such a creditor and the holder of a floating charge seeking to enforce his security, and although I express no opinion on this matter, these reasons should not be taken as an indirect affirmation of the principle of that decision.

The appeal should be allowed and an order made directing payment out of the monies in court to the trustee in bankruptcy. In the circumstances, the trustee's costs of this appeal should be paid out of the fund and there should be no order for costs against the respondent. In the Courts below the trustee is entitled to an order for costs against the respondent.

Appeal allowed.

Solicitors for the defendant, appellant: Lamont & Layton, Winnipeg.

Solicitor for the plaintiff, respondent: A. B. Rutherford, Virden.

1958

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1959

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LOUISE LAMB (*Plaintiff*) .....APPELLANT;

AND

PAUL BENOIT, CHARLES FORGET AND CHARLES NADEAU (*Defendants*) ..... } RESPONDENTS.

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

Damages—Action against police officers for false imprisonment and malicious prosecution—Jehovah's Witnesses—Distribution of literature—Defence of prescription—The Magistrate's Privilege Act, R.S.Q. 1941, c. 18, ss. 5, 7—The Provincial Police Act, R.S.Q. 1941, c. 47, ss. 24, 36—Civil Code, art. 1053.

The plaintiff, a Witness of Jehovah, was arrested in 1946, while she was distributing pamphlets at a street-corner in Verdun, Quebec. Three other members of her sect, who were at the other three corners of the intersection, were arrested at the same time while distributing

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

1959

LAMB
v.
BENOIT *et al.*

a pamphlet called "Quebec's Burning Hate" which was considered seditious at the time. There was no evidence that the plaintiff was distributing that particular pamphlet. She was detained in gaol over the week-end and was later offered her freedom in exchange for a release of all liability for her detention. When she refused to sign the release, she was charged with publishing and as being a party to a conspiracy to publish the pamphlet "Quebec's Burning Hate". She was freed at her preliminary hearing, and later brought an action for damages against the police officers who had arrested and charged her. The main defence pleaded by the three defendants was that the action, having been instituted more than six months after the arrest, was prescribed. The trial judge dismissed the action. This judgment was affirmed by the Court of Appeal.

Held (Taschereau, Fauteux and Abbott JJ. dissenting in part): The action against the defendant Benoit should be maintained and the damages assessed at $2,500.

Held further, per curiam: The action against the defendants Nadeau and Forget should be dismissed.

Per Kerwin C.J. and Rand, Cartwright and Judson JJ.: The arrest and prosecution, as the Court of Appeal found, were quite without justification or excuse. The real defence was that the action was not started within six months, as required by the *Provincial Police Act* and the *Magistrate's Privilege Act*. Both statutes apply to police officers, but while the latter requires good faith on the part of the officer, the former does not mention that condition. The limitation of the six months' prescription to acts done "in good faith" in s. 7 of the *Magistrate's Privilege Act* was nevertheless a condition of the limitation under s. 24 of the *Provincial Police Act*. The meaning in s. 24 of "an act done . . . in his official capacity" was no different from the meaning of "anything done by him in the performance of his public duty" in s. 5 of the *Magistrate's Privilege Act* or "of his duty" in s. 7 of the same Act. An honest mind, intent on enforcing the law, and belief in facts justifying arrest, are essential elements in the performance by an officer of his public duty or of any act done "in his official capacity". The words "in good faith" in s. 7 are, in relation to s. 5, words of amplification not limitation, explicative not qualifying. That state of mind is as applicable to police officers under s. 24 as under s. 7.

In the case of the defendant Benoit, there was lacking that state of mind necessary to the benefit of the limitation under either s. 7 or s. 24, and his defence must be rejected.

In the case of the defendant Nadeau, he took no part in instituting the proceedings and it has not been shown that he was a party to the arrest.

In the case of the defendant Forget, it was clear that he took no part in the arrest or the imprisonment. As to the claim for malicious prosecution, assuming that the law in Quebec was that an action could be maintained against a defendant who had acted without malice provided he had acted without reasonable and probable cause, this Court, in the particular circumstances of this case, should not interfere with the view of the judges of the Courts below that Forget did not act without reasonable and probable cause.

1959

LAMB v. BENOIT *et al.*

Per Locke and Martland JJ.: The action against Nadeau should be dismissed. He was not a party to the detention or in the laying of the charge. As to the unlawful arrest, the proper inference to be drawn from the evidence was that he believed in the existence of facts which would justify the arrest, and there was nothing to support the charge that he acted maliciously or in bad faith. The claim was, therefore, prescribed by s. 24 of the *Provincial Police Act*. *Beatty v. Kozak*, [1958] S.C.R. 177, 195.

As to the defendant Forget, he did not have a *bona fide* belief in the facts which could have justified his conduct as was required in order to invoke the *Provincial Police Act*. However, he was not a party to the arrest and the evidence did not show clearly that the false imprisonment resulted from the laying of the information. As to the claim for malicious prosecution, although neither of the statutes relied upon applied when malice was established, this Court was not justified upon the evidence in reversing the finding of the trial judge that Forget had not acted maliciously.

As to the defendant Benoit, his conduct was from the outset unlawful, and neither of the statutes relied upon applied to the claim for false arrest, false imprisonment, or malicious prosecution. The statutes were each to be construed in the same manner as the *Public Authorities Protection Act*, 1893, 56-57 Vict. (Imp.), c. 61, which required good faith. The Quebec statutes were based upon the earlier English statutes to the same effect as the *Public Authorities Protection Act*, 1893, which merely declared the law as stated in the numerous decisions upon the earlier statutes, and they were subject to the same rules of construction.

As to the claim for malicious prosecution against Benoit, neither statute had any application. *Newell v. Starkie* (1920), 89 L.J.P.C. 1; 26 Halsbury, 2nd ed., p. 497. It was impossible to sustain a contention that there was any reasonable or probable cause for the arrest, imprisonment or prosecution, and as to malice, the evidence disclosed that he was actuated by indirect and improper motives.

The cases decided in England interpreting the *Public Authorities Protection Act*, 1893, and the earlier Acts to the same effect, were to be considered in deciding the interpretation which was to be given to s. 24 of the *Provincial Police Act*. Section 41 of the *Interpretation Act* of Quebec and s. 15 of the *Interpretation Act* of Canada were simply restatements in statutory form of what was said in the judgment of the Barons in *Heydon's* case (1584), 3 Co. Rep. 7(b), which has been applied in England for more than 300 years.

Per Taschereau, *dissenting in part*: The claim against Nadeau and Forget should be dismissed. They committed no fault which could have engaged their liability under art. 1053 of the *Civil Code*.

As to the defendant Benoit, whether he committed a delict by acting intentionally or a quasi-delict by his negligence or imprudence in the exercise of his official capacity, the service of the action was made late and the action must therefore be dismissed.

The whole case turns upon the civil law of Quebec as found in art. 1053 of the *Civil Code* and upon s. 24 of the *Provincial Police Act* which is a special Act of provincial origin enacted after the coming into force of the *Civil Code*, the supreme authority in the matter. That statute governs the police force and prevails over the *Magistrate's*

1959

LAMB
v.
BENOIT *et al.*

Privilege Act, and presupposes a fault under art. 1053 of the *Civil Code.* The action under art. 1053 is normally prescribed by two years; but the Legislature has enacted that if a police officer has acted in his official capacity that prescription was to be reduced to six months. The only condition precedent was that the officer had acted in his official capacity; good faith on his part was not required. Whether Benoit committed a fault in acting recklessly without reasonable and probable cause, he nevertheless acted in his official capacity. Forfeitures, such as found in the statute here, are imperative and cannot be suspended or interrupted. Consequently even if the action had been served on the other defendants within the time limit, it could not serve as an interruption as regards the defendant Benoit. Furthermore, the prescription could not be interrupted in that way because the action was dismissed as against the other defendants.

Per Fauteux J., *dissenting in part*: The action against the defendants Nadeau and Forget should be dismissed. This Court should not modify the unanimous judgment of the Court of Appeal that none of the acts invoked against them by the plaintiff constituted a fault engaging liability.

The action against the defendant Benoit should also be dismissed because service of it was not effected within the six months prescribed by s. 24 of the *Provincial Police Act.* This was an action claiming damages, in a delictual matter, against an officer of the provincial police. Obviously, the dispositions of the *Civil Code* applied. Under art. 1053 of the *Civil Code,* it is sufficient to give the right of action that the act causing damage be illicit; malice is not required. The laying of an information under conditions authorized by the penal law cannot constitute an illicit act. All that is required under the penal law is the belief in the guilt based on reasonable and probable causes. In this view there is no conflict between the civil law of Quebec as to the action in damages for malicious prosecution and the Canadian public law conditioning the right to lay an information. The incidence of malice not being required under the public law, the public law cannot be invoked as modifying the private law, or to contend that Parliament has considered essential for the prosecution of the crime that the absence of malice be *per se* an absolute defence in a civil action for malicious prosecution.

Section 24 of the *Provincial Police Act,* the origin of which was provincial, reduced to six months the prescription of two years generally applicable in the case of actions for damages resulting from delicts or quasi-delicts. This reduction is not based on reasons characterizing the simple prescription but, being part of the very character of the law enacting it, on the intention of the legislature to establish, for reasons related to the administration of the police force, a stipulated delay. Good faith on the part of the officer is of no moment. The prescription is an absolute bar to the action, if the officer acted in his "official capacity". There was no doubt that all the acts done by Benoit were done in his "official capacity".

Per Abbott J., *dissenting in part*: The action against the defendants Nadeau and Forget should be dismissed since, as found by the Court below, they committed no fault.

1959

LAMB v. BENOIT *et al.*

The action against the defendant Benoit should also be dismissed. In placing the plaintiff under arrest and in causing the complaint to be lodged, Benoit was acting "in his official capacity" although such actions were to his knowledge completely unjustified. The right of action in damages such as that asserted here is a civil right and must be founded upon the law in force in Quebec—in this case art. 1053 of the *Civil Code*. The extinguishment of any such right of action by prescription is similarly governed by the law of Quebec and unless s. 24 of the *Provincial Police Act* is applicable that right of action would be prescribed by two years. Benoit was not entitled to avail himself of the special protections and limitation of action provided by the *Magistrate's Privilege Act*, since he was not acting in good faith. However, the language of s. 24 of the *Provincial Police Act*, the provisions of which are said to prevail over those of every other general or special Act, is clear and has the effect of substituting a prescriptive period of six months for the normal period of two years. The prescriptive period of two years applies whether or not the defendant has acted in good faith and with reasonable and probable cause. There are no grounds to limit the period of six months, provided for in s. 24, to those cases in which a police officer has acted in good faith and with reasonable and probable cause.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], affirming a judgment of Montpetit J. Appeal allowed, Taschereau, Fauteux and Abbott JJ. dissenting in part.

W. Glen How, for the plaintiff, appellant.

Honourable Gustave Monette, Q.C., for the defendants, respondents.

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

CARTWRIGHT J.:—The relevant facts are set out in the reasons of other members of the Court and I will refer to them only so far as is necessary to make clear the reasons for the conclusion at which I have arrived.

The appellant asserts two causes of action, false imprisonment and malicious prosecution.

As to Nadeau, I agree that the appeal fails. He took no part in instituting the proceedings against the appellant and consequently is not concerned in the claim for malicious prosecution. In regard to the claim for false imprisonment, for the reasons I am about to state, I have, although not

[1] [1958] Que. Q.B. 237.

1959

LAMB
v.
BENOIT *et al.*

Cartwright J.

without some hesitation, reached the conclusion, in agreement with my brother Rand, that Nadeau was not a party to the arrest of the appellant.

The learned trial judge makes no express finding as to what was said by Nadeau to the appellant. It is not suggested that he used any force or threat of force or that he touched the appellant; and up to the point when the appellant arrived at the door of the automobile in which Benoit was seated the findings made by Pratte J. in the following passage appear to me to be in accordance with the evidence[1]:

> Le samedi, 7 décembre 1946, Benoit se rend à Verdun avec quatre gendarmes, sur l'ordre de son supérieur, le capitaine Labbé, pour y surveiller les activités de certains Témoins de Jehovah au sujet de qui des plaintes avaient été reçues à la Sûreté. Ayant aperçu, à l'intersection des rues Church et Wellington, quatre jeunes filles (une à chaque coin du carrefour) qui offraient des tracts aux passants, il donne ordre à Nadeau de les lui amener. Celui-ci s'approche des jeunes filles et les prie discrètement de le suivre, disant que quelqu'un désire leur parler. Elles acquiescent de bonne grâce, et dès qu'elles sont rendues à la voiture de Benoit, qui est stationnée tout près du carrefour, Nadeau s'en retourne au quartier-général.

However, the appellant testified that when she arrived at the automobile Nadeau not merely requested but ordered her to get into it. I will proceed on the assumption that if this evidence be accepted it would warrant a finding that Nadeau arrested the appellant. Miss Best, who was present and was called as a witness by the appellant was not questioned on this point. Nadeau denied having asked the appellant to get into the automobile. Benoit testified that it was he (Benoit) who asked the appellant and the other young women to get in. Every witness other than the appellant who was questioned on the point said that Benoit and Pelland were the only two police officers who were in the automobile in which the appellant was driven to police headquarters and that Nadeau went back in the other automobile. The appellant testified that the officer who told her to get into the automobile was one of those who rode in the front seat of the automobile in which she was taken to headquarters. On this state of the record, and remembering that the onus of proving that Nadeau took part in her arrest lay upon the appellant, I do not think it would be

[1] [1958] Que. Q.B. at 238.

safe to make a positive finding that it was Nadeau who ordered the appellant to get into the automobile; it seems to me more probable that it was Benoit. This distinguishes the case from *Beatty v. Kozak*[1], relied upon by the appellant, in which it was held that three officers, of whom Beatty was one, acted together in arresting the plaintiff and held her in their joint custody.

The view which I think should be taken as to the facts makes it unnecessary for me to consider the other grounds of defence put forward on behalf of Nadeau on the assumption that he did order the appellant to get into the automobile.

As to Forget also, I agree that the appeal fails.

It is clear that he took no part in the arrest or imprisonment of the appellant, but there remains the question whether he is liable on the claim for malicious prosecution. I was at first of the opinion that he had a good defence to that claim on the ground that in laying the information against the appellant he acted without malice. However, as is pointed out in the reasons of my brother Taschereau, the later decisions of the Court of Queen's Bench appear to hold that the law of the Province of Quebec differs from the English law as to the conditions that must be fulfilled in order that an action shall lie for malicious prosecution.

Under English law the four conditions are as follows:

(*i*) The criminal proceedings must have been instituted by the defendant;

(*ii*) He must have acted without reasonable and probable cause;

(*iii*) He must have acted maliciously;

(*iv*) The proceedings must have terminated in favour of the plaintiff.

The case of *Fabyan v. Tremblay*[2] and the other cases cited on this point by my brother Taschereau appear to hold that in Quebec the third condition need not be fulfilled and an action may be maintained against a defendant who has acted without malice provided he has acted without reasonable and probable cause.

[1] [1958] S.C.R. 177, 120 C.C.C. 1, 13 D.L.R. (2d) 1.
[2] (1917), 26 Que. K.B. 416.

1959

LAMB v. BENOIT et al.

Cartwright J.

The decisions mentioned are contrary to a number of earlier decisions in the Quebec Courts the result of which is accurately summarized in the following passage in Walton—The Scope and Interpretation of the Civil Code of Lower Canada, 1907, at p. 42:

> Questions which concern the relation of the subject to the administration of justice belong to the public law, and are, therefore, governed by the law of England, and not by that of France.
>
> * * *
>
> And it is the English law which decides under what conditions damages are due for false arrest or malicious prosecution.
>
> The plaintiff (i.e. in an action for malicious prosecution) must show that the defendant acted maliciously and without probable cause.

In the case at bar, I do not propose to choose between the two conflicting views set out above as I wish to reserve my opinion on the question until a case arises in which it is necessary to decide it. Its importance is obvious, and the answer to it may well depend on whether the law governing an action for malicious prosecution is considered as a part of the criminal law defining the privilege, or the conditions of immunity, of a citizen who sets that law in motion, in which case it would seem that the law upon the subject should be uniform throughout Canada, or whether it is regarded simply as a branch of the law of torts.

Assuming for the purposes of this branch of the matter that the law to be applied is that laid down in *Fabyan v. Tremblay, supra,* I have with some hesitation, reached the conclusion that, in the peculiar circumstances of this case, we ought not to interfere with the view of the judges in the Courts below that Forget did not act without reasonable and probable cause, when he relied on the statement made to him by Benoit that, after he had consulted with the Crown prosecutor, the latter had directed the laying of the information. The learned trial judge has indicated in his reasons a doubt as to the desirability of the practice said to exist by which a "liaison officer" swears to an information on the advice or instructions of the officer who has investigated the case. I share that doubt. However in the case at bar, where the charges laid were those of publishing a seditious libel and of conspiracy, the officer would of necessity have to be guided by the opinion of the Crown prosecutor.

This conclusion that Forget is free from liability does not leave the appellant without a remedy, for the criminal proceedings against her were instituted by Benoit through the agency of Forget; and, for reasons fully stated by other members of the Court, it is clear that Benoit acted maliciously and without reasonable and probable cause in directing that the information be laid.

As to Benoit, I agree with the reasons and conclusions of my brother Rand and have nothing to add.

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

TASCHEREAU J. (dissenting in part): L'appelante a institué une action en dommages contre les trois intimés et leur a réclamé, conjointement et solidairement, la somme de $5,000. Elle allègue qu'elle fait partie de la secte religieuse connue sous le nom de "Témoins de Jéhovah", et qu'alors qu'elle se tenait au coin des rues Church et Wellington à Verdun, le 7 décembre 1946, elle fut illégalement arrêtée, et conduite au bureau de la Sûreté provinciale à Montréal, où elle fut détenue jusqu'au 9 décembre suivant. A cette même date, une plainte fut logée contre elle pour avoir distribué un libelle séditieux intitulé "Quebec's Burning Hate for God and Christ and Freedom", et pour avoir conspiré avec d'autres pour publier et diffuser dans le public le même libelle séditieux. Le 10 janvier 1947, elle subit une enquête préliminaire, et fut libérée sur le champ par M. le Juge Omer Legrand de la Cour des Sessions de la Paix. Elle a subséquemment poursuivi quatre membres de la Sûreté provinciale qui auraient participé à son arrestation, et à une dénonciation devant les tribunaux correctionnels.

Les défendeurs sont l'officier Charles Nadeau qui a requis l'appelante de venir à la voiture de la Force constabulaire, stationnée non loin; Pierre Pelland qui conduisait la voiture; Paul Benoit qui se trouvait aussi dans la voiture, qui a fouillé sa bourse, qui a ordonné sa détention dans une cellule de la Sûreté; et enfin, Charles Forget qui a signé et assermenté la plainte.

1959

LAMB
v.
BENOIT *et al.*

Taschereau J.

L'honorable Juge Montpetit de la Cour supérieure a débouté la demanderesse de son action pour le motif qu'elle n'avait pas été instituée dans les délais légaux prévus par la loi. L'appelante a inscrit un appel devant la Cour du banc de la reine[1] contre trois défendeurs seulement, omettant d'inclure dans son avis d'appel, Pierre Pelland le conducteur de la voiture. La Cour du banc de la reine a unanimement confirmé le jugement, et c'est de ce dernier qu'il y a appel devant cette Cour.

Il ne fait aucun doute que l'appelante a été l'objet de traitements fort répréhensibles. Après son arrestation, sur l'ordre de Benoit, elle fut écrouée dans une cellule de la Sûreté et y a vécu dans des conditions qu'il me répugne de décrire. Je n'hésite pas à croire qu'elle a dû être profondément humiliée par le traitement dont elle a été la victime. En outre, au cours de cette détention, on lui a offert le compromis de ne pas loger de plainte contre elle et de la libérer, si elle consentait à signer une renonciation à toute réclamation en dommages qu'elle pourrait avoir contre les agents de la Sûreté provinciale. Évidemment, elle a refusé avec raison cette proposition qui révélait de la part des agents la réalisation d'une erreur commise. L'un des intimés, Benoit, dit dans son témoignage que c'est *la routine habituelle* d'obtenir de semblables renonciations de la part des suspects que l'on relâche sans procès.

Comme défense à l'action instituée contre eux, les intimés ont plaidé que les défendeurs ont agi de bonne foi, et n'ont fait que leur devoir en arrêtant la demanderesse, et en portant contre elle une accusation de conspiration pour distribuer un libelle séditieux, et qu'en conséquence ils n'ont encouru aucune responsabilité civile à l'occasion des actes posés par eux dans l'exercice de leurs fonctions. Ils allèguent en outre que les avis donnés aux défendeurs par la demanderesse étaient insuffisants, et ne répondaient pas aux exigences de la loi. Enfin, ils plaident que l'action de la demanderesse a été intentée tardivement, et qu'au moment de son institution elle était prescrite en vertu de la *Loi concernant les privilèges des juges de paix, des magistrats et autres officiers remplissant des devoirs publics,* S.R.Q. 1941, c. 18, et de la *Loi de la Sûreté provinciale et de la police des liqueurs,* S.R.Q. 1941, c. 47.

[1] [1958] Que. Q.B. 237.

Je désire en premier lieu disposer des cas de deux des officiers, intimés dans la présente cause, soit Charles Nadeau et Charles Forget. Le premier, agissant sous les ordres de son supérieur Benoit, est allé, en faisant usage de toute la discrétion possible, demander à l'appelante de le suivre à la voiture où se trouvait Benoit, et l'a priée de monter dans la voiture. C'est son unique participation à cet incident. Comme M. le Juge Pratte de la Cour du banc de la reine, je suis clairement d'opinion qu'il n'a commis aucune faute, et qu'il ne peut être tenu responsable des dommages que l'appelante a pu subir.

Quant à Forget qui a assermenté la plainte, je crois qu'il a agi avec cause raisonnable et probable, en se basant sur des informations reçues d'autres personnes, en qui il avait justement raison de mettre sa confiance. On ne peut exiger de cet *officier de liaison* entre la force constabulaire et les tribunaux, de faire une enquête personnelle chaque fois qu'il doit assermenter une plainte, pour se rendre compte de la véracité des faits qu'on lui rapporte. Cet officier sera à l'abri de toute responsabilité, s'il ne commet aucune imprudence ou négligence dans l'exercice de ses fonctions. Il ne devra aucune réparation civile s'il n'agit pas témérairement. C'est la règle énoncée à l'art. 1053 C.C. qui régit les réclamations de ce genre, et qui doit nécessairement nous guider. Comme le disait Sir Horace Archambeault en prononçant le jugement unanime de la Cour du banc du roi dans *Fabyan v. Tremblay*[1]:

> Autrefois on décidait que c'était le droit anglais qui gouvernait en matière de recours en dommages pour fausse arrestation. Ces décisions étaient basées sur la doctrine que vu que le droit criminel anglais est notre droit, il ne pourrait pas être mis à exécution si les plaignants de bonne foi pouvaient être tenus responsables en dommages pour fausse arrestation.
>
> Cette doctrine n'est plus admise. Notre jurisprudence est aujourd'hui solidement établie en sens contraire; et tout le monde admet maintenant que ce sont les principes du droit civil qui nous régissent en cette matière. On applique à ce cas, comme à tous les autres recours en dommages, la règle de l'article 1053 C.C., qui rend toute personne responsable du dommage qu'elle cause à autrui par sa faute, que cette faute consiste dans son fait, son imprudence, sa négligence ou son inhabilité.

Vide également *Côté v. Côté*[2] *et Prime v. Keiller et al*[3].

[1] (1917), 26 Que. K.B. 416 at 420. [2] (1926), 32 R.L. (N.S.) 344.
[3] [1943] R.L. (N.S.) 65.

1959

LAMB
v.
BENOIT *et al.*

Taschereau J.

Dans le cas qui nous occupe, Forget a pris ses informations de Benoit qui avait consulté l'avocat de la Couronne, et il a logé la plainte dans un temps où l'on considérait les actes reprochés aux "Témoins de Jéhovah" comme séditieux. C'était avant la décision de cette Cour dans *Boucher v. Le Roi*[1].

Ce qui a été décidé dans *Gaston v. Jasmin*[2] s'applique au cas de Forget:

> It is a defence to an action in damages for malicious prosecution that the complainant acted with reasonable and probable cause and that before laying the charge he entrusted the matter to the Chief of Provincial Detectives and took the advice of one of the Crown Prosecutors.

Vide également dans le même sens: *Lalonde v. Ville de Lachine*[3], *Dupuis v. City of Montreal et al*[4] *et Gauthier v. Brodeur*[5].

Je suis clairement d'opinion que Forget ne peut être recherché en dommages comme conséquence de l'acte qu'on lui reproche.

Le cas de Benoit qui a opéré l'arrestation et ordonné l'incarcération de l'appelante dans une cellule de la Sûreté, peut se présenter sous un aspect différent. Je me dispenserai cependant d'analyser la preuve qui concerne cet intimé, et de tirer les conclusions légales qui pourraient découler de ce qu'elle a révélé, vu que je crois que l'action lui a été signifiée tardivement.

En vertu du c. 18 des Statuts Refondus de Québec 1941, qui est la *Loi concernant les privilèges des juges de paix et al,* une certaine protection contre les réclamations en dommages est accordée à ces officiers, et l'art. 7 stipule qu'ils peuvent bénéficier des dispositions du statut, s'ils ont agi de bonne foi. L'une de ces dispositions qui se trouve à l'art. 5, et dont peut conséquemment bénéficier un défendeur de bonne foi, veut que l'action soit instituée *dans les six mois* qui suivent la *commission de l'infraction.* Ces deux articles se lisent ainsi:

> 7. Les juges de paix, officiers ou autres personnes ont droit à la protection et aux privilèges accordés par la présente loi dans tous les cas *où ils ont agi de bonne foi* dans l'exécution de leurs devoirs, bien qu'en faisant un acte, ils aient excédé leurs pouvoirs ou leur juridiction, et aient agi clairement contre la loi.

[1] [1951] S.C.R. 265, 11 C.R. 85, 99 C.C.C.1, 2 D.L.R. 369.
[2] (1928), 45 Que. K.B. 329.
[3] (1912), 18 Que. R.J. 360.
[4] (1913), 44 Que. S.C. 169.
[5] (1926), 64 Que. S.C. 42.

5. Aucune telle action ou poursuite ne peut être intentée contre un juge de paix, un officier ou toute autre personne agissant comme susdit, pour un acte qu'ils ont fait dans l'exécution de leurs devoirs publics, à moins qu'elle ne soit commencée dans les six mois qui suivent la commission de l'infraction.

Une autre loi qui est contenue au c. 47 des Statuts Refondus de Québec 1941, intitulée *Loi de la Sûreté provinciale,* qui s'applique aux membres de la police judiciaire, chargés de la recherche des offenses et infractions criminelles, et des contraventions aux lois de la province; à la gendarmerie chargée du maintien de la paix; à la police de la route, ainsi qu'à la police des liqueurs, est, en vertu de l'art. 36 du même chapitre, une loi qui prévaut sur toute autre loi. Cet article qui est du droit nouveau et qui fait partie du c. 47 en vertu d'un amendement passé en 1938, 2 Geo. VI, c. 76, est ainsi rédigé:

36. Les dispositions de la présente loi prévalent, en cas d'incompatibilité, sur celle de toute autre loi générale ou spéciale.

Il s'ensuit donc que la Sûreté provinciale est régie par une loi spéciale, qui doit nécessairement prévaloir sur les dispositions du c. 18. C'est la conclusion à laquelle en est unanimement arrivée la Cour du banc de la reine, et je m'accorde avec celle-ci sur ce point qui présente une importance capitale pour la détermination du présent litige. L'article 24 en effet contient une disposition qui régit le recours en dommages-intérêts contre les officiers de la Sûreté, *pour les actes qu'ils ont posés en cette qualité.* Cet article ne dit pas qu'ils sont exempts de responsabilité, mais il stipule clairement que l'action doit être instituée dans un délai rigoureux de *six mois.* Si ce n'était de cet article, la demanderesse ne serait déchue de son droit d'action qu'après l'expiration d'un délai de deux ans, en vertu des dispositions de l'art. 2261, para. 2, C.C. L'article 24 se lit ainsi:

24. Toute action dirigée contre un officier de la Sûreté par suite d'un acte qu'il a accompli ou d'une plainte qu'il a portée *en cette qualité d'officier* doit être précédée d'un avis d'au moins trente jours, donné par écrit au défendeur, et intentée dans le district où ledit acte a été posé ou ladite plainte logée.

Cette action se prescrit par six mois.

Comme on peut le constater, à la lecture de l'article ci-dessus du c. 47, et des arts. 5 et 7 du c. 18, il y a de substantielles différences. Ainsi, en vertu des art. 5 et 7 du

1959

LAMB
v.
BENOIT *et al.*

Taschereau J.

c. 18, on exige des officiers, pour qu'ils obtiennent la protection de la loi, *qu'ils aient agi de bonne foi* dans l'exécution de leurs fonctions, tandis qu'en vertu de l'art. 24 du c. 47, tout officier de la Sûreté bénéficie de la prescription de six mois, s'il a accompli un acte ou a porté une plainte *en cette qualité d'officier*.

Dans la cause de *Chaput v. Romain*[1], la question de déchéance ne se présentait que quant à un défendeur seulement. Deux des défendeurs avaient été poursuivis dans les délais légaux, et quant au troisième, Chartrand, cette Cour en est venue à la conclusion qu'il ne pouvait bénéficier des dispositions du c. 18, parce qu'il avait *agi de mauvaise foi.* Ceci était strictement conforme au texte clair et précis de la loi. Il a été de plus décidé par certains membres de cette Cour, que la signification de l'action faite à deux des défendeurs en temps utile, ne pouvait s'appliquer au troisième parce que la forclusion ne peut être interrompue ni suspendue.

Mais dans la cause de *Chaput v. Romain,* la prescription énoncée à l'art. 24 du c. 47 n'a pas été examinée parce que, pour une raison que j'ignore, les défendeurs y ont spécifiquement renoncé, et ont refusé d'invoquer les bénéfices. Dans cette même cause, M. le Juge Kellock a retracé l'origine du statut (c. 18), et un examen des diverses législations l'a conduit à la conclusion que ce chapitre remontait à un statut de 1848 (11 et 12 Vict., c. 44) passé sous l'Union, et qui concernait la protection accordée à certains magistrats. Ce statut s'appliquait au Haut et au Bas Canada, et s'inspirait d'une loi du Parlement anglais de 1750 (*The Constables Protection Act,* 24 Geo. II, c. 44). M. le Juge Kellock a conclu, en conséquence, que c'est ce statut anglais de 1750 qui a servi de fondement au statut canadien, passé sous l'Union, et subséquemment, pratiquement accepté par la Province. Il a donc jugé que le c. 18, s'inspirant du droit anglais, n'accordait aucune protection au défendeur Chartrand parce que ce dernier avait agi sans autorité, avait posé un acte prohibé par le *Code Criminel,* et que la protection en vertu du droit anglais n'est accordée à un magistrat que s'il a agi *de bonne foi* dans l'exécution de ses fonctions. Le c. 18, s'inspirant évidemment de cette

[1] [1955] S.C.R. 834, 114 C.C.C. 170, 1 D.L.R. (2d) 241.

législation, mentionne en toutes lettres *que la bonne foi est un élément essentiel,* pour qu'un magistrat ou un officier public puisse se prévaloir du bénéfice du statut.

Mais le cas qui se présente actuellement n'est pas le même. Il ne s'agit plus du c. 18, mais bien du c. 47, dont les origines sont entièrement de sources différentes. Le premier remonte en effet à 1750, mais le second ne date que de 1870, soit trois ans après la Confédération et quatre ans après l'entrée en vigueur du *Code Civil,* qui est l'autorité suprême en semblable matière.

Il s'ensuit nécessairement que la responsabilité civile de Benoit ne peut reposer que sur l'art. 1053 du *Code Civil,* comme conséquence *d'un délit ou d'un quasi-délit,* si un dommage résulte à autrui, par la faute de l'auteur, soit par son fait, son imprudence, sa négligence ou son inhabilité. C'est ce qui a été décidé dans *Fabyan v. Tremblay, supra,* et maintes fois confirmé par des décisions subséquentes.

Le c. 47 suppose nécessairement une faute découlant de l'art. 1053 de la part du constable. Il faut que ce dernier *ait commis un délit, c'est-à-dire qu'il ait agi avec intention de nuire,* ou *qu'il se soit rendu coupable d'un quasi-délit qui ne suppose pas d'intention,* mais simplement un acte posé témérairement sans cause raisonnable ou probable; autrement, le bénéfice de la prescription serait inutile, car l'action sans l'existence d'une faute ne pourrait réussir.

Qu'il s'agisse donc d'un délit ou d'un quasi-délit, l'action normalement se prescrit par deux ans (2261 C.C.). Cet article dit:

L'action se prescrit par deux ans dans les cas suivants:

(2) pour dommages résultant de délits et quasi-délits, à *défaut d'autres dispositions applicables.*

La dernière partie de cet article *à défaut d'autres dispositions applicables* est d'une grande importance, car il y a ici d'autres dispositions qui s'appliquent au présent cas. Le législateur a voulu en effet, en plaçant dans nos statuts le c. 47, art. 24, qui encore une fois est une loi spéciale, que si un constable a agi *en cette qualité d'officier,* cette déchéance soit réduite à *six mois.* Pour que ce statut trouve son application, il n'est exigé qu'une seule condition, c'est que l'officier ait agi *en cette qualité d'officier.* Il n'est nullement question de *bonne foi* comme dans le c. 18. Dans ce

1959

LAMB
v.
BENOIT *et al.*

Taschereau J.

dernier chapitre, les auteurs de *quasi-délits* seulement bénéficient de la déchéance de six mois, tandis que dans le cas prévu au c. 47, les constables jouissent de la protection du statut, qu'ils aient *commis un délit ou un quasi-délit*. La *bonne foi ou l'intention* n'est pas un élément nécessaire à l'application de la forclusion de six mois, pas plus que s'il s'agissait de l'application de l'art. 2261 C.C., qui limite à deux ans le droit d'action, ou de l'application du droit anglais, qui limiterait à six ans le recours d'une victime dans un cas identique. Dans ces cas, il est indiscutable que la bonne foi est immatérielle, à moins qu'elle soit un élément exigé par la loi, ce qui n'existe pas ici.

Si Benoit a commis une faute en agissant témérairement, sans cause raisonnable et probable, il agissait tout de même *en sa qualité de constable*. C'est évidemment comme constable qu'il a arrêté l'appelante et qu'il a ordonné son incarcération. Son acte imprudent ne fait nullement disparaître cette qualité, et ce n'est pas parce qu'il aurait commis une erreur ou une négligence qui entraînerait sa responsabilité civile, qu'il aurait agi en une autre qualité. C'est précisément à cause de cette faute qu'il aurait commise qu'il est responsable, mais la loi exige que l'action en réparation du dommage qui lui est imputable, soit instituée par la victime dans un délai de six mois, et ce délai est rigoureusement fatal.

L'arrestation en effet a eu lieu le 7 décembre 1946, et la plainte a été assermentée le 9 du même mois. L'action a été signifiée à Benoit le 12 juillet 1947, c'est-à-dire plus de sept mois après la commission des actes délictuels dont on se plaint.

Je ne me propose nullement de donner au texte de la loi, qui est claire et précise, une extension qui serait contraire à la volonté du législateur. Je ne crois pas que l'on puisse importer certaines conditions qui existent dans le c. 18 pour les incorporer dans le c. 47. Sans vouloir professer une exégèse excessive, je crois que les déchéances, ou plutôt les forclusions du genre de celles que l'on trouve à l'art. 24 du c. 47, sont impératives, et ne souffrent aucune suspension ni interruption. C'est l'impérieux devoir des tribunaux de les appliquer dans toute leur rigueur.

On est porté trop souvent à confondre la prescription libératoire d'une obligation civile, avec la forclusion imposée par la Législature. Cette prescription libératoire, par opposition aux délais préfix, est parfaitement distinguée par les auteurs et la jurisprudence. Planiol et Ripert, Droit Civil, vol. 7, 2e éd., p. 818, s'expriment de la façon suivante:

Il faut opposer les délais préfix ou délais emportant déchéance aux prescriptions proprement dites.

L'intérêt de cette distinction concerne d'abord les causes de suspension. Les délais emportant déchéance ne cessent pas de courir contre les mineurs ou les interdits, entre époux pendant le mariage et malgré l'impossibilité matérielle d'agir. Ils ne sont pas non plus susceptibles d'interruption. Par ailleurs, contrairement à la maxime *Quae temporalia sunt ad agendum, perpetua sunt ad excipiendum,* une fois le délai expiré, l'exception elle-même ne pourrait plus être opposée. La déchéance apparaît donc comme une mesure jouant automatiquement et inévitablement au bout d'un certain temps, quelles qu'aient été les circonstances intermédiaires.

Dans Dalloz, Jurisprudence Générale 1934, recueil périodique, p. 33, on lit ce qui suit:

Le délai de trois ans pendant lequel est ouverte l'action en révision de l'indemnité, en matière d'accidents du travail, a le caractère, non d'un délai de prescription, mais d'un délai de forclusion et de déchéance.

Par suite, les causes d'interruption et de suspension de la prescription prévues par le code civil ne s'appliquent pas à ce délai préfixe;

Spécialement, il n'est pas interrompu par une demande de révision formée devant un tribunal incompétent.

Josserand, Cours de Droit Civil, vol. 2, p. 529:

Les délais préfix sont régis par un tout autre statut que celui de la prescription.

1°. Ils ne comportent ni *suspension,* ni *interruption;* par définition même, ils sont préconstitués et ils s'accomplissent au jour dit, fût-ce un jour férié (Rennes, 27 déc. 1930, S. 1931, 2, 69), sans que cette déchéance puisse être conjurée ou différée, même à raison d'un cas de force majeure (Req. 28 mars 1928, S. 1928, 1, 308); la règle *contra non valentem agere non currit prescriptio* est donc sans application en ce qui les concerne;

2°. A plus forte raison, ces délais ne peuvent-ils être modifiés par la volonté des intéressés, pas plus dans un sens que dans l'autre: leur abréviation n'est pas davantage concevable que leur allongement;

Dans Revue Trimestrielle de Droit Civil, 1950, vol. 48, à la page 205, M. Henry Solus écrit ce qui suit:

Aussi comprend-on que poussant jusqu'à son terme la tendance qu'avaient manifestée MM. Ripert et Boulanger en écrivant que la rigueur de la prescription extinctive—telle qu'admise par eux—"l'apparente à un délai préfix", la plupart des auteurs aient écarté catégoriquement la notion de prescription extinctive et aient vu purement et simplement dans le délai de trois ans de l'art. 2279, al. 2, un *simple délai préfix,* à qui ne peuvent et ne doivent point être appliquées les règles ordinaires de la

1959

LAMB
v.
BENOIT *et al.*

Taschereau J.

suspension et de l'interruption de la prescription. Telle est l'opinion d'Aubry et Rau (op. et loc. cit.), de M. Maurice Picard (Planiol et Ripert, op. et loc. cit.), de M. Voirin (Beudant et Lerebours-Pigeonnière, op. et loc. cit.) et de MM. Colin, Capitant et Julliot de la Morandière (op. et loc. cit.) adde sur les délais préfix, la note de M. Voirin, D. 1934. 2. 35.

Au même volume, aux pages 456 et 457, M. Michel Vasseur s'exprime ainsi:

> Aussi rigoureux que les délais de procédure, les délais de forclusion ne peuvent en principe comporter de prolongation, *ni prolongation directe, ni prolongation indirecte.*
>
> a) *L'absence* de toute possibilité *de prolongation directe* des délais de forclusion empêche, ou devrait empêcher, la prise en considération des causes de suspension ou d'interruption des délais de prescription. Peu importe enfin que le bénéficiaire de la forclusion ne puisse justifier d'un préjudice.

Vide également Beudant, Droit Civil Français, vol. 9, p. 151; Baudry-Lacantinerie, Droit Civil, vol. 28, p. 32; Aubry et Rau, Cours de Droit Civil Français, vol. 12, p. 534.

D'ailleurs, dans cette cause de *Chaput v. Romain, supra,* plusieurs membres de cette Cour, appliquant les principes énoncés par les auteurs ci-dessus, ont signalé la profonde distinction qui existe entre la déchéance d'action, qualifiée de délais préfix, et la prescription proprement dite. Ces délais préfix sont régis par un tout autre statut que celui de la prescription. Ils ne comportent ni suspension ni interruption; par définition même, ils doivent s'appliquer au jour dit, sans que la déchéance puisse être différée. Celle-ci est attachée au droit même d'instituer l'action.

Il résulte nécessairement que l'appelante ne peut pas prétendre que l'action, même si elle avait été signifiée aux autres défendeurs en temps utile, constituerait une *interruption* quant à Benoit. De plus, pour que l'interruption, si elle résultait de la signification de l'action aux autres, pût profiter à l'appelante, il eut fallu en vertu des dispositions de l'art. 2226 C.C., que l'action signifiée à Nadeau et Forget dans les délais légaux fût maintenue. En effet, une demande rejetée contre certains des débiteurs solidaires n'interrompt pas la prescription quant aux autres.

Toute la présente cause relève exclusivement du droit civil de la province de Québec, soit de l'application de l'art. 1053 C.C., source de toute responsabilité délictuelle et quasi-délictuelle, et de la forclusion de six mois édictée par l'art. 24 du c. 47 des Statuts Refondus. Cette dernière

loi est une *loi spéciale,* d'origine provinciale, et doit être interprétée restrictivement. Ce serait une erreur de lui donner une extension plus grande que celle que le législateur a voulu lui donner.

S'il est vrai que le c. 18 remonte à un statut impérial de 1750, il n'en est pas ainsi du c. 47 qui, datant de 1870, n'a pas de semblables origines. C'est pour cela que, pour la détermination de cette cause, je ne désire pas m'inspirer des précédents du common law, qui à mon sens, n'ont aucune application, et ne peuvent nous aider à la solution de ce litige.

Dans la cause de *Beattie v. Kozak*[1], cette Cour, interprétant un statut de la province de Saskatchewan, a décidé que quelqu'un qui procédait à l'arrestation d'une autre personne en vertu des dispositions du *Mental Hygiene Act,* devait agir "de bonne foi", s'il voulait bénéficier de la prescription de six mois mentionnée à l'art. 64. Mais cette loi contient une disposition (art. 61), que la protection n'est accordée que si la personne qui procède à l'arrestation a agi "de bonne foi". C'est précisément cette absence de "bonne foi" et de cause raisonnable qui a été la *ratio decidendi* de la majorité de la Cour. Ce statut de la Saskatchewan est, comme on le voit, différent de celui qui est actuellement sous étude.

Pour résumer, je suis d'opinion que l'appel logé contre Nadeau et Forget doit être rejeté, parce que ces derniers n'ont pas commis de faute qui aurait pu engendrer leur responsabilité sous l'empire de l'art. 1053 C.C. Quant à Benoit, s'il a commis un délit en agissant intentionnellement, ou un quasi-délit comme conséquence de négligence, d'inhabilité ou d'imprudence dans l'exercice de *sa qualité d'officier,* l'action lui a été signifiée tardivement, et l'appel doit être également rejeté quant à lui.

On ne peut certainement pas faire revivre une déchéance que prononce la loi civile, en s'inspirant de principes empruntés à une conception légale d'un droit différent qui n'a pas d'application dans la province de Québec. Il n'est pas inopportun de rappeler ici ce qui a été dit par cette Cour dans *Desrosiers v. Le Roi*[2], où les droits d'un tiers

[1] [1958] S.C.R. 177, 120 C.C.C.1, 13 D.L.R. (2d) 1.
[2] (1920), 60 S.C.R. 105, 55 D.L.R. 120.

1959

LAMB v. BENOIT *et al.*

Taschereau J.

vis-à-vis le mandataire et le mandant ont été discutés. On a refusé d'y appliquer les principes du common law qui veut que l'action par le tiers contre l'un empêche le recours contre l'autre, et M. le Juge Anglin, tel qu'il était alors, dit ce qui suit à la page 119:

> This case affords an excellent illustration of the danger of creating English decisions as authorities in Quebec cases which do not depend upon doctrines derived from the English law.

A la page 125, M. le Juge Brodeur exprime les mêmes vues, et à la page 126, voici ce que dit M. le Juge Mignault:

> Avec toute déférence possible, qu'il me soit permis de dire que je ne partage pas l'opinion du savant juge. Si les articles 1716 et 1717 du code civil étaient empruntés à la fois de Pothier et du droit anglais, ce ne serait pas une raison de dire que les principes généraux du droit anglais doivent être adoptés pour résoudre les questions auxquelles ces articles donnent lieu. Je ferais plutôt prévaloir la doctrine de Pothier et de l'ancien droit français, d'autant plus que les codificateurs ne disent pas que ces articles sont *empruntés* au droit anglais, mais, au sujet de l'article 1727 C.C., ils font remarquer que cet article est basé sur l'exposé de la doctrine de Pothier, laquelle, ajoutent-ils, *est d'accord avec* les lois anglaise, écossaise et américaine. Il me semble respectueusement qu'il est temps de réagir contre l'habitude de recourir, dans les causes de la province de Québec, aux précédents du droit commun anglais, pour le motif que le code civil contiendrait une règle qui serait d'accord avec un principe du droit anglais. Sur bien des points, et surtout en matière de mandat, le code civil et le *common law* contiennent des règles semblables. Cependant, le droit civil constitue un système complet par lui-même et doit s'interpréter d'après ses propres règles. *Si pour cause d'identité de principes juridiques on peut recourir au droit anglais pour interpréter le droit civil français, on pourrait avec autant de raison citer les monuments de la jurisprudence française pour mettre en lumière les règles du droit anglais.* Chaque système, je le répète, est complet par lui-même, et sauf le cas où un système prend dans l'autre un principe qui lui était auparavant étranger, on n'a pas besoin d'en sortir pour chercher la règle qu'il convient d'appliquer aux espèces bien diverses qui se présentent dans la pratique journalière.

Dans une cause de *Curley v. Latreille*[1], il a été décidé par M.M. les Juges Anglin, Brodeur et Mignault qui composaient la majorité de la Cour, ce qui suit:

> English decisions can be of value in Quebec cases involving questions of civil law only when it has been first ascertained that in the law of England and that of Quebec the principles upon which the particular subject matter is dealt with are the same and are given the like scope in their application, and even then not as binding authorities but rather as *rationes scriptae*.

Je partage ces vues sans aucune restriction ni qualification.

[1] (1920), 60 S.C.R. 131, 55 D.L.R. 461.

Je suis en conséquence d'opinion que l'appel contre les trois intimés doit être rejeté avec dépens.

The judgment of Rand and Judson JJ. was delivered by

RAND J.:—The facts here are not in dispute. The only material inference urged attempts to charge the appellant through association with three other persons with the distribution of the issue of a publication containing an article headed "Quebec's Burning Hate" alleged at the time to be seditious libel. It is sufficient to say that the inference is quite unwarranted; all four persons were acting individually in distributing such numbers of "The Watch Tower" and "Awake" as might be furnished them. The arrest and prosecution, as the Court of Queen's Bench[1] found, were quite without justification or excuse and the detention of the appellant over the weekend was carried out in a manner and in conditions little short of disgraceful.

The real defence is procedural, that the action was not begun—by service of the writ—within six months as prescribed by two statutes, the *Provincial Police Act*, R.S.Q. 1941, c. 47, s. 24, and the *Magistrate's Privilege Act*, R.S.Q. 1941, c. 18, ss. 5 and 7. The former is as follows:

> 24. Every action against an officer of the Police Force by reason of an act done by him or a complaint lodged by him in his official capacity, must be preceded by at least thirty days' notice to the defendant, in writing, and be brought in the district wherein the said act was done or the said complaint lodged.
>
> Such action shall be prescribed by six months. 4 Geo. VI, c. 56, s. 24.

The latter:

> 5. No such action or suit shall be brought against any justice of the peace, officer or other person acting as aforesaid, for anything done by him in the performance of his public duty, unless commenced within six months after the act committed. R.S. 1925, c. 146, s. 5.
>
> * * *
>
> 7. Any such justice of the peace, officer or other person, shall be entitled to the protection and privileges granted by this Act in all cases where he has acted in good faith in the execution of his duty, although, in doing an act, he has exceeded his powers or jurisdiction, and has acted clearly contrary to law. R.S. 1925, c. 146, s. 7.

[1] [1958] Que. Q.B. 237.

1959

LAMB
v.
BENOIT et al.

Rand J.

Section 2 of c. 18 enumerates the persons embraced within its provisions: "Any justice of the peace, officer or other person fulfilling any public office . . .", and it was not seriously contested that both statutes apply to police officers subject to the effect of s. 36 of c. 47 by which provisions of the *Magistrate's Privilege Act* incompatible with those of the *Provincial Police Act* are overridden; and it is the submission of Mr. Monette that there is such an incompatibility.

Section 24 is said to fix an absolute period of six months for bringing action against a police officer for any act done "in his capacity" as an officer regardless of malice, lack of belief in facts or any other objectionable element or circumstance; that is to say, so long as the act is the kind of act authorized to be done, in this case, arrest, in which the officer objectively purports to exercise his authority and to act as such, the civil proceeding for any wrong done must be brought within six months. This means that "good faith" as found in s. 7 is not a condition of the limitation under s. 24.

These words, "good faith", were examined by this Court in the case of *Chaput v. Romain et al*[1], and the interpretation there given in the factual aspect was this: unless the facts or those honestly believed to be the facts are such as to justify arrest, the officer cannot be said to be acting in good faith. By the judgment of this Court in *Beatty and Mackie v. Kozak*[2], an action commenced after 1949, that interpretation had been made definitive and is now the governing rule for similar language throughout Canada. Is that "good faith" required of police officers in Quebec under s. 24?

What is the meaning in s. 24 of "an act done . . . in his official capacity"? Is it different from "anything done by him in the performance of his public duty" in s. 5 or "of his duty" as in s. 7? An act done in his "official capacity" is surely identical with an act"in performance of his public duty" or his "duty"; if the act is beyond his authority, it cannot be said to have been done in his "official capacity".

[1] [1955] S.C.R. 834, 114 C.C.C. 170, 1 D.L.R. (2d) 241.
[2] [1958] S.C.R. 177, 120 C.C.C. 1, 13 D.L.R. (2d) 1.

I am unable to make any distinction between them; they deal with the same thing, the objective act with its required subjective accompaniments.

Section 5, in prescribing a period of six months for bringing action, is in party with s. 24. Is the effect of s. 7 in specifying good faith to qualify s. 5 by adding that element to it, or does "anything done by him in the performance of his public duty" necessarily imply "good faith"? If an officer maliciously or with no belief in facts justifying arrest proceeds without warrant, can be said to be acting "in performance of his public duty" or in his "official capacity"? I should think that an honest mind, intent on enforcing law, and belief in facts justifying arrest are essential elements in the performance by an officer of his public duty and of any act done "in his official capacity". The words of s. 7, "in good faith", are, in relation to s. 5, words of amplification, not limitation, explicative not qualifying; so interpreted, that state of mind is as applicable to police officers under s. 24 as under s. 7.

Even were that question doubtful, I should come to the same conclusion. Section 5 and s. 24 are procedural benefits which assume a liability for a trespass and which are exceptions from the general limitation of proceedings. Inconsistency between s. 24 and s. 7 in this respect should be clear before such a wide and absolute scope is attributed to s. 24. That was the view taken by the Court of Queen's Bench in *Trudeau v. Kennedy*[1], and with it I am in agreement.

To Benoit it was patent that the appellant was not distributing the issue of the paper containing the alleged libel, nor was there a scrap of evidence on which he could have acted to connect her with the acts of the other three distributors. All this is concluded by what took place at the police station when, in what is said to be the routine practice, Miss Lamb was offered her liberty in exchange for a release of claims, a proposal which she spurned. There was lacking that state of mind necessary to the benefit of the limitation under either s. 7 or s. 24 and his defence must be rejected.

[1] (1938), 42 Que. P.R. 258.

1959

LAMB v. BENOIT et al.

Rand J.

In the case of Nadeau I agree that it has not been shown that he was a party to the arrest. In that of Forget, for the reasons given by my brother Cartwright, I would dismiss the appeal on the ground that reasonable and probable cause was present: but I desire to make it clear that the question of malice has not been considered by me and remains unaffected by these reasons.

In view of all the circumstances, the case is one for substantial damages which I would fix at $2,500.

The appeal against Benoit should be allowed and judgment directed for the appellant in the sum of $2,500 with costs in all courts; the appeal against Nadeau and Forget should be dismissed without costs.

The judgment of Locke and Martland JJ. was delivered by

LOCKE J.:—The appellant, Louise Lamb, was on December 7, 1946, a Minister of the Witnesses of Jehovah and resident at the City of Verdun in Quebec. On that date she was standing at the corner of Church and Wellington Streets in that city, holding in her hands pamphlets called "The Watchtower" and "Awake", publications of the religious body of which she was a member. Her activities apparently consisted of giving copies of these publications to any interested persons passing upon the street. They were described by her as being biblical magazines and their distribution part of the missionary work of the organization. On the other three corners of the intersection three other young women, who were members of the same religious denomination, were standing holding in a similar manner some other publications of the Jehovah Witnesses, making them available to persons passing on the street. Among the publications in the possession of the latter three persons was a copy of the publication "The Watchtower" issued under the date December 8, 1946, which contained an article designated "Quebec's Burning Hate for God and Christ and Freedom" which, as the result proved, was highly obnoxious to large numbers of other residents of the Province of Quebec.

The appellant was not in possession of this latter publication and there is no evidence that she knew of its existence and it is not suggested that the contents of the publications which were in her possession were objectionable in any way. If there was any by-law of the City of Verdun or any other regulation which prohibited the appellant from conducting herself in this manner, we have not been referred to it and it was not proven. The appellant had not gone to the place in question by arrangement with the other three young women and there is no evidence that she was a party to their actions.

While the appellant was thus standing on the street she was approached by the respondent Nadeau, a constable of the provincial police force, who told her that he wanted her to come with him and that there was someone in a motor car nearby who wanted to question her. The same request had apparently been made before this to the other three women and they had complied with it. The appellant followed Nadeau to this car and was instructed by him to get into it. In the car the respondent Benoit was seated, together with another policeman named Pelland, acting as chauffeur.

Benoit is described in the evidence as a special officer of the provincial police and, according to his own evidence, he was in charge of the small party of police officers who went with him to the place in question. According to the appellant, Benoit examined a small hand bag which was in her possession which contained copies of "The Watchtower" and "Awake" and said: "There is nothing here" and that they could let her go. As she was about to step out of the car, however, he asked her to show him her purse and, looking through it, found what was said to be a letter from The Watchtower, Bible and Tract Society to the appellant and, after reading this, he instructed her to stay with them. There is no evidence as to the contents of this document. The party were then driven to the provincial police headquarters in Montreal, where all four were left in charge of the matron. A few minutes later, Benoit, who had left them, returned and informed them that they were to remain in custody over the weekend

1959

LAMB v. BENOIT *et al.*

Locke J.

and they were accordingly placed in a cell, where they were kept until Monday morning, December 9. Benoit signed an order for their detention.

No information had been laid either against the appellant or the others and no warrant had been issued for their arrest. Their fingerprints were, however, taken on the Saturday evening and they were photographed. They were not permitted to telephone, either to a lawyer or to their friends.

On Monday morning, according to the appellant, she was informed that she was to be taken to Court. Before she appeared, however, Benoit told her that he had good news for her, that he had made arrangements to have her released and she was then taken by him to his office in police headquarters. Benoit then informed her that there were "certain formalities" to be complied with in order that she might be released and asked her to sign several slips of paper, three of which were statements to the effect that she would take no action against the provincial police for having detained her. The appellant refused to do this, whereupon he said that if she did not want to sign the releases he would have to charge her with sedition and that it would cost her a lot of money to get out of gaol. Benoit then left her, returning shortly thereafter to enquire if she had changed her mind and would sign the releases and, upon her again refusing, said that he would have to charge her and took her before a judge in his chambers and read the charge which had been laid against her in the meantime by the respondent Forget. Later during the afternoon of the same day she was released on bail.

The information laid by Forget, sworn on December 9, 1946, before a judge of the Sessions of the Peace, stated that the informant had reason to believe and did believe that the present appellant and the three young women referred to had on December 7, 1946, published a seditious libel entitled "Quebec's Burning Hate for God and Christ and Freedom"

by exhibiting it in public, by delivering it from door to door with the view to its being read, the said writing being likely to raise discontent and disaffection among His Majesty's subjects and being likely to provoke feelings of ill will and hostility between different classes of subjects of His Majesty in Canada.

A second charge contained in the information stated that the appellant and the three other women had conspired together and with other persons unknown to publish without legal justification or excuse the seditious libel, to exhibit it in public and to deliver it from door to door, the said writing being likely to raise discontent or disaffection among His Majesty's subjects.

The information, according to the evidence of Forget, was in a form which had been drafted at the City of Quebec for use apparently in proceedings against those distributing literature of Jehovah's Witnesses considered to be objectionable in law as being seditious. Forget, who laid the information at the request and on the direction of Benoit, had not been informed by the latter either that the appellant was exhibiting the publication mentioned or was delivering it from door to door. There is no evidence that the appellant did either and, according to her own evidence, on December 7, 1946, she had done nothing other than to stand offering the unobjectionable publications above mentioned. Benoit had not informed Forget of any facts which could possibly support the charge of conspiracy, which was the second of the two charges made in the complaint. It is sought to support Forget's conduct in this matter by saying that it was the practice of the police authorities concerned to have charges laid in this manner.

On January 10, 1947, the appellant and the three other women appeared before a judge of the Sessions of the Peace and Nadeau and Benoit gave evidence. At the conclusion of the proceedings the complaint was dismissed. Benoit said that he had not found the offending publication in the possession of the present appellant and no evidence was offered in support of the charge of conspiracy.

By a notice dated January 28, 1947, the appellant, through her solicitors, informed Nadeau and Benoit of her intention to bring an action against them for false arrest and for damages, and a like notice was given to Forget by a letter dated February 10, 1947.

The action was commenced on July 10, 1947. The declaration stated the facts in connection with the arrest and detention of the appellant and the information laid against her by Forget which, it was claimed, was done upon the

1959

LAMB v. BENOIT et al.

Locke J.

instructions of Benoit, Nadeau and Pelland, the latter being also named as a defendant, and asserted that the arrest was unlawful and the charges laid and the prosecution conducted without reasonable or probable cause. All of the facts complained of were alleged to have ben done maliciously and in bad faith by the defendants.

The defence filed may be summarized as being that the appellant was one of a group of what were designated in the pleading as "zélateurs" known under the name of the Witnesses of Jehovah, who were engaged in concert in distributing seditious literature of a character calculated to create animosity and discontent among the population.

As to Benoit, it was said that he had acted on the instructions given to him by the representatives of the Crown and all of the defendants asserted that they had acted in good faith in the discharge of their duties as police officers. A further defence pleaded was that all of the defendants having done the acts complained of in the execution of their public duties, the action was barred since it had not been commenced within six months following the commission of the alleged offences.

The defence that the action had not been brought in time is based upon the provisions of chapters 18 and 47, R.S.Q. 1941. The first of these statutes called the *Magistrate's Privilege Act* provides that any officer or other person fulfilling any public duty sued for damages by reason of any act committed by him in the execution thereof may, within one month after the service of the notice mentioned in art. 88 of the *Code of Civil Procedure,* offer to pay a compensation to the party complaining and, if the sum be not accepted, may plead such offer in bar to the action brought against him and deposit the amount offered. Section 5 provides that no such action shall be brought against any such officer "for anything done by him in the performance of his public duty" unless commenced within six months after the act committed. Section 7 provides that such officer shall be entitled to the protection and privileges granted by the Act in all cases where he has acted in good faith in the execution of his duty, although in doing an act he has exceeded his powers or jurisdiction and acted clearly contrary to the law.

The second statute referred to is an *Act relating to the Quebec Provincial Police Force* and, by s. 24, provides that every action against any officer of the police force by reason of an act done by him or a complaint lodged by him in his official capacity must be preceded by at least thirty days' notice in writing to the defendant, and that such action shall "be prescribed by six months". This Act does not contain any provision similar to that contained in s. 7 of the *Magistrate's Privilege Act*, a fact which appears to have been considered as of some significance.

Montpetit J., by whom the action was tried, dismissed it with costs, and that judgment has been upheld by a unanimous judgment of the Court of Appeal[1].

As to the respondent Nadeau, the learned trial judge, while considering that in any event the action should fail as not having been brought within the period of six months following December 7, 1946, was of the opinion that no cause of action was disclosed by the evidence, since he had merely complied with the order of his superior Benoit in approaching the appellant and asking her to come over to the car in which Benoit was seated. The fact that he had told her to get into the car was not mentioned. It had not been shown that Nadeau had taken any part in what occurred thereafter, other than to give evidence at the preliminary hearing on January 10, 1947.

The action against the defendant Pelland was dismissed for the reason that it had not been shown that he had done more than drive the automobile in which the appellant was conveyed to the police headquarters. As the appellant did not appeal against that portion of the judgment dismissing the claim as against Pelland, it does not require further consideration.

As to Forget, the learned judge said:

> Le défendeur Forget est officier de liaison de la Sûreté. Ses fonctions consistent à signer un bon nombre des plaintes de la Couronne (sinon toutes) et à en suivre la marche. Il n'accompagnait pas les autres défendeurs, le 7 décembre 1946. Le seul acte qu'il a posé et qui touche la demanderesse a été, le 9 décembre 1946, d'apposer sa signature au bas de la plainte portée contre cette dernière, et ce, suivant la coutume, en se fiant aux renseignements que ses chefs lui ont fournis. De là il découle que la seule infraction que la demanderesse pourrait reprocher

[1] [1958] Que. Q.B. 237.

1959

LAMB
v.
BENOIT *et al.*

Locke J.

au défendeur Forget a été commise le 9 décembre 1946. Incidemment, la Cour croit devoir signaler ici que, même en admettant, pour fins de discussion, que cette façon de procéder ne soit pas la plus recommandable, surtout pour l'officier de liaison concerné qui s'expose à des ennuis, celui-ci n'a pas agi malicieusement ou de mauvaise foi, mais simplement dans l'exercice normal de ses fonctions.

As to the claim against Benoit, no finding was made in regard to the claim that in arresting the appellant, in bringing about the laying of the charge which contained statements known by him to be false, and in assisting in the prosecution of that charge he had acted maliciously and without reasonable and probable cause, but the learned judge held that the action failed as not having been brought within six months from December 7, 1946, in respect of the claim for false arrest, or within six months of January 10, 1947, in respect of the claim for malicious prosecution, even had Benoit acted in bad faith and maliciously.

The principal judgment in the Court of Appeal[1] was written by Mr. Justice Pratte. As to Nadeau, that learned judge agreed with the judgment at the trial that he had merely executed a legal order of his superior and, in doing so in the manner disclosed by the evidence, had committed no fault. In referring to the evidence, again no mention is made of the fact that, in addition to asking the appellant to come to the motor car in which Benoit had remained, Nadeau had, according to the appellant, told her to get into the car.

Pratte J. further considered that no cause of action was disclosed against Forget. The reasons given for this conclusion are as follows:

> Quant à Forget, sa fonction, au quartier-général de la Sûreté, consistait à porter les dénonciations d'après les rapports faits par les autres officiers. Dans le cas qui nous intéresse, il a porté la dénonciation à la demande de Benoit, après que celui-ci eût affirmé que tel était le désir du procureur de la Couronne. C'est tout ce qu'il a fait; il n'avait pas été mêlé à l'affaire auparavant, et il n'y a pas participé par la suite. Il est vrai qu'il ne s'est pas enquis de la preuve qu'on était en mesure de présenter pour établir l'accusation, mais il n'était pas tenu de le faire; il suffisait qu'il fût croyablement informé des faits imputés à l'appelante. Or, sur ce point, on ne saurait sûrement pas lui reprocher de s'être fié à la parole de son confrère.

[1] [1958] Que. Q.B. 237.

Je dirais donc que Forget n'a commis aucune faute en déposant qu'il avait été croyablement informé que l'appelante s'était rendue coupable de l'acte mentionné dans la dénonciation.

No mention is made of the fact that Benoit had only told him the nature of the complaint that he wished to be made, that is, of a seditious libel, and had not given him the facts regarding the actions of the appellant, though he told him that it was the wish of the Crown prosecutor that a charge be laid. Forget had not consulted and did not consult the Crown prosecutor. Benoit, he said, had given him no special instructions but gave him the names of the persons to be charged, which Forget then caused to be filled in in the form already in his possession, and then signed and swore to the complaint. He knew none of the parties charged, nothing about the circumstances and made no enquiries. Admittedly, the statement in the complaint that he had been credibly informed that the appellant had published the pamphlet referred to in the complaint by exhibiting it in public and by delivering it from door to door was untrue and there were no facts given to him by Benoit or anyone else upon which to base the charge of conspiracy.

As to Benoit, after mentioning the fact that it was contended on behalf of the present appellant that he had not acted in good faith, the learned judge said:

Sur ce point, il me paraît assez clair que l'appelante a raison. Je ne vois pas qu'il soit possible de dire que Benoit a agi de bonne foi dans l'exécution de ses devoirs lorsqu'il a fait porter la dénonciation. Ayant offert sa liberté à l'appelante—à la condition qu'elle signât un écrit qui l'exonérerait de toute responsabilité—il n'est pas raisonnable de penser qu'il la crût coupable. Mais quoi qu'il en soit, le point ne me paraît pas important. En effet, je dirais que, même si Benoit ne doit pas être admis à profiter des dispositions du chapitre 18, il faut encore conclure que l'action n'a pas été prise en temps utile, pour la raison que voici.

Having said this, however, it was pointed out that this did not prevent the application of the limitation imposed by the Quebec *Provincial Police Force Act,* which does not contain any provision similar to s. 7 of the *Magistrate's Privilege Act* which in terms requires that the act complained of be done in good faith. Considering that Benoit had caused the information to be laid in his capacity as an officer of the police force and that, as the action had

1959

LAMB v. BENOIT *et al.*

Locke J.

not been commenced within six months of the date of the arrest complained of or of the dismissal of the criminal charge, he held that the action failed.

It is my opinion that the appeal against the judgment upholdling the dismissal of the charge against Nadeau should be dismissed. Nadeau, it is true, was one of the party who proceeded with Benoit to the place in question, but it was not shown that he was aware that the latter had any intention of arresting or detaining the appellant or that he had not a warrant for her arrest and while, in my view, his act in asking the appellant to come to the car where Benoit was seated and then instructing her to get into the car made him a party to the false arrest, it is not shown that he took any further part in the matter or that he was a party to any detention in the police station or in the laying of the criminal charge against her. As to the participation in the unlawful arrest, I think the position of Nadeau does not differ from that of the appellant Mackie in the case of *Beatty v. Kozak*[1] which was recently before this Court. As, however, the proper inference to be drawn from the evidence is that Nadeau believed in the existence of facts which would justify the arrest, and there is nothing to support the charge that he acted maliciously or in bad faith, I think the claim is prescribed by s. 24 of c. 47.

The case against Forget presents more difficulty. The limitation imposed by s. 5 of the *Magistrate's Privilege Act* is in respect of actions for anything done by an officer in the performance of his public duty and s. 7 declares that such officer shall be entitled to its protection in all cases where he has acted in good faith in the execution of his duty. Section 24 of the Quebec *Provincial Police Force Act* requires that every action against an officer of that force, by reason of any act done by him or a complaint lodged by him in his official capacity, must be preceded by at least thirty days' notice and that "such action shall be prescribed by six months". As the latter statute does not say in terms that it applies to acts done in good faith, it is apparently contended that good faith is not necessary.

[1] [1958] S.C.R. 177, 195, 120 C.C.C.1, 13 D.L.R. (2d) 1.

I am unable, with respect, to agree with this. To be entitled to the benefit of the statute it is necessary that the officer should have a *bona fide* belief in facts which would justify his conduct. In Lightwood on Time Limit of Actions, at p. 396, after reviewing the authorities upon such cases decided under the *Public Authorities Protection Act 1893*, it is said that:

> The mere *bonâ fide* belief that he has power to do the act complained of is not enough; he must believe in facts which would give him the power if they existed.

This statement is, in my opinion, borne out by the authorities and is applicable to cases such as this where it is sought to invoke the section of the *Provincial Police Act*.

In *Selmes v. Judge*[1], Lord Blackburn said in part:

> I agree that if a person knows that he has not under a statute authority to do a certain thing, and yet intentionally does that thing, he cannot shelter himself by pretending that the thing was done with intent to carry out that statute.

The statement in the information sworn to by Forget that he had been credibly informed that the appellant had published the pamphlet referred to by exhibiting it in public and by delivering it from door to door was entirely without foundation. As the evidence shows, the statement was false. As to the portion of it charging conspiracy with the other three, Forget had no information to support such a charge. He swore the information, apparently simply because these were the offences described in the forms he had received from Quebec, he merely filling in the appellant's name before taking his oath.

The claims against Forget are the same as those against Benoit, namely, for false arrest, false imprisonment and malicious prosecution. As to the first, he was not a party to the arrest: as to the second, I have come to the conclusion that the evidence does not show clearly that the imprisonment of the appellant up to the time when she appeared before the judge and was remanded resulted from the laying of the information. To prove this was an essential of the cause of action for false imprisonment. 33 Halsbury, 2nd ed., p. 38.

[1] (1871), L.R. 6 Q.B. 724 at 727, 19 W.R. 1110.

1959

LAMB v. BENOIT et al.

Locke J.

There remains the claim for damages for malicious prosecution. It is no part of the public duty of a police officer to swear to an information falsely stating that he has been credibly informed that the person to be charged had committed a criminal offence, in the complete absence of any such information and when enquiry would disclose that the charge was entirely without foundation. It has been said that it was the usual procedure for the police officer to lay informations in this way, but that contention is irrelevant in determining the question as to whether the act complained of was done in good faith, in performance or intended performance of his duty within the meaning of the statutes. It does, however, have some bearing upon the issue of malice. For reasons which I will state in more detail in dealing with the claim against Benoit, neither of the statutes relied upon apply to a claim for damages against a police officer for a malicious prosecution if malice in law be established in the action. The learned trial judge has, however, found that he did not act maliciously and, in my opinion, we are not justified upon the evidence in this case in reversing that finding.

The claim against Benoit rests upon a different footing. He does not say that he was ordered to take the appellant or the others into custody and there were no circumstances entitling him to arrest the appellant without a warrant, and his conduct was from the outset unlawful. The appellant was not committing any offence at the time she was taken in charge and when, at police headquarters, she asked with what offence she was charged the information was refused to her.

As no warrant had been issued either for the arrest or detention of the appellant, the person in charge of the cells apparently required some written authority to detain her and this appears to have been given by Benoit in a form the nature of which is not disclosed by the evidence. According to Benoit, a Captain Quenneville told him to detain them until Monday for the purpose of laying charges. On Monday morning, he says that he consulted Mr. Oscar Gagnon, then counsel for the Crown, to whom he told what

evidence there was against the four persons and says that Mr. Gagnon said that the evidence against the appellant was less strong and;

que dans ces conditions-là évidemment si elle passait par la routine habituelle du bureau de la libérer.

Asked to describe what this "routine" was, he said:

C'est la règle établie lorsqu'on lâche une personne de faire signer un reçu et de remettre ses effets et de faire signer une formule de désistement de recours.

He does not say that he told Mr. Gagnon that the appellant was not exhibiting the pamphlet to which exception was taken in public or delivering it from door to door or that there was any evidence that she had engaged in a conspiracy with others to do so, and does not suggest that Mr. Gagnon advised the laying of such a charge. He admits that thereafter he demanded that the appellant sign releases and told her she would be liberated if she signed, and says that after she refused he was instructed, either by Quenneville or by Beauregard, as senior police officer, to have the information laid. He was not sure which of them had given these instructions and neither of these officers gave evidence at the hearing. He then went to Forget and told the latter that he had instructions from the Crown to lay a charge.

It is admitted by Benoit that he instructed Forget to lay the information but he denies having told him that the appellant had been distributing the pamphlet mentioned in the complaint, saying that he had merely stated the facts to him.

In my opinion, neither of the statutes relied upon apply to the claim for damages against Benoit for false arrest, false imprisonment or for malicious prosecution.

It is to be remembered that Benoit had not been instructed to take the appellant into custody and it was only upon the discovery of a letter in the appellant's purse, the contents of which are not disclosed, that he decided to take her to the police headquarters. There were no circumstances justifying the police officer in arresting the appellant without a warrant. Sections 30, 32, 34, 35, 36, 646, 647 and 648 of the *Criminal Code* then in force afford no justification

1959

LAMB v. BENOIT et al.

Locke J.

for the arrest. The onus of proving facts justifying an arrest without warrant, in my opinion, lies upon the officer making the arrest. Lightwood, p. 396.

The appellant was detained in custody from the time of her apprehension on December 7 until the information was laid by Forget on the morning of December 9, at the instance of Benoit, and, again, the evidence does not disclose that he believed that she had committed any offence justifying this detention. Indeed, as his conduct showed, the fact that he offered to release the appellant if she would sign the document, which presumably released him as well as the others concerned from any claim for damages, appears to me to show that he was well aware that the arrest and detention had been unlawful.

In my opinion, the statutes relied upon are each to be construed in the same manner as the *Public Authorities Protection Act 1893*, 56-57 Vict. (Imp.), c. 61. That statute refers to "actions commenced against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament or of any public duty or authority". As was pointed out in the judgment of Kellock J. in *Chaput v. Romain*[1], where the authorities are reviewed, the Quebec statutes were based upon the earlier English statutes to the same effect as the *Public Authorities Protection Act 1893* which merely declared the law as stated in the numerous decisions upon the earlier statutes, and they are subject to the same rules of construction. What was said by Lord Blackburn in *Selmes v. Judge* is to the same effect as the judgment of Bayley J. in *Cook v. Leonard*[2], and by Lopes J. in a later case: *Agnew v. Jobson*[3].

As to the claim for malicious prosecution against Benoit, the matters necessary to be proved are the prosecution, that is to say, that the law was set in motion against the appellant on a criminal charge, that the prosecution was determined in her favour, that it was without reasonable and probable cause and that it was malicious. In the case of Benoit, while the trial judge did not deal with the matter, Pratte J. has found that he did not act in good

[1] [1955] S.C.R. 834 at 856, 114 C.C.C. 170, 1 D.L.R. (2d) 241.
[2] (1827), 6 B. & C. 351 at 354, 108 E.R. 481.
[3] (1877), 47 L.J.M.C. 67, 13 Cox C.C. 625.

faith in causing the charge to be laid, a finding clearly supported by the evidence. It is impossible to sustain a contention that there was any reasonable or probable cause for the arrest, imprisonment or the prosecution, a fact which the conduct of Benoit indicates he realized. As to malice, the term in this form of action is not to be considered in the sense of spite or hatred against an individual but of *malus animus* and as denoting that the party is actuated by improper and indirect motives. Clerk and Lindsell on Torts, 11th ed., p. 870. In *Abrath v. North Eastern Railway*[1], Bowen L.J. said that the plaintiff in such an action must prove that the proceedings of which he complains were initiated in a malicious spirit, that is, from an indirect and improper motive and not in furtherance of justice.

In the present matter as the evidence discloses, Benoit first attempted to obtain a release from the appellant by threatening her with prosecution for sedition and, upon her refusing to sign, caused the information to be laid and the appellant retained in custody until she was released upon bail, and it was upon the charges so laid that she was tried and acquitted. The bad faith of Benoit has been found by the Court of Appeal and, in my opinion, the indirect and improper motive for the prosecution was clearly the hope that in some way the bringing of the charge might relieve Benoit and the others from the legal consequences of the false arrest and imprisonment, he well knowing that the charges were false. The fact that before instituting a criminal proceeding the proposed prosecutor lays all of the facts before counsel and acts on his advice is evidence relevant to the issue of reasonable and probable cause, if a prosecution is advised. But the evidence in the present case is clearly quite insufficient to enable Benoit to rely upon the decision in *Abrath's* case.

In these circumstances, the statutes relied upon have, in my opinion, no application. In Halsbury, vol. 26, at p. 497, dealing with actions against public authorities and public officers, it is said:

> In every case the defendant must have acted in good faith, and therefore actions for deceit or malicious prosecution may be commenced after the expiration of the six months' limit.

[1] (1883), 11 Q.B.D. 440.

1959

LAMB v. BENOIT et al.

Locke J.

The authorities support this statement. In *Newell v. Starkie*[1], an appeal from the Court of Appeal in Ireland, where the *Public Authorities Protection Act 1893* was invoked as a defence, Lord Finlay said in part (p. 6):

> The second observation which I have to make is that the Act necessarily will not apply if it is established that the defendant has abused his position for the purpose of acting maliciously. In that case he has not been acting within the terms of the statutory or other legal authority. He has not been *bona fide* endeavouring to carry it out. In such a state of facts he has abused his position for the purpose of doing a wrong, and the protection of this Act, of course, never could apply to such a case.

Lord Atkinson agreed, saying in part (p. 7):

> It is perfectly true that a public official, acting in the exercise of a statutory or other authority, cannot be protected under that Act if he acts maliciously.

It has been contended that the cases decided in England interpreting the *Public Authorities Protection Act 1893* and the earlier Acts to the same effect are not to be considered in deciding the interpretation which is to be given to s. 24 of the Quebec *Provincial Police Force Act*. In support of this, what was said by Anglin J. in delivering the judgment of the majority of this Court in *Curley v. Latreille*[2], has been relied upon. That passage reads:

> English decisions can be of value in Quebec cases involving questions of civil law only when it has been first ascertained that in the law of England and that of Quebec the principles upon which the particular subject matter is dealt with are the same and are given the like scope in their application, and even then not as binding authorities but rather as *rationes scriptae*.

As to this, it is to be remembered that the question upon this aspect of the matter is simply one as to the construction of the language of a Quebec statute. Section 41 of the *Interpretation Act*, R.S.Q. 1941, c. 1, after saying that every provision of a statute, prohibitive or penal, shall be deemed to have for its object the remedying of some evil or the promotion of some good, reads:

> Such statute shall receive such fair, large and liberal construction as will ensure the attainment of its objects and the carrying out of its provisions according to their true intent, meaning and spirit.

[1] (1919), 89 L.J.P.C. 1, 83 J.P. 113.
[2] (1920), 60 S.C.R. 131, 55 D.L.R. 461.

Section 2 provides that the Act shall apply to every statute of the Legislature of the Province, unless and in so far as such application be inconsistent with the object, the context, or any of the provisions of such statute.

This language is indistinguishable in meaning from s. 15 of the *Interpretation Act* of Canada, R.S.C. 1952, c. 158, and appears in substantially this form in all of the other provinces in Canada, except Nova Scotia. In that province, s. 8(5) of R.S.N.S. 1954, c. 136, expresses the rule in a rather different form.

Section 41 of the *Interpretation Act* of Quebec apparently originated in s. 28 of c. 10 of the Statutes of the Province of Canada for 1849 which read:

> and every such Act and every provision or enactment thereof shall be deemed remedial whether its immediate purport be to direct the doing of anything which the Legislature may deem to be for the public good or to prevent or punish the doing of any thing which it may deem contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act and of such provision or enactment, according to their true intent, meaning and spirit.

That section and s. 15 of the *Interpretation Act* of Canada are simply restatements in statutory form of what was said in the judgment of the Barons in the Court of Exchequer in *Heydon's* case[1].

The *Interpretation Act* of England does not contain this provision but the rule in *Heydon's* case is applied and has been for more than 300 years. It is the rule which was applied of necessity in the cases of *Selmes v. Judge, Cook v. Leonard and Agnew v. Jobson,* and by Lord Finlay and Lord Atkinson in the House of Lords in *Newell v. Starkie.*

In *Selmes v. Judge,* above referred to, the judgment is that of the Court of Queen's Bench and the language to be construed was that of 5 & 6 Wm. IV, c. 50, s. 109, providing that no action should be commenced "against any person for any thing done in pursuance of or under the authority of this Act" unless the prescribed notice had been given and action brought within three months. It was as to the construction of this provision that Blackburn J., with whom Lush and Hannen J. agreed, made the statement which I have quoted.

[1] (1584), 3 Co. Rep. 7(b), 76 E.R. 637.

1959

LAMB
v.
BENOIT *et al.*

Locke J.

In *Cook v. Leonard,* the provisions of the statute considered were expressed in similar terms.

In *Agnew v. Jobson,* the action was brought against a justice of the peace who had made an order for the examination of the plaintiff's person and against the police inspector who had taken her in custody for such purpose, it being contended that there was no authority, statutory or otherwise, authorizing the making of such order. The defence was that no notice of the action had been given under the provisions of 11 & 12 Vict., c. 44, described as an Act to protect justices from vexatious actions "for acts done by them in the execution of their office", unless a specified notice was given and the action brought within six months. Lopes J. held that the statute was inapplicable since:

> There was a total absence of any authority to do the act, and although he acted *bona fide,* believing he had authority, there was nothing on which to ground the belief, no knowledge of any fact such a belief might be based on.

It is quite true that the judgment of the Court of Queen's Bench delivered by Blackburn J. in the *Selmes* case, of the judges of the Queen's Bench Division in *Cook v. Leonard,* and of Lopes J. in *Agnew v. Jobson* are not binding upon this Court. Since what was said by Lord Finlay and Lord Atkinson in *Newell v. Starkie* were statements made in the House of Lords and upon a statute the language of which differs from s. 24 of c. 47, it is, of course, not decisive of the matter. However, that is not to say that when the interpretation of the rule of construction in the *Interpretation Act* of Quebec which owes its origin to the common law of England, as expressed in *Heydon's* case, is the question, the opinions of the learned judges who have applied the same rule of construction in England are not entitled to great weight. To apply part of the language of Anglin J. in *Curley v. Latreille* which I have quoted, "the principles upon which the particular subject matter is dealt with are the same".

If it is contended that in construing statutes of the Province of Quebec to which s. 41 of the *Interpretation Act* applies we are to ignore the decisions of the House of Lords and of Courts of appeal in England where the same

rule of construction has been applied, the argument is ill-founded and should be rejected. Nothing said by either Anglin J. or Mignault J. in the case referred to supports any such contention.

For these reasons, it is my opinion that the appeal from the judgment of the Court of Appeal should be allowed as against the respondent Benoit and dismissed as against the respondents Nadeau and Forget without costs.

As to Benoit, without any lawful justification, he caused the arrest and imprisonment of the appellant and was responsible for the laying of the information and the prosecution which followed. The appellant was subjected to the ignominy of arrest and prosecution for the offence of distributing a seditious libel, of which offence Benoit knew from the outset she was innocent. She incurred liability to counsel who appeared on her behalf at the trial in the amount of $150. I would award damages against Benoit of $2,500 and costs throughout.

FAUTEUX J. (dissenting in part):—Le récit des faits invoqués contre chacun des officiers de la Sûreté provinciale poursuivis par l'appelante, soit les officiers Pelland, Nadeau, Forget et Benoît, apparaît aux autres raisons de jugement données en cette cause.

Il n'y a véritablement que le cas de l'officier Benoît qui doit faire l'objet de considérations particulières. En effet, le jugement de la Cour supérieure rejetant l'action contre Pelland, n'ayant pas été l'objet d'un appel, a force de chose jugée. Quant à Nadeau et Forget, je suis d'avis qu'il n'y a pas lieu d'intervenir pour modifier le jugement unanime de la Cour d'Appel[1] décidant, pour les raisons y mentionnées, qu'aucun des faits invoqués contre eux par l'appelante ne constitue une faute engendrant responsabilité.

Du fait que Benoît fit loger la dénonciation par Forget parce que l'appelante avait refusé une offre de libération conditionnée par la signature d'un document exonérant les officiers de toute responsabilité, la Cour en a déduit qu'il n'était pas raisonnable de penser que Benoît croyait en la culpabilité de l'appelante. Considérant, cependant, en droit, que les actions contre les officiers de la Sûreté provinciale

[1] [1958] Que. Q.B. 237.

1959

LAMB v. BENOIT et al.

Fauteux J.

se prescrivent par six mois, aux termes de l'art. 24 du c. 47, S.R.Q. 1941, *Loi de la Sûreté provinciale et de la police des liqueurs,* et, en fait, qu'en prenant, pour computer ce délai,—en ce qui concerne tous les actes reprochés,—la date la plus favorable à l'appelante, soit celle de sa libération à l'enquête préliminaire, le bref d'assignation avait été signifié à Benoît plus de six mois après cette date, la Cour jugea que l'action contre Benoît était prescrite.

Il s'agit d'une action réclamant des dommages-intérêts, en matière délictuelle, contre un officier de la Sûreté provinciale. Manifestement ce sont les dispositions du *Code Civil* de la province de Québec qui doivent s'appliquer, sujet aux modifications y apportées par la loi spéciale régissant ces officiers.

On a prétendu qu'une action en dommages pour dénonciation calomnieuse doit être décidée suivant les principes régissant telles actions sous le régime de la Common Law. Ces principes sont concisément exposés comme suit dans Salmond On the Law of Torts, 10th ed., à la page 624:

> 10. *Malice.*—No action will lie for the institution of legal proceedings, however destitute of reasonable and probable cause, unless they are instituted maliciously—that is to say, from some wrongful motive. (*Williams v. Taylor* 1829, 6 Bing. p. 186). Malice and absence of reasonable and probable cause must unite in order to produce liability. So long as legal process is honestly used for its proper purpose, mere negligence or want of sound judgment in the use of it creates no liability; and, conversely, if there are reasonable grounds for the proceedings (for example, the probable guilt of an accused person) no impropriety of motive on the part of the person instituting these proceedings is in itself any ground of liability.

Telle n'est pas une expression exacte de la loi sous le *Code Civil* gouvernant dans la province de Québec. L'action en dommages est une action de droit privé. Suivant l'art. 1053 C.C., le fait dommageable donnant droit au recours peut avoir été commis avec l'intention de nuire et constituer alors le délit. Il est suffisant, cependant, qu'il constitue une faute d'imprudence, de négligence ou d'inhabilité pour constituer un quasi-délit et donner droit à réparation. En somme, il suffit pour donner ouverture à l'action en dommages, que le fait dommageable, imputable à la partie poursuivie, soit illicite. D'où il suit que si la dénonciation a été logée dans les conditions où la loi pénale autorise de

ce faire, elle ne peut constituer un acte illicite. Ces conditions sont prescrites au *Code Criminel* à l'art. 654 (ancien) et 439 (nouveau). Au temps de la dénonciation logée par Forget, sur les instructions et informations de Benoît, l'art. 654, alors en vigueur, se lisait comme suit:

> 654. Si quelqu'un croit, pour des motifs raisonnables ou plausibles, qu'une personne a commis un acte criminel visé par la présente loi, il peut porter plainte ou faire une dénonciation, par écrit, et sous serment, devant un magistrat ou juge de paix autorisé à émettre un mandat ou une sommation contre le prévenu au sujet de cette infraction.

Il appert cependant de ce texte que si, d'une part, la croyance en la culpabilité, basée sur des motifs raisonnables et plausibles, conditionne, sous le droit public, le droit de dénonciation, les motifs, d'autre part, qui animent et poussent à agir le dénonciateur qui satisfait, par ailleurs, aux conditions de l'article, sont étrangers au droit qu'il a de loger une dénonciation. Ces motifs, empreints ou non de malice au sens donné au mot sous la Common Law pour juger des actions en dommages pour dénonciation calomnieuse, n'ont aucune influence sur l'existence ou la non-existence du droit de dénonciation. Aussi bien, l'acte du dénonciateur, acte qui de sa nature est fatalement dommageable, se justifie, sous le droit public, sur la croyance en la culpabilité, basée sur des motifs raisonnables et plausibles, mais non sur l'absence de malice. Dans ces vues, il ne peut y avoir de conflit entre le droit civil de Québec relatif à l'action en dommages pour dénonciation calomnieuse et le droit public canadien fixant les conditions du droit de dénonciation. L'incidence de la malice n'étant pas retenue sous le droit public, le droit public ne peut être invoqué comme modifiant le droit privé, ou pour soutenir que le Parlement a considéré essentiel à la poursuite efficace du crime, que l'absence de malice soit *per se* un moyen absolu de défense dans une action au civil pour dénonciation calomnieuse. Assumant qu'une telle immunité au civil puisse être validement donnée par le Parlement, elle ne l'a pas été. On ne saurait davantage, mû par un désir d'uniformiser les lois en matière civile alors que, depuis le statut impérial de 1774, l'Acte de Québec, la loi sanctionne impérativement le principe de la non-uniformité en cette matière, appliquer des principes de la Common Law nettement en conflit avec ceux du *Code Civil*.

1959

LAMB
v.
BENOIT *et al.*

Fauteux J.

La prescription de six mois:—Le titre 19 du *Code Civil* traitant de la prescription des actions, indique en l'art. 2261(2) que l'action, pour dommages résultant des délits ou quasi-délits, se prescrit par deux ans, à défaut d'autres dispositions applicables. De telles dispositions se trouvent dans la *Loi de la Sûreté provinciale et de la police des liqueurs, supra.* Cette loi a pour objet de constituer la Sûreté provinciale du Québec, d'en établir les devoirs et fonctions, les divisions territoriales d'opérations, les services, leur direction et composition, les conditions d'admission aux services, d'autoriser l'adoption de règlements, et elle prescrit finalement que les dispositions y contenues prévalent, en cas d'incompatibilité, sur celles de toutes autres lois générales ou spéciales. L'article 24 se trouve au titre de "Dispositions diverses" et constitue l'unique disposition de la loi touchant le recours en justice contre un officier de la Sûreté provinciale et ce, dans les termes suivants:

> 24. Toute action dirigée contre un officier de la Sûreté par suite d'un acte qu'il a accompli ou d'une plainte qu'il a portée en cette qualité d'officier, doit être précédée d'un avis d'au moins trente jours, donné par écrit au défendeur, et intentée dans le district où ledit acte a été posé ou ladite plainte logée.
>
> Cette action se prescrit par six mois.

On a donc, comme c'est le cas d'ailleurs sous la loi générale en matière de procédure civile, suivant l'art. 88 C.P.C., prescrit un avis d'action. On a, de plus, modifié la prescription de deux ans généralement applicable, suivant l'art. 2261(2) du *Code Civil,* dans le cas des actions résultant de délits ou quasi-délits, pour réduire cette prescription à six mois. Que cette disposition de l'art. 24 ait pour but de sanctionner la négligence de l'intéressé à poursuivre, et qu'elle soit alors une simple prescription, ou qu'elle ait pour but de mettre fin rapidement en tout état de cause à la possibilité d'une poursuite, et qu'elle constitue alors un délai préfixe, dans le cas de prescription libératoire, aussi bien que dans le cas de délai préfixe, la bonne foi ne joue aucun rôle. Planiol et Ripert, Droit Civil, 2e éd., vol. 7, p. 735, no 1326:

> En matière de prescription libératoire, les conditions se ramènent à une seule: l'inaction prolongée du créancier. On ne saurait parler ici de possession ni de juste titre; *d'autre part, la bonne foi ne joue aucun rôle.*

Idem, p. 819, no 1403:

> Le délai préfixe est une condition mise par la loi à l'accomplissement d'un acte déterminé, souvent à l'exercice d'une faculté, et il a pour but, non pas de sanctionner la négligence de l'intéressé, mais de mettre fin rapidement, *en tout état de cause*, à la possibilité d'accomplir cet acte.

Cette *Loi de la Sûreté provinciale et de la police des liqueurs, supra,* est d'origine définitivement provinciale. Elle a pour objet, comme indiqué, la constitution et le gouvernement de la Sûreté et non pas d'établir des privilèges pour ces officiers. Contrairement à ce qui est le cas dans la *Loi concernant les privilèges des Juges de paix, des magistrats et autres officiers remplissant des devoirs publics,* c. 18, S.R.Q. 1941, aucune mention n'est faite de la bonne foi et, ni expressément, ni implicitement, peut-on y trouver l'intention de la Législature d'assujettir l'opération de l'art. 24 à l'existence de la bonne foi.

Appliquant le critère formulé dans Planiol et Ripert à l'article 1403, *supra,* je suis d'avis, comme mon collègue M. le Juge Taschereau, que l'art. 24 édicte un délai préfixe. Ce dont il faut tenir compte, voit-on en cet article, pour distinguer le délai préfixe d'avec la simple prescription, c'est le but et le rôle du délai. Cette réduction de délai, pour instituer une action en dommages contre un officier de la Sûreté, constitue une exception à la loi générale. Cette exception ne se fonde aucunement sur les raisons caractérisant la simple prescription, mais, participant du caractère même de la loi où elle est édictée, sur l'intention de la Législature d'établir, pour des raisons d'ordre administratif touchant la Sûreté, un délai préfixe.

La seule condition au jeu de l'art. 24 est donc que l'action soit dirigée contre un officier de la Sûreté par suite d'un acte qu'il a accompli ou d'une plainte qu'il a portée en cette "qualité d'officier". La Législature n'est pas présumée avoir dérogé de la loi générale à moins de s'en être exprimée en des termes irrésistiblement clairs. Utilisant le mot "prescription", elle est présumée donner à ce mot le sens dont il est susceptible dans le contexte de la loi où il se trouve et tenir compte du fait qu'en cette matière, qu'il s'agisse de prescription simple ou de délai préfixe, la bonne foi ne joue aucun rôle. Aussi bien serait-ce obliquement écarter l'intention de la Législature que de faire entrer la bonne foi

1959

LAMB
v.
BENOIT et al.

Fauteux J.

dans l'interprétation de l'expression "en sa qualité d'officier". Au sens de la loi qui nous occupe, l'acte reproché sera réputé accompli par son auteur, "en sa qualité d'officier", s'il a été accompli en raison même du fait qu'il est officier, et non pour des motifs qui lui sont autrement personnels.

Concourant dans l'avis exprimé par le Juge de première instance et tous les membres de la Cour d'Appel, je n'ai aucun doute que tous les actes reprochés à Benoît ont été accomplis par lui en sa qualité d'officier.

On a enfin prétendu que la signification de l'action, dans le délai de six mois, aux autres défendeurs, avait interrompu la prescription quant à Benoît. Qu'il s'agisse de simple prescription ou de délai préfixe, cette prétention ne peut être retenue. Dans le premier cas, l'action n'étant pas fondée au mérite contre aucun des codéfendeurs de Benoît, ces derniers ne peuvent être considérés comme ses codébiteurs; les conditions pour interrompre la prescription ne sont donc pas présentes. Dans le second cas, la disposition n'admet pas d'interruption.

La décision de cette Cour dans *Chaput v. Romain*[1] n'est, pour les raisons indiquées par M. le Juge Taschereau, d'aucune application en cette cause. Quant à celle de *Beatty v. Kozak*[2], et les autres au même effet, elles ne sont également, en raison de l'absence du rôle de la bonne foi dans le statut applicable en la matière, d'aucune portée en l'espèce.

Je renverrais l'appel avec dépens.

ABBOTT J. (dissenting in part):—The facts and the relevant statutory provisions are set out in the reasons of other members of the Court and it is unnecessary for me to repeat them.

Of the three respondents, the Court below has held that two of them, Nadeau and Forget, committed no fault and are therefore not liable in damages to appellant. With that finding I am in agreement. The Court below has also held that although a valid cause of action existed against the respondent Benoit, that right of action had been extinguished by prescription under s. 24 of the *Provincial*

[1] [1955] S.C.R. 834, 114 C.C.C. 170, 1 D.L.R. (2d) 241.
[2] [1958] S.C.R. 177, 120 C.C.C. 1, 13 D.L.R. (2d) 1.

Police Act, R.S.Q. 1941, c. 47, before the present action was instituted. If the said section is applicable, it is clear that appellant's right of action was prescribed and in my view this question of prescription is the sole question at issue in this appeal.

A right of action in damages such as that asserted in the present action is a civil right and must, of course, be founded upon the law in force in Quebec where the acts causing the alleged damage were committed—in this case upon art. 1053 of the *Civil Code.*

Similarly the extinguishment of any such right of action by prescription is governed by the law of Quebec and unless s. 24 of the *Provincial Police Act* is applicable, appellant's right of action in damages for false arrest and malicious prosecution would have been extinguished by prescription on the expiry of two years under art. 2261 C.C. Extinctive prescription is one of the twelve modes of extinguishing an obligation mentioned in art. 1138 C.C. and in Quebec the short prescriptions (of which that provided for in art. 2261 C.C. is one) are something more than mere limitations of action which only bar the remedy without touching the obligation: art. 2267 C.C.

In my opinion the Court[1] below has properly held that the respondent Benoit was not entitled to avail himself of the special protections and the limitation of action provided for under the *Magistrate's Protection Act,* R.S.Q. 1941, c. 18, since he was not acting in good faith as required by that statute and as held by this Court in *Chaput v. Romain*[2]. In *Beatty and Mackie v. Kozak*[3], (an appeal from Saskatchewan where the interpretation and effect of certain sections in the *Mental Hygiene Act* of that Province, R.S.S. 1953, c. 309, were in issue) this Court decided that in order to benefit from the special protections and the limitation of action provided for under that statute, a person claiming such benefit must show that he acted in good faith. The test of good faith was held to be a *bona fide* belief in facts which if they existed, would have justified the action taken.

[1] [1958] Que. Q.B. 237.
[2] [1955] S.C.R. 834, 114 C.C.C. 170, 1 D.L.R. (2d) 241.
[3] [1958] S.C.R. 177, 120 C.C.C. 1, 13 D.L.R. (2d) 1.

1959

LAMB
v.
BENOIT et al.

Abbott J.

Both the *Chaput* case and the *Beatty* case are of assistance in the interpretation of statutory provisions of the kind referred to, but they are not conclusive as to the interpretation and effect of s. 24 of the *Provincial Police Act*. That section is framed in completely different language which is more specific and more absolute than that used in the sections of *Mental Hygiene Act* and the *Magistrate's Privilege Act* which were considered by this Court. Moreover, s. 36 of the *Provincial Police Act* provides that in case of incompatibility, the provisions of that Act shall prevail over those of every other general law or special Act. Section 24 provides that

> every action against an officer of the police force by reason of an act done by him or a complaint lodged by him *in his official capacity* . . . shall be prescribed by six months.

The French text reads as follows:

> Toute action dirigée contre un officier de la Sûreté par suite d'un acte qu'il a accompli ou d'une plainte qu'il a portée en *cette qualité d'officier* . . . se prescrit par six mois.

In my view that language is clear and it has the effect of substituting a prescriptive period of six months for the period of two years provided for in art. 2261 C.C. That prescriptive period of two years applies whether or not the person against whom a claim in damages for false arrest is made, has acted in good faith and with reasonable and probable cause. I am unable to appreciate, therefore, upon what ground the prescriptive period of six months, provided for in s. 24, can be limited to those cases in which a police officer has acted in good faith and with reasonable and probable cause.

As to the effect to be given to the words "in his official capacity", it does not seem to me that it can be seriously suggested that in arresting the appellant and causing a complaint to be lodged against her, Benoit was acting in any other capacity than that of a provincial police officer.

As has been pointed out by the learned authors of Halsbury, 3rd ed., vol. 7, at p. 253, Crown servants may

> be sued and made personally liable for tortious or criminal acts committed by them in their official capacity without showing malice or want of probable cause, unless that is of the essence of the tort or crime.

and they refer to *Brasyer v. MacLean*[1], a decision of the Judicial Committee on an appeal from a decision of the Supreme Court of New South Wales in which a sheriff was held liable in damages for false arrest which had resulted from a false return of rescue made by the said sheriff upon a writ of *capias ad respondendum*.

In placing the appellant under arrest and in causing the complaint to be lodged against her, Benoit, in my opinion, was acting "in his official capacity" as an officer of the Provincial Police although such actions were to his knowledge completely unjustified.

Whether it be desirable that in the case of a provincial police officer the Legislature should shorten to a period of six months the prescriptive period of two years provided under the general law for an action of this kind, is not for me to say. In my opinion it has done so.

I would dismiss the appeal with costs.

Appeal allowed with costs, Taschereau, Fauteux and Abbott JJ. dissenting in part.

Solicitor for the plaintiff, appellant: W. Glen How, Toronto.

Solicitor for the defendants, respondents: Gustave Monette, Montreal.

THOMAS R. PEARSON .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

1959
*Feb. 17
Feb. 26

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Criminal law—Theft—Admissibility of statement of accused—Whether dissent on question of law—Criminal Code, 1953-54 (Can.), c. 51, s. 597(1)(a).

The appellant was convicted on a charge of theft and appealed on the ground that a statement made by him had been wrongfully admitted at trial. The majority in the Court of Appeal affirmed the conviction

[1] (1875), L.R. 6 P.C. 398, 44 L.J.P.C. 79, 33 L.T. 1.

1959

PEARSON
v.
THE QUEEN

on the ground that the conviction did not depend upon the admissibility of the statement, and that, in any event, there had been no injustice done. The dissenting judge considered that the statement had been improperly admitted and was highly prejudicial to the appellant.

Held: The conviction must be affirmed.

This Court was without jurisdiction as there was no dissent on any ground of law. The judgment of the majority resulted from an examination of the evidence, while the dissenting judgment was as to the sufficiency of the evidence for a conviction, which is a question of fact.

APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division, affirming the conviction of the appellant by McLaurin C.J. Appeal dismissed.

A. M. Harradence, for the appellant.

H. J. Wilson, Q.C., and *J. W. Anderson,* for the respondent.

The judgment of the Court was delivered by

THE CHIEF JUSTICE:—The appellant was convicted by the Chief Justice of the Trial Division of the Province of Alberta sitting without a jury on a charge that whilst an employee of Alberta Pacific Grain Co. (1943) Ltd. he did fraudulently and without colour of right convert to his own use certain goods:—grain of a total quantity of approximately 11,300 bushels of a total value of about $8,863, the property of the said company, and did thereby commit a theft contrary to the *Criminal Code* of Canada. An appeal from that conviction was dismissed by the Appellate Division with Mr. Justice Hugh John Macdonald dissenting. The respondent alleges that there is no dissent on a question of law within s. 597 (1)(*a*) of the *Criminal Code* and therefore no appeal to this Court. This argument is entitled to prevail.

The reasons for judgment of the majority of the Appellate Division are very short and read as follows:

The majority of the Court think that the conviction for theft does not depend upon the admissibility of the statement of the accused that was admitted in evidence by the learned Trial Judge.

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

It is our opinion that quite apart from this statement there is ample evidence in the sales of grain by him to prove the offence of theft as charged, and that no injustice has been done to the accused in the verdict of guilty. Therefore, without arriving at any decision on the question of admissibility of the statement, we dismiss the appeal, and affirm the conviction. The time in custody pending the appeal will be allowed to count on the term of imprisonment.

The important parts of the dissenting judgment are as follows:

Amongst the grounds raised on appeal is a submission that the learned Chief Justice improperly admitted a statement of the accused. That statement was admitted in the trial as Exhibit 2, and is unequivocably a confession of guilt.

On the voir dire, an attempt was made by counsel for the defence to show by cross-examination that the statement was not voluntary.

Counsel for the appellant contends that the learned Chief Justice admitted the statement before counsel was given an opportunity of advising the Court if the defence would call evidence. On the voir dire on the question of admissibility two witnesses were called by the Crown, namely, Albert William Meston and Timothy James Corkery. Meston was examined and cross-examined, followed by Corkery's examination and cross-examination. At the conclusion of the cross-examination of Corkery, according to the record, there were remarks by Mr. Thurgood for the Crown and the learned Chief Justice as follows:

> "Mr. THURGOOD: That is all I have in connection with this matter, my Lord. My learned friend has the right to call witnesses.
>
> THE COURT: That is all, Mr. Corkery. You might—we have been conducting a trial within a trial, Mr. Corkery, you might just withdraw and we will have you back later. Oh, I think I will let it in. Recall Mr. Meston."

Counsel stated on the hearing of the appeal that it was his intention to call such evidence on the voir dire, but owing to the ruling made by the learned Chief Justice he was denied such opportunity. The defence must be given every opportunity to show that any statement of an accused, proposed to be tendered in evidence, was not voluntary. I have reached the conclusion that in the case at bar the defence was not given such opportunity.

It seems to me that the confession of the accused was improperly admitted at trial. That confession was of a very damaging character and was highly prejudicial to the accused. Its admission could very well have changed the strategy of the defence in the trial.

I do not think that the remaining evidence conclusively establishes the guilt of the accused. I would accordingly quash the conviction and direct a new trial.

It is apparent that the majority of the Appellate Division in the first part of their reasons in using the word "admissibility" were referring to the question whether the statement of the accused was properly admitted and

1959

PEARSON v. THE QUEEN

Kerwin C.J.

that in the second paragraph they decided that if the statement were improperly admitted then, within the meaning of s. 592 (1)(*b*) of the Code, there was no substantial wrong or miscarriage of justice. There is no doubt as to the rule referred to by counsel for the appellant that the onus rests on the Crown to satisfy the Court that the verdict would necessarily have been the same if a charge to a jury had been correct or if no evidence had been improperly admitted: *Schmidt v. The King*[1]. On this branch of the case the judgment of the majority resulted from an examination of the evidence while the dissenting judgment was as to the sufficiency of the evidence for a conviction which is a question of fact. There was no dissent on any ground of law dealt with by the dissenting judge and upon which there was a disagreement in the Appellate Division and therefore this Court is without jurisdiction: *The King v. Décary*[2]; *Rozon v. The King*[3].

The appeal should be dismissed but the time spent in custody allowed to count on the term of imprisonment.

Appeal dismissed.

Solicitors for the appellant: Harradence, Kerr, Arnell & Duncan, Calgary.

Solicitors for the respondent: H. J. Wilson, Edmonton, and J. W. Anderson, Melfort.

1958

*Nov. 21, 24

1959

Feb. 26

ANTICOSTI SHIPPING COMPANY (*Defendant*) ..... APPELLANT;

AND

VIATEUR ST-AMAND (*Plaintiff*) .. RESPONDENT.

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

Shipping—Contracts—Carriage of goods by water—Bill of lading not issued—Truck damaged en route—Limitation of liability—The Water Carriage of Goods Act, R.S.C. 1952, c. 291, art. IV, rule (5).

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

[1] [1945] S.C.R. 438, 83 C.C.C. 207, 2 D.L.R. 598.

[2] [1942] S.C.R. 80, 77 C.C.C. 191, 2 D.L.R. 401.

[3] [1951] S.C.R. 248, 99 C.C.C. 167, 11 C.R. 255, 2 D.L.R. 594.

1959

ANTICOSTI SHIPPING CO. v. ST-AMAND

The plaintiff, through his agent R, entered into a contract of carriage with the defendant for the transport by sea of the plaintiff's truck. A bill of lading was filled out at the time but apparently no original or copy of it was given to R. The original of the bill was not signed and became mislaid. The truck was damaged through the fault of the defendant which paid all costs of the repairs amounting to more than $500. This action was brought for loss of use during the time the repairs were carried out. The trial judge maintained the action and rejected the plea of limitation of liability. This judgment was affirmed by the Court of Appeal.

Held: The action should be dismissed. The liability of the defendant must be limited to $500.

The proper inference to be drawn from the facts of this case was that the contract was for the carriage to be made under the terms of a bill of lading. In the absence of evidence to the contrary, the shipping clerk's authority was to accept articles for transportation on the basis only of the defendant's bill of lading. The plaintiff's agent requested no special terms. It was an ordinary transaction and if the agent did not see fit to demand a bill of lading, as he had the right to do, it could not affect what was contemplated on both sides. *Pyrene v. Scindia Navigation Company* (1954), 2 Q.B. 402, applied.

No value of the truck was declared or inserted in the bill of lading. Rule (5) of art. IV distributes all liability for damages; therefore, the limit of $500 "per package or unit" must be applied. The word "package" was clearly not appropriate here, and the truck must be taken as being the "unit". The responsibility for seeing that the value of the thing shipped is declared and inserted on the bill is on the shipper and any consequential hardship must be charged against his own failure to respect that requirement.

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

L. Lalande, Q.C., for the defendant, appellant.

L. A. Pouliot, Q.C., and *B. V. Tremblay,* for the plaintiff, respondent.

The judgment of the Court was delivered by

RAND J.:—The main question in this appeal is whether a contract for the carriage by water of a motor truck from Port Menier, on the island of Anticosti, to Rimouski, Quebec, was or was not "covered" by a bill of lading within the meaning of art. I definition (b) of the Rules relating to bills of lading contained in the schedule to the *Water Carriage of Goods Act,* R.S.C. 1952, c. 291. The circumstances of the shipment were those now stated.

[1] [1958] Que. Q.B. 371.

1959

ANTICOSTI SHIPPING CO. v. ST-AMAND

Rand J.

The respondent, then on the mainland, who had previously been working his truck on the island, sent a message to one Riddell at Port Menier, to have the truck shipped back to Rimouski by a vessel of the appellant company plying between Anticosti and various mainland ports along the St. Lawrence river, and arrangements were made accordingly. Riddell was an operating foreman of a paper company of which the appellant is a subsidiary and was generally familiar with the latter's customary mode of undertaking transportation. Following that practice, the shipping clerk filled out a bill of lading, using the standard printed form of the company, no original or copy of which was apparently given to Riddell. The evidence is most sketchy on the details, but it is clear that once having informed the shipping clerk of the shipper's name, of the article to be shipped, its make, weight and destination, and having otherwise arranged to have it loaded on the vessel, he paid no further attention to the matter. In the result, the original of the bill of lading, although completed as to its substantive matter, was not actually signed, and evidently remaining in the office of the company became mislaid. In the course of the transportation the truck was damaged through the fault of the company which paid all costs of repair amounting to more than $500; but for loss of use during the time the work was being done this action was brought.

As the judgment of the Court of Queen's Bench[1] states, the authority given Riddell was general and unrestricted, and the first inquiry is this: from the simple facts placed before us, which undoubtedly truly describe what happened, what is the proper inference to be drawn from them that the contract so arising was one for the carriage to be made under the terms of a bill of lading or on no terms beyond those implied by law? In this we are in as good a position as the Courts below; and on it I have no doubt. In the absence of evidence to the contrary the shipping clerk's authority was to accept articles for transportation on the basis only of the company's bill of lading, following which he proceeded to fill out the standard form with the required matter. His and the company's understanding was therefore beyond question. When Riddell requested

[1] [1958] Que. Q.B. 371.

the shipment to be made, what terms could he possibly have had in mind other than those on which invariably goods were carried by the company? His bald request implies, carry this truck "according to your regular practice". How can we possibly say that anything else could be intended? It was an ordinary transaction, and if, as the respondent's agent, he did not see fit to demand a bill of lading—as by art. III rule (3) he had the right to do—it cannot affect what on both sides was contemplated.

In *Pyrene v. Scindia Navigation Company*[1], Devlin J. says:

> In my judgment whenever a contract of carriage is concluded, and it is contemplated that a bill of lading will, in due course, be issued in respect of it, that contract is from its creation "covered" by a bill of lading, and is therefore in its inception a contract of carriage within the meaning of the Rules and to which the Rules apply. There is no English decision on this point; but I accept and follow without hesitation the reasoning of Lord President Clyde in Harland and Wolff v. Burns and Laird Lines.

With this view I respectfully agree.

But a further question arises out of the consequences of that contract. The appellant pleaded art. IV rule (5) which provides:

> 5. Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with goods in an amount exceeding five hundred dollars per package or unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading.
>
> This declaration if embodied in the bill of lading shall be *prima facie* evidence, but shall not be binding or conclusive on the carrier.

The trial court found the limitation inapplicable where the nature of the article shipped was known and where the company "peut . . . en apprécier la valeur". On this the reasons in appeal stated,

> I would not agree with this interpretation of Article IV of the Water Carriage of Goods Act but it is unnecessary for me to deal with this point in detail in view of the fact that I have come to the conclusion that the contract of carriage in this case was not covered by a bill of lading . . .

I share that expression of opinion.

[1] [1954] 2 Q.B. 402 at 419, 2 All E.R. 158.

1959

ANTICOSTI SHIPPING CO. v. ST-AMAND

Rand J.

Here no value of the truck was declared or inserted in the bill; it is not suggested that the rule does not distribute all liability for damages, and the limit of $500 "per package or unit" must then be applied. The word "package" is clearly not appropriate to describe a truck in the condition of that here and may be disregarded; and this leaves our enquiry to the term "unit".

The limitation is clearly for the benefit of carriers by water, dictated by considerations of important policy. I see no ground for implying any duty on the part of the carrier to bring the fact of limitation to the notice of a shipper or in any other respect to concern himself with the requirement which the statute makes equally apparent to both parties. By s. 2 of the statute

> . . . the Rules relating to bills of lading as contained in the Schedule . . . have effect in relation to and in connection with the carriage of goods by water in ships carrying goods from any port in Canada to any other port whether in or outside Canada.

and that imperative is likewise binding on both of them.

The word "unit" would, I think, normally apply only to a shipping unit, that is, a unit of goods; the word "package" and the context generally seem so to limit it. But there has been suggested and in some cases the rule specifies the unit of the charge for freight. Neither the bill of lading nor the evidence here throws any light on the freight rate unit. There seems to have been only a flat charge of $48 plus $3 wharfage fee; there is no indication, for example, of a rate based on tonnage or any other weight quantity. The weight of the truck is shown, but to assume that the charge is calculated on a rate for 100 pounds would bring a fractional figure which is most unlikely to represent the actual basis. The sum of $500 would scarely be taken as a fair limitation of the value of the average 100 pounds weight of freight; in this case the amount would be the product of 102.16 units at $500 each or $51,000 which seems disproportionate to any policy estimate to be attributed to the rule. And the absence itself of any reasonable ground for extending the word to that type of measure, with the other considerations, excludes its application here.

We are left, then, to take the unit as being that of the article. That this may produce anomalies is indisputable, but the rule does not seem to permit qualification. The

responsibility for seeing that the value of the thing shipped is declared and inserted on the bill is on the shipper and any consequential hardship must be charged against his own failure to respect that requirement.

An analogous case came before the United States Court of Appeal, Second Circuit, in *Isbrandtsen Company, Inc. v. United States of America*[1]. There the provision of the rule was,

> In case of any loss or damage to or in connection with goods, exceeding in actual value $500 lawful money of the United States, per package, or, in case of goods not shipped in packages, per customary freight unit, the value of the goods shall be deemed to be $500 per package or per unit, on which basis the freight is adjusted and the Carrier's liability, if any, shall be determined on the basis of a value of $500 per package or per customary freight unit, . . .

The shipping unit was a locomotive and tender which was likewise the unit for the freight charge in the flat sum of $10,000. There were 10 in all of these units. Augustus Hand, Ct. J., at p. 92 uses this language:

> This interpretation may lead to a strange result, for freight on small locomotives under twenty-five tons is computed per ton and consequently would involve a larger liability than is imposed for the more expensive locomotives involved here. But the language of the limitation is controlling and applies to the locomotives and tenders here by its express terms. Our conclusion accordingly is that Isbrandtsen's liability is limited to $500 per unit of locomotive and tender, or $5,000 in all.

The application there was much more serious than that here and I see no warrant for any other conclusion than that the damage in this case must be limited to the same sum of $500.

I would, therefore, allow the appeal and direct that the action be dismissed with costs throughout.

Appeal allowed with costs.

Attorneys for the defendant, appellant: Beauregard, Brisset, Reycraft & Lalande, Montreal.

Attorney for the plaintiff, respondent: Bertrand V. Tremblay, Ste. Anne des Monts.

[1] (1953), A.M.C. 86.

1958
*Dec.15, 16
1959
Feb. 26
1959

THE COMMISSIONER OF PATENTS ....APPELLANT;

AND

CIBA LIMITED .....RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Patents—Process claims—Application of known method to known materials never before applied to them—Whether process claims disclose invention—Novelty—Utility—The Patent Act, R.S.C. 1952, c. 203, s. 2(d).

The Commissioner of Patents refused to allow the process claims contained in the respondent's application for letters patent because the process defined in the process claims was not new. The application contained claims related to new substances and to the process of making those substances. It was agreed that the products were patentable since they were useful and new and their utility was not previously obvious; that the reaction between reactants of the general type specified here was a known type of general reaction although it had never been applied to the particular reactants specified in the claims; and further, that if a person skilled in the art desired to produce the products he would have known that the process could be used for that purpose. The Exchequer Court granted the patent.

Held: The patent should be granted. The process claimed was an invention as defined in the *Patent Act*.

To constitute an invention within the definition of the Act, the process must be new and useful. There was no question as to its being useful, since it produced compounds which have been admitted to be both new and useful. The process was also novel, because the conception of reacting those particular compounds to achieve a useful product was new. The method and the materials may be both known but the idea of making the application of the one to the other to produce a new and useful compound may be new, and in this case it was. *In re May & Baker Limited and Ciba Limited* (1948), 65 R.P.C. 255, applied.

APPEAL from a judgment of Thorson P. of the Exchequer Court of Canada[1], granting an application for letters patent. Appeal dismissed.

W. R. Jackett, Q.C., and *R. W. McKimm*, for the appellant.

C. Robinson, Q.C., and *R. S. Smart*, for the respondent.

The judgment of the Court was delivered by

MARTLAND J.:—This action arises from a decision of the appellant, in which he confirmed the refusal by an examiner of the process claims in the respondent's application for

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

[1](1957), 27 C.P.R. 82, 17 Fox Pat. C. 3

patent, serial no. 533,000. The respondent's appeal to the Exchequer Court from that decision was allowed by the learned President of that Court[1], from which judgment the present appeal is brought.

The respondent's application relates to a process of producing disinfecting and preserving preparations, consisting of special chemical compounds, and to the compounds so produced. The application mentions that certain existing compounds derived from specified chemicals are known to have disinfectant properties and points out that the advantage of the process of the application "resides in the use of starting materials of simpler constitution, the products thus obtained having surprisingly just as valuable properties as the above named compounds". Claims 1 to 3 of the application are directed to the process and claims 4 to 6 to the products.

The appellant and the respondent agreed as to the following facts:

1. The products claimed in claims 4-6 of the application are patentable since they are useful as disinfectants and preservatives and the persons named as inventors in the application were the first to produce them or suggest their production and to discover their utility which was not previously obvious.

2. The process claimed in claims 1-3 of the application is one for the production of the products claimed in claims 4-6.

3. As of the date when the process claimed in claims 1-3 of the application was first carried out by the persons named as inventors in the application, the reaction between reactants of the general type specified in claims 1-3 of the application was a known and classical type of general reaction, though it had never been applied to the particular reactants specified in these claims which reactants were, however, known chemical compounds.

4. Had a person skilled in the art desired, at the date referred to in paragraph 3, to produce the products claimed in claims 4-6 of the application he would have known that the process claimed in claims 1-3 could be utilized for that purpose.

The issue in the appeal is as to whether, on these agreed facts, the process claims 1 to 3 are inventions as defined in the *Patent Act*, R.S.C. 1952, c. 203. It is agreed that the products referred to in claims 4 to 6 are patentable.

[1] (1957), 27 C.P.R. 82, 17 Fox Pat. C. 3

1959

COMMISSIONER OF PATENTS v. CIBA LTD.

Martland J.

The word "invention" is defined, in subs. (*d*) of s. 2 of the *Patent Act*, as follows:

> (d) "invention" means any new and useful art, process, machine, manufacture or composition of matter, or any new and useful improvement in any art, process, machine, manufacture or composition of matter;

The position of the appellant is stated, in the reasons given for his decision, as follows:

> The point at issue here is whether or not the use of a classical method to produce a novel product amounts to invention. The Examiner holds that it does not and argues that the process claims lack patentable matter in view of the classical method of "quaternating an amine with an alkyl halide" as given on page 162 of the Chemistry of Organic Compounds, Conant McMillan Company, 1939. British Patent No. 493,865, October 17, 1938, shows the reaction of phenoxyalkylamines with a dodecyl halide to prepare phenoxyalkyl-ammonium salts. There is no inventive step in treating a particular phenoxyalkylamine with dodecyl halide to prepare a particular phenoxyalkyl-ammonium salt. He further states that "the process claims are not rendered patentably new merely because they may be employed to produce new and patentable products".
>
> In my opinion there is no room for argument at all. A standard classical reaction is used to react two compounds, each having a well known and defined radical capable of reacting in a standard manner with the other radical and there is no problem or danger of any side reaction.
>
> In this case the novel conception was the new quaternary compounds; once the new compounds were envisaged, there was no problem or difficulty in the production of the compounds. The only inventive step, if any in this case, is the discovery of certain properties in certain phenoxyalkyl-ammonium salts and this fact, in itself, is obviously insufficient to render patentable an old classical method of preparing this type of substance.

The position of the respondent is stated in the reasons for judgment of the learned President, who, after carefully reviewing the judgment of Jenkins J. in *In re May & Baker Limited and Ciba Limited*[1], says:

> For reasons similar to those given by Jenkins J. I express the opinion that when a process consists in the application of a known method to known materials but it has not previously been applied to them and the use of the process results in the production of a substance that is not only new but also valuable for its unobvious useful qualities the process by which such substance is produced is patentable.

In reaching the conclusion which he did, the learned President placed considerable reliance upon the judgment of Jenkins J. in the case above cited. That was a case which involved a petition by Boots Pure Drug Coy. Ld.

[1] (1948), 65 R.P.C. 255.

for the revocation of a patent held jointly by May & Baker Limited and Ciba Limited, and a motion by the latter two companies to amend the specification, which were heard together. There were five claims in the patent, four being process claims and one a claim for the process produced products. The patent claimed the manufacture of a class of bodies shortly termed "sulpha-thiazoles". This class was very large and the specification contained statements that these new bodies "find application in therapeutics" and have "chemotherapeutic activity in certain diseases".

The petition for revocation was based on a number of grounds, including lack of novelty and lack of subject-matter. It was also claimed that the statements as to the therapeutic value of the new bodies were untrue. The patentees admitted that the statements could not be substantiated for the class in general. They applied for leave to amend the specification so that, in effect, it only claimed two bodies, sulphathiazole and sulphamethylthiazole, whose therapeutic properties had been described in detail in the original specification and which had proved to be of great value in medicine.

Jenkins J. granted the petition for revocation on the ground that, although the two named thiazoles were of considerable therapeutic value, there was no evidence that this was true of any other derivatives covered by the claims, and accordingly the patent was bad for want of subject-matter, since the claims covered substances which were not useful. He refused the motion to amend the specification on the ground that the specification in its amended form would claim an invention substantially different from that claimed in its original form. Appeals to the Court of Appeal[1] and subsequently to the House of Lords[2] were dismissed. The arguments on those appeals were confined to the admissibility of the proposed amendments.

The portions of the judgment of Jenkins J. which are relevant to the issue in the present case, and which were cited with approval in the judgment of the learned President, relate to the contention of the petitioner that the

[1](1949), 66 R.P.C. 8. [2](1950), 67 R.P.C. 23.

1959

COMMISSIONER OF PATENTS v. CIBA LTD.

Martland J.

invention lacked novelty and subject-matter, which contention he refused to accept. These portions of his judgment are the following:

At p. 279:

> The fact that the methods described in the specification were in themselves known methods being admitted on the face of the specification itself, it is obvious that the Respondents could only claim novelty for them as part of the entire process consisting of their application to the particular classes of materials described in the specification so as to produce the new substances claimed. If the entire process was in fact new, in the sense that no one had done or projected the doing of it before, and that the new substances produced had never been made or projected before, then, assuming subject-matter, as it is right to do in considering novelty, I think the objection based on want of novelty must fail.

At p. 295:

> Now it seems to me that in considering this question one must begin by determining what is the character of the inventive step to which the invention as claimed by the unamended specification would, if valid, have owed its validity as an invention. If I am right in the conclusions stated earlier in this judgment with regard to subject-matter, there is no inventive step, no element of discovery, merely in making new substances by known methods out of known materials.
>
> What is indispensably necessary in order to elevate a process of this description from a mere laboratory exercise to the status of a patentable invention is the presence of some previously undiscovered useful quality in the substances produced. Assuming that the substances produced do possess some previously undiscovered useful quality, for example some remarkable value as drugs, then although the methods are known and the materials are known yet the application of those methods to those materials to produce those new substances may amount to a true invention, because of the discovery that those particular known materials when combined by those methods not merely produce those new substances but produce, in the shape of those new substances, drugs of remarkable value.
>
> I think it necessarily follows that the identity of the materials chosen (by luck or good management) by the supposed inventor for the production of his new substances is of the essence of his invention. He must, so to speak, be in a position to repel critics by saying: "You tell me that there is nothing in combining known substances A and B to produce my new substance C, because any chemist could have worked the combination from the books and would have known as a matter of chemical definition that C would be the result. But my great secret, my discovery, is that these particular known substances A and B when combined do not merely produce a new substance answering the chemical description C (which according to accepted chemical theory was a foregone conclusion) but produce in the shape of C a remarkably valuable drug.

Counsel for the appellant points out that the case before Jenkins J. was governed by the law as stated in the English legislation prior to the *Patents Act, 1949,* which did not

contain any provision similar to the definition of an invention as set out in subs. (*d*) of s. 2 of the Canadian Act. He argued that English law does not make the distinction between "process" and "product" which exists by virtue of that subsection and which has been clearly drawn in the decisions of this Court in *Continental Soya Company Limited v. J. R. Short Milling Company (Canada) Limited*[1], *The Commissioner of Patents v. Winthrop Chemical Company Incorporated*[2] and *F. Hoffman-LaRoche Co. v. The Commissioner of Patents*[3]. In Canadian law, he says, an invention must be a process or a product, not both, and each must satisfy the statutory requirements before a patent may issue in respect of it.

Accepting all this, it would appear to me that the reasoning of Jenkins J. is properly applicable to the consideration of whether or not the process claims in the present case do disclose an invention. In the case he was considering, four of the five claims were process claims in fact and the passage from his judgment at p. 295 above quoted relates to the question as to whether the process under consideration constituted a patentable invention.

In my view the reasoning is sound and should be applied in the present case. To constitute an invention within the definition in our Act the process must be new and useful. There is no question as to the process here being useful, as it produces compounds which have been admitted to be both new and useful.

Is it a new process? Is the element of novelty precluded because it consists of a standard, classical reaction used to react known compounds? In my opinion the process in question here is novel because the conception of reacting those particular compounds to achieve a useful product was new. A process implies the application of a method to a material or materials. The method may be known and the materials may be known, but the idea of making the application of the one to the other to produce a new and useful compound may be new, and in this case I think it was.

[1] [1942] S.C.R. 187, 2 Fox Pat. C. 103, 2 C.P.R. 1, 2 D.L.R. 114.
[2] [1948] S.C.R. 46, 7 Fox Pat. C. 183, 7 C.P.R. 58, 2 D.L.R. 561.
[3] [1955] S.C.R. 414, 15 Fox Pat. C. 99, 23 C.P.R. 1.

1959

COMMISSIONER OF PATENTS v. CIBA LTD.

Martland J.

I would, therefore, dismiss the appeal. Section 25 of the *Patent Act* precludes any order as to costs against the appellant.

Appeal dismissed, no costs.

Solicitor for the appellant: W. R. Jackett, Ottawa.

Solicitors for the respondent: Smart & Biggar, Ottawa.

1958

*Dec. 3, 4

1959

Feb. 26

BENJAMIN HILLMAN (*Defendant*) .....APPELLANT;

AND

DOUGLAS MARSHALL MacINTOSH (*Plaintiff*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Negligence—Express pick-up man calling at commercial building and falling down elevator shaft—Mechanical safeguards defective—Victim familiar with premises—Liability of building owner—Invitor and invitee—Concealed danger—Defence of independent contractor—Whether breach of statutory duty—The Factory, Shop and Office Building Act, R.S.O. 1950, c. 150.

The plaintiff, a driver for an express company, had been for some time collecting parcels from the tenants of the defendant's commercial building. To collect his parcels, he would stop his truck outside the entrance to an elevator and board the elevator. Normally, the elevator shaft door would not open unless the elevator was opposite it. On November 27, 1951, the plaintiff was discovered at the bottom of the elevator shaft, unconscious and badly injured, with no recollection of what had happened. The evidence disclosed that the locking device ensuring that the elevator was opposite the door before it opened was not in proper working condition, that the shaft door was open, and that the elevator was at the second or third floor. The defendant contended that he had retained the company which had installed the elevator to keep it in order and also had his own engineers make inspections from time to time. Three service calls to repair the interlocking device had been made between the date of the installation, in June 1951, and the date of the accident. The trial judge dismissed the action, and his judgment was reversed by a majority in the Court of Appeal. The defendant-owner appealed to this Court.

Held: The action must be maintained. There was a breach by the defendant, as invitor, of the duty owed by him to the plaintiff, as invitee.

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

1959

HILLMAN v. MACINTOSH

Per Rand and Judson JJ.: There is no doubt that the plaintiff was an invitee. The door was intended for the use and operation as were actually carried on. The duty of the defendant was one of personal responsibility to see that reasonable care was exercised to maintain in proper condition this potentially dangerous apparatus. The facts disclosed that this duty was not discharged and that a trap was negligently allowed to develop. There was no contributory negligence on the part of the plaintiff.

Per Locke, Cartwright and Martland JJ.: The plaintiff was an invitee. There was a common interest between the defendant and the plaintiff, in that it was to the interest of the defendant that his tenants should be able to obtain the services of express company employees in connection with their commercial activities. *Mersey Docks and Harbour Board v. Procter,* [1923] A.C. 253. There existed, at the date of the accident, an unusual danger. The premises were not reasonably safe and no warning of danger was given to the plaintiff. *Indermaur v. Dames* (1886), L.R. 1 C.P. 274. A *prima facie* case was made that the defendant should have known of the danger existing and this case was not met. There was no evidence of any standing arrangement for periodic inspections to be made. Furthermore, an invitor's duty could not be discharged merely by entrusting its performance to an independent contractor: *Thomson v. Cremin,* [1953] 2 All E.R. 1185. The defendant was not entitled to succeed on the ground that the plaintiff failed to exercise reasonable care for his own safety. The plaintiff was entitled to assume that, when the door opened, the elevator would be there.

Although it was not necessary to so decide here, the plaintiff was within the class of persons protected by s. 58 (1)(*c*) of *The Factory, Shop and Office Building Act* as a "passenger", and a claim might have been founded upon a breach of that statutory requirement.

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

C. F. MacMillan, for the defendant, appellant.

H. A. V. Green, Q.C., and *J. A. Wright, Q.C.,* for the plaintiff, respondent.

The judgment of Rand and Judson JJ. was delivered by

RAND J.:—The appellant is the owner of a block in the city of Toronto which is occupied at least in part by tenants engaged in various businesses that call for frequent shipments of packages by express. The practice of the express messengers is to draw up their trucks at elevator entrances to the building and to use an elevator, of which there are three, one passenger and two freight,

[1] [1957] O.R. 284, O.W.N. 187, 8 D.L.R. (2d) 513.

1959

HILLMAN v. MACINTOSH

Rand J.

in order to make calls at the various offices or rooms and to collect parcels which are then taken down by elevator and loaded on the truck. In the case before us such a call was made by the respondent, a messenger employed in the Canadian Pacific Express service, about 4.00 o'clock p.m. on November 27, 1951. Arriving at the eastern side of the building, in the usual manner he backed his truck up to the door opening on the southerly freight open cage elevator, the level of the building floor being approximately that of the truck bottom. The door was in two horizontal sections, the upper of which in opening moved upward and the lower downward. It was operated by a latch and strap mechanism connected with an interlocking device designed to prevent the door from being opened unless the elevator car was at that floor. To open the door the latch would be pulled upward and, with the elevator in proper position, the horizontal sections would be released from the lock, one to be pushed up by hand and the other down by foot by the person opening it. The latter would stand on a ledge in front of the door between 14 and 18 inches in depth. If the door mechanism held fast, indicating that the elevator was not in position, the messenger would be obliged either to go inside the building by means of another door or by calling to some one in the building, to have the elevator brought to where it was required; there were no means outside the building to do that.

The detail circumstances of the accident here are not known. A short while after 4.00 o'clock the respondent was discovered at the bottom of the elevator shaft 20 feet below the floor, stretched out full length, face downward, unconscious and badly injured; and his memory of the events does not go beyond the point of backing the truck up to the door.

An examination disclosed that the locking device was not in good working condition. The fingers of the bolt which apparently engaged another part of the mechanism to bring about the locking were found to be spread which would make the engagement difficult, the lock hard to operate and the door consequently to be opened. In proper condition the cover of the lock was securely held down by screws to the base of the device; but these screws were found loose, a fact easily detectable by ordinary inspection.

With these defects the device was not dependable nor would it work properly and the result might be that the door could be opened when the elevator was at another level. In the opinion of experts the screws must have been loosened in the course of operation or attempted operation of the door over a period. The appellant some time before the accident had known that the door sections could be separated by 2 or 3 inches when the elevator was not at the appropriate level, a condition which should have been given immediate attention but was not. The loosening, in large part at least, was a product, owing to the spread fingers, of necessarily rough usage in working the door which sooner or later would have produced a condition allowing it to be opened on to an empty shaft.

Through a small window in the upper left part of the door a person could look into the shaft and in suitable conditions of light could see whether or not the elevator was at that floor. There was a small electric bulb in the elevator but the respondent who had used the door about twice a day for the six months of the mechanism's installation had never found it alight. If a door leading from the ground floor of the building was open some light would be admitted to the shaft but there was no evidence that, at the time, it was open or closed. The door a few feet north of the southerly elevator door was usually locked and there is no evidence that it was not. The elevator had been installed in the previous June and in that month, August and September on three occasions the difficulty of working the locking device chiefly through stiffness had been such that skilled mechanics had to be called in. There is no evidence of any other specific inspection or test made or work done to or on the elevator between September and the day of the accident, although as mentioned the appellant had known that the door could be opened 2 or 3 inches.

The view of what had happened urged by Mr. Green was that the respondent, reaching the ledge, looked through the window and in the failing light outdoors and none inside, being able to see nothing, pulled the latch, placed his hands on the upper half of the door to push it upward and his foot on the lower part to force it downward, using the force ordinarily required, was able, because

1959

HILLMAN
v.
MACINTOSH

Rand J.

of the loose screws and the internal condition of the locking device, to open the door and, helped by some slight forward momentum, to step forward into the empty shaft and to fall prone to the bottom. The position of the body when found seems to confirm that that was what happened.

At the conclusion of the plaintiff's case a motion for non-suit was allowed. On appeal[1] this was set aside, Laidlaw J. dissenting, and judgment entered for the plaintiff in the amount of damages found by the trial judge. From that judgment this appeal has been brought.

In the Appeal Court considerable attention was given to the classification of the messenger in relation to the premises: was he an invitee or a licensee? On this I entertain no doubt. The various rooms in the building were let to tenants who would and did carry on business, an essential activity of which at least for some of them, including a company of which the appellant was an officer, was the use of the freight elevators to carry goods in packages or parcels to and from the tenanted premises. Of the fullest knowledge and understanding of this by the appellant there is not the slightest doubt. The elevator had been built for that precise purpose; this facility, including the mode of operating the doors, was placed where it was for that particular use by tenants or persons in the normal course of things giving services to them in their businesses. The door at such a level and so placed and equipped was intended for the use and operation as was actually carried on. How an invitation to use the elevator in the course of contemplated business could have been made more openly than that presented by these physical facts I find it difficult to imagine. There could, of course, have been a formal printed invitation posted at the door or the running announcement of a loudspeaker that all messengers were invited to avail themselves of the elevator; but that would be making audible only what was expressed mutely by the facts themselves. The owner had created them and it never could have entered his mind that the daily routine of express men was not what his tenants had bargained and were paying for. He was interested in providing this convenience as part of the

[1] [1957] O.R. 284, O.W.N. 187, 8 D.L.R. (2d) 513.

accommodation he had undertaken to give them; and the express company and the messenger likewise were interested in completing that feature of the business of the tenants; reasonably safe and expeditious means within the building for the conduct of business was an essential tenant privilege which extended to those persons who would be expected to furnish such services.

These considerations are sufficient in my opinion to satisfy any test laid down as necessary to the relation of an invitee. The duty of the appellant was one of personal responsibility to see that reasonable care was exercised to maintain in proper condition this potentially dangerous apparatus. That it was not discharged the facts disclosed sufficiently indicate; what was negligently allowed to develop was a trap. That was the view reached by the Court of Appeal which found also that there was no contributory negligence. I am quite unable to say that either of those findings was wrong.

I would, therefore, dismiss the appeal with costs.

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

MARTLAND J.:—The facts of this case have been fully reviewed in the judgment of my brother Rand and it is unnecessary to repeat them here. The claim is for injuries sustained by the respondent while on premises occupied by the appellant and the legal question is as to the duty owed by the latter to the former and whether there has been any breach of it.

The first question is as to the legal category in which the respondent should be placed; that is, whether he was a licensee or an invitee on these premises at the time and place of the accident. A number of authorities was cited on this point. The appellant relied upon *Fairman v. Perpetual Investment Building Society*[1], which held that a person who lodged in a flat in an apartment house with her sister, the wife of the tenant of the flat, was not an invitee of the owner of the building when walking on a stairway which was under the owner's control, but was only a licensee.

[1] [1923] A.C. 74, 92 L.J.K.B. 50.

1959

HILLMAN v. MACINTOSH

Martland J.

Reference was made to *Jacobs v. London County Council*[1], in which the House of Lords reviewed the effect of the judgments in that case and followed it.

The appellant's argument is that the respondent's position in relation to the appellant, the owner of the office building, was similar to that of Mrs. Fairman, because his business was with the appellant's tenants and not with the appellant himself.

Consideration must, however, be given to the case of *Mersey Docks and Harbour Board v. Procter*[2], which was heard by the House of Lords shortly after judgment had been delivered in the *Fairman* case and which is also cited in the *Jacobs* case. Lord Sumner, at p. 272, said:

> The leading distinction between an invitee and a licensee is that, in the case of the former, invitor and invitee have a common interest, while, in the latter, licensor and licensee have none.

In *Mersey Docks and Harbour Board v. Procter* the deceased husband of the plaintiff was a boilermaker who was working for a contractor on a ship lying in a floating dock owned by the defendant board. Immediately following the passage above cited, Lord Sumner says: "The common interest here is that ships in the docks should, when necessary, be able to employ boilermakers on board of them", though subsequently he held that the invitation did not extend to that part of the premises to which the plaintiff had strayed when he met his death.

In my view there was a common interest in this case as between the appellant and the respondent. The tenants in the appellant's building, including a company of which the appellant was the president, regularly made use of the services of both the Canadian Pacific Express, which employed the respondent, and the Canadian National Express. Every tenant requested these services and the appellant was aware that the employees of the express companies entered the freight elevators from the laneway entrance to perform them. This use of the freight elevators was made with the appellant's full consent. Part of the function of these elevators was their use by the express company employees. I think there was a common interest

[1] [1950] A.C. 361, 1 All E.R. 737.
[2] [1923] A.C. 253, 92 L.J.K.B. 479.

in that it was to the interest of the building owner that his tenants, carrying on business on premises leased from him, should be able to obtain the services of express company employees in connection with their commercial activities. This being so, the relationship between the appellant and the respondent was that of invitor and invitee.

The appellant, therefore, owed to the respondent, in relation to his use of the freight elevators, a duty the classic definition of which is that of Willes J. in *Indermaur v. Dames*[1]:

> And, with respect to such a visitor at least, we consider it settled law, that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows or ought to know; and that, where there is evidence of neglect, the question whether such reasonable care has been taken, by notice, lighting, guarding, or otherwise, and whether there was contributory negligence in the sufferer, must be determined by a jury as matter of fact.

The exact scope of the duty thus defined has been considered in a number of cases. Three views of it were outlined by Lord Reid in *London Graving Dock Co. Ld v. Horton*[2], where he says:

> I think that in this case there was a duty in respect of the danger which caused the accident and that the real question is what was the nature and extent of that duty. Three views have been suggested. In the first place it has been said that the duty of an invitor is to make his premises reasonably safe (at least in so far as that is practicable). Secondly it can be said that the invitor has the option to make his premises reasonably safe or to give to his invitee adequate notice of the danger, and that if he adopts the latter alternative his duty is at an end. Or thirdly his duty can be said to be to use reasonable care to prevent damage to his invitee.

The second interpretation was the one favoured by the majority of the House of Lords in that case.

There did exist, on the date of the accident, an unusual danger in that it was possible to open the door of the freight elevator at the lane without the elevator itself being at that floor. The respondent was found, following the accident, at the bottom of the elevator shaft. The elevator was then at the second or third floor and the lane door to the elevator was open. On the morning after the accident the lane door of the elevator could be opened,

[1] (1866), L.R. 1 C.P. 274 at 288, 35 L.J.C.P. 184.
[2] [1951] A.C. 737 at 777, 2 All E.R. 1.

1959

HILLMAN v. MACINTOSH

Martland J.

even though the elevator itself was some distance below the door. The respondent had no notice from the appellant of the existence of this danger.

The respondent testified that he had never known the elevator not to be at the right floor when the door was opened. He had been using the elevator regularly in the course of his duties as an expressman, visiting the premises practically every day.

The witnesses who opened the elevator door at the lane on the morning following the accident discovered that the screws holding the cover on the interlock of the elevator door were loose, and also those attaching the device to the wall of the elevator shaft. One of the expert witnesses testified that the lock with the cover loose is not dependable; it would be possible that a person would be able to open the door when the elevator was not there.

There was, therefore, an unusual danger. The premises in question were not reasonably safe and no warning of the danger had been given to the respondent.

The next issue is as to whether the appellant should have known of the danger. Did he use reasonable care to prevent damage to the respondent?

Reference has already been made to the condition of the elevator door at the time the accident occurred. The appellant, on examination for discovery, stated that it was his information that the screws of the interlock device were loose at the time of the accident. Other answers also made on discovery establish that the elevator in question was installed in June 1951. The accident occurred on November 27 of that year. Following its installation the Turnbull Elevator Company Limited effected repairs to the elevator on three occasions: once about two weeks after installation, then on August 28 and again on September 6. The work done was necessitated by the fact that the interlocking mechanism was not operating properly. The appellant stated that it was stiff.

He further stated that on occasions the outside door of the elevator could be opened about two or three inches when the elevator was not at the floor in question. The appellant was asked what inspection he made to determine

whether any repairs were necessary. His answer was: "None." When asked whether he had standing instructions to an employee or employees to make periodic inspections, his answer was: "Our engineer, Mr. Hills, looked after that."

There is no evidence as to what, if any, inspections were, in fact, made, as the appellant did not call any evidence at the trial, having applied for a nonsuit at the end of the respondent's case. The appellant could not say how long the condition of the loose screws had existed.

The position is, therefore, that this elevator had caused difficulty, in respect of its interlocking mechanism, such that repairs had had to be made on three occasions in 1951 following its installation. There is no evidence of actual inspections after the repairs were made on the last occasion; that is, September 6, 1951. There is evidence of loose screws on the interlocking mechanism at the time of the accident and that this door could be opened without the elevator being at the proper floor. I think the respondent made a *prima facie* case that the appellant should have known of the danger which existed on the day of the accident and this case has not been met.

The appellant contends that he entrusted the care of the elevator to the Turnbull Elevator Company Limited, an independent contractor, and that, by so doing, he took reasonable care for the safety of those premises. He relies upon the case of *Haseldine v. Daw*[1]. In that case, however, the defendant had retained the services of a competent firm of engineers to make periodic inspections of the lift in question, to adjust it and to report upon it. There were also quarterly inspections by the insurance company's engineer. In the present case there is no evidence of any standing arrangement with the Turnbull Elevator Company Limited for periodic inspections. All we know is that they returned to make repairs after the initial installation because of the faulty mechanism. There is no evidence of any inspections thereafter.

Furthermore, the authority of *Haseldine v. Daw* may be somewhat shaken by the judgment of the House of Lords in *Thomson v. Cremin*[2]. In that case it was held

[1] [1941] 2 K.B. 343, 3 All E.R. 156.
[2] [1953] 2 All E.R. 1185.

1959

HILLMAN v. MACINTOSH

Martland J.

that an invitor's duty to his invitee is personal in the sense that it could not be discharged merely by entrusting its performance to an independent contractor.

The next point is as to whether the respondent used reasonable care for his own safety. The learned trial judge and Laidlaw J.A., in the Court of Appeal, have held that he did not. The majority of the Court of Appeal held that he did.

On this issue counsel for the appellant relies upon two decisions: that of the Court of Appeal in England in *Kerry v. Keighley Electrical Engineering Co., Ltd.*[1], and that of the Supreme Court of Newfoundland (on appeal) *in Newfoundland Hotel v. Lucy Amminson*[2].

In the former case the plaintiff stepped from a lift to the landing of an upper flat, remained for a few seconds on that landing, during which the lift door closed, and then, according to his own evidence, while keeping his back to the lift, stretched his hand backwards, opened the lift door and stepped backwards through it. The lift was not there and he fell down the shaft, sustaining injuries. At the trial Atkinson J. stated that everybody of intelligence knows nowadays that automatic lifts, which operate without the necessity for an attendant, are supposed to be so constructed that the door will not open unless the lift is there. He thought the public today have a right to expect, and to take for granted, that, if the door of a lift opens, the lift will be there.

He relied upon a statement of Lord Wrenbury in the *Fairman* case at p. 96:

> The owner must not expose the licensee to a hidden peril. If there is some danger of which the owner has knowledge, or ought to have knowledge, and which is not known to the licensee or obvious to the licensee using reasonable care, the owner owes a duty to the licensee to inform him of it. If the danger is not obvious, if it is a concealed danger, and the licensee is injured, the owner is liable. But something must be said as to the meaning of "obvious." Primarily a thing is for this purpose obvious if a reasonable person, using reasonable care, would have seen it. But this is not exhaustive unless the words "reasonable care" are properly controlled. There are some things which a reasonable person is entitled to assume, and as to which he is not blameworthy if he does not see them when if he had been on the alert and had looked he could have seen them. For instance: if one step in a staircase or one rung in

[1] [1940] 3 All E.R. 399.

[2] (1949), 23 M.P.R. 194, 4 D.L.R. 520.

a ladder has been removed in the course of the day and a man who had used the staircase or the ladder in the morning comes home in the evening finding the staircase or ladder still ostensibly offered for use, and comes up or down it without looking out for that which no one would reasonably expect—namely, that a step or rung has been removed, he has nevertheless suffered from what has generally been called a "trap," although if he had stopped and looked he would have seen that the step or rung had been removed.

On appeal, MacKinnon L.J. said at p. 403:

For my part, I do not think that it is possible to assimilate the expectation of a reasonable person that a staircase will have all its stairs in position, or that a ladder will have all its rungs in position, and not have a dangerous gap in it, for which he must look, to a suggestion that, if one opens a door to a lift, one is entitled to assume that the lift is opposite to that door.

As between these two views regarding the effect of Lord Wrenbury's statement, it is, I think, significant in the present case that the law of Ontario contains a statutory provision in respect of the duty regarding elevators in office buildings. Paragraph (*c*) of subs. (1) of s. 58 of *The Factory, Shop and Office Building Act,* R.S.O. 1950, c. 126, provides as follows:

58. (1) In every factory, shop, bakeshop, restaurant and office building,

* * *

(*c*) every gate or door opening on to an elevator hoistway shall be connected to the machinery operating the elevator by an interlocking device which shall prevent the elevator car from moving until such gate or door is closed, and which shall prevent such gate or door from being opened unless the elevator car is in the proper position in relation to such gate or door to permit the safe movement of passengers or freight from the landing or floor to the platform of the elevator car;

Further, there is in this case the respondent's own evidence as to his prior experience in the use of this elevator, during which the elevator had always been there when the door opened. There was no such evidence in the *Keighley* case.

1959

HILLMAN v. MACINTOSH

Martland J.

The facts of the *Newfoundland* case are completely different from the present. The deceased husband of the plaintiff in that case had improperly used the elevator in question and in a manner contrary to the rules of the defendant hotel. Further, the elevator there in question was not subject to the regulations regarding electrical safety devices.

It is my view that the respondent was entitled to assume that, when the door opened, the lift would be there. I do not think that the appellant is entitled to succeed on the ground that the respondent failed to exercise reasonable care for his own safety.

Having reached this conclusion, that there was a breach by the appellant, as invitor, of the duty owed by him to the respondent, as invitee, on the appellant's premises, it is not necessary to decide whether the respondent was entitled to succeed against the appellant on a claim for breach of a statutory duty imposed upon the appellant by para. (*c*) of subs. (1) of s. 58 of *The Factory, Shop and Office Building Act,* previously quoted. I am inclined to think that that paragraph did create a duty involving legal responsibility beyond the liability to the money fine imposed for its breach by the section. I think the respondent was within the class of persons protected by this paragraph, i.e., "passengers", and that, in the light of the judgment of the House of Lords in *Millar v. Galashiels Gas Co.*[1], a claim might have been founded upon a breach of that statutory requirement.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the defendant, appellant: Richardson & MacMillan, Toronto.

Solicitor for the plaintiff, respondent: J. A. Wright, Toronto.

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[1] [1949] S.C. (H.L.) 31, A.C. 275, 1 All E.R. 319

1959

*Jan. 29
Feb. 26

MORRIS ROBERT PALMER and NATHAN PALMER, carrying on business under the name of HULL PIPE & MACHINERY COMPANY (*Plaintiffs*) ..... APPELLANTS;

AND

MIRON & FRERE, MIRON & FRERES and MIRON & FRERES LIMITEE (*Defendants*) ..... RESPONDENTS.

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

Damages—Land used by tenant expropriated by Crown—Failure of tenant to remove chattels as requested—Contractor removing same to commence excavation—Damages claimed from contractor—Liability of mandatary for delict or quasi-delict—Civil Code, arts. 1053, 1716, 1727.

The plaintiffs used a certain piece of land, of which they were tenants, as a scrap yard. The land was expropriated by the Crown in 1947 but the plaintiffs continued their occupation and, although requested to do so several times, did not remove their scrap. When the defendants were granted the contract by the Crown for the excavation work to be done on the site, they used a bulldozer to push the scrap for a distance of 35 feet. The plaintiff's action, claiming damages for alleged wrongful removal of the scrap, was dismissed by the trial judge. This judgment was affirmed by the Court of Appeal.

Held: The action should be dismissed.

In an action based on s. 1053 of the *Civil Code,* the plaintiff has to show that a delict or a quasi-delict was committed, that it was imputable to the defendant, and that it resulted in damages for the plaintiff. The defendants, in this case, were not guilty of any fault. In any event, the plaintiffs could not succeed as they have failed to discharge the burden placed upon them of establishing that they sustained any damage. What was done to the scrap did not in any way depreciate its value.

The proposition that because the defendants were acting under the orders of the Crown, they could not be held liable, was not sound. If a delict or a quasi-delict is committed, its authors cannot escape liability on the mere ground that they acted under orders of their principals. *Desrosiers v. The King,* 60 S.C.R. 105. Moreover, the defendants were not the mandataries of the Crown.

Even if it were assumed that the plaintiffs were monthly tenants of the Crown, which is not conceded, they would not be entitled to claim from the defendants, who were not the lessors, damages which they have not proven.

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

1959

PALMER *et al.* v. MIRON & FRERE *et al.*

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

R. Quain, Q.C., and *H. Quain,* for the plaintiffs, appellants.

Honourable R. Pinard, for the defendants, respondents.

The judgment of the Court was delivered by

TASCHEREAU J.:—The plaintiffs, who carry on business under the name of Hull Pipe and Machinery Company, claim from the respondents the sum of $33,540. They allege that during September 1949, the respondents wrongfully removed with the use of bulldozers, some scrap steel, iron, airplane parts, brass fittings, etc., belonging to them, from a certain piece of land situated in the City of Hull and caused them the damages which they claim.

It appears that for some months previous to March 1947, the appellants were the tenants of this land belonging to the City of Hull, and to whom a monthly rental of $15 was paid. In March 1947, the Federal Government started proceedings in expropriation, and acquired full ownership of these lots for the purpose of erecting the Printing Bureau.

The appellants nevertheless continued their occupation of the land, did not remove their scrap, although requested to do so several times, and particularly by a letter addressed to them by the City of Hull on April 2, 1948, by telegrams of the Chief Architect of the Department of Public Works, and finally by a formal notice sent by the Secretary of the same Department on August 23, 1949.

In the meantime, the Department of Public Works had asked tenders for the excavation to be done on the site of the Printing Bureau, and as the respondents' tender was accepted, they were authorized to proceed with their work on August 30, 1949. As the appellants still persisted in not removing their scrap, thus preventing the excavation work to be proceeded with, it was decided after consultation between the Department and the respondents, that the latter would remove it, which was done during the middle of September with the use of a bulldozer. The operation

[1] [1958] Que. Q.B. *268.*

merely consisted in pushing all the scrap metal for a distance of 30 to 35 feet, and letting it lie on the ground, near a fence, so that the excavation work could be started without delay.

It is because this cleaning operation was performed that the plaintiffs claim $33,540. The action was dismissed by the learned trial judge and his judgment was unanimously confirmed by the Court of Queen's Bench[1]. I agree with the conclusions of both Courts.

The action is based on s. 1053 of the *Civil Code* of the Province of Quebec, and the plaintiffs have therefore to show that a delict or a quasi-delict was committed, that it was imputable to the defendants and that as a result of their wrongful act, the appellants suffered damages.

Respondents were not guilty of any fault, but in any event, the appeal must be dismissed on the ground that the appellants, whose burden it was to do so, have not established that they sustained any damage. The mere pushing of the metal, near the fence, for a distance of approximately 35 feet, did not in any way depreciate the value of this scrap. The only possible claim, if any exists, is for the cost of removing it, now that it is mixed with mud and sand, but no evidence whatever has been adduced to show what that excess cost would amount to.

The appellants tried to establish that at a later date, the respondents have again removed this scrap metal, as a result of which operation, they could not salvage any. They have totally failed on that point, as found by the trial judge and the Court of Queen's Bench[1]. In fact the appellants admit that they could not hope to have this Court reverse these concurrent findings.

I must state, however, that I do not agree with the reasoning of the learned trial judge that as the respondents were acting under the orders and instructions of the Crown, represented by the Chief Architect of the Department of Public Works, when they removed the material, they cannot be held liable. I do not think that this proposition

[1] [1958] Que. Q.B. *268.*

1959

PALMER *et al.* *v.* MIRON & FRERE *et al.*

Taschereau J.

is sound. If a delict or a quasi-delict is committed, its authors cannot escape liability on the mere ground that they acted under the orders of their principals.

The following "considérant" appears in the judgment of the trial judge:

> CONSIDERING that defendants, in executing their contract for said excavation, became in a certain manner towards third parties mandatary of the Crown in virtue of a tacit mandate, and as such if acting within limits of their contract, in good faith, they could not be held responsible in place of the Crown their mandator.

This sweeping proposition concerning the respective liability of mandators and mandataries towards third parties does not state the law as it exists in the Province of Quebec, and a careful reading of arts. 1716 and 1727 C.C., and of what has been said in this Court in *Desrosiers v. The King*[1] will show the inaccuracy of this statement. Moreover, the trial judge errs, when he assumes that the respondents in the present case were the mandataries of the Crown. There remains to be noted that the trial judge referred to proceedings taken by the appellants against Her Majesty the Queen in the Exchequer Court. This can have no bearing on the issues in the present action.

Finally, the appellants argued that for the months of July, August and September 1949, they paid the monthly rent of $15 to the Canadian Government and that, therefore, having become monthly tenants of the Crown, they could not be evicted in such a summary manner. Even assuming that they were monthly tenants of the Crown, which is not conceded, this does not entitle them to claim from the respondents, who were not the lessors, any amount for damages which they have not proven.

The appeal fails and should be dismissed with costs.

Appeal dismissed with costs.

Attorneys for the plaintiffs, appellants: Quain & Quain, Ottawa.

Attorneys for the defendants, respondents: Pinard, Pare & Pigeon, Montreal.

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[1] (1919), 60 S.C.R. 105, 55 D.L.R. 120

1959

*Jan. 29

Feb. 26

MORRIS ROBERT PALMER and NATHAN PALMER, carrying on business under the name of HULL PIPE and MACHINERY COMPANY (*Petitioners*) ..... APPELLANTS;

AND

HER MAJESTY THE QUEEN (*Defendant*) ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Crown—Petition of right—Claim for breach of contract—Tenant of former owner remaining in occupation of expropriated Crown land—Nature of tenancy—Absence of authority of Governor in Council—Destruction of chattels on direction of Crown servant by independent contractor—Whether Crown liable—Civil Code, art. 1053—The Exchequer Court Act, R.S.C. 1927, c. 34, ss. 18, 19(b), (c)—The Public Works Act, R.S.C. 1927, c. 166, s. 18.

The petitioners, who were tenants of land subsequently expropriated by the Crown in 1947, remained in occupation after the expropriation and paid rent to the Crown. They claimed damages for an alleged breach of a covenant of peaceful enjoyment, and see *ante* p. 397) for destruction of their chattels on the direction of an officer of the Crown through a contractor. The petition of right was dismissed by the Exchequer Court.

Held: The petition should be dismissed.

There was no lease between the parties and no valid consent was ever given to bind the Crown. The authorization of the Governor in Council, which is an essential requisite for a valid lease entered into by a department of the Crown, was never obtained in this case. Moreover, the petitioners were notified several times to leave the premises which they were occupying from day to day, precariously and by mere tolerance. They were bound to leave at a moment's notice, and their refusal to vacate was marked with the utmost bad faith.

Neither s. 18 nor s. 19(*b*) and (*c*) of the *Exchequer Court Act*, as they stood prior to their amendment in 1949, had any application.

APPEAL from a judgment of Thorson P. of the Exchequer Court of Canada[1], dismissing a petition of right. Appeal dismissed.

R. Quain, Q.C., and *R. Quain, Jr.*, for the petitioners, appellants.

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

[1] [1951] Ex. C.R. 348, [1952] 1 D.L.R. 259.

1959

PALMER *et al.* v. THE QUEEN

P. Ollivier and *R. Tassé,* for the defendant, respondent.

The judgment of the Court was delivered by

TASCHEREAU J.:—I have today given my reasons why the appeal of the present appellants in another case against *Miron & Freres*[1] fails, and while the evidence is not identical, it is unnecessary to restate the salient facts. However, it may be stated that the appellants claim from the present respondent, the same amount of $33,540 which they claimed from Miron & Freres in the other case before the Superior Court of the Province of Quebec. The learned President of the Exchequer Court[2] dismissed the petition of right with costs, and I agree with the conclusions which he has reached.

It is first of all claimed that the payment by the apellants to the respondent of the rents, namely, $15 a month, for July, August and September, 1949, made them monthly tenants, and that they were entitled to a month's notice, and therefore should have had the enjoyment of the land until the end of September. I believe that this argument cannot support the claim of the appellants. Of course, if there is a breach of contract, a petition of right will lay against the Crown to recover damages, but here there was no lease between the parties and no valid consent has ever been given to bind the respondent. Section 18 of the *Public Works Act* says:

> 18. No deed, contract, document or writing in respect of any matter under the control or direction of the Minister shall be binding on His Majesty or be deemed to be the act of the Minister, unless the same is signed by him or by the Deputy Minister, and countersigned by the Secretary of the Department, or the person authorized to act for him.

Vide: *St. Ann's Island Shooting and Fishing Club Limited v. The King*[3], where it was held that the authorization of the Governor General in Council was an essential requisite for a valid lease entered into by a department of the Crown. Here, no such authority has ever been obtained.

Moreover, the appellants knew of the expropriation proceedings, they had been notified several times that they would have to leave the premises they were occupying

[1] [1959] S.C.R. 397.
[2] [1951] Ex. C.R. 348, [1952] 1 D.L.R. 259.
[3] [1950] S.C.R. 211, 2 D.L.R. 225.

from day to day, precariously and by mere tolerance. Under these conditions, they were bound to leave at a moment's notice. They in fact received several notices, and their refusal to vacate the property is marked with the utmost bad faith. Even after having been notified, and after having, at the request of their lawyer, obtained a few days delay to clear the way, they deposited some additional scrap, indicating their determination to scorn the notices they had received.

The other submissions of the appellants based on old ss. 18 and 19 (*b*) and (*c*) of the *Exchequer Court Act*, have been rightly ruled out by the learned trial judge.

Under s. 18, the Exchequer Court has exclusive original jurisdiction . . . in all cases in which the land, goods or money of the subject, are in the possession of the Crown. This is not a case where the Crown *had possession* of land, goods or money belonging to the appellants. Not only did the Crown not have possession of these goods, but it requested several times that they be taken away from its premises. There was no actual possession, and no possession in law within the meaning of the Act.

As to s. 19 (*b*) and (*c*), it seems sufficient to say that they do not apply. Section 19 (*b*) deals with the case of a subject whose property has been injuriously affected by the construction of a public work, and s. 19 (*c*) as it then was, is to the effect that the subject has a 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.

Section 19 (*b*) does not apply, because no property belonging to the appellants has been injuriously affected by the construction of the Printing Bureau. Nor does s. 19 (*c*) apply. As pointed out in the Exchequer Court, there is no allegation of the negligence of any particular officer or servant of the Crown, but in any event, counsel for the appellants stated that the only suggested officers or agents were Miron & Freres, and they were independent contractors.

1959

PALMER et al. v. THE QUEEN

Taschereau J.

The appeal fails and should be dismissed with costs.

Appeal dismissed with costs.

Attorneys for the petitioner, appellant: Quain & Quain, Ottawa.

Attorney for the defendant, respondent: A. Labbe, Buckingham.

1959

*Jan. 27, 28
Feb. 26

PAL SALAMON .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Charge to jury—Drunkenness—Provocation—Rule in Hodge's case—Criminal Code, 1953-54 (Can), c. 51, ss. 201(a)(ii), 203.

The appellant was convicted of the murder of a woman at whose house he was a boarder. After the appellant and the woman had returned home from a drinking party, a quarrel took place between them. The woman's husband intervened, brought the quarrel to an end, and the woman proceeded to a wash-room. She was shortly after followed by the appellant, and in a matter of minutes one witness heard a shot while another heard the appellant calling the woman an insulting name, and the latter retaliating in a similar fashion, and then the shot. The woman was found fatally injured. The conviction was affirmed by the Court of Appeal.

Leave was granted by this Court to appeal on questions of law respecting the trial judge's charge to the jury on the issues of drunkenness, provocation, and the rule in *Hodge's* case.

Held (Cartwright J. dissenting): The conviction should be affirmed.

Per Taschereau, Fauteux, Abbott, Martland and Judson JJ.: The trial judge related the defence of drunkenness to the capacity to form the intent specified in s. 201(*a*)(*ii*) of the *Criminal Code*. The jury was, therefore, properly instructed on that defence.

With respect to provocation, culpable homicide committed in the heat of passion generated by a provocation lacking the feature of suddenness does not come within the terms of the opening paragraph of s. 203 of the *Criminal Code*. In this case, there was no evidence of sudden provocation within the meaning of the section, and therefore there was no duty on the trial judge to instruct the jury on the subject. In any event, no fault could be found with the instructions given to the jury on this matter.

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

On the facts of this case, a reasonable jury, even applying the rule in *Hodge's* case, could only, if acting judicially, reach the conclusion that the appellant, having entered the room, produced his revolver and fired it at the woman, either at once or upon the exchange of insults. It was no part of the case for the prosecution, but for the defence, to explain away this fact attending *actus reus* and *mens rea*, by evidence showing accident, self-defence, sudden retaliation to sudden provocation, or drunkenness affecting the capacity to form the relevant specific intent. Drunkenness and provocation were adequately put before the jury and rejected. Accident or self-defence were not raised, nor was there any evidence to support either.

Per Locke J.: The trial judge's charge adequately and accurately stated the law to the jury with regard to the defence of drunkenness.

There was no evidence of provocation within the meaning of s. 203 of the *Criminal Code* and therefore the appellant was not entitled to have the issue put to the jury. An accused person who, as the appellant did, provokes another to fight by striking or abusing him and is struck in self-defence and kills such person in an ensuing fight, cannot escape conviction for murder by saying that the killing was committed in the heat of passion.

The rule in *Hodge's* case was to be followed only when the evidence relied upon was wholly, or to a material extent, circumstantial. In this case, the instruction was unnecessary since no other inference was possible than that the appellant had fired the fatal shot.

Per Cartwright J., dissenting: On the question of provocation, there was non-direction amounting to misdirection which may well have affected the verdict. The trial judge did not make it clear to the jury that in dealing with the question whether the accused was in fact provoked they should consider the accused's condition of drunkenness, and certain passages in his charge tended to give the jury the impression that they should not consider it. There was, furthermore, no room for the application of s. 592(1)(*b*)(*iii*) of the *Criminal Code*.

APPEAL from a judgment of the Court of Appeal for Ontario, affirming the appellant's conviction for murder. Appeal dismissed, Cartwright J. dissenting.

J. O'Driscoll and *J. H. Gillies*, for the appellant.

W. C. Bowman, Q.C., and *F. L. Wilson*, for the respondent.

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

FAUTEUX J.:—This is an appeal, by leave of this Court, from a unanimous judgment of the Court of Appeal for Ontario affirming the verdict of a jury finding the appellant guilty of having, at the city of London, in the province of Ontario, on the 26th day of July 1958, murdered one Joyce Alexander.

1959

SALAMON v. THE QUEEN

Fauteux J.

The appellant, a "freedom fighter" during the 1956 Hungarian revolt, having escaped to Austria in November of that year, arrived in Canada in January 1957 and, from the end of February 1957 to the date of his arrest, lived and worked in the city of London. At the time of the fatal occurrence, he was residing with Mrs. Alexander, her husband and her child at 499 Hamilton Avenue and had for some time entertained a close relationship with her and contributed to her support and that of her child.

In the morning of the 25th of July, he and Mrs. Alexander arranged to meet at a certain place, about 4 o'clock of the afternoon. The latter failed to keep the appointment and the appellant, apparently looking for her, proceeded to visit beverage rooms, where he met Joseph Kish, one of his acquaintances, and consumed beer with the latter. Both returned to 499 Hamilton Avenue, where Joyce Alexander was and each of the three had two bottles of beer. The three left at 9 o'clock, conveyed the child to a baby-sitter and went to the Brunswick Hotel where they stayed from 9.30 to 11.30, drank beer and were, on the occasion, joined by John Gnay and Alex Kapler. A heated discussion on communism took place and was brought to an end by the intervention of a waiter. Kish, on the invitation of Kapler and Gnay, and the appellant and Mrs. Alexander, on the invitation of Kish, then proceeded to 5 Prospect Avenue, the home of one Olejnik, fetching the child on their way, and arriving there at about midnight. While at that place, wine was consumed; Kapler asked Mrs. Alexander to accompany him to his farm; and once again, appellant became involved in an argument on communism. Being requested to leave, he asked Mrs. Alexander to accompany him and upon her refusal, left, but returned for the purpose, he testified, of asking Kish to prevail upon her to go home. To attract Kish's attention, he rapped on a window and broke a pane of glass. Kapler came out, a struggle ensued between the two, appellant broke away, fired five shots in the air with his revolver and eventually found his way to 499 Hamilton Avenue. When later, between 1 a.m. and 2 a.m., Alexander arrived home, the accused, who was lying on his bed fully clothed, got up and asked him whether he had seen Joyce Alexander; the husband answered in the negative and went to bed. Appellant had consumed a

certain quantity of beer and was, for some time, either lying or sitting on his bed when, it being close to 4 o'clock a.m., Mrs. Alexander entered the house with Kish and the child. Salamon came out of his room, asked her and received an explanation for her failure to keep the afternoon appointment. An argument followed between the two. He requested her to give him immediately the shoes and skirt she was wearing and which he had bought for her. She told him that she would give them the next day. He insisted, assaulted her. Blows were struck, her skirt torn off and they began throwing dishes at each other. Alexander testified that, at this stage, he came out of his room, brought the quarrel to an end and told his wife to go to the adjoining bathroom to wash the blood off the back of her neck, which she did. It is the contention of the Crown that, at that moment, appellant went to his room to get his revolver. Kish testified that the appellant did go to his room and Alexander said he did not. Appellant himself, when examined in chief, testified that he remembered nothing of what took place then or thereafter; on cross-examination, however, he admitted having some recollection of going to his room and this, he said he did because he wanted the quarrel to end. He was seen by both Kish and Alexander entering the wash-room but neither of these two saw what took place therein. However, the door having been left open, in a matter of moments after the entrance of Salamon, Alexander heard a shot while Kish said he heard, in quick sequence, appellant calling the woman a dirty name, then the latter retaliating in a similar fashion, and then the shot. Appellant immediately emerged from the wash-room, carrying his revolver in the right hand and pointing it at Alexander and Kish, picked up his coat and left the room. When apprehended by the police a few minutes later at the back door of the house, he had his revolver, cocked, in his right hand. The police, who wrested it from him, found, in the barrel, five live bullets and one discharged cartridge, indicating that appellant's revolver, having seven cartridge-chambers, had been re-loaded, subsequent to the discharge of the five shots at Olejnik's place, and either prior or subsequent to the fatal shot. On the

1959

SALAMON v. THE QUEEN

Fauteux J.

evidence, it is not open to say that between the two shootings, that is the one at Olejnik's and the fatal one, any one, but the accused, had the physical possession of this revolver or knew where it was.

As the trial judge indicated to the jury, with the apparent approval of counsel for the accused, the defence was provocation and drunkenness which defence, in the circumstances of this case, implied that Salamon was in fact the author of the death. There was no suggestion of accident or self-defence nor is there any evidence in this respect. The jury rejected the defence of provocation and drunkenness and found the prisoner guilty.

The grounds upon which leave to appeal was granted are, in the order in which they will be considered, the following:

(1) Did the learned trial Judge err in his charge to the jury in regard to the defence of drunkenness?

(2) Did the learned trial Judge err in his charge to the jury in regard to the defence of provocation?

(3) Did the learned trial Judge err in failing to instruct the jury in accordance with the rule in Hodge's case?

Defence of drunkenness. The substance of the submissions of counsel for the appellant is (*a*) that the trial judge failed to direct the jury that they should consider whether, at the time Salamon fired his revolver, he was affected by drunkenness to the point of being unable to form the intent specified in s. 201(*a*)(*ii*), and (*b*) that he misdirected them in telling them that if they believed that to be the case, or were left in doubt, they could—instead of directing them that they should—reduce murder to manslaughter. On a careful reading of the charge, I am satisfied that the jury was properly instructed on the defence of drunkenness. The learned trial judge did relate the defence of drunkenness to the capacity to form the intent indicated. While, in a general reference to the power of the jury to reduce murder to manslaughter, he used the word "may", which is the word mentioned in s. 203(1), he made it clear that it was their duty to do so should they find, or be left in doubt, that the situation, where such a reduction is open, was present in the case.

Defence of provocation. The relevant part of s. 203 reads as follows:

203. (1) Culpable homicide that otherwise would be murder may be reduced to manslaughter if the person who committed it did so in the heat of passion caused by sudden provocation.

(2) A wrongful act or insult that is of such a nature as to be sufficient to deprive an ordinary person of the power of self-control is provocation for the purposes of this section if the accused acted upon it on the sudden and before there was time for his passion to cool.

(3) For the purposes of this section the questions

(*a*) whether a particular wrongful act or insult amounted to provocation, and

(*b*) whether the accused was deprived of the power of self-control by the provocation that he alleges he received,

are questions of fact, but no one shall be deemed to have given provocation to another by doing anything that he had a legal right to do, or by doing anything that the accused incited him to do in order to provide the accused with an excuse for causing death or bodily harm to any human being.

Appellant testified that when he left Olejnik's house, he "was not mad" at Joyce Alexander; he wished her to go home with him. On his own story, he cannot be said to have then been in a state of provocation. Even assuming there had been, at that stage, provocation from her, the length of time elapsing from this point to that of the fatal occurrence would negative any relation of suddenness between the fact of such provocation at Olejnik's place and the fact of the alleged retaliation at 499 Hamilton Avenue. As stated by Rand J. in *The Queen v. Tripodi*[1]: "Suddenness must characterize both the insult and the act of retaliation". Evidence of sudden provocation, if any, must then be found in the events taking place subsequently at the home of the deceased woman. In the consideration of these events, again it must be kept in mind that culpable homicide committed in the heat of passion generated by a provocation lacking the feature of suddenness does not come within the terms of the opening paragraph of the section. The evidence shows that from the time Joyce Alexander entered her home to that of the fatal shot, the appellant, and not she, took, and kept throughout, the initiative of the events leading to her death. He was evidently waiting for her arrival. He started the quarrel during which she retaliated. The dispute subsided with the intervention of the husband and, as instructed by the latter, she proceeded to the wash-room. Appellant went to his room, then proceeded to the wash-room, called her a dirty name, causing her to retaliate in a similar fashion, and then shot, or shot without anything being said.

[1] [1955] S.C.R. 438 at 443, 112 C.C.C. 62, 21 C.R. 192, 4 D.L.R. 445.

1959

SALAMON v. THE QUEEN

Fauteux J.

On this evidence, appellant cannot justify or excuse his actions in saying that he was facing a situation characterized with suddenness, unexpectedness or lack of premonition. He had and kept the initiative of the situation in which he found himself. There was no sudden provocation on the part of Joyce Alexander causing sudden retaliation on his part. On this view that there was no evidence of sudden provocation within the meaning of the section, there was no duty for the trial judge to charge the jury on the matter and it is unnecessary to consider the minute criticism which counsel for the appellant made of the address of the trial judge in the matter.

Assuming there was such evidence, I must say that no fault can be found as to the manner in which the trial judge dealt with the question. The only submission as to which comment may be found necessary is the alleged omission of the trial judge to direct the jury that, in order to decide whether the appellant was actually provoked, they had to take into consideration the question of drunkenness. The jury having been told that there were two distinct defences, *i.e.*, that of provocation and that of drunkenness, the trial judge proceeding to deal with the first, invited them to consider the question in two stages: (*i*) Whether an ordinary person would be deprived of his self-control because of anything said or done by the deceased woman and (*ii*) Whether the accused had been actually provoked by her conduct. With respect to the first question, he told them: "At this stage you must not consider the character, background, temperament, or condition of the accused", implying that such matters were not ruled out of the consideration in the second stage. With respect to the second question, he instructed them to consider the "background, temperament, psychological background" of the accused, the concluding directions in the matter being reported as follows in the transcript of the charge:

> I think I mentioned to you the fact that if you get over the hurdle of whether the ordinary man would be provoked and decided that this man was also provoked, you can also consider how drunk he was, and that is something which you should take into consideration.

With the following opening sentence, he then proceeded to deal with the defence of drunkenness: "The other defence is that of drunkenness itself".

Counsel for the Crown suggested and, I think, rightly so, that what the trial judge is reported to have said when concluding his instructions on provocation, is, in part, inaccurately reported in the transcript in that he did not say "and decided", but said "in deciding". Be that as it may, read as a whole, I think that the address in the matter makes it clear that the jury were instructed that it was their duty to consider the condition of drunkenness of the accused to decide whether he had acted on provocation.

The *Hodge's Case*[1] rule. The proposition that the trial judge erred in failing to instruct the jury in accordance with the rule in the *Hodge's Case* is predicated on the submission that there was no direct evidence that: (*i*) the appellant had a gun when he entered the wash-room, (*ii*) that the appellant was the one who fired a shot and (*iii*) that if the appellant did fire the shot, such was not accidental or in self-defence or the result of provocation by the deceased in the wash-room. Hence it is said that there is only circumstantial evidence both as to *actus reus* and *mens rea.*

From all the facts preceding, accompanying and following the fatal shot, and particularly from the fact that when Joyce Alexander proceeded to the wash-room, for the purpose indicated, she had no knowledge that the appellant would follow her to that room, and much less knowledge as to where the revolver was, and from the direct evidence of what was heard to take place, either instantaneously or in quick succession, in the wash-room, a reasonable jury, even applying the *Hodge* rule, could only, if acting judicially, in the absence of evidence explaining it away, reach the conclusion that appellant, having entered the room, produced his revolver and fired it at the woman, either at once or upon the exchange of insults. It was no part of the case for the prosecution, as suggested in (*iii*) above, but for the defence to explain away this fact attending *actus reus* and *mens rea,* by evidence showing accident, or self-defence, or sudden retaliation to sudden provocation, or drunkenness affecting the capacity to form the relevant specific intent. Appellant is presumed to have intended the natural consequences of his act and, as stated by Lord Birkenhead in the *Beard Case*[2], this presumption is not

[1] (1838) 2 Lew. C.C. 227, 168 E.R. 1136. [2] [1920] A.C. 479.

1959

SALAMON v. THE QUEEN

Fauteux J.

rebutted by evidence of drunkenness falling short of an incapacity in the accused to form the intent necessary to constitute the crime. The defences of drunkenness and provocation were adequately put before the jury and rejected by them. Accident or self-defence were not raised at trial, nor is there any evidence in support thereof.

On these views, this ground of appeal is ill-founded and it is unnecessary to deal with the real purport and limits of application of the *Hodge's Case* rule or with what was said by this Court in this regard, with respect to the particular circumstances in the case of *Lizotte v. The King*[1].

I would dismiss the appeal.

LOCKE J.:—The questions of law upon which leave to appeal was granted are stated in other reasons to be delivered in this matter.

I consider that the judge's charge adequately and accurately stated the law to the jury in regard to the defence of drunkenness.

In my opinion, there was no evidence of provocation within the meaning of that expression as it is used in s. 203 of the *Criminal Code* and, accordingly, this was not a ground upon which the offence committed might be reduced to manslaughter.

As the evidence of the witness Kish shows, when Joyce Alexander returned to the premises where she lived with her husband, the appellant was the aggressor in the dispute and the struggle which was followed within a very few minutes by her death. According to Kish, after reproaching the woman for failing to keep an appointment with him that afternoon, the appellant attempted forcibly to take off her shoes, saying that he had given them to her, and this precipitated a struggle in which each struck the other. After failing to remove the shoes, he forcibly removed her skirt and immediately thereafter the two commenced throwing dishes at one another. At this stage, the woman's husband appeared and stopped them and, as his wife was bleeding from a cut at the back of her neck, told her to go into the adjoining wash-room to remove the blood. How the woman received this wound is not explained. She then

[1] [1951] S.C.R. 115 at 133, 99 C.C.C. 113, 11 C.R. 357, 2 D.L.R. 754.

walked into the wash-room through a door which was standing almost wide open and, according to Alexander, she was immediately followed by the appellant and, within a matter of a few seconds, the shot was fired which caused her death. Kish, however, said that after the woman went to the wash-room the appellant went to another room in the house and returned apparently immediately thereafter and went into the wash-room. He was then heard by Kish to call the woman a vile name and she thereupon called him one equally objectionable and the shot followed immediately. Alexander's account and that of Kish differ in this respect that it was only the latter who said that the appellant left the room and returned before going into the wash-room and Alexander did not remember hearing his wife and the appellant calling each other names while in the wash-room. Also, while Alexander said that it was a matter of seconds between the time that the appellant went into the wash-room and the time the shot was heard, Kish said it was "a couple of minutes".

While the door of the wash-room was open, apparently the woman and the appellant were not visible to Kish and Alexander when the shot was heard. Immediately thereafter the appellant came out of the wash-room with a revolver in his hand and, after menacing Kish and Alexander with it, left the room and was shortly after arrested on the premises. Alexander, entering the wash-room, found his wife lying dying upon the floor and she shortly afterwards expired. The revolver which the police took from the appellant was loaded, with the exception of one chamber from which a shot had been discharged, and it was this bullet that killed Joyce Alexander.

It will be seen from this account that it was the appellant who provoked, first, the argument, and then, the struggle with the woman and, as the evidence of Kish showed, it was he who first applied to her a vile name when he followed her into the wash-room. In my opinion, under these circumstances, it cannot be successfully contended that if the accused became angered "on the sudden" he was provoked by the actions of the woman which followed upon his assaulting her in the manner described. An accused person who provokes another to fight by striking or abusing him and is struck in self-defence and kills such person in

1959

SALAMON v. THE QUEEN

Locke J.

an ensuing struggle cannot, in my opinion, escape conviction for murder by saying that the killing was committed in the heat of passion. It was the unlawful act of assaulting the woman that led to whatever steps she took to defend herself, and what occurred in the wash-room when the shot was fired was merely a continuation of the struggle which had started in the adjoining room, whether, as Alexander stated, the appellant followed her immediately into the wash-room or after a short interval.

In these circumstances, there was, in my opinion, no evidence of provocation within the meaning of s.203. The learned trial judge, considering that there should be a question left to the jury on the point, in a passage of his charge used language which, with respect, appears to me to have been ambiguous in referring to the bearing that the drunkenness of the appellant might have upon the matter. Since, however, the appellant was not entitled to have the issue put to the jury, in my opinion no consequences injurious to the accused resulted.

The third question is based upon the failure of the learned trial judge to charge the jury in accordance with the instructions in *Hodge's Case*[1].

The only respect in which any portion of the evidence could be said to be circumstantial was due to the fact that no witness saw the shot actually fired: accordingly, that it was fired by the appellant was a matter of inference. The rest of the evidence upon which the appellant was found guilty was direct. As the examination of the record shows, the learned trial judge told the jury that, upon the evidence, no question of accident or self-defence arose and it was proven that the woman was killed by a shot fired from the revolver which the appellant had in his hand when he came out of the wash-room.

The rule in *Hodge's Case* is to be followed when the evidence relied upon is wholly or to a material extent circumstantial. In my opinion, however, in the circumstances of this case when no other inference was possible than that the appellant had fired the fatal shot, any such instruction to the jury was unnecessary.

I would dismiss the appeal.

[1] (1838) 2 Lew. C.C. 227, 168 E.R. 1136.

1959

SALAMON v. THE QUEEN

CARTWRIGHT J. (*dissenting*):—This is an appeal, brought pursuant to leave granted by this Court on November 18, 1958, from a unanimous judgment of the Court of Appeal for Ontario dismissing an appeal from the conviction of the appellant on September 12, 1958, after trial before Stewart J. and a jury on a charge of the murder of Joyce Alexander.

The questions of law on which leave to appeal was granted were as follows:

1. Did the learned trial judge err in failing to instruct the jury in accordance with the rule in Hodge's case?
2. Did the learned trial judge err in his charge to the jury in regard to the defence of provocation?
3. Did the learned trial judge err in his charge to the jury in regard to the defence of drunkenness?

I find it necessary to deal only with the second of these questions and as, in my opinion, there should be a new trial I do not propose to make any extended reference to the evidence.

It was not suggested that the death of Joyce Alexander was not caused by a bullet fired from a revolver in the hand of the appellant. The shooting took place in a wash-room in a basement apartment at 499 Hamilton Road, London, Ontario, the door of which was open so that the witnesses in the room off which the wash-room opened could hear although they could not see what went on between the appellant and the victim in the very short period of time that elapsed between the former following the latter into the wash-room and the firing of the fatal shot.

Without going into the details of the evidence it may safely be affirmed that it would have been open to the jury to find such provocation as would reduce the crime from murder to manslaughter.

No exception is taken to the manner in which the learned trial judge charged the jury as to how they should approach the question whether the acts and insults alleged to constitute provocation were of such a nature as to be sufficient to deprive an ordinary person of the power of self-control. He made it plain that on this branch of the inquiry no account should be taken of the idiosyncrasies of the appellant and that the standard to be applied was that of an ordinary person.

1959

SALAMON v. THE QUEEN

Cartwright J.

What is said to constitute a fatal defect in the charge is the alleged failure of the learned trial judge to make it clear to the jury that in approaching the question whether the appellant was in fact provoked and fired the shot in the heat of passion caused by the provocation they were entitled, and indeed bound, to take into consideration his condition of drunkenness.

After dealing with the question whether an ordinary person would have been provoked, the learned trial judge continued:

> If you do not think so then you can forget all about provocation as a ground for reducing the charge from murder to manslaughter. If you do think, if you do think that there was provocation, that is that an ordinary man would be provoked to violence, then the next thing you have to decide is *was* the accused provoked to violence to such an extent that he suddenly lost control and committed the act which he did? In doing that you are entitled to consider the background of the individual. Now this is a difficult problem for you, but let me repeat: it is not provocation until the ordinary man would be provoked to violence. Forget about the ordinary man and say was the accused provoked, and if so you can say why. You have already answered that by saying the ordinary man would be provoked, but to determine whether or not the accused was provoked take into consideration his background, temperament, psychological background, and, if he was provoked, did he do this in the heat of the moment suddenly, or did he have the power to reflect, because provocation is only a defence in law if acted upon immediately and before there is power to reflect.

The learned judge then reviewed the evidence bearing on the question whether the appellant was in fact provoked; in so doing he made no mention of his drunkenness. He concluded this part of his charge as follows:

> I think I mentioned to you the fact that if you get over the hurdle of whether the ordinary man would be provoked, and decided that this man was also provoked, you can also consider how drunk he was, and that is something which you should take into consideration.

From this last quoted passage it seems to me that the jury would understand that it was not until after they had decided (i) that an ordinary person would be provoked and (ii) that the appellant was in fact provoked that they could consider how drunk he was.

This view is strengthened by the circumstance that the learned trial judge immediately proceeded to deal with the defence of drunkenness as a separate defence, and his charge contains such statements as the following:

> Now the test, so far as drunkenness is concerned, is, has it, has drunkenness, so affected the mind that it has caused a lack of capacity in the accused to form the intent to do what he did? If drunkenness only

extends to the extent that the man was so affected as to be more inclined to fight, more belligerent, more argumentative, more disposed to, let us say, shoot, that is not enough. Before drunkenness can be a defence there must be inebriety to such an extent that the man is incapable of forming a specific intent essential to constitute the crime.

I do not suggest that this is not a perfectly accurate direction as to the defence of drunkenness but it might well strengthen the impression which I think had already been given to the jury that drunkenness did not enter into the question of provocation in fact.

After reading and re-reading the charge in its entirety it is my opinion (*i*) that at no point in his charge did the learned trial judge make it clear to the jury that in dealing with the question whether the accused was in fact provoked they should consider his condition of drunkenness and (*ii*) that certain passages in the charge would tend to give the jury the impression that they should not so consider it.

In my respectful view, this was non-direction amounting to misdirection which may well have affected the verdict of the jury.

It could not be seriously contended that on all the evidence a jury, acting reasonably, might not have found a verdict of manslaughter and there is no room for the application of s. 592(1)(*b*)(*iii*) of the *Criminal Code*.

I would allow the appeal, quash the conviction and order a new trial.

Appeal dismissed, Cartwright J. *dissenting.*

Solicitor for the appellant: J. O'Driscoll, Toronto.

Solicitor for the respondent: The Attorney General for Ontario, Toronto.

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WILLIAM HOWARD WRIGHT AND PERCY MAGINNIS (*Plaintiffs*) .. } APPELLANTS;

AND

THE CORPORATION OF THE VILLAGE OF LONG BRANCH (*Defendant*) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Real property—Public square—Dedication—Intention—Paper title held by individual—Whether dedication by plan as public highway—The Land Titles Act, R.S.O. 1950, c. 197.

A parcel of land containing 64 1/4 acres was divided into two parcels of 54 1/4 and 10 acres respectively. The land in dispute here was a 100-foot square in the 10-acre parcel. In 1886, a plan was registered under *The Land Titles Act* subdividing the 54 1/4-acre parcel; and, although the 10-acre parcel was not included, the plan showed the square coloured in the same way as other roads and squares. The square was included in the plan in error because the owner of the 54 1/4-acre parcel was not the owner of the 10-acre parcel. In 1932, by permission of the defendant municipality, a war memorial was erected on the square by the Canadian Legion. The plaintiffs, who held paper title to the square, sued for a declaration that they were owners of the land. The defendant claimed uninterrupted exclusive possession for 50 years or more and dedication and counterclaimed for a declaration that the land free from any claim was its property. The trial judge maintained the action and dismissed the counterclaim. This judgment was reversed by the Court of Appeal on the ground that there had been dedication at common law as part of a highway and acceptance of the offer. The plaintiffs appealed to this Court.

Held (Cartwright and Martland JJ. dissenting): The plaintiffs were entitled to a declaration that they were the registered owners of the land in question subject to a dedication for the purpose of the war memorial now erected thereon.

Per Rand, Abbott and Judson JJ.: There was no basis for any claim to a possessory title.

There was no dedication in 1886 under the statute by reason of the plan. There had been no common law dedication and the municipality could not claim title through the statutory effect of the plan. The root of the plaintiffs' title was a grant under a power of sale contained in a mortgage covering the whole of the 10-acre parcel without excepting the square. There was no imperfection in the registered title and, until 1932, nothing happened to impair the rights of the plaintiffs' predecessors in title. The memorial could not have been erected without the acquiescence of the title holders. The interest held by the public since 1932 could be characterized as a dedication of the land for the limited purpose of erecting and maintaining a war memorial; but it could not be held that there was a transfer of the legal title in fee. If and when the memorial ceases

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

to remain on the square, the land will stand free of the burden. There was no acceptance in 1932 of a continuing offer of dedication of the square as part of the highway made in 1886.

Per Cartwright and Martland JJ., dissenting: Until 1932, nothing had happened that impaired the rights of the predecessors in title of the plaintiffs to the square. Where the question raised is whether land has been dedicated for a particular purpose, there is no reason, in principle, why both the intention to dedicate and its purpose may not be inferred from open and unobstructed user by the public for the particular purpose for a substantial time; but, in the present case, the evidence was insufficient to establish an *animus dedicandi* on the part of the registered owners in 1932, or at any time subsequent thereto. The judgment at trial should be restored except in so far as it awarded costs as between solicitor and client.

APPEAL from a judgment of the Court of Appeal for Ontario[1], reversing a judgment of Wilson J. Appeal allowed, Cartwright and Martland JJ. dissenting.

W. J. Anderson and *P. Webb,* for the plaintiffs, appellants.

P. J. Bolsby, Q.C., and *B. J. MacKinnon,* for the defendant, respondent.

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

RAND J.:—This action arises out of a dispute over the ownership of land in the Village of Long Branch. The land is 100 feet square and is situated at the southeast corner of the intersection of Park Road and Long Branch Avenue. The plaintiffs sued for a declaration that they were owners of the land. The defendant municipality claimed title free from any adverse claim of the plaintiffs on two grounds, (*a*) uninterrupted exclusive possession for fifty years or more, and (*b*) dedication of the land as part of a highway.

There is no basis for any claim to a possessory title on the part of the municipality, and the question is solely one of dedication.

In 1886 the owners of adjoining property comprising 54¼ acres put their property under *The Land Titles Act* subdivided as shown on a plan M-9 on which the disputed square was coloured in brown in the same way as other roads and squares. Both the trial judge and the Court

[1] [1957] O.W.N. 278, 9 D.L.R. (2d) 417.

1959

WRIGHT AND MAGINNIS v. VILLAGE OF LONG BRANCH

Rand J.

of Appeal[1] have found that the square was included in plan M-9 in error because the owner of the 54¼-acre parcel was not the owner of the square at the time. That land was the northwest corner of a larger 10-acre parcel. The owner who filed the plan on the 54¼acre parcel was only the mortgagee of the 10-acre parcel and had no right to include the parcel in the plan; and the description by metes and bounds which accompanied the plan and on which it was based did not include the square. There was therefore no dedication of the disputed land in 1886 under the statute by reason of plan M-9 or through sales of lots by reference to it.

The municipality says that there was also a like dedication by plan M-9 of a 30-foot strip of land along the westerly boundary of the 10-acre parcel as part of Long Branch Avenue, and that the title in fee of the disputed land is in the same condition as that of the strip. The appellant, admitting that the 30-foot strip has, at some time, become committed to street purposes, does not dispute an interest in it in the municipality; but as the description of the 54¼ acres on which the plan was based did not include the strip a similar question of dedication arises.

That dedication is indicated by the record of the Registry Office for 1883. On October 4 of that year a grant of the 10-acre lot from Eastwood, as owner of lot 9, which embraced both the 54¼ and the 10-acre portions, to Lennox was registered and the description beginning with "by admeasurement 10 acres more or less" accords with that on which the appellants rely. But in a mortgage back to Eastwood by Lennox registered on the same day the description declares the lot to be "by admeasurement 9½ acres more or less" and the northern boundary to the west and the western boundary to the south, instead of running first a distance, as in the grant, of 10 chains and 13 links to the center of lot 9 and thence southerly following the center line, is stated to run "9 chains and 63 links to the E. limit of a right-of-way (66 feet wide) thence S. 16 degrees E. along the E. limit of said right-of-way parallel with the E. limit of Lot 9". The width of

[1] [1957] O.W.N. 278, 9 D.L.R. (2d) 417.

Long Branch Avenue on plan M-9 is shown as 60 feet throughout. The footage of the northern boundary in the grant is 668.58 and on the mortgage 635.58; adding 3 feet to the latter to conform to a 60-foot right-of-way gives the same distance, less 30 feet for one-half of the right-of-way, as in the grant. The width of the 9½-acre lot as shown on plan M-9 is 529 feet plus the width of the square, evidencing a discrepancy between the two original measurements of 6½ feet which may be explained by the double line on the eastern side of the plan running the entire length of lot 9. The 66-foot right-of-way along the center line of lot 9 is specifically excepted from an order or certificate made by the High Court dated December 10, 1884, and registered on January 2, 1885. In view of this it is patent that there had been a common law dedication and that the municipality cannot claim title to the strip or the disputed land through the statutory effect of plan M-9.

After the filing of that plan, the 10-acre parcel was dealt with in its title aspect as a whole, including the disputed square. The root of the plaintiffs' title is a grant under a power of sale contained in a mortgage which covered all of the 10-acre parcel and made no exception either of the strip or the square. There is no imperfection in the plaintiffs' registered title, and until the year 1932, as the Court of Appeal[1] held, nothing had happened that impaired the rights of the plaintiffs' predecessors in title.

In the summer of that year, however, under a purported permission of the municipality, a war memorial was constructed on the square; the ground around the memorial was improved, lawns and paths were put in and shrubbery was planted along the boundaries. There is no evidence that the owner was, at any time, consulted, although the land still formed part of the 10-acre parcel, and it may be that in 1932 there was a vague notion that the municipality was the owner of it. The registered owner had died in January 1932 and his widow, the executrix and sole beneficiary of his will, probated on July 23, survived him only until December following. It is most improbable that this memorial could have been constructed without

[1] [1957] O.W.N. 278, 9 D.L.R. (2d) 417

1959

WRIGHT AND MAGINNIS v. VILLAGE OF LONG BRANCH

Rand J.

the acquiescence of the widow or continued without that of her successors in title. In 1947, when the 10-acre parcel was conveyed, there was excluded from the sale "that portion of the said lands which has been appropriated for and established as a war memorial square."

Whatever interest the municipality now possesses in the square must have arisen from what was done in 1932. I would characterize that as a dedication of the land for a limited purpose, namely, the erection and maintenance of a war memorial; but that event furnishes no ground on which it can be held that there was a transfer of the legal title in fee. The ownership of the fee remains in the appellants, subject to the right of the public to enter upon the land and to the right to maintain the memorial. If, through the exercise of power conferred by law, the memorial is removed from the land or ceases permanently to exist, the object and duration of the dedication will have come to an end and the land will stand freed of the burden.

The Court of Appeal has held that there was an acceptance in 1932 of a continuing offer of dedication of the square as part of the highway made in 1886, a holding with which, in the circumstances, I am unable to agree. I can find no evidence that the square was ever used as or ever formed part of the highway, or that over such a period of years with its many changes of ownership, it could possibly be said that the offer continued. The dedication must be held to have taken place wholly in 1932 and to have been for the specific and limited purpose mentioned.

The principle determining the nature of the interest created by dedication is analogous to that of other modes of creating public interests, as, for example, where land is conveyed to a municipal body for the purpose of a market place; the user for that object cannot be changed except by legislation; and if by authorized action its use as a market is abandoned, the beneficial interest revives in the original actor or his successors. The question has

arisen in a number of cases in Ontario, such as *Guelph v. The Canada Company*[1], *Hamilton v. Morrison*[2], instances of market places, and *In re Peck v. Galt*[3]. In this last a square dedicated "to remain always free from any erection or obstruction" excluded the power of the town to close and to dispose of it to the trustees of a church.

In *Re Lorne Park Road*[4], the Appellate Division, speaking through Clute J.A., at p. 59 referred to 13 Cyc. 444 (IV.A.):

> The doctrine expounded in the early English cases was applied to highways, but was gradually extended to all kinds of public easement, such as squares, parks, wharves, etc., . . .

and to p. 448:

> The full applicability of the doctrine of dedication to parks and public squares and commons is now generally recognised, and where land is dedicated for a public square without any specific designation of the uses to which it can be put, it will be presumed to have been dedicated to such appropriate uses as would under user and custom be deemed to have been fairly in contemplation at the time of the dedication.

These references were not strictly necessary to the judgment but they are in harmony with previous authorities in the province and the extension given to parks, etc., is universally established in the United States. In a late decision, *In re Ellenborough Park*[5], the Court of Appeal in England has affirmed the judgment of Danckwerts J., holding that a right to the "full enjoyment" of a pleasure ground may exist as an easement appurtenant to neighbouring dwelling houses. This is an analogous and striking extension of private right behind which public interests of similar genre have never been allowed to lag. By s. 427 of *The Municipal Act*, R.S.O. 1950, c. 243, the soil of every highway is vested in the municipal corporations having jurisdiction over the highway but by subs. (2) in cases of dedication the vesting is subject to any rights in the soil reserved by the person who laid out or dedicated the highway.

I would, therefore, allow the appeal, set aside the judgments of the Court of Appeal and the trial court and declare the registered title of the square to be in the plaintiffs subject to the dedication for the purpose mentioned.

[1](1854) 4 Grant 632.
[2](1868) 18 U.C.C.P. 228.
[3](1881) 46 U.C.Q.B. 211.
[4](1914) 33 O.L.R. 51.
[5](1955) 3 W.L.R. 892, (1956) Ch. 131, 159.

1959

WRIGHT AND MAGINNIS v. VILLAGE OF LONG BRANCH

Rand J.

I would allow the plaintiffs their costs of the action and in this Court, but there should be no costs to either party in the Court of Appeal.

The judgment of Cartwright and Martland JJ. was delivered by

CARTWRIGHT J. (*dissenting*):—The relevant facts out of which this appeal arises are set out in the reasons of my brother Rand. I agree with his conclusion that until the year 1932 nothing had happened that impaired the rights of the predecessors in title of the appellants to the lands in question, and I am in general agreement with all that he says as to the applicable law.

It has long been accepted as the law of Ontario that an owner of land may dedicate it to the public as an open square. In 1854, in *Guelph v. The Canada Company*[1], Spragge V.C. referring, with approval, to the judgment of Chancellor Walworth in *Watertown v. Cowan*[2], says:

> After alluding to cases, then recently decided, as "settling the principle that where the owners of certain property have laid it out into lots, with streets and avenues intersecting the same, and have sold their lots with reference to such plan, it is too late for them to resume a general and unlimited control over the property *thus dedicated to the public* as streets, so as to deprive their grantees of the benefit they may acquire by having such streets kept open." He adds, "And this principle is equally applicable to the case of a similar dedication of lands in a city or village to be used as an open square or public walk."

In *Peck v. Galt*[3], Osler J. after finding that a property known as Queen's Square had been "actually and intentionally dedicated for the use of the public, by the owner of the soil, either as a public square or a market square", went on, at p. 218, to state the principle:

> Whether the dedication arises from the acts of the owner, or by express grant, or contract, the corporation, if they accept it at all, must do so on the terms imposed, or for the purpose indicated by the donor.

In most, if not all, of the cases referred to during the argument in which land has been found to have been dedicated to the public for use as a square for a particular purpose the intention to dedicate and the purpose have been found in a plan with appropriate notations or in a written instrument or in both; but I see no reason, in principle, why both the intention and the purpose may

[1] 4 Gr. 632. [2] 4 Paige 510.

[3] (1881) 46 U.C.Q.B. 211.

not, in a proper case, be inferred from open and unobstructed user by the public for the particular purpose for a substantial time.

In *Cornwall v. McNairn*[1], Lebel J., as he then was, examines a number of cases including *Bailey et al. v. The City of Victoria*[2], and succinctly and accurately states the law, at p. 482, as follows:

> The question whether there has been a dedication in law is a question of fact, and in order to establish such a dedication two things must be proved: (1) an intention to dedicate on the part of the owner; and (2) an acceptance by the public.

In the case at bar I find the evidence insufficient to establish an *animus dedicandi* on the part of the registered owner or owners in the year 1932 or at any time subsequent thereto.

The learned trial judge summed up his findings on this branch of the matter as follows:

> I find against the contention that there has been dedication by a registered owner at any time. Certainly there was no dedication when Plan M-9 was filed and I think the evidence of what has occurred since does not establish dedication.

It should be pointed out that the pleadings did not raise the question of a dedication in or about 1932 for the purposes of a war memorial square. The respondent asserted a dedication by the filing of plan M-9 in 1886 resulting in the square becoming part of a public highway and so being vested in the respondent. It may be that if the issue had been squarely raised the evidence would have been directed with greater particularity to what occurred in 1932.

Commencing with the year 1932 the paper title is as follows. At the beginning of that year Samuel Wright was the registered owner of the parcel of land containing 10 acres more or less of which the square formed the north-westerly part. He died on January 17, 1932. Probate of his will was granted on July 23, 1932, to Dorothy Wright, his sole beneficiary. She died intestate on December 5, 1932. Letters of administration of her estate were granted on May 13, 1933, to Stanley Douglas, who in November 1942 conveyed the whole parcel to Samuel T. Wright and Harold R. Wright. In the same month Harold R. Wright

[1] (1946) O.R. 837.

[2] (1920) 60 S.C.R. 38.

1959

WRIGHT AND MAGINNIS v. VILLAGE OF LONG BRANCH

Cartwright J.

conveyed to Samuel T. Wright and by deed dated April 8, 1946, the latter conveyed to the appellants. All of these instruments convey the whole parcel of 10 acres more or less including the square. By deed dated July 22, 1948, the appellants conveyed to Tony Chubak all the lands described in the conveyances above mentioned except the square of which, consequently, they remain the registered owners.

The deed to Chubak was made pursuant to an agreement of sale which described the lands sold as being those: described in a conveyance from Samuel T. Wright to William Howard Wright and Percy Maginnis dated April 8th, 1946, and registered as Instrument No. 4825 in Book D, Village of Long Branch on the 10th April 1946, excepting therefrom that portion of the said lands which has been appropriated for and established as a War Memorial Square: the said Lands comprising approximately nine and one-half acres . . .

The words just quoted do not appear in the deed to Chubak. In it the lands conveyed are described by metes and bounds so as to exclude the square.

The evidence as to what occurred in 1932 is that the representatives of Branch 101 of The Canadian Legion approached officials of the respondent seeking a site for the erection of a war memorial and obtained permission from them to erect it on the square in question. I think that the proper inference from all the evidence bearing on the point is that everyone who thought about the matter at all at that time was under the impression that the respondent had the right to permit the square to be used in any way in which it thought fit. The work done by the Legion and the respondent and the user of the square by the public were, in my opinion, in pursuance of a licence or permission given by the respondent under the mistaken belief that it had the right to give it. This evidence negatives the inference of the existence of an *animus dedicandi* on the part of the owners of the fee which otherwise might well have been drawn from their tacit acquiescence in all that was done. In other words, while in the absence of explanation the open and unobstructed user by the public for a substantial time raises the inference of an offer to dedicate by the owner of the fee, that inference is destroyed when it is shown that the offer to dedicate was made by some one other than the owner.

The failure of the owners to object and the words in the agreement with Chubak, quoted above, are explainable on the basis that the mistaken belief of the respondent was shared by the owners.

For the above reasons I have reached the conclusion that there is no sufficient proof of an intention to dedicate on the part of the owner or owners and that the appeal succeeds.

The learned trial judge ordered the defendant to pay the plaintiff's costs of the action and counterclaim upon a solicitor and client basis. On the argument before us counsel for the appellants stated in answer to a question from the Court that in the event of the appeal succeeding he would ask for costs on a party and party basis only. This makes it unnecessary to determine whether there is any jurisdiction to make such an order as was made but I incline to the view that there is not. In *Patton v. Toronto General Trusts Corporation*[1], Lord Blanesburgh said at p. 639:

> As for an order directing the appellant to pay any costs of the executors as between solicitor and client, their Lordships know of no principle upon which such an order could have been supported. As against an opposite party executors are no more entitled to solicitor and client costs than is an individual litigant.

In the course of the argument the question was raised from the bench as to whether the Attorney-General was not a necessary party to the action as framed and reference was made to the judgment of Schroeder J., as he then was, in *Williams and Wilson Ltd. v. Toronto*[2]. However, all counsel appeared to unite in urging the Court to decide the questions raised as between the parties who are before it. In so doing I wish to make it clear that I do not imply any doubt as to the accuracy of what was decided by Schroeder J. in the case just mentioned.

I would allow the appeal with costs throughout and restore the judgment of the learned trial judge subject only to the provision that paragraph 3 of his formal judgment should be varied to read:

> 3. And this Court doth Further order that the Defendant do pay to the Plaintiffs their costs of this action and of the counterclaim forthwith after taxation thereof.

[1] (1939) A.C. 629. 1930

[2] (1946) O.R. 309 at pp. 323 to 328.

1959

WRIGHT AND MAGINNIS v. VILLAGE OF LONG BRANCH

Cartwright J.

Appeal allowed, Cartwright *and* Martland JJ. *dissenting.*

Solicitors for the plaintiffs, appellants: Parkinson, Gardiner, Roberts, Anderson & Conlin, Toronto.

Solicitor for the defendant, respondent: P. J. Bolsby, Toronto.

1958

*Nov. 28

*Dec. 1

1959

Feb. 26

MAURICE JETTÉ AND CHARLES LAROCQUE *et al.* (*Defendants*) .... } APPELLANTS;

AND

DAME ESTELLE TRUDEL-DUPUIS (*Plaintiff*) ..... } RESPONDENT.

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

Motor vehicles—Head-on collision between two cars—Gratuitous passenger fatally injured—Joint and several liability—Civil Code. art. 1053.

Following a collision between two vehicles, the plaintiff's husband, who was a gratuitous passenger in one of the vehicles, was fatally injured. The trial judge found both drivers at fault and condemned them jointly and severally. This judgment was affirmed by the Court of Appeal.

Held: The appeals should be dismissed.

There was no manifest error in the judgments of the Courts below on the question of liability and this Court was not justified in intervening on the question of damages.

Actions—Motor vehicle collision—Gratuitous passenger—Whether defence of "agony of collision" can be invoked.

The defence of "agony of collision" can be invoked against a gratuitous passenger as well as against the driver of another car. The fault in both cases is founded on art. 1053 of the Civil Code, and there is no legal principle preventing the application of that defence to the action instituted by a gratuitous passenger.

Actions—Against several defendants—Separate defences—Whether evidence of one defendant can be used against the other—Civil Code, arts. 1053, 1106, 1108—Code of Civil Procedure, art. 87.

In an action for damages instituted against two defendants jointly and severally, and where separate defences are filed, the evidence of one defendant can be used against the other defendant. Any other solution would bring about contradictory judgments, incompatible with the theory of joint and several obligation.

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

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

J. Deschênes, for the defendant Jetté, appellant.

J. de Billy, Q.C., for the defendant Larocque, appellant.

F. Nobert, for the plaintiff, respondent.

The judgment of the Court was delivered by

TASCHEREAU J.:—L'intimée est la veuve de Arthur Dupuis, décédé le 17 novembre 1952, comme conséquence d'un accident d'automobile, survenu le même jour sur la route reliant Neuville à Pont-Rouge, dans le comté de Portneuf.

A cette date, Arthur Dupuis était un passager gratuit dans la voiture de Maurice Jetté, conducteur bénévole, alors que ce dernier se dirigeait dans une direction nord-sud sur la route Québec à Montréal. Sur une partie de la route comprise entre deux courbes, la voiture de Jetté vint en collision avec un camion Ford, propriété des défendeurs-appelants Hervé et Lucien Drolet, et conduit par un nommé Charles Larocque, employé des appelants Drolet, alors qu'il était dans l'exécution de ses fonctions comme conducteur.

La demanderesse-intimée institua contre Charles Larocque, conducteur Hervé Drolet et Lucien Drolet, propriétaires du camion, et Maurice Jetté, conducteur bénévole de la voiture où se trouvait son mari, une action en dommages réclamant d'eux conjointement et solidairement la somme de $79,927. L'intimée réclame pour elle personnellement $45,927, et $34,000 en sa qualité de tutrice à ses quatre enfants mineurs.

L'honorable juge de première instance siégeant à Trois-Rivières, en est venu à la conclusion qu'il y avait, de la part des conducteurs des deux véhicules, faute contributive, et a en conséquence maintenu l'action jusqu'à concurrence de $28,927 en faveur de la demanderesse personnellement, et $14,790 en sa qualité de tutrice à ses enfants mineurs, soit un total de $43,717. La Cour du banc de la reine[1] a unanimement confirmé ce jugement, tant sur la responsabilité conjointe et solidaire des défendeurs-appelants, que

[1] [1956] Que. Q.B. *815.*

1959

JETTÉ AND LAROCQUE *et al.* *v.* TRUDEL-DUPUIS

Taschereau J.

sur la question du quantum des dommages accordés par le juge au procès. Il s'agit donc en premier lieu de déterminer la responsabilité imputable aux défendeurs-appelants, qui devant cette Cour, comme devant la Cour du banc de la reine, ont logé chacun un appel indépendant.

Cet accident s'est produit entre dix et onze heures de l'avant-midi, et le juge au procès, après un long et minutieux examen des faits révélés par la preuve, est arrivé à la conclusion que les deux voitures, qui par une journée ensoleillée, circulaient dans des directions opposées entre Pont-Rouge et Neuville, se sont frappées de façon telle, que les parties avant du côté droit de chaque voiture sont venues en contact. Ceci évidemment indique que les conducteurs des deux voitures, ou de l'une ou de l'autre ne tenaient pas le côté droit de la route.

Malgré l'existence de deux courbes à une distance assez éloignée l'une de l'autre, le champ de vision s'étendait de 1200 à 1500 pieds. Le chemin avait une largeur de 22 pieds et 5 pouces en asphalte, et une largeur totale de 37 pieds, y compris les accotements. Il n'y avait que 3 pieds environ au centre de la route qui n'étaient pas couverts de glace ou de neige, mais le reste, d'après la preuve, était très glissant, et présentait un état dangereux, particulièrement aux endroits sinueux. L'accident s'est produit à environ 450 pieds, passé la courbe du côté nord, d'où venait le défendeur-appelant Jetté, et à environ 150 pieds de la courbe sud, d'où venait Larocque, au volant du camion.

Il est certain que cet accident aurait pu être évité, si les précautions nécessaires avaient été prises de part et d'autre, et il ne fait aucun doute qu'il existe en faveur de l'innocente victime qui se trouvait dans la voiture de Jetté, un recours contre l'un ou l'autre des conducteurs, ou contre les deux solidairement, s'il y a faute contributive. Les deux défendeurs-appelants s'accusent réciproquement de négligence, et chacun veut faire supporter par l'autre la totalité de la responsabilité de ce malheureux accident.

Le juge au procès a conclu qu'il y avait faute contributive, et que les fautes de Jetté, entraînant sa responsabilité, étaient diverses. En premier lieu, selon lui, il n'aurait pas porté l'attention voulue à la conduite de sa voiture. En effet, quoique son champ de vision fut d'environ 1200

pieds, il admet n'avoir vu le camion venant en sens inverse qu'à 250 ou 300 pieds. En second lieu, Jetté circulait à une trop grande vitesse, soit près de 40 milles à l'heure, sur une surface glissante et par conséquent dangereuse. Evidemment, cette vitesse l'empêchait d'avoir sur sa voiture le contrôle qu'il aurait dû avoir étant donné la condition de la route. De plus, après avoir tenu le côté droit du chemin, comme il devait le faire pour effectuer une rencontre, il inclina subitement vers la gauche aux derniers instants qui ont précédé l'accident, tel qu'il l'admet lui-même, et tel que le démontre la position des voitures après leur contact. Ce geste, effectué pour éviter l'accident, pourrait certes être une excuse valable, mais si l'on considère que Jetté aurait pu freiner, s'il avait porté l'attention voulue et filé à une vitesse moindre, il n'aurait pas été obligé de faire ce mouvement qui, nécessairement, a obstrué la route.

Quant à Larocque, le juge lui attribue également plusieurs fautes. Il lui reproche à lui aussi une trop grande vitesse, soit 35 ou 40 milles à l'heure sur cette chaussée glissante; un manque d'attention dans la conduite de sa voiture, qu'il note surtout dans le fait que Larocque n'a aperçu la voiture de Jetté qu'à une distance de deux ou trois arpents, quand il pouvait voir à une distance beaucoup plus éloignée. Le juge conclut également qu'il est en preuve que Larocque n'a pas freiné avant la collision.

Le juge attache peu de foi évidemment au témoignage de Larocque, qui dit qu'il se tenait à droite lorsque la collision s'est produite, et cette affirmation serait inacceptable par le fait que les deux véhicules se sont heurtés du côté droit, et que Larocque admet qu'avant la collision son automobile était de biais sur la route. Le juge incline aussi à croire que Larocque, par la conduite de sa voiture, a créé un danger qui a occasionné la manœuvre du défendeur Jetté vers la gauche.

Après avoir pesé les preuves apportées par Jetté et Larocque, le juge croit qu'il y a eu faute contributive, et que c'est la vitesse excessive de chacun des conducteurs, qui a été la cause déterminante de cet accident. La Cour du banc de la reine en est arrivée à la même conclusion. Elle croit entre autres que Jetté a été non seulement

1959

JETTÉ AND LAROCQUE *et al.* *v.* TRUDEL-DUPUIS

Taschereau J.

imprudent, mais qu'il a manqué de jugement en tournant vers la gauche comme il l'a fait. Après avoir fait l'appéciation de la preuve en ce qui concerne Larocque, et après avoir relaté les fautes que lui impute le juge de première instance, elle ne croit pas qu'il soit possible pour une Cour d'appel d'intervenir et de modifier le jugement quant à la responsabilité respective des deux conducteurs.

Je partage substantiellement ces vues, et comme la Cour supérieure et la Cour du banc de la reine, je suis d'opinion qu'il y a eu faute contributive. Les deux conducteurs, évidemment, ne portaient pas l'attention voulue à la conduite de leurs voitures, procédaient à une trop grande vitesse sur une surface glacée, ce qui constituait une grave imprudence, et ils ont malhabilement manœuvré pour éviter l'accident. Sans concourir dans tout ce qui a été dit par les tribunaux inférieurs, je ne puis arriver à la conclusion qu'il y a eu erreur manifeste de leur part, et je crois qu'aucun des deux conducteurs ne peut être exempté de responsabilité.

Je désire cependant signaler un passage du jugement de M. le Juge St-Jacques avec qui s'accordent MM. les Juges Gagné et Owen, où il est dit:

> Quoi qu'il en soit, il (Jetté) lui fallait démontrer hors de doute qu'en déviant vers la gauche, il faisait un acte prudent et excusable. Il ne peut pas être question, ici, de cette défense "de l'agonie de la collision", puisque le litige n'est pas mû entre le propriétaire du camion et le propriétaire de l'automobile de Jetté.

Si ceci veut dire, comme le texte me paraît l'indiquer, que l'excuse de "l'agonie de la collision" ne peut être invoquée par un conducteur bénévole vis-à-vis son passager gratuit, je ne crois pas que ce soit là un juste exposé de la loi. Je crois au contraire que le conducteur bénévole peut aussi bien soulever cette défense vis-à-vis le passager, que vis-à-vis le conducteur de l'autre voiture avec qui il vient en collision.

La faute vis-à-vis un autre automobiliste, comme celle vis-à-vis le passager gratuit, procèdent toutes deux de l'art. 1053 C.C. qui est la source de la responsabilité civile. Si l'imprudence, la négligence, et l'inhabilité sont excusées par l'application de la théorie de "l'agonie de la collision", vis-à-vis un autre conducteur, je ne connais pas de principe de droit qui interdise à un conducteur bénévole de

l'invoquer aussi pour repousser l'action du passager gratuit. Dans les deux cas, le conducteur peut se disculper en plaidant qu'il n'a pas été négligent, parce qu'un fait qui lui est étranger, a subitement surgi qui a pu occasionner une erreur de sa part.

De plus, le juge au procès dit dans son jugement:

. . . une objection de caractère général à l'effet que la preuve apportée dans l'une des contestations ne saurait être invoquée dans l'autre. L'économie de nos lois et la jurisprudence reconnaissent le bien-fondé de cette objection, et il nous incombe de ne pas nous départir des principes y exposés dans le résumé de la preuve qui va suivre.

M. le Juge St-Jacques dit également dans ses notes:

Je disposerais des deux appels en même temps, tout en faisant les distinctions qui peuvent résulter de la litis contestation et de la preuve.

Dans la présente cause, chaque défendeur-appelant a produit sa propre défense, en réponse à une unique action, où il y avait des conclusions conjointes et solidaires. Je ne partage pas l'opinion exprimée déjà que la preuve de l'un des défendeurs ne puisse servir à l'autre—vide: *Deslauriers v. Montreal Tramways* (cause non rapportée) et *Chrétien v. Baron*[1]. Je suis d'accord avec les vues exprimées par M. le Juge Bertrand dans *Sauvé v. Jeannotte* (C.S. non rapportée), par M. le Juge Gagné dans *Joly v. Donolo and Concrete Column*[2], et par M. le Juge Prévost dans *Denis v. Janssons*[3]. Toute autre solution, a-t-on dit avec raison, favoriserait des décisions contradictoires, incompatibles avec la théorie de la solidarité, comme par exemple la détermination de l'étendue de l'incapacité physique d'un tiers, victime de la faute solidaire de deux automobilistes. Le but de l'enquête commune sur l'action actuelle instituée contre les co-défendeurs fut de révéler toute la vérité au tribunal, et c'est sur toute la preuve, faite par l'une ou l'autre des parties, que la Cour devait juger le mérite et vider le litige. Lorsqu'une action est dirigée contre plusieurs défendeurs, le droit à la défense séparée existe bien, mais la loi n'autorise *qu'un seul procès* sur l'action du demandeur.

[1] [1957] Que. S.C. 195. [2] [1952] Que. K.B. 141.
[3] [1955] Que. S.C. 210.

1959

JETTÉ AND LAROCQUE *et al.* *v.* TRUDEL-DUPUIS

Taschereau J.

Il reste la question des dommages. Sur ce point, le juge au procès et la Cour du banc de la reine sont unanimes. Je ne crois pas qu'il s'agisse de l'un de ces cas, où cette Cour soit justifiée d'intervenir.

Les appels doivent être rejetés avec dépens.

Appeals dismissed with costs.

Attorneys for the defendant Jetté, appellant: Létourneau, Quinlan, Forest, Deschènes & Emery, Montreal.

Attorneys for the defendants Larocque et al., appellants: Gagnon & de Billy, Quebec.

Attorney for the plaintiff, respondent: F. Nobert, Trois Rivières.

1958

*Nov. 24, 25

1959

Feb. 26

MARCEL LAPIERRE (*Plaintiff*) .....APPELLANT;

AND

CITY OF MONTREAL (*Defendant*) .....RESPONDENT.

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

Damages—Action recursoire—Claim against City of Montreal, as joint tort-feasor, for share of amount paid in settlement of action in damages—Pedestrian injured following collision between two vehicles—Stop sign not in place at intersection—Pedestrian's action against owners of vehicles instituted more than six months after accident—Whether City's liability extinguished by prescription—Whether joint and several liability—Charter of City of Montreal, art. 45—Civil Code, arts. 1106, 1117, 1118, 1156, 2261.

To recover from the City of Montreal part of the amount paid in settlement of an action in damages instituted against the owners of two vehicles by a pedestrian who was injured following a collision between these two vehicles on the ground that the accident was partly due to the fact that a stop sign at the intersection where the accident occurred was not in place at the time, the plaintiff (the owner of one of the vehicles) must establish that there was joint and several liability between him and the City. No such joint and several liability existed in the present case, since when the victim, more than six months after the accident, instituted the action against the plaintiff, any right the victim might have had against

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

the City had been prescribed by virtue of art. 45 of the City's Charter. Therefore, the plaintiff and the City were not codebtors of the victim at the time the latter's action against the plaintiff was instituted.

Furthermore, it was very doubtful whether there ever existed a joint and several liability between the plaintiff and the City *vis-à-vis* the victim, since the quasi-delicts were not the same, but were of a different nature.

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

R. Cordeau, for the plaintiff, appellant.

P. Beauregard, Q.C., for the defendant, respondent.

The judgment of the Court was delivered by

TASCHEREAU J.:—Dans le cours du mois de janvier 1952, vers 8.30 heures du soir, le taxi du demandeur Lapierre qui se dirigeait de l'est à l'ouest sur la rue Ontario, en la Cité de Montréal, vint en collision avec une autre voiture automobile, propriété de Alcide Beaudry, qui se dirigeait sur la rue Aylmer du nord au sud. Comme conséquence de cette collision, la voiture de Beaudry, sous l'effet du choc, alla frapper un piéton du nom de Paul Albert Vocelle qui marchait sur le trottoir, au coin sud-ouest de l'intersection, lui causant de sérieuses lésions corporelles.

Comme conséquence de cet accident, Vocelle intenta des poursuites judiciaires contre Beaudry et Lapierre, le demandeur dans la présente cause, et réclama pour blessures corporelles la somme de $40,000.

Beaudry avait également poursuivi le présent demandeur Lapierre et la Citié de Montréal, pour la somme de $350.65, et le 21 mars 1955, l'honorable Juge P. E. Côté en vint à la conclusion qu'il y avait faute contributive dans la proportion de 40 pour cent contre le demandeur Beaudry et 60 pour cent contre les deux défendeurs, Lapierre et la Cité de Montréal, conjointement et solidairement. La faute imputée à la Cité de Montréal fut de ne pas avoir replacé un signal d'arrêt à l'intersection de la rue Ontario et de la rue Aylmer, indiquant que la rue Ontario était un boulevard, où les automobilistes qui s'y engageaient avaient

[1] [1959] Que. Q.B. 125.

1959

LAPIERRE v. CITY OF MONTREAL

Taschereau J.

priorité, et qui avait été renversé depuis trois jours. Le montant accordé par le jugement fut de $210.39 avec intérêts et dépens, que Lapierre et la Cité de Montréal ont acquitté.

Quelque temps plus tard, Lapierre et Beaudry, défendeurs dans l'action de Paul Vocelle, mais où la Cité de Montréal n'était pas partie, discutèrent la possibilité d'un règlement avec le demandeur Vocelle, et dans lequel la Cité de Montréal refusa d'intervenir. Finalement, un règlement fut effectué, où Beaudry paya la somme de $5,000 et $400 de frais, et le présent demandeur Lapierre $8,000 et $600 de frais.

Dans la présente action, le demandeur réclame de la Cité de Montréal les trois-quarts de ce qu'il a payé à Vocelle, comme conséquence du règlement intervenu, soit la somme de $6,833.85, avec intérêts depuis le 27 juin 1955, et cette action, qui a été entendue par M. le Juge André Demers de la Cour supérieure, a été maintenue jusqu'à concurrence de $4,000, plus $300 de frais sur l'action intentée par Vocelle, le tout avec dépens. La Cour du banc de la reine[1] a maintenu l'appel interjeté, et a rejeté l'action avec dépens.

Le demandeur Lapierre qualifie son action dirigée contre la Cité de Montréal d'action récursoire. Il a prétendu, et le juge au procès lui a donné raison, que les deux conducteurs des automobiles, Lapierre et Beaudry, sont responsables conjointement et solidairement avec la Cité de Montréal, des dommages qu'il a subis. En effet, l'art. 1106 C.C. stipule que l'obligation résultant d'un délit ou quasi-délit, commis par deux personnes ou plus est solidaire. Il est vrai que la victime n'a poursuivi que Lapierre et Beaudry, et n'a pas exercé de réclamation contre la Cité de Montréal devant les tribunaux, mais le règlement fait par Lapierre, le demandeur appelant dans la présente cause, ne l'empêcherait pas d'invoquer l'art. 1118 C.C. qui est la base de l'action récursoire, et qui veut que le codébiteur d'une dette solidaire qui l'a payée, peut répéter contre les autres les portions de chacun d'eux. Comme il y aurait

[1] [1959] Que. Q.B. 125.

solidarité entre les trois débiteurs, la Ville de Montréal devrait payer sa part, d'où l'action qui a été maintenue par M. le Juge Demers.

La Cour du banc de la reine a maintenu l'appel et a rejeté l'action du présent appelant. La Cour en est venue unanimement à la conclusion que l'action de Vocelle, tout en ayant été logée dans les délais légaux contre Lapierre et Beaudry, avait été instituée plus de six mois après que la prescription eût été acquise en faveur de la Cité de Montréal, et qu'en conséquence, cette dernière se trouvait libérée vis-à-vis la victime de toute obligation solidaire ou autre, au moment où l'action a été instituée, et où les paiements ont été faits par le présent appelant.

La Charte de la Cité de Montréal contient en effet la disposition suivante:

> 45. Aucune action en dommages intérêts ou en indemnité n'est recevable contre la Cité si elle n'est intentée *dans les six mois du jour où le droit d'action a pris naissance.*

Il est certain que la présente action récursoire n'est pas une action du genre de celle prévue à cet art. 45. Cet article établit une relation juridique entre la victime d'un accident et la Cité de Montréal, mais ne couvre évidemment pas le cas du débiteur d'une obligation solidaire qui réclame la part d'un codébiteur, en vertu de 1118 C.C.

C'est ce que M. le Juge Pratte disait avec raison dans la cause de *Montreal Tramways v. Eversfield*[1], quand il écrivait:

> La prescription d'une action récursoire, par laquelle la compagnie des tramways de Montréal réclame au défendeur des dommages-intérêts qu'elle a été condamnée à payer à la victime d'une collision, a son point de départ à compter *du jugement qui alloue les dommages-intérêts à la victime et non à compter de la collision.*

C'est aussi l'opinion que cette Cour exprimait dans *La Cité de Montréal v. Le Roi*[2]:

> Dans la présente cause, il n'y a pas de jugement déclarant la solidarité entre les co-auteurs du quasi-délit, mais il n'est pas nécessaire que les tribunaux interviennent pour que la solidarité existe. Du moment que les parties sont tenues solidairement, par l'opération de la loi, l'une des parties ainsi solidairement obligée, et de qui le paiement est réclamé, peut payer volontairement, et exercer contre son codébiteur, les droits

[1] [1948] Que. K.B. 545.
[2] [1949] S.C.R. 670 at 673-4, 4 D.L.R. 1.

1959

LAPIERRE v. CITY OF MONTREAL

Taschereau J.

que lui confère l'article 1118 du Code Civil. C'est à la date où elle effectue ce paiement que naît son droit d'agir et qu'elle peut validement exercer son recours *contre ceux qui sont solidairement tenus avec elle.*

Mais il faut nécessairement qu'il existe un point de départ pour que l'art. 1118 trouve son application, et c'est précisément l'existence d'une obligation solidaire entre plusieurs codébiteurs, vis-à-vis une victime qui, dans le cas qui nous occupe, était Vocelle. Or, c'est ce qui fait défaut dans la présente cause. Quand l'action a été instituée contre Lapierre et Beaudry, par l'opération de l'art. 45 de la charte de la Cité de Montréal, cette dernière *était libérée* vis-à-vis Vocelle, et il n'existait donc aucun lien de solidarité entre l'intimé et Lapierre et Beaudry, vis-à-vis le demandeur. Ce que 1118 autorise, c'est la division entre les codébiteurs d'une dette solidaire, existante vis-à-vis un créancier, victime d'un délit ou quasi-délit.

Pour illustrer l'erreur dont est entaché l'argument du demandeur, nous n'avons qu'à supposer, comme la chose aurait pu arriver dans le présent cas, que Vocelle eût institué son action non seulement contre Lapierre et Beaudry, mais aussi contre la Cité de Montréal, dix mois après l'accident qui est survenu et dont il a été la victime. Par l'effet de la prescription de six mois stipulée à l'art. 45 de la charte, l'action aurait été évidemment rejetée contre la Cité de Montréal. On ne peut sûrement pas prétendre qu'une action récursoire dans ce cas aurait existé quand même contre la Cité de Montréal au bénéfice de Lapierre ou de Beaudry. Je ne puis concevoir que Lapierre aurait plus de droit contre la Cité de Montréal dans le cas actuel, qu'il n'en aurait eu si l'action avait été rejetée contre la même Cité.

Dans la cause de *Montreal Tramways v. Eversfied, supra,* l'action de la victime Valade avait été instituée contre la Montreal Tramways avant que la prescription de deux ans ne fût acquise, alors que la solidarité existait entre la Montreal Tramways et Eversfied. La Cour du banc du roi a décidé avec raison, sur inscription en droit, que l'action récursoire de Montreal Tramways Company contre Eversfied n'était pas sujette à la prescription de deux ans, stipulée à l'art. 2261 C.C., mais que cette prescription ne commençait à courir qu'à partir de la date du jugement

condamnant la Montreal Tramways, date où le droit de cette dernière avait pris naissance. C'est le même principe qui a été affirmé par cette Cour dans la *Cité de Montréal v. Le Roi, supra.*

Dans le cas présent, par l'effet de la prescription édictée à l'art. 45 de la charte de la Cité de Montréal, la ville a été totalement libérée de responsabilité vis-à-vis Vocelle à l'expiration des six mois et, en conséquence, il n'y avait plus d'obligation solidaire sur laquelle pouvait reposer une action récursoire.

Je tiens de plus à souligner que j'entretiens des doutes sérieux sur l'existence d'une dette solidaire entre Lapierre, Beaudry et la Cité de Montréal vis-à-vis Vocelle. En cas de délit ou de quasi-délit, la solidarité existe bien en vertu de l'art. 1106 C.C., mais il faut que ce délit ou ce quasi-délit *soit le même, qu'il soit de même nature.* Comme le dit Mignault, vol. 5, p. 480:

> Tous les individus condamnés pour un *même crime* ou pour un *même délit* sont tenus solidairement des dommages et intérêts, restitutions et frais, auxquels ils sont condamnés.

M. le Juge Jetté, dans une cause de *Jeannotte v. Couillard*[1], confirmé par la Cour d'Appel[2] sur ce point, a décidé qu'il n'y avait pas de solidarité quand l'acte et la faute des co-auteurs *sont différents,* et voici comment il s'exprimait:

> Le demandeur prend des conclusions conjointes contre le pharmacien et le médecin. Je dois dire de suite que je ne puis pas admettre la solidarité; ce n'est pas la même faute, ce n'est pas le même acte; l'action du pharmacien est une suite de l'acte du médecin, mais ce n'est pas le même acte, et ce n'est pas la même responsabilité. Je considère que la faute n'a pas le même degré, il faut nécessairement séparer cette responsabilité parce que la faute n'est pas commune, et n'est pas la même.

Dans le cas présent, le quasi-délit de Lapierre a consisté dans son inhabilité dans la conduite de son véhicule, tandis que celui de la Cité de Montréal serait un acte d'omission de ne pas avoir replacé le signal exigé, pour indiquer l'existence d'un boulevard. Ces quasi-délits me paraîssent de différente nature, mais sur ce point, dont la solution n'est pas essentielle à la détermination du présent litige, je préfère réserver ma décision, quand se présentera un

[1] (1894), 3 Que. K.B. 462 at 468.
[2] (1894) 3 Que. K.B. 461.

1959

LAPIERRE v. CITY OF MONTREAL

Taschereau J.

cas approprié. Je signale simplement mon hésitation afin d'indiquer que je ne prends pas pour acquit que l'existence de la *responsabilité solidaire* entre Lapierre, Beaudry et la Cité de Montréal, élément essentiel à la présente action récursoire, a été démontrée à ma satisfaction.

Pour ces raisons, je crois que l'appel ne peut réussir et doit être rejeté avec dépens.

Appeal dismissed with costs.

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

Attorneys for the defendant, respondent: Berthiaume & McDonald, Montreal.

ALBERT JOSEPH ROSE .....APPELLANT;

1959

*Feb. 16
Mar. 25

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Criminal law—Acquittal at non-jury trial on charge of criminal negligence causing death—No evidence offered by accused after Crown's case—Crown nonsuited— Reasonable doubt—Duty of trial judge—Whether Crown entitled to appeal—Whether finding of non-criminal negligence question of law alone—Criminal Code, 1953-54 (Can.), c. 51, ss. 191, 558, 584.

On a trial by a judge alone on a charge of causing death by criminal negligence in the operation of a motor vehicle, the accused, who had driven through a red light and killed W, was acquitted. He did not put in any defence because the trial judge expressed the opinion that the Crown had not furnished sufficient evidence to support the charge. The trial judge held that the facts did not constitute criminal negligence as defined by s. 191 of the *Criminal Code*. On appeal by the Crown claiming that the trial judge had misdirected himself on what constituted criminal negligence and that this was a question of law alone, the Court of Appeal, by a majority judgment, ordered a new trial. The accused appealed to this Court.

Held: The appeal should be allowed and the judgment of acquittal restored.

The appeal involved a combined question of law and fact, therefore the Court of Appeal lacked jurisdiction to hear it. That the accused did not see the red light through an oversight was a question of fact which the trial judge determined after hearing all the witnesses and weighing all the circumstances of the case. The trial judge sitting without a jury was fulfilling a dual capacity. He directed himself properly and, when he decided on the facts submitted that criminal negligence ought not to be inferred, he was fulfilling the functions of a jury on a question of fact.

The contention that the trial judge at the conclusion of the evidence of the Crown should not have given the accused the benefit of the doubt cannot be entertained. Sitting as a jury, the trial judge must reject a motion to dismiss when there is a *prima facie* case. Then, there is no room for the benefit of the doubt. It is only when all the evidence is adduced that this benefit may be granted. Here, no motion was made. The trial judge expressed his views on the case, but he did not then deliver judgment. When, after an adjournment requested by the accused, the latter declared that he had no evidence to offer, the case was complete, and it was then the imperative duty of the trial judge to give the accused the benefit of the doubt he may have had, after hearing the argument of the Crown.

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

1959

ROSE v. THE QUEEN

APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division[1], reversing a judgment of Riley J. and ordering a new trial. Appeal allowed.

N. D. Maclean, Q.C., for the appellant.

H. J. Wilson, Q.C., for the respondent.

The judgment of the Court was delivered by

TASCHEREAU J.:—The appellant was charged that on the 17th of January, 1958, at Edmonton, he, by criminal negligence, caused the death of Brynjulf Wetting, in the operation of a motor vehicle. He was acquitted by the trial judge, sitting without a jury, but the Appellate Division, Supreme Court of Alberta[1], quashed the judgment of acquittal and ordered a new trial, Mr. Justice Porter dissenting.

It is contended on behalf of the appellant that there was no question of law alone, such as to enable the Attorney General to appeal the judgment of acquittal to the Supreme Court of Alberta. The majority of the Appellate Division held that the finding of fact of the trial judge raised a question of law, as to whether the accused was guilty of criminal negligence in the operation of his motor vehicle.

This exceptional and limited right which the Attorney General has to appeal a verdict of acquittal, is given by s. 584 of the *Criminal Code*, which says:

584. (1) The Attorney General or counsel instructed by him for the purpose may appeal to the Court of Appeal.

(*a*) against a judgment or verdict of acquittal of a trial court in proceedings by indictment on any ground of appeal that involves *a question of law alone.*

The Court of Appeal is therefore incompetent to hear the case if the question raised is not a pure question of law, but involves a mixed question of law and fact. I have reached the conclusion that appellant's argument on this point must prevail, as the question raised was not a matter of law alone.

The learned trial judge considered all the evidence. He found that the appellant went through a red light, was not keeping a proper look-out, that his speed was not above

[1] (1957), 26 W.W.R. 710, 122 C.C.C. 185, 29 C.R. 318.

the normal at that intersection and that he stopped within a reasonable distance. He reached the conclusion that he did not see the red light, and that it was his failure to do so that was the determining cause of the accident. That the appellant did not see the red light through an oversight, is a question of fact, which the learned trial judge determined after hearing all the witnesses and weighing all the circumstances of the case. This heedlessness may create civil liability, but the degree of inattention which he found, did not show necessarily in the circumstances, *wanton or reckless disregard* of the lives or safety of other persons, (Cr.Code 191), which the statute requires to make the act criminal.

The trial judge sitting without a jury was fulfilling a dual capacity. He had, therefore, to discharge the duties attached to the functions of a judge, and also the duties of a jury. As a judge he had to direct himself as to whether any facts had been established by evidence from which criminal negligence may be reasonably inferred. As a jury he had to say whether, from those facts submitted, *criminal negligence ought to be inferred. Metropolitan Railway Company v. Jackson*[1], *King v. Morabito*[2]. I think that the trial judge directed himself properly, and that when he decided on the facts submitted to him that criminal negligence *ought not to be inferred,* he was fulfilling the functions of a jury *on a question of fact.*

It was also contended on behalf of the respondent that the *Morabito* case, *supra,* should govern here, and that the judge at the conclusion of the evidence of the respondent, should not have given the appellant the benefit of the doubt. In the latter case, the accused through counsel had made to the trial judge, sitting without a jury, a motion to dismiss, alleging lack of evidence, before declaring whether or not he had any evidence to adduce. In this Court it was said by Kellock J. concurred in by Rand and Locke JJ.:

> It is clear, I think, that no other application could have been made at that stage in the absence of an election on the part of the defence to call or not to call evidence. Had a jury been present, the learned trial judge could have done no more, on the application of the defence, than have decided whether or not there was evidence upon which the jury might convict.

[1] (1877), 3 App. Cas. 193 at 197, 47 L.J.Q.B. 303.
[2] [1949] S.C.R. 172 at 174, 93 C.C.C. 251, 7 C.R. 88, 1 D.L.R. 609.

1959

ROSE
v.
THE QUEEN

Taschereau J.

Of course, when the trial judge sits as a jury, he has to instruct himself as if he were instructing the jury, and if there is a *prima facie* case he must reject a motion to dismiss. Then, there is no room for the benefit of the doubt. It is only when all the evidence is adduced that this benefit may be granted to the accused.

Here, no motion was made. It is true that the trial judge expressed, at that stage, his views on the issue of the case, but he did not then deliver judgment. After an adjournment requested by the accused appellant's counsel, the latter declared that he had no evidence to offer. (558 new Cr. Code) (944 old Cr. Code.) The case was then complete, it was ready to go to the jury or judge, and it was then not only open, but it was the imperative duty of the trial judge to give the accused the benefit of the doubt, he may have had, after hearing the argument for the Crown.

I am of the opinion that this appeal should be allowed and the judgment of acquittal restored.

Appeal allowed, judgment of acquittal restored.

Solicitors for the appellant: Maclean & Dunne, Edmonton.

Solicitor for the respondent: The Attorney General for the Province of Alberta.

1958

*Oct.31

1959

Mar. 25

THE TOWNSHIP OF SCARBOROUGH (*Defendant*) ..... APPELLANT;

AND

FRANK S. BONDI (*Plaintiff*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Municipal corporations—Restrictive building by-laws—Amendment to by-law affecting one lot only—Whether discriminatory—Consent of Municipal Board to amendment given after passing—Whether by-law invalid—The Municipal Act, R.S.O. 1950, c. 243, s. 390.

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

The defendant township passed a by-law by which it imposed building restrictions in a certain area, and later, in 1956, amended the by-law by adding to it the following clause: "Notwithstanding the provisions of this by-law, two single family detached dwellings only may be erected on the whole of lot 98, registered plan 1734." This amendment was subsequently approved by the Municipal Board. The trial judge ruled the by-law valid, but the Court of Appeal quashed it as being discriminatory. The township appealed to this Court.

Held: The amending by-law was invalid.

The amending by-law resulted from a valid exercise of the Council's legislative power as given by s. 390(1)4 of The *Municipal Act,* and it was not in fact discriminatory against the plaintiff. The municipality acted in good faith and in the interest generally of the area covered by the by-law and did not legislate with a view to promoting some private interest. The amending by-law was reasonable and in keeping with the general character of the neighbourhood. It was nothing more than an attempt to enforce conformity with the standards established by the original by-law, and could not be characterized as discriminatory merely because it pointed to one particular person or lot.

However, the amending by-law was invalid because it was finally passed without the approval of the Municipal Board having been first obtained. Section 390(9) of *The Municipal Act* imperatively forbids the passing of a by-law to amend or repeal a by-law such as the original one in this case without the approval of the Municipal Board obtained prior to or contemporaneously with such passing. The council exercised a power to the exercise of which the approval of the Municipal Board was necessary and, by s. 43 of *The Municipal Act,* it was expressly forbidden to exercise that power until the approval of the Board had been obtained. The amending by-law was therefore a nullity.

This case should be decided on the law as it existed when the matter was dealt with by the Court of Appeal, and this Court could take no account of the amendment to s. 390(9) made in 1958.

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

H. Beckett, Q.C., and *J. A. Taylor,* for the defendant, appellant.

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

TASCHEREAU J.:—For the reasons given by my brothers Cartwright and Judson, I would dismiss the appeal with costs.

The judgment of Locke and Cartwright JJ. was delivered by

[1] [1957] O.R. 643, O.W.N. 536, (1958), 11 D.L.R. (2d) 358.

1959

TOWNSHIP OF SCARBOROUGH v. BONDI

CARTWRIGHT J.:—The questions raised on this appeal are stated in the reasons of my brother Judson which I have had the advantage of reading. On the main question, for the reasons given by him, I agree with his conclusion that by-law no. 7023 is valid, unless on the second ground urged by Mr. Robinette it must be held void for failure on the part of the council of the appellant to follow the course prescribed by the relevant statutory provisions, in that it was finally passed without the approval of the Municipal Board having been first obtained.

By-law no. 7023 amends by-law no. 2041 which was passed under the powers conferred on the council of the appellant by the predecessor of what is now s. 390 of *The Municipal Act*, R.S.O. 1950, c. 243. We were informed by counsel that by-law no. 2041 was duly approved by the Municipal Board.

By-law no. 7023 was given its first reading on September 17, 1956, and on September 24, 1956, was given its second and third reading and passed. On the last-mentioned date subs. (9) of s. 390 of *The Municipal Act* read as follows:

(9) No part of any by-law passed under this section and approved by the Municipal Board shall be repealed or amended without the approval of the Municipal Board.

An application for approval was heard by the Municipal Board on November 1, 1956, and on November 12, 1956, a formal order of the Board approving by-law no. 7023 was issued.

The wording of subs. (9) of s. 390 may be constrasted with that of subs. (8) of the same section which reads:

(8) No part of any by-law passed under this section shall come into force without the approval of the Municipal Board, and such approval may be for a limited period of time only, and the Board may extend such period from time to time upon application made to it for such purpose.

Reading these two subsections together, it appears to me that subs. (8) contemplates the final passing of a by-law by the council and a subsequent application for its approval by the Board, while subs. (9) imperatively forbids the passing of a by-law to amend or repeal a by-law such as no. 2041 without the approval of the Board obtained prior to or contemporaneously with such passing.

A somewhat similar question came before the Appellate Division of the Supreme Court of Ontario in *Re Butterworth and City of Ottawa*[1]. The legislation there under consideration provided that by-laws might be passed by the councils of urban municipalities for certain purposes one of which was:

> 13. With the approval of the Municipal Board, and within the limitations and restrictions, and under the conditions prescribed by order of the Board, for requiring all persons who shall, after a sale thereof, deliver coal or coke within the municipality, by a vehicle, from any coal-yard, store-house, coal-chute, gas-house or other place:—
>
> (*a*) To have the weight of such vehicle and of such coal or coke ascertained prior to delivery, by a weighing machine established as provided by paragraph 11.

The city council passed a by-law in pursuance of this power which was not before its final passing approved by the Board but was so approved after it had been passed and after a motion to quash it had been launched. A motion to quash was dismissed by Falconbridge C.J.K.B. and his decision was confirmed by a unanimous judgment of the Appellate Division delivered by Hodgins J.A.

After pointing out the practical impossibility of requiring concurrent consent to the act of passage of the by-law and certain inconveniences in obtaining a prior approval, Hodgins J.A. says at p. 90:

> These considerations, while rendering it probable that a reasonable course has been pursued in the present instance, cannot control the construction of the statute, if the words clearly point to an opposite conclusion.
>
> But they add force to the contention that where the approval has been given and no conditions etc. have been laid down, the statute has been complied with in fact and in law as well.

Having decided that as a matter of discretion the by-law should not be quashed the learned Justice of Appeal concluded his reasons, at p. 93, as follows:

> I think the Court should not be astute to quash a by-law passed by the municipal council and approved by the Board, just because the method adopted is open to some criticism due to the peculiar wording of the legislation giving authority to make the by-law effective. The only consequence would be to require the parties to try it again in a slightly different way so as to produce a result exactly the same.
>
> In the words of Meredith, J., in *Cartwright v. Town of Napanee* (1905) 11 O.L.R. 69, 72, there is every reason for "declining to exercise a jurisdiction which would compel the respondents to march up the hill merely to march down again at their will."

[1] (1918), 44 O.L.R. 84.

1959

TOWNSHIP OF SCARBOROUGH v. BONDI

Cartwright J.

If subss. (8) and (9) quoted above were the only statutory provisions requiring consideration I would incline to follow *re Butterworth* but since the date of that decision s. 43 of *The Ontario Municipal Board Act* has been passed. This reads as follows:

> 43. Where by this or any other general or special Act the permission, approval or sanction of the Board is necessary to the exercise of any power or the doing, or the abstention from doing or continuing to do any act, matter, deed or thing, such power shall not be exercised or act, matter, deed or thing be done or abstained from being done or be continued until such permission, approval or sanction has been obtained.

The predecessor of this section was first enacted in 1932 by s. 47 of 22 Geo. V, c. 27. Its terms appear to me to be free from any ambiguity and to be fatal to the appellant's case. The council in passing by-law no. 7203 was exercising a power to the exercise of which the approval of the Board was necessary by the provisions of s. 390(9) of *The Municipal Act;* and, by s. 43, just quoted, it was expressly forbidden to exercise that power until the approval of the Board had been obtained. It results that by-law no. 7203 is a nullity.

It can scacely be denied that this construction, which I think we are compelled by the plain words of the statute to adopt, may result in great inconvenience, but we must decide the case on the law as it existed when the matter was dealt with by the Court of Appeal and can take no account of the amendment to s. 309(9) made by 1958 6-7 Elizabeth II, c. 64, s. 31(2), as a result of which the subsection now reads:

> No part of any by-law that repeals or amends a by-law passed under this section and approved by the Municipal Board shall come into force without the approval of the Municipal Board.

For the above reasons, all of which are based upon a ground which was raised before the Court of Appeal but with which that Court found it unnecessary to deal, I would dismiss the appeal with costs.

ABBOTT J.:—For the reasons given by my brothers Cartwright and Judson, I would dismiss the appeal with costs.

JUDSON J.:—This is an appeal from the judgment of the Court of Appeal for the Province of Ontario[1] which quashed an amendment to a zoning by-law of the Township of Scarborough. The original by-law, no. 2041, was

[1] [1957] O.R. 643, O.W.N. 536, (1958), 11 D.L.R. (2d) 358.

passed on March 21, 1938, under authority of s. 406 of *The Municipal Act,* R.S.O. 1937, c. 266, now R.S.O. 1950, c. 243, s. 390, subs. (1)4. It imposed residential restrictions on certain lands in registered plans 2763 and 1734 and permitted the erection of only one dwelling per 100 feet of frontage on a public street.

Before the present dispute the by-law had been amended on at least three occasions on the petition of individual property owners so as to permit the erection of dwellings on parcels of land having a frontage of less than 100 feet on a public street but having large areas. The lands of the respondent comprise the westerly portion of lot 98 and are approximately 20,000 square feet in area. Lot 98 is a triangular shaped corner lot which has a frontage of 221 feet on Annis Road and 333 feet on Hill Crescent. Before the passing of the amending by-law 7203 (the by-law under attack) it would have been possible to erect at least four dwellings because of the frontages on the two streets. The by-law in question here, passed on September 17, 1956, amended by-law 2041 by providing that

> Nothwithstanding the provisions of this by-law, two single family detached dwellings only may be erected on the whole of lot 98, registered plan 1734.

The easterly portion of lot 98 fronting entirely on Hill Crescent already had a house built on it. The respondent's property, the westerly portion of lot 98, is still vacant land. It has a frontage of 221 feet on Annis Road by approximately 100 feet on Hill Crescent. The perpendicular depth throughout is 100 feet. If, therefore, one looks at the by-law before amendment, it would be possible to put two houses on this vacant lot, each having a frontage of 110 feet, 6 inches on Annis Road by a depth of 100 feet. This would give each house an area of approximately 11,000 square feet.

The respondent purchased his property in May of 1951. In July of 1956 he agreed to sell to a third party, who proposed to put two houses on the property, each having a frontage of 100 feet on Annis Road. It was a condition of the agreement that the purchaser should be able to obtain permission from the municipality to erect these two houses. The agreement came to nothing because property owners in the vicinity petitioned the township

1959

TOWNSHIP OF SCARBOROUGH v. BONDI

Judson J.

council to amend the by-law. Their petition pointed out that the average ground area for the houses in this neighborhood was in excess of 45,000 square feet, whereas the two new houses would each have a ground area of approximately 10,000 square feet. The objection to the proposed buildings on comparatively small lots in a neighborhood such as this is apparent and needs no further comment. The amending by-law was first read on September 17, 1956, and received its second and third readings on September 24, 1956. It came before the Ontario Municipal Board for approval on November 1, 1956. An oral hearing was held at which the respondent was represented and heard. The Board reserved judgment and gave its decision approving the amendment on November 22 after an inspection of the area. The Board stated that the restriction imposed by the amending by-law was reasonable and in keeping with the general character of the neighborhood.

The respondent then moved for an order quashing the by-law. The application was dismissed by order dated April 12, 1957. This order was reversed on appeal[1] and it is from this reversal that the present appeal is taken. The Court of Appeal held that even if the amending by-law was passed in good faith, it was discriminatory in scope, application and effect and consequently invalid, being aimed at and applying only to one lot within the defined area.

I do not think that one can characterize this by-law as discriminatory merely because it points to one particular person or lot. The task of the municipality in enacting the original by-law was to impose building restrictions over a fairly wide area. Lot 98, out of which the respondent's property came, was originally triangular in shape at the intersection of Annis Road and Hill Crescent. There was at that time no indication that it would be divided into two parcels so as to leave the respondent with a 221 foot frontage on Annis Road with a depth of only 100 feet. No other lot in the immediate vicinity has a depth of less than 150 feet. If the municipality had foreseen this subdivision at the time of the enactment of the original by-law, can it be doubted that it could have provided that the 100 foot frontage should be taken to refer to the frontage on Hill Crescent and not to a division of the 221 foot

[1] [1957] O.R. 643, O W.N. 536, (1958), 11 D.L.R. (2d) 358.

frontage on Annis Road? This is all that the amending by-law does, although it does not say so in so many words. The intent and effect of the amending by-law are clear— to compel the respondent to fall in with the general standards of the neighborhood and prevent him from taking advantage of the district amenities, the creation of the by-law, to the detriment of other owners. Far from being discriminatory, the amending by-law is nothing more than an attempt to enforce conformity with the standards established by the original by-law and which have been observed by all owners in the subdivision with this one exception.

The classic definition of discrimination in the Province of Ontario is that of Middleton J.A. in *Forst v. Toronto*[1]:

> When the municipality is given the right to regulate, I think that all it can do is to pass general regulations affecting all who come within the ambit of the municipal legislation. It cannot itself discriminate, and give permission to one and refuse it to another; . . .

Although I have a firm opinion that the original and amending by-laws do not infringe this principle, I share the doubt expressed by the learned Chief Justice whether it can ever afford a guide in dealing with a restrictive or zoning by-law. The mere delimitation of the boundaries of the area affected by such a by-law involves an element of discrimination. On one side of an arbitrary line an owner may be prevented from doing something with his property which another owner, on the other side of the line, with a property which corresponds in all respects except location, is free to do. Moreover, within the area itself, mathematical identity of conditions does not always exist. All lots are not necessarily of the same frontage or depth. The configuration of the land and the shape of the lots may vary. Some lots may have frontages on two streets. These are only some of the considerations which may justify a municipality in enacting these by-laws in exercising a certain amount of discretion.

The power to pass the by-law is contained in s. 390 (1) 4 of *The Municipal Act,* now R.S.O. 1950, c. 243. It reads:

> 390. (1) By-laws may be passed by the councils of local municipalities:
>
> 4. For regulating the cost or type of construction and the height, bulk, location, spacing, external design, character and use of buildings or structures to be erected within any defined area or areas or upon land

[1] (1923), 54 O.L.R. 256.

1959

TOWNSHIP OF SCARBOROUGH v. BONDI

Judson J.

abutting on any defined highway or part of a highway, and the minimum frontage and depth of the parcel of land and the proportion of the area thereof which any building or structure may occupy.

I think that this by-law may be justified under "spacing" and "minimum frontage and depth of the parcel of land". Although the original by-law refers only to minimum frontage and says nothing about the depth of the parcel, the facts are that at that time, long before lot 98 had been subdivided, there were no lots in the immediate vicinity of the land in question with a depth of less than 150 feet and in most cases the lots were considerably deeper. Therefore, when the by-law said that a lot should have a minimum frontage of 100 feet, the facts made it mean 100 feet frontage by a depth of not less than 150 feet. It was at that time impossible to foresee how lot 98, with its peculiar shape as compared with the rest of the lots, would eventually be subdivided. The municipality dealt with the problem after the subdivision had actually been made and when the owner of the westerly portion proposed to make a use of the lot which was not in keeping with the character of the neighborhood.

I have no doubt concerning the finding of the learned Chief Justice that the municipality in enacting this amending by-law was acting in good faith and in the interest generally of the area covered by the by-law and that it was not legislating with a view to promoting some private interest, and I am equally satisfied with the finding of the Municipal Board that the amending by-law was reasonable and in keeping with the general character of the neighborhood. I am therefore of the opinion that it resulted from a valid exercise of the legislative power and that it was not in fact discriminatory against the respondent.

I have thought it necessary to consider the application to this problem of the principles stated in the reasons of the learned Chief Justice and the Court of Appeal but there still remains the question whether the prior approval of the Municipal Board under s. 43 of *The Municipal Board Act* is a condition precedent to the validity of the amending by-law. This was an alternative ground of appeal in the Court of Appeal but the court found it unnecessary to deal with it. On this point I am in agreement with my

brother Cartwright that the by-law must be held to be a nullity for lack of prior approval. Consequently, the appeal fails and must be dismissed with costs.

Appeal dismissed with costs.

1959

TOWNSHIP OF SCARBOROUGH v. BONDI

Judson J.

Solicitor for the defendant, appellant: James A. Taylor, Toronto.

Solicitor for the plaintiff, respondent: Lewis Duncan, Toronto.

CANADIAN PETROFINA LIMITED (*Plaintiff*) ..... APPELLANT;

AND

P. R. MARTIN & CITY OF ST. LAMBERT (*Defendants*) ..... RESPONDENTS.

1958

*Nov. 26, 27

1959

Mar. 25

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

Municipal corporations—Zoning by-laws—Demand for gasoline station building permit—Permit refused—By-law amended subsequently—Mandamus—Whether accrued rights of owner of land—Effect and purpose of zoning statutory power.

The plaintiff company applied to the City of St. Lambert for a gasoline station building permit required under by-law 392, then in force, and was told that the by-law did not allow the erection of a gasoline station in district "D", where its property was situated. A few weeks later, the city passed by-law 405 which amended by-law 392 and which by art. 87C provided: "Gasoline filling stations are prohibited . . . except in District F." The company applied for a writ of mandamus contending that by-law 392 was ineffective to prohibit the erection in district "D" and that the adoption of by-law 405 could not defeat the rights already acquired under by-law 392. The trial judge allowed the writ of mandamus. This judgment was reversed by the Court of Appeal. The company appealed to this Court.

Held: The appeal should be dismissed.

In passing by-law 405, the city did not act in bad faith and in a manner oppressive and unjust to the company. The by-law was not adopted to defeat the company's application for a permit but for general application.

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

1959

CDN. PETROFINA LTD. v. MARTIN et al.

The company's contention that it had an accrued right which could not be defeated by the subsequent enactment of art. 87C of by-law 405 could not be maintained. The whole object and purpose of a zoning statutory power is to empower the municipality to put restrictions, in the general public interest, upon the right which a land-owner, unless and until the power is implemented, would otherwise have to erect upon his land such buildings as he thinks proper. Hence the status of land-owners cannot *per se* affect the operation of a by-law implementing the statutory power without defeating the statutory power itself. Prior to the passing of such a by-law the proprietary rights of a land-owner are then insecure in the sense that they are exposed to any restrictions which the municipality, acting within its statutory power, may impose. If the insecurity attending this incidental right to erect has not yet been removed by the granting of the permit, by the municipality acting in good faith, as in the present case, such right cannot become an accrued right effective to defeat a subsequently adopted zoning by-law prohibiting the erection of the proposed building in the area affected. *City of Toronto v. Trustees of Roman Catholic Separate Schools of Toronto*, [1926] A.C. 81, referred to.

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

P. Dessaulles and *A. Forget, Q.C.*, for the plaintiff, appellant.

C. H. MacNaughten, Q.C., for the defendants, respondents.

The judgment of the Court was delivered by

FAUTEUX J.:—This is an appeal from a unanimous decision of the Court of Queen's Bench[1] setting aside a judgment of the Superior Court maintaining appellant's petition of mandamus, for the issuance of a building permit for the erection of a gasoline filling station on the south-west corner of Victoria and Woodstock streets in the city of St. Lambert.

The events leading to this litigation may be summarized as follows:

The appellant company, a vendor of motor fuels and motor oils and operator of service stations, obtained on November 12, 1954, and accepted on July 27, 1955, an option to purchase, at the location and for the purpose above indicated, a parcel of land, conditional upon it obtaining from the city respondent all necessary permits

[1] [1958] Que. Q.B. 801.

and approvals. By a letter, dated May 30, 1955, and supported by a plot plan, construction plans and specifications, appellant applied for a gasoline filling station building permit, required under building by-law no. 392 then in force in the city. Acknowledging receipt of this application in a letter of June 10, 1955, respondent Martin, city manager and building inspector, advised appellant that the building by-law of the city did not allow the erection of a gasoline filling station in that area which, it may be added, was within what is described in the by-law as district "D". Some ten days later, *i.e.*, in a letter dated June 20, addressed to the Mayor and Councillors of the city respondent, appellant asked what specific provisions of the by-law prevented the granting of its application, in answer to which respondent, in a letter of June 29, referred appellant to by-law 392, s. 5, arts. 87 and 89. On the very date of appellant's letter of June 20, notice of motion having been duly given, the Council of the City passed by-law 405 reading as follows:

BY-LAW NO. 405

AMENDING BY-LAW NO. 392

WHEREAS it is a matter of public interest in view of the continued development of the City according to the policy followed by past Councils, to interprete and clarify Article 87 of By-Law No. 392.

WHEREAS, by the Charter of the City of St. Lambert, 25-26 GEO. V. Chapter 125, section 24, the Council may make, amend and repeal by-laws to determine the kind of building to be erected on certain streets and to prevent the erection thereon of any buildings of a different class.

WHEREAS, the Council for the City of St. Lambert has taken the stand that it should refuse and in fact, has refused permits for the construction of gasoline filling stations in District D, such being the interpretation of the By-Law.

WHEREAS, Notice of Motion has been duly given.

THEREFORE It is proposed by Alderman Oughtred L.W. Seconded by Alderman King R. and resolved that a By-Law bearing No. 405 be and is adopted and that it be enacted and decreed by the said By-Law as follows:—

1. THAT Article 87 is amended by adding the following paragraphs:

"87A.—Article 87 was never meant to authorize gasoline filling stations, the erection of which was and is prohibited in District D.

87B.—The provisions of section 87A of this By-Law are interpretative and shall take effect as from the first of January 1950.

1959

CDN. PETROFINA LTD. v. MARTIN et al.

Fauteux J.

87C.—Gasoline filling stations are prohibited in all Districts within the limits of the City of St. Lambert, except in District F."

2. This present By-Law shall come into force according to law."

A month later, on July 20, appellant's solicitors being seized of the matter, informed the city by letter that they had advised their client that art. 87 of by-law 392, properly interpreted, was ineffective to prohibit the erection of gasoline filling stations in district "D", that the adoption of by-law 405, of which they alleged having been recently apprised, could not defeat the rights already acquired by the company under by-law 392, and that, unless the city was prepared to grant the permit, appropriate judicial proceedings would ensue. This was followed by a letter from the city, dated July 21, advising that the matter would receive the immediate attention of its legal advisor upon the return of the latter from vacation, and by a further letter, on September 14, from appellant's solicitors to the city, insisting upon a decision in the matter.

On October 18, appellant, with the authorization of Challies J., caused a writ of mandamus to issue. In the declaration, served with the writ upon respondents, appellant prays that *arts. 87 A and B* of by-law 405 be declared null and void and of no force or effect as *ultra vires* and, demanding act of its readiness to pay, on the issue of the permit, such amount as, pursuant to the provisions of the city by-law, might be indicated by the building inspector, that respondent Martin be enjoined to grant appellant the building permit requested.

The trial Judge, having formed the view that art. 87 of by-law 392 allows "business places" in district "D" to the sole and specific exception of manufacturing establishments; that *art. 87 B* of by-law 405 violated appellant's accrued right to the permit under art. 87 of by-law 392, and that it was, because of retroactivity, illegal, *ultra vires* and, in any event, unjust and oppressive to the appellant, maintained the latter's petition for mandamus, declared *art. 87 B* of by-law 405 null and void and of no force or effect as against the appellant; gave act to the latter of its readiness to comply with the provisions of the city by-laws as to the payment for the building permit applied for; ordered respondent Martin, as building inspector of the

city respondent, to receive and consider appellant's application for the permit sought for and to grant it in accordance with the plans and specifications left with respondent on appellant's application or as same could be amended in compliance with the by-laws of the city.

On respondent's appeal to the Court of Queen's Bench[1], Bissonnette J.A. held that, properly interpreted, art. 87 of by-law 392 was effective to prohibit the building of gasoline filling stations in any of the city districts except in district "F"; Rinfret and Choquette JJ.A., concurring in this interpretation, held further that, by reason of *art. 87 C* of by-law 405 and of the decision of the Judicial Committee in *City of Toronto v. Trustees of the Roman Catholic Separate Schools of Toronto*[2], as interpreted and applied *In re Upper Estates v. MacNicol*[3] and *Spiers v. Toronto Township*[4], appellant had no accrued right to a permit when the latter article was adopted since, at that time, the gasoline filling station was neither erected nor in the process of being erected, nor had its erection been authorized by the municipal authorities under by-law 392 as the latter stood prior to the adoption of art. *87 C* of by-law 405. The appeal of respondents was consequently allowed, the judgment of first instance set aside and the petition for mandamus dismissed. Hence the present appeal.

It should immediately be said that appellant's submission that, in passing by-law 405, the city acted in bad faith and in a manner oppressive and unjust to the company, is not supported. The declared purpose of the by-law is to remove any possible ambiguity as to its interpretation as invariably given in the past by the city. While the declared purpose of a legislation is not always conclusive of its true purpose, in the present case, the fact that the city's interpretation is identical to that of the Court of Appeal supports the sincerity of the purpose indicated in the by-law and that the latter was not adopted to defeat appellant's application for a permit, but for general application.

[1] [1958] Que. Q.B. 801.
[2] [1926] A.C. 81, [1925] 3 D.L.R. 880.
[3] [1931] O.R. 465, 4 D.L.R. 459.
[4] [1956] O.W.N. 427, 4 D.L.R. (2d) 330.

1959

CDN. PETROFINA LTD. v. MARTIN et al.

Fauteux J.

It should also be noted that, under the statutory powers of the city, the provisions of *art. 87 C* of by-law 405 are admittedly unassailable and, in fact, in no way assailed by appellant. These provisions constitute a part of the subject matter of the by-law, which the municipal council manifested its intention to enact irrespective of the rest of the subject matter and hence a part subject to severance if other parts were invalid.

In this situation, assuming that on any ground raised, it should be held that art. 87 of by-law 392 and arts. 87 A and B of by-law 405 in no way affect its rights to erect, in district "D", a gasoline filling station, appellant cannot succeed unless it appears that, contrary to what is the case for any land owner in the district, its rights are not subject to the restrictive provisions of *art. 87 C.*

Appellant's contention must be that, having made the application for a permit and deposited the plans at a time when its right to use the land for the proposed purpose was in no way affected by a by-law, it had an accrued right which could not be defeated by the subsequent enactment of art. 87 C of by-law 405.

The merit of this proposition is, I think, implicitly negatived on the reasoning of the Judicial Committee in the *City of Toronto Corporation v. Trustees of the Roman Catholic Separate Schools of Toronto, supra.* While the statutory powers of the city of Toronto differ from those of the respondent city, in that any by-law passed pursuant thereto is restricted in its operation, and while the questions of fact arising in that case are, in some respect, at variance with the admitted facts of this case, the basic principle governing in the matter is the same. What was then said by Lord Cave may be stated concisely as follows, for the purpose of this case. The whole object and purpose of a zoning statutory power is to empower the municipal authority to put restrictions, in the general public interest, upon the right which a land owner, unless and until the power is implemented, would otherwise have to erect upon his land such buildings as he thinks proper. Hence the status of land owner cannot *per se* affect the operation of a by-law implementing the statutory power without defeating the statutory power itself. Prior to the passing of such a by-law the proprietary rights of a land owner

are then insecure in the sense that they are exposed to any restrictions which the city, acting within its statutory power, may impose.

From this it follows that, while the right to erect includes the right to receive the necessary permit for the erection of the building proposed to be erected in conformity with the law in force for the time being, the latter right is not any more secure than the former to which it is incidental. And if the insecurity attending this incidental right has not yet been removed by the granting of the permit, by the municipal authority acting in good faith, as in the present case, such right cannot become an accrued right effective to defeat a subsequently adopted zoning by-law prohibiting the erection of the proposed building in the area affected.

In these views, I find it unnecessary to pursue the matter further.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Attorneys for the plaintiff, appellant: McDonald, Dessaules & Joyal, Montreal.

Attorney for the defendants, respondents: Cecil H. MacNaughten, Montreal.

WILFRID FAUBERT (*Plaintiff*) .....APPELLANT;

AND

ANTOINE POIRIER (*Defendant*) .....RESPONDENT.

1958
*Nov. 20
1959
Mar. 25

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

Real property—Sale of immoveable—Assignment of an "obligation" owed to purchaser as payment—Erroneous interpretation by vendor of meaning of word "obligation" in agreement—Whether misrepresentation—Whether subjective error—Whether evidence of corroboration—Civil Code, arts. 992, 993.

As part of the consideration for the sale of a property, the defendant purchaser assigned to the plaintiff vendor a debt ("acte d'obligation") owing by a third party to the purchaser as creditor. The debt owing

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

1959

FAUBERT v. POIRIER

to the purchaser was an unsecured one but the vendor, in error, believed that it was secured, since, as he testified, he always understood that the word "obligation" implied that the debt was secured by hypothec. When the vendor learned, subsequently to the signing of the agreement, that the debt was unsecured, he brought action to have the agreement set aside alleging that he had been led into error by the false representations of the purchaser. The trial judge set the agreement aside with costs against the plaintiff, as he found that the error was a subjective one on the part of the vendor and that no fraud could be imputed to the purchaser. This judgment was reversed by a majority in the Court of Appeal on two grounds: (1) That since the plaintiff had pleaded misrepresentation the trial judge had decided *ultra petita* when he decided on the ground of substantive error only, and (2) That there was no finding of corroboration and no evidence to corroborate the subjective error. The plaintiff appealed to this Court.

Held: The appeal should be allowed and the agreement set aside.

As to the procedural point raised by the Court of Appeal, the defendant himself introduced the question of subjective error upon which the finding of the trial judge was based. The plaintiff pleaded misrepresentation, the defendant denied this allegation, and then pleaded specifically that the plaintiff had fully understood the nature of the agreement into which he had entered.

As to the question of evidence, there was corroboration of the evidence concerning the subjective error and the trial judge did in fact make specific reference to this corroboration. The error made in this case was one of fact. But whether or not the plaintiff made an error of fact or law his consent was vitiated as to the consideration for the sale and hence he was entitled to be released from the contract. *Rawleigh v. Dumoulin*, [1926] S.C.R. 551, referred to.

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

A. Lemieux, Q.C., for the plaintiff, appellant.

A. Leblanc, for the defendant, respondent.

The judgment of the Court was delivered by

FAUTEUX J.:—L'appelant se pourvoit à l'encontre d'une décision majoritaire de la Cour d'Appel[1] infirmant le jugement de la Cour supérieure annulant, pour cause d'erreur subjective de l'appelant, un contrat de vente d'immeuble fait et signé par les parties devant Me J. M. Leduc, notaire à Salaberry-de-Valleyfield, le 24 mai 1952.

Les faits peuvent se résumer substantiellement comme suit. Vers cinq heures de l'après-midi du samedi, 24 mai 1952, l'intimé, homme d'affaires de Côteau-du-Lac, rencontra à Valleyfield l'appelant, menuisier de cet endroit,

[1] [1956] Que. Q.B. 551.

et discuta des termes d'achat d'une propriété annoncée en vente par ce dernier. L'accord s'étant fait, en apparence du moins, les parties se donnèrent rendez-vous à sept heures le même soir, au bureau du notaire Leduc, où elles signèrent l'acte incriminé. La propriété est vendue pour un prix de $13,800,

en paiement partiel duquel soit pour un montant de sept mille huit cents dollars, le vendeur accepte de l'acquéreur pareil montant de sept mille huit cents dollars à ce dernier dû par Edmond Langevin, propriétaire de taxi, de Salaberry-de-Valleyfield, *par acte d'obligation passé devant Me Phillippe Malouin, notaire, le huit septembre mil neuf cent cinquante, sous le No. 2396 de ses minutes.* Cette somme est payable le huit septembre mil neuf cent soixante. De plus, ledit Edmond Langevin, par ledit acte, s'est engagé à endosser durant cette période à la demande du créancier, un ou des billets ou autres reconnaissances de dettes juqu'à concurrence de ladite somme. Cette somme porte intérêt au taux de quatre pour cent l'an payable annuellement. L'acquéreur transporte ladite somme au vendeur, en capital, intérêt et le subroge dans tous ses droits et actions *résultant dudit acte d'obligation,* en capital, intérêt accrus et à accroître, et accessoires. Le vendeur accorde à l'acquéreur quittance pour ladite somme de sept mille huit cents dollars.

(Les italiques de cet extrait sont miens).

Quant au solde du prix de vente, soit $6,000, l'acquéreur (*i*) assume de payer pour et à l'acquit du vendeur une somme de $3,000 due à Lucien et Eugène Legault et garantie par hypothèque sur la propriété vendue et (*ii*) s'engage à payer la balance de $3,000 par versements semestriels et consécutifs de $200 chacun à compter du 1er novembre 1952 avec intérêt au taux de 5 pour cent à compter du 2 juin 1952, le vendeur conservant pour le paiement de cette somme un privilège de vendeur, prenant rang après la créance hypothécaire des Legault.

Contrairement à ce que l'appelant dit avoir compris, l'acte d'obligation mentionné à l'extrait ci-dessus n'est pas un acte d'obligation comportant hypothèque, mais réfère à une obligation purement personnelle. A la vérité, il s'agit là d'une reconnaissance de dette payable au bout de dix ans avec, avant échéance, certains privilèges d'accommodation au bénéfice du créancier.

Ainsi donc et suivant cet acte de vente, le vendeur appelant ne reçoit aucun paiement comptant; il demeure personnellement responsable du paiement de la créance de $3,000 des Legault; il donne quittance à l'acheteur intimé pour $7,800, soit pour plus de la moitié du prix de vente, et reste avec une créance non garantie pour ce

1959

FAUBERT v. POIRIER

Fauteux J.

montant, créance dont il ne pourra exiger le paiement de Langevin que dans huit ans; et il ne sera complètement payé de sa créance de $3,000 contre l'acheteur intimé que dans sept ans et six mois.

Voilà bien, je crois, un contrat manifestant de la part du vendeur un degré d'imprévoyance, sinon de prodigalité, qu'aucune circonstance au dossier, autre que celle de l'existence de l'erreur dont il se plaint, ne paraît expliquer. Ajoutons que le marché s'est conclu en quelque deux heures, alors que le bureau d'enregistrement était fermé, Langevin était hospitalisé à Montréal et le notaire Malouin était lui-même absent de chez lui.

Dès le lendemain, soit le dimanche, l'appelant téléphone à l'épouse de Langevin pour s'assurer de la propriété sur laquelle l'hypothèque qu'il croyait détenir en garantie de sa créance, était établie. L'information reçue jeta le doute dans son esprit et, dès le lundi, ses appréhensions furent confirmées par les notaires Leduc et Malouin qu'il alla consulter. Sans autre délai, il va s'en ouvrir à son avocat lequel, après avoir écrit à l'intimé, institue cette action pour annulation de contrat, alléguant que Faubert a été victime d'une erreur résultant de fausses représentations de la part de Poirier.

Les témoignages des parties sont nettement contradictoires. Résumant sa pensée sur l'appréciation de ces deux témoins et de la substance de leurs témoignages, le Juge au procès déclare ce qui suit:

> Nous sommes d'opinion que les deux parties en cette cause sont d'honnêtes gens, l'un plus roué en affaires que l'autre, et qui a sans doute profité légitimement d'un manque d'instruction de l'autre. Le demandeur le dit tout au long de son témoignage: Lorsque le défendeur employait le mot "obligation", il avait dans l'esprit une idée bien arrêtée qu'il s'agissait d'une obligation hypothécaire. D'autre part, il est facile à la lecture des témoignages, de se rendre compte que le défendeur Poirier n'a pas instruit son vendeur de la différence qu'il peut y avoir entre une obligation pure et simple, personnelle, et une obligation hypothécaire. Cette différence juridique le demandeur devait la savoir: il n'appartenait pas au défendeur de le renseigner là-dessus. L'erreur dont se plaint le demandeur existe. C'est une erreur de droit dont il a droit de se plaindre mais qu'il ne peut imputer au défendeur parce que dans notre opinion, il n'a pas fait devant cette Cour la preuve formelle, complète et précise de la fraude qu'il allègue dans son action.

Et plus loin, il ajoute:

> A la lecture de son témoignage, l'on constate que le demandeur n'était pas un homme d'affaires averti mais plutôt un illettré qui sait à peine lire couramment et pour qui le mot "obligation" n'avait d'autre sens que celui d'obligation hypothécaire.

Enfin, rappelant qu'en pratique prudente il convient de chercher une corroboration des prétentions du plaideur qui invoque son erreur, à moins que sa crédibilité ne soit préférable à celle de son adversaire, et tenant compte que l'erreur subjective n'étant pas, de son essence, imputable au défendeur, ne saurait, pour cette raison, lui préjudicier, le juge au procès annula le contrat avec dépens contre Faubert et réserva aux parties tous droits pouvant leur résulter de cette annulation.

Dans des raisons de jugement très élaborées, ces vues furent substantiellement partagées en Cour d'Appel par M. le Juge Rinfret, dissident. Les juges de la majorité[1], pour infirmer le jugement, s'appuyèrent sur deux motifs, dont l'un a trait à la procédure, et l'autre, à la preuve faite pour établir l'existence de l'erreur subjective.

Sur le motif de procédure. L'action du demandeur reposant non sur une allégation d'erreur subjective mais sur une allégation d'erreur résultant de fausses représentations trouvée non fondée, le juge au procès aurait, dit-on, adjugé *ultra petita* en maintenant l'action pour cause d'erreur subjective. A mon avis, ce motif doit être écarté. Ayant nié l'allégation de fausses représentations, le défendeur s'est chargé lui-même de plaider en plus, et spécifiquement, que le demandeur avait bien compris l'acte qu'il avait signé et qu'il avait donné à cet acte un consentement valide et libre. Sur cette question de fait, comme sur les autres, la contestation fut liée. C'est donc le défendeur qui a introduit dans la cause la question de l'erreur subjective.

Sur la preuve de l'existence de cette erreur subjective. S'inspirant de l'arrêt dans *Rawleigh v. Dumoulin*[2], décidant en somme qu'il ne suffit pas au demandeur en annulation de contrat pour cause d'une telle erreur, d'en affirmer le fait, mais que son affirmation doit être corroborée, les juges de la majorité ont exprimé l'avis que le juge au procès n'a

[1] [1956] Que. Q.B. 551. [2] (1925), 39 Que. K.B. 241.

1959

FAUBERT v. POIRIER

Fauteux J.

pas indiqué en son jugement qu'il avait trouvé cette corroboration dans la preuve et que, de toutes façons, la preuve ne révèle aucune corroboration. En toute déférence, je ne puis partager ces vues.

Comme déjà indiqué, le juge de première instance a mentionné, avec approbation, la règle de prudence appliquée dans *Rawleigh v. Dumoulin, supra.* Récitant les circonstances de la cause, il a particulièrement mis en contraste le fait que le vendeur était un illettré avec le fait que l'acheteur était un homme d'affaires averti, et il a noté que ce dernier avait "profité légitimement d'un manque d'instruction de l'autre". Le jugement, étant lu dans son entier, manifeste que le juge ne s'est pas contenté de la simple affirmation du demandeur pour conclure qu'il avait vraiment été victime de son erreur.

La présence au dossier de preuve corroborative n'est pas douteuse. Cette différence entre le degré d'instruction et d'expérience respectif des contractants, la célérité apportée aux pourparlers et à la conclusion du contrat, la diligence du vendeur à se plaindre, et surtout, si on s'en rapporte au contrat lui-même, le sens du mot "obligation" et les conditions inusitées, dans les circonstances, du mode de paiement du prix, sont autant d'éléments de preuve dont la somme supporte l'affirmation de Faubert. Au Petit Dictionnaire de Droit de Dalloz 1951, p. 892, n° 1, on ajoute ce qui suit après avoir généralement défini le mot "obligation":

> Le mot "obligation" désigne encore, dans le notariat, l'acte constatant *un emprunt assorti d'une constitution d'hypothèque.*

Nos rapports judiciaires abondent de décisions où l'on voit que, sous le Droit Civil de Québec, les mots "acte d'obligation" désignent une créance conventionnellement garantie par hypothèque. Et voilà bien ce que Faubert a juré avoir compris. Cette erreur sur le sens des mots, en l'espèce, est une erreur de fait. Mais, même si l'on retient le témoignage de l'acheteur qu'il aurait, au cours des pourparlers ou immédiatement avant la signature du contrat, déclaré qu'il s'agissait d'une obligation personnelle, Faubert n'appréciant pas la différence des conséquences juridiques résultant d'une obligation hypothécaire et d'une obligation personnelle, il aurait été victime d'une erreur de droit. Dans un cas comme dans l'autre, son consentement a été vicié en ce qui

concerne la considération de la vente de l'immeuble et il a droit à l'annulation du contrat. Dans Colin et Capitant, Droit Civil Français, 1948, t. 2, p. 39, n° 50, on s'en exprime ainsi:

> L'erreur de *droit*, comme l'erreur de *fait*, vicie le consentement de celui qui la commet. Il n'y a donc pas lieu d'établir de différence entre leurs effets ni d'invoquer la règle que "nul n'est censé ignorer la loi". (Req. 28 mai 1888, D.P. 89. 1.315; cf. Civ. 17 nov. 1930, S. 1932. 1.7.) Celui qui s'est trompé mérite dans les deux cas la protection de la loi.

On retrouve la même doctrine dans Migneault, Droit Civil Canadien, vol. 5, p. 216, et dans Trudel, Traité de Droit Civil de Québec, vol. 7, p. 159. On ne peut davantage opposer à Faubert que son erreur eut été dissipée par le notaire Leduc s'il s'était enquis de la véritable situation avant de signer l'acte. En fait, convaincu qu'il s'agissait d'une créance garantie par hypothèque, la nécessité de ce faire ne s'est pas présentée à son esprit. De toutes façons et en droit, même s'il a été imprudent, son imprudence ne peut lui être opposée en ce qui concerne l'annulation du contrat. *Rawleigh v. Dumoulin*[1].

Je maintiendrais l'appel, rétablirais les conclusions du juge de première instance, le tout avec dépens en Cour d'Appel et en cette Cour.

Appeal allowed with costs.

Attorneys for the plaintiff, appellant: Lemieux & Savard, Valleyfield.

Attorney for the defendant, respondent: Albert Leblanc, Valleyfield.

MERIZA LACARTE (*Plaintiff*) ..... APPELLANT;

AND

THE BOARD OF EDUCATION OF TORONTO (*Defendant*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Libel and slander—School teacher dismissed—Statutory duty to communicate reasons to teacher—Defence of qualified privilege—Absence of evidence of malice—The Teachers' Board of Reference Act, 1946 (Ont.), c. 97, s. 2.

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

[1] [1926] S.C.R. 551, 4 D.L.R. 141.

1959

LACARTE v. BD. OF EDUCATION OF TORONTO

The plaintiff, a former high school teacher, was dismissed from her employment in 1948 by a letter informing her that, by a resolution, the defendant Board had approved a recommendation of the Advisory Vocational Committee that her employment be terminated "on the ground of lack of co-operation". She sued for damages for libel allegedly contained in her letter of dismissal. The defence pleaded qualified privilege and lack of malice. The trial judge, sitting with a jury, ruled that the publication had been on occasions of qualified privilege and that there was no evidence of malice to go to the jury, and directed a verdict for the defendant. This judgment was affirmed by the Court of Appeal.

Held (Rand and Cartwright JJ. dissenting): The action should be dismissed.

Per Taschereau, Locke and Abbott JJ.: The letter dismissing the plaintiff was written in pursuance of the statutory duty imposed by s. 2 of *The Teachers' Board of Reference Act,* 1946 (Ont.), which provided that every termination of employment of a teacher by a board was required to be by notice in writing indicating the reasons for such dismissal. Such publication of the letter and the carbon copies of it, and of the copies of the resolutions as was made by the defendant, was made upon occasions of qualified privilege and there was no proof of malice in fact. *Toogood v. Spyring* (1834), 1 C.M. & R. 193, *Osborne v. Boulter,* [1930] 2 K.B. 226, 232, and *Edmondson v Birch,* [1907] 1 K.B. 371, 380, referred to. There was no evidence upon which a jury could properly find that the members of the Advisory Vocational Commitee who recommended the dismissal of the plaintiff, or the members of the Board of Education or their officers who carried out their duty in informing the plaintiff in writing of the reasons for her dismissal, were actuated by any other motive than the due discharge of their duties.

Per Rand and Cartwright JJ., *dissenting*: It would have been open to a properly directed jury to find that certain of the employees of the defendant who, acting within the scope of their duties, furnished the information on which the defendant acted in making the statement complained of were actuated by malice towards the plaintiff. If the jury had reached such a conclusion, the qualified privilege would have been defeated. Where a corporation is under a duty, whether of perfect or imperfect obligation, to publish a statement about a person, and in the preparation of that statement relies on information furnished by one of its employees within the scope of whose employment it is to furnish the information, the malice of that employee in furnishing false and defamatory information which is made part of the statement published will in law be treated as the malice of the corporation, although all members of the boards of directors or of trustees which authorize the publication are individually free from malice. A new trial should be directed.

APPEAL from a judgment of the Court of Appeal for Ontario[1], affirming a judgment of Wells J. in an action for libel. Appeal dismissed, Rand and Cartwright JJ. dissenting.

[1] [1956] O.W.N. 844.

Miss Meriza Lacarte, in person.

D. J. Walker, Q.C., and *D. H. Osborne, Q.C.*, for the defendant, respondent.

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

LOCKE J.:—In this action which was commenced on August 23, 1951, the present appellant claimed damages against the Board of Education for wrongful dismissal, for libel and for other relief, the nature of which is not of importance in the present appeal.

By an order made by the Chief Justice of the High Court on January 12, 1953, it was directed that all issues raised in the pleadings, except that of libel, be tried by a judge without a jury, and that the issue of libel and the assessment of damages for libel only be tried before a jury.

The action in respect of the alleged wrongful dismissal and the claims for other relief was dismissed at the trial. Appeals to the Court of Appeal and to this Court[1] were dismissed.

The action for the alleged libel was tried before Wells J. and a jury. At the conclusion of the evidence given on behalf of the appellant, that learned judge, upon the respondent's motion for a non-suit, directed the jury to find a verdict for the respondent and judgment was entered dismissing the action. That judgment was upheld by a unanimous judgment of the Court of Appeal[2], the reasons for which were delivered by Roach J.A. and it is from the latter judgment that, by special leave, this appeal has been brought *in forma pauperis*.

The contract of employment in respect of the termination of which the action was brought was originally made between the appellant and the respondent on May 2, 1940. The appellant continued in the respondent's employ until June 30, 1948, at which date it was terminated pursuant to a written notice given by the Board to the appellant in a letter dated May 7, 1948. It is in respect of the terms of this letter which, as required by statute, gave the reason for the termination of the contract that the claim for libel

[1] [1955] 5 D.L.R. 369. [2] [1956] O.W.N. 844.

1959

LACARTE v. BD. OF EDUCATION OF TORONTO

Locke J.

was made. The letter informed the appellant that, by a resolution, the Board had approved a recommendation of the Advisory Vocational Committee that the agreement be terminated on the date mentioned "on the ground of lack of co-operation with the principal and certain members of the staff of the Danforth Technical School".

By the statement of claim it was alleged that the said "notice" (referring to the letter) was "malicious and unfair to the plaintiff"—that it wrongfully declared the appellant guilty of having failed to co-operate with the principal and members of his staff and that the respondent or the servants of the respondent who were responsible for the form of the notice thereby knowingly and maliciously sought to injure the appellant and to make it impossible for the appellant to secure the recommendation of a principal for future employment in the City of Toronto or the Province of Ontario.

The statement of defence gave lengthy particulars of the reasons which led to the appellant's dismissal and, with these, we are not concerned. As to the claim for libel, the respondent alleged that, by the provisions of the *Teachers' Board of Reference Act*, c. 97 of the Statutes of 1946, it was required that every termination of employment of a teacher shall be by notice in writing which shall indicate the reasons for such dismissal, that the publication or publications complained of, if there were such, were made upon occasions of qualified privilege and without malice, the respondent believing the statement made to be true. Justification was not pleaded to the claim for libel.

The appellant gave evidence on her own behalf at the hearing, proving the fact of the employment and its termination, swearing that she had not failed to co-operate with the principal of the Danforth School or other members of the staff of that school and describing her unsuccessful endeavours to obtain other employment, during the course of which she had exhibited the copy of the letter from the Board of May 7, 1948, to the principals of other schools where she sought employment. She was cross-examined at some length upon the matter of her disagreements with the principal of the Danforth School, a Mr. Ferguson, as to criticisms which she had made of his direction of the school,

of the complaints she had made to the Director of Education, Dr. C. C. Goldring, and to other persons, and as to her application to the Minister of Education, the Honourable George Drew, on May 19, 1948, for a board of reference to enquire into her dismissal. In addition, the appellant called various secretaries, clerks and stenographers employed in the Board of Education, including the secretary of Dr. Goldring, the business administrator of the Board, the chief accountant, Mr. E. H. Silk, Q.C., the senior solicitor for the Attorney General's Department and the Deputy Minister of Education, in an endeavour to prove publication of the letter under circumstances which would defeat the claim of qualified privilege.

The respondent Board of Education was constituted under the provisions of the *Board of Education Act* which, at the time of the occurrence of the matters under consideration, appeared as c. 361, R.S.O. 1937. The Advisory Vocational Committee referred to in the letter to the appellant of May 7, 1948, was the body which, under the provisions of the Vocational *Education Act,* c. 369, R.S.O. 1937, was charged with the management and control of the Danforth High School.

By s. 2 of the *Teachers' Board of Reference Act 1946* every termination of employment of a teacher by a board is required to be by notice in writing which shall indicate the reasons for such dismissal, and it was in pursuance of this statutory duty that the letter of May 7, 1948, was written. As the evidence showed, records were kept of the meeting of the Advisory Vocational Committee held on April 29, 1948, in which the following appears:

> From the Director of Education submitting as requested a further report regarding Miss M. Lacarte, teacher at Danforth Technical School.
>
> Following a review of the case by the Director of Education and the Superintendent of Secondary Schools, the Director of Education recommended as follows:—"That the contract of Miss M. Lacarte be terminated on June 30th, 1948 on the ground of lack of co-operation with the principal and certain members of the staff of Danforth Technical School."
>
> After some discussion the recommendation of the Director was adopted on motion of Representative Burns.

A portion of the minutes of a meeting of the Board of Education held on May 6, 1948, at which the resolution referred to in the letter of May 7 was passed was also put

1959

LACARTE v. BD. OF EDUCATION OF TORONTO

Locke J.

in evidence. The letter had been dictated to a stenographer, Miss Mary Cartwright, an employee of the Board, and two carbon copies of it were kept with its records. According to Miss Cartwright, these copies were retained in the Board's files, one being bound up in a book, and the other in what were described as the central files. They would, of necessity, be seen by the filing clerk or clerks who attended to such work.

As to the other employees and officials of the Department who gave evidence, none of them said that they had ever seen the letter or a copy of it, though the agenda of the meeting of the Advisory Vocational Committee which was held on April 29, 1948, and of those of the respondent Board held on May 6 had been seen by some of them. While these minutes contained copies of the resolutions which were passed by these respective bodies, since the claim for libel is restricted to the alleged publication of the letter of May 7, this evidence need not be considered. I would, however, add that if any such claim had been made in respect of these minutes, the evidence shows that they were seen only by persons employed by the respondent whose duty it was to deal with such documents in the ordinary course of the respondent's business, or to keep a record of the termination and the reasons for the termination of a teacher's employment.

The appellant, in writing to the Honourable George Drew requesting a reference under the provisions of the *Teachers' Board of Reference Act 1946,* had enclosed a copy of the letter complained of, and this was seen by the Deputy Minister of Education, as well as, presumably, by the Minister and by Mr. Silk, Q.C. of the Attorney General's Department, when certain proceedings were taken by the appellant in regard to the board of reference which was ultimately granted and which considered the appellant's complaint. Since this publication was made by the appellant, it is of no assistance to her contention.

The learned trial judge, in a carefully considered judgment, held that such publication of the letter and the carbon copies of it and of the copies of the resolutions as had been made by the respondent was upon occasions of qualified privilege, a conclusion with which the learned judges of the Court of Appeal have unanimously agreed.

The letter was written and the reasons for the termination of the appellant's services stated for the reasons to which I have referred. In the ordinary course of business, the letter was dictated to a stenographer and copies were undoubtedly seen by the filing clerks. The ground upon which the privilege rests in a case such as this is stated by Baron Parke in *Toogood v. Spyring*[1]. That it is not lost by such communications is shown by the cases referred to by the learned trial judge: *Osborn v. Boulter*[2] and *Edmondson v. Birch*[3], which, in my opinion, accurately state the law. In the last mentioned case it was said by Fletcher Moulton L.J. (p. 382) that if a business communication is privileged, as being made on a privileged occasion, the privilege covers all incidents of the transmission and treatment of that communication which are in accordance with the reasonable and usual course of business.

Such a claim of privilege might, of course, be defeated by proof of malice in fact. The learned trial judge, dealing with this aspect of the matter, referred to a passage from the judgment of Lord Macnaghten in delivering the judgment of the Judicial Committee in *Jenoure v. Delmege*[4], adopting what had been said by Parke B. in *Wright v. Woodgate*[5], reading:

> The proper meaning of a privileged communication is only this: that the occasion on which the communication was made rebuts the inference *prima facie* arising from a statement prejudicial to the character of the plaintiff, and puts it upon him to prove that there was malice in fact—that the defendant was actuated by motives of personal spite or ill-will, independent of the occasion on which the communication was made.

The learned trial judge found that there was no evidence to go to the jury upon which they could properly find malice on the part of the respondent and said that he did not consider that any one could reasonably deduce from the evidence that there was any wrongful motive or intent on any one's part in dealing with the dissemination of the reasons for the appellant's dismissal after the dismissal took place. The learned judges of the Court of Appeal were unanimously of the opinion that there was no evidence

[1] (1834), 1 C.M. & R. 181 at 193, 149 E.R. 1044.
[2] [1930] 2 K.B. 226, 232.
[3] [1907] 1 K.B. 371, 380.
[4] [1891] A.C. 73 at 78.
[5] (1835), 2 C.M. & R. 573 at 577, 150 E.R. 244.

1959

LACARTE v. BD. OF EDUCATION OF TORONTO

Locke J.

of malice and that the learned trial judge was right in so holding in directing that a verdict in favour of the defendant be returned.

My consideration of the record in this matter leads me to the same conclusion. I find no evidence upon which a jury could properly find that the members of the Advisory Vocational Committee who recommended the dismissal of the appellant, the members of the Board of Education or their officers who carried out their duty in informing the appellant in writing of the reasons for her dismissal, were actuated by any other motive than the due discharge of their duties.

I would dismiss this appeal with costs if demanded.

The judgment of Rand and Cartwright JJ. was delivered by

CARTWRIGHT J. (*dissenting*):—This is an appeal from a judgment of the Court of Appeal for Ontario[1] dismissing an appeal from a judgment of Wells J. who had dismissed the appellant's claim for damages for libel.

On August 23, 1951, the appellant commenced an action against the respondent in which she claimed, *inter alia,* damages for libel. At the first trial of the action before the late Mr. Justice Anger the jury failed to reach an agreement. Following this the learned Chief Justice of the High Court directed that the issue of libel should be tried separately before a judge and jury and that all other issues raised in the action should be tried by a juge without the intervention of a jury. In this appeal we are concerned only with the claim for damages for libel.

The words complained of were contained in a letter of dismissal dated May 7, 1948, addressed by the respondent to the appellant reading as follows:

THE BOARD OF EDUCATION
155 College Street,
Toronto.

A. V. Ackehurst,
Assistant Secretary,
7 May, 1948.

Miss Meriza Lacarte,
9, Tennis Crescent,
Toronto, 4, Ontario.
Dear Madam:—

[1] [1956] O.W.N. 844.

By Resolution of the Board of Education for the City of Toronto passed on the sixth day of May, 1948, approving a recommendation of the Advisory Vocational Committee of the said Board, made on the twenty-ninth day of April, 1948, I was instructed to, and do hereby, inform you that your agreement as a teacher with the said Board will be terminated on the thirtieth day of June, 1948, on the ground of lack of co-operation with the Principal and certain members of the Staff, of the Danforth Technical School.

This Notice is given pursuant to the terms of the said agreement and Regulations Nos. 10 (ss.4) and No. 29 of the said Board.

Yours truly,
(signed) C. H. R. FULLER
Business Administrator
and Secretary-
Treasurer.

The words of which particular complaint is made are those stating the ground of dismissal as being:
lack of co-operation with the Principal and certain members of the Staff of the Danforth Technical School.
These words were also contained in minutes of a meeting of the Advisory Vocational Committee of the respondent of April 29, 1948, and in the minutes of a private session of the respondent held following its regular meeting on May 6, 1948.

In the statement of claim the appellant alleged that the words complained of were published by the respondent to the Principal of Danforth Technical School and members of his staff, to other members of the respondent's staff, to the Minister of Education for the Province of Ontario, to members of his staff and to members of the staff of the Attorney General for Ontario.

At the opening of the trial before Wells J. it was made plain by counsel for the respondent that there was no plea of justification and that the defence relied on was that the statement was published on occasions of qualified privilege and without malice.

The appellant pleaded a number of innuendoes, but I do not find it necessary to consider these as it is clear that the words complained of are, in their plain and ordinary meaning, defamatory of the appellant and calculated to disparage her in her profession.

The trial occupied several days. At the conclusion of the plaintiff's case counsel for the respondent moved for a non-suit and after hearing some hours of argument the

1959

LACARTE v. BD. OF EDUCATION OF TORONTO

Cartwright J.

learned trial judge granted this motion and directed the jury that as a matter of law they must return a verdict for the defendant.

The learned trial judge was of opinion that it was the duty of the respondent, under s. 2(1) of *The Teachers' Boards of Reference Act* to give the respondent notice in writing indicating the reasons for her dismissal, that the resolutions embodying those reasons, including the statement complained of, were published by the respondent to about twenty persons all of whom were officials, clerks, stenographers, filing clerks or members of the accounting department of the respondent, that the publications were on an occasion of qualified privilege and were not made to any of those persons otherwise than in a reasonable manner and in the ordinary course of business. The learned judge indicated that he had reached this conclusion in regard to the members of the accounting staff only after considerable reflection.

The learned judge went on to hold that there was no evidence upon which the jury could find express malice.

As I have formed the opinion that there must be a new trial I will refer to the evidence only so far as is necessary to make clear the reasons for my conclusion.

On the question whether the publication to the members of the accounting department was covered by the privilege I do not find it necessary to express a final opinion. That question is one to be decided by the judge presiding at the new trial on the evidence before him. Certainly some of the answers made by the witnesses who were questioned on the point indicated that there was no necessity for the members of that department to know the reason for a teacher's dismissal but other answers made in response to questions which while permissible were most leading indicated the contrary.

I have read with care all the evidence given at the trial and in my opinion it would have been open to a properly directed jury to find that some of the employees of the respondent who, acting within the scope of their duties, furnished the information on which the respondent acted in making the statement complained of were actuated by malice towards the appellant.

The evidence bearing on this question is chiefly that of the appellant herself, which was uncontradicted and not seriously shaken on cross-examination. From all the evidence it appears to me that the jury might reasonably have taken the following view of the facts:—(i) that the statement that the appellant had failed to co-operate with the Principal and certain members of the staff of Danforth Technical School was false, not merely because falsity is presumed in the absence of a plea of justification but because the falsity was proved by the appellant's evidence; (ii) that the principal was irritated by the fact that the appellant made repeated complaints about various matters, such as, for example, minor discourtesies to which she was subjected by other members of the staff and the lack of specific instructions as to the circumstances under which teachers including the appellant should be asked to give private tuition; (iii) that the most serious of her complaints was in regard to the fact that, while her outstanding qualifications as a teacher of French were admitted, she was without cause diverted from the teaching of that subject to others which were not only less congenial to her but in which she was not so well qualified; (iv) that her complaints were justified but she was given no redress; (v) that her request to the Superintendent of Secondary Schools that she be recommended for transfer to another collegiate in which she could teach French was refused without cause, was resented by the principal and resulted only in the latter suggesting that the appellant should resign if she was unwilling to carry on with the teaching programme outlined for her; (vi) that the appellant at all times carried out her duties and obeyed the instructions given to her by the principal; (vii) that the irritation mentioned above ripened into dislike and resulted in a desire to get rid of the appellant; (viii) that instead of stating what he knew to be the true reason for seeking her dismissal which was irritation at the repeated complaints, all of which the jury might have found to be justified, the principal represented that she was failing to cooperate.

I wish to make it clear that I do not say the jury ought to have made these findings but in my view it was open to them to do so and to draw from them the inference that the principal, at least, was actuated by express malice.

1959

LACARTE v. BD. OF EDUCATION OF TORONTO

Cartwright J.

In reaching their conclusion the jury were entitled to consider that the respondent in whose knowledge, i.e., in that of its officials and employees, these matters lay did not see fit to tender evidence in contradiction of that of the appellant.

On the assumption that the publication was protected by the occasion of qualified privilege, as held by the learned trial judge, the onus of proving express malice was of course on the appellant, but, as in all civil cases, the jury might find it proved if all the evidence raised a preponderance of probability of its existence. As was said by Lord Atkin in Perrin v. Morgan[1]:

> To decide upon proven probabilities is not to guess but to adjudicate.

If the jury reached the conclusion that the principal was actuated by express malice, I am of opinion that the qualified privilege which would otherwise have protected the respondent would be defeated. It is a permissible inference that the statement made by the respondent that the appellant had failed to co-operate with the principal was founded on reports from the latter and that in making whatever reports he made he was acting within the scope of his employment.

The applicable principle of law may, in my opinion, be stated as follows. Where a corporation is under a duty, whether of perfect or imperfect obligation, to publish a statement about X, and in the preparation of that statement relies on information furnished by one of its employees within the scope of whose employment it is to furnish the information, the malice of that employee in furnishing false and defamatory information which is made part of the statement published will in law be treated as the malice of the corporation, although all members of the board of directors or of trustees which authorizes the publication are individually free from malice.

I am assisted in reaching this conclusion by the reasoning of McArthur J. in *Falcke v. The Herald and Weekly Times Ltd*[2]., a case in which the question arose whether the

[1] [1943] A.C. 399 at 414, 1 All E.R. 187.
[2] [1925] V.L.R. 56.

defence of fair comment relied on by the defendant corporation was defeated by a finding that the writer of the comment was actuated by malice. At pages 72 and 73 the learned Judge says:

> The next question is whether the dishonesty of MacDonald in writing the article is imputable to the defendant so as to make the comment, which was published by the defendant and not by MacDonald, an unfair comment. As far as I am aware, this precise point has never been decided, though there are a number of authorities showing that the principal, whether a corporate body or an individual, may be liable for the malice or fraud of his servant or agent acting within the scope of his authority, and in particular for the malice of his servant or agent in *publishing* a libel. It seems to me that the same principle should apply in the case of the servant or agent *writing* a defamatory comment for the purpose of being published and which is published by the defendant. The wrong complained of by the plaintiff is the printing and publishing of and concerning him certain defamatory words. Those defamatory words are not written by the defendant himself, but by a writer who was employed by the defendant to write a comment. The defendant might have written the comment himself, and if he had done so, and did not honestly believe in the opinions expressed he would, on publication, undoubtedly be liable. Instead of writing the comment himself he employs a servant or agent to write it for him. "Qui facit per alium facit per se." It seems to me that he must be responsible for both the acts and the state of mind of his servant or agent. It is true that, until the words are published, the plaintiff has no cause of action, but once they are published, and once the question arises as to whether or not they are fair comment, the circumstances under which the words were *written* become important, and if it be shown that they were written dishonestly or maliciously by the servant or agent employed by the defendant to write them, then it seems to me that that dishonesty or malice is imputable to the defendant so as to destroy the fair comment. It may be put perhaps more simply, and somewhat differently, thus:—A defamatory comment has been published by the defendant of the plaintiff; for that the defendant is *prima facie* liable in damages to the plaintiff; to defeat that *prima facie* liability the defendant endeavours to prove that it was fair comment. But in endeavouring to do this he proves (or it appears in the course of the case) that the comment was a dishonest comment made by his servant or agent whilst acting in the scope of his authority. Surely this does not amount to proof of fair comment?
>
> The defendant cannot escape liability by saying—"I did not know it was unfair when I published it. I did not know that my servant or agent, whom I employed to write an opinion, wrote a dishonest opinion."
>
> I am, therefore, of opinion that the defendant has not succeeded in its defence of fair comment.

I do not find it necessary to deal with any of the other points which were raised in argument before us.

In the result I would allow the appeal, set aside the judgments in the Courts below and direct a new trial of the action in so far as it relates to the claim for damages

1959

LACARTE v. BD. OF EDUCATION OF TORONTO

Cartwright J.

for libel. At the trial counsel for the appellant urged the learned trial judge to take the verdict of the jury so as to avoid the possible necessity of a new trial but this course was not followed. Under all the circumstances I would direct that the appellant recover the costs of the abortive trial and of the appeal to the Court of Appeal from the respondent. In this Court the appellant will recover the costs to which she is entitled having regard to the fact that the appeal was brought *in forma pauperis*.

Appeal dismissed with costs if demanded, Rand *and* Cartwright JJ. *dissenting.*

Solicitor for the defendant, respondent: D. Hillis Osborne, Toronto.

1958

*Dec. 3

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Feb. 26

THE CANADIAN BANK OF COMMERCE (*Defendant*) ..... APPELLANT;

AND

T. McAVITY & SONS, LIMITED (*Plaintiff*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Mechanics' liens—Construction of sewers and mains on public highways for subdivision owner—Claim for price of materials supplied—Assignment of book debts by contractor—Whether sums received from owner by assignee held in trust—Whether trust dependent on right of lien—Whether contractor a "contractor" within the Act—The Mechanics' Lien Act, R.S.O. 1950, c. 227, ss. 1, 2, 3, 5.

The plaintiff company claimed the price of materials supplied to S Co. and used by the latter, under a contract with a subdivision owner, for the construction of sewers and water mains on public streets and highways. The money owed to S Co. under its contract was paid to the defendant bank as assignee under a general assignment of book debts from S Co. The trial judge held that the bank was a trustee of the money. This judgment was affirmed by the Court of Appeal. The bank appealed to this Court and argued that s. 2 of *The Mechanics' Lien Act,* which provides that "nothing in this Act shall extend to any public street or highway", rendered s. 3 inapplicable to money payable in respect of work done on such street or highway; and further, that since no lien could arise in consequence of the work, S Co. was not a "contractor" within the Act.

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

Held: The defendant bank was a trustee of the money under s. 3(1) of the Act.

Per Rand, Cartwright, Abbott and Martland JJ.: The effect of s. 2 was simply to remove certain works on highways from the application of the second object of s. 5, which was to provide a lien, but that did not affect or diminish the kinds of works which were the "purposes", in the sense used in s. 1(*a*), of the Act as being the objects of construction contracts. Section 3 dealt with the "contractor" in a new aspect; it created the equivalent of a lien on the money and it assumed a contract for a work mentioned in s. 5. The two securities, the land, and the moneys, were completely independent on one another. The clearest language would have to be found to hold, as it was argued by the defendant, that where no lien can arise no beneficial interest can be created in the moneys. It would defeat the fundamental object of the statute to deny this trust, while giving additional security to those already entitled to a lien.

Per Locke J.: The work contracted for fell within the general description of works mentioned in s. 5, and the fact that its performance did not give rise to a lien was immaterial in deciding whether S Co. was a "contractor" as defined in the Act. The circumstance that no right of lien arose was of no more consequence than was the fact that the right of lien had been lost in *Minneapolis Honeywell Regulators Co. v. Empire Brass Co.*, [1955] S.C.R. 694. The right given to a material man to resort to the moneys paid to the contractor under s. 3 was quite distinct from the right to a lien given by s. 5.

Section 2 was designed to prevent a lien upon a public street or highway but its language was not designed to affect the right given to material men by s. 3(1) and did not include it.

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

Honourable R. L. Kellock, Q.C., and *W. H. C. Boyd, Q.C.*, for the defendant, appellant.

W. T. Smith, Q.C., and *G. W. McLean*, for the plaintiff, respondent.

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

RAND J.:—This appeal arises out of the construction of sewers and water mains with their appurtenances in public highways by the Spartan Contracting Company under a contract with J. A. Bailey Limited, the owners of land known as the "Beverley Hills Subdivision". The claim made by the respondent is for the price of materials supplied to the contractor. The appellant holds a general

[1] [1958] O.W.N. 324, 14 D.L.R. (2d) 153, 37 C.B.R. 1.

1959

CDN. BANK OF COMMERCE v. McAVITY & SONS LTD.

Rand J.

assignment of book debts from the contracting company which includes such moneys as those owing under the contract.

The claim is made under s. 3 of *The Mechanics' Lien Act*, R.S.O. 1950, c. 227, which, in subs. (1), provides:

(1) All sums received by a builder or contractor or a subcontractor on account of the contract price shall be and constitute a trust fund in the hands of the builder or contractor, or of the subcontractor, as the case may be, for the benefit of the proprietor, builder or contractor, subcontractors, Workmen's Compensation Board, workmen and persons who have supplied material on account of the contract, and the builder or contractor or the subcontractor, as the case may be, shall be the trustee of all such sums so received by him, and until all workmen and all persons who have supplied material on the contract and all subcontractors are paid for work done or material supplied on the contract and the Workmen's Compensation Board is paid any assessment with respect thereto, may not appropriate or convert any part thereof to his own use or to any use not authorized by the trust.

The defence is that the subsection does not apply to the work or the contract because of s. 2 of the Act:

2. Nothing in this Act shall extend to any public street or highway, or to any work or improvement done or caused to be done by a municipal corporation thereon.

Mr. Kellock puts his case thus: s. 1(*a*) defines "contractor" as follows:

(a) "contractor" means a person contracting with or employed directly by the owner or his agent for the doing of work or service or placing or furnishing materials for any of the purposes mentioned in this Act;

The word "purposes" is then carried to s. 5, subs. (1) which reads:

(1) Unless he gives an express agreement to the contrary and in that case subject to section 4, any person who performs any work or service upon or in respect of, or places or furnishes any materials to be used in the making, constructing, erecting, fitting, altering, improving or repairing of any erection, building, railway, land, wharf, pier, bulkhead, bridge, trestlework, vault, mine, well, excavation, fence, sidewalk, pavement, fountain, fishpond, drain, sewer, aqueduct, roadbed, way, fruit or ornamental trees, or the appurtenances to any of them for any owner, contractor, or subcontractor, shall by virtue thereof have a lien for the price of the work, service or materials upon the estate or interest of the owner in the erection, building, railway, land, wharf, pier, bulkhead, bridge, trestlework, vault, mine, well, excavation, fence, sidewalk, paving, fountain, fishpond, drain, sewer, aqueduct, roadbed, way, fruit or ornamental trees, and appurtenances and the land occupied thereby or enjoyed therewith, or upon or in respect of which the work or service is performed, or upon which the materials are placed or furnished to be used, limited, however, in amount to the sum justly due to the person entitled to the lien and to the sum justly owing, except as herein provided, by the owner,

and the placing or furnishing of the materials to be used upon the land or such other place in the immediate vicinity of the land designated by the owner or his agent shall be good and sufficient delivery for the purpose of this Act, but delivery on the designated land shall not make such land subject to a lien.

Interpreting the language of these subsections, he argues that the "purposes" mentioned in the Act are those enumerated in s. 5(1) and that by reason of s. 2 there is excised from them such works as those in question: these later are to be deemed to be specifically and for all purposes struck out of the statute. As, then, a "contractor" is one who contracts to do work "for any of the purposes mentioned", the Spartan Company was not such a contractor, and s. 3 did not impose any trust on the moneys received by it from the owner of the highway.

The objects of s. 5 are two fold and disparate: the first, to mention, by enumeration, the different types, in the widest sense, of improvements on and to lands to which workmen and material suppliers, by their work and materials, have added value; and secondly, to provide a security for them on that value to which, *ex aequo et bono,* they are entitled. The effect of s. 2 is simply to remove certain works on highways from the application of the second object, the reason for which is obvious: the sale of a highway to realize a private debt is not to be seriously contemplated. But that does not affect or diminish the kinds of work which are the "purposes", in the sense used in s. 1(*a*), of the Act as being the objects of construction contracts; the description remains as it was, in terms unrelated to any particular land or owner.

The language of s. 2 confirms this view. It declares that "Nothing in this Act" shall "extend" to a highway or to any work or improvement to a highway. In what respect can "anything" in the Act "extend" to a highway? What is aimed at is a provision producing a property effect upon a highway: there is no concern with an enumeration for descriptive purposes of kinds of work on lands generally to which the statute annexes certain legal consequences; the described works remain "mentioned" notwithstanding and unaffected by s. 2. Nor does either "highway" or "improvement" include a contract for work on a highway or moneys payable under it. The only statutory effect of

1959

CDN. BANK OF COMMERCE v. McAVITY & SONS LTD.

Rand J.

the Act that, in the proper sense, could extend to the "highway", as a physical object, is the lien: mere description is quite beyond its purpose.

Section 3 deals with the "contractor" in a new aspect; it creates the equivalent of a lien on the moneys and it assumes a contract for a work mentioned in s. 5. The two securities, that is, the land and the money, are completely independent of one another; and to accede to the argument would be to hold that the legislature has added to a lien on land a beneficial interest in the contract money, but that, where no lien can arise, no beneficial interest is created in the moneys. We would have to find the clearest language to bring about such an inequitable result.

The lien on the land charges the interest of the owner but only to the extent of the moneys due by him to the contractor. Apart from the percentage of price required to be retained, it might happen that the price has been paid in full and the lien brought to an end, leaving the workmen and the material men nothing but the credit of the contractor on which to rely. It was to fill this hiatus that the contract moneys became charged, bringing about a security not only by way of lien to the amount of the remaining obligation of the owner, but by way also of a trust of the moneys received by the contractor or subcontractor, thus carrying the security of the price for the work down to the point of reaching those doing work or supplying materials. It would defeat that fundamental object of the statute to deny this trust to workmen on a work in a highway and leave them without any security whatever, while giving additional security to those already entitled to a lien. I find no language in the statute that can be read as intending that result.

Section 3 was originally enacted by c. 12, s. 30 of the Statutes of 1901 in substantially the same language as the present s. 2, but as a proviso to s. 7 of c. 153, R.S.O. 1897. Section 7 declared the estate or interest to which the lien created by the then s. 4, now s. 5, would attach. In 1910 the Act was revised and re-enacted as c. 69 and the proviso became s. 3. By c. 34, s. 21 of the *Statute Law Amendment Act, 1942*, s. 2a creating a trust in the contract moneys was added to the Act. In the revision of 1950 s. 3 and s. 2a became ss. 2 and 3 respectively. Under the original proviso

there is no doubt that the object of the exception was exclusively to provide that the lien would not attach to a highway: and the revision in 1910 by making it an independent section, while improving the statutory draftsmanship, did not modify that intendment. That must have been the assumption in 1942 when a vital extension of security designed for the benefit of workmen and material men was enacted; that was a time when highway construction had reached huge proportions among civil works undertakings in the province in which municipalities would participate extensively. The denial of its benefits to such works, in the presence of the language which has been analysed, would be a major frustration of a most important legislative purpose.

I would, therefore, dismiss the appeal with costs.

LOCKE J.:—The agreed statement of facts upon which this matter was heard states that the respondent supplied materials to Spartan Contracting Company, Limited, for the installation of fire hydrants and related equipment at Beverley Hills Subdivision, Richmond Hill, Ontario: that the Spartan Company had entered into a contract with the owners of the subdivision to construct sewers, water mains and appurtenances in the subdivision and that the materials supplied were used in respect to works on public streets and highways within the subdivision. In these circumstances, the Spartan Company as contractor and the respondent as the supplier of material would have been entitled to a lien upon the lands upon which the material was placed, were it not for the provisions of s. 2 of *The Mechanics' Lien Act,* R.S.O. 1950, c. 227.

Section 2 reads:

> Nothing in this Act shall extend to any public street or highway or to any work or improvement done or caused to be done by a municipal corporation therein.

Admittedly, this section which was introduced into *The Mechanics' Lien Act* of Ontario in 1901 is to be construed as declaring that no lien may attach to such a street and highway under the provisions of s. 5 of the Act. The appellant, however, contends that it is also effective to render s. 3 inapplicable to moneys received by a builder or contractor for work done on such a street or highway.

1959

CDN. BANK OF COMMERCE v. MCAVITY & SONS LTD.

Locke J.

The language of s. 2 is lacking in clarity. Section 3 does not by its terms deal with public streets or highways but with moneys received by a builder or contractor on account of the contract price of work done or material supplied and, as the section reads, such moneys may be payable for work done for any of the purposes described in general terms by s. 5. That language is sufficiently wide to cover work done upon a street or highway. To declare that moneys so received are to be held in trust does not appear to me, on the face of it, to *extend* the section to a street or highway, even though the moneys in the particular case are payable in respect of work done upon them. The appellant's contention seeks to construe the section as if it read that nothing in the Act should extend to any public street or highway or to any money paid or payable in respect of work on them.

It is permissible, in view of the ambiguity in the language of s. 2, to enquire into the history of both sections.

Section 2, as originally enacted in 1901, affected only any claim to a mechanics' lien in respect of work done or material supplied for work on a street or highway itself. Section 3(1) was not added to *The Mechanics' Lien Act* until 1942. The amendment was, apparently, taken practically verbatim from an amendment to *The Builders' and Workmen's Act* of Manitoba made ten years earlier: c. 2, S.M. 1932. In Manitoba, the section continues as part of *The Builders' and Workmen's Act* and is now s. 3 of c. 28, R.S.M. 1954. As in Manitoba claims against such a trust fund are made under a separate statute, no question can arise as to the right being dependent upon the existence of a mechanics' lien under *The Mechanics' Lien Act* of that province.

It is by reason of the fact that in Ontario s. 3(1) was made part of *The Mechanics' Lien Act* that the question to be decided in this case arises.

In view of the decision of this Court in *Minneapolis Honeywell Regulators Co. v. Empire Brass Co.*[1], it can no longer be maintained that the right of a supplyman under s. 3 is conditional upon the existence of an enforceable lien under *The Mechanics' Lien Act.*

[1] [1955] S.C.R. 694, 3 D.L.R. 561.

In British Columbia s. 19 of *The Mechanics' Lien Act* was added by s. 2 of c. 48 of the Statutes of 1948. Its terms, with some slight changes which do not affect any question to be considered here, are identical with s. 3 of the Ontario Act and s. 3 of *The Builders' and Workmen's Act* of Manitoba.

The report of the trial of that case[1] before Davey J. (as he then was) is to be found in[1]. While the language of s. 2 of the Ontario *Mechanics' Lien Act* appears as s. 3 in the British Columbia Act, that section did not touch the matters to be decided. However, some of the arguments advanced in favour of the present appellant were considered in dealing with the case in the Courts of British Columbia and in this Court.

The Minneapolis Honeywell Company, as supplyman, had furnished material to a contractor engaged in building certain public schools in Vancouver. The company, while entitled to a mechanics' lien, had not filed such a lien but brought an action, after the time for filing had expired, against the contractor and against the Empire Brass Manufacturing Co. Ltd. (which had obtained an assignment of moneys payable by the owner from the contractor) claiming that the moneys which had been paid to the latter company were affected with a trust under s. 19. It was contended before Davey J. that the right to assert a claim under s. 19 was dependent upon the existence of a valid mechanics' lien at the time the action was commenced. I refer to the judgment of Davey J. on this aspect of the matter at pp. 220 and 221, that learned judge rejecting the argument. On appeal, however, the majority of the Court upheld the contention, holding that, as the time for filing a lien against the land had expired at the time the writ was issued, the claim under s. 19 could not be maintained. O'Halloran J. A. dealt with this aspect of the matter at length[2]. Sidney Smith J. A. agreed with this interpretation of the section. Robertson J. A. dissented, agreeing with Davey J.

The word "contractor" is defined by s. 2 of *The Mechanics' Lien Act* of British Columbia to mean:

> a person contracting with or employed directly by the owner or his agent for the doing of work or service, or placing or furnishing material for any of the purposes mentioned in this Act.

[1] (1954), 11 W.W.R. (N.S.) 212, 1 D.L.R. 678.
[2] (1954), 13 W.W.R. 449, 453-7, 4 D.L.R. 800.

1959

CDN. BANK OF COMMERCE v. MCAVITY & SONS LTD.

Locke J.

This is identical with the definition in subs (*a*) of s. 1 of the Ontario Act. The definition of "sub-contractor" includes the language of the Ontario definition as meaning:

> a person not contracting with or employed directly by the owner or his agent for the purposes aforesaid, but contracting with or employed by the contractor, or under him by another sub-contractor

with an addition which does not affect the present matter.

O'Halloran J.A. considered further that the Minneapolis Honyewell Company was neither a contractor or a sub-contractor within the meaning of s. 19 of the British Columbia Act, and Sidney Smith J.A. agreed.

On the appeal to this Court, the respondent supported both of these findings. The unanimous judgment of this Court[1] held that the Minneapolis Honeywell Company was entitled to claim upon the fund.

The present appeal, in effect, raises both of these questions, though on different grounds.

It is said for the appellant that the Spartan Company was not a contractor "for any of the purposes mentioned in this Act" since the purposes referred to in the definition are those described in s. 5, that that section is to be read as if it, in terms, excluded services rendered or materials placed upon a public street or highway and that, accordingly, a person contracting to do work on such a street or highway is not a contractor within the definition. Stated otherwise, the point is that since no lien could arise in consequence of the work, the Spartan Company was not a contractor, as so defined. It would, presumably, follow that the Spartan Company was not a contractor within the meaning of that term in s. 3. The Spartan Company was clearly not a sub-contractor. Accordingly, since it fell within neither definition, any claim of the material man under s. 3 could not be sustained.

The opinion of the majority of the learned judges of the Court of Appeal for British Columbia, that no claim could be made under s. 19 of the Act of that province, rested on the ground that, considering the Act as a whole, it should be construed as meaning that the existence of a valid claim to a lien upon the property was essential to such a claim. Here it is said that, since no lien could ever

[1] [1955] S.C.R. 694, 3 D.L.R. 561.

arise upon a public street or highway, work done or materials placed upon such property was not done or placed "for any of the purposes mentioned in this Act."

In my opinion, the contention should be rejected. The work contracted for by the Spartan Company with the owner of the subdivision fell within the general description of works mentioned in s. 5, and the fact that its performance did not give rise to a right of lien upon the property I consider to be immaterial in deciding whether that company was a contractor as defined. In determining whether the Spartan Company was a contractor within s. 3, the circumstance that no right of lien arose is of no more consequence than was the fact that the right of lien had been lost in the *Minneapolis Honeywell* case when the proceedings were instituted.

The right given to a material man to resort to the moneys paid to the contractor under s. 3 is quite distinct from the right to a lien given by s. 5. In my opinion, when the Legislature of Ontario adopted the language of the section of *The Builders' and Workmen's Act* of Manitoba, it was intended that the additional right so given should be the same as if it were conferred, as was done in Manitoba, by a separate statute.

As to s. 2, when enacted in 1901 it was designed to prevent a lien, with a consequent right of sale, attaching upon a public street or highway for obvious reasons. No such reason could exist in the case of the new and distinct right given to material men and others in 1942. The language of s. 2 was not designed to affect such a right and does not, in my opinnion, include it.

I would dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitors for the defendant, appellant: Blake, Cassels & Graydon, Toronto.

Solicitors for the plaintiff, respondent: Downey, Shand & Robertson, Toronto.

1958
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COMPOSERS, AUTHORS AND PUBLISHERS ASSOCIATION OF CANADA, LIMITED (*Plaintiff*) .. APPELLANT;

AND

SIEGEL DISTRIBUTING COMPANY LIMITED, VASIL C. LEKSOVSKY, PANDO C. PERELOFF and BORIS C. LEKSOVSKY, Administrator of the Estate of VASIL PENCHOFF, Deceased, PANDALIS CHRIS, TRAIKOS ALEXOPOLUS and WILLIAM MICHAIL (*Defendants*) ..... RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Copyrights—Infringements—Public performance of music—Whether coin-operated phonograph or "juke box" in restaurant a gramophone—The Copyright Act, R.S.C. 1952, c. 55, s. 50(7).

The plaintiff society instituted proceedings for infringement of copyright by public performance over loudspeakers of music played by an instrument owned by the defendant S Co. and placed in the restaurant of the other defendants under the terms of a rental agreement. The instrument was placed in the basement of the restaurant and had wire connections to the loudspeakers and selectors in the booths of the restaurant. The instrument operated automatically by electricity whenever a patron deposited a coin in any of the selectors. The sound volume was under a central control at a desk on the main floor. It was argued, *inter alia,* in defence, that as it was impossible to describe the system by which the performance was accomplished as a gramophone, the exoneration from the payment of fees under s. 50(7) of the *Copyright Act* was inapplicable. The Exchequer Court ruled that the performance was by means of a gramophone. The plaintiff appealed to this Court.

Held (Cartwright and Fauteux JJ. dissenting): The performance was by means of a gramophone and therefore no fees were payable under s. 50(7) of the Act.

Per Rand, Martland and Judson JJ. The question to be decided was not precisely whether the entire installation was a gramophone but rather whether the particular performance, the thing aimed at, was by means of a gramophone. When a patron deposited a coin and selected a musical number to be played, the music produced was a public performance by means of a gramophone. The view that the

*PRESENT: Rand, Cartwright, Fauteux, Martland and Judson JJ.

word "gramophone", as used in the statute, was limited to a single cabinet or equivalent embodiment with all the parts held together in a single compact unit could not be accepted. Neither did the multiplication of speakers remove the performance from being one by means of a gramophone. No determinative influence could be attributed to the several selectors, the placement of the record on the turn-table and its engagement by a needle, or in the central volume control.

Per Cartwright and Fauteux JJ., *dissenting*: When a customer in the restaurant deposited a coin in a selector in one of the booths, the music which followed was produced by means, not merely of the mechanism situated in the basement, which might well be described as a gramophone, but by the totality of all the combined instrumentalities. The totality of these component parts was not a gramophone in the popular or commercial meaning of that word; consequently, the performance of the musical works was a performance not by means of a gramophone but by means of an entirety, not embodied within the meaning of that word, one of the component parts of which was a gramophone. It followed that the defendants were not entitled to the exoneration from the payment of fees.

APPEAL from a judgment of Cameron J. of the Exchequer Court of Canada[1], dismissing an action for infringement. Appeal dismissed, Cartwright and Fauteux JJ. dissenting.

H. E. Manning, Q.C., for the plaintiff, appellant.

G. W. Ford, Q.C., and *A. D. Rogers*, for the defendants, respondents.

The judgment of Rand, Martland and Judson JJ. was delivered by

RAND J.:—The question here is narrow but not free from difficulty. It arises out of a situation with the following features. A musical programme is given in about 30 booths of a restaurant by means of two speakers affixed to a table in each by which electric impulses produced by and carried to them by wires from an ordinary primary gramophone mechanism set up in the basement of the building are converted into sound; the entire system through a further device is set in motion by the deposit of a coin in a box in each booth and selection of records is made by means of pressing a button opposite the name of the composition desired from lists set out to the number of over 100 on panels in each booth. The sound volume is under a central control by an employee of the restaurant at a desk on the

[1] [1957] Ex. C.R. 266, 16 Fox Pat. C. 194, 27 C.P.R. 141.

1959

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

Rand J.

main floor. The record selector device, so operated, is, in the basement, integrated with the impulse producer mechanism. The records are held in a revolving circular frame and as that selected reaches a certain point it is moved to engage a spindle on a vertical turn table where contact with it is made by a stylus or needle. The multiple distribution of the electric impulses begins at a point beyond the basic apparatus and an amplifier from which they are carried on the wires to the speakers. The playing of a record takes place through all the speakers at the same time and is not controllable at the individual booths. In the ordinary gramophone corresponding wires are led to a speaker installed with the primary apparatus within, say, a cabinet, and the distribution to the booths and the speakers simply divides that stream of impulses into many streams by means of extended wires. That product, the impulses, can be so carried to any number of speakers desired; even within a cabinet there may be several, the combined effect of which is intended more faithfully to reproduce the total sound that was recorded on the disc. The question is this: can the music given out by these speakers severally or in their entirety be described as a performance by means of a gramophone?

Some further features of the mechanical organization are to be mentioned. The entire apparatus is owned by the respondent company; it is maintained in the restaurant premises under the terms of a so-called lease from the individual respondent owners of the restaurant of space sufficient for its installation. It remains under the general control of the owner and operation is effected by the patrons. The records with the selector panels are chosen, owned and furnished by the company. The electricity is supplied by the restaurant owners. The installation of wires and speakers to the booths is one that is properly called "custom-made", that is, accommodated to the particular premises. The revenue from the users is divided equally between the owner and the restaurant keepers.

If, instead of being carried to all of these speakers, the impulses had been led only to a speaker installed in a cabinet, that is, in fixed and rigid relation to the primary apparatus, it is not disputed that the entirety would be a

gramophone notwithstanding the incorporation in that unity of similar starting, selecting and volume-controlling devices. It is argued, however, that the system in its entirety is the means by which the performance is accomplished, and that, as it is impossible to describe it as a gramophone, the exoneration from the payment of fees for the performance of copyrighted music given by s. 50, subs. (7) of the *Copyright Act*, R.S.C. 1952, c. 32 is inapplicable. That subsection reads:

> (7) In respect of public performances by means of any radio receiving set or gramophone in any place other than a theatre that is ordinarily and regularly used for entertainments to which an admission charge is made, no fees, charges or royalties shall be collectable from the owner or user of the radio receiving set or gramophone, but the Copyright Appeal Board shall, so far as possible, provide for the collection in advance from radio broadcasting stations or gramophone manufacturers, as the case may be, of fees, charges and royalties appropriate to the new conditions produced by the provisions of this subsection and shall fix the amount of the same; in so doing the Board shall take into account all expenses of collection and other outlays, if any, saved or savable by, for or on behalf of the owner of the copyright or performing right concerned or his agents, in consequence of the provisions of this subsection.

The contention is that that language can be satisfied only by a single compact machine or instrument made up as the earliest phonographs were, or within a cabinet, as most of the present day machines are marketed.

From such a primary and basic productive unit, an entirety with an identity which, from the beginning, has been preserved, within its own immediate, integrated and single structure containing the entire mechanism for receiving, converting and making audible what has been written on a record, extensions in distribution can go from one speaker separated by a few feet from the primary mechanism in the same room to speakers throughout a building or by possibility, a continent. Commencing with an admitted gramophone and passing to the next stage of an ordinary cabinet with its speaker in a separate unit sold with and the two treated by the trade as a single instrument, at what point in the further extensions of the impulses by means of wires and speakers are we to say that within the meaning of the subsection a gramophone

1959

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

Rand J.

has ceased to be the means of producing the performance: that, instead, the original means has become a system of music distribution or of record-playing devices which cannot be said to be a gramophone means?

I cannot accept the view that the word as used in the statute is limited to a single cabinet or equivalent embodiment with all the parts held together in a single compact unit. To take the example already given, the speaker set up separately in the same room as a complementary unit of an entirety and sold as one, how can that difference of a few feet of wire render what was a gramophone when rigidly fixed in all parts to be that no longer? On the other hand, there may be such a division of production, control and function in generating, distributing and producing the ultimate expression in sound, through severance in the stages in electric impulses and in air waves that we at once see the total system to be divisible into, first, the creation of potential sound in electrical form as a commodity and secondly, its sale and purchase for utilization by conversion into actual sound by owners of speaking devices. That was the nature of the organization in *Associated Broadcasting Company Limited v. Composers, Authors and Publishers Association of Canada*[1]. There the primary generation and the distribution of electric product over wires of an independent telephone company was under one control, and its utilization by purchasers who consumed the energy by the process of speakers under another.

Equally I cannot see that the multiplication of speakers or sound outlets produced from and fed by one primary apparatus, the entirety being under a single operational control within the premises in which the performance is given, removes the performance from being one by means of a gramophone.

In the restaurant here there would have been no objection if any number of separate single unit gramophones had been placed around the booths to furnish music to the guests: the operation of each would have been a performance by means of a gramophone. They could have been synchronized to the same music and all of them switched on or off by the same act. Together their sound

[1] [1954] 3 All E.R. 708.

effects would be in a substantial unison and musical harmony; and the whole would be one generalized performance. In a scientific sense the product of each speaker is no doubt uniquely its own, and in that sense also there is a time difference, infinitesimal though it may be, in reaching the ears of a hearer; but, as the evidence shows, for practical purposes there was in this case no conflict in the sound vibrations within the ordinary range of hearing creating musical confusion and what was heard, though primarily that in the booth of the particular listener, was a composite product.

The essence of what the statute contemplates and its purpose are important here. It contemplates the use of gramophones for an object which, apart perhaps from a free or charitable entertainment, is subsidiary or incidental to a different main object for which there is at a particular time and place some degree of public, with the entire music instrumentalities within the premises and in their productive action under a unified arrangement, operation and control: a self-contained establishment. The object is not to promote the sale of gramophones and if a dozen of them, whether co-ordinated or not, can be placed at different points in the restaurant, I think it would defeat the purpose of the statute if their basic productive means could not be combined into one to supply the existing speakers or their equivalents: if that is so, we are in the situation presented here.

A great deal of emphasis was placed on the fact of the severed selectors, including the placement of the record on the turn table and the engagement with it of the stylus. But an examination of the functions involved shows this to be neutral to the determinative matter. In the first phonographs with a cylindrical record the operation and production of sound assumed certain acts to be done by the person making use of them: he had to wind up by hand the spring that furnished the power to rotate the cylinder, to place the record on the cylinder, and to move or press the button or switch that would put the machine in action. But these external human acts were not part of the action of a gramophone; they were anterior to its functioning; they were acts to be done in order that the invented instrument and the copyrighted record could be

1959

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

Rand J.

brought under an operation which produced a music or other sound result. The particular means by which the corresponding acts here were done were likewise collateral or subordinate accidentals. When the power shifted from hand or spring to electricity the machine did not cease to be a phonograph, nor when the record was changed from a cylinder form to that of a disc, nor when the change of record shifted from the hand to the mechanical action of an arm, nor when the starting mechanism evolved to the means of dropping a penny in a slot activating a mechanical shaft to bring about the same action. In all these auxiliary changes the essential phonograph remained and under its original name. This points up the fact that such a name connotes certain constitutive physical members co-ordinated in action with certain forces to produce an entirety of desired effect; and the changes in means that serve collateral or preparatory functions do not affect or involve the essence of the constituted device. Similarly with the volume control; its centralization furnishes an external act to be performed by one person affecting all speakers collectively instead of being affected severally by an individual for each speaker. Nothing in that touches any integral feature of the gramophone instrumentality itself.

Finally it should be emphasised that the question is not precisely, is the entire installation a gramophone? That was the form in which the appellants' case in *Associated Broadcasting Company* case was presented and considered, and the Committee had no difficulty in concluding that the link of the Bell Telephone Company's participation was sufficient in itself to negative the submission. The question is rather whether the particular performance, the thing aimed at, provided by the proprietor, is by means of a gramophone. There is a real if somewhat elusive difference between them: the latter tends slightly to the adjectival meaning of the word gramophone; is the music gramophonic? Whether we take the case as being a performance by each speaker or a single performance in a merged product, the significance to the question is the same. When, then, a patron in such a booth deposits a dime and selects a musical number to be played, in the presence of the management, control and self-containment specified, it

may properly be said that the music produced is a public performance by means of a gramophone. That being so, under the subsection no fees are payable.

The appeal should, therefore, be dismissed with costs.

The judgment of Cartwright and Fauteux JJ. was delivered by

CARTWRIGHT J. (*dissenting*):—This is an appeal, brought pursuant to leave granted on March 12, 1958, from a judgment[1] of Cameron J. delivered on July 19, 1957, dismissing the appellant's action with costs.

The action was for a declaration (*a*) that the appellant is the owner of that part of the copyright in certain specified musical works which consists of the right to perform the same or any substantial part thereof in public throughout Canada, (*b*) a declaration that the respondents and each of them have infringed the said copyright, (*c*) an injunction restraining the respondents from infringing the appellant's copyright in the said musical works, (*d*) a similar injunction as to all musical works the sole right to perform which in public in Canada is the property of the appellant, (*e*) damages. The appellant also claims an accounting as to profits.

The relevant facts and the contentions of the parties are set out in the reasons of my brother Rand, which I have had the advantage of reading, and do not require repetition.

In my view when a customer in the restaurant, operated by the respondents other than Siegel Distributing Company Limited, deposited a coin in the box in one of the booths, the music which followed was produced by means not merely of the mechanism situated in the basement, which might well be described as a gramophone, but by the totality of all the combined instrumentalities which are described in detail in the reasons of my brother Rand. The question which we have to decide appears to me to be whether that totality is aptly described by the word "gramophone". I accept the statement of Viscount Simonds

[1] [1957] Ex. C.R. 266, 16 Fox Pat. C. 194, 27 C.P.R. 141.

1959

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

Cartwright J.

in *Associated Broadcasting Co. Limited v. C.A.P.A.C.*[1], that it does not appear that that word has acquired a scientific meaning other than its popular or commercial meaning.

If it could be said that the playing of the music in the restaurant was by means of a gramophone the case of *Vigneux v. Canadian Performing Right Society Ltd.*[2] would be decisive in the respondents' favour, but that case is of no assistance in ascertaining the meaning of the word gramophone as it was assumed in all the courts that the mechanism there under consideration was a gramophone.

Associated Broadcasting Co. Ltd. v. C.A.P.A.C., supra, dealt with a mechanism and a method of operation differing in several respects from the one under consideration in the case at bar, but it states the principle that the decisive question is not whether the mechanism on an analysis of its functions is seen to do what a gramophone does, but whether regarded as an entirety it would in ordinary and commercial speech be described as a gramophone. On that question dictionaries are of little, if any, assistance and its solution must in reality depend on the view of the judges who are called upon to decide it, as to the meaning of the word.

I have reached the conclusion that the totality of component parts with which we are concerned is not a gramophone in the popular or commercial meaning of that word and that consequently the performance of the musical works referred to in the evidence was a performance not by means of a gramophone but by means of an entirety, not embraced within the meaning of that word, one of the component parts of which was a gramophone. It follows from this that the respondents are not entitled to the exoneration from the payment of fees given by s. 50(7) of the *Copyright Act.*

I would allow the appeal, set aside the judgment of Cameron J. and direct that judgment be entered against all the respondents for the relief claimed in paras. (*a*), (*b*), (*c*) and (*d*) of the prayer for relief contained in the statement

[1] [1954] 3 All E.R. 708 at 711.

[2] [1945] A.C. 108, 1 All E.R. 432, 4 Fox Pat. C. 183, 4 C.P.R. 65, 2 D.L.R. 1.

of claim and for damages to be assessed by the Exchequer Court. The appellant is entitled to its costs in the Exchequer Court and in this Court.

1959

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

Cartwright J.

Appeal dismissed with costs, Cartwright *and* Fauteux JJ. *dissenting.*

Solicitors for the plaintiff, appellant: Manning, Mortimer, Mundell & Bruce, Toronto.

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

THE LORD'S DAY ALLIANCE OF CANADA ON ITS OWN BEHALF AND IN ITS REPRESENTATIVE CAPACITY ..... APPELLANT;

1959

*Feb. 23, 24
Apr. 28

AND

THE ATTORNEY GENERAL OF BRITISH COLUMBIA, CITY OF VANCOUVER AND VANCOUVER MOUNTIES HOLDINGS LTD. ON ITS OWN BEHALF AND IN ITS REPRESENTATIVE CAPACITY ... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Constitutional law—Validity of provincial enactment authorizing municipality to permit Sunday sport—Permissive enactment—Whether within exception of s. 6 of the Lord's Day Act, R.S.C. 1952, c. 171—Whether criminal legislation—Whether delegation of authority—The Criminal Code, 1953-54 (Can.), c. 51, ss. 7, 8, 11—The Constitutional Questions Determination Act, R.S.B.C. 1948, c. 66.

By s. 14 of Bill 55, the British Columbia Legislature proposed to amend the charter of the City of Vancouver by adding s. 206A thereto which authorized the city council to pass a by-law specifying public games and sports, other than horse-racing, that might be played in the city or parts thereof for gain, or prize, or reward, within certain hours on Sunday afternoons, and "which but for this section would be unlawful under . . . The Lord's Day Act (Canada)". The Lieutenant-Governor in Council of British Columbia referred to the Court of Appeal the question of the validity of the proposed legislation. By a majority it was held to be *intra vires.*

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

1959

LORD'S DAY ALLIANCE OF CANADA v. ATTY. GEN. OF BRITISH COLUMBIA et al.

Held: The proposed legislation was *intra vires* in its entirety.

Per Kerwin C.J. and Taschereau, Fauteux and Abbott JJ.: (1) The Bill governed the conduct of people on Sunday and did not create an offence against the criminal law. This permissive legislation fell within heads 13 or 16 of s. 92 of the *British North America Act* and was, therefore, within the power of the provincial Legislature. This was not a case of delegation where Parliament attempted to authorize a provincial legislature to do something beyond the latter's power but within the competence of Parliament. Section 6 of the *Lord's Day Act* does not apply to a province when it chooses to permit a certain occurrence. Looking at the pith and substance of the legislation, since in constitutional matters there is no general area of criminal law, the Legislature was not prohibiting something but merely stating in an affirmative manner that certain actions could be taken. The decision of the Privy Council in *Lord's Day Alliance of Canada v. Attorney General for Manitoba,* [1925] A.C. 384, completely covered the matter here in question and could not be distinguished by reference to English statutes, as now there are no criminal offences except those enacted by the Parliament of Canada.

(2) The point taken in the Court of Appeal, that the Legislature had attempted to delegate its powers to the council of the municipality was abandoned by the appellant, but, in any event, as was held by the majority in the Court of Appeal, the by-law would be a provincial law within s. 6 of the *Lord's Day Act,* R.S.C. 1952, c. 171.

Per Rand, Cartwright, Martland and Judson JJ.: Where a certain activity, when engaged in on Sunday, is not at the time forbidden as a criminal offence, the declaration by a provincial statute that it may be indulged in on that day is a valid enactment and is an Act "in force" within the meaning of those words in s. 6 of the *Lord's Day Act: Lord's Day Alliance of Canada v. Attorney General for Manitoba, supra.* There are no laws in force touching the observance of Sunday except the *Lord's Day Act,* since s. 8 of the new *Criminal Code* came into force. There is no such thing as a "domain" of criminal law. In a federal system, distinctions must be made arising from the true object, purpose, nature, or character, of each particular enactment. It is a misconception of the operation of s. 6 of the *Lord's Day Act* to say that its effect was to create a delegation of dominion power to the provinces. It cannot be open to serious debate that Parliament can limit the operation of its own legislation and may do so upon any event or condition.

Per Locke and Martland JJ.: The language of s. 6 as well as that of ss. 4 and 7 of the *Lord's Day Act* shows that the limitation of the prohibition applies not only to statutes passed prior to the coming into force of the Act but also to those which might thereafter be enacted. If therefore the province, in the exercise of its powers under heads 13 and 16 of s. 92 of the *British North America Act,* should permit the activities in question, the prohibition did not extend to them. By reason of s. 8 of the new *Criminal Code,* the Imperial statutes referred to in argument were no longer part of the law of British Columbia at the time the amendment was passed. There was no question of the delegation of the power of Parliament to the legislature, nor as to whether the provincial Act amended the *Lord's Day Act,* nor

of any adoption by the Dominion of the provincial legislation by virtue of the language in s. 6. The amendment was a "provincial act or law" within the meaning of ss. 4 and 6 of the *Lord's Day Act*.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], declaring, on a reference by the Lieutenant-Governor in Council of British Columbia, that a proposed amendment to the Charter of the City of Vancouver to permit Sunday sport was *intra vires*. Appeal dismissed.

F. A. Brewin, Q.C., and *R. J. McMaster*, for the appellant.

John J. Urie, for the Attorney General of British Columbia, respondent.

J. W. de B. Farris, Q.C., and *R. K. Baker*, for the City of Vancouver, respondent.

W. R. Jackett, Q.C., and *T. B. Smith*, for the Attorney General of Canada, intervenant.

W. B. Common, Q.C., for the Attorney General of Ontario, intervenant.

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

THE CHIEF JUSTICE:—This is an appeal by The Lord's Day Alliance of Canada on its own behalf and in its representative capacity against a decision of the Court of Appeal of British Columbia[1] on a reference directed to it by the Lieutenant-Governor in Council of the Province. The question submited is:

Is Section 14 of Bill 55, entitled "An Act to Amend the Vancouver Charter", or any of the provisions thereof, and in what particular or particulars, or to what extent, intra vires the Legislature of the Province?

Section 14 of the Bill referred to provides:

14. The said Act is further amended by inserting the following as Section 206A:

206A. (1) Notwithstanding anything contained in the "Sunday Observance Act" or in any other statute or law of the Province, where a by-law passed under subsection (2) hereof is in force and subject to its provisions, it shall be lawful for any person between half past one and six o'clock in the afternoon of the Lord's Day, commonly called Sunday, to provide for or engage in any public game or sport for gain, or for any prize or reward, or to be present at any performance of such public game or sport at which any fee is charged, directly or indirectly, either for

[1] (1959), 15 D.L.R. (2d) 169, 121 C.C.C. 241.

1959

LORD'S DAY ALLIANCE OF CANADA v. ATTY. GEN. OF BRITISH COLUMBIA et al.

Kerwin C.J.

admission to such performance or to any place within which the same is provided, or for any service or privilege thereat, that is specified in such by-law and which but for this Section, would be unlawful under Section 6 of "The Lord's Day Act (Canada)" or to do or engage any other person to do any work, business or labour in connection with any such public game or sport which but for this Section would be unlawful under Section 4 of "The Lord's Day Act (Canada)".

(2) (*a*) The Council may pass a by-law declaring subsection (1) to be in force throughout the city or in such part or parts thereof as may be specified in the by-law and upon such by-law coming into force, subsection (1) shall apply throughout the city or in such specified part or parts as the case may be.

(*b*) the application of subsection (1) shall be limited to such public games or sports as are specified in the by-law.

(*c*) The by-law shall not specify horse-racing as a public game or sport.

(*d*) Where subsection (1) applies in specified parts of the city the limitation authorized by clause (*b*) hereof may differ in different parts.

(*e*) The by-law may reduce the period of time between half past one and six o'clock mentioned in subsection (1).

(*f*) The by-law shall provide for the regulation and control of the public games and sports specified in it and may provide for the regulation and control of any matter or thing in connection with such public games and sports.

(*g*) (*i*) No by-law passed under this section shall be repealed until the following question has been submitted to the electors, and a majority of affirmative votes obtained: Are you in favour of the repeal of the by-law passed under the authority of the Vancouver Charter that regulates public games and sports for gain on the Lord's Day?

(*ii*) The Council may submit the question set out above to the electors at any annual election.

(*iii*) Upon the presentation of a petition requesting that the by-law passed under this section be repealed, signed by at least ten percent of the electors of the municipality, the Council shall at the next annual election submit to the electors the question set out in subclause (i).

(*h*) Any petition mentioned in clause (*g*) (*iii*) above shall be deemed to be presented when it is lodged with the City Clerk and the sufficiency of the petition shall be determined by him, and his certificate as to its sufficiency shall be conclusive for all purposes. Provided, however, that a petition that is lodged with the City Clerk in the months of November or December shall be deemed to be presented in the month of February next following.

Three members of the Court were of opinion that the section was *intra vires* the provincial Legislature and two that it was *ultra vires*. The later also certified that, in any event, a by-law of the council of the City of Vancouver passed in pursuance of any power or authority the Legislature might have under the provisions of the *Lord's Day Act*, R.S.C. 1952, c. 171, would not be a provincial law within

the meaning of the *Lord's Day Act*. This last point was abandoned before us but, in any event, as was held by the majority in the Court of Appeal, such a by-law would be a provincial law. The Legislature is merely providing that, if the city council passes a by-law under subs. (2), then subs. (1) takes effect.

The Legislature was purporting to proceed under the powers conferred by the exception contained in s. 6 of the *Lord's Day Act*:

> 6. (1) It is not lawful for any person, on the Lord's Day, except as provided in any provincial Act or law now or hereafter in force, to engage in any public game or contest for gain, or for any prize or reward, or to be present thereat, or to provide, engage in, or be present at any performance or public meeting, elsewhere than in a church, at which any fee is charged, directly or indirectly, either for admission to such performance or meeting, or to any place within which the same is provided, or for any service or privilege thereat.
>
> (2) When any performance at which an admission fee or any other fee is so charged is provided in any building or place to which persons are conveyed for hire by the proprietors or managers of such performance or by any one acting as their agent or under their control, the charge for such conveyance shall be deemed an indirect payment of such fee within the meaning of this section.

In my view the matter is covered completely by the judgment of the Judicial Committee in *Lord's Day Alliance of Canada v. Attorney General for Manitoba*[1]. Their Lordships there considered their earlier judgment in *Attorney General for Ontario v. Hamilton Street Railway Co.*[2], where it was held that in circumstances arising before the enactment of the *Lord's Day Act* in 1906 (Statutes of Canada, c. 27), the prohibition with sanctions of certain activities on Sunday came within the heading of criminal law and therefore within the exclusive legislative authority of the Parliament of Canada. It was as a result of that decision that the *Lord's Day Act* was enacted. Its effect was stated by Lord Blanesburgh in the *Manitoba* case at p. 391 as follows:

> The circumstances calling for the Act supply clearly enough the explanation of its content. The Act is laying down for the whole of Canada regulations for the observance of Sunday. Some things on that day are everywhere prohibited; others are everywhere allowed. But there is an intermediate class of activities—Sunday excursions are amongst them—with reference to which the Act recognizes that differing views may prevail in the respective Provinces of the Dominion, so varying in

[1] [1925] A.C. 384, 1 W.W.R. 296, 43 C.C.C. 185, 1 D.L.R. 561.
[2] [1903] A.C. 524, 2 O.W.R. 672, 7 C.C.C. 326.

1959

LORD'S DAY ALLIANCE OF CANADA v. ATTY. GEN. OF BRITISH COLUMBIA *et al.*

Kerwin C.J.

these Provinces are the circumstances, usages and predominant religious beliefs of the people. The Act proceeds to provide accordingly, putting it generally, that with reference to these matters, Provincial views shall within a Province prevail. As Anglin J. observed in *Ouimet v. Bazin*, 46 Can. S.C.R. 502, 530, this course was no doubt adopted "to enable local bodies to deal with the peculiar requirements of localities with which they would presumably be more familiar and perhaps more in sympathy".

There is therefore reserved to each Province power in these intermediate cases by (inter alia) "a Provincial Act . . . hereafter in force" to exempt that Province from the operation of the general prohibition in whole or in part.

Now, in their Lordships' judgment, a Provincial Act passed subsequently to the passing of this statute, if it is to be "in force" within the meaning of the reservation, must be one effectively enacted by the Provincial Legislature, and the solution of the problem whether the statute of Manitoba now under consideration, and in particular s. 1, is in that sense of these words "in force" in the Province, will be simplified if it be first asked whether or not it would have been within the competence of the Legislature of Manitoba effectively to enact it had there been on this subject of Sunday excursions no previous Dominion legislation at all.

To this question no other than an affirmative answer can, their Lordships think, be given. The argument to the contrary proceeds upon a view of *Attorney-General for Ontario v. Hamilton Street Ry. Co.* (1903) A.C. 524 decision, which they conceive is not admissible. The Board, dealing there with the Ontario Act as a whole—as an Act which created offences and imposed penalties for their commission—held that such a statute was part of the criminal law, and, as such, exclusively within the competence of the Parliament of Canada. But the Board was not considering the power of a Provincial Legislature to recognize what may be called the non-observance of Sunday as distinct from its assumption of power to enforce by penalties or punishment the observance of that day. And the two things are very different. Legislative permission to do on Sunday things or acts which persons of stricter sabbatarian views might regard as Sabbath-breaking is no part of the criminal law where the acts and things permitted had not previously been prohibited. Such permission might aptly enough be described as a matter affecting "civil rights in the Province" or as one of "a merely local nature in the Province". Nor would such permission necessarily be otiose. The borderline between the profanation of Sunday—which might at common law be regarded as an offence and therefore within the criminal law—and the not irrational observance of the day is very indistinct. It is a question with reference to which there may be infinite diversity of opinion. Legislative permission to do on Sunday a particular act or thing may, therefore, amount to a useful pronouncement that within the Province the acts permitted are on the one side of the line and not on the other. In the present case, as it happens, no objection could have been taken to the section under consideration on the ground that Sunday excursions were in Manitoba unlawful or criminal. They were not. They had never, according to the present assumption, been specifically prohibited by the Parliament of Canada. They were not unlawful by the laws of England existing on July 15, 1870, from which day the Dominion Parliament, by 51 Vict. c. 33, introduced into Manitoba such of these laws as related to matters within the jurisdiction of the Parliament of Canada. It follows that, prior to the Dominion Act of 1906, Sunday excursions were not in Mani-

toba the subject of prohibition. Enacted, therefore, by the Provincial Legislature before that statute, s. 1 of the Manitoba Act of 1923 would, in the opinion of their Lordships, have been intra vires and effective. The section would have been "in force" in the Province in the fullest meaning of these words, as found in the Act of 1906. And the section, if then in "force", would have so continued notwithstanding the passing of that Act. It would have been a "Provincial Act . . . now in force".

As Duff J. says in *Ouimet v. Bazin*, 46 Can. S.C.R. 502, 526, when speaking of the *Lord's Day Act*, 1906: "This latter enactment appears to be framed upon the theory that the provinces may pass laws governing the conduct of people on Sunday; and by the express provisions of the Act such laws, if in force when the Act became law, are not to be affected by it. That is a very different thing from saying that in this Act the Dominion Parliament has manifested an intention to give the force of law to legislation passed by a provincial legislature professing to do what a province under its own powers of legislation cannot do, viz., to create an offence against the criminal law within the meaning of the enactments of the 'British North America Act' already referred to". With those observations the Board is in entire agreement.

To paraphrase the words of Duff J., approved in the *Manitoba* case, s. 14 of Bill 55 governs the conduct of people on Sunday and does not create an offence against the criminal law. It follows that the permissive legislation here in question falls within Heads 13 or 16 of s. 92 of the *British North America Act* and is, therefore, within the power of the provincial Legislature. It is not a case of delegation where the Dominion Parliament attempts to authorize a provincial legislature to do something beyond the latter's power, but within the competence of Parliament, such as occurred in *Attorney General of Nova Scotia v. Attorney General of Canada*[1]. Section 6 of the *Lord's Day Act* merely provides that if a provincial legislature chooses to permit a certain occurrence, then that section does not apply to the particular province. In constitutional matters there is no general area of criminal law and in every case the pith and substance of the legislation in question must be looked at. This proposition is not inconsistent with anything that was said in the judgment of this Court in *Henry Birks & Sons v. City of Montreal*[2]. Here the Legislature is not prohibiting something but merely stating in an affirmative manner that certain actions may be taken. This distinguishes the situation from that which confronted this Court in *Ouimet v. Bazin*[3].

[1] [1951] S.C.R. 31, [1950] 4 D.L.R. 369.
[2] [1955] S.C.R. 799, 5 D.L.R. 321.
[3] (1912), 46 S.C.R. 502, 20 C.C.C. 458, 3 D.L.R. 593.

1959

LORD'S DAY ALLIANCE OF CANADA v. ATTY. GEN. OF BRITISH COLUMBIA et al.

Kerwin C.J.

It was sought to distinguish the *Manitoba* case on historical grounds and reference was made to certain English statutes:

An Act for punishing Divers Abuses Committed on the Lord's Day, called Sunday (1625) 1 Car. I, C. 1;

An Act for the further Reformation of Sunday Abuses Committed on the Lord's Day, commonly called Sunday (1627) 3 Car. II, C. 7;

An Act for the better observation of the Lord's Day, commonly called Sunday (1626) 29 Car. II, C. 7;

An Act for preventing certain Abuses and Profanation of the Lord's Day, called Sunday (1780) 21 Geo. III, C. 49;

An Act to Amend the Laws in England relative to Games (1831) 1 and 2 Will. IV, C. 32;

An Act to Repeal an Exception in an Act of the Twenty-seventh Year of King Henry the Sixth concerning the days whereon Fairs and Markets ought not to be kept (1850) 13 and 14 Vict., C. 23.

However, ss. 7 and 8 of the new *Criminal Code* provide:

7. (1) The criminal law of England that was in force in a province immediately before the coming into force of this Act continues in force in the province except as altered, varied, modified or affected by this Act or any other Act of the Parliament of Canada.

(2) Every rule and principle of the common law that renders any circumstance a justification or excuse for an act or a defence to a charge continues in force and applies in respect of proceedings for an offence under this Act or any other Act of the Parliament of Canada, except in so far as they are altered by or are inconsistent with this Act or any other Act of the Parliament of Canada.

8. Notwithstanding anything in this Act or any other Act no person shall be convicted

(*a*) of an offence at common law,

(*b*) of an offence under an Act of the Parliament of England, or of Great Britain, or of the United Kingdom of Great Britain and Ireland, or

(*c*) of an offence under an Act or ordinance in force in any province, territory or place before that province, territory or place became a province of Canada,

but nothing in this section affects the power, jurisdiction or authority that a court, judge, justice or magistrate had, immediately before the coming into force of this Act, to impose punishment for contempt of court.

The criminal law of England is "altered", "varied", "modified" and "affected" by s. 8 by providing that, notwithstanding anything in the Code or any other Act, no person shall be convicted of an offence at common law, or of an offence under any Act of the Parliament of England, or of Great Britain, or of the United Kingdom of Great Britain and Ireland. There are, therefore, no criminal offences, except those which are such by enactments of the Parliament of Canada.

The appeal should be dismissed without costs.

The judgment of Rand, Cartwright, Martland and Judson JJ. was delivered by

RAND J.:—This is an appeal from the majority answer given by the Court of Appeal of British Columbia[1] to a question put to it by the Lieutenant-Governor in Council of that province relating to a Bill proposing an amendment to the Charter of Vancouver, introduced into the legislature and read a first time on February 26, 1958. The Bill in part was in these terms:

14. The said Act is further amended by inserting the following as section 206A:

(1) Notwithstanding anything contained in the "Sunday Observance Act" or in any other statute or law of the Province, where a by-law passed under subsection (2) hereof is in force and subject to its provisions, it shall be lawful for any person between half past one and six o'clock in the afternoon of the Lord's Day, commonly called Sunday, to provide for or engage in any public game or sport for gain, or for any prize or reward, or to be present at any performance of such public game or sport at which any fee is charged, directly or indirectly, either for admission to such performance or to any place within which the same is provided, or for any service or privilege thereat, that is specified in such by-law and which but for this Section, would be unlawful under Section 6 of "The *Lord's Day Act* (Canada)" or to do or engage any other person to do any work, business or labour in connection with any such public game or sport which but for this Section would be unlawful under Section 4 of "The *Lord's Day Act* (Canada)".

The question put was:

Is section 14 of Bill 55, entitled "An Act to Amend the 'Vancouver Charter'," or any of the provisions thereof, and in what particular or particulars, or to what extent, intra vires the Legislature of the Province?

To this O'Halloran, Bird and Davey JJ.A. answered that the Bill in its entirety was *intra vires* of the province; Sidney Smith and Sheppard JJ.A. that it was *ultra vires*.

In the view I take of it, the answer depends upon the nature or character of a provincial Act of a permissive as contradistinguished from a prohibitory effect where there is no existing prohibition of the activity which is the subject-matter of the Act and where any repealing effect of which would be confined to matters consequential or collateral to the prohibited matter or otherwise related to but not directly aimed against the activity by reason of public policy on the observance of Sunday in a religious aspect.

[1] (1959), 15 D.L.R. (2d) 169, 121 C.C.C. 241.

1959

LORD'S DAY ALLIANCE OF CANADA v. ATTY. GEN. OF BRITISH COLUMBIA et al.

Rand J.

On that matter we have two authoritative pronouncements by the Judicial Committee: *Attorney General for Ontario v. The Hamilton Street Railway Company*[1] and *The Lord's Day Alliance v. Attorney General for Manitoba*[2]. The former held that prohibitory provisions of an *Act to Prevent the Profanation of the Lord's Day* enacted by the legislature of Ontario were *ultra vires* as being within the area of criminal law exclusively committed to the Dominion Parliament; in the latter a provision in a provincial Act passed in 1923 by the Manitoba legislature by which it was declared that it "shall be lawful", by any mode of conveyance, to run excursions to summer resorts, beaches or camping grounds on Sunday, was within provincial power and valid. This judgment, in my opinion, governs the present controversy and requires the same answer.

Section 6 of the *Lord's Day Act*, R.S.C. 1952, c. 171, deals with the subject-matter of the Bill here:

> 6. (1) It is not lawful for any person, on the Lord's Day, *except as provided in any provincial Act or law now or hereafter in force,* to engage in any public game or contest for gain, or for any prize or reward, or to be present thereat, or to provide, engage in, or be present at any performance or public meeting, elsewhere than in a church, at which any fee is charged, directly or indirectly, either for admission to such performance or meeting, or to any place within which the same is provided, or for any service or privilege thereat.

The reasons of the Judicial Committee in the *Manitoba* case were given by Lord Blanesburgh. Speaking of the scope of the Dominion Act, he distributed the matters dealt with as (*a*) certain acts absolutely forbidden, (*b*) certain left unaffected, and (*c*) others specified in ss. 4, 6 and 7 lying within a controversial range on which there are such differences of opinion that it would be legitimate to respect in any particular area those there predominating. It was to give effect to them that the language of exception contained in the sections mentioned was designed: local attitudes so expressed were to prevail. On p. 391 in his own words:

> The Act is laying down for the whole of Canada regulations for the observance of Sunday. Some things on that day are everywhere prohibited; others are everywhere allowed. But there is an intermediate class of activities—Sunday excursions are amongst them—with reference to which

[1] [1903] A.C. 524, 2 O.W.R. 672, 7 C.C.C. 326.

[2] [1925] A.C. 384, 1 W.W.R. 296, 43 C.C.C. 185, 1 D.L.R. 561.

the Act recognizes that differing views may prevail in the respective Provinces of the Dominion, so varying in these Provinces are the circumstances, usages and predominant religious beliefs of the people. The Act proceeds to provide accordingly, putting it generally, that with reference to these matters, Provincial views shall within a Province prevail. As Anglin J. observed in *Ouimet v. Bazin,* 46 Can. S.C.R. 502, 530, this course was no doubt adopted "to enable local bodies to deal with the peculiar requirements of localities with which they would presumably be more familiar and perhaps more in sympathy."

And at p. 392:

> Legislative permission to do on Sunday things or acts which persons of stricter sabbatarian views might regard as Sabbath-breaking is no part of the criminal law where the acts and things permitted had not previously been prohibited. Such permission might aptly enough be described as a mater affecting "civil rights in the Province" or as one of "a merely local nature in the Province." Nor would such permission necessarily be otiose. The borderline between the profanation of Sunday—which might at common law be regarded as an offence and therefore within the criminal law—and the not irrational observance of the day is very indistinct. It is a question with reference to which there may be infinite diversity of opinion. Legislative permission to do on Sunday a particular act or thing may, therefore, amount to a useful pronouncement that within the Province the acts permitted are on the one side of the line and not on the other. . . . It follows that, prior to the Dominion Act of 1906, Sunday excursions were not in Manitoba the subject of prohibition. Enacted, therefore, by the Provincial Legislature before that statute, s. 1 of the Manitoba Act of 1923 would, in the opinion of their Lordships, have been intra vires and effective. The section would have been "in force" in the Province in the fullest meaning of these words, as found in the Act of 1906.

I take that language to mean that where a certain activity, when engaged in on Sunday, is not at the time, as a criminal offence, forbidden, the declaration by a provincial statute that it may be indulged in on that day is a valid enactment and is an Act "in force" within the meaning of those words in s. 6 of the *Lord's Day Act.* In other words, a positive declaration of a liberty to act in a particular manner as the converse expression of the absence of any prohibition against it, exhibiting impliedly the view on the matter of the exception provided in the statute to be attributed to a province, as contemplated by s. 6, is a valid Act in force. The conversion of a negative state of absence of prohibition of an act into a positive assertion of permission to do that act is in substance a "useful pronouncement" on a matter on which there may be an "infinite diversity of opinion", a declaration "that within the Province the acts permitted are on the one side of the

1959

LORD'S DAY ALLIANCE OF CANADA v. ATTY. GEN. OF BRITISH COLUMBIA et al.

Rand J.

line and not on the other", and a sufficient subject-matter for the exercise of provincial legislative power. This was in principle the argument presented in the *Manitoba* appeal on behalf of the province when, as it appears at p. 386, it was urged by counsel that "the Act of 1923 merely declared the common law." The declaration was held also to be made as effectively by an Act passed subsequently to 1906 as one in force at the time of passing the enactment of that year.

It was argued by Mr. Brewin that a sufficiently distinguishing circumstance between the *Manitoba* case and that here lay in the fact that in that province prior to 1906 there was no law against running excursions by conveyances but that in British Columbia the law of England introduced in 1858 did forbid such games as those dealt with in the Bill now proposed. I see no basis for that distinction as applied in the case before us. The *Criminal Code* which came into force on April 1, 1955, by declaring in s. 8 that "no person shall be convicted" of any offences at common law or under an Act of the Parliament of England or of Great Britain or of the United Kingdom of Great Britain and Ireland or under an Act or ordinance in force in a province before it became a province of Canada has effectually abolished all offences created otherwise than by the Parliament of Canada. The provisions of the *Act Respecting the Observance of Sunday*, R.S.B.C. 1948, c. 318, enacted originally in 1858 and continued as law in the province by the *Confederation Act* of 1867 were thus repealed. At the time of the introduction of the Bill there was, and on its enactment at any subsequent time there will be, no law in force touching the observance of Sunday except that of the Dominion Act of 1906. The situation in this respect is then identical with that in Manitoba in 1923.

Into this branch of his argument Mr. Brewin injected the idea of a "domain" of criminal law which, as I understood it, was in some manner a defined area existing apart from the actual body of offences at a particular moment; and that it was characterized by certain distinguishing qualities. Undoubtedly criminal acts are those forbidden by law, ordinarily at least if not necessarily accompanied by penal sanctions, enacted to serve what is considered a

public interest or to interdict what is deemed a public harm or evil. In a unitary state the expression would seem appropriate to most if not all such prohibitions; but in a federal system distinctions must be made arising from the true object, purpose, nature or character of each particular enactment. This is exemplified in *Attorney General for Quebec v. Canadian Federation of Agriculture*[1], in which certain prohibitions with penalties enacted by Parliament against certain trade in margarine were held to be *ultra vires* as not being within criminal law.

Beyond or apart from such broad characteristics, of no practical significance here, which describe an area by specifying certain elements inhering in criminal law enactments, no such "domain" is recognized by our law. The language of Lord Blanesburgh in the *Manitoba* case refers to "domain" as the body of present prohibitions, the existing criminal law, and nothing else. The same view expressed in *Proprietary Articles Trade Association v. Attorney General for Canada*[2] by Lord Atkin will bear repeating:

> The power must extend to legislation to make new crimes. Criminal law connotes only the quality of such acts or omissions as are prohibited under appropriate penal provisions by authority of the State. The criminal quality of an act cannot be discerned by intuition; nor can it be discovered by reference to any standard but one: Is the act prohibited with penal consequences? . . . It appears to their Lordships to be of little value to seek to confine crimes to a category of acts which by their very nature belong to the domain of "criminal jurisprudence"; for the domain of criminal jurisprudence can only be ascertained by examining what acts at any particular period are declared by the State to be crimes, and the only common nature they will be found to possess is that they are prohibited by the State and that those who commit them are punished.

There is nothing here of a domain free from such mundane requirements.

It was argued finally that the effect of the exception in s. 6 was to create a delegation of dominion power to the province contrary to the holding of this Court in *Attorney General for Nova Scotia v. Attorney General for Canada*[3]. The idea of delegation arises from a misconception of the operation of s. 6. The legislative efficacy in prohibiting the activity named is that solely of Parliament; the effect of the exception is to declare that in the presence of a

[1] [1951] A.C. 179, [1950] 4 D.L.R. 689.
[2] [1931] A.C. 310 at 324, 55 C.C.C. 241, 2 D.L.R. 1, 1 W.W.R. 552.
[3] [1951] S.C.R. 31, [1950] 4 D.L.R. 369.

1959

LORD'S DAY ALLIANCE OF CANADA v. ATTY. GEN. OF BRITISH COLUMBIA et al.

Rand J.

provincial enactment of the appropriate character the scope of s. 6 automatically ceases to extend to the provincial area covered by that enactment. The latter is a condition of fact in relation to which Parliament itself has provided a limitation for its own legislative act. That Parliament can so limit the operation of its own legislation and that it may do so upon any such event or condition is not open to serious debate.

I would, therefore, dismiss the appeal. There will be no costs to any party.

The judgment of Locke and Martland JJ. was delivered by

LOCKE J.:—The question referred to the Court of Appeal[1] under the provisions of the *Constitutional Questions Determination Act*, R.S.B.C. 1948, c. 66, reads:

> Is Section 14 of Bill 55 entitled "An Act to amend the 'Vancouver Charter'," or any of the provisions thereof, and in what particular or particulars, or to what extent, *intra vires* the Legislature of the Province?

The terms of the section mentioned are stated in other reasons to be given in this matter.

The answer to be made depends, in my opinion, entirely upon the interpretation that is to be given to s. 6 of the *Lord's Day Act*, R.S.C. 1952, c. 171.

Subsection (1) of s. 6, so far as it is necessary to consider its provisions, reads:

> It is not lawful for any person, on the Lord's Day, except as provided in any provincial Act or law now or hereafter in force, to engage in any public game or contest for gain, or for any prize or reward, or to be present thereat . . .

The prohibition, on the face of it, does not purport to be absolute. Had the legislation in question been passed prior to the coming into force of the *Lord's Day Act* and, if at that time the Imperial statutes to which we have been referred had not been in force in British Columbia, it would have been impossible to successfully contend that the legislation was not *intra vires* the Legislature since, by the very terms of s. 6, activities of the nature referred to in British Columbia were not affected. This aspect of the matter was

[1] (1959), 15 D.L.R. (2d) 169, 121 C.C.C. 241.

referred to by Lord Blanesburgh in the judgment of the Judicial Committee in *Lord's Day Alliance v. Attorney General of Manitoba*[1].

Subject to the powers given to the legislature by head 15 of s. 92, the exclusive authority to legislate in relation to the criminal law, except as to the constitution of courts of criminal jurisdiction, is vested in Parliament by head 27 of s. 91. Parliament cannot extend the jurisdiction of the legislature by delegation, *A.G. N.S. v. A.G. Canada*[2], nor by abstaining from legislating to the full extent of its powers in a field in which its jurisdiction is exclusive, *Union Colliery v. Bryden*[3].

The language of s. 6 as well as that of ss. 4 and 7 shows that the limitation of the application of these sections applied not only to statutes passed prior to the coming into force of the Act but also those which might thereafter be enacted. The words are "provincial Act or law now or hereafter in force", which makes it perfectly clear that if the province, in the exercise of its powers under heads 13 and 16 of s. 92 of the *British North America Act* should permit such activities, the prohibition did not extend to them.

The Imperial statutes referred to were no longer part of the law of British Columbia at the time the amendment was passed by reason of s. 8 of the new *Criminal Code.*

In my opinion, no question of the delegation of the power of Parliament to the Legislature, nor as to whether the provincial Act in some way amends the *Lord's Day Act,* nor of any adoption by the Dominion of the Provincial legislation by virtue of the language employed in s. 6, arises in the matter. The powers of the Legislature which have been invoked are derived solely from s. 92. Section 6 of the *Lord's Day Act* does not prohibit Sunday sports of the kind referred to in the impugned legislation if the statute of the province, whensoever enacted, permits them. The scope of the prohibition is limited by Parliament and no question of conflict between the Dominion and the provincial legislation arises.

[1] [1925] A.C. 384 at 393, 1 W.W.R. 296, 43 C.C.C. 185, 1 D.L.R. 561.
[2] [1951] S.C.R. 31, [1950] 4 D.L.R. 369.
[3] [1899] A.C. 580 at 588.

1959

LORD'S DAY ALLIANCE OF CANADA v. ATTY. GEN. OF BRITISH COLUMBIA et al.

Locke J.

Sidney Smith and Sheppard JJ.A., who dissented from the view of the majority of the court, considered that the amendment was not a "provincial Act or law" within the meaning of that expression in ss. 4 and 6 of the *Lord's Day Act*. Counsel appearing for the appellant before us said that he did not contend that the legislation was invalid on this ground. This, however, does not relieve this Court of its duty of considering the question. This is a reference—not an action.

The learned judges who dissented considered that under the amendment it was the City by-law which was the operative provision which permitted Sunday games and sports, and the Vancouver City council, and not the Legislature, which was to decide whether or not these should be permitted. The view of the majority was, however, that a provincial Act—such as the present amendment—which becomes effective in a defined area upon the passing of a municipal by-law in accordance with its terms, is a provincial law within the meaning of s. 6. That was the view expressed by Dennistoun J.A. in *Rex v. Thompson*[1].

I agree with the opinion of the majority of the Court of Appeal. It is the amending section that declares that it shall be lawful to engage in these activities when the conditions prescribed have been complied with, and the Act as thus amended the authority for what is done.

In my opinion, the legislation is *intra vires* in its entirety and the answer to the question submitted should be in the affirmative.

I would dismiss this appeal.

Appeal dismissed without costs.

Solicitor for the appellant: R. J. McMaster, Vancouver.

Solicitor for the Attorney General of British Columbia, respondent: G. D. Kennedy, Victoria.

Solicitor for the City of Vancouver, respondent: E. N. R. Elliott, Vancouver.

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[1] [1931] 1 W.W.R. 26, 39 Man. R. 277, 55 C.C.C. 33, 2 D.L.R. 282.

LEO FLEMING (*Defendant*) .....APPELLANT; 1958

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AND 1959

FLOYD ATKINSON (*Plaintiff*) .....RESPONDENT. Mar. 25

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Animals—Negligence—Cattle straying on highway—Pastured on road—Collision with motor vehicle—No by-law prohibiting straying—Liability of owner of cattle—Trespass—Whether law of England same as law of Ontario.

The plaintiff, while driving on a hilly country road, was injured and his vehicle damaged when he struck and killed two cattle, part of a herd of twenty owned by the defendant, all of which were grazing unattended on the highway. The plaintiff sued for damages and the defendant counterclaimed for the value of the cattle. The trial judge found the plaintiff 40 per cent. negligent and the defendant 60 per cent. He dismissed the counterclaim on the ground that the cattle were trespassers. This judgment was reversed in part by the Court of Appeal to the extent of maintaining the counterclaim. The defendant cattle owner appealed to this Court.

Held (Locke and Cartwright JJ. dissenting): The appeal should be dismissed.

Per Taschereau and Rand JJ.: The defendant was in the same position as a drover along the highway who, admittedly, is held to the exercise of reasonable care in driving cattle on to or along the highway. To put or drive animals on to the highway was not within the purely negative rules laid down in *Searle v. Wallbank,* [1947] A.C. 341.

Per Fauteux, Abbott and Judson JJ.: The historical basis for the rule in Searle v. Wallbank, supra, dependent as it was upon the peculiarities of highway dedication in England, has never existed in Ontario. The public right of passage on the highways of Ontario was never subject to the risk of straying animals for the historical reasons given in that case. The highways of Ontario for the most part did not result from dedication but were created when the province was surveyed. The fee remained in the Crown. The rights of adjoining owners were the same as of any other member of the public and no higher. There was therefore no reason for giving adjoining owners any special rights to permit the straying of animals. Furthermore, the other foundation for the rule was that until the advent of fast-moving traffic no cause of action could possibly have existed. This foundation must also be rejected. It was therefore open to this Court to apply the ordinary rules of negligence to the case of straying animals and the case of *Searle* offered no obstacle. That case had never been the determining factor in Ontario until the decision in *Noble v. Calder,* [1952] O.R. 577. With the exception of the latter case, there were no decisions in Ontario which hold that

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

1959

FLEMING v. ATKINSON

the common law of England as defined in the *Searle* case was ever the common law of Ontario. The appeal should be dismissed because the duty rejected in *Serle v. Wallbank* existed in Ontario.

Per Locke J., *dissenting*: The proximate cause of the injury suffered by the plaintiff was his own negligence. The evidence disclosed a complete and reckless disregard by him of his duty to avoid injury to the animals and, even if they were trespassers upon the highway (which they were not), there was no liability: *Excelsior Wire Rope v. Callan*, [1930] A.C. 404. The principle upon which *Davies v. Mann* (1842), 10 M. & W. 546 was decided, applied. Upon the evidence the legal question referred to in the judgment of the Court of Appeal did not arise.

Per Cartwright J., *dissenting*: The duties of a cattle-owner whose property adjoins a highway are regulated by the common law of England except in so far as that law has been modified by statutes or by-laws: *Noble v. Calder, supra*. The English decisions appear to be based not on a supposed right of the owner to let his animals run at large on the highway but on the absence of any duty to users of the highway to keep his animals from straying therefrom. Accepting the law of Ontario as being the same as that laid down in *Searle v. Wallbank, supra*, it was impossible to say that the present case was removed from its application by the mere fact that twenty animals were involved. What was proved against the defendant was a case of non-feasance which neither his knowledge nor his indifference could transform into misfeasance. If, on the other hand, the presence of the cattle constituted a breach of a legal duty, the negligence of the plaintiff was the sole effective cause of the accident.

APPEAL from a judgment of the Court of Appeal for Ontario[1], reversing in part a judgment of Moorhouse J. Appeal dismissed, Locke and Cartwright JJ. dissenting.

C. F. MacMillan, for the defendant, appellant.

R. A. Pringle, Q.C., for the plaintiff, respondent.

The judgment of Tashereau and Rand JJ. was delivered by

RAND J.:—Mr. MacMillan's case is rested on *Searle v. Wallbank*[2] which, in declaring the common law of England, decides two points: first, that there is no duty on an owner of land adjoining a highway toward a person driving a vehicle on the highway to maintain fences on his property against the escape of animals: and secondly, that such an owner owes no duty to a person so using that highway to exercise reasonable care to keep his animals off the highway. These are purely negative rules; the owner, in relation to an animal on his land bordering on a highway,

[1] [1956] O.R. 801, 5 D.L.R. (2d) 309.
[2] [1947] A.C. 341, 1 All E.R. 12.

intent on the ordinary husbandry of and on his own land and that alone, remaining wholly negative toward the use of the highway, incurs no liability for its escape; it is a case of pure non-feasance, total non-action and non-purpose in the absence of a duty. The judgment does not touch the question of a duty arising when he knows of the presence of his animals on the highways or when he does an affirmative act, the known or contemplated and inevitable consequence of which is that they go upon the highway. The direct and obvious act would be driving them there, but the act of being responsible for their presence is not limited to its being against or directive of the inclination of the animal; if it is turned out of the barn, for example, on to a roadway that leads to a gate opening on the highway and that gate is intended to be open or is thereupon opened and the owner knows that the cattle will, in the circumstances and of their own accord and inclination from use or other inducement, pass along on to the highway, there is more than negative conduct on his part. Turning them out in front of an open gate or opening the gate when they are turned out, with a mind aware of what they will do, without more, is an affirmative act intended to lead and leading to their being at large on the highway.

That was the factual situation here: the cows were milked in the barn in the mornings; the inference is clear that on the day in question they were not taken to the pasture, and in the ordinary course of feeding they ranged the highway daily from morning till night; to the question, "Where did he pasture the animals"?, Hartin, the farmhand of the appellant, in the latter's presence, answered, "Well, sir, they was running on the roads" and it remained unchallenged.

The state of mind of the owner is made clear by his statement to the police officer that the cattle were his "property" and that he would "let them go where I like". The rules laid down in *Searle* are historical incidents of life in rural England arising from conditions relatively primitive, which the advent of the motor vehicle has revolutionized. There are to be noticed, also, as affecting the application of old rules to new social life, the special circumstances of the earliest days of Ontario to which Roach J.A.,

1959

FLEMING v. ATKINSON

Rand J.

speaking for the Court of Appeal[1], makes reference, such as the origin of highways by governmental action, their ownership in the Crown, and the series of statutes dealing with fencing and with animals running at large.

Assuming but not deciding that the rule so laid down was brought by the colonists to the province, its scope is to be confined strictly to the limits defined. To "let them go" implies, in the circumstances here, a removal of restraint or the acquiescence in their movement, the actual nature of which we do not know because the owner did not see fit to take the stand. The testimony of the farmhand and his wife who had lived and worked on the farm for about a year, unchallenged on cross-examination and uncontradicted by him, furnishes ample evidence for that inference. He is, then, in the same position as a drover along the highway who, admittedly, is held to the exercise of reasonable care in driving cattle on to and along the highway. In *Searle,* Lord Porter expressed the view that to put or drive animals on to the highway was not within the rules there laid down.

The judgment of the Court of Appeal[1] was placed on a failure in a duty of care in relation to the animals where they were, but it was based on the presence of a large number, 20, animals as distinguished from one. The validity of this distinction I do not find it necessary to inquire into, and I express no opinion upon it one way or the other.

I have had the privilege of reading the reasons of my brother Judson in which liability is put upon the duty of an owner to use reasonable care to keep his animals from trespassing on the highway. I agree that *vis-à-vis* the owner of the fee there is a trespass when the animals are not using the highway for the ordinary purpose of passage; I do not find it necessary, however, to go to the extent of finding such a duty in this case. There was here more than mere failure to use reasonable care; what the animals did was the virtually inevitable and foreseen consequence of turning them loose at the barn. Although I am inclined to agree with it, the rule of a positive or active duty extending, say, to reasonable inspection and maintenance of means used to

[1] [1956] O.R. 801, 5 D.L.R. (2d) 309.

contain the animals on the owner's land, goes beyond the necessities of what is before us, and I leave it for future decision.

I would, therefore, dismiss the appeal with costs.

LOCKE J. (*dissenting*):—This is an action for damages for personal injuries said to have been occasioned by the negligence of the appellant in permitting his cattle to graze upon a county highway in Ontario. As, in my opinion, the evidence demonstrates that, to adopt the language of Lord Sumner in *British Columbia Electric v Loach*[1], "the efficient, the proximate, the decisive cause" of the respondent's injuries was his own negligence, I would allow the appeal. Even had the cattle been unlawfully on the highway or in the position of trespassers, and I agree with Mr. Justice Roach that they were not, neither fact would, in my view, be any more material than was the fact that the child whose case was considered by the House of Lords in *Excelsior Wire Rope v. Callan*[2] was a trespasser.

By the statement of claim the respondent alleged that while driving east upon a highway in a Willys jeep, on going over a crest of a hill he was suddenly confronted by several head of cattle belonging to the defendant that were trotting towards him, that he thereupon stopped the vehicle and "was charged by three or more of the cattle", in consequence of which he suffered severe personal injuries. Particulars of the negligence complained of were: (*a*) that the defendant had knowingly permitted his cattle to be at large upon the highway without proper supervision; (*b*) that he failed to fence or maintain his fences adjoining the roadway in a reasonable state of repair and that they were inadequate to contain cattle; (*c*) that he had knowledge of "the vicious propensity of cattle that when confronted with a red coloured object, charge the object", that he failed to see that the cattle were kept in an enclosure strong enough to prevent them charging and attacking persons and property on the highway; (*d*) that the appellant had negligently left an opening in the fence through which the cattle strayed; and lastly, (*e*) that the cattle were followed by two bulls who were chasing them, thus constituting a nuisance on the highway.

[1] [1916] 1 A.C. 719 at 726. [2] [1930] A.C. 494.

1959

FLEMING v. ATKINSON

Locke J.

No attempt was made at the hearing to support any of the allegations in (*c*) and (*e*) above. Had they not been included, the defendant might well have objected that the statement of claim did not disclose a cause of action and set the question down for argument before trial under Rule 122 of the Supreme Court of Ontario.

The evidence given in support of the claim was both confusing and contradictory and it is necessary to examine it in detail.

The respondent was driving in a westerly direction upon a gravel road, accompanied by two men by name Asselstine and Stinchcombe. These three were the only eye witnesses of the accident. Atkinson was the driver of the conveyance which was owned by a third person and which he was driving in an endeavour to detect a defect in its mechanism. It was about 4 o'clock in the afternoon: the weather was fair and the road was dry and he had driven over it several times before. Atkinson said that he was driving between 30 and 35 miles an hour when he drove over a small hill or knoll and saw ahead of him some cattle, whereupon he reduced the speed of the car to 10 or 15 miles an hour. Proceeding at this rate driving through the cattle without mishap, he came to another knoll which, as he proceeded, fell sharply away in front of him. He did not say that he had thereafter increased the speed of the car. He said that this second hill was so steep "when coming over the top you have no vision to see until you get right down to the bottom" and said that it was when he reached the bottom "that there was three head of cattle coming towards me at a fair pace". According to him, he "could not see them until they were right on top of me, your view was obstructed", and he said that as soon as he saw them he put on the brakes and brought the vehicle to a stop but that, just as he was coming to a halt, the three cattle struck it. He said nothing about passing any cattle between the top of the knoll and the point of impact. When cross-examined, he said that he had not seen the three cattle approaching until they were the length of the jeep away, and this was shown to have been from 10 to 14 feet.

Asselstine, who was sitting on the extreme right of the front seat of the vehicle, said in direct examination that as soon as they came over the hill he saw 15 or 20 head

of cattle, some in the center of the road and some in the ditches, and that they were then about 20 or 25 feet away. In answer to a leading question he answered in the affirmative when asked if he had seen them after they had driven over a second knoll or hill. After the learned trial judge had pointed out the leading nature of the question, he directed that the witness give his account of the matter again. This reads as follows:

We just popped over the hill and there was the cows; there is kind of an opening through them, and threw the brakes on and started through them.

Asked by the trial judge to explain what he meant, he said:

There was a flock of cows all over the road, so we threw the brakes on and thought we would get through, and the closest I can figure it is we got through a few of them and just have hit some more where—

Following this, the transcript reads:

MR. RICHARDSON (the defendant's counsel): Got through a few and then hit one?

THE WITNESS: Yes, we threw the brakes on and were still sliding, and the closest I can figure it is one stepped out in front of us.

HIS LORDSHIP: Went through a few and hit one.

MR. RICHARDSON: Still sliding.

HIS LORDSHIP: Threw brakes on and still sliding.

Q. You were still sliding when you hit the one?

A. Yes, sliding through the gravel.

The witness said that their speed was about 30 miles per hour when they reached the top of the hill. He said nothing about a second hill.

The cross-examination reads in part:

Q. Well, now, then, as I understand your story you came over a knoll, hopped over a knoll to use your expression, and when you got to the top of the knoll you saw the cattle down in the valley, is that right?

A. Right.

Q. And immediately your driver applied his brakes and skidded?

A. Right.

Q. Is that right. Yes. And he skidded—missed some of the cattle and hit one or two?

A. Right.

The witness had not said that the cattle were down in the valley.

1959

FLEMING v. ATKINSON

Locke J.

Stinchcombe was seated between Atkinson and Asselstine and says that they were driving at about 30 to 35 miles an hour when they approached the first hill. He said:

> We went over two small hills after we passed Mr. Fleming's house, and about the third hill, it was a sharp hill, you couldn't see anything, we went over it and dropped right down and the cattle were right in the middle of the road.
>
> MR. PRINGLE (the plaintiff's counsel):
>
> Q. Speak up loudly, please.
>
> A. There was about 15 or 18 head of cattle in the middle of the road when we dropped over the third sharp hill.
>
> Q. Yes, and how far away were they from you when you first saw them?
>
> A. Well, about two or three lengths of the jeep, I think.
>
> Q. Where were they on the road?
>
> A. Well, approximately blocking the whole road.
>
> Q. And what did you observe happen then?
>
> A. Well, Mr. Atkinson applied the brakes and then I don't recall too much. We skidded into the cow.
>
> Q. And how far did you skid after you hit the cattle, do you know?
>
> A. Not too far, pretty well stopped us.
>
> Q. How many cattle did you run into and hit?
>
> A. I think we hit three of them, one was skinned up.

He said further that when they first saw the cattle the latter were facing the jeep and, asked if he had struck the animals, said:

> Well, one we hit her in the side, on the side, and I couldn't say where we hit the other one.

He said that, generally speaking, the herd was facing them and that, while some of the animals were moving around, the others were moving towards them. On cross-examination, he said that when they got to the hill, which presumably meant the third hill which had not been mentioned by the other witnesses, they saw the cattle about 25 to 30 feet distant and that Atkinson had reduced the speed to between 5 and 10 miles an hour when the animals were struck, and said that the brakes had been applied immediately the cattle became visible.

This is all the evidence that was given on behalf of the respondent to sustain the charges of negligence and the account of each of the witnesses differed materially, as will be seen. However, evidence given for the appellant by a disinterested witness is of some assistance in coming to a conclusion upon the facts.

Constable Bolyea of the London Township Police Force arrived at the scene at about 4.40 p.m. He found the jeep on the south travelled portion of the road and two dead cows, one lying to the rear of it on the shoulder of the road and one in a ditch to the north. He was able to determine the point of impact and, from that point, there was a skid mark 39 feet long to the west which had been made by the jeep. From the westerly end of this skid mark to the top of the hill the distance was 150 feet. Describing the road, he said that there were two sharp inclines and it was on the most easterly of these that the accident had occurred. He said that from the top of this hill the driver of a car had a clear view to the place where the cattle were struck, and that there was an unobstructed view for 500 yards to the east. He described the grade as being "a gradual grade down to where the cows are". He said further that the position of the jeep showed that it had continued to the east after striking the animals, a distance which, he thought, might be two or three lengths of the vehicle.

That there was a clear view from the brow of the second hill to the place of the collision was also proven by another distinterested witness, Joseph H. Yeomans, who helped the police officer in taking measurements on the road. His son, Clifford Yeomans, had been with him at the appellant's farm and had seen the jeep approaching the location where the accident occurred and estimated its speed as being at least 50 miles an hour.

It would have been of material assistance in dealing with this appeal if the learned trial judge had dealt rather more fully with the issues of fact upon which any finding of negligence must depend. In the reasons delivered by him he found that the respondent was driving at a reasonable rate of speed and that the distance from the brow of the hill "to the point of impact with several of an unattended herd of some 20 head of cattle" was established to his satisfaction as 189 ft. The learned judge did not say at what point, whether at the brow of the second hill or at some earlier stage, the speed of the jeep had been reasonable nor what he considered to be reasonable in the circumstances, or mention the fact that the respondent had said that, when he drove through the cattle on the road between the first and the second hills, he had reduced the speed to

1959

FLEMING v. ATKINSON

Locke J.

about 10 to 15 miles an hour. It was after doing this that he reached the brow of the second hill. The reasons further state that the witness Asselstine had said that they were travelling from 15 to 20 miles an hour when they came over the hill, but the witness had not said this. The only evidence given by him as to the speed was that, just prior to the accident, it was about 30 miles an hour.

The finding that the distance from the brow of the hill to the place where the cattle were struck was 189 feet, as stated by Constable Bolyea, shows that the learned trial judge found against the credibility of the respondent. While the latter had sworn that he could not see the three cows which, he said, ran into his jeep, until he reached the bottom of the second hill, he did not attempt to explain why this was and he was not called to give evidence in rebuttal to the constable's evidence that the view was unobstructed from the top of the hill to the point of collision and for more than 300 yards further to the east. The respondent's account, as I have shown, was that he had driven through the main body of the herd, which was between the first and the second hills, and he did not suggest that there were any other cattle on the road after he drove over the second hill, except the three which, he said, charged into the jeep. As to these, he said he did not see them until they were about 12 or 14 feet distant.

The learned judge accepted the evidence of the constable that the accident happened on the eastern side of the second hill. He obviously did not believe the witness Asselstine who said nothing about a second hill but whose account was that they came over a hill and came suddenly upon the cattle on the road some 20 to 25 feet away, that the respondent put on the brakes and drove through the herd and, while the car was sliding, a cow stepped in front of it and was hit. This would place the scene of the accident as between the first and the second hills and bears no resemblance to the respondent's story in any respect.

As to Stinchcombe, he said that the accident occurred on a third hill which, as the constable's evidence shows, did not exist. He said that the cattle were blocking the road when they came over the hill and were then only about 20 or 30 feet away, whereupon Atkinson had promptly put on the brakes and the jeep had skidded into the herd at a

speed of from 5 to 10 miles an hour. The finding of the learned judge as to the place of the accident shows that he did not believe this witness: it is, indeed, impossible, in view of the evidence of the constable and of the length of the skid marks, that his evidence could be true.

No finding was made as to the truth of the respondent's evidence that the three cows had charged unexpectedly into the jeep. Neither Asselstine or Stinchcombe had said that this had occurred and, indeed, their evidence appears to contradict it. Asselstine had said that a cow had walked in front of the jeep while it was skidding and been struck. Stinchcombe, that the cattle were facing them when they first saw them and that he thought they had struck three, one being struck on the side: he was unable to say where the others were hit.

The reasons delivered at the trial do not mention the fact that the respondent had sworn that he had brought the jeep to a halt or practically to a halt (he said both) by the time the collision occurred and that it had not skidded, whereas the evidence of Constable Bolyea showed that the jeep had skidded 39 feet before hitting the animals and had continued to the east some two or three lengths of the vehicle.

The learned judge appears to me to have based his finding of liability against the appellant on what he considered to be the breach of a duty which is referred to in a passage from the judgment of Romer L.J. in *Deen v. Davies*[1]. It is there said that the owner of an animal who brings it upon a highway owes a duty to those using the highway to use reasonable care to prevent the animal damaging them and that this duty arose when an owner permitted cattle to pasture unattended on the highway. After considering at length a number of authorities, the learned judge found that the appellant's cattle were not lawfully upon the highway and that he ought to have anticipated that their presence there would create a dangerous situation.

Without discussing the accuracy of the statement relied upon, which I consider to be unnecessary, and with great respect for the opinion of the learned trial judge, he appears to have overlooked the fact that while, undoubtedly, without the presence of the cattle upon the highway the

[1] [1935] 2 K.B. 282, 295-6.

1959

FLEMING v. ATKINSON

Locke J.

accident would not have occurred, this does not decide the matter. Their presence was a *causa sine qua non* undoubtedly, but that is not the point. The judgment at the trial unfortunately did not deal with the real question to be determined on the issue of negligence.

The unanimous judgment of the Court of Appeal was delivered by Roach J.A. That learned judge did not agree with Moorhouse J. that the cattle were trespassing on the highway. With this I agree though I think, in view of the evidence which I have referred to, the matter is of no moment.

The findings of fact made by Roach J.A. read:

> The cattle were somewhere along the second hill and within 150 feet of its top. They were not visible to the persons in the jeep until, as one of those persons put it, the jeep "popped" over the top of the second hill. The cattle were strung out along the roadway of that second hill, some of them sufficiently close to the shoulders on either side that the plaintiff, by the exercise of some dexterity, was able to steer the jeep between them and avoided striking any of the cattle in the fore part of that herd. However, there were three stragglers at the far end of the herd and separated from the rest of it by a short distance. It was probably the commotion in the front section of the herd as the cattle beasts scampered in the direction of each side of the road, and the noise of the jeep, that bestirred these three stragglers. They were on a piece of the travelled portion of the road at each side of which the shoulder dropped off rather precipitously into a deep ditch. Almost abreast of each other these three stragglers suddenly started running up the road toward the jeep and collided almost head on with it.

I am unable, with respect, to agree that this correctly summarizes the evidence. The main body of the cattle were not strung along the roadway of the second hill, if the evidence of the respondent and Asselstine is to be believed. They say that it was when they drove over the first hill that they encountered the main body of the animals on and alongside the road, and the respondent said that it was after he had driven through this herd at the reduced speed of 10 to 15 miles an hour that he came to the second hill and that it was not until he got "right down to the bottom" of it that he first saw the three cows some 10 to 14 feet distant. He did not say, and there is no evidence, that there were any other cattle on or along the roadway between the top of the second hill and the point of impact. As the evidence shows, the "three stragglers" were over the second hill at the bottom of the grade and separated from

the main body by more than 189 feet. I can find nothing in the evidence to support the suggestion that the three cows were startled into running by any scampering by the other animals.

The reasons of the Court of Appeal say nothing about the speed of the vehicle as it drove down the second hill, a vital matter to be considered in determining liability in this case. The respondent's story that the vehicle had not skidded and that it had stopped or practically stopped at the time of impact was shown to be untrue by the constable's evidence and the skid marks on the road.

While the judgment at the trial appears to have been based on the ground that the cattle were trespassers upon the highway, Roach J. A. found that they were not. The judgment appealed from appears to proceed on the basis that while the presence of the cattle upon the highway was not unlawful, the appellant should have foreseen that their presence on this hilly road might result in their being struck by vehicles, the drivers of which were unaware of their presence, coming suddenly upon them.

Whatever there is to be said for this as a proposition of law, in my opinion, and with the greatest respect, it has no bearing upon the issue in this case.

While the Courts below have found that the appellant was partly to blame, they appear to have done so for different reasons and upon differing views as to what the evidence disclosed. As pointed out by Taschereau J. in delivering the judgment of this Court in *The North British and Mercantile Insurance Company v. Tourville*,[1] even were there concurrent findings upon the facts, it would be our duty to examine the evidence and come to our own conclusion as to where the liability rests. Other than that the appellant was guilty of some act of negligence which contributed to the occurrence of the accident, the findings in this matter do not appear to me to be concurrent. We are in equally as good a position as the learned judges of the Court of Appeal to determine the weight to be given to the conflicting evidence upon which this claim is based.

[1] (1895), 25 S.C.R. 177.

1959

FLEMING v. ATKINSON

Locke J.

Accepting the evidence of the respondent that the speed of the jeep was about 30 miles an hour when he first came upon the herd, that he reduced that speed to some 10 to 15 miles an hour before he came to the brow of the second hill, at that point, as was proven to the satisfaction of the trial judge, he had a clear and unobstructed view of the road down the hill to the place of collision. There were no other cattle on this part of the roadway. The skid marks which showed clearly on this gravel road did not commence for a distance of 150 feet from the summit, so that the brakes were not firmly applied until the jeep was within 39 feet of the cattle. The length of the skid marks and the fact that the jeep carried on to the east an appreciable distance after striking the cattle with such force that they died almost immediately is conclusive proof, in my opinion, that after driving over the top of the second hill the respondent had increased the speed to a very considerably higher rate before suddenly applying the brakes. As the approaching jeep would be plainly visible to the animals on the road for at least 189 feet, the evidence given, only by the respondent, that the cows charged headlong into it appears to me to be as manifestly untrue as his denial that the jeep had skidded. His evidence as to this would appear to have been given in order to support the admittedly groundless charges in the statement of claim that the animals were vicious, to the appellant's knowledge, and would charge a red coloured object and that they had been chased by two bulls. There was no red object and the respondent admitted that the presence of the bulls somewhere in the herd had nothing to do with the occurrence. Stinchcombe's evidence was that at least one of the animals was struck on the side, which would indicate that it had been trying to get off the road to avoid the oncoming car.

It is a common occurrence throughout Canada for drivers, both of horse-drawn vehicles and motor cars, to meet small numbers or herds of cattle upon country highways such as this. Cattle are slow-moving animals and readily frightened and persons encountering them in these circumstances are charged with knowledge of this fact and with the duty of driving with caution to avoid injuring them. No prudent person would drive a horse-drawn vehicle through cattle found upon the highway at a speed of 10 miles an hour since

to do so would be simply to court trouble. Drivers of motor vehicles charged with this duty are probably too often inclined to forget that a motor car in motion upon a highway is a dangerous machine, the management of which imposes upon them a high degree of care to avoid injury to others. It is to be noted that a special section of the *Highway Act of Ontario*, R.S.O. 1950, c. 167, s. 46, deals with the duty of such drivers to avoid frightening horses or other animals upon the highway.

The evidence in the present matter discloses, in my opinion, a complete and reckless disregard by the respondent of his duty to avoid injuring these animals. They were in plain view on the roadway ahead and yet he drove toward them at a speed which precluded him from stopping, and the animals from escaping.

In *Davies v. Mann*,[1] the owner of a donkey had left it upon the highway fettered in the fore feet and thus unable to get out of the way of the defendant's wagon which was going at a quick pace along the road. It was held that the jury at the trial had been properly directed that, although it was an illegal act on the part of the plaintiff to put the animal on the highway, he was entitled to recover. Lord Abinger C. B. said that while it was not denied that the animal was lawfully on the highway, were it otherwise it would have made no difference since the defendant might by proper care have avoided injuring the animal. Baron Parke, after referring to what he had said to the same effect in *Butterfield v. Forrester*[2], said that the judge at the trial had been right in telling the jury that the mere fact of negligence on the part of the plaintiff in leaving his donkey on the public highway was no answer to the action, unless its being there was the immediate cause of the injury and that if they were of the opinion that it was caused by the fault of the defendant's servant in driving too fast, the mere fact of putting the animal upon the road did not bar the plaintiff of his action. Although the donkey might have been wrongfully there, still the defendant was bound to go along the road at such a pace as would be likely to prevent mischief.

[1] (1842), 10 M. & W. 546, 152 E.R. 588.
[2] (1809), 11 East. 60, 103 E.R. 926.

1959

FLEMING v. ATKINSON

Locke J.

It is rarely, indeed, that in a traffic accident the facts are so similar to those in a leading case as the facts disclosed by the evidence in the present matter are to those in *Davies v. Mann*. It was, in my opinion, the reckless conduct of the respondent which was the sole cause of this accident. I would set aside the judgments of the Court of Appeal and at the trial and direct that judgment be entered dismissing the action and allowing the appellant's counterclaim with costs in all courts.

This is an action and not a reference and it has not been the practice of this Court to express opinions on questions of law which are unnecessary for the disposition of the issues in the case before it. For this reason, I express no opinion as to whether the common law of Ontario, as it affects the liability of the owner of domestic animals who allows them to stray upon a country highway, differs from the law of England as stated in *Searle v. Wallbank*.[1]

I would allow this appeal and dismiss the action with costs throughout.

CARTWRIGHT J. (*dissenting*):—This is an appeal from a unanimous judgment of the Court of Appeal[2], affirming the judgment of Moorhouse J. in favour of the respondent for $5,608.40 damages, and varying the judgment to provide that the appellant should recover $220 on his counterclaim.

The respondent suffered serious personal injuries and no complaint is made as to the amount of his total damages which the learned trial judge assessed at $9,347.34.

On the afternoon of August 2, 1952, the respondent, accompanied by two passengers, was driving easterly in a Willys jeep on a county road in the County of Hastings. The road was described as hilly. Its surface was gravelled. The appellant was the owner of a farm part of which was on the north and part on the south side of this road; he owned 18 cows and 2 bulls, most or all of which were on the road unattended at the time of the accident. The appellant's fields adjoining the highway were fenced but, according to the weight of the evidence, the fences were inadequate to prevent cattle straying onto the highway. The jeep came into contact with three of the cows, one on the front of the jeep and one on each side; two of the cows were killed.

[1] [1947] A.C. 341, 1 All E.R. 12.
[2] [1956] O.R. 801, 5 D.L.R. (2d) 309.

The respondent testified that the cow that "came along" the left side of the jeep "struck where the gas tank is and the weight of its stomach came out on my left leg." His evidence continues:

Q. How would it hit you on the knee? A. There is no door on the jeep, it is all open.

Q. And part of its body came in the door? A. Yes.

Q. And hit you on the knee? A. Yes, the pressure.

Q. What did it do to your knee? A. Well, the doctor said it broke it up into splinters, broke it off.

In the statement of claim the respondent alleged in part:

He (the plaintiff) was proceeding in a lawful and prudent manner, having regard to the hilly condition of the road. While going over a crest of a hill he was suddenly confronted by several head of cattle belonging to the Defendant, that were trotting towards the jeep. These cattle were owned by the Defendant but were not under the care and control of the Defendant, his servants or agents.

4. The Plaintiff stopped his vehicle and was charged by three or more of the cattle, one of the animals colliding with the left side of the vehicle causing severe injury to the left leg of the Defendant, the other animals struck the jeep causing damage to the vehicle.

* * *

7. The Plaintiff states and the facts are that the injuries sustained by the Plaintiff to his person and the vehicle were caused by the negligence of the Defendant, in that:—

(1) He knowingly permitted his cattle to be at large upon the Highway without proper supervision;

(2) He failed to fence in or in the alternative, he failed to maintain his fences adjoining the roadway in a reasonable state of repair. The said fences were in a poor and rundown condition, and totally inadequate to contain cattle;

(3) He had knowledge of the vicious propensity of cattle that when confronted with a red coloured object, charge the object. He failed to see that the cattle were kept in an enclosure strong enough to prevent them charging and attacking persons and property on the Highway.

(4) The Defendant had negligently left an opening in the fence through which the cattle were straying on the Highway.

(5) The cattle were being followed by two bulls who were chasing the cattle, thus constituting a nuisance on the Highway which was the duty of the Defendant to prevent.

There was no evidence to support the allegations in sub-paras. (3) and (5) of para. 7, or to suggest that the appellant had knowledge of a tendency on the part of any of his cattle to run into or blunder into vehicles or persons on the highway.

1959

FLEMING v. ATKINSON

Cartwright J.

The respondent's evidence, which appears to have been accepted by the learned trial judge, was to the effect that he was driving at a reasonable speed, that as he came over the top of a hill he was confronted by a number of cattle, that he slowed down to between 10 and 15 miles per hour, that he passed these cattle without mishap, that he then dropped over a second and sharper hill and was confronted by the three cows that came in contact with the jeep, that they were coming towards him "at a fair pace", that he proceeded to bring his vehicle to a stop and that just as he was coming to a halt the three cows struck the jeep.

The learned judge found that from the point at which the three cows came into the respondent's vision to the point of impact was 189 feet. He also found that the appellant's cattle were allowed to run at large and graze upon the highway, that this was a usual occurrence and must have come to the attention of the appellant.

After a careful examination of the relevant authorities the learned judge summed up his conclusions as follows:

> Applying the principles to be deduced from the aforesaid cases as I interpret them, I find the defendant did owe a duty to the plaintiff and that he failed in that duty. His cattle were unlawfully upon a hilly highway traversed by motor vehicles to his knowledge and he ought reasonably to have anticipated that this would create a dangerous situation.
>
> * * *
>
> The plaintiff was himself negligent in that under all the circumstances, he was not keeping such a lookout and did not have his vehicle under such control that he could stop if his way was impeded, as it was in the depression in the highway. I find the percentage of negligence attributable to the plaintiff is 40% and to the defendant 60%.

It would seem from the last-quoted passages that the learned trial judge was of the view that the respondent had not brought his jeep to a stop at the moment of impact, and that his failure to do so was negligent and was an effective cause of the accident, the other effective cause being the existence of a dangerous obstruction to traffic (i.e. the three cows or the one cow the contact with which caused the respondent's injury) allowed by the appellant to be upon the highway in breach of his duty to users of the highway.

In my view the judgment of the Court of Appeal in *Noble v. Calder*[1] correctly decides that the duties of an owner of cattle whose lands adjoin a public highway are

[1] [1952] O.R. 577, 3 D.L.R 651.

regulated by the common law of England except so far as that law has been modified by relevant statutes or by-laws. With the greatest respect to those who entertain a contrary view, I can find no sufficient reason in the historical differences between the ways in which highways came into existence in England and in Ontario to warrant the formulation in the two jurisdictions of different rules of law as to the duty of the owner of a field abutting a highway. The English decisions reviewed and approved in *Searle v. Wallbank*[1] appear to me to be based not on a supposed right of the owner to let his animals run at large on the highway but on the absence of any duty to users of the highway to keep his animals from straying thereon. I think I am right in saying that in every Ontario case in which such a duty was held to exist there was a prohibition against permitting unattended animals to be on the highway contained in either a statute or a by-law.

It is true that the rule affirmed in *Searle v. Wallbank* grew up before the advent of fast moving traffic on the highways and there is much to be said for the view that with the coming of such traffic a duty which had not hitherto existed should have been imposed upon the owners of animals. But that view was carefully considered and definitely rejected by the House of Lords in *Searle v. Wallbank*. As was pointed out by Viscount Maugham, the suggested duty would be onerous. The reasons urged in favour of its imposition would seem to me to have greater force in England than in Ontario as, if one may take notice of matters set out in Year books and almanacs, there are far more domestic animals and far more motor vehicles to the square mile in the former than in the latter.

I take it then that the law of Ontario is the same as that laid down in *Searle v. Wallbank* and correctly summarized in the head-note to that case as follows:

> The owner of a field abutting on the highway is under no prima facie legal obligation to users of the highway so to keep and maintain his hedges and gates along the highway as to prevent his animals from straying on to it nor is he under any duty as between himself and users of the highway to take reasonable care to prevent any of his animals, not known to be dangerous, from straying on to the highway.

[1] [1947] A.C. 341, 1 All E.R. 12.

1959

FLEMING v. ATKINSON

Cartwright J.

Accepting this as an accurate statement of the applicable law, I find myself unable to say that this case is removed from its operation by the circumstance that the appellant owned a total of twenty animals all of which frequently strayed onto the highway.

If the proper inference to be drawn from all the evidence was that the appellant had not merely failed to take any steps to keep the animals from the highway but had actively placed them thereon, different considerations might well arise; but it appears to me that what is proved against the appellant is a case of non-feasance which neither his knowledge nor his indifference can transform into misfeasance. In my opinion the appeal succeeds.

Since writing the above I have had the advantage of reading the reasons of my brother Locke. If I had formed the opinion that the presence of the cattle on the highway constituted a breach of a legal duty owed by the appellant to the respondent I would for the reasons given by my brother Locke have agreed with his conclusion that the appeal should be allowed on the ground that the negligence of the respondent was the sole effective cause of the accident.

I would allow the appeal, set aside the judgments below and direct that judgment be entered dismissing the action and awarding the appellant $550.00 on his counterclaim, with costs throughout.

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

JUDSON J.:—The accident which gives rise to this litigation happened on a country road in the Province of Ontario on a summer afternoon between the plaintiff, the driver of a motor vehicle, and three cows, part of a larger herd belonging to the defendant which was grazing on the side of the road. Both the learned trial judge and the Court of Appeal[1] have found that there was nothing unusual in the presence of these animals on the highway and that their owner made no effort to keep them within the boundaries of his property, the fences of which were in a state of very poor repair. The defendant's appeal to this Court raises squarely the question whether an adjoining owner owes a duty of reasonable care

[1] [1956] O.R. 801, 5 D.L.R. (2d) 309.

to users of the highway to prevent domestic animals, not known to be dangerous, from straying on to the highway. *Searle v. Wallbank*[1], followed in Ontario in *Noble v. Calder*[2], both deny the existence of any such duty. The judgment under appeal has found the defendant, the owner of the animals, partly responsible for this accident, a distinction having been drawn on the facts between the present case and *Noble v. Calder*. I think it desirable now when the matter is in this Court for the first time to examine further into the nature of the obligation, if any.

There were two reasons implicit in the judgment in *Searle v. Wallbank* for the rejection of the duty. The first is based upon the history of the highways of England, which came into being largely as a result of dedication by adjoining owners, who gave to the public no more than a right of passage which had to be exercised subject to the risk of straying animals. The second is based upon the facts as they existed until the advent of fast moving traffic. It is put in this way by Maugham L. C., at p. 353:

> No facts in my opinion have been established which would tend to show that farmers and others at some uncertain date in our lifetime became subject for the first time to an onerous and undefined duty to cyclists and motorists which never previously existed.

It is beyond dispute that for centuries straying animals on the highway did not present any risk to slow moving traffic. The only risk in the situation arose when an animal *mansuatae naturae* showed a vicious propensity, and for this the owner was only liable on proof of scienter.

I am in complete agreement with the reasons of Roach J. A. in the judgment under appeal when he says that the historical basis for the rule in *Searle v. Wallbank*, dependent as it is upon the peculiarities of highway dedication in England, has never existed in Ontario. This seems to me to be of the greatest significance when considering the rights of the public on these highways. The public right of passage on the highways of Ontario was never subject to the risk of straying animals for the historical reasons given in *Searle v. Wallbank*. For the most part the highways of Ontario did not come into being as a result of dedication by adjoining owners. They were created when the province

[1] [1947] A.C. 341, 1 All E.R. 12.
[2] [1952] O.R. 577, 3 D.L.R. 651.

1959

FLEMING v. ATKINSON

Judson J.

was surveyed. The fee remained in the Crown and it is now vested either in the Crown in right of the Province or in the municipalities. This distinction between the legal position in England, where the ownership of the fee in the highways still remains in the adjoining owners, and that in Ontario, where the fee is in the highway authority, was traced in detail by Boyd C. in *Ricketts v. Markdale*.[1] How, in these circumstances, can an adjoining owner acquire any right to permit his animals to stray on the highway? Against the highway authority, his animals are trespassers. His right is the same as that of any other member of the public and no higher, namely, the right of passage for himself and his animals, the right of access to his property and special rights which are of no significance in this inquiry, such as the right of purchase when highways are closed and the right to occupy unopened road allowances. There is therefore no reason for giving adjoining owners any special rights to permit the straying of animals. This alone is sufficient to distinguish the law of Ontario from the law of England and to render the principle stated in *Searle v. Wallbank* inapplicable here.

The other foundation for the principle of immunity in favour of the adjoining owner was that until the advent of fast moving traffic no cause of action could possibly have existed. There was in fact no real risk worthy of judicial consideration from the mere presence of straying animals on the highway. There was nothing that called for the interference of the law in this situation. But does it follow as a consequence of this that there can be no cause of action today when the facts are entirely different and when there has been a developing law of negligence for the last 150 years? As was pointed out by the learned editor in 66 L.Q.R. 456, the real objection to the decision in *Searle v. Wallbank* is that a conclusion of fact has hardened into a rule of law when the facts upon which the original conclusion was based no longer exist:

> As long as the conclusion of fact and the rule of law were not in conflict, this shift from the one to the other passed unnoticed but now that the "experience of centuries" is no longer valid under the changed conditions of modern motor traffic it is not surprising that the law on this point is subject to criticism.

[1] (1900), 31 O.R. 610.

A rule of law has, therefore, been stated in *Sarle v. Wallbank* and followed in *Noble v. Calder* which has little or no relation to the facts or needs of the situation and which ignores any theory of responsibility to the public for conduct which involves foreseeable consequences of harm. I can think of no logical basis for this immunity and it can only be based upon a rigid determination to adhere to the rules of the past in spite of changed conditions which call for the application of rules of responsibility which have been worked out to meet modern needs. It has always been assumed that one of the virtues of the common law system is its flexibility, that it is capable of changing with the times and adapting its principles to new conditions. There has been conspicuous failure to do this in this branch of the law and the failure has not passed unnoticed. It has been criticized in judicial decisions (including the one under appeal), in the texts and by the commentators.

The anomalous nature of the rule is emphasized by comparison with the rights and obligations existing between adjoining owners. In this situation the owner of the animals must keep them upon his land under control and is liable for trespass if they escape and do such damage as it is in their nature to commit. The right of action for trespass exists also in the owner of the soil of a highway if cattle depasture his herbage. An owner may only drive his animals on to the highway for the purpose of passage and if he does so he must exercise reasonable care while they are using the highway for this purpose. By contrast, the rule is said to be one of non-liability if the animals are permitted to stray. Further, what difference is there between driving the animals on to the highway and turning them loose on the property when it must be apparent, as in the present case, that sooner or later they will be on the highway?

My conclusion is that it is open to this Court to apply the ordinary rules of negligence to the case of straying animals and that the principles enunciated in *Searle v. Wallbank,* dependent as they are upon historical reasons, which have no relevancy here, and upon a refusal to recognize a duty now because there had been previously no need of one, offer no obstacle. The course of judicial decision in Ontario indicates that until the decision in *Noble v. Calder,* the principles of *Searle v. Wallbank* have never been the determining

1959

FLEMING v. ATKINSON

Judson J.

factor. This, I think, can be said with certainty although it is not always easy to trace a consistent line of reasoning. The cases have turned largely upon a consideration of local by-laws where the highway authority is the municipality, and statutory prohibitions where the province is the authority. They are fully reviewed both on fact and law in the reasons of Roach J. A. in the Court of Appeal.

This accident happened on a county road and there was no municipal by-law prohibiting the straying of animals. In *Patterson v. Fanning*,[1] there was such a by-law and the judgment of Armour C. J. O. was founded on this fact and led him to the conclusion that the animal was unlawfully at large. The judgment of Osler J. A., however, was founded on negligence and nothing more, and he held that there was liability because the damage was such as might reasonably be expected to follow the negligent act.

I have some difficulty with the deduction of the learned Chief Justice drawn from *Ricketts v. Markdale* that, had it not been for the by-law, the animals would have been lawfully at large upon the public highway. The Court of Queen's Bench as early as 1877 in *Jack v. Ontario, Simcoe and Huron R. R. Union Co.*[2], had denied the right of anyone to have his animals wander at large upon the highway. Moreover, *Ricketts v. Markdale* merely held that children had a right to play upon the highway if there was no general law or by-law against it. It is difficult to see how a by-law against children playing on the highway could, in itself, prevent anyone from recovering on behalf of an injured child against a wrongdoer, or how the conclusion follows that if there is no prohibitory by-law, animals may be permitted to stray on the highway.

The next two decisions, *McMillan v. Wallace*[3] and *Direct Transport Ltd. v. Cornell*[4], were both decided under a section in *The Highway Improvement Act* which imposed a penalty upon owners of certain animals who permitted them to run at large upon the King's Highway. This was held to involve a statutory prohibition and the imposition of something very close to absolute liability. In the second of these two

[1] (1901), 2 D.L.R. 462.
[2] 14 U.C.Q.B. 328.
[3] (1929), 64 O.L.R. 4, 3 D.L.R. 367.
[4] [1938] O.R. 365, 3 D.L.R. 456.

cases, the court stated the proposition in slightly different terms following the decision in *Lochgelly Iron and Coal Co. Ltd. v. M'Mullan*[1], which held that the breach of the statutory duty was in itself negligence and entailed liability for damage caused to the plaintiff since the statute in effect prohibited the presence of the cattle on the highway. In consequence of these two decisions, *The Highway Improvement Act* was amended in 1939 and the amendment is now to be found in R.S.O. 1950, c. 166, s. 86(3), in these terms:

> . . . this subsection shall not create any civil liability on the part of the owner of horses, cattle, swine or sheep for damages caused to the property of others as a result of the horses, cattle, swine or sheep running at large within the limits of the King's Highway.

The amendment helps very little in the clarification of this problem. It appears to leave untouched claims for personal injury and it is at least arguable whether the section in itself had ever imposed any civil liability. The liability was imposed in the two cases because the Courts, using the statute as a guide to the conduct expected of a keeper of animals, imposed an absolute duty to prevent them from straying, an imposition which to me seems just as objectionable as the failure to impose any duty at all. It was held in *Noble v. Calder* that the 1939 amendment to *The Highway Improvement Act* meant a return to the common law of England as expressed in *Searle v. Wallbank*. I can gather an intention to abolish the use of the statutory standard without more to decide the case, but does it follow that the amendment was meant to introduce the common law of England as expressed in *Searle v. Wallbank*? The alternative inference is that the Courts were left to decide the matter untrammelled by the statutory prohibition and not that animals were free to stray upon the highway and that their keepers were under no duty to guard against such straying.

The last case to which I wish to refer is *Wyant v. Welch*[2]. This was a county road accident and there was a by-law declaring it unlawful for any person to suffer or permit certain animals to run at large on county highways. The case was tried by a jury and the jury found in answer to two questions that the defendant did not fail to observe the duty imposed upon him by the by-law and was not guilty

[1] [1934], A.C. 1.
[2] [1942] O.R. 671, [1943] 1 D.L.R. 13.

1959

FLEMING v. ATKINSON

Judson J.

of any negligence which caused or contributed to the accident. The finding of the Court of Appeal was that the by-law did not contemplate the creation of a cause of action beyond what was given by the common law but there was no definition of what right of action the common law did give and there was, in addition, the jury's finding that there had been no negligence.

My conclusion is that there is nothing in this line of authority, with the exception of *Noble v. Calder*, which holds that the common law of England as defined in *Searle v. Wallbank* was ever the common law of the Province of Ontario. I would dismiss the appeal, not, however, for the final reason stated in the Court of Appeal, which depended upon the number of animals involved, but rather because, in my opinion, the duty rejected in *Searle v. Wallbank* does exist in the Province of Ontario. As pointed out by Roach J. A., there can be no difficulty in the application of the ordinary rules of negligence to the facts in this type of case and the matter should be left to the tribunal of fact to determine, with due regard to all the circumstances, including the nature of the highway and the amount and nature of the traffic that might reasonably be expected to be upon it, whether or not it would be negligent to allow a domestic animal to be at large.

The appeal should be dismissed with costs. The learned trial judge's apportionment of responsibility has been sustained by the Court of Appeal and I do not think that this is a case where this Court should take another view.

Appeal dismissed with costs, Locke *and* Cartwright J.J. *dissenting.*

Solicitors for the defendant, appellant: Richardson & MacMillan, Toronto.

Solicitors for the plaintiff, respondent: Pringle & Pringle, Belleville, Ontario.

1959

FORD MOTOR COMPANY OF CANADA, LIMITED (*Plaintiff*) ..... APPELLANT;

*Mar. 5, 6
Apr. 28

AND

THE PRUDENTIAL ASSURANCE COMPANY LIMITED, SUN INSURANCE OFFICE, LIMITED, HARTFORD FIRE INSURANCE COMPANY, THE WORLD FIRE AND MARINE INSURANCE COMPANY, THE BRITISH NORTHWESTERN INSURANCE COMPANY, PHOENIX ASSURANCE COMPANY, LIMITED, INSURANCE COMPANY OF NORTH AMERICA, THE SCOTTISH UNION AND NATIONAL INSURANCE COMPANY, BRITISH TRADERS' ASSURANCE COMPANY, LIMITED, BRITISH AMERICA ASSURANCE COMPANY, THE LONDON AND LANCASHIRE INSURANCE COMPANY, LIMITED, NORWICH UNION FIRE INSURANCE SOCIETY, LIMITED (*Defendants*) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Insurance—Policies covering property damage and loss of profits or business interruption caused by riot—Riot of workmen forcing closing down of plant—Resultant damages to property and loss of profits—Whether exclusion clause applicable.

The plaintiff company was insured under two sets of policies covering physical damage to property and loss of profits or business interruption due to *inter alia*, "riot" the meaning of which was extended to include "open assemblies of strikers (inside or outside the premises) who have quitted work and of locked-out employees". By cl. 6(*c*) of the policies, it was provided that there should "in no event" be any liability in respect of loss due to physical damage caused by "cessation of work or interruption to process or business operations or change in temperature".

On December 3, 1951, a number of the plaintiff's employees left their employment and compelled every employee to leave the plant with the result that the plant was shut down. The winter weather caused serious physical damage to the machinery up to the time the power was restored on December 14. The defendants argued that no part of the loss was caused by riot but by a combination of stoppage of work and change in the temperature.

The trial judge maintained in part the action brought under the policies. This judgment was reversed by the Court of Appeal. The plaintiff appealed to this Court.

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

1959

FORD MOTOR CO. OF CANADA LTD. v. PRUDENTIAL ASSURANCE CO. LTD. et al.

Held: The appeal should be dismissed.

What occurred was plainly a "riot" within the meaning of the policies, and liability was excluded by cl. 6(*c*) since the damage was caused by cessation of work or by interruption to process or business operations, or by change in temperature.

The problem was one of attribution of cause and was not solved by a mere determination that the riot was the proximate cause of the loss. The parties had in contemplation that a riot might cause not only direct physical damage to the property but might also bring into being cessation of work, interruption to process or business operations, and change in temperature, and that for losses assignable to these causes or exceptions there was to be no liability. These causes operated concurrently with the riot and resulted solely from it, but none the less limited liability. The argument that the exceptions operate only when they result from causes other than riot was not supported by the cases under fire policies containing an exclusion for damage by explosion. Furthermore, the Court of Appeal was right in rejecting the limitations put by the trial judge on the causes enumerated in cl. 6(*c*) when he held that they did not operate because they had no independent existence apart from the riot, and restricting its meaning to change in atmospheric temperature.

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

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

P. Wright, Q.C., and *B. J. MacKinnon, Q.C.*, for the defendants, respondents.

The judgment of the Court was delivered by

JUDSON J.:—The appellant, Ford Motor Company of Canada, Limited, sued a number of insurance companies on twenty-four policies of insurance for a total claim of $905,111.71 for loss alleged to have been caused by riot. On twelve of the policies the claim was for $217,478.71 for property damage, and on the other twelve policies for $687,623.00 for loss of profits or business interruption claimed as the necessary result of the physical damage flowing from the riot. The policies were all in uniform and standard form and were basically contracts of fire insurance, providing the plaintiff indemnity against loss or damage by fire. By virtue of statutory condition no. 4, these did not cover, in the first instance, loss or damage caused by riot.

[1] [1958] O.W.N. 295, 14 D.L.R. (2d) 7.

But each policy had attached to it an Additional Perils Supplemental Contract which provided that the coverage was extended to "direct loss or damage to the property covered under said 'Fire' Policy caused directly by the after-noted additional perils", one of which was riot "as herein-after defined and limited."

Riot was given the following extended meaning:

> 6. Riot: The term "Riot" shall in addition to Riot include open assemblies of strikers (inside or outside the premises) who have quitted work and of locked-out employees.

Then, in the same paragraph, there are certain pertinent exclusions which are in the following terms:

> There shall in no event be any liability hereunder in respect to
>
> (c) Loss due to physical damage to the property insured caused by cessation of work or by interruption to process or business operations or by change in temperatures, whether liability in respect thereto is specifically assumed now or hereafter in relation to any other peril or not.

The facts which give rise to this claim are clearly set out in the judgment of the learned trial judge. They were accepted in full by the Court of Appeal[1] and need no extensive repetition. On December 3, 1951, a certain number of employees of the Ford Company in Windsor left their employment. By concerted action these employees compelled every employee to leave the plant with the result that the whole plant was shut down and operations ceased early in the afternoon of December 3 with the exception of the powerhouse, which was also completely shut down on the following morning. Until the evening of December 14, no employee was permitted to enter the plant and there was no heat or electricity in the buildings. December 3 had been an unusually mild day and many of the windows throughout the plant, all of which were electrically operated, were open when the trouble began. When the electricity was shut off there was no way of closing these windows and they remained open until the powerhouse was again in operation and power restored on December 14. The mild weather of December 3 did not continue. With rain, snow and freezing conditions outside and no internal heat in the plant, the result was serious physical damage to the plant machinery

[1] [1958] O.W.N. 295, 14 D.L.R. (2d) 7.

1959

FORD MOTOR CO. OF CANADA LTD. v. PRUDENTIAL ASSURANCE CO. LTD. et al.

Judson J.

and work in process and consequent loss of profits and business interruption after the resumption of work on December 14, all of which is claimed for in the two sets of policies.

As a result of a full examination of the events which occurred, the learned trial judge held that the conduct of the employees amounted to a riot as that term was understood at common law, as well as being within the extended meaning of riot given by the Supplemental Contract. The Court of Appeal concurred in this finding and would have held, had it been necessary, that there was a riot within the definition of the *Criminal Code* and within the ordinary dictionary meaning of the term. There cannot be any question of these findings and in any event, what occurred in Windsor was plainly a riot within the definition of the Supplemental Contract, that is "open assemblies of strikers (inside or outside the premises) who have quitted work". The substantial question is whether the damage was caused by cessation of work or by interruption to process or business operations or by change in temperature. Damage caused in this way was within the exclusion defined in cl. 6(*c*) of the supplemental contract.

The learned trial judge found that the riot was the proximate cause of all the property damage and loss of profits. He then held on the construction of the Supplemental Contract that there could be no recovery for any loss or damage attributable to a cause named in the exclusionary clause notwithstanding that those causes were not proximate causes. The problem was not solved when he had ascertained that riot was the proximate cause. It was, in addition, necessary to read the policy as a whole and ascertain what the parties meant by providing a coverage for riot with these exclusions. He concluded that "cause" meant "proximate cause" when related to the cover but not when related to the exclusionary clause. The insurance companies on the construction of this policy were not to be responsible for any damage brought about or contributed to by any of the causes mentioned in the exempting clause notwithstanding that such damage was a consequence of the riot.

Notwithstanding this construction, he still found that cessation of work and interruption to process or business operations did not operate as causes because they had no

independent existence apart from the riot. He therefore qualified the meaning of these phrases accordingly and did the same with the phrase "change in temperature" by restricting its meaning to change in atmospheric temperature. These are very serious limitations and come close to destroying any efficacious power in the exclusionary clause.

The Court of Appeal[1] accepted the learned trial judge's findings that there was a riot and that riot was the proximate cause of the damage, and also found that the causes mentioned in the exclusionary clause were concurrent causes but referred to these as concurrent proximate causes. It seems to me that there is no substantial difference between the judgment of the learned trial judge and that of the Court of Appeal on this point. According to both, the riot was a continuing event or cause and was operating along with the other causes mentioned in the exclusionary clause, and whether these are called concurrent causes or concurrent proximate causes, the loss due to physical damage to the property arising when these causes operate is excluded.

The real point of departure between the judgment of the Court of Appeal and that of the trial judge is in the matter of construction of the exclusionary clause. The Court of Appeal held that it was plain that the parties foresaw that in the event of a riot there would be cessation of work, interruption to process and business operations and change in temperature of the buildings. They rejected the limitations imposed by the learned trial judge and held that if these events occurred, there was no liability for damage so caused. In the result there could only be recovery for the physical damage to the hinge on the gate of the powerhouse. The appeal was allowed and the judgment at trial, which had directed a reference to ascertain the damage sustained by the plaintiff as a result of the riot from causes other than change in temperature, was set aside. The cross-appeal of the plaintiff was dismissed and judgment was given for the plaintiff only for the amount of the physical damage resulting from causes other than those specified in sub-clause (*c*), which was, of course, only the damage to the hinge on the gate.

[1] [1958] O.W.N. 295, 14 D.L.R. (2d) 7.

1959

FORD MOTOR CO. OF CANADA LTD. v. PRUDENTIAL ASSURANCE CO. LTD. et al.

Judson J.

Counsel for the appellant argues before this Court that the learned trial judge, having found that the riot was the proximate cause, had really decided the case at that point, that there was no need and, indeed, no power to go further, and that there was error even in the limited meaning and operation assigned to cl. 6(*c*). He further submits that the 6(*c*) causes did not do the damage in themselves and that therefore they were not proximate causes but at most contributory causes, and that if they were merely contributory causes, the exclusionary clause had no operation at all—either to reduce or extinguish liability. He also assigns error to the judgment of the Court of Appeal based, as it was, upon a finding of concurrent proximate causes not only upon a denial of any such theory of causation but also because it was made in the absence of any evidence to support it. I have no difficulty in deciding that this last objection has no validity. There is no uncertainty or controversy about the facts of this case. The problem is not one of explanation of fact but one of attribution of cause and, in these circumstances, the inference of causation is as much a matter for the appellate tribunal as for the trial judge.

In cases such as this the problem is not solved by a mere determination that riot was the proximate cause of the loss. Causation is not being considered in the abstract but in relation to a claim for indemnity under an insurance policy which contains an exclusion. Liability for causation by riot is limited by the exceptions stated in cl. 6(*c*). It seems to me clear, as it did to the Court of Appeal, that the parties had in contemplation that a riot might cause not only direct physical damage to the property but might also bring into being cessation of work, interruption to process or business operations, and change in temperature and that for losses assignable to these causes or exceptions there was to be no liability. The peril insured against was riot "as hereinafter defined or limited" subject to the exception that there should in no event be any liability for losses as caused in clause 6(*c*). These causes were unquestionably operating concurrently with the continuing riot. It is true also that they resulted solely from the riot except "change in temperature", which was a combination of the

lack of internal heat, the open windows and an external factor, change in atmospheric temperature. But they are none the less limitations on liability.

There is nothing new in the appellant's submission that since the riot brought the causes enumerated in cl. 6(*c*) into being, the riot is the proximate cause of the loss and the 6(*c*) causes are to be disregarded. This is merely another way of stating that the 6(*c*) causes are only to be regarded if they are the result of a cause other than the riot. This same argument has been put forward and rejected in cases having to do with claims under fire policies which contain also an exception or exclusion that the insurer is not to be liable for loss or damage by explosion. A fire occurs and it is followed by an explosion caused by the fire. The insurer is liable for the fire damage but not the explosion damage. The exclusion of explosion is not limited to an explosion from a cause other than the fire. This line of authority is very clear and consistent and is of long standing. It goes back at least as far as *Stanley v. The Western Insurance Company*[1], and has been applied in *Re Hooley Hill Rubber & Chemical Co. Ltd. v. Royal Insurance Co.*[2]; *Curtis's and Harvey (Canada) Ltd. v. North British and Mercantile Insurance Co. Ltd.*[3]; *Sin Mac Lines Ltd. et al v. Hartford Fire Insurance Co. et al.*[4] The principle to be deduced is no more than this—that liability for the consequences of what the Court holds to be the proximate cause of the loss may be negatived by a properly framed clause of exclusion and it seems to me that if it is found, as a matter of construction, that the causes specified in the clause of exclusion apply, then it is of no significance whether these are referred to as proximate causes or simply causes.

Nor do I think that this principle is in any way disturbed by the decisions in *Boiler Inspection and Insurance Co. of Canada v. Sherwin-Williams Co. of Canada Ltd.*[5] and *Leyland Shipping Co. Ltd. v. Norwich Union Fire Insurance Society Ltd.*[6], upon which the appellant really

[1] (1868), L.R. 3 Exch. 71, 37 L.J. Ex. 73.
[2] [1920] 1 K.B. 257.
[3] [1921] 1 A.C. 303.
[4] [1936] S.C.R. 598, 3 D.L.R. 412.
[5] [1950] S.C.R. 187, 1 D.L.R. 785; affirmed [1951] A.C. 319, 3 D.L.R. 1.
[6] [1918] A.C. 350.

1959

FORD MOTOR CO. OF CANADA LTD. v. PRUDENTIAL ASSURANCE CO. LTD. et al.

Judson J.

founded its argument. In the first of these cases the insurance was against accident and excluded losses from fire and from accident caused by fire. There was an explosion —an accident within the meaning of the policy—and that accident caused a fire. There was never any question that the subsequent fire loss was excluded. The whole case was argued throughout on that basis. The real controversy was whether there had been a fire preceding the explosion. If there had been such a fire, then the loss from the explosion was excluded because it would then be a case of accident caused by fire. It was held that there had been no such antecedent fire. Consequently, the proximate cause of the loss was accident, the peril insured against, and there was no exclusion that applied to cut down the loss from this cause. This case, therefore, cannot be taken as deciding that once the proximate cause is ascertained to be the peril insured against, an exclusionary clause has no operation if the causes mentioned in it result from the proximate cause. The ratio of the decision in this Court is at p. 209 in the reasons of Locke J., where he says: "I agree that loss of which fire is the direct or proximate cause is excluded but in my view the loss was not so caused."

The *Leyland* case was concerned not with a clause of exception or exclusion but with a warranty in a marine policy against all consequences of hostilities. The ship was torpedoed but succeeded in reaching port, where she sank before she could be repaired because of repeated grounding with the ebb and flow of the tide. The effect of a warranty such as this is well understood. Unless it is complied with exactly, the insurer is discharged from liability, as of the date of the breach. Compliance with the warranty, in other words, is a condition precedent to liability on the policy. The only point to be decided in this type of case is whether the proximate cause of the loss is one against which the warranty was given. If it is, the action fails for non-compliance with the warranty. The very nature of the problem compels the Court to determine proximate cause —whether it is a matter of "consequences of hostilities" within the warranty or "perils of the sea" within the coverage of the policy. It must be one or the other and no problem arises concerning the modification or limitation of "proximate cause" by an exclusionary clause.

I turn now to the meaning to be given to the causes enumerated in cl. 6(c). The learned trial judge held that there was no "cessation of work or interruption to process or business operations" as contemplated by the clause because, in his opinion, these conditions were brought about by the compulsion of the riot. It is quite clear that the plant protection men were available for work and would have entered the plant and saved the damage, had it not been for the display of force by mass picketing that prevented their entry. It seems to me that this limitation upon the application of these causes is to be rejected for two reasons. The first is that as a matter of construction it is impossible to read into the exclusionary clause any such limitation and, in the second place, such a limitation is inconsistent with the finding of the learned trial judge and the line of authority, beginning with *Stanley v. Western, supra,* relied upon by him, that these causes operate notwithstanding the fact that they were brought into being by the riot.

The learned trial judge also imposed a limitation upon the operation of the cause "change in temperature". He rejected the appellant's submission that the cause was too vague and uncertain to have any operation but he adopted the same principle in dealing with this cause as with the other two named causes in 6(*c*). Anything attributable to the riot was not within this cause. He therefore limited its operation to change in atmospheric temperature. I think that there is the same error here as there is in the limitation of the other two causes and that the Court of Appeal was correct in rejecting the limitations imposed by the learned trial judge upon any of these 6(*c*) causes.

I am therefore of the opinion that the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the plaintiff, appellant: Blake, Cassels & Graydon, Toronto.

Solicitors for the defendants, respondents: Wright and McTaggart, Toronto.

1959

*Feb. 10, 11
Apr. 28

OXFORD MOTORS LIMITED .....APPELLANT;

AND

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income tax—Distributor of automobiles receiving rebates from supplier—Whether rebates forgiveness of debt or trading profit—The Income Tax Act, 1948 (Can.), c. 52, ss. 3, 4.

In 1951 the appellant, a distributor and retailer of foreign-made automobiles, had a large inventory of cars on hand and was heavily indebted to its supplier. The supplier granted to the appellant a rebate of $250 on each automobile in stock and subsequently sold. The rebates were to be applied to retire the appellant's outstanding indebtedness to the supplier. The minister included the rebates in the appellant's income. The appellant contended that the rebates were a capital gain arising from a forgiveness of debt. The assessment was confirmed by the Exchequer Court.

Held (Cartwright J. dissenting): The rebates were taxable as income earned in the course of the appellant's trading operations. Each rebate was in the nature of a discount granted or a subsidy paid to supplement the appellant's trading receipts: *Lincoln Sugar Ltd v. Smart,* [1937] A.C. 697. The fact that the rebates took the form of credits against the appellant's indebtedness did not alter their true character or make them merely the forgiveness of a debt previously incurred: *British Mexican Petroleum Ltd. v. Jackson* (1932), 16 T.C. 570, distinguished.

Per Cartwright J., *dissenting*: The substance of the transaction was the forgiveness of a past-due debt incurred in a previous year. The evidence did not support the view that the rebates were the equivalent of payments made in the nature of subsidies. This case was brought within the principle of the decision in *British Mexican Petroleum Ltd. v. Jackson, supra.* No part of the total amount of the rebates should have been treated as a receipt from the appellant's business in calculating the profit therefrom.

APPEAL from a judgment of Dumoulin J. of the Exchequer Court of Canada[1], affirming the decision of the Minister. Appeal dismissed, Cartwright J. dissenting.

D. N. Hossie, Q.C., and *J. G. Alley,* for the appellant.

W. R. Jackett, Q.C., F. J. Cross, and *G. W. Ainslie,* for the respondent.

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

[1] [1958] Ex. C.R. 261, [1958] C.T.C. 184, 58 D.T.C. 1104.

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

ABBOTT J.:—Since 1936 appellant has been a distributor and retailer of Morris motor cars in British Columbia and in the adjoining States of Washington and Oregon, purchasing its cars from Nuffield Exports Limited of Oxford, England.

In the summer of 1951 appellant had a large inventory of cars on hand, for which it had not paid Nuffield, and by reason of the imposition of severe Consumers Credit Restrictions in March of that year was experiencing great difficulty in disposing of its inventory. Following discussions which took place between officers of the Nuffield company and its Canadian dealers during the summer of 1951, Nuffield offered to all its Canadian dealers a special arrangement in virtue of which it agreed to give a rebate of $250 on each car in stock in Canada on September 1, 1951, and subsequently sold in Canada, such rebate to be available upon payment being made to Nuffield of an amount equal to the c.i.f. value of the cars on which rebate was claimed. The amount of all rebates was to be applied on the dealer's outstanding indebtedness to Nuffield. In February 1952, this arrangement appears to have been modified; the grant of the rebate was dissociated from actual sales but it continued to be applicable only with respect to the cars on hand in Canada at September 1, 1951, and to cars sold in Canada and not in the United States. In essence this allowance does not seem to differ from the discount on prompt payment commonly allowed by wholesalers of a great variety of merchandise to retailers all over Canada. The arrangement here was in reality, simply the granting of a discount of $250 upon the sale price of cars sold or upon their purchase price if paid between the dates stipulated by Nuffield.

In fact most of the cars on hand at September 1, 1951, were sold prior to September 30, 1952, which was the end of appellant's taxation year, and during that twelve month period the appellant obtained rebate credits from Nuffield in the amount of $483,185.91. In its books these credits were reflected in its profit and loss account for the year under various income and expense items. It filed its income

1959

OXFORD MOTORS LTD. v. MINISTER OF NATIONAL REVENUE

Abbott J.

tax return for the 1952 taxation year, reporting taxable income as being $10,469.42 and was assessed tax in the amount of $5,275.67.

It should perhaps be mentioned that during the period from October 1, 1951, to September 30, 1952, appellant carried on its business in partnership with a related company under the firm name of "British Motor Centre" but the existence of that partnership is of no significance to this appeal.

Appellant appealed from the assessment to the Exchequer Court of Canada[1] and upon that appeal took the position that the application of the rebates in its books had been made in error; that the total amount of these rebates, was in law the forgiveness of a debt, and as such should have been credited as a capital accretion to its surplus account. That appeal was dismissed with costs and the present appeal is from that judgment.

The relevant provision of the *Income Tax Act* is s. 4 which reads as follows:

> 4. Subject to the other provisions of this Part, income for a taxation year from a business or property is the profit therefrom for the year.

The issue here is whether the admitted profit, realized by appellant in its financial year ending September 30, 1952, as a result of the special rebate arrangement with Nuffield, was a profit earned in the course of its trading operations as contended by the Crown, or a capital gain as contended by appellant.

The principal business of appellant is the buying and selling of new and used motor cars. The circumstance which gave rise to the special rebate arrangement with Nuffield was the imposition by the Federal Government of consumer credit restrictions. It was not suggested that the imposition of these restrictions (which were cancelled in May 1952) had the effect of decreasing the value of the cars held by appellant nor was it suggested that they were ultimately sold at reduced prices. What the restrictions did do was to make sales on credit more difficult. In other words, in the language of trade, the appellant had a slow moving inventory.

[1] [1958] Ex. C.R. 261, [1958] C.T.C. 184, 58 D.T.C. 1104.

It was to meet this situation that Nuffield offered to all its Canadian dealers the special rebate arrangement of $250 with respect to each Morris car on hand on September 1, 1951, and subsequently sold in Canada.

Nuffield was, of course, faced with a situation, where not only appellant but its other Canadian distributors, held large inventories of cars not readily saleable and for which they were unable to pay, and being unwilling to go into the selling business in Canada itself, the rebate scheme was no doubt instituted in order to assist these dealers to continue in business, dispose of their cars, and discharge their obligations to Nuffield.

One effect of the rebate arrangement was to enable appellant to extend more generous terms to its customers, by increasing its trade-in allowances for used cars. That appellant took advantage of this, is indicated by the fact that the sum of $51,856.10 appears as an item of expense in the 1952 accounts under the head "Over allowances—Used Cars". No similar item appeared in the accounts for the previous year.

The result of the offer made by Nuffield was that appellant's inventory of cars, if sold in Canada, would yield to it an additional gross profit of $250 per car. Put alternatively, the cost of every car sold in Canada was reduced by $250. The fact that the rebates took the form of credits against appellant's indebtedness to Nuffield, did not alter their true character, or make them merely the "forgiveness" of a past due debt incurred in a preceding year, as that term was used in the *British-Mexican Petroleum* case to which I shall refer presently. These rebates were intimately related to the appellant's trading operation, and in my opinion the profit realized from them was clearly a trading profit from the business.

Viewed in another aspect, it could be said that Nuffield agreed to pay to its Canadian dealers a subsidy of $250 on each car sold in Canada and such a subsidy has been held to be part of revenue for the purpose of computing profit: *Lincoln Sugar Limited v. Smart*[1]. In that case at p. 704, Lord Macmillan referred to the payments made, as "intended artificially to supplement their (the taxpayer's)

[1] [1937] A.C. 697, 1 All E.R. 413.

1959

OXFORD MOTORS LTD. v. MINISTER OF NATIONAL REVENUE

Abbott J.

trading receipts so as to enable them to maintain their trading solvency". The same statement might appropriately be made with respect to the rebates in issue here. It would be immaterial in such a case, whether the subsidy were received in cash or in the form of credit notes against outstanding indebtedness.

In his able argument Mr. Hossie put his case squarely upon the basis that the benefit derived by appellant, was in law, a forgiveness of debt, and as such was to be treated as a capital accretion, and he relied upon the decision of the House of Lords in *British Mexican Petroleum Limited v. Jackson*[1], but in my view, that decision has no application in the circumstances of this case. In the *British Mexican* case the facts were as follows. The British Mexican company, in addition to certain other liabilities, actual and contingent, owed very large sums to two creditors who were also the principal shareholders in the company. This indebtedness represented oil purchased, and freight charges incurred, during a preceding accounting period. As the result of a sharp decline in prices, the value of the company's assets had decreased, its working capital was seriously impaired and it was in fact insolvent. In these circumstances the two shareholder creditors and a third creditor, with whom the debtor company had entered into a contract for the construction of ten tank steamers on which there was a large sum owing, entered into a written agreement for the partial remission by the three creditors concerned, of their claims against the debtor company. It was an express term of this agreement that the sum remitted should be applied by the debtor to reduce the amount shown in its books in respect of its assets "to a figure more nearly representing the present value thereof". What really happened was that the three interested creditors assisted in restoring the capital position of the company by writing off claims which could no longer be paid out of the proceeds of available assets.

The main argument for the Crown was that the indebtedness remitted had been treated in the previous accounting period as an expense of trade deductible from gross receipts in that period but that, to the extent that

[1] (1932), 16 T.C. 570.

it was subsequently released, it was never in fact expended; and that in consequence the accounts for the previous period should be opened up and the deduction brought into conformity with the amount actually paid. Alternatively it was urged that the amount of the sum released ought to be brought into profit and loss account as a credit item in the period in which the release was granted. Both contentions failed in all Courts. As to the alternative submission (which Lord Thankerton stated was not seriously pressed), it seems clear that the amount remitted was properly considered as a capital item. As Lord Hanworth M.R., delivering the judgment of the Court of Appeal, stated at p. 588, the release was given "not by way of return of something which had been taken out from the Company in a previous accounting period, but which was, by a new bargain made, to afford new capital and was under the terms of that bargain to be placed to the relief of the depreciation account and not otherwise. It cannot be brought into the profit and loss account of either 1921 or 1922".

The *British Mexican* case did not decide, that under no circumstances can the forgiveness of a trade debt be taken into account, in determining the taxable profit arising from the carrying on of a business, and I have found no subsequent case in which it has been so held. No one has ever been able to define income in terms sufficiently concrete to be of value for taxation purposes. In deciding upon the meaning of income, the Courts are faced with practical considerations which do not concern the pure theorist seeking to arrive at some definition of that term, and where it has to be ascertained for taxation purposes, whether a gain is to be classified as an income gain or a capital gain, the determination of that question must depend in large measure upon the particular facts of the particular case.

For the reasons which I have given, I would dismiss the appeal with costs.

CARTWRIGHT J. (*dissenting*):—The facts out of which this appeal arises are stated in the reasons of my brother Abbot. The question for decision is whether the rebates totalling $483,185.91 given by Nuffield to the appellant in

1959

OXFORD MOTORS LTD. v. MINISTER OF NATIONAL REVENUE

Cartwright J.

the course of the later's taxation year ending September 30, 1952, should be regarded as receipts from its trade or business during that year.

The difficulties of the problem are of fact rather than of law. The underlying rules are not in dispute; they are stated in the judgment of Kerwin C.J. in *Minister of National Revenue v. Anconda American Brass Ltd.*[1], as follows:

> The statement of Lord Clyde in *Whimster & Co. v. The Commissioners of Inland Revenue,* (1925) 12 Tax Cas. 813 as to the two fundamental matters to be kept in mind in computing annual profits is accepted in England and is applicable here. It appears at p. 823 of the reports:—
>
> "In the first place, the profits of any particular or accounting period must be taken to consist of the difference between the receipts from the trade or business *during such year or accounting period* and the expenditure laid out to earn *those receipts.* In the second place, the account of profit and loss to be made up for the purpose of *ascertaining that difference* must be framed consistently with the ordinary principles of commercial accounting, so far as applicable, and in conformity with the rules of the *Income Tax Act,* or of that Act as modified by the provisions and schedules of the Acts regulating Excess Profits Duty, as the case may be."

If during the taxation year in question the appellant had received, or acquired any right to receive, payment of the $483,185.91 or any part thereof, as a trading receipt, the amount so received should be taken into account in determining the amount of its profit and this result would not be altered by the circumstance that the appellant elected, or was bound by some agreement, to apply the sum so received in reduction of a past due indebtedness. On a consideration of the whole record in the light of the full and helpful arguments of counsel, the conclusion appears to me to be inescapable that the substance of the transaction was the forgiveness by Nuffield of a past due debt incurred in a previous taxation year. The evidence does not support the view that the rebates were the equivalent of payments in the nature of subsidies. The case of *Lincoln Sugar Limited v. Smart*[2] is distinguishable on the facts.

The character of the transaction is not affected by the circumstance that Nuffield's decision to forgive the indebtedness was prompted not by solely philanthropic

[1] [1954] S.C.R. 737 at pp. 738, 739, [1954] C.C.T. 335, 54 D.T.C. 1179.
[2] [1937] A.C. 697, 1 All E.R. 413.

motives but rather by the desire to enable the appellant, a purchaser of large numbers of its cars, to remain in business.

It was not suggested that there should be a re-opening of the accounts of the previous taxation year. The evidence appears to me to bring the case within the principle of the decision in *The British Mexican Petroleum Co. Ltd. v. Jackson*[1], and particularly the following passages.

At p. 585, Rowlatt J., after stating that the trading profit for a year is to be arrived at by comparing the amounts received from selling goods with the amount paid out to put the trader in the position to do so by buying goods, with the necessary adjustments in the account to allow for the stock which is carried over from year to year, and that the profit is the difference between what is received and what is paid out in the year's trading, continues:

> How on earth the forgiveness in that year of a past indebtedness can add to those profits I cannot understand. It is not a matter depending upon the form in which the accounts are kept. It is a matter of substance, looking at the thing as it happened, as a man who knows nothing of scientific accountancy might look at it—it is the receipts against payments in trading.

At p. 592, Lord Thankerton says:

> I am unable to see how the release from a liability, which liability has been finally dealt with in the preceding account, can form a trading receipt in the account for the year in which it is granted.

And at p. 593, Lord Macmillan says:

> If, then, the accounts for the year to 30th June, 1921, cannot now be gone back upon, still less in my opinion can the Appellant Company be required to enter as a credit item in its accounts for the eighteen months to 31st December, 1922, the sum of £945,232, being the extent to which the Huasteca Company agreed to release the Appellant Company's debt to it. I say so for the short and simple reason that the Appellant Company did not, in those eighteen months, either receive payment of that sum or acquire any right to receive payment of it. I cannot see how the extent to which a debt is forgiven can become a credit item in the trading account for the period within which the concession is made.

In the case at bar, the substance of the transaction tends to be obscured, but is not altered, by the circumstance that the forgiveness was made piecemeal and that the individual items composing the total of $483,185.91 were

[1] (1932), 16 T.C. 570.

1959

OXFORD MOTORS LTD. v. MINISTER OF NATIONAL REVENUE

Cartwright J.

related in time some to the sales of cars and some to the payment of drafts; each item was in substance nothing other than the voluntary forgiveness of a past indebtedness incurred in a previous taxation year.

In my opinion no part of the said sum of $483,185.91 should have been treated as a receipt from the appellant's business in calculating the profit therefrom for the taxation year in question.

I would allow the appeal, set aside the judgment of the Exchequer Court, and direct that the assessment be referred back to the respondent to be dealt with in accordance with these reasons. The appellant is entitled to its costs in the Exchequer Court and in this Court.

Appeal dismissed with costs, Cartwright J. dissenting.

Solicitors for the appellant: Davis, Hossie, Campbell, Brazier and McLorg, Vancouver.

Solicitor for the respondent: A. A. McGrory, Ottawa.

1959

*Feb. 11
Apr. 28

CAINE LUMBER COMPANY LIMITED ..... APPELLANT;

AND

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income tax—Capital cost allowance—Timber limit purchased by taxpayer in non-arm's-length transaction—Timber limit not operated by vendor—Whether "depreciable property"—The Income Tax Act, 1958 (Can.), c. 52, ss. 11, 17, 20.

In the course of his operations of a saw-mill and planing-mill, C purchased for $250 a timber limit on which he did no cutting and made no claim for capital cost allowance. In 1951 he sold the limit for $15,000 to the appellant company, a person, within the meaning of the Act, with whom he was not dealing at arm's-length. In 1952 the appellant cut timber on the limit and claimed a capital cost allowance which was calculated on the price of $15,000 paid to C. The minister reduced the allowance to an amount based on the cost

*PRESENT: Locke, Cartwright, Fauteux, Abbott and Martland JJ

of the limit to C plus the expenditures made by him upon the limit. The appellant contended that since no timber had been cut by the vendor the limit did not become "depreciable property" as defined by s. 20(3)(*a*) of the *Income Tax Act* until operations were commenced on it in 1952. The Income Tax Appeal Board ruled in favour of the appellant, but this judgment was reversed by the Exchequer Court.

Held: The appeal of the taxpayer should be dismissed. The minister had properly used the cost of the limit to the vendor as the basis for determining the capital cost allowance to which the appellant was entitled.

Per curiam: The expression "depreciable property of a taxpayer" is defined in s. 20(3)(*a*), but the words "depreciable property", standing alone, are not defined anywhere in the Act. Consequently, the words "depreciable property" in s. 20(2)(*a*) must be construed without the assistance of a statutory definition, and they clearly refer to property such as a timber limit, the value of which depreciates as the timber is cut.

Per Cartwright and Martland JJ.: The result would be the same even if the definition of "depreciable property of a taxpayer" in s. 20(3)(*a*) were applied to construe the words "depreciable property" in s. 20(2)(*a*), as the latter section applied if the property constituted depreciable property vested in the taxpayer who claimed the allowance, irrespective of whether or not the property was "depreciable property" for the vendor from whom the taxpayer acquired it by a transaction not at arm's-length.

APPEAL from a judgment of Dumoulin J. of the Exchequer Court of Canada[1], reversing a judgment of the Income Tax Appeal Board.

J. L. Lawrence, for the appellant.

W. R. Jackett, Q.C., F. J. Cross, and *G. W. Ainslie,* for the respondent.

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

LOCKE J.:—This is an appeal from a judgment of Dumoulin J. delivered in the Exchequer Court[1] by which a judgment of the Income Tax Appeal Board, allowing the appeal of present appellant from a ruling of the Minister, was set aside and the assessment restored.

The appellant is a lumber manufacturer and during the taxation year 1952 carried on its business at Prince George, B.C.

[1] [1958] Ex. C.R. 216, [1958] C.T.C. 132, 58 D.T.C. 1086.

1959

CAINE LUMBER CO. LTD. v. MINISTER OF NATIONAL REVENUE

Locke J.

Martin S. Caine, prior to the year 1949, operated a saw mill and planing mill at Prince George and in the course of his operations purchased a timber limit for $250. The appellant was incorporated for the purpose of taking over his business and in the year 1951 Caine sold the limit to the company for the sum of $15,000. In the interval between the date of the purchase of the limit by Caine and the sale to the company, the former had expended on the property a sum of $2,678.60. Caine had never claimed or been allowed any capital cost allowance in connection with the property. The parties agreed for the purpose of the trial that the company was a person with whom Caine was not dealing at arms-length with the meaning of s. 17 of the *Income Tax Act,* 1948 (Can.), c. 52.

During the year in question the appellant cut timber on the limit and, under the provisions of the Act and the regulations made under it, was entitled to claim a capital cost allowance. This was claimed, calculated on the price paid by it to Caine. The Minister allowed the claim based on a purchase price of $2,928.60, being the aggregate of the amount paid by Caine for the limit and the amount expended on it by him while it was his property.

Section 11(1) provides that there may be deducted in computing the income of a taxpayer in a taxation year:

(*a*) such part of the capital cost to the taxpayer of property, or such amount in respect of the capital cost to the taxpayer of property, if any, as is allowed by regulation;

(*b*) such amount as an allowance in respect of an oil or gas well, mine or timber limit, if any, as is allowed to the taxpayer by regulation.

The regulations, in so far as they affect the present question, read as follows:

1100. (1) Under paragraph (*a*) of subsection (1) of section 11 of the Act, there is hereby allowed to a taxpayer, in computing his income from a business or property, as the case may be, deductions for each taxation year equal to

* * *

(*e*) such amount as he may claim not exceeding the amount calculated in accordance with Schedule C to these Regulations in respect of the capital cost to him of a timber limit or a right to cut timber from a limit.

Schedule C reads in part as follows:

1. For the purpose of paragraph (*e*) of subsection (1) of section 1100 of these Regulations, the amount that may be deducted in computing the income of a taxpayer for a taxation year in respect of a timber limit is the lesser of

(*a*) an amount computed on the basis of a rate (computed under section 2 of this Schedule) per cord or board foot cut in the taxation year, or

(*b*) the undepreciated capital cost to the taxpayer as of the end of the taxation year (before making any deduction under section 1100 of these Regulations for the taxation year) of the timber limit.

2. The rate for a taxation year is

(*a*) if the taxpayer has not been granted an allowance in respect of the limit for any previous year, an amount determined by dividing the capital cost of the limit to the taxpayer *minus* the residual value by the total quantity of timber in the limit (expressed in cords or board feet) as shown by a *bona fide* cruise.

The provisions of s. 11 of the Act and of the regulations above referred to are required in order to afford a means of properly ascertaining the trading profit of persons engaged in such businesses as mining and lumbering, where capital assets are depleted by the operations. Section 14(2) provides for other cases and declares that for the purpose of computing income the property described in an inventory shall be valued at its cost to the taxpayer or its fair market value, whichever is lower, or in such other manner as may be permitted by regulation.

Subsection 1 of s. 17 provides that where a taxpayer has purchased anything from a person with whom he was not dealing at arms-length at a price in excess of the fair market value, the fair market value thereof shall, for the purpose of computing the taxpayer's income of the business, be deemed to have been paid. Subsection (2) provides for the case where, in similar circumstances, the purchase is for a price less than the fair market value.

Section 20, with some slight differences which do not affect the present matter, first appeared in the *Income Tax Act* by an amendment made in 1949 (s. 7, c. 25). Subsection (1) as applicable to the year 1952 reads:

Where depreciable property of a taxpayer of a prescribed class has, in a taxation year, been disposed of and the proceeds of disposition exceed the undepreciated capital cost to him of depreciable property of that class immediately before the disposition, the lesser of

1959

CAINE LUMBER CO. LTD. v. MINISTER OF NATIONAL REVENUE

Locke J.

(a) the amount of the excess, or

(b) the amount that the excess would be if the property had been disposed of for the capital cost thereof to the taxpayer

shall be included in computing his income for the year.

Subsections (2) and (3), so far as they need be considered, read:

(2) Where depreciable property did, at any time after the commencement of 1949, belong to a person (hereinafter referred to as the original owner) and has, by one or more transactions between persons not dealing at arms-length, become vested in a taxpayer, the following rules are, notwithstanding section 17, applicable for the purposes of this section and regulations made under paragraph (a) of subsection (1) of section 11:

(a) the capital cost of the property to the taxpayer shall be deemed to be the amount that was the capital cost of the property to the original owner.

(b) where the capital cost of the property to the original owner exceeds the actual capital cost of the property to the taxpayer, the excess shall be deemed to have been allowed to the taxpayer in respect of the property under regulations made under paragraph (a) of subsection (1) of section 11 in computing income for taxation years before the acquisition thereof by the taxpayer.

(3) In this section and regulations made under paragraph (a) of subsection (1) of section 11,

(a) "depreciable property of a taxpayer" as of any time in a taxation year means property in respect of which the taxpayer has been allowed, or is entitled to, a deduction under regulations made under paragraph (a) of subsection (1) of section 11 in computing income for that or a previous taxation year.

The assessment complained of applied the provisions of subs. (2).

The case for the appellant is that the words "depreciable property" in the first line of subs. (2) should bear the meaning assigned to the expression "depreciable property of a taxpayer" in subs. (3). Accordingly, it is said that since Caine, during the time he owned the limit, did not cut any timber from it and was never allowed and never became entitled to a deduction under the regulations, s. 2 was improperly applied by the Minister in refusing to allow for depreciation based on the full cost of the limit to the company.

Counsel for the Minister agrees with the contention that the words "depreciable property" are to be given the meaning assigned to the expression "depreciable property of a taxpayer" in subs. (3).

The factum filed for the respondent contends that if the definition of the phrase "depreciable property of a taxpayer" is applied *mutatis mutandis* in regard to the expression "depreciable property" in subs. (2), the subsection would read:

> Where *the property in respect of which a taxpayer has been allowed, or is entitled to, a deduction under regulations made under paragraph (a) of subsection (1) of section 11 in computing income for that or a previous taxation year,* did, at any time after the commencement of 1949, belong to a person, (hereinafter referred to as the original owner), and has, by one or more transactions between persons not dealing at arm's length, become vested in the taxpayer, the following rules are, notwithstanding section 17, applicable for the purposes of this section and regulations made under paragraph (*a*) of subsection (1) of section: . . .

The expression depreciable property of a taxpayer, as it appears in subs. (3)(*a*) is contained in quotations and it is these words when used together that are defined. The words depreciable property, standing alone, are not defined anywhere in the Act. The expression depreciable property of a taxpayer appears in subs. (1) of s. 20 and in subs. 4(*g*) of that section and is to be there construed in accordance with the definition.

It will be seen that other expressions used in the section are also defined, namely, "disposition of property", "proceeds of disposition", "total depreciation allowed to a taxpayer" and "undepreciated capital cost to a taxpayer of depreciable property" in paragraphs (*b*), (*c*), (*d*) and (*e*) of subs. (3). Since the words "depreciable property of a taxpayer" do not appear in subs. (2), subs. (3)(*a*) does not apply.

The words "depreciable property" in subs. (2) are accordingly, in my opinion, to be construed without the assistance of a statutory definition. The words clearly refer to property such as a timber limit, the value of which depreciates as the timber is cut and, as the operation of s. 17 is excluded, the assessment complained of was properly made.

I would dismiss this appeal with costs.

The judgment of Cartwright and Martland JJ. was delivered by

MARTLAND J.:—I agree with the conclusions of my brother Locke and merely wish to add that, in my opinion, the result of this appeal would be the same even if the

1959

CAINE LUMBER CO. LTD. v. MINISTER OF NATIONAL REVENUE

Martland J.

definition of "depreciable property of a taxpayer" in subs. (3) of s. 20 of the *Income Tax Act* were to be applied in construing the meaning of the words "depreciable property" in subs. (2) of that section. It seems to me that subs. (2) applies if the property in question constitutes depreciable property vested in the taxpayer who claims the allowance provided under s. 11(1)(*b*), irrespective of whether or not the property was "depreciable property" in the hands of the person from whom the taxpayer acquired it by a transaction not at arm's length.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: Wilson, King & Fretwell, Vancouver.

Solicitor for the respondent: A. A. McGrory, Ottawa.

1959

*Mar. 2
Apr. 28

WILLIAM EWART BANNERMAN .....APPELLANT;

AND

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income tax—Company funds diverted by president—Legal, telephone and travelling expenses paid by other shareholder to obtain winding-up order—Whether deductible from shareholder's income—The Income Tax Act, 1948 (Can.), c. 52, ss. 2, 3, 4, 12, 81.

Some years ago, the appellant formed, with another man, a private company each of them acquiring half of the company's issued shares. The appellant's associate was appointed president and had the deciding vote. In 1951, the appellant discovered that the president had, during the past few years, converted to his own use a very large amount of the company's funds. The president undertook to make restitution but later took the position that he owed nothing to the company or to the appellant. He refused also to approve payment by the company for rental of a property of the appellant which the company was occupying. The appellant obtained a winding-up order after the president had refused to have the company placed in voluntary liquidation. A liquidator was appointed and subsequently the liquidator, the president, and the appellant agreed to submit certain

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

questions of accounting to arbitration. The arbitrators determined the amount owed by the president to the liquidator and the rental owed by the liquidator to the appellant.

The appellant sought to deduct from his 1952 income the legal expenses (solicitor's fees plus travelling and telephone expenses) incurred by him in securing the winding-up order. He contended that part of the expenses had been incurred for the purpose of earning rental income from his property and part of the expenses for the purpose of earning income from his shares in the company. The minister disallowed the deductions and this decision was affirmed by the Income Tax Appeal Board and the Exchequer Court.

Held: The appellant was not entitled to the deduction claimed.

The money spent by him to secure the winding-up order was not an expense incurred for the purpose of earning income from his rented property or from his shares in the company. As decided by the Exchequer Court, there was nothing to prevent the appellant from bringing an action to recover the rent. The purpose of the winding-up proceedings was to remove the president from his position of control in the company. As also decided by the Exchequer Court, a distribution under s. 81(1) of the Act was not inevitable and the receipt by the appellant of moneys "deemed to be a dividend" was very unlikely.

APPEAL from a judgment of Kearney J. of the Exchequer Court of Canada[1], affirming a decision of the Income Tax Appeal Board. Appeal dismissed.

J. A. Ogilvy, Q.C., and *A. J. Campbell, Q.C.*, for the appellant.

L. Lalande, Q.C., and *J. M. Poulin*, for the respondent.

The judgment of the Court was delivered by

THE CHIEF JUSTICE:—This is an appeal by William E. Bannerman against a decision of the Exchequer Court[1] affirming the judgment of the Income Tax Appeal Board which had dismissed his appeal to it from the assessment by the Minister of National Revenue for income tax with respect to the income of the appellant for the year 1952. There is no dispute as to the items shown by the appellant in his return as receipts but the question is as to $13,357.06 claimed by him as a deduction on the ground that the items comprising that sum fall within the exception in s. 12(1)(*a*) of the *Income Tax Act*, R.S.C. 1952, c. 148.

[1] [1957] Ex. C.R. 367, [1957] C.T.C. 375, 57 D.T.C. 1249.

1959

BANNERMAN v. MINISTER OF NATIONAL REVENUE

Kerwin C.J.

By s. 2 of that Act an income tax is to be paid upon the taxable income for each taxation year of every person resident in Canada at any time in the year. Sections 3 and 4 provide:

3. The income of a taxpayer for a taxation year for the purposes of this Part is his income for the year from all sources inside or outside Canada and, without restricting the generality of the foregoing, includes income for the year from all

(*a*) businesses,

(*b*) property, and

(*c*) offices and employments.

4. Subject to the other provisions of this Part, income for a taxation year from a business or property is the profit therefrom for the year.

Section 12(1)(*a*) and (*b*) enact:

12. (1) In computing income, no deduction shall be made in respect of

(*a*) an outlay or expense except to the extent that it was made or incurred by the taxpayer for the purpose of gaining or producing income from property or a business of the taxpayer,

(*b*) an outlay, loss or replacement of capital, a payment on account of capital or an allowance in respect of depreciation, obsolescence or depletion except as expressly permitted by this Part.

These are the only sections requiring consideration as there is no extensive description of "income" such as was found in the *Income War Tax Act*. In view of the disappearance of what was s. 6:

6. In computing the amount of the profits or gains to be assessed, a deduction shall not be allowed in respect of (*a*) disbursements or expenses not wholly, exclusively and necessarily laid out or expended for the purpose of earning the income

many of the decisions under that Act are inapplicable. However, this Court held in *Riedle Brewery Ltd. v. The Minister of National Revenue*[1], that a certain degree of latitude must be allowed in determining the question whether the disbursements or expenses were laid out or expended for the purpose of earning the income, *i.e.*, with the object and intent that they should earn the particular gross income reported for the taxation period. Under s. 12(1)(*a*) of the present Act it is sufficient that an outlay be made or expense incurred with the object or intention that it should earn income, but since in one sense it might be said that almost every outlay or expense was made or incurred for that purpose, a line must be drawn in the individual case depending upon the circumstances and bearing in mind the provisions of s. 12(1)(*b*).

[1] [1939] S.C.R. 253, 3 D.L.R. 436.

It might first be noticed that in 1952 the appellant was not engaged in any business on his own account but was a salaried employee, *i.e.*, vice-president and assistant general manager of Page-Hersey Tubes, Limited. With his income tax return for 1952 the appellant sent the District Taxation Office a letter, dated April 27, 1953, reading as follows:

> From my investment dividend income from Canadian Corporations I have deducted expenses which I have paid out of that income to protect my interests in the income of another Canadian Company, whose income was being fraudulently dissipated by the operating head of that Company, and who, because of such action and expense on my part, has now been removed by Court Order from such position.
>
> The following is the make up of the amount deducted.
>
> | | |
> |---|---|
> | Legal expense | $10,000.00 |
> | Long distance Telephone expense | 340.00 |
> | Travelling expense | 3,016.26 |
> | | $13,357.06 |
>
> Upon your request I shall be pleased to furnish details and receipted bills, and such further information as you may require.

The "Canadian Company" referred to in this letter is Concrete Column Clamps Limited, which was incorporated some years ago under the *Dominion Companies Act*. At first the issued capital was $80,000, one half of which was contributed by the appellant and the other half by one Dominique Vocisano. It was taxed as a family corporation and dividends were paid in 1938, 1939 and 1940. No dividends were paid later and therefore none were received by the appellant from it in 1952, although his holdings had increased considerably in value.

Vocisano managed the affairs of the company and while he and the appellant had an equal investment, the former was president and had a casting vote as shareholder and director. In July 1951, the appellant, as a result of information divulged by investigators employed by the Department of National Revenue, became aware that during the years 1941 to 1950 inclusive Vocisano had converted to his own use a very large amount of the funds of the company. At first Vocisano undertook to settle the tax liability of the company and to arrange all outstanding matters, but he subsequently took the position that he owed nothing to the company or to Bannerman. He did pay a substantial sum as taxes owing by the company.

1959

BANNERMAN v. MINISTER OF NATIONAL REVENUE

Kerwin C.J.

The appellant was advised to have the company placed in voluntary liquidation but his efforts in that direction were defeated by Vocisano's casting vote. The appellant then took proceedings to have the company wound up on the ground that it was just and equitable so to do and after a trial lasting about thirteen days Mr. Justice Batshaw ordered the company wound up and appointed Harold J. Inns as liquidator.

Subsequent thereto Vocisano and the appellant agreed to submit to arbitration an accounting between the company and Vocisano and between the company and Bannerman. The award of the arbitrators was filed as an exhibit in this case in the Exchequer Court. At pp. 165 and 168 of the record are found references by the arbitrators to "padded expenses" recorded in the books of the company. At p. 165 it is stated "both Mr. Vocisano and Mr. Bannerman have admitted that it was their practice over a number of years to 'pad' the gratuities account in the company's records and to split between themselves the excess of the amount paid by the company to Mr. Vocisano over the amount said to have been actually disbursed by him" and at p. 168, that the appellant received from Vocisano, other than in repayment of loans, sums totalling $103,554.50, included in which were:

Bonds received by Mr. Bannerman shortly after he had made a cash subscription of $25,000.00 for capital stock	$25,000.00
Bonds and cash received by Mr. Bannerman in 1951 and said to represent the division between himself and Mr. Vocisano of the excess of the proceeds of three cheques over gratuities alleged to have been paid by Mr. Vocisano	6,000.00

The arbitrators found that these two payments were made by Vocisano to Bannerman out of revenues of the company diverted by the former and they accordingly held the appellant accountable to the liquidator for the total of these two sums, $31,000, and gave Vocisano credit for a corresponding sum in his accounting with the liquidator. The arbitrators also found that the liquidator owed Bannerman $15,065.67 for rent of a certain property in Toronto owned by Bannerman and occupied by the company.

The question of damages alleged to have been suffered by the company as a result of Vocisano's actions was removed from those matters to be considered by the

arbitrators. During the pendency of the arbitration proceedings an action was instituted by the liquidator against Vocisano to recover $2,000,000 as such damages. The judgment of Mr. Justice Montpetit in that action is filed in these proceedings. We were advised that each party appealed to the Court of Appeal for Quebec and that the judgments rendered by that Court have been appealed to this Court.

Reference has been made to the arbitration and to the winding-up proceedings because they indicate that the expenses claimed by the appellant as a deduction from his income tax for the year 1952 were not made for the purpose of earning income from his property, *i.e.*, his shares in the company. As to the claim that part of the $13,357.06 was incurred for the purpose of Bannerman securing the rent, it is significant that in his letter of April 27, 1953, quoted above, the only suggestion advanced is that he paid the money "to protect my interests in the income of another Canadian Company". I agree with the learned Judge of the Exchequer Court that there was nothing to prevent the appellant bringing an action to recover the rent. It is quite true that if some other proceedings were taken that had the same result that would suffice so long as the purpose of earning income could be deduced. Furthermore, as to all the items, a careful perusal of the record satisfies me that the appellant's action in taking the winding-up proceedings was to remove Vocisano from the position he occupied in the company's affairs by reason of his casting vote. The extracts quoted above from the exhibits filed in this case indicate that the appellant definitely had in mind throughout a long period the question of income tax. Section 81(1) of the *Income Tax Act* provides:

> 81. (1) Where funds or property of a corporation have, at a time when the corporation had undistributed income on hand, been distributed or otherwise appropriated in any manner whatsoever to or for the benefit of one or more of its shareholders on the winding-up, discontinuance or reorganization of its business, a dividend shall be deemed to have been received at that time by each shareholder equal to the lesser of
>
> (*a*) the amount or value of the funds or property so distributed or appropriated to him, or
>
> (*b*) his portion of the undistributed income then on hand.

1959

BANNERMAN v. MINISTER OF NATIONAL REVENUE

Kerwin C.J.

I also agree with the learned trial judge that a distribution under that section will not inevitably take place and that the receipt by the appellant of monies "deemed to be a dividend" is very unlikely. Under all the circumstances the money paid out by the appellant totalling $13,357.06 and which includes a payment on account of $10,000 for legal fees, the balance being travelling and telephoning expenses, is really an outlay of capital under s. 12(1)(*b*) of the *Income Tax Act*.

For these reasons the appeal should be dismissed with costs.

Appeal dismissed with costs.

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

Attorney for the respondent: A. A. McGrory, Ottawa.

1959

*Feb. 17
Apr. 28

REGINALD HAYES .....APPELLANT;

AND

MAUDE EDWARDS MAYHOOD, Executrix of the Will of John Wellington Hayes, Deceased (*Applicant*) } RESPONDENT;

AND

WESTERN LEASEHOLDS LIMITED ...RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Wills—Trust estates—Oil lease granted by executrix approved by Court—Opposition by beneficiary of 1/28 interest in minerals—Whether delay in administration—Whether oil lease a lease of real property—The Devolution of Real Property Act, R.S.A. 1955, c. 83—The Land Titles Act Clarification Act, 1956 (Alta.), c. 26.

The testator H died in 1938 and his executrix granted an oil lease to W.L. Co. in 1957. The Court approved the granting of the lease. The appellant, a beneficiary with a 1/28 interest in the minerals and who opposed the application for approval of the lease, appealed to the Court of Appeal where W.L. Co. was added as a party. The Court of Appeal dismissed the appeal and the beneficiary appealed to this Court. He contended that (1) the executrix had ceased to act as an executrix for

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

lapse of time, (2) neither s. 11 or s. 14 of *The Devolution of Real Property Act* empowered the execution of such a document as it was neither a sale of real property or a lease of real property, and (3) the agreement was not in the interests of the estate.

Held: The appeal should be dismissed.

(1) The executrix was a personal representative of the deceased within the definition of *The Devolution of Real Property Act,* and nothing in that statute precluded her from making the application at the time she did. The trial judge had the power to make the order. Furthermore, the registrar could, under s. 55 of *The Land Titles Act,* R.S.A. 1955, c. 170, have refused to accept a transfer to the individual beneficiaries of their respective undivided 1/28 interests in the mineral rights as being less than 1/20.

(2) In view of s. 2 of *The Land Titles Act Clarification Act,* the agreement was a lease within the meaning of *The Land Titles Act* as it was a document of the kind defined in this section and related to lands for which a certificate of title had been granted under *The Land Titles Act.* The word "lease" is not defined in *The Devolution of Real Property Act,* but when the word is used in s. 14 of that Act it must have been intended to include in its application leases of real property under *The Land Titles Act.* If the meaning of the word in s. 14 is ambiguous then the two statutes are in *pari materia* and it is proper to look at the subsequent legislation to see what is the proper construction to put upon the earlier statute. The lower Court had, therefore, the authority to approve the agreement as being a lease of real property.

(3) This Court had no jurisdiction to deal with this appeal in so far as it related to the manner in which the lower Court exercised the discretion conferred upon it by s. 14.

APPEAL from a judgment of the Appellate Division of the Supreme Court of Alberta, affirming a judgment of Egbert J. Appeal dismissed.

E. S. Watkins, for the appellant.

K. E. Eaton, for the respondent Mayhood.

J. R. McColough, for the respondent Western Leaseholds Ltd.

The judgment of the Court was delivered by:

MARTLAND J.:—By his will, dated June 26, 1937, John Wellington Hayes devised and bequeathed all petroleum and natural gas rights possessed by him, or in which he had an interest, at the time of his death, as to a one-quarter share thereof to Frederick L. Mayhood, as to a one-quarter share thereof to eight named beneficiaries (nephews and nieces of the testator) of whom the appellant was one, and as to the remaining one-half share in trust for Gertrude

1959

HAYES v. MAYHOOD et al.

Martland J.

Evelyn Mattern (now Gertrude Evelyn Crosby). The testator died on February 9, 1938. One of the eight named beneficiaries had predeceased him and one died following his death.

Frederick L. Mayhood was the executor of the estate. He died on August 25, 1954, and the respondent Maude Edwards Mayhood, his widow, is his executrix and the sole beneficiary of his estate. Administration of the estate of John Wellington Hayes had been completed prior to the death of Frederick L. Mayhood, except as to certain mineral rights which he held; namely, all petroleum and natural gas and the right to work the same within, upon or under the North Half of Section Fifteen (15) in Township Twenty-five (25) Range One (1) West of the Fifth Meridian in the Province of Alberta, containing Three Hundred and Twenty (320) acres more or less; all mines and minerals and the right to work the same within, upon or under the North East Quarter of Section Sixteen (16) in Township Twenty-five (25) Range One (1) West of the Fifth Meridian in the Province of Alberta, containing One Hundred and Sixty (160) acres more or less, excepting thereout 4.95 acres for a roadway; all mines and minerals other than gold and silver within, upon or under the said 4.95 acres previously mentioned and all petroleum and natural gas and the right to work the same within, upon or under Blocks A and B according to a plan of record in the South Alberta Land Registration District as Calgary 2760-A.K.

With a view to realizing the only assets of the estate unadministered, the respondent executrix, on June 24, 1957, caused her solicitors to write to ten major oil companies, requesting offers to lease these mineral rights. Two offers were received. One was an offer to lease the mineral rights in all the lands for ten years, at an initial bonus, including first year's rental, of $5 per acre. The other offer, made by the respondent Western Leaseholds Ltd., related only to the North Half of Section 15 and the North East Quarter of Section 16, Township 25, Range 1, West of the Fifth Meridian, and proposed a ten-year lease, at an initial bonus and first year's rental of $25 per acre. This offer was dated August 5, 1957, and was open for acceptance only until

August 19, 1957. Following the receipt of this offer, the respondent executrix had made efforts to obtain other offers, but without success.

The respondent executrix submitted this offer to Mrs. Crosby, who approved of it, and she herself also approved it. Between them they held a 75 per cent. interest in these mineral rights.

On August 19, 1957, as executrix of the will of John Wellington Hayes, deceased, she accepted the offer of the respondent company, subject to her securing approval by the Court under the provisions of *The Devolution of Real Property Act*, R.S.A. 1955, c. 83.

Application for approval of the proposed petroleum and natural gas lease to the respondent company was made before Egbert J. on September 30, 1957, and approval was granted. The application was opposed by the appellant, who is entitled to a 1/28 interest in the minerals involved. A petroleum and natural gas lease from the respondent executrix to the respondent company was executed, dated September 30, 1957, relating to the petroleum and natural gas in the lands, comprising some 480 acres. It was for a term of ten years and so long thereafter as the leased substances or any of them are being produced from the leased lands.

The lease required operations for the drilling of a well to commence within one year from its date, but subject to postponement for one year by payment of the sum of $480. Further annual postponements could be obtained from time to time by like payments. The lease contained provision for its termination after the drilling of a dry well, unless further drilling was effected or delay rental was paid. Provision was made for the payment of a 12½ per cent. royalty in respect of the current market value at the well of petroleum oil produced, saved and marketed from the lands and for a 12½ per cent. royalty in respect of gas or other products obtained from the lands. The lease contained provisions for the payment of taxes, for the surrender of the lease and other terms.

The appellant appealed from the order of Egbert J. to the Appellate Division of the Supreme Court of Alberta.

1959

HAYES
v.
MAYHOOD
et al.

Martland J.

The respondent company was added as a party to the proceedings prior to the argument of that appeal, in which it participated. The appeal, by a majority of four to one, was dismissed from the bench. The present appeal is from this judgment of the Appellate Division.

Three grounds of appeal were argued on behalf of the appellant, as follows:

1. That the respondent executrix had been in breach of her duty, under *The Devolution of Real Property Act,* to vest the mineral rights in question in the devisees in undivided shares and, in consequence, that at the time she executed the petroleum and natural gas lease to the respondent company she was only a bare trustee of the mineral rights and had no power to dispose of them save by way of a transfer to the devisees.

2. That *The Devolution of Real Property Act* did not empower the execution of a document such as she executed, as it was neither a sale of real property, pursuant to s. 11 of that Act, nor a lease of real property, pursuant to s. 14 of that Act.

3. That the agreement made with the respondent company was not in the interests and to the advantage of the estate and the persons beneficially interested therein.

The relevant provisions of *The Devolution of Real Property Act* are as follows:

2. In this Act,

(*a*) "Court means the Supreme Court of Alberta, or a judge thereof;

* * *

(*c*) "personal representative" means the executor, original or by representation, or administrator for the time being of a deceased person.

3. (1) Real property in which a deceased person was entitled to an interest not ceasing on his death

(*a*) on his death, notwithstanding any testamentary disposition, devolves upon and becomes vested in his personal representative from time to time as if it were personal property vesting in him, and

(*b*) shall be dealt with and distributed by his personal representative as personal estate.

* * *

(3) The personal representative is the representative of the deceased in regard to his real property to which he was entitled for an interest not ceasing on his death as well as in regard to his personal property.

* * *

4. Subject to the powers, rights, duties and liabilities hereinafter mentioned, the personal representative of a deceased person holds the real property as trustee for the persons by law beneficially entitled thereto, and those persons have the same right to require a transfer of real property as persons beneficially entitled to personal property have to require a transfer of such personal property.

* * *

9. (1) At any time after the date of grant of probate or letters of administration, the personal representative may convey the real property to a person entitled thereto, and may make the conveyance either subject to a charge for the payment of money that the personal representative is liable to pay, or without any such charge.

* * *

(3) At any time after the expiration of one year from the date of grant of probate or of letters of administration, if the personal representative has failed when requested by the person entitled to any real property, to convey the real property to that person, the Court if it thinks fit, on the application of that person and after notice to the personal representative, may order that the conveyance be made, and may in default make an order vesting the real property in that person as fully and completely as might have been done by a conveyance thereof from the personal representative.

(4) If, after the expiration of one year, the personal representative has failed, with respect to the real property or a portion thereof, either to convey it to a person entitled thereto or to sell and dispose of it, the Court on the application of a person beneficially interested, may order that the real property or portion be sold on such terms and within such period as appears reasonable, and on the failure of the personal representative to comply with the order may direct a sale of the real property or portion upon such terms of cash or credit, or partly one and partly the other, as is deemed advisable.

* * *

11. (1) Subject to the provisions hereinafter contained, no sale of real property for the purpose of distribution only is valid as respects any person beneficially interested, unless that person concurs therein.

(2) Where, in the sale of real property

(*a*) a mentally incompetent person is beneficially interested,

(*b*) adult beneficiaries do not concur in the sale,

(*c*) under a will there are contingent interests or interests not yet vested, or

(*d*) the persons who might be beneficiaries are not yet ascertained,

the Court upon proof satisfactory to it that the sale is in the interest and to the advantage of the estate of the deceased and the persons beneficially interested therein, may approve the sale, and any sale so approved is valid as respects the contingent interests and interests not yet vested, and is binding upon the mentally incompetent person, non-concurring persons and beneficiaries not yet ascertained.

(3) If an adult beneficiary accepts a share of the purchase money, knowing it to be such, he shall be deemed to have concurred in the sale.

* * *

1959

HAYES v. MAYHOOD et al.

Martland J.

14. (1) The personal representative may, from time to time, subject to the provisions of any will affecting the property, do any one or more of the following:

(a) lease the real property or a part thereof for a term of not more than one year;

(b) lease the real property or a part thereof, with the approval of the Court, for a longer term;

(c) raise money by way of mortgage of the real property or a part thereof, for the payment of debts, or for payment of taxes on the real property to be mortgaged, and, with the approval of the Court, for the payment of other taxes, the erection, repair, improvement or completion of buildings, or the improvement of lands, or for any other purpose beneficial to the estate.

(2) Where infants or mentally incompetent persons are interested, the approvals or order required by sections 11 and 12 in case of a sale are required in the case of a mortgage, under clause (c) of subsection (1), for payment of debts or payment of taxes on the real property to be mortgaged.

With respect to the first point, the argument was that the mineral rights in question had remained in the hands of the executor of the estate for nearly twenty years; that they should have been vested in the beneficiaries during that time and that the beneficiaries could then have dealt with their own interests as they thought fit. It was contended that the respondent executrix should not have been permitted to compel the concurrence of a dissenting beneficiary in the proposed disposition of the mineral rights. It was also submitted that, by virtue of the lapse of time, the respondent executrix had ceased to act as an executrix and was merely a bare trustee of the mineral rights on behalf of the beneficiaries.

I do not accept the contention that the respondent executrix had ceased to act as an executrix by reason of the lapse of time. I have examined the authorities cited by the appellant and, in my view, they do not support this contention. The respondent executrix was a personal representative of the deceased, within the definition of *The Devolution of Real Property Act,* and there is nothing in that statute which precluded her from making the application which she did make at the time she did.

It was open to the judge hearing the application to consider whether the delay in administration was such that the order should not be granted, but he elected, as I think he had the power to do, to make the order.

I will, when considering the third head of argument, discuss the question as to whether there should be any interference at this stage with the discretion which he exercised in making that order.

It should, however, be noted, in relation to the submission that there ought to have been a transfer of the mineral rights in undivided shares to the various beneficiaries, that the seven beneficiaries of a one-quarter interest were each thereby entitled to a 1/28 interest in the mineral rights. Section 55 of *The Land Titles Act,* R.S.A. 1955, c. 170, empowers the registrar to refuse to accept for registration any instrument transferring an undivided interest in a parcel of land containing any mines and minerals or any mineral and being less than an undivided 1/20 of the whole interest in the mines and minerals or in any mineral contained in that parcel of land. The Registrar could, therefore, have refused to accept a transfer to the individual beneficiaries (of whom the appellant was one) of their respective undivided 1/28 interests in the mineral rights in question.

I turn now to the second argument of the appellant. It was contended that neither under s. 11 nor s. 14 of *The Devolution of Real Property Act* could an order be made approving the agreement between the respondents, because it constituted neither a sale of real property nor a lease of real property.

Reference was made to the decision of this Court in *Berkheiser v. Berkheiser*[1], in which consideration was given to the legal nature of the interest created by a petroleum and natural gas lease similar to the one in question here. In that case Rand and Cartwright JJ. held that the interest created was either a *profit à prendre* or an irrevocable licence to search for and win the substances named. Kellock, Locke and Nolan JJ. held that it was to be construed as a grant of a *profit à prendre* for an uncertain term, which might be brought to an end upon the happening of any of the various contingencies for which the instrument provided.

[1] [1957] S.C.R. 387, 7 D.L.R. (2d) 721.

1959

HAYES v. MAYHOOD et al.

Martland J.

That was an appeal from the Court of Appeal in Saskatchewan. That Court had previously held, in *In re Heier Estate*[1], that a "lease" of petroleum and natural gas rights was not a lease within the meaning of s. 15(1) of *The Devolution of Real Property Act* of Saskatchewan, which is in similar terms to s. 14(1) of the Alberta Act.

The position in Alberta is, I think, different, however, in view of the enactment in 1956 of *The Land Titles Act Clarification Act,* 1956 (Alta.), c. 26, s. 2 of which provides as follows:

> 2. It is hereby declared that the term "lease" as used in *The Land Titles Act* and any Act for which *The Land Titles Act* was substituted includes, and shall be deemed to have included, an agreement whereby an owner of any estate or interest in any minerals within, upon or under any land for which a certificate of title has been granted under *The Land Titles Act* or any Act for which *The Land Titles Act* was substituted, demises or grants or purports to demise or grant to another person a right to take or remove any such minerals for a term certain or for a term certain coupled with a right thereafter to remove any such minerals so long as the same are being produced from the land within, upon or under which such minerals are situate.

In view of this provision, it is clear that the agreement in question here is a lease within the meaning of *The Land Titles Act,* as it is a document of the kind defined in this section and relates to lands for which a certificate of title has been granted under *The Land Titles Act.*

The word "lease" is not defined in *The Devolution of Real Property Act,* but I think that when the word is used in s. 14 of that Act it must have been intended to include in its application leases of real property under *The Land Titles Act.*

If the meaning of the word, as used in s. 14 of *The Devolution of Real Property Act,* is ambiguous, then I think that the two statutes are in *pari materia,* both having provisions relating to real property in the Province of Alberta. That being so, it is proper to look at the subsequent legislation to see what is the proper construction to put upon the earlier statute: *Cape Brandy Syndicate v.*

[1] (1952) 7 W.W.R. (N.S.) 385.

Inland Revenue Commissioners[1], cited with approval by Lord Buckmaster in *Ormond Investment Company, Limited v. Betts*[2].

I am, therefore, of the opinion that the Court had the authority, under s. 14 of *The Devolution of Real Property Act,* to approve the agreement made between the respondents as being a lease of real property. It is not necessary for me to consider whether the agreement in question constituted a sale of real property within the meaning of s. 11 of that Act, as was contended by the respondent company.

The third point relates not to the jurisdiction of the Court to make the order which was made, but as to whether, in the circumstances, it should have been made.

Counsel for the respondent company contends that this Court had no jurisdiction to hear an appeal in relation to this point, in view of the provisions of s. 44 of the *Supreme Court Act,* which read as follows:

> 44. (1) No appeal lies to the Supreme Court from a judgment or order made in the exercise of judicial discretion except in proceedings in the nature of a suit or proceeding in equity originating elsewhere than in the Province of Quebec and except in *mandamus* proceedings.
>
> (2) This section does not apply to an appeal under section 41.

Subsection (2) has no application in this case, as no leave to appeal was granted by this Court pursuant to s. 41 of the *Supreme Court Act.*

In my opinion the contention of the respondent company on this point is correct. Section 14 of *The Devolution of Real Property Act* empowers a personal representative, subject to the provisions of the will, to lease the real property or a part thereof for a term longer than one year with the approval of the Supreme Court of Alberta. That approval was granted by Egbert J. and his decision was sustained by the Appellate Division. For the reasons already given, I think the Supreme Court of Alberta had jurisdiction to grant the approval which was given. Section 14 does not provide any directions or rules in relation to the exercise of the jurisdiction thereby granted. The approval of a lease under that section is left entirely to the discretion of the Court. I do not think, therefore, that this Court has juris-

[1] [1921] 2 K.B. 403.
[2] [1928] A.C. 143 at 156.

1959

HAYES v. MAYHOOD et al.

Martland J.

diction to deal with this appeal in so far as it relates to the manner in which the Supreme Court of Alberta exercised the discretion conferred upon it by that section.

In my opinion the appeal should be dismissed. The appellant should pay to the respondent company its costs of this appeal. The respondent executrix, although represented, took no part in the appeal and took no position with respect to the points raised. For those reasons, I do not think she is entitled to costs on the present appeal as against the appellant, but she will be entitled to her costs in this Court out of the estate.

Appeal dismissed with costs.

Solicitors for the appellant: Tavender & Watkins, Calgary.

Solicitors for the applicant, respondent Mayhood: Mayhood & Cumming, Calgary.

Solicitors for the respondent Western Leaseholds Ltd.: Macleod, McDermid, Dixon, Burns, McColough, Love & Leitch, Calgary.

1959

*Mar. 16, 17, 18 Apr. 28

OMAR L. TURNEY and GLADYS M. TURNEY (*Defendants*) ..... APPELLANTS;

AND

FRED ZHILKA (*Plaintiff*) .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Real property—Sale of Land—Description of land—Whether uncertainty of description—No agreement on what to be sold and what to be retained—Whether contract enforceable—Condition that property be annexed by village and subdivision plan approved—Whether condition precedent—Whether right of waiver—The Statute of Frauds, R.S.O. 1950, c. 371.

By a contract of sale of land describing the property as "all and singular the land and not buildings", the vendors T were to retain certain buildings and surrounding land out of the 60-odd-acre parcel sold. The contract contained a proviso that "the property can be annexed to the Village . . . and a plan is approved by the Village Council for subdivision". The date for completion was fixed at "60 days after plans

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

are approved". Neither party undertook to fulfil this condition and neither reserved any power of waiver. The vendors repudiated the contract because the annexation condition had not been complied with. The purchaser sued for specific performance.

The action was maintained by the trial judge who found that the purchaser could waive the annexation condition as it was made for his benefit. Subsequently, on appeal to a single judge from a report of the Master to whom the trial judge had referred the matter of ascertaining the limits and description of the property, it was found that a reasonable amount of land to be retained by the vendors should be a 10-acre parcel. The Court of Appeal dismissed the appeal of the vendors.

Held: The appeal should be allowed and the action for specific performance dismissed.

The contract was not enforceable in view of s. 4 of *The Statute of Frauds*. The contract did not show what was intended to be sold and to be retained by the vendors and no parol evidence could cure this defect. The evidence made it quite clear that the parties never reached any agreement, oral or written, on the quantity or description of the land to be retained or conveyed.

The parties never agreed on the retention of the 10-acre parcel determined by the Court below, and the purchaser can only get specific performance if the parties have made an enforceable contract. They have not done so and the Court could not do it for them. The principle that uncertainty of description may sometimes be resolved by finding that one party has a right of election did not apply to this contract, which gave no such right of election.

The purchaser had no right to waive the annexation condition which was a true condition precedent—an external condition upon which the existence of the obligation depended. Until the event occurred, there was no right to performance on either side. The parties did not promise that it would occur, and there could be no breach until the event did occur.

APPEAL from a judgment of the Court of Appeal for Ontario[1], affirming a judgment of Spence J. Appeal allowed.

J. T. Weir, Q.C. and *J. M. Beatty,* for the defendants, appellants.

H. G. Steen, Q.C. and *W. S. Wigle,* for the plaintiff, respondent.

[1] [1956] O.W.N. 369, 815, 3 D.L.R. (2d) 5, 6 D.L.R. (2d) 223.

1959

TURNEY *et al.* v. ZHILKA

The judgment of the Court was delivered by:

JUDSON J.:—The first difficulty in this case arises from the description of the property contained in the offer to purchase made by the plaintiff Zhilka and accepted by the defendant Turney. The description was in these terms:

all and singular the land and not buildings situate on the East side of 5th Line west in the township of Toronto and known as 60 acres or more having frontage of about 2046 feet on 5th line more or less, by a depth of about .... feet, more or less (lot boundaries about as fenced), being part of west ½ lot 5 Con 5 west.

It is common ground that this description does not mean that the buildings are to be removed but that certain lands around the buildings are to be retained by the vendor, who assumed at the time when the contract was made that he had about 65 acres and that he could retain five acres around his buildings. Actually the vendor only owned 62.37 acres, as he discovered when he had a survey made. This shortage of land caused difficulty between the parties and when eventually the purchaser sued for specific performance, he defined his claim in the writ by metes and bounds in such a way that he left the vendor with only one and a half acres and a barn half on the land claimed by the purchaser and half on the land which the purchaser said the vendor might retain. The purchaser settled his own description with the surveyor and claimed 60.87 acres out of the total of 62.37 acres.

On this branch of the case the defence was non-compliance with s. 4 of *The Statute of Frauds*. If it had been intended to sell the whole of the lands owned by the vendor, the description in the contract would have been adequate. But the contract in this case does not show what is intended to be sold and what is intended to be retained by the vendor and no parol evidence can cure this defect because the admissibility of such evidence presupposes an existing agreement and sufficient certainty of description to enable the property to be identified once the surrounding facts are pointed to. These conditions do not exist here. There is not only lack of sufficient certainty of description but the evidence makes it quite clear that the parties never reached any agreement, oral or written, on the quantity or description of the land to be retained or the land to be conveyed.

The course taken by the litigation emphasizes these uncertainties. The trial judge decreed specific performance and referred it to the Local Master to ascertain "the exact limits and description of the property to be conveyed by the contract." The first order of the Court of Appeal directed the reference to proceed and reserved the final disposition of the appeal pending the outcome of the reference. However, the Local Master, in the following brief report, found that it was impossible to comply with the terms of the reference:

> 1. I find that on the evidence before me it is impossible to determine and state what is a reasonable amount of land immediately surrounding the buildings to be conveyed by the contract set forth in paragraph one of the said judgment.

On appeal to a single judge, the report was varied and a finding made that a reasonable amount of land enclosing the buildings would be a 10-acre parcel, which the order then proceeded to describe by metes and bounds. Following this order, the Court of Appeal[1] finally disposed of the matter and dismissed the appeal.

The reference to the Local Master was to ascertain the exact limits and description of the property to be conveyed. The report departs from this direction in stating that the Local Master is unable to determine what is a reasonable amount of land to be retained surrounding the buildings. It is apparent that the Local Master could not follow the order of reference and define the lands to be conveyed because there never was any agreement on this point. Therefore, what was referred to him as a problem of identification of the lands assumed to have been agreed upon by the parties is eventually solved by the imposition of what the Court considers to be reasonable terms, namely, the retention of a 10-acre parcel.

The reason why the judge, on appeal from the report, found 10 acres to be a reasonable amount of land to be retained was that *The Planning Act* provides that no vendor in the circumstances of a case such as this may convey

[1] [1956] O.W.N. 369, 815, 3 D.L.R. (2d) 5, 6 D.L.R (2d) 223.

1959

TURNEY *et al.* v. ZHILKA

Judson J.

unless the lands retained by him amount to 10 acres, or a plan of subdivision is approved. The parties never agreed on the retention of a 10-acre parcel around the buildings. The purchaser, however, is satisfied with his bargain and will accept the land minus this 10 acres and pay the full purchase price. But, on the other hand, he can only get specific performance if the parties have made an enforceable contract. They have not done so in this case and the Court cannot do it for them.

The purchaser sought to support his judgment on the principle that uncertainty of description may sometimes be resolved by finding that one party has a right of election, a right to choose the land to be retained or the land to be conveyed as the case may be. It is impossible to apply the principle to this contract, which gives no such right of election either expressly or by implication. The case against the defendant was not framed on this basis nor was the argument put forward until the case reached this Court.

The other defence pleaded was that the purchaser failed to comply with the following condition of the contract:

> Providing the property can be annexed to the Village of Streetsville and a plan is approved by the Village Council for subdivision.

The date for the completion of the sale is fixed with reference to the performance of this condition—"60 days after plans are approved". Neither party to the contract undertakes to fulfil this condition, and neither party reserves a power of waiver. The purchaser made some enquiries of the Village council but the evidence indicates that he made little or no progress and received little encouragement, and that the prospects of annexation were very remote. After the trouble arose over the quantity and description of the land, the purchaser purported to waive this condition on the ground that it was solely for his benefit and was severable, and sued immediately for specific performance without reference to the condition and the time for performance

fixed by the condition. The learned trial judge found that the condition was one introduced for the sole benefit of the purchaser and that he could waive it.

I have doubts whether this inference may be drawn from the evidence adduced in this case, but, in any event, the defence falls to be decided on broader grounds. The cases on which the judgment is founded are *Hawksley v. Outram*[1] and *Morrell v. Studd*[2]. In the first case a purchaser of a business stipulated in the contract of sale that he should have the right to carry on under the old name and that the vendors would not compete within a certain area. A dispute arose whether one of the vendors, who had signed the contract of sale under a power of attorney from another, had acted within his power. The purchaser then said that he would waive these rights and successfully sued for specific performance. In the second case, the contract provided that the purchaser should pay a certain sum on completion and the balance within two years. He also promised to secure the balance to the vendor's satisfaction. The purchaser raised difficulties about the performance of this promise, and the vendor said that he would waive it and take the purchaser's unsecured promise. It was held that he was entitled to do so. All that waiver means in these circumstances is that one party to a contract may forego a promised advantage or may dispense with part of the promised performance of the other party which is simply and solely for the benefit of the first party and is severable from the rest of the contract.

But here there is no right to be waived. The obligations under the contract, on both sides, depend upon a future uncertain event, the happening of which depends entirely on the will of a third party—the Village council. This is a true condition precedent—an external condition upon which the existence of the obligation depends. Until the

[1] [1892] 3 Ch. 359. [2] [1913] 2 Ch. 648.

1959

TURNEY *et al.* v. ZHILKA

Judson J.

event occurs there is no right to performance on either side. The parties have not promised that it will occur. In the absence of such a promise there can be no breach of contract until the event does occur. The purchaser now seeks to make the vendor liable on his promise to convey in spite of the non-performance of the condition and this to suit his own convenience only. This is not a case of renunciation or relinquishment of a right but rather an attempt by one party, without the consent of the other, to write a new contract. Waiver has often been referred to as a troublesome and uncertain term in the law but it does at least presuppose the existence of a right to be relinquished.

The defence to this action succeeds on both grounds that were pleaded. It is unnecessary to consider the third defence based on non-compliance with *The Planning Act* and I express no opinion on this.

The appeal should be allowed with costs both here and in all proceedings before the Court of Appeal. The action should be dismissed with costs, including the costs of the reference and the motion to vary the report.

Appeal allowed with costs.

Solicitors for the defendants, appellants: Bowyer, Beatty & Andrews, Brampton.

Solicitor for the plaintiff, respondent: L. A. Maldaver, Toronto.

THE CORPORATION OF THE TOWNSHIP OF WATERS (*Defendant*)	APPELLANT;	1959 Mar. 18, 19, 20 *Apr. 28

AND

THE INTERNATIONAL NICKEL COMPANY OF CANADA LIMITED (*Plaintiff*)	RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Taxation—Municipality—"Concentrator"—Assessment of an "iron ore recovery plant"—Whether exempt from assessment—Whether liable to business tax—The Assessment Act, R.S.O. 1950, c. 25, ss. 6, 33.

The function of the plant erected in the defendant municipality by the plaintiff company was to separate by a process of heat and leaching iron ore-bearing material from other elements such as sulphur, copper and nickel. At the completion of this process, the ore was in powder form and it was then compressed into pellets for sale to the industry. The iron ore-bearing material entering the plant had previously been separated, in another plant located 3½ miles away, from other minerals found in the ore as originally mined by the plaintiff.

The municipality sought to tax the plaintiff in respect of the plant for both land and business taxes. The trial judge held that the plaintiff company was not liable for either tax, and this judgment was affirmed by the Court of Appeal.

Held: The company was not liable to pay either tax.

The work done in the plant was concentration of materials and, therefore, the plant was a concentrator and was not assessable under s. 33(4) of *The Assessment Act*. The alternative contention that only concentrators situate upon mineral land were exempt under s. 33(4), could not be entertained. This was not a term of the exemption.

As to the business assessment under s. 6, nothing in the nature of manufacturing was carried on at the plant.

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

C. L. Dubin, Q.C., and *W. A. Inch*, for the defendant appellant.

T. T. Weir, Q.C. and *B. M. Osler, Q.C.*, for the plaintiff, respondent.

The judgment of the Court was delivered by

*PRESENT: Kerwin C.J. and Locke, Abbott, Martland and Judson JJ.

[1] [1958] O.R. 168, 12 D.L.R. (2d) 648.

1959

TOWNSHIP OF WATERS v. INTERNATIONAL NICKEL CO. OF CAN.

LOCKE J.:—This is an appeal from a judgment of the Court of Appeal for Ontario[1] which dismissed the appeal of the present appellant, the defendant in the action, from a judgment delivered by Wells J. at the trial. By that judgment it was declared that the buildings of the respondent company, situate on the property in question, are not assessable for taxation by the respondent, that the appellant is not liable for taxation by the respondent in respect of the said buildings, and directing the respondent to remove from its assessment roll for the years 1955 and 1956 the entries relating to the appellant of which notice of assessment had been given.

The questions to be decided turn upon the interpretation to be given to subs. (4) of s. 33 and cl. (*e*) of s. 6 of *The Assessment Act*, R.S.O. 1950, c. 24.

Subsection (4) reads:

> The buildings, plant and machinery in, on or under mineral land, and used mainly for obtaining minerals from the ground, or storing the same, and concentrators and sampling plant, and, subject to subsection 7, the minerals in, on or under such land shall not be assessable.

The facts to be considered in dealing with the matter are not in dispute. The respondent company is the owner of a number of mines in the Sudbury area and the principal metallic contents of the ore are nickel and copper. The ore as mined, after being broken into pieces some 4 to 6 inches in thickness, is taken to the respondent's plant at Copper Cliff for treatment. There the ore is crushed and ground to a powder and the nickel and copper content separated from the rock by a floatation process. The residue is then subjected to a magnetic treatment which results in the removal of further material, the main content of which is iron. This material which contains, in addition, small quantities of nickel and copper, sulphur and some waste rock, is then carried suspended in water a distance of some $3\frac{1}{2}$ miles to the ore reduction plant or concentrator which is the subject matter of the dispute. Some 30,000 to 40,000 tons of ore a day are brought to the works at Copper Cliff and approximately 1,000 tons of magnetic material, which is high in iron, is treated at the plant in Waters Township.

[1] [1958] O.R. 168, 12 D.L.R. (2d) 648.

At this plant the material is subjected to heat to drive off the sulphur content, which is treated as valueless, and to further heat and leaching to recover the nickel and copper which is sufficient in quantity to be of value and is sent elsewhere for further treatment. The waste rock, which constitutes approximately 5 per cent. of the material when it reaches the plant, is for the greater part removed and the remaining material which is after the removal of the moisture content in powder form is pelletized into small iron balls about an inch in diameter.

According to the evidence of Louis Renzoni, an engineer and metallurgist in the employ of the respondent company, who described the process, the material carried suspended in water from the plant at Copper Cliff has an iron content of 60 per cent. and, after the removal of the nickel, copper, sulphur and waste rock, this is raised to 68 per cent. In this form it is readily saleable to steel mills. Without the removal of the nickel, copper and sulphur it would be unsaleable. The process is one that has been developed by the respondent company and enables it to recover substantial quantities of iron from its ore which were formerly not extracted.

The contention of the appellant is that the plant in question is not a concentrator within the meaning of subs. (4) and is accordingly not exempted. It is further contended that upon the true construction of the subsection the concentrators which are exempted must be situate upon mineral land and it is said that there is no evidence that this is the case in the present matter.

There is no definition of the word "concentrator" in *The Assessment Act* and no help is to be obtained from the dictionary definitions, since the term is applied apparently to apparatus used for a variety of purposes other than mining. Thus, it is defined in the new Oxford Dictionary as an apparatus for concentrating solutions or other products of manufacture. As it relates to mining, the word is not descriptive of a machine or apparatus but rather of the buildings or plant in which the process known in mining as concentration is carried on. The question to be determined is as to whether, at this property, the process of concentration is carried on.

1959

TOWNSHIP OF WATERS v. INTERNATIONAL NICKEL CO. OF CAN.

Locke J.

Concentration, as it relates to mining, is defined in Webster's last edition as the improvement of ore by removing waste as by currents of water. In Funk and Wagnall's Dictionary it is defined in this sense as the removal of the less valuable parts of ore preparatory to smelting. As the subsection relates to mining and mining activities, evidence might properly have been received as to what is commonly understood by persons engaged in that business in Canada to be concentration *Unwin v. Hanson*[1], Lord Esher at 119; *Maxwell,* 10th ed., p. 54.

The case for the respondent is that the treatment of the material at the plant was simply a continuation of the process commenced at the Copper Cliff concentrator, the entire process being designed to recover the valuable metal contained in the ore by separating it from the waste. The nickel and copper had been removed by flotation at the Copper Cliff plant and the iron, with small quantities of nickel and copper, by the magnetic treatment from the residue. At the Waters Township plant the application of heat and the leaching process were merely further steps in the work of recovering the iron in a marketable form and removing from the material the sulphur, copper, nickel and most of the waste rock which contaminated the iron concentrates. Renzoni, who had been engaged for more than twenty years by the company in his professional capacity, considered that the entire process was that of concentration. In reply to a question in cross-examination, he said that the plant at Copper Cliff was commonly described as a concentrator and, as the evidence shows, the processes there carried on were, in relation to the iron bearing material, simply continued at the plant in question.

The learned trial judge expressed the view in the course of the cross-examination that the evidence of the witness should be confined to describing the procedure that was followed. However, later in the examination, in answer to a question from him as to the treatment to which the material was subjected at the plant, the witness said that in the result they had concentrated from 60 per cent. to 68 per cent. of iron. The witness was asked however, in re-examination, to say what the technical meaning of the

[1] [1891] 2 Q.B. 115.

word "concentrate" was, to which he replied that it was a material that falls short of being a pure material which has been concentrated from a more impure state and that, in other words, it is a material in the process of purification.

For the appellant, Henry Urquhart Ross, an assistant professor of metallurgy at the University of Toronto, was called. The witness expressed the opinion that while the work done at Copper Cliff was undoubtedly properly described as concentration, the work done at the plant in question should not be so described. While not disagreeing in any way with what had been said by Renzoni as to what was done at the plant, he was of the opinion that the application of heat during the process of the removal of the sulphur, since it worked a chemical change, was not properly a process of concentration and, speaking generally, said that the use of chemicals in the course of the recovery of ores was not to be considered as concentration. In my view of the evidence of this witness, which I have carefully considered, neither of these contentions survived the test of cross-examination. The heat applied for the purpose of eliminating the sulphur was a step taken to remove an impurity from the iron concentrate. The heat applied thereafter and the leaching were merely further steps taken to remove material which, while some of it was of value, was a contaminant in the iron ore and would have prevented its sale. The removal of the majority of the remaining rock waste was as to that material merely a continuation of what had been done at Copper Cliff.

In my opinion, the evidence supports the finding made at the trial that the work done in this plant was concentration of the material and, accordingly, the plant itself properly designated as a concentrator.

The passage from the judgment of Meredith C.J.O. in *Re McIntyre Porcupine Mines Ltd. and Morgan*[1], which has been referred to as being a definition of the word "concentrator" is rather a definition of the process of concentration and supports my conclusion as above stated.

[1] (1921), 49 O.L.R. 214 at 217, 62 D.L.R. 619.

1959

TOWNSHIP OF WATERS v. INTERNATIONAL NICKEL CO. OF CAN.

Locke J.

The appellant contends in the alternative that only concentrators situate upon mineral land are exempted by subs. (4). In my opinion, this is not a term of the exemption and I have come to this conclusion upon my consideration of the language of the subsection which I think to be clear. The buildings, plant and machinery in, on or under mineral land, referred to in the opening words of the subsection, are, as it states, those used mainly for obtaining minerals from the ground or storing them. These words would include the plant and machinery used underground for the recovery and removal of the ore to the surface and the necessary buildings situate upon the surface associated with such operations and which would usually be at or in the vicinity of the entrance to the shaft. Concentrators and sampling plants have nothing to do with these processes and the subsection treats them separately, and to give the language the suggested meaning would require to read into the section words that are not there. Both Wells J. and Roach J.A., who delivered the unanimous judgment of the Court of Appeal, reached this conclusion upon a consideration of the language of the subsection.

In the reasons for the judgment of the Court of Appeal it is said that assistance in interpreting subss. (4) is to be obtained by a consideration of subss. (5), (8) and (9) of s. 34. From the fact that it is said that the taxes to be computed on profits under subs. (5) are in lieu of taxes that would be computed on the assessment of tax items enumerated in subs. (4), were it not for the fact of their being exempted from assessment under subs. (4), it seems apparent that when the matter was argued before the Court of Appeal it was not drawn to the attention of that court that the municipality had received a payment under the regulations made under subs. (1) of s. 33(*a*) in respect of the years in question and, accordingly, by reason of the provisions of subs. (2) of that section, was prohibited from assessing or taxing the profits of any mine or mineral work under subss. (5) or (8) of s. 33. This being so, it would not appear that there could be double taxation under *The Assessment Act*. The respondent as the owner of a mine is liable to taxation under the provisions of subs. (4) of *The Mining Tax Act*, R.S.C. 1950, c. 237, but counsel for both

parties before us took the stand that under that section any profit arising from the operations in Waters Township are not affected. If this be right, it would not appear that any question of double taxation arises. I should also point out that what was decided in the case of the Township of *Tisdale v. Hollinger Consolidated Gold Mines Ltd.*[1], was that while the property in question was exempt from taxation under *The Assessment Act* the mining company was liable under the provisions of *The Mining Tax Act,* R.S.O. 1927, c. 28.

The remaining question is as to the liability of the respondent to business assessment under the provisions of s. 6 of *The Assessment Act* which, so far as it is necessary to consider the same, reads:

> (1) Irrespective of any assessment of land under this Act, every person occupying or using land for the purpose of, or in connection with, any business mentioned or described in this section shall be assessed for a sum to be called "business assessment" to be computed by reference to the assessed value of the land so occupied or used by him, as follows:—
>
> (*e*) Subject to clause j, every person carrying on the business of a manufacturer for a sum equal to 60 per cent of the assessed value, and a manufacturer shall not be liable to business assessment as a wholesale merchant by reason of his carrying on the business of selling by wholesale the goods of his own manufacture on such land.

The contention that anything in the nature of manufacturing is carried on at the plant in question appears to me to be quite without foundation. The process there carried out results in the separation of the iron, nickel and copper content of the concentrate from each other and from the waste rock and, so far as the iron concentrate is concerned, thereafter compacting it by partial fusion into small balls, a form in which it can be conveniently used by a manufacturer, in this case a steel mill. The situation is no different, in my opinion, than if the concentrate were shipped in powder form. The reason that it is not so shipped is that, in that form, it would not be usable in a blast furnace. In so far as the small quantities of nickel and copper recovered are concerned, it is shown that these were shipped either to the smelter or refinery of the respondent where the metal is after further treatment produced in a form in which it may be used by a manufacturer.

[1] [1931] O.R. 640, 4 D.L.R. 239; affirmed [1933] S.C.R. 321, 3 D.L.R. 15.

1959

TOWNSHIP OF WATERS v. INTERNATIONAL NICKEL CO. OF CAN.

Locke J.

These are the only issues which are raised by the pleadings in this action. I express no opinion on the question as to the liability of the respondent for any profits arising from the operations in Waters Township under the provisions of *The Mining Tax Act*.

I would dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitors for the defendant, appellant: Miller, Maki & Inch, Sudbury.

Solicitors for the plaintiff, respondent: Osler, Hoskin & Harcourt, Toronto.

1959

Feb. 11, 12
*Apr. 28

M. MOLNER (*Plaintiff*) .....APPELLANT;

AND

STANOLIND OIL & GAS COMPANY AND REMPEL CONSTRUCTION LIMITED AND OTHERS (*Defendants*) ..... RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Mechanics' liens—Mines and minerals—Surface and mineral lease of unpatented Crown lands—Liens for materials supplied for buildings—Whether liens to be registered with Registrar of Land Titles or with Minister of Mines and Minerals—The Mechanics' Lien Act, R.S.A. 1942, c. 236, as amended.

S. Co. held a surface lease and an oil and gas lease on unpatented Crown lands. On the land covered by the surface lease, R. Co. constructed for S. Co. certain buildings to house equipment and personnel engaged in the production of oil. Various mechanics' liens were filed for materials supplied to R. Co. in the construction of the buildings. The plaintiff M filed his first lien with the Minister of Mines and Minerals against the oil and gas, and his second lien with the Registrar of the Land Titles Office against the land. The plaintiffs C and I registered their liens with the Registrar against the land included in the surface lease only. An issue was directed as to where the liens should have been filed.

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

The trial judge held that only M's first lien was valid. In the Court of Appeal M's first lien was upheld and his second was declared not proper. A majority in the Court having held that the liens of C and I had been properly registered, M appealed to this Court, contending that only his lien, registered with the Minister, was valid.

Held: The claims for lien ought properly to have been filed with the Registrar of the Land Titles Office.

A lien which, as in this case, does not require to be registered with the Minister of Mines and Minerals under s. 48 of *The Mechanics' Lien Act* can be properly registered, under s. 19 of the Act, with the Registrar of the Land Titles Office, even though it relates to unpatented lands. *Union Drilling and Development Co. Ltd. v. Capital Oil & Natural Gas Co. Ltd.*, [1931] 2 W.W.R. 507, followed. In the present case, s. 48 did not require that any of the liens should have been registered with the Minister. The property in respect of which these liens were claimed consisted of houses, garages and a bath house. These buildings constituted improvements or appurtenances but could not be considered as falling within any of the three classes of property defined in s. 48(1).

APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division[1], reversing a judgment of Egbert J. Appeal dismissed.

V. M. Dantzer, for the plaintiff, appellant.

J. R. Smith, for the defendants, respondents Stanolind Oil and Gas Co. and Rempel Construction Co.

W. D. Dickie, for Crown Lumber Co. Ltd.

T. J. Dunn, for Imperial Lumber Co. Ltd.

The judgment of the Court was delivered by

MARTLAND J.:—On March 21, 1955, Her Majesty The Queen in the right of the Province of Alberta granted a petroleum and natural gas lease no. 102766 to Honolulu Oil Corporation in respect of 5,760 acres of land in township 47, range 9, west of the 5th meridian in the Province of Alberta for a term of twenty-one years from the 22nd of November, 1954, which was referred to in evidence as the "G" lease. This lease was later assigned by Honolulu Oil Corporation to Hudson's Bay Oil and Gas Company Limited on April 19, 1955, and subsequently, on the same date, by that company to itself and Stanolind Oil and Gas Company (hereinafter referred to as "Stanolind") as to an undivided 50 per cent. interest each. Fifty-six producing oil wells have been drilled on these lands.

[1] (1958), 24 W.W.R. 337, 13 D.L.R. (2d) 635.

1959

MOLNER v. STANOLIND OIL & GAS CO. et al.

Martland J.

By lease no. 587, dated December 16, 1955, Her Majesty The Queen in the right of the Province of Alberta leased to Stanolind, for a pumper's housing area, 6.39 acres of land in the same township and range, in that portion which, if surveyed, would be the north west quarter of section 36. This was a surface lease for a term of ten years from September 1, 1955.

On September 6, 1955, Stanolind made a contract with Rempel Construction Ltd. (hereinafter referred to as "Rempel") for the erection upon these lands of seven four-room houses with attached one-car garage, a four-car garage, a three-truck garage and a bath house. In turn Rempel made a contract with the appellant for labour and materials on plumbing, gas lines, water lines, sewer lines and unit heaters in connection with these buildings. Rempel also contracted with the respondents Crown Lumber Company Limited and The Imperial Lumber Company Limited (hereinafter referred to respectively as "Crown" and "Imperial") for the supply of lumber and building materials for the same project. The appellant and the respondents Crown and Imperial furnished the labour and materials which respectively they had agreed to supply.

The lands described in the above-mentioned petroleum and natural gas lease and in the surface lease were not patented and consequently no certificates of title had issued under the provisions of *The Land Titles Act.*

The appellant registered two liens, the first, dated May 8, 1956, with the Minister of Mines and Minerals on May 9, 1956, and the second, dated June 7, 1956, in the Land Titles Office for the North Alberta Land Registration District on the same date.

The description of the land to be charged in the lien first mentioned was

the Petroleum and Natural Gas and related Hydrocarbons in that area known as Pembina Crown G Lease being Township Forty-seven (47) Range Nine (9) West of the Fifth (5) Meridian, and in particular LSD 12, S 36, T 27, R 9, W of the 5th M., comprised in oil and gas lease number 102766.

The description of the land to be charged in the second lien above mentioned was

Township Forty-seven (47) Range nine (9) West of the Fifth Meridian, and in particular LSD 12, S 36, T 27, R 9, West of the Fifth (5) Meridian.

Imperial registered a lien in the Land Titles Office dated April 5, 1956, on April 9, 1956. The description of the land to be charged was

S.W. Corner of L.S.D.—13—13—47—9 West of the 5th (Res. all M & M).

Crown registered a lien in the Land Titles Office dated April 9, 1956, on or about April 11, 1956. The description of the land to be charged was

The North West quarter of Section 36, Township 47, Range 9, West of 5th Mer.

A statement of claim was issued by the appellant against Stanolind, later amended to add Rempel as a party defendant, on May 25, 1956, in respect of its first lien. Crown issued an originating notice of motion on June 22, 1956, in respect of its lien. The two proceedings were consolidated for trial by order of Chief Justice McLaurin on July 16, 1956. On December 6, 1956, by order of Boyd McBride J., it was directed that the first issue to be tried was whether the claims for lien should have been registered with the Minister of Mines and Minerals under s. 48 of *The Mechanics' Lien Act*, R.S.A. 1942, c. 236, as amended, or with the Registrar in the Land Titles Office of the North Alberta Land Registration District under s. 19 of that Act.

At the trial evidence was given by a Mr. Jones, the Superintendent of Pan American Petroleum Corporation in the Pembina oil field, as to the purpose of construction of the buildings in question. He stated that the "G" lease was relatively central to their operations south of the Pembina River and that the site was chosen so that they would have their personnel centrally located with respect to their operations. He said that houses were occupied by four pumpers, of whom three worked entirely on the "G" lease, handling production from that lease. Houses were also occupied by three supervisors who handled supervisory work, some on the "G" lease and some on other leases in that vicinity. He did not have specific, detailed knowledge of exactly how Stanolind planned to use the houses before the construction of them had actually started.

The learned trial judge held that the proper place of registration was with the Minister of Mines and Minerals and that, accordingly, only the lien of the appellant, which was registered there, was valid.

1959

MOLNER v. STANOLIND OIL & GAS CO. et al.

Martland J.

On appeal to the Appellate Division[1], Ford C.J.A. and Porter J.A. held that the proper place of registration was in the Land Titles Office. The latter went on to hold that none of the liens attached to surface rights.

Johnson J.A. and Macdonald J.A. held that the appellant's first lien, registered with the Minister of Mines and Minerals, was properly registered and that the liens of Crown and Imperial, registered in the Land Titles Office, were also properly registered.

Boyd McBride J.A. agreed with the learned trial judge.

A majority of the Court having held that the liens of Crown and Imperial had been properly registered the appellant appealed to this Court, contending that only his lien, registered with the Minister of Mines and Minerals, was valid.

The relevant sections of *The Mechanics' Lien Act*, applicable in this action, which are contained in R.S.A. 1942, c. 236, as amended by 1952 (Alta.), c. 51, are the following:

2. In this Act, unless the context otherwise requires,

* * *

(*c*) "improvement" includes structure, erection, building, railway, tramway, wharf, pier, bulkhead, bridge, trestlework, vault, mine, water, gas, oil or other well, gas or oil pipe line, excavation, fence, sidewalk pavement, fountain, fishpond, drain, sewer, ditch, flume, aqueduct, roadbed, way, fruit or ornamental trees and the appurtenances to any of them;

* * *

6. (1) Unless he signs an express agreement to the contrary and in that case, subject to the provisions of section 4, a person who performs any work or service upon or in respect of or places or furnishes any materials to be used in the making, constructing, erecting, fitting, altering, improving, demolishing, or repairing of any improvement for any owner, contractor or sub-contractor, shall by virtue thereof have a lien for so much of the price of the work, service or materials as remains due to him in the improvement and the land occupied thereby or enjoyed therewith, or upon or in respect of which the work or service is performed, or upon which the materials are to be used.

* * *

(4) When a lienholder's claim is for work, service or material supplied,

(*a*) for any mining or drilling operation; or

[1] (1958), 24 W.W.R. 337, 13 D.L.R. (2d) 635.

(*b*) to prospect for or recover any mineral;

the lien given by subsection (1) shall attach only to the mineral and shall not attach to the surface of the land.

* * *

19. (1) A claim for the registration of a lien, Forms 1, 2 and 3, of the Schedule, may be made to the Registrar in the Land Titles Office of the Land Registration District in which the land is situate, and shall set out,

(*a*) the name and residence of the person claiming the lien and of the owner or alleged owner of the land, and of the person for whom and the time within which the work was or is to be done;

(*b*) a short description of the work done or to be done;

(*c*) the sum claimed as due or to become due;

(*d*) a description of the land sufficient for the purpose of registration;

(*e*) the date of ceasing to work;

(*f*) an address for service of the claimant.

(2) The claim shall be verified by the affidavit (Form 4) of the claimant or of his agent or assignee.

* * *

(5) Every Registrar under *The Land Titles Act* shall be supplied with printed forms of such claims and affidavits in blank, which shall be supplied to every person requesting the same and desiring to register a lien.

(6) Every such Registrar shall decide whether his office is or is not the proper office for the registration of the lien and direct the applicant accordingly; and no claim shall be adjudged insufficient on the ground that it was not made to the proper Registrar.

* * *

(8) Upon the filing of the claim and affidavit, the Registrar shall enter and register the lien as an incumbrance against the land, or the estate or interest in the land therein described, as provided by *The Land Titles Act.*

* * *

21. (1) A substantial compliance with section 19 shall be sufficient and no lien shall be invalidated by reason of failure to comply with any of the requisites of the section unless, in the opinion of the judge, the owner, contractor or subcontractor, mortgagee or other person, is prejudiced thereby, and then only to the extent to which he is thereby prejudiced.

(2) Nothing in this section shall dispense with the making of a claim for the registration of a lien.

* * *

48. (1) Where a lien is claimed in respect of property which consists of,—

(*a*) any mine; or

(*b*) any well drilled for the purpose of obtaining oil, gas or other mineral; or

(*c*) any work or operation conducted preparatory thereto;

and if the property is held under any claim, lease, license, permit, reservation or other agreement from the Crown granted pursuant to the *Dominion Lands Act,* or pursuant to *The Provincial Lands Act,* or pursuant to *The Mines and Minerals Act,* or by some person claiming by, through or under

1959

MOLNER v. STANOLIND OIL & GAS CO. et al.

Martland J.

any holder of such claim, lease, license, permit, reservation or other agreement, the claim for registration of the lien shall be made to the Minister of Mines and Minerals instead of to the Registrar of Land Titles.

* * *

(3) The provisions of this Act as to registration by the Registrar of Land Titles shall apply, *mutatis mutandis*, to registration hereunder by the Minister, and upon registration, the lien shall be enforceable as against the interest of the holder of the claim, lease, license, permit, reservation or other agreement as aforesaid in the same manner as a lien duly registered pursuant to section 19.

The view of the learned trial judge was that all the liens claimed fell within subs. (4) of s. 6, which, he said, covered all operations incidental to the recovery of a mineral, including oil. He held that registration of the liens, under s. 19, in the Land Titles Office was a nullity because the lands were not patented lands and consequently compliance with that section was an impossibility. He thought that the judgment of the Appellate Division in *Union Drilling and Development Company Limited v. Capital Oil & Natural Gas Company Limited*[1], had ceased to be applicable after the enactment of s. 23 of the Act (the predecessor of s. 48). He held that the buildings in question here were appurtenances to oil wells within s. 2(*c*) and that registration of the appellant's lien under s. 48 was valid.

With regard to the question as to whether registration of a lien in respect of unpatented lands can be effected under s. 19 of the Act, this point was decided by the judgment of Harvey C.J.A., speaking for the whole Court, in the *Union Drilling* case previously mentioned. In that case it was held that there may be a valid lien, under *The Mechanics' Lien Act*, against an interest in unpatented lands, although, since, in such a case, there is no certificate of title, a "registration" of the lien, within the strict meaning of that term in *The Land Titles Act*, is not possible. It was the opinion of the Court that s. 21 was a very comprehensive, curative section and that, when read along with s. 19, it was sufficient to warrant the registration of such a lien. While the facts of that case related to an oil well on a Crown lease the proposition of law stated in it was not limited to that type of case, but was of general application.

[1] [1931] 2 W.W.R. 507, 3 D.L.R. 656, 25 A.L.R. 529.

In 1931, by c. 24, provision was made for registration of a lien with the Minister of Lands and Mines in case it was claimed in respect of property which consisted of any oil well or gas well, or oil and gas well, or any property held in connection with any such well, and if such property was held under lease from the Crown. This section, which was originally s. 22*a* of the Act, later became s. 23. In 1952 it was replaced by s. 48, in which the wording is somewhat altered. In particular, whereas the earlier section had referred to "any property held in connection with any such well", s. 48(1)(*c*) refers to "any work or operation conducted preparatory thereto".

I do not think that the decision in the *Union Drilling* case ceased to have effect because of these provisions. A lien which does not require to be registered with the Minister of Mines and Minerals under s. 48 can, on the basis of the judgment in that case, be properly registered, under s. 19 of the Act, with the Registrar at the Land Titles Office, even though it relates to unpatented lands.

Do the liens in question here come within the provisions of s. 48? The learned trial judge has pointed out, with justification, the extreme difficulty of construing the wording of this section and his view in that regard is shared by judges of the Appellate Division. However, a construction of the section must be attempted. It requires registration of a lien with the Minister of Mines and Minerals and not with the Registrar of the Land Titles Office, if the lien is granted in respect of property which consists of:

(*a*) any mine; or

(*b*) any well drilled for the purpose of obtaining oil, gas or other mineral; or

(*c*) any work or operation conducted preparatory thereto;

The property in respect of which these liens are claimed consists of houses, garages and a bath house. Being buildings, they constituted improvements within the definition in s. 2(*c*) and, by virtue of s. 6(1), the appellant, Crown and Imperial would acquire liens in them. I do not see how these buildings can be considered as falling within any of the three classes of property defined in subs. (1) of s. 48.

1959

MOLNER v. STANOLIND OIL & GAS CO. et al.

Martland J.

The appellant, however, points out that the definition of an improvement in s. 2(*c*) includes, among a number of other items, "gas, oil or other well" and that at the end of that paragraph there are added the words "and the appurtenances to any of them". He contends that the buildings were appurtenances to the oil wells and, therefore, argues that they fall within para. (*b*) of subs. (1) of s. 48. I do not agree with this contention. Section 2(*c*) says only that an appurtenance to an oil well is an improvement. It does not say that it is an oil well. Section 48 does not make use anywhere of the word "improvement". It refers only to specific kinds of property in respect of which a lien is claimed.

It is true that s. 6(1) provides for the existence of a lien in the land occupied by the improvement, as well as in the improvement itself, and that "land", as defined in *The Land Titles Act,* includes mines and minerals, so that a lien may attach to mines and minerals. Section 6(4), in certain defined circumstances, limits the lien to the mineral and prevents its attaching to the surface of the land. Section 48 is headed by the words "Lien on Minerals Held from the Crown" and applies in respect of liens which affect leases from the Crown. It does not, however, by its terms, apply in every case where there is a claim of a lien in respect of a mineral which is under lease from the Crown. Its operation is dependent upon a lien being claimed in respect of a mine; a well drilled for oil, gas or other mineral; or work or operations conducted preparatory thereto. It seems to me that none of the liens in question was claimed in respect of property of that kind.

This conclusion would appear to dispose of the issue here, which, it should be remembered, was restricted solely to the question of the proper place for the registration of the liens under consideration in these actions. For the reasons given, it is my opinion that s. 48 does not require that any of these liens should be registered with the Minister of Mines and Minerals and they can properly be registered with the Registrar of the North Alberta Land Registration District under s. 19 of the Act.

There was a good deal of discussion, in the judgments at trial and in the Appellate Division, as to whether or not subs. (4) of s. 6 applied in respect of these liens, so as to restrict their application solely to the minerals. This subsection restricts, in certain defined cases, the extent of a lien which arises under s. 6(1). My own view would be that the work, services and materials in question here were not supplied to recover a mineral within the meaning of para. (*b*) of subs. (4) of s. 6. It is true that the buildings in relation to which they were supplied were used by an oil company to house employees and vehicles employed and used in connection with the production of oil, but I feel that to say that the work, services and materials in question here were actually supplied to recover oil is extending the application of that paragraph too far. They were supplied to construct buildings and they only related indirectly to the recovery of oil because of the use to which Stanolind intended to apply the buildings.

I do not think that this conclusion is in any way in conflict with the decision of the Appellate Division in *McFarland v. Greenbank*[1], where the issue was as to whether equipment of an oil or gas well could be termed appurtenant to the well, even though it were not annexed to the realty.

The formal judgment order of the Appellate Division in this matter does not contain any judgment of the whole Court, but consists merely of a recital of the conclusions reached by the individual members of it. However, as pointed out previously, a majority of that Court held that the liens registered by Crown and Imperial could properly be registered with the Registrar at the Land Titles Office. It was against that decision that the appellant appealed to this Court to contend that only his lien, registered with the Minister of Mines and Minerals, was valid. That contention has failed and, accordingly, the appeal should be dismissed. The order of this Court should be that the answer to the question raised in the order of Boyd McBride J., dated December 6, 1956, is that the claims for lien there mentioned ought properly to have been filed with the Registrar in the Land Titles Office of the North Alberta

[1] [1939] 1 W.W.R. 572, 2 D.L.R. 386.

1959

MOLNER v. STANOLIND OIL & GAS CO. et al.

Martland J.

Land Registration District. The respondents Crown and Imperial should be entitled to their costs in this Court as against the appellant.

Appeal dismissed with costs.

Solicitors for the plaintiff, appellant: Cormack & Dantzer, Edmonton.

Solicitors for respondents, Stanolind Oil & Gas Co. and Rempel Construction Co.: Allen, MacKimmie, Matthews, Wood, Phillips & Smith, Calgary.

Solicitors for Crown Lumber Co.: Sanford, Dickie & Oughton, Calgary.

Solicitors for Imperial Lumber Co.: Ross, Wallbridge, Johnson, Cox, Pilon, Lefsrud & Wilson, Edmonton.

1959

Jan. 30

*May 27

CIRCLE FILM ENTERPRISES INCORPORATED (*Plaintiff*) .... } APPELLANT;

AND

CANADIAN BROADCASTING CORPORATION (*Defendant*) ..... } RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Copyright—Infringement—Literary work—Film—Plaintiff not author but assignee—Plaintiff's title put in issue—Presumption arising from certificate of registration—Evidence—Burden of proof—Admissibility of copies of assignment—Damages—Copyright Act, R.S.C. 1927, c. 532, as amended.

The plaintiff, as assignee of the copyright in a religious film named "Golgotha", claimed damages for infringement by the defendant. The ownership of the copyright was put in issue by the defendant. The plaintiff relied upon a certificate of registration of copyright in its name and the presumption arising under s. 36(2) of the *Copyright Act*. The defendant relied upon the presumption of s. 20(3) of the Act that the author is presumed to be the owner of the copyright. The trial judge dismissed the action.

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

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

A certificate of registration under s. 36(2) is evidence to show that the author is not the owner. There was in this case no evidence apart from the statutory presumption in s. 20(3)(*b*) that the author was the owner. The case, therefore, on the inter-relation of these two sections, came to the tribunal of fact merely with this evidence, that the plaintiff was, *prima facie*, and the author was not, the owner of the copyright. This was evidence to the contrary within s. 20(3)(*b*) and with its production, the presumption disappeared as a rule of law. There was only one piece of evidence, the certificate of registration. Having produced it, the plaintiff had adduced some evidence in support of its case, sufficient to compel the tribunal of fact to act in its favour in the absence of any evidence to contradict it, and had satisfied its onus of proof.

Quite apart from the certificate, there was evidence here to rebut the presumption of s. 20(3)(*b*). The two photostatic copies of two assignments from the author were admissible evidence to rebut the presumption of ownership in the author. The plaintiff's president testified that the originals were in the hands of the author, who did not wish to part with them, and based his testimony as to the authenticity of the signature upon his long personal knowledge of the persons involved and their signature. It was open to the plaintiff to submit proof in this way.

The amount of damages claimed was excessive. The only loss proved was the loss of the fee that the defendant had inadvertently paid to the wrong person. The plaintiff was, therefore, entitled to that fee or in the alternative to a reference to the Exchequer Court for an assessment of damages at its own risk as to costs.

APPEAL from a judgment of Thorson P. of the Exchequer Court of Canada[1], dismissing an action for damages for infringement of copyright. Appeal allowed.

R. Quain, Q.C., and *R. Quain, Jr.*, for the plaintiff, appellant.

D. S. Maxwell and *G. W. Ainslie*, for the defendant, respondent.

The judgment of the Court was delivered by

JUDSON J.:—The appellant, who claims to be the owner of the copyright in a religious film named "Golgotha", sued the respondent for infringement. The film was based upon a scenario written in 1934 by Canon Joseph Raymond, a citizen of France. All rights of film adaptation of the scenario and all television rights are claimed by the appellant, whose title depends upon a long series of assignments, most of which were executed in France. In the first place, the appellant asserts that its title is proved under s. 36(2) of the *Copyright Act* by virtue of the production of a

[1] [1957] 28 C.P.R. 5, 17 Fox Pat. C. 15.

1959

CIRCLE FILM ENTERPRISES INC. v. C.B.C.

Judson J.

certificate of registration of copyright under that Act. The respondent in its statement of defence put the ownership of the copyright in issue and asserts that s. 20, subs. (3), operates in its favour and that under this subsection the author is presumed to be the owner of the copyright. The first question, therefore, is one of the interaction of these two sections of the *Copyright Act*. There can, of course, be no possible conflict when the plaintiff is the author of the work in which copyright is claimed, but in this case the plaintiff is admittedly not the author and the plaintiff's title is put in issue.

The judgment under appeal[1] holds that if s. 20(3) applies and the plaintiff is not the author but an assignee, he must prove his chain of title from the author down, and that he cannot discharge the onus of proof by the mere production of a certificate of registration under s. 36(2) of the Act, such registration being insufficient to constitute the contrary proof required by s. 20, subs. (3), of the Act. The attack on this proposition is the central point of the appeal. Section 20, subs. (3) reads:

> 20. (3) In any action for infringement of copyright in any work, in which the defendant puts in issue either the existence of the copyright, or the title of the plaintiff thereto, then, in any such case,
>
> (*a*) the work shall, unless the contrary is proved, be presumed to be a work in which copyright subsists; and
>
> (*b*) the author of the work shall, unless the contrary is proved, be presumed to be the owner of the copyright; . . .

Section 36(2) reads:

> 36. (2) A certificate of registration of copyright in a work shall be *prima facie* evidence that copyright subsists in the work and that the person registered is the owner of such copyright.

The difficulty results from the amendment to the *Copyright Act* enacted by 1931 c. 8, s. 7, which repealed the old section having to do with presumptions in favour of the plaintiff in a copyright action. The old section of the Act

[1] [1957] 28 C.P.R. 5, 17 Fox Pat. C. 15.

had been in force since 1921 and was in terms identical with the English legislation. From 1921 to 1931 the Canadian *Copyright Act* provided:

> In any action for infringement of copyright in any work, the work shall be presumed to be a work in which copyright subsists and the plaintiff shall be presumed to be the owner of the copyright, unless the defendant puts in issue the existence of the copyright, or, as the case may be, the title of the plaintiff, . . .

In this form, if the presumption stands, not being put in issue by the defence, there is no conflict between ss. 20(3) and 36(2). If the presumption disappears, by being put in issue, then certain other presumptions, not relevant here but having a plain and recognizable function, appear. Why the legislation was changed to make the author the presumed owner when the title of the plaintiff is put in issue, I do not know. It seems to add nothing to the rights of an author and it may be a serious handicap to any other plaintiff. A plaintiff, if it is an assignee, may meet the presumption by proving its chain of title but where, as in this case, the plaintiff claims through a number of *mesne* assignments, most of which were executed in a foreign country, the burden of proof may become intolerably heavy. The important question is whether it can meet that presumption by the production of a certificate of registration under s. 36(2), which certifies that copyright in the work in question, the author of which is Canon Joseph Raymond of Paris, France, was registered on the 5th day of February, 1952, in the name of the Circle Film Enterprises Incorporated, the plaintiff in this action.

Registration first came into Canadian copyright legislation in the Act of 1921. It disappeared from the English legislation in 1911. It is permissive in character and the subsistence of copyright in no way depends upon registration, but its proof and proof of ownership are plainly intended to be facilitated by the enactment of s. 36(2).

1959

CIRCLE FILM ENTERPRISES INC. v. C.B.C.

Judson J.

That this was the object of s. 36(2) is indicated in the judgment of this Court in *Massie & Renwick Ltd. v. Underwriters' Survey Bureau Ltd.*[1], *per* Duff C.J., when he said:

> Certificates of registration have been produced for these plans which, under sections 36(2) and 37(6), constitute *prima facie* evidence that copyright subsists in the work and that the persons registered were the owners of such copyright. This *prima facie* case has not been met.

Is it met in the present case by the appeal to the presumption mentioned in s. 20(3)(*b*) that the author is presumed to be the owner of the copyright? I take the operation of a presumption of this kind to be as stated by Wigmore on Evidence, 3rd ed., s. 2491(2):

> It must be kept in mind that the peculiar effect of a presumption "of law" (that is, the real presumption) is merely to invoke a rule of law compelling the jury to reach the conclusion *in the absence of evidence to the contrary* from the opponent. If the opponent *does* offer evidence to the contrary (sufficient to satisfy the judge's requirement of some evidence), the presumption disappears as a rule of law, and the case is in the jury's hands free from any rule.

In spite of the difficulty created in 1931 when the presumption in favour of the plaintiff was changed to a presumption in favour of the author, my opinion is that a certificate of registration under s. 36(2) is evidence to show that the author in this case is not the owner. There is no evidence apart from the statutory presumption in s. 20(3)(*b*) that he is the owner. The case therefore, on the interrelation of these two sections, comes to the tribunal of fact merely with this evidence, that the plaintiff is, *prima facie,* and the author is not, the owner of the copyright in question. This is evidence to the contrary within s. 20(3)(*b*) and with its production, the presumption has disappeared as a rule of law. There is only one piece of evidence and that is the certificate of registration. There are no evidentiary facts behind s. 20(3)(*b*) which, of their own weight, can lead to an inference of ownership of the copyright remaining with the author. In a case where there is evidence to contradict the certificate, then its weight may be affected, but in the absence of any such evidence, its weight is not to be minimized because no proof of title is required in the application for registration and because the Copyright Office assumes no responsibility for the truth of the facts asserted in the application and

[1] [1940] S.C.R. 218 at 238, 3 C.P.R. 184, 1 D.L.R. 625.

conducts no independent examination. A plaintiff who produces this certificate has adduced some evidence in support of his case, sufficient to compel the tribunal of fact to act in his favour in the absence of any evidence to contradict it.

In my opinion, therefore, by the production of this certificate and in the absence of any evidence to the contrary, the plaintiff in this case has satisfied the burden of proof, both the primary burden—that which rests upon a plaintiff as a matter of substantive law and is sometimes referred to as the risk of non-persuasion—and also the secondary burden, that of adducing evidence; *Smith v. Nevins*[1] and *Ontario Equitable v. Baker*[2]. On this ground the dismissal of the action should be set aside and judgment entered for the plaintiff.

As an alternative to reliance upon the certificate, the plaintiff attempted to prove a complete chain of title from the author down. The defendant objected to the admissibility of all these documents. They were, however, admitted subject to the objection, considered by the learned President and rejected by him as falling short of proof of ownership of the copyright and as offending the Best Evidence Rule. I do not think it necessary to examine them in detail or to enquire into the basis for their rejection except in the case of two documents, which in my opinion are clearly admissible. These are two assignments from Canon Raymond, the first to La Société Ichthys Films covering rights of film adaption of the scenario, and the second, a subsequent confirmatory assignment of the television rights from Canon Raymond to one Chalus, the then owner of the copyright under the first assignment. The president of the plaintiff corporation testified that the originals of these documents were in the hands of Canon Raymond or his lawyers and that they did not wish to part with them. The witness did produce photostatic copies of these assignments, the first manually signed as an original by Canon Raymond, and the second similarly

[1] [1925] S.C.R. 619 at 638, [1924] 2 D.L.R. 865.
[2] [1926] S.C.R. 297 at 308, 2 D.L.R. 289.

1959

CIRCLE FILM ENTERPRISES INC. v. C.B.C.

Judson J.

signed by both Canon Raymond and Chalus, and he also testified to the authenticity of these signatures, based upon a long personal knowledge of these men and their signatures. This is admissible evidence to rebut the presumption of ownership in the author. The defendant, relying solely on the presumption, is setting up the ownership of Canon Raymond and on this evidence the author had parted with ownership and there is not the slightest evidence of its reacquisition by him. It is open to the plaintiff to submit proof in this way and the fact that it might have taken out a commission for the oral examination of Canon Raymond does not destroy the admissibility of the evidence. Therefore, quite apart from the certificate, there is evidence in this case to rebut the presumption raised by s. 20(3)(*b*).

The learned trial judge did not assess the damages. I agree with his statement that the amount claimed by the plaintiff was excessive because there was no evidence that the capital value of the work as a film for exhibition in motion picture theatres had been seriously affected by its use on television. The meagre earnings of this film over a long period show that it had no great earning capacity either in or out of a theatre. The only loss proved was the loss of the fee that the Broadcasting Corporation inadvertently paid to the wrong person. I would allow the appeal and direct that judgment be entered for the plaintiff in the amount of this fee, together with the costs of the trial and the appeal. If the plaintiff is not satisfied with this determination of the case, it will be referred back to the Exchequer Court for an assessment of damages, untrammelled by the option given to the appellant, but at the appellant's own risk as to costs.

Appeal allowed with costs.

Solicitors for the plaintiff, appellant: Quain & Quain, Ottawa.

Solicitor for the defendant, respondent: W. R. Jackett, Ottawa.

DAME MARIE COLETTE RHEAUME (*Plaintiff*) ..... APPELLANT;

1959
Mar. 3
*May 27

AND

LA CITE DE QUEBEC AND YVON THIBAULT (*Defendants*) ..... RESPONDENTS.

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

Negligence—Motorcyclist striking oil puddle on road and fatally injured—Action by widow for damages against municipality—Whether notice furnished on time—Prescription—Charter of the City of Quebec, 19 Geo. V, c. 95, art. 535—Arts. 1056, 2262(2) of the Civil Code.

While travelling on a motorcycle along a street in Quebec City, the deceased's vehicle skidded on a puddle of lubricating oil which had come out of a barrel that had fallen from a truck driven by an employee of one of the defendants. The deceased was thrown on the road and fatally injured. His widow notified the defendant City of the accident within 30 days, but not within 15 days. She then instituted an action against the City and against the owner of the truck, and obtained judgment against both jointly and severally. The Court of Appeal unanimously affirmed the judgment against the owner of the truck; and by a majority judgment dismissed the action against the City on the ground that notice of the accident had not been given to the City within 15 days as required by art. 535 of its Charter. The widow appealed to this Court.

Held: The appeal should be dismissed.

Under art. 535 of the Charter of the City of Quebec, any action against the City for damages for bodily injuries resulting from a fall on a sidewalk or roadway is precluded unless notice of the accident is filed with the City within 15 days of the accident. No right of action exists without that notice. In the absence of notice everyone's right of action is prescribed, and not only the right of action attaching to the actual victim, as the appellant had argued.

The second contention of the appellant to the effect that her right of action (being derived from art. 1056 C.C. and not from the victim) was not an action for damages resulting from bodily injuries within the meaning of art. 535 of the Charter could not be upheld, since an action for bodily injuries can include one in which the plaintiff was not the actual victim. *Regent Taxi and Transport Ltd. v. Petits Frères de Marie,* [1932] A.C. 295, followed.

The suggestion that the 15-day notice in art. 535 envisaged only the case of a pedestrian falling on the sidewalk or roadway and that it was therefore sufficient in this case to have given the 30-day notice, could not be maintained. Where an accident resulted solely, as in this case, from the condition of a roadway, the 15-day notice provision

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

1959

RHÉAUME
v.
CITÉ DE QUÉBEC
et al.

governing injuries resulting from falls on sidewalk or roadway must apply. That is what is envisaged by art. 535 which covers the case of a motorcyclist falling in the circumstances of this case.

Finally, at this stage of the proceedings, it would not be appropriate to allow the plaintiff to produce evidence tending to justify the non-filing of the notice.

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

L. A. Pouliot, Q.C. and *L. Corriveau,* for the plaintiff, appellant.

J. de Billy, Q.C., for the defendant City, respondent.

The judgment of the Court was delivered by

FAUTEUX J.:—Le 26 juillet 1955, Gabriel Rochette procédait en motocyclette sur la rue Saint-Vallier, en la cité de Québec, lorsque, passant sur une large flaque de graisse lubréfiante provenant d'un baril tombé d'un camion appartenant à Yvon Thibault et conduit par son préposé Claude Boulet, il perdit l'équilibre et fit une chute sur la chaussée. Comme résultat, il se fractura le crâne et décédait quelques heures plus tard.

Plus de quinze jours après cet accident, soit le 25 du mois suivant, l'appelante, épouse du défunt, avisait, par lettre de son procureur, la cité intimée du fait de cet accident. Par la suite, elle intentait, tant personnellement qu'en sa qualité de tutrice à leur enfant posthume, une action contre l'intimée et Thibault, et obtint contre eux, dans un procès par jury, une condamnation conjointe et solidaire de $30,000.

Porté en appel[1], ce jugement fut unanimement confirmé quant à Thibault mais cassé par une décision majoritaire quant à la cité sur le motif qu'avis de cet accident ne lui avait pas été donné dans les quinze jours de la date de cet accident fatal, suivant les exigences des dispositions de l'art. 535 de sa charte. De là le présent pourvoi de l'appelante contre ce jugement.

[1] [1959] Que. Q.B. 108.

C'est la prétention de l'appelante qu'aucun avis n'était nécessaire en l'espèce et que, dans le cas contraire, il était suffisant de donner l'avis, comme ce fut le cas, dans les trente jours.

Tel qu'amendé et en vigueur au temps de l'accident et de l'institution de l'action, l'art. 535 de la charte de la cité de Québec (19 George V c. 95) se lit comme suit:

> Nonobstant toute loi à ce contraire, nul droit d'action n'existe contre la cité pour dommages-intérêts résultant de blessures corporelles infligées par suite d'un accident, ou pour dommages à la propriété mobilière ou immobilière, à moins que, dans les trente jours de tel accident ou de tels dommages et, dans les cas d'accident et de dommages provenant d'une chute sur un trottoir ou sur la chaussée, à moins que, dans les quinze jours de tel accident et de tels dommages, un avis écrit n'ait été reçu par la cité, mentionnant en détail les dommages soufferts, indiquant les nom, prénoms, occupation et adresse de la personne qui les a subis, donnant la cause de ces dommages et précisant la date, l'heure approximative et l'endroit où ils sont arrivés.
>
> Aucune action en dommages-intérêts ou en indemnité ne peut être intentée contre la cité, avant l'expiration de trente jours de la date de la réception de l'avis ci-dessus.
>
> Le défaut d'avis ci-dessus ne prive pas, cependant, les victimes d'accidents de leur droit d'action, si elles prouvent qu'elles ont été empêchées de donner cet avis par force majeure ou pour d'autres raisons analogues jugées valables par le juge ou le tribunal.

Évidemment, les dispositions de la nature de celle qui précède sont exorbitantes du droit commun et ne doivent recevoir une application que dans les cas qui y sont clairement prévus. *Ville de Louiseville v. Triangle Lumber Co.*[1]. Encore faut-il, cependant,—et c'est là l'inéluctable devoir des tribunaux,—leur donner leur effet, quelle qu'en soit la rigueur, lorsque se présentent ces cas prévus. *La Cité de Québec v. Baribeau*[2].

Aux vues des procureurs de l'appelante, lues et interprétées comme un tout, les dispositions de l'art. 535 ne sauraient s'appliquer dans le cas, comme en l'espèce, d'une action instituée sous le régime de l'art. 1056 du *Code Civil* et ce pour deux raisons.

La prescription du premier paragraphe de l'art. 535 ne vise, dit-on, que le droit d'action de la personne même qui a subi l'accident, ce qui exclut les bénéficiaires de l'art. 1056. Cette prétention se fonde sur l'interprétation qu'on donne au dernier paragraphe lequel, dit-on, indique que ce sont

[1] [1951] S.C.R. 516. [2] [1934] S.C.R. 622, 4 D.L.R. 426.

1959

RHÉAUME v. CITÉ DE QUÉBEC et al.

Fauteux J.

les victimes mêmes de l'accident qui doivent donner l'avis prescrit au premier. Et de là, on déduit que c'est leur droit d'action et uniquement le leur qui est visé par la prescription du premier paragraphe. Je ne vois pas que cette conclusion découle du texte du dernier paragraphe. De plus, elle fait manifestement violence au texte même du premier alinéa:

> Nonobstant toute loi à ce contraire, *nul droit d'action* n'existe contre la cité pour dommages-intérêts résultant de blessures corporelles infligées par suite d'un accident, ou pour dommages à la propriété mobilière ou immobilière, à moins que, . . . de tel accident . . . un avis écrit n'ait été reçu par la cité . . .

Il importe peu que ce droit d'action soit celui de la victime ou qu'il ait été transmis à son héritier dans le cas, par exemple, de dommages à la propriété mobilière ou immobilière, ou que ce droit soit celui établi au bénéfice des personnes mentionnées à l'art. 1056. Peu importe le titulaire ou la nature de son droit; on ne peut distinguer là où le texte de la loi est absolu. Nul droit d'action n'existe sans l'avis. Peu importe aussi par qui l'avis est donné; la Législature ne s'en est pas exprimée dans la disposition. Il est impératif, mais il suffit qu'il soit reçu par la cité. On ne peut aggraver, au moyen de déductions, cette disposition exorbitante du droit commun, en limitant à la victime le droit de donner un avis valide quand le texte de la prescription imposant l'obligation de ce faire ne décrète pas une telle limitation. Ce qu'on a voulu, c'est que la cité soit avisée; c'est là l'essence de la prescription. Et la disposition d'exception du troisième paragraphe, permettant aux victimes d'accidents d'échapper aux conséquences de l'inobservation de cette prescription dans des cas bien spécifiés, n'en saurait affecter l'interprétation. Accueillir la prétention de l'appelante serait, comme s'en exprime M. le Juge Pratte de la majorité en Cour d'Appel, restreindre le champ d'application de la règle en ramenant celle-ci à la dimension du cas où il est fait exception à son opération.

Comme seconde raison, on rappelle que l'appelante et son fils tiennent leur droit d'action de l'art. 1056 C.C. et non pas de la victime de l'accident, et on soumet qu'une telle action n'est pas, tel que prévu au premier paragraphe de l'art. 535, une action en dommages-intérêts résultant de blessures corporelles. Pour rejeter cette prétention, les

juges de la majorité en Cour d'Appel se sont appuyés particulièrement sur les dispositions du deuxième paragraphe de l'art. 2262 C.C., tel qu'interprété par le Comité Judiciaire du Conseil Privé dans *Regent Taxi and Transport, Ltd. v. Petits Frères de Marie*[1]. La disposition pertinente de cet article se lit comme suit:

> 2262. L'action se prescrit par un an dans les cas suivants:—
> (1) .....
> (2) Pour lésions ou blessures corporelles sauf les dispositions spéciales contenues en l'article 1056; .....

Et à la page 302 du rapport de cette cause, Lord Russell of Killowen déclare ce qui suit:

> This reference to art. 1056 can only be made for the purpose of ensuring that the one year mentioned in art. 1056 shall prevail over the one year mentioned in art. 2262, thus showing that in the view of the framers of the Code the words 'actions for bodily injuries' in art. 2262 would, of their own force, include an action the plaintiff in which was not the person upon whom the bodily injuries had been inflicted.

Terminant sur ce point de la nécessité de l'avis en l'espèce, je dois dire en toute déférence qu'après anxieuse considération, il m'est impossible de concourir dans l'opinion exprimée par M. le Juge Martineau, dissident en Cour d'Appel. Cette opinion se fonde particulièrement sur une décision rendue par M. le Juge Martineau, dissident en Cour d'Appel. Cette il s'agissait d'interpréter, non pas les dispositions de l'art. 535 de la charte de la cité de Québec, mais les dispositions de l'art. 622 de la *Loi des cités et villes*, S.R.Q. 1941, c. 233. Comme il est noté aux raisons de cette décision et comme il est d'ailleurs admis dans celles données par la Cour d'Appel en la présente cause, le texte de l'art. 622 diffère de celui de l'art. 535 que nous devons appliquer ici.

Au soutien de la proposition subsidiaire, soumise par l'appelante devant cette Cour, et voulant que, assumant la nécessité de l'avis, il était suffisant de le donner dans les trente jours, comme ce fut le cas, on a soumis que l'accident en l'espèce ne constitue pas une chute sur la chaussée au sens de la disposition, celle-ci ne visant, dit-on, que la chute d'un piéton sur la chaussée. On a cité, à l'appui, la décision rendue par la Cour d'Appel dans *Cité de Montréal*

[1] [1932] A.C. 295, 53 Que. K.B. 157, 2 D.L.R. 70.
[2] [1950] Que. K.B. 294.

1959

RHÉAUME v. CITÉ DE QUÉBEC et al.

Fauteux J.

et Les Héritiers Belland v. Busque[1]. A mon avis, cette décision ne supporte aucunement cette prétention de l'appelante. Il s'agissait là du renversement d'un piéton par une automobile appartenant à la cité de Montréal et conduite par son préposé. Précisant que la disposition de l'art. 536 de la charte de la cité de Montréal envisage deux hypothèses, soit celle d'une action pour dommages-intérêts résultant de blessures corporelles infligées par suite d'un accident ou pour dommages à la propriété mobilière ou immobilière, et l'hypothèse d'une action en dommages résultant d'une chute sur un trottoir ou sur la chaussée, on considéra évidemment qu'en raison des faits fondant la demande, celle-ci était de la première et non de la seconde catégorie.

Dans la présente cause où la chute de Rochette sur la chaussée a été exclusivement causée par la condition dangereuse de la chaussée,—et c'est là le fondement de la demande contre la cité—il ne peut être douteux, à mon avis, que le cas est de ceux visés par la deuxième catégorie de l'art. 535. Ce qu'on envisage en ces cas, c'est la responsabilité que la cité peut encourir lorsque, par suite de la condition dangereuse d'un trottoir ou d'une chaussée, une personne y fait une chute et se blesse. Sans doute et dans le cas d'une chute sur un trottoir, l'accidenté sera-t-il généralement un piéton. Dans le cas d'une chute sur la chaussée, où d'autres que les piétons ont droit de circuler, rien dans le texte de la disposition ne permet d'exclure le cas du cycliste qui, dans des circonstances similaires à celles de cette cause, perd l'équilibre, tombe et se blesse à cause de la condition dangereuse de la chaussée. La disposition réfère à "une chute sur un trottoir ou sur la chaussée" et non à la chute d'un piéton sur un trottoir ou sur la chaussée. Aussi bien, donnant aux mots de la disposition leur sens naturel et ordinaire, cette dernière prétention de l'appelante ne saurait être accueillie sans qualifier le texte en y ajoutant.

A la fin de l'audition, le procureur de l'appelante a demandé, au cas où cette Cour en viendrait à la conclusion qu'un avis de quinze jours était nécessaire, l'émission d'une ordonnance lui permettant d'établir des faits donnant ouverture au bénéfice de l'exception prévue au dernier

[1] [1952] Que. Q.B. 585.

1959

RHÉAUME v. CITÉ DE QUÉBEC et al.

Fauteux J.

paragraphe de l'art. 535. Assumant qu'en droit il soit possible d'accéder à cette requête, je ne crois pas qu'au stade et dans les conditions où elle est présentée, il y ait lieu d'y faire droit.

Dans les circonstances, je maintiendrais la décision de la Cour du banc de la reine et renverrais le présent appel, avec dépens.

Appeal dismissed with costs.

Attorney for the plaintiff, appellant: L. Corriveau, Quebec.

Attorneys for the defendant City, respondent: J. de Billy, B. Pelletier and A. Leclerc, Quebec.

1958

Dec. 10, 11, 12

1959

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BRUCE PRIESTMAN (*Defendant*) .....APPELLANT;

AND

ANTHONY COLANGELO and RALPH SHYNALL (*Plaintiffs*) ..... } RESPONDENTS;

AND

ROBERT SMYTHSON (*Defendant*) .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Negligence—Police officer—Liability—Police car pursuing stolen car—Warning shot of no effect—Second shot aimed at rear tire—Uneven road causing shot to wound thief-driver—Stolen car going out of control and killing two pedestrians on sidewalk—Whether excessive force used—Whether negligence—The Police Act, R.S.O. 1950, c. 279—The Criminal Code, 1953-54 (Can.), c. 51, ss. 25(4), 230, 232.

Two uniformed police officers in a patrol car pulled alongside a stolen car at an intersection and ordered the driver, one S, to pull over. Instead he turned to his right and drove west at a high rate of speed along a residential street. The police car followed in close pursuit and on three occasions attempted to pass it, but each time S cut it off, and on the third occasion the police car was forced over the curb. Then P, one of the officers, fired a warning shot in the air, but S increased his speed. As the cars were approaching a very busy intersection, P fired a shot aimed at the left rear tire of the stolen car. As he fired this shot, the police car struck a bump in the pavement. The

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

1959

PRIESTMAN v. COLANGELO, SHYNALL AND SMYTHSON

bullet struck the rear window of the stolen car, ricochetted and struck S, rendering him unconscious. S's car went out of control, mounted the curb and hit fatally two student nurses standing on the sidewalk. The administrators of their respective estates sued P and S for damages, and S sued P for damages. The three actions were tried together.

The trial judge maintained the actions against S and dismissed them as against P. In the Court of Appeal, the appeal of the administrators was allowed and the appeal of S dismissed. In this Court, P appealed; and the administrators and S cross-appealed.

Held (Cartwright and Martland JJ. dissenting): The appeal of the police officer P should be allowed and the cross-appeals dismissed.

Per Taschereau and Locke JJ.: The evidence did not disclose a cause of action against P. The proximate cause of the fatal injuries sustained by the two nurses was the negligent and criminal conduct of S, the driver of the stolen car.

The officers were engaged in the performance of a duty imposed upon them by the *Criminal Code* and by *The Police Act*. In considering whether the firing of the second shot was a reasonable attempt by P to discharge his duty, it was to be borne in mind that S was a thief and had demonstrated that he was prepared to jeopardize the lives of both officers. The manner in which S had driven the stolen car constituted an indictable assault upon the officers: ss. 230, 232 of the *Criminal Code*. In deciding whether in any particular case a police officer had used more force than was reasonably necessary to prevent an escape within the meaning of s. 25(4) of the *Criminal Code* general statements as to the duty to take care to avoid injury to others made in negligence cases could not be accepted as applicable without reservation unless full weight was given to the fact that the act complained of was one done under statutory powers and in pursuance of a statutory duty.

The performance of the duty imposed upon police officers to arrest offenders who have committed a crime and are fleeing to avoid arrest may, at times and of necessity, involve risk of injury to other members of the community. Such risk, in the absence of a negligent or unreasonable exercise of such duty is *damnum sine injuria*. Broom's Legal Maxims, p. 1; *British Cast Plate v. Meredith*, 4 T.R. 794 and *Fisher v. Ruislip-Northwood Urban District Council*, [1945] 1 K.B. 584, followed.

If the circumstances are such that the legislature must have contemplated that the exercise of a statutory power and the discharge of a statutory duty might interfere with private rights and the person to whom the power is given and upon whom the duty is imposed acts reasonably, such interference will not give rise to an action. In this case, the action of P was reasonably necessary and no more, both to prevent the escape and to protect those persons whose safety might have been endangered if the escaping car had reached the approaching intersection. So far as P was concerned, the fact that the bullet struck S was simply an accident.

Per Fauteux J.: The appeal of P should be allowed for the reasons given by Laidlaw J. in the Court of Appeal.

Per Cartwright and Martland JJ., *dissenting*: Assuming that S's escape could not have been prevented by reasonable means in a less violent manner and that P was therefore justified in using his revolver, the

question arises as to whether s. 25(4) of the Code applied not only as against S but also as against third persons. As a matter of construction, it should be taken in its restricted sense as applicable only against S. If Parliament intended to enact that grievous bodily harm or death might be inflicted upon an entirely innocent person and that such person should be deprived of all civil remedies to which he would otherwise have been entitled, in circumstances such as those of this case, it would have used words declaring such intention without any possible ambiguity. Section 25(4), therefore, afforded no justification to P for causing the death of the two nurses.

The duty to apprehend S was not an absolute one to the performance of which P was bound regardless of the consequences to persons other than S. In the circumstances of this case, P should not have fired as he did and was, therefore, guilty of negligence in so doing. If, as was contended, the continuation of the pursuit would almost inevitably have resulted in disaster, it was the duty of the police to reduce their speed and, it may be, to abandon the pursuit rather than open fire.

APPEALS and CROSS-APPEALS from a judgment of the Court of Appeal for Ontario[1], reversing in part a judgment of Barlow J. Appeals allowed and cross-appeals dismissed.

T. N. Phelan, Q.C., for the defendant, appellant.

J. W. Brooke, for the plaintiff Colangelo, respondent.

H. P. Cavers, for the plaintiff Shynall, respondent.

G. R. Dryden, for the defendant Smythson, respondent.

The judgment of Taschereau and Locke JJ. was delivered by

LOCKE J.:—In this matter I agree with Mr. Justice Laidlaw, who dissented in the Court of Appeal[1], that the evidence does not disclose a cause of action against the appellant Priestman by reason of the deaths of Columba Colangelo and Josephine Shynall. The proximate cause of the fatal injuries they sustained was the negligent and criminal conduct of the respondent Smythson.

It is to be remembered that the appellant Priestman and Constable Ainsworth, in attempting to effect the arrest of Smythson, were exercising powers conferred upon them by the *Criminal Code* and, at the same time, attempting to

[1] [1958] O.R. 7, 11 D.L.R. (2d) 301, 119 C.C.C. 241.

1959

PRIESTMAN v. COLANGELO, SHYNALL AND SMYTHSON

Locke J.

discharge a duty imposed upon them by *The Police Act*, R.S.O. 1950, c. 279 s. 45. That section, so far as it need be considered, reads:

> The members of police forces appointed under Part 11 shall be charged with the duty of preserving the peace, preventing robberies and other crimes and offences . . . and apprehending offenders.

Section 25 provides by subs. (1) that every peace officer who is required or authorized by law to do anything for the enforcement of the law is, if he acts on reasonable and probable grounds, justified in doing what he is required to do and in using as much force as is necessary for that purpose. Subsection (4) reads:

> A peace officer who is proceeding lawfully to arrest, with or without warrant, any person for an offence for which that person may be arrested without warrant . . . is justified, if the person to be arrested takes flight to avoid arrest, in using as much force as is necessary to prevent the escape by flight, unless the escape can be prevented by reasonable means in a less violent manner.

Smythson had stolen the car and was fleeing arrest and in the course of doing so committed other criminal offences to which I refer later, and for any of these was subject to arrest without warrant under the provisions of ss. 434, 435 and 436 of the Code.

The officers were thus not merely performing an act permitted by these statutes but engaged in the performance of what was a duty imposed upon them, a fact which, in my view, has a vital bearing upon the question of the liability of Priestman.

In *British Cast Plate v. Meredith*[1], an action was brought against the defendants who were acting under the authority of the commissioners appointed under a *Paving Act*, which authorized them to pave streets in the Parish of Christchurch in Surrey. In the course of doing so, the pavement was raised substantially which interfered with the user of the premises of the plaintiff which fronted on the street. Lord Kenyon C.J. said that it did not appear that the commissioners had been guilty of any excess of jurisdiction and, while some individuals may suffer an inconvenience

[1] (1792), 4 T.R. 794, 100 E.R. 1306.

under all such Acts of Parliament, the interests of individuals must give way to the accomodation of the public. Buller J. said in part (p. 797):

> There are many cases in which individuals sustain an injury, for which the law gives no action; for instance, pulling down houses, or raising bulwarks, for the preservation and defence of the kingdom against the King's enemies. The civil law writers indeed say, that the individuals who suffer have a right to resort to the public for a satisfaction: but no one ever thought that the common law gave an action against the individual who pulled down the house, &c. This is one of those cases to which the maxim applies, *salus populi suprema est lex.* If the thing complained of were lawful at the time, no action can be sustained against the party doing the act.

The *British Cast Plate* case was referred to with approval by the House of Lords in *Mersey Docks v. Gibbs*[1] by Lord Blackburn at p. 112. As is there pointed out, loss so sustained is *damnum sine injuria.* This does not, however, relieve those exercising such statutory powers of the duty to take reasonable care in exercising them. Lord Blackburn points out in the passage above referred to that, though the legislature has authorized the execution of the work, it does not thereby exempt those authorized to make them from the obligation to use reasonable care that in making them no unnecessary damage be done.

In *Geddis v. Proprietors of Bann Reservoir*[2], Lord Blackburn, referring to the exercising of statutory powers, said that it was thoroughly well established that no action would lie for doing what the legislature has authorized if it be done without negligence, although it does occasion damage to anyone, but that an action would lie for doing that which the legislature has authorized if it be done negligently.

There may, however, be duties imposed upon public officers and others for the protection of the public, the performance of which in many circumstances may involve risk of injury to third persons.

In a recent case in England, *Fisher v. Ruislip-Northwood Urban District Council*[3], Lord Green made an exhaustive examination of the cases dealing with the liability of persons exercising statutory powers and duties and, in the

[1] (1866), L.R. 1 H.L. 93. [2] (1878), 3 App. Cas. 430 at 455.
[3] [1945] 1 K.B. 584.

1959

PRIESTMAN v. COLANGELO, SHYNALL AND SMYTHSON

Locke J.

course of his judgment after saying that undertakers entrusted with statutory powers are not in general entitled in exercising them to disregard the safety of others, said (p. 592):

> The nature of the power must, of course, be examined before it can be said that a duty to take care exists, and, if so, how far the duty extends in any given circumstances. If the legislature authorizes the construction of works which are in their nature likely to be a source of danger and which no precaution can render safe, it cannot be said that the undertakers must either refrain from constructing the works or be struck with liability for accidents which may happen to third persons. So to hold would make nonsense of the statute.

Actionable negligence has been defined in a variety of manners. In *Vaughan v. the Taff Vale Railway Company*[1], Willes J. said that the definition of negligence is the absence of care according to the circumstances. The concluding words of this short definition are at times lost sight of and are those which must be kept most clearly in mind in considering an action such as the present, which is based on what is said to have been a negligent manner of discharging the duty which rested upon the constables.

It was at the corner of Donland and Mortimer Streets, where the traffic is controlled by lights, that the police car driven by Constable Ainsworth drew alongside the stolen car driven by Smythson and Priestman ordered the latter to pull in to the curb. Smythson, apparently appreciating that Priestman was a police officer, turned to his right and drove, at a rate of speed which apparently varied from 40 to 60 miles an hour, west on Mortimer Street. The police car followed in close pursuit, Ainsworth attempting to get his car ahead of the stolen car in order to stop it and, three times within a distance of 600 feet, Smythson cut in ahead of the police car, making it necessary for Ainsworth to check the speed to avoid a collision. The third time this was done the police car was forced up over the south curb of Mortimer Street where it narrowly escaped crashing into a telephone pole. It was not until after this had occurred that Priestman first fired the warning shot into the air and thereafter, at a time when the police car was again upon the pavement driving west in a position to the south of

[1] (1860), 5 H. & N. 679 at 688, 157 E.R. 1351.

the stolen car, no attention having been paid to the warning shot Priestman fired a second shot aimed at the left rear tire of the stolen car, in the hope of bringing the car to a halt or slowing it down by the blowing out of the tire.

According to Priestman, the complete face of the tire was fully exposed to him when he fired, evidence which is supported by the photograph of the car which forms part of the record. It was then approximately 40 feet distant. Priestman had spent two years in the army during the recent war and had been trained in the use of small arms and had received further training for some three weeks when he became a member of the police force and said that he considered himself to be a better than average shot with a revolver. Accordingly to the uncontradicted evidence, which was accepted by Barlow J., it was the fact that, just as he fired the second shot, the police car struck a bump in the pavement which elevated his aim and resulted in the bullet striking the rear window of the stolen car and Smythson received the wound which disabled him.

Both of the police officers say that as they drove west on Mortimer Street there was no traffic on the roadway in either direction and they saw no pedestrians upon the sidewalks. The speed of the cars up to the time that the police car was forced up on to the boulevard was estimated by Ainsworth at from 35 to 50 miles an hour, and thereafter had increased and both were travelling at a speed estimated at 55 to 60 miles an hour. Mortimer Street is intersected to the west of the place where the shot was fired by Woody Crest Street and Pape Avenue. The first intersection where traffic might have been encountered travelling from north to south was, as closely as can be determined from the evidence, some 250 feet from the place where the second shot was fired. The intersection with Pape Avenue was, according to the plan put in evidence, 550 feet further to the west. Pape Avenue, was a through street, said by the appellant to be the busiest street in the township and both constables say that they were conscious of the necessity of attempting to stop the fleeing car before it reached that intersection.

1959

PRIESTMAN v. COLANGELO, SHYNALL AND SMYTHSON

Locke J.

In considering whether the action of Priestman in firing the second shot was a reasonable attempt by him to discharge his duty, it is to be borne in mind that, as the constables were both aware Smythson was a thief and he had demonstrated that he was prepared, in order to escape, to jeopardize both of their lives. The manner in which he had driven the car constituted an assault upon the officers, as defined by s. 230 of the Code. Assaults upon peace officers engaged in the execution of their duty are indictable under s. 232 of the Code. Forcing the police car over the curb was an attempt to cause the officers grievous bodily harm and, had the police car collided with the telephone pole at the rate of speed it was then travelling, the collision might well have been fatal to one or both of the constables and Smythson indictable for murder. Whatever may have been Smythson's previous record, he acted in a recklessly dangerous and criminal manner in his efforts to escape. The officers had made three determined efforts to halt the car by getting ahead of it, which had been frustrated. At the rate of 50 miles an hour the fleeing car would have reached the first of the two intersections in something less than four seconds and the second in about 10 seconds, travelling at a speed which would give no opportunity to Smythson to avoid cross traffic at the intersection or for such traffic to avoid a collision.

In deciding whether in any particular case a police officer had used more force than is reasonably necessary to prevent an escape by flight within the meaning of subs. 4 of s. 25 of the Code, general statements as to the duty to take care to avoid injury to others made in negligence cases such as *Polemis v. Furness Withey and Company*[1], *Hay or Bourhill v. Young*[2], and *M'Alister or Donoghue v. Stevenson*[3], cannot be accepted as applicable without reservation unless full weight is given to the fact that the act complained of is one done under statutory powers and in pursuance of a statutory duty. The causes of action asserted in these cases were of a different nature.

[1] [1921] 3 K.B. 560. [2] [1943] A.C. 92.
[3] [1932] A.C. 562 at 580.

The performance of the duty imposed upon police officers to arrest offenders who have committed a crime and are fleeing to avoid arrest may, at times and of necessity, involve risk of injury to other members of the community. Such risk, in the absence of a negligent or unreasonable exercise of such duty, is imposed by the statute and any resulting damage is, in my opinion, *damnum sine injuria.* In the article in the last edition of Broom's Legal Maxims, p. 1, dealing with the maxim *salus populi suprema est lex* where the passage from the judgment of Buller J. in the *British Cast Plate* case is referred to, the learned author says:

> This phrase is based on the implied agreement of every member of society that his own individual welfare shall, in cases of necessity, yield to that of the community; and that his property, liberty, and life shall, under certain circumstances, be placed in jeopardy or even sacrificed for the public good.

Assuming a case where a police officer sees a pickpocket stealing from a person in a crowd upon the street and the pickpocket flees through the crowd in the hope of escaping arrest, if the officer in pursuit unintentionally collides with some one, is it to be seriously suggested that an action for trespass to the person would lie at the instance of the person struck? Yet, if the test applied in the cases which are relied upon is adopted without restriction, it could be said with reason that the police officer would probably know that, if he ran through a crowd of people in an attempt to arrest a thief, he might well collide with some members of the crowd who did not see him coming. To take another hypothetical case, assuming a police officer is pursuing a bank robber known to be armed and with the reputation of being one who will use a gun to avoid capture. The escaping criminal takes refuge in a private house. The officer, knowing that to enter the house through the front door would be to invite destruction, proceeds to the side of the house where through a window he sees the man and fires through the window intending to disable him. Would an action lie at the instance of the owner of the house against the officer for negligently damaging his property? If an escaping bank robber who has murdered a bank employee is fleeing down an uncrowded city street and fires a revolver at the police officers who are pursuing

1959

PRIESTMAN v. COLANGELO, SHYNALL AND SMYTHSON

Locke J.

him, should one of the officers return the fire in an attempt to disable the criminal and, failing to hit the man, wound a pedestrain some distance down the street of whose presence he is unaware, is the officer to be found liable for damages or negligence?

The answer to a claim in any of these suppositious cases would be that the act was done in a reasonable attempt by the officer to perform the duty imposed upon him by *The Police Act* and the *Criminal Code,* which would be a complete defence, in my opinion. As contrasted with cases such as these, if an escaping criminal ran into a crowd of people and was obscured from the view of a pursuing police officer, it could not be suggested that it would be permissible for the latter to fire through the crowd in the hope of stopping the fleeing criminal.

The difficulty is not in determining the principle of law that is applicable but in applying it in circumstances such as these, In *Rex v. Smith*[1], Perdue J. A., in charging a jury at the trial of a police officer for manslaughter, is reported to have said that shooting is the very last resort and that only in the last extremity should a police officer resort to the use of a revolver in order to prevent the escape of an accused person who is attempting to escape by flight. With all the great respect that I have for any statement of the law expressed by the late Chief Justice of Manitoba, in my opinion this is too broadly stated and cannot be applied under all circumstances. Applied literally, it would presumably mean in the present case that, being unable to get in front of the escaping car, due to the criminal acts of Smythson, the officers should have abandoned the chase and summoned all the available police forces to prevent the escape. This would have involved ignoring their obligation to endeavour to prevent injury to other members of the public at the intersections which would be reached within a few seconds by the escaping car.

Police officers in this country are furnished with firearms and these may, in my opinion, be used when, in the circumstances of the particular case, it is reasonably necessary to do so to prevent the escape of a criminal whose actions, as in the present case, constitute a menace to other

[1] (1907), 13 C.C.C. 326, 17 Man. R. 282.

members of the public. I do not think that these officers having three times attempted to stop the fleeing car by endeavouring to place their car in front of it were under any obligation to again risk their lives by attempting this. No other reasonable or practical means of halting the car has been suggested than to slacken its speed by blowing out one of the tires.

The reasons for judgment delivered by Schroeder J. A. make no mention of the fact that at the time the second shot was fired the stolen car was approaching the intersection of Mortimer Street with Pape Avenue. I do not assume from the fact that this was not mentioned that the matter was not considered by that learned judge but, with great respect, I think insufficient weight was given to this important fact as well as to the criminal nature of the actions of Smythson in forcing the police car off the roadway. Both Barlow J. and Laidlaw J. A. considered the bearing that the rapid approach of the vehicle to the intersection with Pape Avenue had on the issue of negligence. Both of these learned judges have referred in their reasons to the fact that the shooting of Smythson resulted from the police car striking a rough place in the highway and both considered that the constables had exhausted all reasonable means of stopping the car before the shot was fired. With these conclusions, I respectfully agree.

The pavement on Mortimer Street was 35 feet in width and the sidewalks on either side lay five feet distant from the curb. The houses on either side are set back at varying distances from the lot lines in the block to the east of Woody Crest, except at the intersection with that street. It is undisputed that there was no other vehicular traffic on the street to the west of the speeding cars that was visible to Priestman. Some little children were playing on the lawn at some place in front of the house on the southwest corner of Woody Crest and Mortimer, but the evidence does not show that they were in a position where they would be visible to the driver of a car going west. Miss Eileen Keating was standing on the sidewalk on the south side of Mortimer, opposite a bus stop placed some 35 feet west of the west curb line of Woody Crest, talking to Miss Colangelo and Miss Shynall. The latter two were sitting

1959

PRIESTMAN v. COLANGELO, SHYNALL AND SMYTHSON

Locke J.

on a stone step on the south side of the house built on the southwest corner, in a position where their presence was hidden from the view of a driver of a car approaching from the east by a hedge growing along the south side of the lot. Miss Keating was, however, in a position where she was in full view but Priestman did not see her. At the time the second shot was fired she was about 100 yards to the west of the police car. Priestman did not fire at Smythson. It was only the fact that the car struck a bump on the roadway, of the existence of which he was unaware, which elevated the revolver as the shot was fired that caused the bullet to pass through the rear window of the fleeing car and strike Smythson. Had the bullet hit the tire, presumably a blow-out would have resulted and the speed of the fleeing car reduced, so that the police car could have passed and then stopped it. There is no evidence that such a blow-out would have menaced the safety of persons 100 yards distant who were off the roadway, and I think this is not to be presumed.

The cause of action pleaded is in negligence which, in the case of an officer attempting to perform his duty in these difficult circumstances, is to be construed, in my opinion, as meaning that what was done by him was not reasonably necessary and not a reasonable exercise of the constable's powers under s. 25 in the circumstances. As Laidlaw J. A. has pointed out, to find the constable guilty of negligence in the manner in which the revolver was fired, as distinct from firing at all, would necessitate finding that Priestman should have anticipated that his arm might be jolted at the instant he fired. That learned judge was not willing to make that finding nor am I.

I consider that the statement in Broom to which I have referred accurately states the law and that it is applicable in the present circumstances. The powers exercised by the constable are, in this sense, of a similar nature to powers of the nature referred to by Lord Greene in the passage from *Fisher's* case. If the circumstances are such that the legislature must have contemplated that the exercise of a statutory power and the discharge of a statutory duty might interfere with private rights and the person to whom

the power is given and upon whom the duty is imposed acts reasonably, such interference will not give rise to an action.

In my opinion, the action of the appellant in the present matter was reasonably necessary in the circumstances and no more than was reasonably necessary, both to prevent the escape and to protect those persons whose safety might have been endangered if the escaping car reached the intersection with Pape Avenue. So far as Priestman was concerned, the fact that the bullet struck Smythson was, in my opinion, simply an accident. As to the loss occasioned by this lamentable occurrence, I consider that no cause of action is disclosed as against the appellant.

For these reasons, I would allow these appeals and set aside the judgments entered in the Court of Appeal. In accordance with the provisions of the orders granting leave to appeal to this Court, no costs should be awarded against the respondents Colangelo and Shynall. I would dismiss the cross-appeals without costs. The appeal of Smythson should be dismissed and without costs.

The judgment of Cartwright and Martland JJ. was delivered by

CARTWRIGHT J. (*dissenting*):—These appeals arise out of two actions which, with another action, were tried together before Barlow J. without a jury. To make clear the questions raised for decision it is necessary to give a brief recital of the facts, which are fully stated in the reasons of the Court of Appeal[1].

On August 1, 1955, Smythson, then 17 years of age, stole a new Buick automobile, which was red in colour and bore dealers' licence plates, from a dealer's lot on Danforth Avenue in the township of East York. Priestman, the appellant, a police officer of the township, was in a police car driven by his senior, constable Ainsworth. They were on patrol duty when, shortly before 8.30 p.m. while it was still broad daylight, they received a message on the radio telephone reporting the theft and giving the description and licence number of the stolen car. Almost immediately they saw a motor vehicle which they believed to be—and which later turned out to be—the stolen vehicle, driven by

[1] [1958] O.R. 7, 11 D.L.R. (2d) 301, 119 C.C.C. 241.

1959

PRIESTMAN v. COLANGELO, SHYNALL AND SMYTHSON

Cartwright J.

Smythson. The stolen vehicle was travelling west on Cosburn, turned south at the intersection with Donlands and continued southerly on Donlands Avenue at about 20 miles an hour. It came to a stop about 2 feet from the west curb by reason of a red traffic light at the corner of Donlands and Mortimer Avenues. The police car pulled up alongside the stolen car and Priestman ordered Smythson to stop. Both officers were in uniform and Smythson, no doubt, realized that they were police officers. Instead of stopping he pulled around the corner quickly and drove west on Mortimer Avenue at a high rate of speed. The police car followed and on three occasions attempted to pass the stolen car in order to cut it off, but each time Smythson pulled to the south side of the road and cut off the police car. On the third occasion the police car was forced over the south curb on to the boulevard and was compelled to slow up in order to avoid colliding with a hydro pole on the boulevard. Following this third attempt and as the police car went back on to the road, Priestman fired a warning shot from his .38 calibre revolver into the air. The stolen car increased its speed and when the police car was one and a half to two car lengths from the stolen car Priestman aimed at the left rear tire of the stolen car and fired. The bullet hit the bottom of the frame of the rear window, shattered the glass, riocheted and struck Smythson in the back of the neck, causing him to lose consciousness immediately. The stolen car went over the curb on the south side of the road, grazed a hydro pole, crossed Woodycrest Avenue—an intersecting street—went over the curb on the south-west corner, through a low hedge about 2 feet high, struck the veranda of the house on the south-west corner a glancing blow and grazed along the side of the house, coming to a stop somewhere near the north-west corner of the house. On its course along the side of the house it struck and killed Columba Colangelo and Josephine Shynall, who were waiting for a bus.

On October 14, 1955, the administrator of Josephine Shynall commenced an action against Smythson and Priestman claiming damages under *The Fatal Accidents Act*. On November 8, 1955, the administrator of Columba Colangelo

commenced a similar action. On February 1, 1956, Smythson commenced an action against Priestman for damages for personal injuries. As mentioned above, these three actions were tried together.

The learned trial judge was of opinion that Smythson's action against Priestman failed on two grounds, (i) that the force used by Priestman was not more than was necessary to prevent Smythson's escape by flight and that Priestman was justified in firing as he did by the terms of s. 25(4) of the *Criminal Code,* and (ii) that the action, not having been commenced within six months of the act complained of, was barred by s. 11 of *The Public Authorities Protection Act,* R.S.O. 1950, c. 303.

Smythson's appeal in that action was dismissed. All members of the Court of Appeal agreed with the learned trial judge as to the second ground on which he proceeded. Laidlaw J.A. was also of opinion that Priestman was justified in using his revolver to prevent Smythson's escape and had acted without negligence. No appeal was taken by Smythson from the judgment of the Court of Appeal in that action.

In the Shynall and Colangelo actions the learned trial judge held (i) that the fatalities were caused by the negligence of Smythson, and (ii) that Priestman was justified in using the force he did use and that as against him the actions must be dismissed. In each action he assessed the damages at $1,250, and gave judgment accordingly against Smythson for that amount with costs, dismissed the action as against Priestman with costs and directed that the plaintiff should add to his judgment against Smythson the costs payable by him to Priestman.

From these judgments the plaintiffs and Smythson appealed to the Court of Appeal, the plaintiffs asking that Priestman also be found negligent and that the damages be increased, and Smythson asking that he be absolved from the finding of negligence made against him and that Priestman be found solely to blame for the fatalities.

The Court of Appeal[1] were unanimous in upholding the finding that Smythson was guilty of negligence causing the fatalities and in refusing to increase the damages awarded.

[1] [1958] O.R. 7, 11 D.L.R. (2d) 301, 119 C.C.C. 241.

1959

PRIESTMAN v. COLANGELO, SHYNALL AND SMYTHSON

Cartwright J.

The majority held that Priestman also was guilty of negligence and that the blame should be apportioned equally between Smythson and Priestman. Laidlaw J.A., dissenting in part, would have dismissed the appeal. In the result judgment was directed to be entered in each action against Smythson and Priestman jointly and severally for $1,250 damages, and providing that as between them each should be liable to the extent of 50 per cent.

From these judgments Priestman appeals to this Court, pursuant to special leave granted by the Court of Appeal, asking that the judgment of the learned trial judge be restored. The plaintiff in each action cross-appeals asking that the damage be increased. Smythson cross-appeals in each action asking that he be absolved from the finding of negligence made against him and that Priestman be held solely to blame.

At the conclusion of the argument of Smythson's counsel on his cross-appeal the Court was unanimously of opinion that the finding of negligence against Smythson should not be disturbed and counsel for the other parties were not called upon on that point.

Two main grounds are urged in support of Priestman's appeal: first, that Priestman in firing his revolver as he did, used only as much force as was necessary to prevent the escape of Smythson by flight, that his escape could not have been prevented by reasonable means in a less violent manner, that Priestman was therefore justified in acting as he did by s. 25(4) of the *Criminal Code*, that that justification relieved him from civil liability not only as regards Smythson but also as regards the plaintiffs, and that the Court of Appeal erred in holding that the question whether he was liable to the plaintiffs fell to be decided in accordance with the rules of the common law as to the duty of reasonable care: Second, that even if the Court of Appeal were right in holding that the last-mentioned question fell to be decided in accordance with the rules of the common law as to the duty of reasonable care, they erred in holding that Priestman had acted negligently.

In dealing with the first ground it is necessary to set out the terms of subss. (1), (3) and (4) of s. 25 of the *Criminal Code* which are as follows:

25. (1) Every one who is required or authorized by law to do anything in the administration or enforcement of the law

(*a*) as a private person,

(*b*) as a peace officer or public officer,

(*c*) in aid of a peace officer or public officer, or

(*d*) by virtue of his office,

is, if he acts on reasonable and probable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose.

* * *

(3) Subject to subsection (4), a person is not justified for the purposes of subsection (1) in using force that is intended or is likely to cause death or grievous bodily harm unless he believes on reasonable and probable grounds that it is necessary for the purpose of preserving himself or any one under his protection from death or grievous bodily harm.

(4) A peace officer who is proceeding lawfully to arrest, with or without warrant, any person for an offence for which that person may be arrested without warrant, and every one lawfully assisting the peace officer, is justified, if the person to be arrested takes flight to avoid arrest, in using as much force as is necessary to prevent the escape by flight, unless the escape can be prevented by reasonable means in a less violent manner.

It is clear that Priestman was a peace officer who was proceeding lawfully to arrest Smythson, without warrant, for an offence for which he might be arrested without warrant, and that Smythson had taken to flight to avoid arrest; Priestman was therefore justified in using as much force as was necessary to prevent the escape by flight unless the escape could be prevented by reasonable means in a less violent manner. When subs. (3) and subs. (4) of s. 25 are read together the conclusion is inescapable that if all the conditions prescribed in subs. (4) are present the officer is justified in using force that is intended or is likely to cause death or grievous bodily harm to the person in flight.

In the case at bar there existed all the conditions requisite to afford justification under subs. (4) with the possible exception of the one stated in the concluding words "unless the escape can be prevented by reasonable means in a less violent manner"; on the question whether that condition was fulfilled I share the doubts expressed by Schroeder J.A. and I agree with him that it is unnecessary to make a finding upon it. For the purposes of this branch of the matter, I

1959

PRIESTMAN v. COLANGELO, SHYNALL AND SMYTHSON

Cartwright J.

will assume, without deciding, that Smythson's escape could not have been prevented by reasonable means in a less violent manner and that as between Priestman and Smythson the former was justified in using his revolver as he did.

On this assumption the question arises whether the terms of subs. (4) afford a justification not only for causing the bodily injuries to Smythson but also for causing the death of the two young women. This is a question of construction. I agree with Mr. Phelan's submission that the word "justified" as used in the subsection means freed from civil liability as well as from criminal responsibility which might otherwise exist. The word "justified" is used in a number of sections in Part I of the *Criminal Code* in contradistinction from the phrase "protected from criminal responsibility" which is used in a number of other sections in the same part.

The question of difficulty is whether the justification afforded by the subsection is intended to operate only as between the peace officer and the offender who is in flight or to extend to injuries inflicted, by the force used for the purpose of apprehending the offender, upon innocent bystanders unconnected with the flight or pursuit otherwise than by the circumstance of their presence in the vicinity. The words of the subsection appear to me to be susceptible of either interpretation and that being so I think we ought to ascribe to them the more restricted meaning. In my opinion, if Parliament intended to enact that grievous bodily harm or death might be inflicted upon an entirely innocent person and that such person or his dependants should be deprived of all civil remedies to which they would otherwise have been entitled, in circumstances such as are present in this case, it would have used words declaring such intention without any possible ambiguity.

I am fortified in this view as to the true construction of the subsection by the judgment of Thurlow J. in *The Queen v. Sandford*[1], a case in which s. 41, the predecessor of s. 25(4) was invoked. That learned judge was clearly of opinion that although justification for a peace officer shooting exists as regards a fugitive offender that circumstance does not

[1] [1957] Ex. C.R. 220, 11 D.L.R. (2d) 115, 118 C.C.C. 93.

relieve the officer from the duty to use reasonable care for the safety of others. I refer particularly to the following passages:

At p. 223:

> Moreover, assuming that there were no other reasonable means of preventing the escape of McDonald and that the defendant Hilker could have justified shooting and injuring or killing him in the attempt to hit one of the tires, in my view the defendant Hilker was negligent in shooting as he did without due regard for the safety of the passengers in the car.

and at p. 224:

> Assuming Hilker's right to use force to stop McDonald, it was still his duty to have due regard for the safety of the passengers and other people and not to use force in such a way as to be likely to injure them.

While in *Robertson and Robertson v. Joyce*[1], to which extended reference is made in the reasons of the Court of Appeal, this question of construction did not arise directly as no one other than the fleeing offender suffered injury, there are a number of expressions in the judgment of the Court delivered by Laidlaw J.A. in that case which point in the same direction as the judgment of Thurlow J. above referred to.

I conclude that the first main ground upon which Priestman's appeal is based fails and pass to the second, which raises the question whether the two fatalities were contributed to by negligence on the part of Priestman.

Under s. 45 of *The Police Act,* R.S.O. 1950, c. 279, Priestman was charged with the duty of apprehending Smythson; it is not necessary to consider whether the duty imposed by that section differs from the duty which would have rested upon him at common law. A public officer who wilfully neglected to perform a duty imposed on him either by common law or statute was guilty of a common law misdemeanour. Prosecutions for offences at common law have now been done away with by s. 8 of the *Criminal Code* and while s. 164 of the *Criminal Code,* R.S.C. 1927, c. 36, made it an offence wilfully to omit to do any act required to be done by any act of any legislature in Canada that section has been repealed and s. 107 of the present Code, which replaced it, is limited in its application to Acts of Parliament; but these circumstances do not alter the fact that it

[1] [1948] O.R. 696, 4 D.L.R. 436, 92 C.C.C. 382.

1959

PRIESTMAN v. COLANGELO, SHYNALL AND SMYTHSON

Cartwright J.

was Priestman's duty to apprehend Smythson, and the existence of that duty is one of the circumstances to be considered in determining whether his conduct was negligent.

This duty to apprehend was not, in my opinion, an absolute one to the performance of which Priestman was bound regardless of the consequences to persons other than Smythson. Co-existent with the duty to apprehend Smythson was the fundamental duty *alterum non laedere,* not to do an act which a reasonable man placed in Priestman's position should have foreseen was likely to cause injury to persons in the vicinity.

The identity of the persons likely to be injured or the precise manner in which the injuries would be caused, of course, could not be foreseen; but, in my opinion, that the car driven by Smythson would go out of control as a result of the shot fired by Priestman was not "a mere possibility which would never occur to the mind of a reasonable man" —to use the words of Lord Dunedin in *Fardon v. Harcourt-Rivington*[1]—it was rather a reasonable probability; that causing a car travelling at a speed of over sixty miles an hour on a street such as Mortimer Avenue to be suddenly thrown out of control would result in injury to persons who happend to be upon the street also seems to me to be a probability and not a mere possibility. To hold, as has been done by all the judges who have dealt with this case, that Smythson should have foreseen the harm which was caused and at the same time to hold that Priestman ought not to have foreseen it would, it seems to me, involve an inconsistency. In my opinion, Priestman's act in firing without due regard to the probabilities mentioned was an effective cause of the fatalities and amounted to actionable negligence unless it can be said that the existence of the duty to apprehend Smythson robbed his act of the negligent character it would otherwise have had.

The question which appears to me to be full of difficulty is how far, if at all, the duty which lay upon Priestman to apprehend Smythson required him to take, or justified him in taking, some risk of inflicting injury on innocent persons. Two principles are here in conflict, the one *alterum non*

[1] (1932), 146 L.T. 391 at 392.

laedere, above referred to, the other *salus populi suprema lex.* It is undoubtedly in the public interest that an escaping criminal be apprehended and the question is to what extent innocent citizens may be called upon to suffer, without redress, in order that that end may be achieved. In spite of the diligence of counsel, little helpful authority has been brought to our attention. I have already made it clear that for the purposes of this branch of the matter I am assuming that Priestman could not have prevented Smythson's escape otherwise than by firing his revolver, and, on this assumption, it appears to me that the question for the Court is: "Should a reasonable man in Priestman's position have refrained from firing although that would result in Smythson escaping, or should he have fired although foreseeing the probability that grave injury would result therefrom to innocent persons?" I do not think an answer can be given which would fit all situations. The officer should, I think, consider the gravity of the offence of which the fugitive is believed to be guilty and the likelihood of danger to other citizens if he remains at liberty; the reasons in favour of firing would obviously be far greater in the case of an armed robber who has already killed to facilitate his flight than in the case of an unarmed youth who has stolen a suit-case which he has abandoned in the course of running away. In the former case it might well be the duty of the officer to fire if it seemed probable that this would bring down the murderer even though the firing were attended by risks to other persons on the street. In the latter case he ought not, in my opinion, to fire if to do so would be attended by any foreseeable risk of injury to innocent persons.

In the particular circumstances of the case at bar I have, although not without hesitation, reached the conclusion that Priestman ought not to have fired as he did and that he was guilty of negligence in so doing.

In forming this opinion I have been influenced in particular by the following matters disclosed in the evidence. There was no suggestion that Smythson was armed. His crime, while serious, was not one of violence, although he was willing to resort to violent means to escape arrest. Mortimer Avenue is a residential street in a built-up area with single and semi-detached houses in close proximity to

1959

PRIESTMAN v. COLANGELO, SHYNALL AND SMYTHSON

Cartwright J.

each other on each side of the street. There is a bus-stop at the corner of Mortimer and Woodycrest. It was a holiday evening in summer time and in the ordinary course of events a number of the residents of the street would be expected to be in the vicinity. There were in fact three young women at the last-mentioned corner and some children playing close by. Priestman believed his skill with a revolver to be better than average, but he had never before fired a shot from a moving vehicle or at a moving target. If the revolver were accurately aimed at unintended elevation of the muzzle of a quarter of an inch at the instant of firing would be sufficient to cause the bullet to strike the Smythson car where it did instead of on the tire. Priestman says that before firing he saw no vehicles or persons but his own description of the way in which he looked is:—"I took a quick glance". I refer also to the two following passages in his examination for discovery read into the record at the trial:

315. Q. . . . You know that bullets ricochet if they hit a solid object?
A. Yes, sir. I do.

316. Q. You knew that at the time you fired the shot? Is that right?
A. Yes, sir. I guess it would. I did not realize that. I did not take that into consideration at the time of the accident.

* * *

374. Q. Well, what did you believe would happen if you did hit the tire, the rear tire?
A. At that time I never took that into consideration.

379. Q. Did you consider before or at the time you fired at the tire what would happen to the Buick car if you did in fact hit that tire?
A. No, sir. I did not.

I have not overlooked Mr. Phelan's submission that to pursue the car driven by Smythson into Pape Avenue at the speed at which it was travelling would have been attended with even greater danger to the public than firing at the car while still on Mortimer Avenue; the use of the siren might have reduced the suggested danger; but if, as it was put in argument, the continuation of the pursuit would almost inevitably result in disaster, it is my opinion that the duty of the police was to reduce their speed and, it may be, to abandon the pursuit rather than to open fire.

I conclude that the second main ground of appeal fails and that Priestman's appeal should be rejected.

There remains the question of the quantum of damages; as to this Laidlaw J.A. said:

> . . . I am disposed to think that a greater sum might have been properly allowed but nevertheless I cannot say that the learned trial judge erred in principle or that the amount assessed by him is so inappropriate as to be an improper assessment. There is no sufficient reason or ground to justify alteration by this Court of the award of damages as made by the learned trial judge.

A similar view was expressed by the other members of the Court. In my opinion no sufficient reason has been shown for interfering with the assessments made by the learned trial judge confirmed as they have been by the unanimous judgment of the Court of Appeal.

I would dismiss the appeals with costs and the cross-appeals without costs.

FAUTEUX J.:—For the reasons given in the Court of Appeal by Mr. Justice Laidlaw[1], I would allow the appeals entered by Priestman in both cases and set aside the judgments entered in the Court of Appeal. In accordance with the provisions of the orders granting leave to appeal to this Court, no costs should be awarded against the respondents Colangelo and Shynall. I would dismiss the cross-appeals without costs. The appeal of Smythson should be dismissed and without costs.

Appeals allowed without costs; cross-appeals dismissed without costs.

Solicitors for the defendant, appellant: Phelan, O'Brien, Phelan & Rutherford, Toronto.

Solicitors for the plaintiff Colangelo: McCarthy & McCarthy, Toronto.

Solicitors for the plaintiff Shynall: Cavers, Chown & Cairns, St. Catharines.

Solicitors for the defendant Smythson: Levinter, Grossberg, Shapiro, Mayzel & Dryden, Toronto.

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[1] [1958] O.R. 7, 11 D.L.R. (2d) 301, 119 C.C.C. 241.

1959

Mar. 4
*Apr. 28

GERALD SMITH .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Criminal law—Juvenile delinquents—Whether notice of hearing served on parents—Conviction made in absence of parents—Certiorari—Lack of jurisdiction—Leave to appeal granted by Supreme Court of Canada—Criminal Code, 1953-54 (Can.), c. 51, ss. 141, 414, 705, 708(1)—The Juvenile Delinquents Act, R.S.C. 1952, c. 160, s. 10(1)—The Supreme Court Act, R.S.C. 1952, c. 259, s. 41.

The appellant, a boy aged 14, was declared by a judge of the Winnipeg Juvenile Court to be a juvenile delinquent. He moved before a judge of the Court of Queen's Bench for an order quashing the conviction without the actual issue of a writ of certiorari on the ground, *inter alia*, that his parents had not been properly served with a notice of hearing of the charge. His application was dismissed, and this judgment was affirmed by a majority in the Court of Appeal. Leave to appeal was granted by this Court subject to argument as to the right to grant leave.

Held: The appeal should be allowed and the finding of delinquency quashed.

Per Kerwin C.J. and Judson J.: This Court had power to grant leave to appeal under s. 41(1) of the *Supreme Court Act*. Section 41(3) of the Act had no application as the judgment appealed from was not one affirming a conviction.

Section 10(1) of the *Juvenile Delinquents Act*, which requires that written notice of the hearing of any charge of delinquency shall be served on the parent or parents of the child concerned, had not been complied with. The letter written to the father by the probation officer was not compliance with the section and the mere fact that thereafter the father was advised verbally of the nature of the charge did not mend matters. Furthermore, the father was not afforded the right to be present at the hearing as mentioned in s. 10(1). It was no answer to say that the granting of a writ of certiorari was a matter of discretion. No such question could arise where the terms of a statute had not been complied with.

Per Locke and Martland JJ.: Compliance with s. 10 of the *Juvenile Delinquents Act* is a condition precedent to the Juvenile Court judge acquiring jurisdiction, and it was shown in this case that the section had not been complied with. Furthermore, the record disclosed a failure to comply with the imperative provisions of s. 708(1) of the *Criminal Code*, which requires that the substance of the information shall be stated to the accused and that he shall be asked whether he pleads guilty or not guilty. Sections 17 and 38 of the *Juvenile Delinquents Act* do not relieve the judges of the Juvenile Court from complying with s. 708(1) of the Code.

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

1959

SMITH v. THE QUEEN

Per Cartwright J.: Service on the parent or parents of the appellant of notice of hearing was an essential preliminary, in the absence of which the judge of the Juvenile Court acted without jurisdiction. Furthermore, there was neither arraignment nor plea in this case. This was clearly a case in which the writ of certiorari should be granted.

APPEAL from a judgment of the Court of Appeal for Manitoba[1], affirming a decision of Campbell J. Appeal allowed.

J. L. Crawford, for the appellant.

G. E. Pilkey, for the respondent.

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

THE CHIEF JUSTICE:—On September 23, 1957, the appellant Gerald Smith, then fourteen years of age, was declared by the judge of the Winnipeg Juvenile Court and Family Court to be a delinquent and was fined $10. An application that the finding of a delinquency against the child be quashed without the actual issue of a writ of certiorari was dismissed by Campbell J. on December 23, 1957, and an appeal from his decision was dismissed May 16, 1958, by the Court of Appeal for Manitoba[1], Adamson C.J., Coyne and Montague JJ., the Chief Justice dissenting. On June 26, 1958, we granted Gerald leave to appeal to this Court on all points mentioned in his notice of motion subject to argument as to our right to grant leave. The appeal did not come on for argument until March 4, 1959.

For a proper appreciation of the questions involved it is necessary to set forth the attending circumstances in some detail. On August 15, 1957, the information and complaint by Julius Chmielewski, probation officer of the Winnipeg Juvenile Court and Family Court was taken "that Gerald Smith, a child, did on or about the 7th day of June, 1957, at the City of Winnipeg, in the said Province, commit a delinquency in that he did unlawfully and indecently assault Helen Balaban, a female, contrary to the form of the statute in such case made and provided".
According to the affidavit of the probation officer filed on the application to Campbell J., he attempted unsuccessfully from August 16 to August 27, 1957, to get in touch by tele-

[1] (1958), 25 W.W.R. 97, 121 C.C.C. 103.

1959

SMITH
v.
THE QUEEN

Kerwin C.J.

phone with Gerald's parents or either of them at their home in Winnipeg and on August 27 sent a letter by post to Matthew Smith, the child's father, addressed to him at his home, reading as follows:

Dear Mr. Smith:— Re: Your son Gerald

This is to advise you that you must be present with your son for a court hearing on Friday, August 30th, at 10 o'clock in the morning.

On August 29, 1957, the father admitted to the officer having received the letter but indicated that he could not be present with Gerald at Court on August 30 as he was leaving Winnipeg on a business trip. The officer informed the father that his son and four other juveniles were charged in regard to an indecent assault upon a little girl in a shack behind the father's home. The father indicated that this was nothing serious but rather a boyish prank. He requested that the matter be remanded for two weeks to Friday, September 13, 1957, and the matter was so arranged.

According to the same affidavit, the father telephoned the officer on September 12 requesting a further remand to Monday, September 16, on the ground that he would be out of the city for the weekend. The officer intimated that the mother could bring the child to Court but the father indicated that his wife knew nothing of the matter and he did not want her to become involved, but he assured the officer that he would be present at Court with Gerald and that he would not require any further remand. On September 16 neither the father nor child appeared in Court and a warrant was issued for the apprehension of the child. On September 20 he was arrested without the knowledge of his parents and was brought before the judge of the Winnipeg Juvenile Court and Family Court, and was remanded in custody to September 24. Later in the day, on September 20, the mother attended at the office of the probation officer and was informed by him of the circumstances of the delinquency alleged against Gerald.

Three other juveniles were apprehended in connection with the same delinquency and appeared in Court on July 8 and the final disposition of the matter so far as they were concerned was completed July 16. On August 30, a fourth boy attended Court with his mother, on which date the matter of that charge was completed.

The transcript of what occurred in Court on Friday, September 20, is as follows:

JUDGE: Gerald, how old are you?

GERALD: 14.

JUDGE: 14. When is your birthday?

GERALD: March 2nd.

JUDGE: You didn't show up when you were supposed to show up so we issued a warrant. Why weren't you here?

GERALD: I didn't know.

Mr. CHMIELEWSKI: His father was doing all the arranging Your Honor, the boy was away all summer on the farm. The father was in touch with me three times and asked to remand the case and remand the case and then he forgot to make any arrangements. He asked me to remand the case definitely for Monday, he's going to be here, and he didn't even bother to phone and tell me about it. I think he's just giving us the run-around, so as a result a warrant was issued for this boy. It's unfortunate, but the boy didn't know what arrangements were made to be here or not. The father was carrying out all the arrangements.

JUDGE: That's all very well but this lad was in here and he's charged with a pretty serious offence.

Mr. CHMIELEWSKI: No. Your Honor he wasn't here. He was charged but he was not here.

JUDGE: Oh I see. There's an Information here sonny that on or about the 7th of June, a long time ago, unlawfully and indecently assault Helen Balaban. What about that is that correct or not? What did you do?

GERALD: We took her pants down and let her go.

JUDGE: Is this one of the boys that had that Club?

Mr. CHMIELEWSKI: Yes, this happened to be in his own yard.

JUDGE: Well the father is not here again this morning?

Mr. CHMIELEWSKI: There's nobody here. I didn't know anything about this family . . . is your mother sick? (To Gerald)

GERALD: I don't know whether she is.

Mr. CHMIELEWSKI: Doesn't she live at home?

GERALD: She's at home.

JUDGE: Well we'll remand this to September 24th, that's Tuesday, at 10 o'clock. Okay.

Mr. CHMIELEWSKI: In custody?

JUDGE: Yes.

COURT ADJOURNED.

What may be taken to be a return to a writ of certiorari, if it had been granted, appears on the back of the information and complaint where the judge indicated that on September 23 "Case brought forward to this date at request of Mr. Chmielewski. Delinquent. Fine $10.00". It was on that date that counsel appeared for the first time and requested an adjournment as there had not been sufficient

1959

SMITH
v.
THE QUEEN

Kerwin C.J.

time for him to be properly instructed. He stated that, on the facts as he understood them, he would advise the boy to plead not guilty. The adjournment was refused, the judge taking the position that the boy had already admitted the delinquency. All this time the father was kept outside the room in which the hearing was taking place and it was only then that the judge directed that he be brought in. During the discussion which ensued between the judge and the father the latter said that there had been a misunderstanding as to the date to which the hearing was to be finally adjourned. Considering that there had been a plea of guilty by the child the magistrate imposed a fine of $10.

This Court had power to grant leave to appeal under subs. (1) of s. 41 of the *Supreme Court Act*, R.S.C. 1952, c. 259:

> 41. (1) Subject to subsection (3), an appeal lies to the Supreme Court with leave of that Court from any final or other judgment of the highest court of final resort in a province, or a judge thereof, in which judgment can be had in the particular case sought to be appealed to the Supreme Court, whether or not leave to appeal to the Supreme Court has been refused by any other court.

Subsection (3) reads:

> 41. (3) No appeal to the Supeme Court lies under this section from the judgment of any court acquitting or convicting or setting aside or affirming a conviction or acquittal of an indictable offence or, except in respect of a question of law or jurisdiction, of an offence other than an indictable offence.

It has no application as the judgment of the Court of Appeal is not one affirming a conviction.

In connection with the first ground of appeal "that the Juvenile Court Judge has no jurisdiction" no reference was made on the argument before us to s. 414 of the *Criminal Code* which reads in part:

> 414. Subject to this Act, every superior court of criminal jurisdiction and every court of criminal jurisdiction that has power to try an indictable offence is competent to try an accused for that offence
>
> (*a*) if the accused is found, is arrested or is in custody within the territorial jurisdiction of the court;

As pointed out by the Chief Justice of Manitoba, we must take judicial notice of the Order-in-Council appointing Emerson J. Heaney, Esquire, a Juvenile Court Judge. He was appointed by the Lieutenant-Governor-in-Council of

Manitoba under the authority of subs. (1) of s. 6 of *The Child Welfare Act*, R.S.M. 1954, c. 35, whereby the Lieutenant-Governor-in-Council may establish Courts for the purpose of dealing with juvenile delinquents under *The Juvenile Deliquents Act* and define their respective territorial jurisdictions. It was, therefore, a Court duly established under a provincial statute for the purpose of dealing with juvenile delinquents in accordance with what is now s. 2(1)(*b*) of the *Juvenile Delinquents Act*, R.S.C. 1952, c. 160. Subsection (1) of s. 5 thereof provides that prosecutions and trials under the Act shall be summary and shall *mutatis mutandis* be governed by the provisions of the *Criminal Code* relating to summary convictions in so far as such provisions are applicable. Part XXIV of the *Criminal Code* relates to summary convictions and included therein is s. 705:

> 705. Every summary conviction court has jurisdiction to try, determine and adjudge proceedings to which this Part applies in the territorial division over which the person who constitutes that court has jurisdiction.

However, it has been held by the Court of Appeal for Ontario in *Rex v. Abbott*,[1] that s. 577 of the old *Criminal Code* which, for present purposes, is in the same terms as s. 414 of the new Code, applied where, although the offence charged had been committed outside the territorial limits of the jurisdiction of a Court, the accused was in custody within those limits. Leave to appeal from that decision was refused[2] on two grounds, one of which was that it was not in conflict with a prior decision of the Ontario Court of Appeal in *The King v. O'Gorman*[3].

In view of the fact that no argument was adduced with reference to s. 414 of the Code, I say nothing about the first ground of appeal but proceed to a consideration of another objection urged on behalf of the appellant; that is that, as required by subs. (1) of s. 10 of the *Juvenile Delinquents Act*, due notice of the hearing of the charge of delinquency was not served on either parent. That subsection reads as follows:

> 10. (1) Due notice of the hearing of any charge of delinquency shall be served on the parent or parents or the guardian of the child, or if there be neither parent or guardian, or if the residence of the parent or parents

[1] [1944] O.R. 230, 81 C.C.C. 174, 2 D.L.R. 378.
[2] [1944] S.C.R. 264, 82 C.C.C. 14, 4 D.L.R. 481.
[3] (1909), 18 O.L.R. 427, 15 C.C.C. 123.

1959

SMITH
v.
THE QUEEN

Kerwin C.J.

or guardian be unknown, then on some near relative living in the city, town or county, if any there be, whose whereabouts is known, and any person so served has the right to be present at the hearing.

The letter of August 27, 1957, is certainly not a compliance with this section and the mere fact that thereafter the father was advised verbally of the nature of the charge does not mend matters. On this ground the appeal should be allowed and in this connection it might be pointed out that the father was not afforded the right to be present at the hearing as mentioned in the latter part of the subsection. I quite agree with the Chief Justice of Manitoba that prior thereto the father was most neglectful but that cannot cure the defect. Nor is it any answer to say that the granting of a writ of certiorari is a matter of discretion. No such question can arise where the terms of a statute have not been complied with.

While it appears to be clear that the Juvenile Court judge was bearing in mind what had been said when the other children were before him, it is preferable to pass no judgment on the other points raised on behalf of the appellant.

The appeal should be allowed and the orders of the Court of Appeal and of Campbell J. set aside. In view of the fact that the appellant was in custody from September 20 to September 23 and of the long time that has elapsed since then, there should not be a new trial, but the finding of deliquency should be quashed. In fact, counsel for the Crown agreed that, if the Court came to the conclusion that the finding could not stand, there should not be a new trial.

The judgment of Locke and Martland JJ. was delivered by

LOCKE J.:—The appellant, Gerald Smith, then a boy of fourteen years, was on August 15, 1957, charged in an information laid by a probation officer under the provisions of the *Juvenile Delinquents Act*, R.S.C. 1952, c. 160, that he:

did on or about the 7th day of June, A.D. 1957 at the City of Winnipeg in the said province commit a delinquency in that he did unlawfully and indecently assault Helen Balaban, a female, contrary to the form of the statute in such case made and provided.

The offence of indecent assault is indictable and one guilty of the offence is liable to imprisonment for five years and to be whipped, under the provisions of s. 141(1) of the *Criminal Code*.

The evidence does not disclose that the fact of the information having been laid was communicated directly to the boy but, in an affidavit made by the probation officer which was filed in the proceedings taken before Campbell J. hereinafter referred to, that official stated that he made several attempts to communicate with the parents of the boy and, these failing, he wrote a letter on August 27, 1957, to the boy's father, Matthew Smith, addressed to his home in Winnipeg, saying:

> This is to advise you that you must be present with your son for a court hearing on Friday, August 30th, at 10 o'clock in the morning.

This notice appears to have been given in purported compliance with s. 10 of the *Juvenile Delinquents Act* which, so far as it need be considered, reads:

> Due notice of the hearing of any charge of delinquency shall be served on the parent or parents or the guardian of the child.

On August 29, Matthew Smith came to the office of the probation officer in Winnipeg, and, according to the latter, admitted that he had received the letter and asked that the hearing be adjourned from August 30 for two weeks. The officer agreed to this and swears that at this time he informed the father that his son and four other juveniles were charged with an indecent assault upon a little girl. He further states that on September 12 Matthew Smith telephoned to him asking for a further adjournment from September 13 to September 16, assuring the probation officer that he would be present at that time with the boy. This adjournment was made but on September 16 neither the boy nor his father appeared.

On that date a warrant was issued for the arrest of the boy. The material does not disclose the date of the arrest but on September 20 the boy was in custody and was brought before the judge of the Juvenile Court and a transcript of what took place at this time forms part of the record. When the boy was asked by the judge why he had not appeared on the previous occasion, his answer was that

1959

SMITH
v.
THE QUEEN

Locke J.

he did not know about the matter and the probation officer explained to the Court that all the arrangements had been made with the father. There is no suggestion that any notice of what was apparently intended as a hearing of the charge and which was then held was given to either of the boy's parents or that either of them knew anything about it until after the event.

As the record discloses, the information was not read to the boy, the judge contenting himself with saying to him that there was an information saying that on or about the 7th of June he had unlawfully and indecently assaulted Helen Balaban, and then asked:

> What about that? Is that correct or not. What did you do?

To this the boy replied:

> We took her pants down and let her go.

This answer appears to have been interpreted by the judge as a plea of guilty. No other evidence was given. It appears from the affidavit filed by the probation officer that three other boys had been apprehended, charged with the same offence, and these charges had been disposed of on July 16, more than two months previous. A fourth boy also involved, it was stated, had appeared on August 30, 1957, in the Court when the matter was dealt with. There was no evidence given as to where the alleged offence had been committed but the probation officer told the judge that Gerald Smith was one of the boys that had a club, meaning, apparently, a boys' club, and that the occurrence had taken place in the back yard of his father's property.

At the conclusion of these proceedings on September 20, the judge did not announce his decision but remanded the boy to custody until September 24. On September 23, Mr. J. L. Crawford, a barrister practising in Winnipeg, appeared on the instructions of the father before the judge of the Juvenile Court and asked that the matter be reopened and the boy permitted to withdraw what had apparently been regarded as his plea to the charge. The judge declined to permit this and announced that he was going to fine the boy $10 and this was paid. The information which had been

laid and which was endorsed with the record of the various remands so-called bears an endorsement reading: "Delinquent, fine $10."

Section 5 of the *Juvenile Delinquents Act* provides that, except as otherwise provided in the Act, prosecutions and trials shall be summary and shall be governed by the provisions of the *Criminal Code* relating to summary convictions in so far as such provisions are applicable, whether or not the act constituting the offence charged would be, in the case of an adult, triable summarily, with certain exceptions which do not affect the present matter.

Section 708(1) of the *Criminal Code* provides in part that, where the defendant appears before a summary conviction Court, the substance of the information shall be stated to him and he shall be asked whether he pleads guilty or not guilty to the information where the proceedings are in respect of an offence that is punishable on summary conviction, a provision which is rendered applicable by the terms of s. 5 above mentioned.

Section 37 of the *Juvenile Delinquents Act* provides for an appeal from any decision of a juvenile Court by leave of a judge of the Court of Queen's Bench, an appeal which, if granted, is heard by a judge of that Court. The appellant in the present matter did not apply for leave but moved before Campbell J. for an order quashing the conviction without the actual issue of a writ of *certiorari*.

In the reasons for judgment delivered by that learned judge he said in part:

> I find that there was more than adequate notice to the father of the hearing of this charge. Section 10 of the *Juvenile Delinquents Act* 1929 has been adequately complied with.

He further was of the opinion that a plea had been properly taken, that the nature of the charge had been explained in the proper manner by the Juvenile Court judge and that there had been no denial of justice. It is, in my opinion, unnecessary to consider the portion of the reasons delivered by the learned judge dealing with what was said to be the refusal of the Juvenile Court judge to hear counsel on behalf of the boy and his refusal to permit what was considered to be the plea of guilty to be withdrawn.

1959

SMITH v. THE QUEEN

Locke J.

The opinion of the majority of the learned judges of the Court of Appeal[1] was delivered by Coyne J.A. who considered that sufficient information had been given to the boy as to the nature of the charge and that he had fully understood it, that the evidence showed that full information as to the charge was conveyed to the father on August 29 and that Campbell J. had in refusing to direct that a writ of *certiorari* be issued and the conviction quashed properly exercised his discretion. Adamson C.J.M., who dissented, would have directed that a writ of *certiorari* be issued and the conviction quashed upon the grounds, *inter alia,* that s. 10 of the *Juvenile Delinquents Act* had not been complied with and that, accordingly, the Juvenile Court judge had not acquired jurisdiction to hear the charge and that there had been no arraignment and plea taken as required by s. 708(1) of the Code.

As provided by s. 17 of the *Summary Convictions Act,* R.S.M. 1954, c. 24, the evidence taken in this matter is to be treated as part of the conviction or order in any proceedings other than an appeal to the County Court to quash the conviction, whether by *certiorari* or otherwise. I agree with the learned Chief Justice of Manitoba that it was shown that s. 10 of the *Juvenile Delinquents Act* had not been complied with. The language of the section is imperative:

> Due notice of the *hearing of any charge* of delinquency shall be served on the parent or parents.

The letter written to the father by the probation officer on August 27 gave notice of a hearing on August 30, though the offence with which the son was charged was not stated. While the father was informed of the nature of the charge on August 29, the hearing referred to in the letter did not take place, the matter being adjourned by arrangement until August 30, and again by arrangement with the father until September 16 when neither the father nor the son appeared. Accepting the statement made by the boy on September 20, he knew nothing about the matter. There is no pretense that any notice, either in writing as required by s. 10 or oral, was given to the father or the mother of the hearing which took place after the boy was arrested on

[1] (1958), 25 W.W.R. 97, 121 C.C.C. 103.

September 20, and it is upon the evidence that was taken at that time that the finding that he was a delinquent was based.

Compliance with the section is, in my opinion, a condition precedent to the Juvenile Court judge acquiring jurisdiction. The principle applied by the Court of Appeal for Manitoba in *Rex v. Howell*[1] applies.

I am further of the opinion, in agreement with the learned Chief Justice, that the record discloses a failure to comply with the imperative provisions of s. 708(1) of the Code. The offence with which this boy was charged was that defined by s. 141 of the *Criminal Code* but, by virtue of s. 3 of the *Juvenile Delinquents Act*, such an offence by a child of the age of the appellant is to be known as a delinquency and dealt with as provided in that Act. Section 708(1) requires that the substance of the information shall be stated to the accused and that he shall be asked whether he pleads guilty or not guilty. There was, in my opinion, an insufficient compliance with the first of these requirements. It is unlikely that a boy of fourteen would understand what an "information" was or appreciate the gravity of the offence defined by the *Criminal Code* with which he was charged. These are matters that should have been explained to him before he was permitted to plead. As to the second requirement, he was not asked whether he pleaded guilty or not guilty to the information. On the contrary, the boy was told that there was an information that some three months previously he had unlawfully and indecently assaulted Helen Balaban and the questions then put to him which are quoted above were simply an invitation to him to make a statement of what had occurred. The boy had been deprived of the protection the presence of his father would have afforded by the failure to comply with s. 10 and should not have been permitted by the judge to make a statement without at least being warned that he was not obliged to say anything. The failure of the Juvenile Court judge to discharge what was his clear duty in this respect to the boy appearing before him without counsel does not go to the question of jurisdiction, but the

[1] (1910), 19 Man. R. 317, 13 W.L.R. 594, 16 C.C.C. 178.

1959

SMITH
v.
THE QUEEN

Locke J.

failure to comply with the plain provisions of s. 708(1) does. The principle applied in *Howell's* case is also applicable in these circumstances, in my opinion.

The contention that s. 17 of the *Juvenile Delinquents Act* which provides that the trial may be as informal as the circumstances will permit, consistently with a due regard for a proper administration of justice, and of s. 38 that a juvenile delinquent shall be treated not as a criminal but as a misdirected or misguided child, in some way relieves the judges of that court from complying with s. 708(1) of the Code, cannot be supported. I can see no difficulty in complying with ss. 17 and 38 of the *Juvenile Delinquents Act* while following the requirements of that section.

As upon these grounds it is my opinion that the conviction cannot stand, I express no opinion upon the other objections raised to the proceedings in the present matter.

I would allow this appeal, set aside the judgment of the Court of Appeal and the order of Campbell J. and direct that the finding of delinquency be quashed.

CARTWRIGHT J.:—The relevant facts are stated in the reasons of the Chief Justice and those of my brother Locke which I have had the advantage of reading.

I agree with their conclusion that service on the parent or parents of the appellant of notice of the hearing held on September 20, 1957, as imperatively required by s. 10(1) of the *Juvenile Delinquents Act,* was an essential preliminary, in the absence of which the learned judge of the Juvenile Court acted without jurisdiction. It was on that date that the learned judge took from the appellant what he regarded as a plea of guilty. The supposed plea was the only foundation for the finding of delinquency.

The finding that the learned judge was, for the reason just mentioned, without jurisdiction to proceed with the hearing is sufficient to dispose of this appeal, but I am also of opinion that there was neither arraignment nor plea. If the learned judge had said to the appellant,

> There's an information here sonny that on or about the 7th of June, a long time ago, unlawfully and indecently assault Helen Balaban. What about that is that correct or not?

It might have been arguable that this was a sufficient compliance with the provisions of s. 708(1)(*a*) of the *Criminal Code*, but the addition of the words,—"What did you do?" —transformed what might have been regarded as a question as to whether the appellant pleaded guilty or not guilty into an invitation to him to make a statement as to what had occurred.

As to the suggestion that the writ of *certiorari* should be refused in this case as a matter of discretion, in my opinion the rule by which the Court should be guided is accurately stated in the following passage in Halsbury's Laws of England, 3rd ed., vol. 11, p. 140:

> Although the order is not of course it will though discretionary nevertheless be granted *ex debito justitiae*, to quash proceedings which the Court has power to quash, where it is shown that the Court below has acted without jurisdiction or in excess of jurisdiction, if the application is made by an aggrieved party and not merely by one of the public and if the conduct of the party applying has not been such as to disentitle him to relief; . . .

In my opinion, this is clearly a case in which the writ should be granted.

I do not find it necessary to express an opinion on any of the other matters argued before us.

I would dispose of the appeal as proposed by the Chief Justice.

Appeal allowed and finding of delinquency quashed.

Solicitors for the appellant: Munson & Crawford, Winnipeg.

Solicitor for the respondent: The Attorney-General of Manitoba.

1959

Jun. 8

*Jun. 25

WILLIAM CLAYTON GRAHAM .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Possession of stolen bonds—Whether guilty knowledge—Evidence—Explanation—Whether reasonably true—Whether inconsistent with any rational explanation—Criminal Code, 1953-54 (Can.), c. 51, s. 296.

The appellant was convicted under s. 296 of the *Criminal Code* of having in his possession stolen bonds "knowing that they were obtained by the commission in Canada of an indictable offence". On June 26 and July 15, 1958, the appellant had cashed at a bank in Windsor, five bonds which had been stolen. His explanation was that he had received the bonds from a man named Moore whom he had met at a bar in Detroit. Moore told him that he had some bonds which he wished to cash but that he could not cross the border because he was having trouble with the Canadian Immigration authorities. Moore offered to pay him $100 for each bond that he cashed, and the appellant received this payment and accounted to Moore for the rest of the proceeds.

Held: The appeal should be dismissed and the conviction affirmed.

While there were certain expressions in the reasons of the trial judge which might indicate that he thought there were elements of probability in the story told by the accused, on a weighing of the story as a whole and after consideration of it, step by step, he rejected it decisively in his conclusions that the explanation could not be reasonably true, that it could not be believed by anyone and that there was nothing before him whereby he could possibly believe it. There was therefore no misdirection in the consideration of the accused's defence.

The trial judge, furthermore, did not direct himself that if he disbelieved the explanation he was bound to convict. On a consideration of all the evidence, the trial judge reached the conclusion that it was inconsistent with any rational explanation other than the guilt of the accused. He reached and stated the conclusion that the accused 'could not possibly not have known" that the bonds were stolen.

APPEAL from a judgment of the Court of Appeal for Ontario, affirming the conviction of the appellant. Appeal dismissed.

E. P. Hartt, for the appellant.

W. C. Bowman, Q.C., for the respondent.

The judgment of the Court was delivered by

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

1959

GRAHAM
v.
THE QUEEN

JUDSON J.:—The appellant was convicted under s. 296 of the *Criminal Code* at Windsor, Ontario, in the County Court Judge's Criminal Court on two charges of having in his possession stolen Government of Canada bonds "knowing that they were obtained by the commission in Canada of an indictable offence". These bonds had undoubtedly been stolen from a branch of the Bank of Montreal in the Province of Quebec on April 22 or April 23, 1958, during the course of a break-in in which the safety deposit boxes were looted. On June 26 the appellant cashed one of these stolen bonds having a face value of $1,000 at the Windsor branch of the Provincial Bank of Canada and on July 15, 1958, at the same bank, he cashed four more bonds of the same denomination. He was arrested on August 27, 1958. He was duly cautioned and made no statement but two days later, on August 29, he did make a statement to the police in which he gave an explanation similar to the one which he gave at the trial. His explanation was that he had received the bonds from a man named Moore whom he had met in a bar in the city of Detroit. He said that Moore explained that he had the bonds which he wished to cash but could not cross the border because he was having trouble with the Canadian Immigration authorities. He offered to pay the appellant $100 for each bond that he cashed and the appellant said that he received this payment and accounted for the rest of the proceeds to the person from whom he had received the bonds.

The sole theory of the defence was that the accused had offered an explanation of his possession of the bonds which might reasonably be true, and the main ground of appeal to this Court was that the learned trial judge had misdirected himself in his consideration of this defence. The duties of a trial judge in connection with this defence are well defined and they have been authoritatively stated by this Court in *Richler v. The King*[1], in the following paragraph at p. 103:

> The question, therefore, to which it was the duty of the learned trial judge to apply his mind was not whether he was convinced that the explanation given was the true explanation, but whether the explanation might reasonably be true; or, to put it in other words, whether the Crown

[1] [1939] S.C.R. 101, 4 D.L.R. 281, 72 C.C.C. 399.

1959

GRAHAM
v.
THE QUEEN

Judson J.

had discharged the onus of satisfying the learned trial judge beyond a reasonable doubt that the explanation of the accused could not be accepted as a reasonable one and that he was guilty.

The error assigned by counsel for the appellant is that the learned trial judge did actually find that the explanation given by the accused might reasonably be true but that, in spite of this, he proceeded to convict because the accused should have known that the bonds were stolen. If this were so, the appeal would succeed because an approach such as this would place an onus on the accused of offering an exculpatory explanation going beyond the bounds laid down by the authorities. I am, however, satisfied that the reasons for judgment of the learned trial judge are not open to this construction. While there are certain expressions in the reasons which might indicate that he thought there were elements of probability in the story told by the accused, on a weighing of the story as a whole and after a consideration of it, step by step, he rejected it decisively in the following conclusion:

> The explanation that the accused has given on the stand, by his actions and all that he has done all through these transactions, could not reasonably be true, and the explanation could not be believed by anyone, and there is nothing before me whereby I could possibly believe it, and that being the case, all I can do is find the accused guilty as charged.

It was also argued for the appellant that the learned trial judge erred in law in that he directed himself that if he disbelieved the explanation of the accused he was bound to convict. In my opinion the learned judge did not so direct himself. He appears on a consideration of all the evidence to have reached the conclusion that it was inconsistent with any rational explanation other than the guilt of the accused. He clearly reached and stated the conclusion that the appellant "could not possibly not have known" that the bonds were stolen.

I am, therefore, of the opinion that there was no misdirection in this case, that the explanation offered was submitted to the proper tests and properly weighed and that the prosecution on ample evidence has discharged the onus as stated in the *Richler* case.

I would dismiss the appeal. Time spent in custody pending this appeal should count as part of the term of imprisonment imposed by the trial judge.

Appeal dismissed.

DR. HAROLD HENDERSON, DR. J. H. SPENCE and DR. DONALD B. FERGUSON (*Plaintiffs*) ..... APPELLANTS;

AND

DR. DAVID W. B. JOHNSTON representing the medical staff of Victoria Hospital, London, and The Board of Hospital Trustees of the City of London (*Defendants*) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Hospitals—Hospital Board's statutory power of general management of public hospital—Validity of by-law excluding qualified practitioners from attending patients in hospital—Validity of by-law prohibiting fee-splitting among practitioners enjoying hospital privileges—The City of London Act, 1954 (Ont.), c. 11—The Public Hospitals Act, R.S.O. 1950, c. 307.

The plaintiffs, three medical practitioners in London, Ontario, sued for a declaration that two by-laws passed by the defendant Board were *ultra vires*. The first by-law had to do with the regulation of the medical staff and the second, with the practice of fee-splitting. The action was dismissed by the trial judge, and this judgment was affirmed by the Court of Appeal.

Held: The action should be dismissed.

The Board of Trustees of a public hospital has authority to exclude qualified medical practitioners from the privileges of the hospital and from attending their patients therein. The contrary claim advanced by the plaintiffs, was unsupported by authority. There was no such absolute right as the one asserted. No common law or statutory origin was suggested and it could not come from any statutory or other recognition of professional status. The right of entry into the hospital and the right to use its facilities, in the exercise of the profession of these plaintiffs, must be found in the hospital authority for, apart from them, it has no independent existence.

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

1959

HENDERSON v. JOHNSTON et al.

Section 10 of the statutory agreement between the Board and the University of Western Ontario, providing that members of the medical profession of the City of London and vicinity who are not on the active staff of the hospital shall have the privilege of attending patients as members of the courtesy staff, was of no help to the plaintiffs. The section was expressly made subject to the regulation of the trustees. The selection of staff is an essential feature of regulation and management of the hopsital and the most that the statutory agreement could do for the plaintiffs was to give them the status defined by its terms. Moreover, the agreement did not vest any rights in the plaintiffs. They were not parties to it.

As to the by-law respecting fee-splitting, it was within the power of management of the Board and was not an attempt at general regulation of medical ethics. The Board was here concerned only with the regulation of this hospital and the members of the profession who practise there.

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

W. B. Williston, Q.C., for the plaintiffs, appellants.

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

The judgment of the Court was delivered by

JUDSON J.:—The appellants are three qualified medical practitioners of the city of London who are suing for a declaration that two by-laws passed by the defendant, The Board of Hospital Trustees of the city of London, are *ultra vires*. The first by-law has to do with the regulation of the medical staff of Victoria Hospital and the second, with the practice of fee-splitting. The action was dismissed; an appeal to the Court of Appeal[1] was dismissed, and, in my judgment, the appeal to this Court fails and should also be dismissed.

The Board passed the Medical Staff By-Law on April 22, 1953, after consultation and discussion with the medical staff and with its approval. The by-law was approved by the Lieutenant-Governor in Council on July 22, 1953, as required by s. 9 of the *Public Hospitals Act*. Authority to enact this by-law is ample. By s. 1 of the *Act respecting the General Hospital of the City of London* (Statutes of Ontario 1887, c. 58), the general management of the hospital is given to the Board. In addition, by the general regulations made under s. 4 of the *Public Hospitals Act*,

[1] [1957] O.R. 627, 11 D.L.R. (2d) 19.

particularly regulations 2 and 6, the Board is given power to govern and manage the hospital and to provide for the appointment and functioning of a medical staff. These regulations were approved by the Lieutenant-Governor in Council on May 29, 1952, and filed with the Registrar of Regulations on June 4, 1952, pursuant to the *Regulations Act* and I take these steps to be the departmental declaration pursuant to s. 5 of the *Public Hospitals Act* that they are in force with respect to all hospitals in the Province. One method of exercising the statutory power of government and management is by by-law even though the statutes and regulations do not expressly state that the powers may be so exercised. Such an express power did not appear until the legislation of 1954, which was enacted a short time before the second by-law under attack was passed. Nevertheless, if the regulation of the medical staff as affected by the first by-law is within the power of management, there is obviously no substance to the objection that it cannot be done by by-law.

The Medical Staff By-law deals in great detail with everything appropriate to this subject-matter. It provides for six divisions of the medical staff: 1. The Honorary staff; 2. The Consulting staff; 3. The Teaching staff (active staff); 4. The Out-Patients' staff (active staff); 5. The General Practice staff; 6. The Courtesy staff. The members of these divisions are to be appointed annually by the Board. The appellants are members of the "Courtesy staff" and their position is defined in part by the following provisions of the by-law:

The General Practice Staff

(*a*) The General practice staff shall consist of those members of the medical profession eligible as hereinafter provided who wish to attend private and semi-private patients in the hospital.

The Courtesy Staff

(*a*) The courtesy staff members shall have the privileges extended to the general practice staff members with the exception of voting privileges . . .

(*b*) Courtesy staff membership shall be restricted to those qualified physicians residing in London and within such distance from the City of London as may from time to time be determined by the Board of Trustees in collaboration with the Medical Staff . . .

1959

HENDERSON v. JOHNSTON et al.

Judson J.

The complaint of the plaintiffs is that the Board of Trustees of the hospital in the exercise of its power of management, cannot restrict them in the practice of their profession or determine who may be members of the Courtesy Staff. They claim that as members of the medical profession in good standing, they have an absolute right to attend their patients in private or semi-private rooms in the hospital and that no power is vested in the Board to limit this right. This is the substantial point of the attack on the first by-law. The issues in this branch of the case are therefore very narrow. They amount to no more than a bald assertion of a right and a denial of the Board's power to regulate in any way the matters in controversy for it is undisputed that, beyond this, no practitioner has been denied anything—whether right or privilege—in connection with his practice in the hospital. The claim is unsupported by authority and I am satisfied that there is no such absolute right as the one asserted. No common law or statutory origin was suggested and it cannot come from any statutory or other recognition of professional status. The right of entry into the hospital and the right to use the facilities there provided, in the exercise of the profession of these appellants, must be found in the regulations of the hospital authority for, apart from them, it has no independent existence.

The appellants also claim to benefit from the terms of an agreement dated January 1, 1946, between the Hospital Board and the University of Western Ontario, which received statutory confirmation by the *Victoria Hospital, London, Act* 1946 (Statutes of Ontario 1946, c. 105). It was entered into because Victoria Hospital is the University's major teaching hospital in the City of London. Sections 6 and 10 of the agreement read as follows:

> 6. The Trustees shall make appointments to the Active Staff of the Hospital annually on the recommendation of the Board of Governors of the University and subject to the approval of the Joint Relations Committee or a majority thereof. In making appointments to the Active Staff of the Hospital regard shall be had to the previous training and record of the appointee, his capacity to render service to the sick in the Hospital, his scientific attainments, his teaching capacity and his likelihood of professional development. No member of the Hospital Medical Staff may be dismissed without the consent of the Trustees.

10. Subject to the regulation of the Trustees, members of the Medical Profession of the City of London and vicinity who are not on the Active Staff of the Hospital shall have the privilege of attending patients in private and semi-private rooms as members of the Courtesy Staff.

Section 10 is the only possible origin of any right such as the one claimed by the appellants and it is expressly made subject to the regulation of the Trustees. In spite of the argument that such regulation does not give the power to exclude any duly qualified medical practitioner, it seems to me that the selection of staff is an essential feature of regulation and management of the hospital and that the most that this statutory agreement can do for the appellants is to give them the status defined by its terms. Moreover, I think it is clear that the agreement does not vest any rights in the appellants. They are not parties to it. It is intended to govern the relations between the Hospital Board and the University in connection with a teaching hospital and the confirmation of this agreement by the Legislature adds nothing to the rights of the appellants nor does it detract from the power of management given to the Board by the Statutes and Regulations previously mentioned.

With no right established as claimed by the appellants, it is plain that the authorities relied upon by counsel for the appellants, having to do with municipal by-laws which prohibit or give a right of choice to a municipal official when they should be concerned with the licensing, regulating or governing of a trade, have no application here. These cases are all based upon the principle that there is a common-law right to engage in any lawful occupation and that a municipal power to regulate such a right does not authorize a prohibition of its exercise or a discriminatory use of the power.

The second by-law under attack is aimed against fee-splitting. It prohibits the practice among those physicians and surgeons who are privileged to attend patients in Victoria Hospital. It compels such persons to submit to inspection of their books and it provides for the denial of the privileges of the hospital to any physician or surgeon who has not complied with the provisions of the by-law. It is generally agreed, and the appellants do not question this principle, that fee-splitting is a reprehensible practice but

1959

HENDERSON v. JOHNSTON et al.

Judson J.

the appellants question the by-law because, they say, it is not related to the management, operation or control of the hospital but is an attempt to legislate on matters relating to the ethics of the medical profession under the guise of regulating the use of the hospital. There is no validity in either of these submissions. The By-law is within the power of management. There is here no attempt at general regulation of medical ethics. The Board is concerned only with the regulation of this hospital and the members of the profession who practise there. Moreover, Victoria Hospital as a teaching hospital of the University must have such a by-law to meet the standards required by the Joint Commission of Accreditation of Hospitals of the United States and Canada and it is of vital importance both to hospital and university that these standards be met.

This second by-law was enacted January 26, 1955 and was approved by Order-in-Council dated February 17, 1955, as required by s. 9 of the *Public Hospitals Act*. At the time of its enactment the powers of the Board had been re-defined in an *Act respecting the City of London* (Statutes of Ontario, 1954, c. 115, s. 5). The 1887 legislation had merely given the Board the general management of the hospital. The 1954 legislation speaks of the general management, operation, equipment and control of the hospital being vested in and exercised by the Board, and gives express power to enact by-laws and regulations for these purposes, subject to the *Public Hospitals Act*. This is merely a re-definition of the power of the Board and nothing turns upon it. I would have held that the by-law against fee-splitting was within the power of the Board under the legislation of 1887 as well as that of 1954.

I agree with the reasons of Roach J.A. in the Court of Appeal and would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the plaintiffs, appellants: Thompson & Brown, London.

Solicitors for the defendants, respondents: Mitchell & Hockin, London.

LOUIS DRAGER (*Plaintiff*) .....APPELLANT;

1959
Feb. 12, 13
*Jun. 10

AND

LILLIAN D. ALLISON AND WILLIAM ADOLPH DRAGER (*Defendants*) ... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Action—Surety—Prepayment by surety—No gift intended—Rights against debtor—Whether accelerating remedy—Whether surety's character changed to mere volunteer—Action for declaration before due date of debt.

The plaintiff, the father of the defendants, guaranteed the payments to be made by the defendants under an agreement to purchase a property. Without any demand from the vendor or any request from the defendants, he paid the balance which was not yet due. The defendants sold the property and the plaintiff claimed a lien on the property and on the monies. The defendants pleaded a gift and that the plaintiff was a mere volunteer. The trial judge maintained the action, but this judgment was reversed by the Court of Appeal.

Held: The action should be maintained.

A surety who pays the guaranteed debt in relief of the principal debtor before the debt has become legally due and without any request from the debtor, does not thereby lose his right of action altogether by becoming a mere volunteer. If no gift is intended, as in the present case, although he cannot accelerate his remedy, he may nevertheless ultimately assert his remedy at the time when the guaranteed debt should ordinarily have been paid.

In the present case, the action was properly brought. As the defendants had definitely repudiated their obligation to the surety and asserted their intention to dispose of the property and its proceeds in disregard of his rights, the plaintiff was entitled to commence an action for a declaration of his rights at the time when he did so even though the guaranteed debt had not yet become due.

APPEAL from a judgment of the Court of Appeal for Saskatchewan[1], reversing a judgment of Thomson J. Appeal allowed.

G. H. Yule, Q.C., for the plaintiff, appellant.

E. N. Hughes, for the defendants, respondents.

The judgment of the Court was delivered by

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

[1](1958), 13 D.L.R. (2d) 204.

1959

DRAGER v. ALLISON et al.

CARTWRIGHT J.:—This is an appeal from a judgment of the Court of Appeal for Saskatchewan[1] which by a majority (Gordon J. A. dissenting) reversed the judgment of Thomson J. and dismissed the appellant's action.

The evidence at the trial was conflicting and the learned trial judge accepted that of the appellant in preference to that of the respondents. The findings of fact made by the learned trial judge appear to me to be supported by the evidence and may be summarized as follows.

The appellant is the father of the respondents; he is a farmer; he can sign his name but apart from that can neither read nor write. In 1955, the respondent Lillian Allison was looking for a house; the appellant assisted in the search and found a fairly large house, belonging to one Gooding, which he suggested should be purchased by the respondent Allison and by his other daughter Martha who was about to get married. Gooding refused to sell to the two daughters of the appellant unless the latter would guarantee payment of the purchase price and this the appellant agreed to do.

Under date of October 1, 1955, an agreement under seal was entered into between Gooding as vendor and Lillian D. Allison and Martha E. Drager as purchasers, for the sale of the house above mentioned for the price of $12,500, payable as follows:

> the sum of Five Hundred ($500.00) dollars on the day of the date hereof, the receipt whereof is hereby by the vendor acknowledged; and the remaining sum of Twelve Thousand ($12,000.00) dollars as follows, that is to say, the sum of Four Thousand ($4,000.00) dollars on September 30th, 1955, the sum of Two Thousand ($2,000.00) dollars on the first day of April, 1956, the sum of Three Thousand ($3,000.00) dollars on the first day of October, 1956 and the remaining sum of Three Thousand ($3,000.00) dollars on the first day of October, 1957 all payments to be applied firstly on interest and secondly on principal. With Interest at the rate of Six (6%) per centum per annum from the day of the date hereof, on the said purchase price or so much thereof as shall from time to time remain unpaid, as well after as until the same becomes due, such interest to become due and be paid monthly and the first payment of interest to become due and be paid on the 1st day of November, A.D. 1955;

The agreement contained the following provisions:

> The Purchaser Covenants, promises and agrees with the vendor; that he will pay the said purchase price and interest at the times herein provided for payment thereof.
>
> * * *

[1] (1958), 13 D.L.R. 204.

Provided, however, that if on or before April 1st, 1956 all of the monies owing under this agreement for sale are paid in full all interest due will be deleted.

* * *

If and when the purchaser makes default in payment of any sum payable hereunder or in the performance of any covenant, promise, agreement or undertaking herein contained on his part, so much of the purchase price of the said land as is then unpaid to the vendor hereunder shall, though not then due and payable, at the option of the vendor become forthwith due and payable;

* * *

The purchaser shall have the privilege of at any time paying any sum in addition to the sums payable hereunder, on account or in full of the said purchase price and interest and in that event interest on such amount so paid shall be computed only to such date of payment.

* * *

I, Louis Drager, in consideration of the Vendor selling the said property to the purchasers on the terms and conditions herein set out do hereby covenant and agree with the vendor that the purchasers will pay the monies payable hereunder at the times and in the manner herein set forth and that on default by them I will pay the monies as aforesaid and perform all things herein required of the purchasers.

The agreement was signed and sealed by the appellant.

It is common ground that the deposit of $500 and the $4,000 payable on September 30, 1955, were paid to the vendor by the appellant and were gifts by him to his daughters.

By agreement dated March 29, 1956, Lillian Allison and Martha Drager assigned the agreement of October 1, 1955, to the said Lillian Allison and the respondent William Adolph Drager. The payment of $2,000 due on April 1, 1956, was paid by William Adolph Drager, on March 29, 1956, out of monies paid to him by the appellant partly for arrears of wages and partly as a gift.

At this point it will be observed that the legal relationship of the parties was as follows: Gooding, the vendor, was entitled to immediate payment of the instalments of interest which had fallen due on the 1st days of November and December, 1955, and of January, February and March, 1956; the respondents, the purchasers, owed the balance of the purchase price; this balance was not yet due and payable but would fall due, $3,000 on October 1, 1956, and $3,000 on October 1st, 1957; the appellant was under

1959

DRAGER v. ALLISON et al.

Cartwright J.

the usual liabilities of a guarantor and could be called upon by Gooding to make any payments as to which there was default by the purchasers. The fact that the agreement contained an acceleration clause is not of importance as there is no suggestion that Gooding sought to avail himself of its provisions.

On March 29, 1956, at the time when William Adolph Drager paid the $2,000 due on April 1, 1956, the appellant was about to leave for Vancouver, and without any demand from Gooding or any request from the respondents or either of them he paid to La Roche, Gooding's agent, the balance of the purchase price of $6,000, together with the registration fees and instructed him to have the title registered in the names of the respondents. La Roche carried out these instructions.

On returning from Vancouver about 20 days later the appellant went to La Roche, "asked for the title" and was told by La Roche that the respondents had made a sale of the house to one Senft. The appellant thereupon took the position that he was entitled to the $6,000 which he had paid. After some discussion the appellant agreed to accept $3,000 which the respondents agreed to pay him but the making of this agreement was denied by the respondents and its only relevance is to the question of credibility.

On August 28, 1956, the appellant commenced this action alleging that he had paid the $6,000 as surety and claiming a lien on the property and on the monies owing to the respondents under the agreement with Senft.

In their statement of defence the respondents pleaded that the $6,000 was paid as a gift; but at the trial and in the Court of Appeal and before us argued that, even if there was no intention on the part of the appellant to make a gift, he had no cause of action as he had paid their debt when it was not due without demand or request and was in law in the position of a mere volunteer who pays the debt of another.

The learned trial judge found that the appellant paid the $6,000 as guarantor and not with the intention of making a gift to the respondents. I agree with the finding of the learned trial judge that there was no intention to make a gift; it is supported by the evidence, was affirmed

by Gordon J. A. and was not rejected by the majority in the Court of Appeal; the issue in that Court was stated by McNiven J. A., who delivered the judgment of the majority, to be as follows:

> The plaintiff asserts and the defendants deny that the payment of $6,000.00 was made pursuant to the guarantee. That is the sole and only issue and much of the evidence adduced was extraneous to that issue. If the said payment was not made pursuant to the guarantee, it matters little either at common law or in equity whether the said payment was made as a gift or merely as a volunteer. If made pursuant to the terms of the guarantee, the plaintiff had a right to be subrogated to the rights of the vendor under the agreement, if not at common law, then in equity. That right was determined at the time the payment was made.

The learned Justice of Appeal went on to hold that, as at the time of the payment of the $6,000 there was no default under the agreement, no demand from the vendor and no request either express or implied from the respondents that the appellant should make the payment, he should be held to have made it not under his guarantee but as a mere volunteer and had no right of action. The authorities cited by the learned Justice of Appeal in support of the proposition that a mere volunteer who pays the debt of another does not thereby acquire a right of action against him were not questioned.

In my opinion the learned trial judge was right in holding that the appellant paid the $6,000 not as a mere volunteer but because of his potential liability under his covenant as guarantor. He knew that the respondents could not make the payment of the $6,000 on or before April 1, 1956. It is true that they were under no obligation to make the payment, although they had the right to make it and thereby escape payment of all the interest that would otherwise have been payable. It was to the advantage of both the appellant and the respondents that the payment should be made; but it is clear, as is stressed by McNiven J. A., that the appellant was neither bound nor requested to make the payment at the time he made it. I do not find it necessary to consider whether the legal situation is affected by the circumstances that five monthly payments of interest were overdue on March 29, 1956. The question of law on which the majority of the Court of Appeal have differed from the learned trial judge is whether a surety who

1959

DRAGER v. ALLISON et al.

Cartwright J.

pays the guaranteed debt in relief of the principal debtor before the debt has become legally due and without any request from the debtor thereby loses his right of action altogether or whether it is merely postponed until such time as the debt becomes legally due.

The gist of the judgment of the learned trial judge on this branch of the matter is contained in the following passage in his reasons:

> A surety so often as he pays anything under his guarantee in relief of the principal debtor, has an immediate right of action against the latter. That, however, is subject to the exception that he cannot accelerate his remedy by paying the guaranteed debt before it becomes legally due. *Halsbury's Laws of England*, Third Edition, Volume 18, Page 478 (Sec. 881). *While he cannot accelerate his remedy, he may nevertheless ultimately assert his remedy at the time when the guaranteed debt should ordinarily have been paid.*

It is with the final sentence, which I have italicized, in the passage quoted that the majority in the Court of Appeal are in disagreement; but with the greatest respect, I am of opinion that the learned trial judge has correctly stated the law.

It is common ground that a surety can not by prepayment accelerate his remedy but I can find no ground in principle or authority for holding that by prepayment he changes his character from that of guarantor to that of mere volunteer and thereby forfeits his rights altogether. Counsel were unable to find any case in which it was so held and I have found none.

In *Coppin v. Gray*[1], the plaintiff had accepted for the defendant an accommodation bill which fell due on February 15, 1828; he paid it on January 15, 1828, a month before it was due. He brought suit against the defendant on February 12, 1834, which it will be observed was more than six years after the date of payment but less than six years after the maturity of the bill. In rejecting the defence based on the *Statute of Limitations* the Vice-Chancellor (Sir J. L. Knight Bruce) said, at p. 210 of the report in 1 Y. & C. Ch.:

> . . . the mere fact that he paid the bill before the time when, according to its tenor, it became due, would not, I apprehend, give him a right of suit before that time against the drawer, by way of loan to whom he accepted it.

[1] (1842), 1 Y. & C.C.C. 205, 62 E.R. 856, 11 L.J. Ch. 105.

and at p. 106 of the report in the Law Journal:

> I think that for the purpose of the Statute of Limitations, the bill of exchange must be considered as paid when it arrived at a state of complete maturity, and that the defendants cannot set up the fact of the bill having been prepaid for the purpose of defeating the claims of the plaintiff.

This case is of only limited assistance on the question before us but, since the acceptor of an accommodation bill is a surety for the payment by the drawer (vide Halsbury, 3rd ed., vol. 18, p. 414, para. 773), the above quoted statements of the Vice-Chancellor appear to indicate that he assumed that while prepayment would not accelerate a surety's remedy it would not destroy it.

In my opinion as between the appellant, the surety, and the respondents, the principal debtors, the payment of $6,000 made on March 29, 1956, should be considered as having been made as to $3,000 on October 1, 1956, and as to $3,000 on October 1, 1957, and their rights should be determined accordingly.

No question appears to have been raised at any stage of the proceedings as to whether the commencement of the action was premature in view of the fact that the writ was issued before the appellant became entitled to claim payment of either of the sums of $3,000. In my view the action was properly brought. The respondents had definitely repudiated their obligation to the appellant and asserted their intention to dispose of the property and its proceeds in disregard of his rights, and under the principles enunciated in *Kloepfer v. Roy*[1], the appellant was entitled to commence an action for a declaration of his rights at the time when he did so.

For the above reasons, I would allow the appeal. We were informed by Counsel that if we should be of opinion that the appeal succeeds we need not concern ourselves with the precise form of the order that should be made as, by arrangement between the parties, the purchase moneys paid by the purchaser from the respondents are being held to await the outcome of the appeal.

[1] [1952] 2 S.C.R. 465, 3 D.L.R. 705.

1959

DRAGER v. ALLISON et al.

Cartwright J.

I would accordingly allow the appeal and restore the judgment of the learned trial judge with costs throughout.

Appeal allowed with costs.

Solicitor for the plaintiff, appellant: G. H. Yule, Saskatoon.

Solicitors for the defendants, respondents: Francis, Gauley, & Hughes, Saskatoon.

1959

Feb. 26
*Apr. 28

LUCIE DUMOUCHEL DIT MITCHELL (*Plaintiff*) ..... APPELLANT;

AND

LA CITE DE VERDUN (*Defendant*) ....RESPONDENT.

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

Negligence—Municipality—Injury resulting from tripping into pothole in concrete curb of taxi stand—Duty of persons using the stand.

The plaintiff's father, a taxi driver, was injured as a result of a fall into a hole in the concrete curb of a stand, assigned by the defendant, as a taxi stand. This stand adjoined a park where there was no paved sidewalk but a foot-path and a cement curb. A drain was set in the curb and adjoining it the curb cement had broken away, leaving a hole about eight inches deep. Earlier in the year, the defendant had filled the hole with gravel which apparently had been washed away. While dusting his taxi, the victim placed his foot in the hole, fell and suffered serious injuries and died a few months later.

The trial judge maintained the action, and the Court of Appeal affirmed the negligence of the defendant but found contributory negligence on the part of the victim.

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

It is true that the victim should have known of the existence of this hole, which constituted a trap, nevertheless it could not be said that a duty rested upon him to maintain a constant lookout with respect to it. This duty would be in excess of the one normally required of the reasonable prudent man, placed in his position. The victim could not therefore be said to have been contributory negligent and his damages should be awarded in full.

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

1959

DUMOUCHEL v. CITÉ DE VERDUN

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

A. Nadeau and *R. Guertin,* for the plaintiff, appellant.

M. Fauteux, Q.C., for the defendant, respondent.

The judgment of the Court was delivered by

FAUTEUX J.:—L'appelante, fille et unique héritière de feu Ovide Dumouchel, a repris, avant l'audition en Cour supérieure, l'instance dans une action en dommages intentée par son père contre la cité à la suite d'un accident intervenu le 24 novembre 1953, dans les circonstances suivantes.

Dumouchel était chauffeur de taxi et membre de la Woodland Taxi Association, une association de voituriers faisant affaires dans la cité de Verdun et utilisant à ces fins, sur assignation de l'intimée, quelque douze postes d'attente dans les rues de la cité. Au jour indiqué, le père de l'appelante et deux compagnons de travail se trouvaient au poste du boulevard Brown, établi en face d'un petit parc sillonné d'allées pour les piétons, et avaient stationné leurs voitures en bordure de la chaîne de béton longeant et séparant la chaussée d'une de ces allées. En attendant les appels, Dumouchel et un de ses compagnons s'occupaient à épousseter l'extérieur de leurs voitures et, pour ce faire quant à l'un des côtés, se tenaient et marchaient sur le long de cette chaîne de béton. Partiellement encaissé dans icelle se trouvait un puisard dont la surface était presque au même niveau. Mais, par suite de l'action du gel et du dégel, il s'était produit, au printemps, à un point adjacent au côté droit du puisard, un trou dans la chaîne, lequel avait, le 24 novembre 1953, atteint une profondeur de 8 pouces et une largeur augmentant irrégulièrement, du fond à la partie supérieure, jusqu'à 8 pouces. La voiture de Dumouchel se trouvait stationnée vis-à-vis cet endroit. Il procédait, comme indiqué, à nettoyer son véhicule lorsque, accidentellement, il mit et se prit le pied gauche dans ce trou, perdit l'équilibre et tomba sur l'allée des piétons. Dans le résultat, il subit une fracture de la cuisse gauche, éventuellement l'amputation de ce membre, et décédait quelque dix mois après la date de l'accident.

[1] [1957] Que. Q.B. *703.*

1959

DUMOUCHEL v. CITÉ DE VERDUN

Fauteux J.

Adjugeant sur le mérite de l'action en dommages, la Cour supérieure déclara que ce trou constituait un danger sérieux; que les risques d'accident en résultant s'aggravaient du fait de sa présence à un endroit que le public en général et les conducteurs de taxis en particulier étaient invités à fréquenter en raison de l'établissement de ce poste d'attente; que cette situation existait depuis au moins le printemps 1953, alors que l'accident se produisit en fin de novembre de la même année; qu'au printemps, la cité y avait fait des réparations d'ordre temporaire en y mettant du gravier que les eaux du parc en s'y écoulant avaient subséquemment et graduellement lavé; que la cité connaissait cet état de choses, ou aurait dû le connaître depuis longtemps, eût-elle été vigilante. L'intimée fut donc, en raison de sa négligence, jugée entièrement responsable de cet accident et condamnée à payer à la demanderesse en reprise d'instance, les dommages établis à la somme de $16,880.35.

La cité appela de ce jugement. La Cour du banc de la reine[1] confirma l'opinion du juge au procès quant à la négligence de la cité et quant à la détermination des dommages. Mais exprimant l'avis que Dumouchel avait commis une faute d'inattention en se plaçant le pied dans ce trou, elle accueillit l'appel en partie; et, déclarant que ce manque de précaution avait contribué de moitié à l'accident, réduisit d'autant le montant des dommages accordés. D'où le pourvoi de l'appelante.

Sur la négligence de la cité et le quantum des dommages, il y a accord de vues aux deux Cours inférieures et il y a également chose jugée. Le débat se limite donc à la contribution possible de Dumouchel à cet accident.

Que le fait de la victime ait concouru avec la persistante négligence de la cité à la réalisation du dommage, la chose est certaine. En droit, ce fait ne saurait atténuer la responsabilité de la cité qu'à la condition et que dans la

[1] [1957] Que. Q.B. *703.*

mesure où il peut être fautif. Vraisemblablement, Dumouchel devait connaître l'existence de ce trou, même s'il n'appréciait pas toute la gravité du danger en résultant. On lui reproche d'avoir, au cours de ce travail, auquel il est commun de voir les chauffeurs de taxis se livrer, commis une faute d'inattention. La preuve au dossier, et surtout les photographies sur la situation des lieux, la position et les particularités de cette défectuosité dans la chaîne de béton, indiquent clairement qu'il ne s'agit pas là d'un danger ostensiblement signalé et constituant, sans plus, un avertissement effectif. Il s'agit plutôt d'un véritable piège contre lequel les chauffeurs de taxis ne pouvaient se garer que par une attention indéfectiblement soutenue. Sauriol, l'un des chauffeurs de taxis, s'en exprime ainsi:

"A tout bout de champ, j'avais le pied rendu dans cette affaire-là."

Dans les circonstances de cette cause, ce serait demander un degré de prudence supérieur à celui requis de l'homme raisonnablement prudent, placé et agissant dans les mêmes circonstances, que d'exiger que toujours, à chaque instant, et sans jamais y faillir, Dumouchel ait eu à l'esprit, au cours de son travail à ce poste, la présence de ce piège. La négligence de la cité pouvait en fait, mais non en droit, lui imposer une telle obligation; la cité est mal venue à invoquer cette inattention momentanée qui, en somme, est la conséquence normale, sinon inévitable, d'un situation créée par sa faute. Aussi bien, en toute déférence et comme le juge de première instance, je tiendrais la cité entièrement responsable de cet accident.

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

Appeal allowed with costs.

Attorneys for the plaintiff; appellant: Nadeau & Nadeau, Montreal.

Attorneys for the defendant, respondent: Fauteux, Blain & Fauteux, Montreal.

1959
May 25, 26
*Jun. 25

THE CANADIAN INDEMNITY COMPANY (*Defendant*) ..... APPELLANT;

AND

EVELYN DORIS ERICKSON and ALFRED S. COEY (*Plaintiffs*) ..... RESPONDENTS.

ON APPEAL FROM THE COURT FOR APPEAL FOR MANITOBA

Insurance—Automobile—Policy providing for extended coverage—Claim by injured passenger against insurer—Right of insurer to set up defences available against insured—Breach of statutory condition by insured—Whether forfeiture—Whether passenger entitled to relief denied to insured—The Insurance Act, R.S.M. 1954, c. 126, ss. 6, 123, 215, 227—Statutory condition 6.

The infant plaintiff, a gratuitous passenger in a car owned and driven by Z, was injured when the car overturned. She brought action by her father against Z and obtained judgment. The plaintiffs then brought an action against the defendant insurance company under s. 227 of *The Insurance Act*, R.S.M. 1954, c. 126, to have the insurance moneys applied towards satisfaction of the judgment. The defendant refused to pay on the ground that the rights of the insured had been forfeited by a violation of statutory condition 6. The trial judge granted partial relief from the forfeiture and this judgment was affirmed by the Court of Appeal.

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

The insured did not comply with statutory condition 6(2) because he failed to co-operate with the insurer after the accident and, contrary to s. 215 of *The Insurance Act*, made wilfully false statements about the claim. Under s. 227(6), the insurer has a right to avail itself of any defences that it would have been able to set up against the insured. This could only be overcome by relief granted by the Court under s. 123 of the Act. In this case, where extended coverage was provided, there was no room for relieving the insured against forfeiture under s. 123, and, therefore, the plaintiffs could not succeed.

APPEAL from a judgment of the Court of Appeal for Manitoba[1], affirming a judgment of DuVal J. Appeal allowed.

J. N. McLachlan, for the defendant, appellant.

R. D. Guy, Jr., Q.C., for the plaintiffs, respondents.

The judgment of the Court was delivered by

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

[1] (1958), 14 D.L.R. (2d) 769, [1958] I.L.R. 1447.

THE CHIEF JUSTICE:—By leave of the Court of Appeal for Manitoba The Canadian Indemnity Company appeals from a judgment of that Court[1] affirming by a majority the judgment at the trial. Under a motor vehicle liability policy of insurance the appellant had agreed to indemnify one Zatylny (hereafter called the insured) against direct and accidental loss of or damage to his automobile caused by collision with another object and against legal liability for bodily injury or death or damage to the property of others, including, in consideration of an additional premium, passenger hazard. Although at one stage there was a dispute as to whether the insured or Evelyn Doris Coey (now the respondent Evelyn Doris Erickson) was driving the former's automobile on October 29, 1955, it is now accepted that the insured was the driver and that Evelyn was a gratuitous passenger. The car overturned and she was injured. An action was brought by Evelyn by her next friend, her father, Alfred S. Coey, and said Alfred S. Coey in his personal capacity against the insured, and under the provisions of subs. 9 of s. 227 of *The Insurance Act,* R.S.M. 1954 c. 126, the present appellant was added as a third party. That action resulted in a judgment in favour of the plaintiffs against the insured which was affirmed by the Court of Appeal but no disposition was made in that action of the third party proceedings. The Canadian Indemnity Company declining to pay the amount of the judgment or any part thereof, an action was brought by the infant and her father against the company to recover the damages and costs awarded them in the first action and it is the judgment of the Court of Appeal affirming that at the trial which granted part of the relief sought that is before us for consideration.

The present action was brought pursuant to subs. (1) of s. 227 of The Insurance Act:

> 227. (1) Any person having a claim against an insured, for which indemnity is provided by a motor vehicle liability policy, shall, notwithstanding that such person is not a party to the contract, be entitled, upon recovering a judgment therefor against the insured, to have the insurance money payable under the policy applied in or towards satisfaction of his judgment and of any other judgments or claims against the insured covered

[1] (1958), 14 D.L.R. (2d) 769, [1958] I.L.R. 1447.

1959

CDN. INDEMNITY CO. v. ERICKSON et al.

Kerwin C.J.

by the indemnity and may, on behalf of himself and all persons having such judgments or claims, maintain an action against the insurer to have the insurance money so applied.

* * *

It is admitted that there are no other judgments or claims against the insured for which indemnity was provided by the motor vehicle liability policy.

Subsections 3 and 6 of s. 227 read:

227. . . .

(3) (i) No assignment, waiver, surrender, cancellation or discharge of the policy, or of any interest therein, or of the proceeds thereof, made by the insured after the happening of the event giving rise to a claim under the policy; and

(ii) no act or default of the insured before or after such event in violation of the provisions of this Act or of the terms of the contract; and

(iii) no violation of the Criminal Code or of any law or statute of any province, state or country, by the owner or driver of the automobile;

shall prejudice the right of any person, entitled under subsection (1), to have the insurance money applied upon his judgment or claim, or be available to the insurer as a defence to such action.

* * *

(6) Subject to subsection (7), where a policy provides, or if more than one policy, the policies provide, for coverage in excess of the limits mentioned in section 222 or for extended coverage in pursuance of subsections (1), (2) and (4) of section 223, nothing in this section shall, with respect to such excess coverage or extended coverage, prevent an insurer from availing itself, as against a claimant, of any defence that the insurer is entitled to set up against the insured.

Subsection (7) does not apply and it is agreed that the policy provided for extended coverage in accordance with subs. (2) of s. 223:

223. . . .

* * *

(2) The insurer may, by an endorsement on the policy or by provision in the policy and in consideration of an additional stated premium, and not otherwise, extend the coverage in whole or in part in the case of an owner's policy or driver's policy in respect to the matter mentioned in clause (*d*) of section 221.

Clause (d) of s. 221 refers to coverage "for any loss or damage resulting from bodily injury to or the death of any person being carried in or upon entering or getting on to

or alighting from the automobile". Therefore, under subs. (6) of s. 227, there is nothing to prevent the company from availing itself as against the respondents of any defence that it was entitled to set up against the insured. To overcome this effect of that subsection the respondents rely on s. 123, but, before considering the latter, it is necessary to advert to other provisions of *The Insurance Act* and to the actions of the assured which the appellant argues entitles it to raise defences against him.

I do not attach importance to the words in subs. (1) of s. 227 "payable under the policy" but the only rights given the respondents by that subsection are subject to the qualification thereof spelled out in subs. (6) of s. 227. Furthermore, by subs. (1) of s. 215:

> 215. (1) Where an applicant for a contract gives false particulars of the described automobile to be insured, to the prejudice of the insurer, or knowingly misrepresents or fails to disclose in the application any fact required to be stated therein or where the insured violates a term or condition of the policy or commits a fraud, or makes a wilfully false statement with respect to a claim under the policy, a claim by the insured shall be invalid and the right of the insured to recover indemnity shall be forfeited.

and by no. 6(2) of the statutory conditions of every contract of automobile insurance:

> 6. (2) The insured shall not voluntarily assume any liability or settle any claim except at his own cost. The insured shall not interfere in any negotiations for settlement or in any legal proceeding, but, whenever requested by the insurer, shall aid in securing information and evidence and the attendance of any witness, and shall co-operate with the insurer, except in a pecuniary way, in the defence of any action or proceeding or in the proceeding or in the prosecution of any appeal.

On the evidence it is clear that the insured did not comply with statutory conditions 6(2) because he failed to cooperate with the company and in contravention of subs. (1) of s. 215 he made a wilfully false statement with respect to a claim under the policy. It is true that on the night of the accident or in the early morning thereafter, at the hospital, he said that he had been travelling at seventy miles per hour. However, shortly thereafter, he changed his story and in a written statement to the police claimed he was travelling only forty miles an hour and that a deer had suddenly jumped into the middle of the road before him while he was driving. On the same day, he also gave

1959

CDN. INDEMNITY CO. v. ERICKSON et al.

Kerwin C.J.

a statement to the appellant's insurance adjuster in somewhat the same terms. About ten days later, he had an interview with the solicitor for the respondents in the latter's office and accepting, as the trial judge did, the solicitor's version of what occurred there is no doubt that on that occasion the insured stated he had been driving at seventy miles per hour. He gave the police a statement to this effect. These latter steps were taken without the knowledge of and without consultation with the appellant. The insured was interviewed by solicitors retained on behalf of the appellant and as a consequence thereof a non-waiver agreement was obtained and liability was denied and it was suggested that the insured obtain independent legal advice. On April 3, 1956, the insured filed proofs of loss for damage to his automobile in which he stated that "a deer jumped in front of the car causing the car to swerve and finally roll on the road—resulting in the damage". On November 19, 1956, on his examination for discovery in the first action he stated that he was not driving the car at the time of the accident, but that the infant respondent was driving and that he was sitting beside her playing a guitar and singing. He also stated that there was no deer involved in the accident.

Under these circumstances there is no room for any relief to the insured against forfeiture under s. 123 of the Act, which reads as follows:

> 123. Where there has been imperfect compliance with a statutory condition as to proof of loss to be given by the insured or other matter or thing required to be done or omitted by the insured with respect to the loss insured against and a consequent forfeiture or avoidance of the insurance, in whole or in part, and the court deems it inequitable that the insurance be forfeited or avoided on that ground, the court may relieve against the forfeiture or avoidance on such terms as it deems just.

In fact the trial judge so found, but he then proceeded to hold that he had a discretion to relieve the respondents against forfeiture to the extent of $5,000 and costs of the first action with interest. In so doing I agree with Tritschler J. A. that the learned trial judge was in error in two respects:—firstly, in stating that immediately following the accident the respondents had the right to collect from the company under the policy to the extent of $5,000 and costs, because any rights the respondents might have arose

according to subs. (1) of s. 227 "upon recovering a judgment thereafter against the insured"; and, secondly, in stating that the company was primarily liable under its policy,—if he meant thereby that it was so liable to the respondents.

The majority of the Court of Appeal held that the trial judge came to the right conclusion, although, as the Chief Justice of Manitoba pointed out, the trial judge after saying that "under the circumstances in this case the insured is not entitled to any relief", that is precisely what he granted. In the view of the majority of the Court of Appeal the trial judge should have said that the insured was entitled under s. 123 to relief from forfeiture to the extent of $5,000 and costs which shall go to the plaintiffs. With respect I am unable to agree that the insured was entitled to any relief and that being so the respondents cannot succeed. In fact, as Tritschler J. A. points out, s. 227 creates a distinction between ordinary coverage and extended coverage and if under s. 123 the respondents could be relieved from forfeiture in a case where the insured was not entitled to relief, there would be very little practical difference between the two cases.

The appeal should be allowed, the judgments below set aside and the action dismissed. In accordance with the terms of the order of the Court of Appeal granting leave to appeal, the appellant shall pay the respondents' costs as between solicitor and client in this Court; the other terms of the order have been complied with.

Appeal allowed.

Solicitors for the defendant, appellant: Fillmore, Riley, McLachlan, Norton & Yarnell, Winnipeg.

Solicitors for the plaintiffs, respondents: Guy, Chappell, Guy, Wilson & Coghlin, Winnipeg.

1959

Apr. 28, 29, 30
*Jun. 25

ROBERT E. SOMMERS .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

H. WILSON GRAY, PACIFIC COAST SERVICES LTD and EVERGREEN LUMBER SALES LTD. ..... } APPELLANTS;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law—Bribery—Conspiracy—Minister of the Crown—Whether an "official"—Offences under the old Code—Prosecution commenced after coming into force of new Code—Whether limitation period provided by old Code applicable—Effect of transitional provisions in new Code—Criminal Code, R.S.C. 1927, c. 36, ss. 158, 1140—Criminal Code, 1953-54 (Can.), c. 51, ss. 102(e), 745, 746.

The appellants were charged under ss. 158(1)(*e*) and 573 of the former *Criminal Code*, S, for accepting bribes from his co-accused while he was the Minister of Lands and Forests of British Columbia, and the others for giving these bribes, and all of them, for conspiracy to commit these offences. They were convicted by a jury and the verdict was affirmed by a majority in the Court of Appeal. In this Court, the two questions of law involved were: (1) whether a Minister of the Crown in the Province of British Columbia is an "official" within the meaning of s. 158(1)(*e*) of the former Code; and (2) whether the prosecution was barred by s. 1140(1)(*b*)(i) of the former Code.

Held: The appeal should be dismissed.

A Minister of the Crown in British Columbia is an "official" within the meaning of s. 158(1)(*e*) of the former Code. It is impossible to agree with the proposition that s. 158(1)(*e*) applies only to non-political officials as distinguished from political officials. At common law, corruption of any official, either judicial or ministerial, is an offence, and with respect to ministerial officers, an offence in the essence of which the distinction between political and non-political officers has no significance. The history of the Canadian statutory provisions do not indicate, either expressly or by any kind of implication, an intention of Parliament to make such a fundamental departure from the law as would represent the exclusion of Ministers of the Crown and persons involved with them in bribery, from the application of the Act.

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

The prosecution was not barred by s. 1140(1)(*b*)(i) of the former Code. The operation of this statutory limitation was conditioned by the expiration of the time limit indicated and the failure to have, within the same, instituted the proceedings, and before these facts could come into being, the former Code was repealed and the new one substituted therefor. The proceedings here were commenced after the coming into force of the new Code which does not provide for limitation of actions with respect to offences under s. 158. So that as s. 1140 was not the law governing in this case, there was no longer any text of law supporting any exception to the common law principle of *nullum tempus occurrit regi*. The transitional provisions of the new Code (s. 746) indicate, by necessary implication if not in express terms, that the repeal of the former Code did not affect any offence committed against the criminal law prior to the repeal, and this whether proceedings for their prosecutions were commenced or not at the time of the coming into force of the new Code. They also prescribe, for such offences, the procedure obtaining after that time, either in continuance or for the commencement of the proceedings. Finally, they provide for the penalty, forfeiture or punishment to be imposed, after that time in like cases. Thus, for the purposes of the transition, the section specially, and exhaustively, deals with such matters which are covered, for general purposes, in s. 19 of the *Interpretation Act*, R.S.C. 1952, c. 158. The case here came clearly within the language of s. 746(2)(*a*) of the new Code, for the substantive offences were committed prior to, but the proceedings were commenced after, the coming into force of the new Code. So that, with respect to procedure, these offences had to be "dealt with, inquired into, tried and determined" in accordance with the provisions of the new Code.

Finally, s. 19(1)(*c*) of the *Interpretation Act* had no application since, in the circumstances of this case, the right claimed under that section on behalf of the appellants never came into existence. The two facts conditioning the coming into force of the statutory limitation, *i.e.*, the expiration of the time limit and the failure to have, within the same, commenced the proceedings, never came and never could possibly come into being, because of the change in the adjective law.

APPEALS from a judgment of the Court of Appeal for British Columbia[1], affirming the conviction of the appellants. Appeals dismissed.

A. E. Branca, Q.C., and *N. Mussallem*, for the appellant, Sommers.

J. R. Nicholson, for the appellants Gray and Others.

V. L. Dryer, Q.C., and *G. L. Murray*, for the respondent.

The judgment of the Court was delivered by

FAUTEUX J.:—The appellants Robert E. Sommers, H. Wilson Gray, Pacific Coast Services Ltd., and Evergreen Lumber Sales Ltd., were convicted before Wilson J. and a

[1] (1959), 28 W.W.R. 19, 124 C.C.C. 52, 30 C.R. 252.

1959

SOMMERS AND GRAY v. THE QUEEN

Fauteux J.

jury, at the assizes held in and for the county of Vancouver in the province of British Columbia, of offences under sections 158(1)(*e*) and 573 of the former *Criminal Code*, R.S.C. 1927 c. 36, to wit: (i) Sommers, of accepting bribes from his co-accused, and the latter, of giving him these bribes while he was an official of the government, i.e Minister of Lands and Forests of the province; and (ii) All of them, of conspiracy to commit these indictable offences.

The verdict, having been appealed to the Court of Appeal for British Columbia, was affirmed by a majority decision[1], Davey J. A. dissenting on two questions of law which now, and pursuant to s. 597(1)(*a*) of the new Code, form the basis of these appeals by Sommers and his co-accused.

The first of these two questions which, if answered negatively, as was done by the dissenting judge, strikes at the root of all the convictions, is:

> Whether or not a Minister of the Crown in the Province of British Columbia is an official within the meaning of s. 158(1)(*e*) of the old Code.

The parts of s. 158 which are relevant, as well as those which are referred to in the dissent, read as follows:

> 158. Every one is guilty of an indictable offence.....who,
> (*a*) makes any offer, proposal, gift, loan or promise, or gives or offers any compensation or consideration, directly or indirectly, to any *official* or person in the *employment* of the government, or to any member of his family, or to any person under his control or for his benefit, with intent to obtain the assistance or influence of such *official* or person to promote either the procuring of any contract with the government for the performance of any work, the doing of any thing, or the furnishing of any goods, effects, food or materials, the execution of any such contract, or the payment of the price or consideration stipulated therein, or any part thereof, or of any aid or subsidy payable in respect thereof; or
> (*b*) being an *official* or person in the *employment* of the government, directly or indirectly, accepts or agrees to accept, or allows to be accepted by any person under his control or for his benefit, any such offer, proposal, gift, loan, promise, compensation or consideration; or
> (*c*) .....
> (*d*) .....
> (*e*) being an *official* or *employee* of the government, receives, directly or indirectly, whether personally or by or through any member of his family or person under his control or for his benefit, any gift, loan, promise, compensation or consideration whatsoever, either in money or otherwise, from any person whomsoever, for assisting

[1] (1959), 28 W.W.R. 19, 124 C.C.C. 52, 30 C.R. 252

or favouring any individual in the transaction of any business whatsoever with the government, or who gives or offers any such gift, loan, promise, compensation or consideration; or

(*f*) by reason of, or under the pretence of, possessing influence *with the government, or with any minister or official thereof,* demands, exacts or receives from any person any compensation, fee or reward, for procuring from the government the payment of any claim, or of any portion thereof, or for procuring or furthering the appointment of himself or of any other person, to any office, place or employment, or for procuring or furthering the obtaining for himself or any person, of any grant, lease or other benefit from the government; or offers, promises or pays to such person, under the circumstances and for the causes aforesaid, or any of them, any such compensation, fee or reward; or

(*g*) having dealings of any kind with the government through any department thereof, pays to any *employee* or *official* of the government, or to any member of the family of such *employee* or *official,* or to any person under his control or for his benefit, any commission or reward; or within one year before or after such dealings, *without the express permission in writing of the head of the department* with which such dealings have been had, the proof of which permission shall lie upon him, makes any gift, loan, or promise of any money, matter or thing, to any such employee or other person aforesaid; or

(*h*) being an *employee* or *official* of the government, demands, exacts or receives from such person, directly or indirectly, by himself, or by or through any other person for his benefit, or permits or allows any member of his family, or any person under his control, to accept or receive

(i) any such commission or reward, or

(ii) within the said period of one year, *without the express permission in writing of the head of the department* with which such dealings have been had, the proof of which permission shall lie upon him, accepts or receives any such gift, loan or promise; or

(The words relied on by the dissenting judge have been italicized.)

It was recognized in the Courts below and conceded here by counsel for the appellants that, taken in its ordinary and natural sense, the word "official" is wide enough to include a Minister of the Crown. It is suggested, however, that there are reasons pointing to "official" as meaning, under this provision, non political officials of the permanent Civil Service and officials holding government offices analogous thereto, as distinguished from Ministers of the Crown who are political and non permanent officials. A like distinction, it is said, is recognized in Anson's The Law and Custom of the Constitution, 3rd ed., vol. 2, part 2,

1959

SOMMERS AND GRAY v. THE QUEEN

Fauteux J.

p. 69, and also in *The Senate and House of Commons Act*, R.S.C. 1952, c. 249, s. 10 and *The Constitution Act*, R.S.B.C. 1948, c. 65, s. 23, both of these Acts forbidding any person in receipt of any salary, fee or emolument from the government, to be a member of the House of Commons or the Provincial Legislature, respectively. That Parliament intended such a distinction to obtain in the matter here under consideration flows, it is suggested, from various inferences to be drawn from: (i) the association of the word "official" with the words "employee of the government" in s. 158(1)(*e*); (ii) the particular provisions of s. 158(1)(*f*), (*g*) and (*h*) of the old Code and those of s. 102 which, in the new Code, is the counter-part of s. 158, and (iii) the scale of punishment prescribed for corruption of various officials according to the importance of their position and the seriousness of their offence.

With deference, I am unable to agree with the proposition that s. 158(1)(*e*) applies only to non-political officials as distinguished from political officials.

At common law, corruption of any official, either judicial or ministerial, is an offence, and with respect to ministerial officers, an offence in the essence of which the distinction between political and non-political officers has no significance. This clearly appears from what was said in 1769 by Lord Mansfield in *Vaughan's* case[1], and applied, as still being a true statement of the common law, nearly two centuries later, in 1914, by Lawrance J., in *Whitaker*[2]. In *Vaughan's* case, the accused was charged with an attempt to bribe a Privy Councillor, the First Lord of the Treasury. Noting that where it is an offence to take a bribe, it is an offence to give it, the question, said Lord Mansfield, was whether a "great officer", at the head of the Treasury and in the King's confidence, could not be guilty of a crime by selling his interest with the King, in procuring the office sought by the accused. He said:—"A terrible consequence will result to the public if everything that such an officer is concerned in advising the disposal of, should be set up for sale". The answer was that an offer to bribe a Privy

[1] (1769), 4 Burr. 2494, 98 E.R. 308. [2] 10 Cr. App. R. 245.

Councillor constituted, as well as an offer to bribe a Judge, a criminal offence at common law and the conviction of the accused was affirmed.

In 1883, Parliament adopted the first Canadian statutory provisions dealing with the matter of corruption of ministerial officials. The Act, which is 46 Victoria, c. 32, is entitled "An Act for the better prevention of fraud in relation to contracts involving the expenditure of public monies." Sections 1, 2 and 3 form the three substantive provisions, section 3 being the source of s. 158(1)(*e*) of the *Criminal Code,* R.S.C. 1927, c. 36. In these three substantive sections, the word "officer" is associated with the words "employee of the government" or "person in the employment of the government". In my view, neither this association of words nor anything else in the Act of 1883 indicates, either expressly or by any kind of implication, an intention of Parliament to make such a fundamental departure from the law as would represent the exclusion of Ministers of the Crown and persons involved with them in bribery, from the application of the Act. A rational and reasonable *raison d'être* of this association of words is to cover, amongst other cases, that of a Minister of the Crown who is not an "employee" or a "person in the employment of the government", but part of the government and who, as such, was and still is recognized, both under the common law and, as will be shown hereafter, under the Canadian statutory law, as an "officer" of the government. An intent to bring such a limitation to the scope of the law is inconsistent with the very title of the Act of 1883, to which one is entitled to refer for the purposes of throwing light on the construction of the Act. Maxwell On Interpretation of Statutes, 9th ed., p. 44.

Nor can such an intent be found in the language of the provisions of the ensuing legislation involving, in this respect, no modification of the Act of 1883:—(i) *The Revised Statutes of 1886,* c. 173 reproduce the provisions of the Act of 1883, in sections 20 to 24 inclusively; (ii) "*An Act respecting Frauds upon the Government*", 54-55 Vict., c. 23, (1891), where, for the first time, the word "official" is substituted for the word "officer", and where the provisions of section (1) (*e*) are identical with s. 158(1)(*e*) of

1959

SOMMERS AND GRAY v. THE QUEEN

Fauteux J.

the *Criminal Code*, R.S.C. 1927, c. 36; (iii) *The first Criminal Code of 1892*, 55-56 Victoria, c. 29, where the provisions of s. 133 are similar to those of s. 158 of the *Criminal Code*, R.S.C. 1927, c. 36.

Furthermore, it is to be assumed that Parliament used the word "officer" or the word "official" in their ordinary and natural sense. These words, particularly in view of the provisions of the interpretation section, i.e. s. 155, R.S.C. 1927, c. 36, include a Minister of the Crown. There are many statutory enactments where the word "officer" is used in clear reference to or designation of the holder of the highest government ministerial offices. Of these statutory provisions, the following may be mentioned:—Section 58 of the *B.N.A. Act* refers to the Lieutenant-Governor of a province as an "officer"; in the provisions of s. 31(*l*) and (*m*) of the *Interpretation Act*, R.S.C. 1952, c. 158, there is a clear implication that a Minister of the Crown is an "officer"; section 2 of c. 253 of *The Solicitor General of Canada Act*, R.S.C. 1952, authorizes the Governor in Council to appoint an "officer" called the Solicitor General; *The Demise of the Crown Act*, R.S.C. 1952, c. 65, as well as its original predecessor, *The Act respecting Commissions, and Oaths of Allegiance and of Office*, 1868, 31 Vict., c. 36, with reference to the continuance in office in the event of a demise of the Crown, covers the case of every ministerial or judicial officer by the following words:—"any officer of Canada, any functionary in Canada, or any judge of a Dominion or Provincial Court in Canada." It may be added that, while the matter must be determined on the language used by Parliament in s. 158(1)(*e*), the *Act respecting the Constitution of the Province* R.S.B.C. 1948, c. 65, designates, in s. 9, the Prime Minister and the other Ministers constituting, with the Lieutenant-Governor, the Executive Council of the province, as "officials". The cases of *MacArthur v. The King*[1] and *Belleau v. Minister of National Health and Welfare et al.*,[2] quoted by counsel for the appellants, are only relevant to illustrate that the natural meaning of a word may, because of the context in which it is found, or the origin of the statutory enactment

[1] [1943] Ex. C.R. 77, 3 D.L.R. 225.
[2] [1948] Ex. C.R. 288, 2 D.L.R. 632.

in which it appears, or the judicial history of such enactment, be restricted for the purpose of a particular Act or a particular provision thereof. These cases respectively decide that the meaning of the term "officer or servant of the Crown", in s. 19(*c*), and the term "officer of the Crown", in s. 30(*c*), of the *Exchequer Court Act,* do not include a Minister of the Crown.

The contention that the word "official" in s. 158(1)(*e*) is used in a restricted sense, is predicated, in law, on the rule of interpretation according to which the same meaning is implied by the use of the same expression in every part of an Act and, in fact, on the association of the word "official" with the word "Minister" in s. 158(1)(*f*) and with the words "Head of the Department" in sections 158(1)(*g*) and (*h*), or with similar words under s. 102 of the new Code, the counter-part of s. 158 of the old Code. This rule of interpretation is only tantamount to a presumption, and furthermore, a presumption which is not of much weight. For the same word may be used in different senses in the same statute: *Whitley v. Stumbles*[1] and even in the same section *Doe v. Angell*[2]. The case of *The Queen v. Allen*[3] shows that the interpretation contended for by the appellants does not obtain in cases where, as in the present, it would, in the result, leave untouched a portion of the mischief aimed at by the enactment. In these views, it is unnecessary to consider the argument submitted by the parties on the question whether one may validly resort to the new Code by the purpose of interpreting the earlier one.

Finally, and for the reason that the punishment prescribed in s. 158(1)(*e*) would be, if applicable to a Minister of the Crown, out of proportion with the more severe punishment provided in other sections in the case of less important ministerial officers, it is suggested that one must infer that the word "official" in s. 158(1)(*e*) does not include a Minister of the Crown. The premise of this reasoning is quite inapt, in my view, to convey an implied intent of Parliament to render immune from prosecution, under s. 158(1)(*e*), a Minister of the Crown and other persons involved with him in bribery.

[1] [1930] A.C. 544.
[2] (1846), 9 Q.B. 328, 115 E.R. 1299.
[3] (1872), L.R. 1 C.C.R. 367.

1959

SOMMERS AND GRAY v. THE QUEEN

Fauteux J.

Before parting with the consideration of this first question of law, it may be added that it was contended, in the Court of Appeal, that the case of a Minister of the Crown was to be dealt with by impeachment and not in the ordinary way before the Criminal Courts. This submission was abandoned in the Court below, as well as before this Court.

The second question of law upon which there was a dissent in the Court of Appeal is:

> Whether or not the prosecution for the substantive offences, as distinguished from the charge of conspiracy, was barred by the provisions of s. 1140(1)(*b*)(i) of the Criminal Code, R.S.C. 1927, c. 36.

The question arises out of the following circumstances. Section 1140 deals with limitation of actions in the case of certain indictable offences including those under s. 158. With respect to offences under the latter section, s. 1140(1)(*b*)(i) provides that no prosecution shall be commenced after the expiration of two years from their commission. If, as contended by counsel for the appellants, s. 1140(1)(*b*)(i) is the law governing in this case, the question must admittedly be answered affirmatively, for the prosecution of these substantive offences was commenced after the expiration of the two years from their commission. However, the operation of this statutory limitation is conditioned by the expiration of the time limit indicated and the failure to have, within the same, instituted the proceedings, and before these two facts could come into being, the old Code was repealed and the new Code was substituted therefor. The proceedings in this case were commenced after the coming into force of the new Code which, while still providing for limitation of actions in the case of some of the indictable offences mentioned in s. 1140, did not do so with respect to others, including those described in s. 158. So that if, as contended by counsel for the respondent, s. 1140(1)(*b*)(i) is not the law governing in this case, the answer to the question must clearly be negative, for there is no longer any text of law supporting any exception to the common law principle *nullum tempus occurrit regi.*

Anticipating that situations of a character similar to that of the one here considered would naturally arise, during the transitional period consequential to the repeal of the

old Code and the substitution therefor of the new one, Parliament has, in Part XXV of the latter, entitled "Transitional and Consequential", enacted special provisions of a transitional nature respecting proceedings and punishment. These provisions are to be found in section 746.

Section 746 reads as follows:

746. (1) Where proceedings for an offence against the criminal law were commenced before the coming into force of this Act, the offence shall, after the coming into force of this Act, be dealt with, inquired into, tried and determined in accordance with this Act, and any penalty, forfeiture or punishment in respect of that offence shall be imposed as if this Act had not come into force, but where, under this Act, the penalty, forfeiture or punishment in respect of the offence is reduced or mitigated in relation to the penalty, forfeiture or punishment that would have been applicable if this Act had not come into force, the provisions of this Act relating to penalty, forfeiture and punishment shall apply.

(2) Where proceedings for an offence against the criminal law are commenced after the coming into force of this Act the following provisions apply, namely,

(*a*) the offence, whenever committed, shall be dealt with, inquired into, tried and determined in accordance with this Act;

(*b*) if the offence was committed before the coming into force of this Act, the penalty, forfeiture or punishment to be imposed upon conviction for that offence shall be the penalty, forfeiture or punishment authorized or required to be imposed by this Act or by the law that would have applied if this Act had not come into force, whichever penalty, forfeiture or punishment is the less severe; and

(*c*) if the offence is committed after the coming into force of this Act, the penalty, forfeiture or punishment to be imposed upon conviction for that offence shall be the penalty, forfeiture or punishment authorized or required to be imposed by this Act.

The provisions of this section indicate, by necessary implication if not in express terms, that the repeal of the former Code does not affect any offence committed against criminal law prior to the repeal, and this whether proceedings for their prosecution were commenced or not at the time of the coming into force of the new Code. They also prescribe, for such offences, the procedure obtaining after that time, either in continuance or for the commencement of the proceedings. And they finally provide for the penalty, forfeiture or punishment to be imposed, after that time, in like cases. Thus, for the purposes of the transition from the former to the new Code, the section specially, and, in my view, exhaustively, deals with such matters which are covered, for general purposes, in s. 19 of the *Interpretation*

1959

SOMMERS AND GRAY v. THE QUEEN

Fauteux J.

Act, R.S.C. 1952, c. 158, in paragraphs (1)(*d*) and (*e*) and (2)(*b*), (*c*) and (*d*). Hence, there is no necessity to resort to these provisions of s. 19 of the *Interpretation Act* to find, as it was contended by counsel for the appellants, an authority for the commencement or continuance of proceedings for the prosecution of such offences, or to determine which of the former or the new Code, should these proceedings, at any phase of a case, and the sanctions of the law, be in accordance with. These special provisions of s. 746 would be futile if the matters they regulate were to be determined by reference to these general provisions of s. 19 of the *Interpretation Act*.

The case here under consideration clearly comes within the language of s. 746(2)(*a*), for the substantive offences were committed prior to but the proceedings were commenced after the coming into force of the new Code. So that, with respect to procedure, these offences had to be *dealt with, inquired into, tried and determined* in accordance with the provisions of the new Code. The provisions of s. 1140(1)(*b*)(i), limiting the time within which a prosecution under s. 158(1)(*e*) may be commenced, being undoubtedly merely procedural, ceased from the date of the coming into force of the new Code, to be afterwards effective with respect to proceedings commenced after that date. And as there is no text of law, in the new Code, to support, in the matter, an exception to the common law principle *nullum tempus occurrit regi*, a prosecution for an offence committed prior to the new Code, under s. 158(1)(*e*), can no longer be subject to any limitation of action. With deference, I cannot attach, as did the learned dissenting judge, any significance to the lack of reference to the provisions of s. 1140 in s. 746(2)(*a*) of the new Code. The language of s. 746(2)(*a*) is clear, unambiguous, imperative and all-embracing; it must be given its effect.

In these views, only one further point requires consideration. Reference was made to s. 19(1)(*c*) of the *Interpretation Act* providing that:

> 19. (1) Where any Act or enactment is repealed, or where any regulation is revoked, then, unless the contrary intention appears, such repeal or revocation does not, save as in this section otherwise provided,
>
> (*a*) .....

(*b*) .....

(*c*) affect any right, privilege, obligation or liability acquired, accrued, accruing or incurred under the Act, enactment or regulation so repealed or revoked.

Counsel for the appellants submitted that these provisions are effective to protect, against the consequences of the repeal of the *Criminal Code,* R.S.C. 1927, c. 36, and of the substitution therefor of the new Code, any right acquired, accrued or accruing under the former, including, it is said, a right for the appellants to oppose as a defence, in the prosecution for the substantive offences under s. 158(1)(*e*), the limitation of action provided in s. 1140(1)(*b*)(i).

These provisions of s. 19(1)(*c*) of the *Interpretation Act* deal with substantive rights which, subject to the qualifications of the opening words of the section, they aim to protect against the consequences of the repeal of the Act under which their existence is claimed. Had the time limit under the former Code expired before the new Code came into force, the question, then being entirely different from the one here considered, would call for other considerations. In the circumstances of this case, the right claimed on behalf of appellants never came into existence. The two facts conditioning the coming into play of the statutory limitation, i.e., the expiration of the time limit and the failure to have, within the same, commenced the proceedings, never came and never could possibly come into being, because of the change in the adjective law.

In *The King v. Chandra Dharma*[1], the prosecution was commenced more than three but less than six months after the date of its commission; the time limit having been extended from three to six months between the date of the commission and that of the prosecution of the offence. On a Crown case reserved, Lord Alverstone, C. J., with the concurrence of Lawrance, Kennedy, Channell and Phillimore JJ., having said, at page 338, that statutes which make alterations in procedure are *prima facie* retrospective, added:

> It has been held that a statute shortening the time within which proceedings can be taken is retrospective, and it seems to me that it is impossible to give any good reason why a statute extending the time within which proceedings may be taken should not also be held to be retrospective.

[1] [1905] 2 K.B. 335.

1959

SOMMERS AND GRAY v. THE QUEEN

Fauteux J.

The law, as stated in that case, has been followed by this Court in *McGrath v. Scriven and McLeod*[1], affirming the judgment of the Supreme Court of Nova Scotia[2]. The decision of this Court in *Upper Canada College v. Smith*[3], quoted by counsel for the appellants, has no application in the matter. As stated by Turgeon J.A., in *Beattie v. Dorosz and Dorosz*[4], the statute considered was not a statute creating a time limit for the bringing of actions, it was a statute making unenforceable certain oral contracts which had previously been valid and enforceable. The question considered was whether such a statute affected contracts already entered into.

The appeals should be dismissed.

Appeals dismissed.

Solicitor for the appellant, Sommers: A. E. Branca, Vancouver.

Solicitors for the appellants, Gray and Others: Guild, Nicholson & Company, Vancouver.

Solicitors for the respondent: Ellis, Dryer & McTaggart, Vancouver.

1959

Feb. 24, 25

*Jun. 9

WILLIAM TREMBLAY (*Defendant*) ....APPELLANT;

AND

J. P. VERMETTE (*Plaintiff*) .....RESPONDENT;

AND

THOMAS H. ONSLOW .....MIS-EN-CAUSE;

AND

BEST WOOD MANUFACTURING LIMITED ..... } BANKRUPT.

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

Bankruptcy—Company—Liability of former shareholder as contributory—The Bankruptcy Act, R.S.C. 1927, c. 11, s. 70(1), (3).

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

[1] (1920), 35 C.C.C. 93, 56 D.L.R. 117.
[2] (1920), 33 C.C.C. 70, 52 D.L.R. 342.
[3] (1920), 61 S.C.R. 413, 57 D.L.R. 648.
[4] (1932), 2 W.W.R. 289 at 293.

1959

TREMBLAY v. VERMETTE et al.

By a written contract, the defendant T and his partner O sold to Best Wood Manufacturing Limited all the assets of a woodworking business which they had been operating. Payment was made in the form of fully paid-up shares. The contract was approved by the shareholders but, by inadvertence, was not filed with the provincial Secretary as required by s. 42 of the *Quebec Companies Act*. From time to time thereafter, T assisted the company in its financial difficulties, but resigned as a director in September 1946 and took no part in its affairs from that date. In July 1947, T sold all claims he might have against the company and his shares in it to A. This transfer of the shares was registered in the books of the company on July 21, 1947. The company was declared bankrupt on March 11, 1948. The trustees in bankruptcy applied to the Court to have T and O declared contributories of the company for the full par value of the shares issued to them. The trial judge dismissed the application, but this judgment was reversed by the Court of Appeal. T alone appealed to this Court.

Held: The appeal should be allowed and the application dismissed.

Per Taschereau, Fauteux, Abbott and Judson JJ.: Even if the failure to register the contract with the provincial Secretary rendered T liable as a contributory, he ceased to be so liable by reason of the transfer of his shares long before the bankruptcy. When a shareholder transfers his shares he transfers all his future rights and obligations as a shareholder from that date. The trustees' claim was based on s. 70 of the *Bankruptcy Act,* R.S.C. 1927, c. 11, but cases decided under a similar section in the *Winding-Up Act,* R.S.C. 1886, c. 129, settled that nothing created any liability on the part of a past shareholder where such liability was not provided by the Act under which the company was created or some related Act. In the circumstances of this case, s. 70(3) of the *Bankruptcy Act* had no application.

Per Locke J.: The appellant was entitled to succeed on the ground that he had ceased to be a shareholder several months prior to the bankruptcy and that the evidence did not support a claim on the part of the trustees under s. 70(3) of the *Bankruptcy Act*. Where a shareholder has validly transferred his shares before a call is made by the company, it is a good defence to an action by the company in respect of the call, provided the transfer has been registered in its books. Apart from any liability that might arise by reason of s. 70(3), after the transfer had been recorded the appellant ceased to be liable to be made contributory in a winding-up or bankruptcy. Section 70(3) had no application in the circumstances of this case.

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

G. Monette, Q.C., and *Miss L. Tremblay,* for the defendant, appellant.

J. Prieur, for the plaintiff, respondent.

[1] [1957] Que. Q.B. 209.

1959

TREMBLAY v. VERMETTE et al.

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

ABBOTT J.:—Respondent, acting in his quality as trustee of Best Wood Manufacturing Limited in bankruptcy, applied to the Superior Court, sitting in bankruptcy, to have the appellant Tremblay and the mis-en-cause Onslow, declared contributories of the said company for the full par value of the shares issued to them. That application was contested and was dismissed by the trial judge. On appeal[1] the judgment was reversed and both the appellant and Onslow held liable as contributories, Tremblay to the extent of $5,400 on the 2,500 shares having a par value of $25,000, originally issued to him. Onslow did not appeal to this Court.

The record is a most unsatisfactory one. The evidence tendered by the respondent trustee to establish the liability of appellant as a contributory consisted principally of the minute book and some, but not all, of the books of account and bank books of the company. The relevant facts, however, would appear to be as follows.

On December 31, 1945, Tremblay and Onslow acquired a woodworking business theretofore carried on at Pont Viau, for a price of $15,000, plus assumption of the outstanding liabilities of the business, which were stated to be between $12,000 and $14,000.

Tremblay and Onslow continued to carry on this business in partnership as from January 1, 1946, under the name of Best Wood Manufacturing Company, and the evidence indicates that between that date and May 31, 1946, additional assets were acquired to the value of some $7,000 or $8,000.

By contract in writing entered into on May 31, 1946, Tremblay and Onslow sold to Best Wood Manufacturing Limited, now in bankruptcy, for a price of $35,000, all the assets of the business in question. These assets are described in detail in a schedule attached to the contract, with

[1] [1957] Que. Q.B. 209.

a value placed on each item, and a total valuation of $35,065.45. Referring to the assets sold and transferred, the contract contains the following condition:

Tel que le tout se trouvait le 15e jour de mars 1946, et dont ledit acquéreur a pris possession et administration exclusive et ininterrompue depuis cette date.

The company purchaser did not assume payment of any of the liabilities of the said business. The vendors agreed to accept payment of the purchase price in the form of 3,500 fully paid up shares of the capital stock of the company purchaser, of a par value of $10 each. This contract was approved at meetings of directors and shareholders of the said company held on May 31, 1946, and of the 3,500 shares, 2,500 were allotted to Onslow and 1,000 to Tremblay. Apparently by inadvertence, the said contract was not filed with the provincial Secretary under s. 42 of the *Quebec Companies Act*, R.S.Q. 1941, c. 276, which reads as follows:

42. Subscriptions for stock must be paid in cash, unless payment therefor in some other manner has been agreed upon by a contract, a copy of which must be fyled with the Provincial Secretary at or before the issue of such shares or within thirty days thereof.

The amount of paid-up capital from year to year, shall be published annually in a report to the shareholders.

At the said meeting of directors held on May 31, 1946, Tremblay applied for and was allotted an additional 1,500 shares at a price of $10 per share. The minutes of the meeting concerning the issue of these shares read as follows:

Il est résolu:

D'ACCEPTER l'application de monsieur William Tremblay Sr, pour l'achat comptant et immédiat de 1500 actions du capital-actions de Best Wood Manufacturing Limited, au prix de $10.00 l'action à savoir pour un montant global de $15,000.

Le secrétaire expose à l'assemblée que le président de la compagnie, Monsieur William Tremblay Sr a déjà avancé une somme de $15,000 laquelle a été déposée à la Banque Provinciale du Canada au compte de la compagnie.

Tremblay's total shareholding was therefore, 2,500 shares of a total par value of $25,000.

The partnership had maintained a bank account with the Banque Provinciale and the debit balance in that account on May 31, 1946, appeared as $16,082.98. On January 22, February 15 and March 29, 1946, respectively,

1959

TREMBLAY v. VERMETTE et al.

Abbott J.

Tremblay had advanced $3,000 to the business and these amounts—totalling $9,000—were deposited in the said account with La Banque Provinciale and applied in reduction of the firm's indebtedness to the bank. On July 13, 1946, Tremblay made two further payments aggregating $19,600 which had the effect of completely extinguishing the indebtedness to the bank, leaving a small credit balance of $23.45.

On July 19, 1946, a new account was opened with the same branch of La Banque Provinciale in the name of the company now in bankruptcy. The small credit balance of $23.45 in the old account in the name of the partnership was transferred to the new account.

As I have stated, the agreement of May 31, 1946, stipulated that the assets of the partnership had been transferred as of March 15, 1946, and it seems clear that the old account at La Banque Provinciale was operated for the benefit of the new company as from that date up to July 24, 1946, when it was closed out.

From July to September 1946, the company continued to keep its account with La Banque Provinciale and during that period a fresh debit balance of approximately $12,000 was built up.

The minutes of a meeting of directors held on September 11, 1946, record that at that time the bank was insisting upon payment of the amount due it, and that at the request of the other directors, Tremblay agreed to pay off the bank. The bank's indebtedness was stated to be approximately $12,500 (the bank account on that date indicated a debit balance of $11,889.02) and it was in fact paid off by Tremblay.

In consideration of the moneys so advanced, the company sold and transfererd to Tremblay all the machinery and equipment in its establishment at Pont Viau, and at the same time Tremblay leased the said machinery and equipment back to the company for a rental of $300 per month up to a total of $12,500. Upon receiving payment of the total sum of $12,500 and interest, Tremblay undertook to reconvey the machinery and equipment to the company.

At meetings of directors and shareholders, held on September 11, 1946, these arrangements with Tremblay were approved, appropriate agreements were executed, and Tremblay resigned as a director and officer of the company although retaining the shares which had been issued to him.

At the same meetings, Tremblay was replaced as a director, new officers were elected, and a resolution adopted authorizing the change of the company's bank account from la Banque Provinciale to the Bank of Montreal.

From September 11, 1946, to July 21, 1947, no directors or shareholders meetings appear to have been held, and there is no indication that after September 11, 1946, Tremblay took any part in the affairs of the company although the company's boks, produced by the trustee, indicate that the company continued to carry on business. No bank books were produced by the trustee covering the period between September 30, 1946, and September 8, 1947 (when an account appears to have been opened with the Banque Canadienne Nationale, as hereinafter mentioned), but the company's books indicate that during that period an account was maintained with the Bank of Montreal.

On July 21, 1947, Tremblay transferred all claims he might have against the company, as well as the shares in the company held by him, to one Ewart C. Atkinson for the price of $3,500. The transfer of 2,500 shares from Tremblay to Atkinson was registered in the books of the company on July 21, 1947, and Tremblay ceased to be a shareholder on that date. The company's books of account indicate that by July 21, 1947, Mr. Atkinson was already a substantial creditor of the company and the minutes of a meeting of directors held on that date state that he was.

A Cash Book of the company, filed as an exhibit by the respondent, contains entries made from September 12, 1946, to November 15, 1947, and the respondent also produced a bank book of Banque Canadienne Nationale in the name of the company, indicating that an account was opened with that bank on September 8, 1947, with a credit of $5,000, and which contains entries made from that date up to November 14, 1947, when the account still showed

1959

TREMBLAY v. VERMETTE et al.

Abbott J.

a credit of $220.06. The company's minute book, however, contains no record of any authorization for the opening of such account.

Onslow, who was the Secretary of the company, testified that he was aware that on or about September 8, 1947, a loan had been obtained by the company from the said bank; that this loan had been guaranteed personally by Mr. Atkinson but that no resolution of the Board had been passed authorizing the loan.

The company was declared bankrupt on March 11, 1948. The statement filed by the respondent as trustee indicates ordinary claims filed amounting to $7,145.75 and privileged claims totalling $2,123.78. The largest creditor was the Banque Canadienne Nationale with a claim of $4,717.10. The obvious inference to be drawn from the evidence is that all these claims arose subsequent to July 21, 1947, when Atkinson appears to have taken over the direction and control of the company. Certainly those arose subsequent to September 1946 when Tremblay paid off the company's indebtedness to the Banque Provinciale.

The legal issues involved in this appeal are the following:

1. Whether the failure to register the contract of May 31, 1946, with the provincial Secretary, under the provisions of s. 42 of *The Quebec Companies Act,* rendered the appellant liable as a contributory, for the full issue price of the shares.
2. Even if it did, whether he ceased to be so liable by reason of the transfer of his shares to E. C. Atkinson on July 21, 1947.

The Court of Appeal held against appellant on both issues but declared the liability of $25,000 on his shares to have been compensated to the extent of $19,600, and held him liable as a contributory for the balance of $5,400. There has been no cross-appeal.

Since I have reached the conclusion that appellant is entitled to succeed on the second issue of law to which I have referred, I do not find it necessary to consider whether s. 42 of *The Quebec Companies Act* has any application in the circumstances of this case.

The law as to the effect of a transfer of shares was comprehensively stated by Lindley L. J. in *In re National Bank of Wales; Taylor, Phillips, and Rickards' Cases*[1], where he said:

> The word "share" does not denote rights only—it denotes obligations also; and when a member transfers his share he transfers all his rights and obligations as a shareholder as from the date of the transfer. He does not transfer rights to dividends or bonuses already declared, nor does he transfer liabilities in respect of calls already made; but he transfers his rights to future payments and his liabilities to future calls.

Since appellant had transferred his shares to Atkinson long prior to the bankruptcy, respondent based his claim to have appellant declared a contributory, upon s. 70, subss. 1 and 3, of the *Bankruptcy Act* then in force, R.S.C. 1927, c. 11, which read as follows:

> 70. (1) Every shareholder or member of a corporation or his representative shall be liable to contribute the amount unpaid on his shares of the capital or on his liability to the corporation or to its members or creditors, as the case may be, under the act, charter or instrument of incorporation of the company or otherwise.
>
> (3) If a shareholder has transferred his shares under circumstances which do not, by law, free him from liability in respect thereof, or if he is by law liable to the corporation or to its members or creditors, as the case may be, to an amount beyond the amount unpaid on his shares, he shall be deemed a member of the corporation for the purposes of this Act and shall be liable to contribute as aforesaid to the extent of his liability to the corporation or its members or creditors independently of this Act.

No section similar to s. 70(3) is contained in the present *Bankruptcy Act*, R.S.C. 1952, c. 14.

The effect of a similar section in the *Winding-up Act*, R.S.C. 1886, c. 129, was considered by Meredith C. J. C. P. in *In re Wiarton Beet Sugar Manufacturing Co.; Freeman's Case*[2], an appeal from a report of the official trustee which placed appellant on the list of contributories in respect of certain shares in a company then being wound-up under the *Winding-up Act*. The shares in question were bonus shares and although issued as fully paid, in fact nothing had been paid in respect of them. It was sought to hold Freeman liable not only for shares still registered in his name, but also for shares which he had previously transferred as fully paid up shares to a third party.

[1] [1897] 1 Ch. 298 at 305.
[2] (1906), 12 O.L.R. 149.

1959

TREMBLAY v. VERMETTE et al.

Abbott J.

Dealing with the shares transferred prior to the winding-up order, the learned Chief Justice referred to the fact that under the English *Companies Act* past members, within a year after they have ceased to be members, are in the event of the company being wound-up, made liable (under certain conditions and with certain limitations as to the extent of their liability) to contribute to the assets of the company, and that legislation of a similar character was then found in the *Bank Act of Canada,* and went on to point out that the Ontario *Companies Act,* under which the Wiarton Sugar Company was incorporated, contains no provision of a similar character, and that the only persons upon whom calls might be made are the shareholders of the company.

It might be noted here, that in this respect *The Quebec Companies Act,* under which the company in bankruptcy was incorporated, is similar to the Ontario *Companies Act* and contains no such provision.

The learned Chief Justice then went on to deal with the position under the *Winding-up Act,* in the following passage at p. 152:

> I find nothing in the Winding-up Act which creates any liability on the part of a past member of a company where such a member is not subjected to such a liability by the Act under the authority of which the company is created or some Act relating to it.
>
> Section 44 of the Winding-up Act, R.S.C. ch. 129, (now section 53(1) which is in virtually the same terms as s. 70(1) of the Bankruptcy Act), though very general in its terms, notwithstanding the use of the words "or otherwise", has, I think, no application to any liability which is not one of the shareholder or member as such, and sec. 45 (now sec. 54) is designed, I have no doubt, to meet such cases as are dealt with in the provisions of the Bank Act to which I have referred, and to provide for cases in which as under that Act a shareholder is liable beyond the amount unpaid on his shares.
>
> I am unable therefore to come to the conclusion that the appellant is liable *qua* shareholder to contribute to the assets of the company under the Winding-up Act.

The decision in *Freeman's* case was followed by Robson J., as he then was, in *In re Winnipeg Hedge and Wire Fence Company Limited*[1], another case involving s. 45 of the *Winding-up Act.*

[1] (1912), 22 Man. R. 83, 1 D.L.R. 316.

Section 70, subs. 3 of the *Bankruptcy Act* is in virtually the same terms as s. 45 (now s. 54) of the *Winding-up Act*, which was considered in *Freeman's* case and in the *Winnipeg Hedge and Wire* case, the same principles must be applicable under both Acts, and I am in agreement with the views expressed by the two learned judges, in the decisions to which I have just referred.

There is no suggestion of fraud or bad faith on the part of appellant. No attempt was made to show that the assets transferred under the contract of May 31, 1946, were not worth the price agreed upon. Appellant appears to have afforded substantial financial support to the company in bankruptcy. He took no part in the management of its affairs after September 11, 1946, the date on which he resigned as a director and officer of the company. When he transferred his shares to Atkinson on July 21, 1947, he appears to have done so in perfect good faith, believing them to be fully paid up, and the claim against him is based solely upon non-compliance with the statutory requirement of s. 42 of *The Quebec Companies Act*. In my opinion s. 70(3) of the *Bankruptcy Act*, R.S.C. 1927, c. 11, had no application under such circumstances.

For the reasons which I have given, I would allow the appeal with costs here and below, and restore the judgment of the learned trial judge.

LOCKE J.:—If it were necessary to determine the standing of the accounts as between the appellant and the bankrupt company as of the date of the receiving order, the proper disposition to be made of this matter, in my opinion, would be to direct a new trial, due to the inadequacy of the evidence. I consider, however, that the appellant is entitled to succeed on the grounds that he had ceased to be a shareholder several months prior to the bankruptcy and that the evidence does not support a claim on the part of the trustees under subs. (3) of s. 70 of the *Bankruptcy Act*, R.S.C. 1927, c. 11, and amendments.

It should be said that there is nothing in the evidence to indicate any inadequacy in the consideration given by the appellant and the mis-en-cause for the shares allotted to them on May 31, 1946, as payment for the assets transferred to the company, and the failure to register the contract with

1959

TREMBLAY v. VERMETTE et al.

Locke J.

the Provincial Secretary, as required by s. 42 of *The Quebec Companies Act,* R.S.Q. 1941, c. 276, was not attributable to either of these parties. As to the subscription for 1,500 other shares by the appellant on that date which, according to the company's records, had been paid for in cash by the appellant depositing the amount of $15,000 in the company's bank account, while the evidence shows that this amount had not been paid prior to the allotment, I would consider that it was a proper inference from the evidence that this amount had been paid by the moneys paid in to the company's credit in the Banque Provinciale by the appellant on July 13, 1946. The evidence is so unsatisfactory and incomplete, however, that if it were necessary to deal with this aspect of the matter it would be my opinion that there should be a new trial.

The evidence is, however, clear that the shares issued to the appellant were so issued as being fully paid up and that on July 21, 1947, nearly eight months prior to the making of the receiving order, the appellant sold and transferred all of these shares to E. C. Atkinson and the transfer was approved at a regularly constituted meeting of the directors and new shares issued as fully paid up to Atkinson. While unnecessary, the proceedings at this meeting of the directors were approved at a meeting of the shareholders held later on the same day.

The bankrupt company was incorporated by letters patent under *The Quebec Companies Act.* Under s. 38 shareholders are liable for any amount unpaid on their shares in the capital stock of the company. Under s. 68 transfers of shares are not valid for any purpose until entry thereof is duly made in the register of transfers and, in the present case, in respect of the shares of the appellant that requirement was duly complied with.

Section 70 of the *Bankruptcy Act,* as it read at the relevant times, under a sub-heading "Contributories to Insolvent Corporations", provided by subs. (1) that every shareholder shall be liable to contribute the amount unpaid on his shares of the capital. The liability of a contributor is *qua* shareholder and the appellant was not declared bankrupt until March 11, 1948, several months after the appellant had ceased to be a shareholder.

For the trustee, however, it is contended that there is liability under subs. (3) of s. 70 which read:

> If a shareholder has transferred his shares under circumstances which do not, by law, free him from liability in respect thereof, or if he is by law liable to the corporation or to its members or creditors, as the case may be, to an amount beyond the amount unpaid on his shares, he shall be deemed a member of the corporation for the purposes of this Act and shall be liable to contribute as aforesaid to the extent of his liability to the corporation or its members or creditors independently of this Act.

This subsection was taken practically *verbatim* from s. 54 of the *Winding-Up Act,* R.S.C. 1927, c. 213.

Where a shareholder has validly transferred his shares before a call is made by the company, it is a good defence to an action by the company in respect of the call, provided the transfer has been registered in its books. Apart from any liability that might arise by reason of subs. (3) of s. 70, after the transfer had been recorded the appellant ceased to be liable to be made a contributory in a winding-up or bankruptcy: Masten & Fraser on Company Law, 4th ed., p. 286; *In Re Hoylake Railway Co.; Ex-parte Littledale*[1]. The property in the shares passes when the directors assent to the transfer and it is registered, and the transferor cannot be liable *qua* shareholder.

Subsection (3), which was not reproduced when the *Bankruptcy Act,* 1927 was repealed and reenacted by the *Bankruptcy Act,* 1949, dealt with cases where the transfer of shares is made under circumstances which do not by law free the shareholder from liability in respect thereof, which presumably refers to transfers which may be impeached for, *inter alia,* fraud or other irregularity, and does not touch the present transaction. The meaning to be assigned to the words "if he is, by law, liable to the corporation or to its members or creditors, as the case may be, to an amount beyond the amount unpaid on his shares" is, I think, not free from doubt but has no application to the present matter.

[1] (1874), L.R. 9 Ch. 257.

1959

TREMBLAY v. VERMETTE et al.

Locke J.

I would accordingly allow the appeal with costs, including the costs of the respondent's motion made on May 25, 1959, and restore the judgment at the trial.

Appeal allowed with costs.

Attorneys for the defendant, appellant: Lafleur & Ste. Marie, Montreal.

Attorney for the plaintiff, respondent: J. Prieur, Montreal.

1959

Feb. 16
*Jun. 25

HELENE MARGUERITE PATRICIA JACKMAN (*Defendant*) ..... APPELLANT;

AND

CECIL WILLIAM JACKMAN (*Plaintiff*) ..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Husband and wife—Real property—House purchased by husband in wife's name—Trust claimed by husband—Whether presumption of advancement rebutted.

The plaintiff-husband brought action against his wife for judicial separation and, *inter alia,* for a declaration that a certain house was held by the wife on behalf of herself, her husband and their child. The house was bought in 1951, the husband making the down payment of $10,000 out of his own funds, and title was taken in the wife's name only. The trial judge concluded that an outright gift had been intended, but this judgment was reversed by the Appellate Division. The wife appealed to this Court.

Held: The appeal should be allowed; the presumption of advancement had not been rebutted.

Per Kerwin C.J.: In the present case, the important feature was that the wife had been earning money regularly and that the possibility of another separation between the spouses was envisaged by both parties; notwithstanding this the title was taken in the name of the wife and the husband thought he might have to report a gift of $10,000 in his income tax return. The trial judge was right in holding that "there was no understanding or arrangement or even any suggestion from the plaintiff that the defendant should hold" the property in trust.

Per Locke, Martland and Judson JJ.: The evidence did not rebut the presumption that an advancement was intended. Where a husband purchases property or makes an investment in the name of his wife, a

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

gift to her is presumed in the absence of evidence of an intention to the contrary. Other than the plaintiff's denial that he intended a gift, the only other evidence as to his intention at the time was to be gathered from certain subsequent occurrences. While the absence of natural love and affection between the spouses in this case was a circumstance to consider in determining whether or not an advancement was intended, no question of consideration enters into the matter. A voluntary settlement by a husband could not be impeached by the settlor on the ground of a lack of consideration. The description of the transaction as a post nuptial settlement in the draft of a separation agreement and the evidence given by the plaintiff relating to the question of a gift tax supported rather than rebutted the presumption of advancement.

Per Cartwright J.: The evidence as to the surrounding circumstances and what occurred at the time of the conveyance strengthened rather than rebutted the presumption of gift, and further support for the defendant's case was found in the plaintiff's subsequent declarations.

APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division[1], reversing a judgment of Riley J. Appeal allowed.

W. G. Morrow, Q.C., for the defendant, appellant.

N. D. Maclean, Q.C., for the plaintiff, respondent.

THE CHIEF JUSTICE:—The appellant-wife and the respondent-husband were married on July 3, 1941, and the only issue of the marriage is Terence Lynwood Norgaard Jackman, born July 31, 1944. The respondent brought an action against his wife in Alberta for judicial separation, custody of the child and for a declaration that a certain property known as 5208 Ada Boulevard, Edmonton, was held by the appellant on behalf of herself, the respondent and the child, or for a variation under *The Domestic Relations Act*, R.S.A. 1942, c. 300, of the terms of the transfer of that property to be mentioned later. He also advanced a claim under *The Dower Act*, 1948 (Alta), c. 7.

The trial judge dismissed the action and allowed the wife's counter-claim for judicial separation and custody of the child but disallowed her claim for maintenance of the latter. He found that the appellant was the sole owner of the property and ordered the respondent to deliver up possession thereof to her. He ordered the respondent to pay

[1] (1958), 15 D.L.R. (2d) 106, 25 W.W.R. 131.

1959

JACKMAN v. JACKMAN

Kerwin C.J.

the appellant her costs of the action. In his reasons he directed that the counter-claim be allowed with costs to the extent indicated but the formal judgment merely directs that the wife recover from the husband her costs of the action.

The Appellate Division[1] allowed in part the present respondent's appeal to it; declared that the appellant held the property in trust for herself and the respondent; ordered her to pay the costs of the appeal; gave her liberty to re-apply for an order for maintenance of the child and the husband liberty to apply for directions as to access to the child; in all other respects the judgment at the trial was affirmed. The wife now appeals from that judgment.

It is unnecessary to detail the marital difficulties of the parties as they appear in the reasons for judgment of the trial judge and of the Appellate Division. When the first house occupied by the husband and wife was purchased under an agreement for sale, the husband was a member of the Armed Services and his parents made the down payment. The appellant is a school teacher and her annual income has been about the same as that of the husband. She kept up the monthly payments on this first house and the balance was paid by the husband. Title was taken in the name of the appellant only and ultimately the property was sold. The second house was purchased in 1946 and while at first the title was in the name of the respondent only, later it was put in the joint names of both parties.

The Ada Boulevard property, which is the one in question, was purchased in 1951 and the circumstances are important. The appellant heard that the property was for sale and telephoned her husband to go out to it immediately. This he did and his wife there informed him that she would like to have the title to it in her own name. As expressed in the respondent's factum, it may be that, as the appellant had left the husband on two previous occasions and taken the child with her, the respondent thought that she might be intending to leave again and he imagined that putting the title in her name would not jeopardize his interest. The respondent says that the appellant promised to make a real home for her husband and son

[1] (1958), 15 D.L.R. (2d) 106, 25 W.W.R. 131.

and that there would be no more trouble on her part. The wife's evidence is that she had left the respondent on the earlier occasions for good cause because of his actions. The respondent made the down payment of $10,000 and although he proposed that title should be in their joint names title was taken in the wife's name only. The husband admits that he considered the possibility of having to report in his income tax return a gift of $10,000.

I agree with the trial judge's statement that: "There was clearly no understanding or arrangement, or even any suggestion from the plaintiff that the defendant should hold the Ada Boulevard home, conveyed to her and in her name, as a trustee for herself and the plaintiff, much less as trustee for herself, the plaintiff and the infant Terence". The applicable law was considered by this Court in *Hyman v. Hyman*[1]. There the circumstances in favour of the husband securing an interest in real estate were more favourable to him than in the present case. At p. 539 of the report it is stated:

> Considering the whole case, we are of opinion that the appellant has failed to bring forward, in the words of Moss, J., in *McManus v. McManus*[2], "clear, distinct and precise testimony" of any definite trust in his favour.

Reliance was placed by the Appellate Division upon the decision of the Court of Appeal in England in *Silver v. Silver*[3], and particularly the following statement by Lord Justice Parker at p. 527:

> We are here considering what I may call a family asset, the matrimonial home, something acquired by the spouses for their joint use, with no thought of what is to happen should the marriage break down. In these circumstances it seems to me that, in the present age, common sense dictates that such an asset should be treated as the joint property of both, in the absence of evidence to the contrary. This view is well expressed by Denning, L.J., in *Fribance v. Fribance* (1957) 1 All E.R. 357 at p. 359); and also in *Rimmer v. Rimmer* ((1952) 2 All E.R. 863).

Even in the *Silver* case the Court of Appeal dismissed an appeal from a county court judge who had declined to make the declaration asked by the husband. I have not overlooked that Lord Evershed pointed out that in this day and age the presumption of advancement is more easily capable of rebuttal than in the past but he felt that

[1] [1934] 4 D.L.R. 532. [2] (1876), 24 Gr. 118.
[3] [1958] 1 All E.R. 523.

1959

JACKMAN v. JACKMAN

Kerwin C.J.

the fact that the original sum of £90 had been provided by the wife's parents was an important factor. In the present case the important feature is that the appellant had been earning money regularly and that the possibility of another separation between the spouses was envisaged by both parties; notwithstanding this the title was taken in the name of the wife and, as I have already pointed out, the husband thought he might have to report a gift of $10,000 in his income tax return.

The respondent does not mention in his factum and his counsel did not argue before us that any claim could be advanced under *The Domestic Relations Act*. He did, however, argue that *The Dower Act* applied. We did not require to hear counsel for the appellant in reply on that question. On both points I entirely agree with what was said by the trial judge.

The appeal should be allowed, the judgment of the Appellate Division set aside and that of the trial judge restored. The appellant is entitled to her costs in the Appellate Division and in this Court.

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

LOCKE J.:—In my opinion, the evidence in this matter does not support the view that the purchase of the property on Ada Boulevard in Edmonton in 1951 was in the nature of a joint venture by a husband and wife, each contributing substantially to the purchase price of the property.

The parties were married in 1941 and the wife, the appellant in this appeal, has been employed continuously since that time, except for a period during the year in which the only child of the marriage was born. With this exception, throughout the period from 1941 until 1955 she has contributed substantially to the living expenses of the family. However, her contribution to the purchase of the various house properties during that time appears to have been slight.

The first house, situated on 91st Street, was purchased at a time when the respondent was on military service and absent from Edmonton. The purchase was negotiated by

the appellant and made in her own name. The down payment of $800 was made out of moneys given to her by the parents of the respondent. The total purchase price was $3,750 and it was apparently payable in instalments and the appellant contributed something towards these payments, the amount of which is not disclosed by the evidence. The final payment of $1,900 was made by the respondent and the title was taken in the appellant's name. A second house on the same street was purchased by the respondent in 1946. The first house was sold for $4,500 and this was applied on account of the purchase price of $6,000 for the second house and the balance of $1,500 was paid by the respondent. The respondent took title to the second house in his own name but, according to him, the appellant threatened to leave him and to take the child with her at some time in the year 1948 unless the respondent would transfer the property into their joint names, and this was done and the title to that property remains in that state up to the present time.

The appellant contributed nothing to the cash payment of $10,000 made on account of the purchase of the third property in May of 1951. It would thus appear that, in regard to all three properties up to and including the date of the last purchase, the contributions of the wife were limited to such portion of the $3,750 paid as the price of the first house as she contributed, surplus to the $2,700 paid by the respondent or by his parents on his behalf.

In these circumstances, it does not appear to me that a case is made out for describing the third property as a family asset, in the sense that that expression was used by Parker L. J. in *Silver v. Silver*[1], which is referred to in the reasons for judgment of Mr. Justice Johnson.

Riley J., by whom the action was tried, concluded upon the evidence that an outright gift was intended when the respondent directed that the purchase of the Ada Boulevard property should be made in his wife's name and paid the

[1] [1958] 1 All E.R. 523 at 527.

1959

JACKMAN v. JACKMAN

Locke J.

required cash payment out of his own funds. The unanimous judgment of the Appellate Division[1] has reversed this finding, declaring that the appellant holds the property as trustee for her husband and herself.

Where a husband purchases property or makes an investment in the name of his wife, a gift to her is presumed in the absence of evidence of an intention to the contrary. The basis for this, as it applies to a father and his son, is stated in the early cases: *Dyer v. Dyer*[2] and *Finch v. Finch*[3], by Lord Eldon at p. 50 where, referring to the case of *Dyer v. Dyer,* he said that where A purchases in the name of B, A paying the consideration, B is a trustee notwithstanding the Statute of Frauds, but that rule does not obtain when the purchase is in the name of a son and such a purchase is an advancement *prima facie.*

In *Fowkes v. Pascoe*[4], Sir W. M. James L.J. at p. 350 spoke of the presumption as being that the advancement is an anticipation of a testamentary provision. The authorities are collected in Lewin on Trusts, 15th ed., p. 148 et seq. and the rule as stated by Chief Baron Eyre in *Dyer v. Dyer* shown to have been applied to such transactions between husband and wife.

The question to be determined is as to what was the intention of the respondent when he arranged the purchase of the property on Ada Boulevard in his wife's name and paid the amount of $10,000 from his own funds. The respondent's account of the transaction is that while he was negotiating the purchase his wife said that she would like to have it made in her name, that he at first demurred, and then:

> She promised to give me the (sic) real home for the boy and I and I still demurred and she started for the door, picked up her purse off the table, and I thought it possibly to put it in her name would not jeopardize my interest and we would have a home and it was something I wanted very much, so at the moment I agreed it would go in her name and she said we would have a family home.

The appellant gave evidence but said nothing as to what had taken place at the time of purchase and gave no explanation of why it was made in her name.

[1] (1958), 15 D.L.R. (2d) 106, 25 W.W.R. 131.
[2] (1788), 2 Cox 92, 30 E.R. 42.
[3] (1808), 15 Ves. 43, 33 E.R. 671.
[4] (1875), L.R. 10 Ch. 343.

Other than the respondent's denial that he intended to give this property to his wife, the only other evidence as to his intentions at the time is to be gathered from certain subsequent occurrences. The respondent when examined for discovery had been asked whether he had reported the transaction as a gift when making his next income tax return. He had said that he found that it was unnecessary to report the gift "until the mortgage is paid off because it is not a gift until the mortgage company transfers the title to the ownership (sic) of the purchaser." He had also said on discovery:

> And another thing, there was the income tax problem: I was making a gift of $10,000. I proposed that at best we should put it in our joint names.

In August 1955 the appellant left home without the respondent's consent, removing practically all of the furniture, and the parties have since lived apart, the child remaining with the mother. In the following year the parties met and apparently agreed upon the terms of a separation. The respondent was to make a payment of $9,000 and the wife to transfer the Ada Boulevard property to him. By arrangement the parties went to Mr. W. G. Chipman, a solicitor in Edmonton, and gave him instructions to draw an agreement. Mr. Chipman was the respondent's solicitor and it was understood that the appellant would submit the agreement when drawn to her own solicitor for approval. This proposed agreement, which was not signed since the appellant's solicitor did not approve of it, was put in evidence. The preamble recited that the wife had left what was referred to as the marital home, 5208 Ada Boulevard, Edmonton, on August 30, 1955, and that the parties had agreed to live separate from each other in the future. A second recital read:

> And whereas the said marital home, purchased and paid for by the husband, was placed in the name of the wife, as registered owner, at her request as a post nuptial settlement;

Mr. Chipman gave evidence and said that the draft agreement had been prepared as a result of the instructions given to him by the parties at an interview at which both were present and that he had gone through its terms with each of them and they both agreed with them.

1959

JACKMAN v. JACKMAN

Locke J.

The only other evidence from which any inference can be drawn in determining the intention of the respondent and the understanding of the appellant as to what was intended is to be found in the fact that from May 1951 until August 1955 the monthly payments required to be made on the mortgage on the Ada Boulevard property were made by the appellant out of the rentals which she received from the 91st Street property, apparently with the consent of the respondent, and the further fact that the respondent, according to his evidence, made improvements to the property during this period to the extent of about $2,500.

In determining the question of fact as to the intention of the respondent in arranging the purchase in his wife's name, the learned trial judge, in concluding that the presumption of advancement had not been rebutted, attached importance to the fact that the transaction was referred to as a post nuptial settlement in the draft agreement and to the statements made by the respondent in relation to the question of a gift tax to which I have referred above. Johnson J. A., who delivered the unanimous judgment of the Appellate Division, attached importance to the undoubted fact that there was little in the nature of natural love and affection between the parties whose marriage appears to have been a most unhappy one almost from the outset, and considered that this indicated a lack of consideration for a transfer of the property into the wife's name.

With great respect, while the absence of natural love and affection between the husband and the wife in the present matter is a circumstance to consider in determining whether or not an advancement was intended, no question of a consideration for the transfer enters into the matter. A voluntary settlement by a husband cannot be impeached by the settlor on the ground of a lack of consideration, and the transaction which took place in this matter was described, with the respondent's approval, as a post nuptial settlement in the draft agreement.

The fact that the reasons for judgment delivered by Johnson J. A. do not deal with the fact that, with the respondent's approval, the transaction was referred to in

the draft agreement as a post nuptial settlement does not, of course, indicate that this circumstance was not considered by the learned judges of the Appellate Division but, with great respect, it appears to me that sufficient weight was not given to this material evidence. In the reasons it is said that it is not disputed that a gift of a part interest in the property was intended but that anything less than a conveyance of the entire interest was intended is not, in my opinion, supported by the evidence.

While the case for the appellant does not appear to me to be as clear as that of the wife in the case of *Hyman v. Hyman*[1], which was decided in this Court, since there the husband had sworn to an affidavit on the conveyance, stating that the only consideration for the transfer was natural love and affection and the same was a gift to the grantee, the description of the transaction in the draft agreement and the evidence given by the respondent relating to the question of gift tax does support rather than rebut the presumption of advancement. In my view, no support is to be found for the respondent's position from the fact that he had transferred the 91st Street property into the joint names of his wife and himself when she threatened to leave him in 1948. I do not think this justifies an inference that when the Ada Boulevard property was purchased he intended that she should hold the property in trust for the two of them or for them and the infant child, rather does it indicate the contrary.

In my opinion, the evidence does not rebut the presumption than an advancement was intended and the finding made at the trial should not have been disturbed. I would accordingly allow this appeal with costs in this Court and in the Appellate Division and restore the judgment at the trial.

CARTWRIGHT J.:—The relevant facts and the views taken by the Courts below are stated in the reasons of the Chief Justice and those of my brother Locke.

[1] [1934] 4 D.L.R. 532.

1959

JACKMAN v. JACKMAN

Cartwright J.

There appears to be no difference of opinion as to the applicable rule. It is concisely and accurately stated in Halsbury, 3rd ed., vol. 19, p. 832:

> Where a husband purchases property or makes an investment in the name of his wife, a gift to her is presumed in the absence of evidence of an intention to the contrary.

In my opinion, the effect of the evidence as to the surrounding circumstances and what occurred at the time when the respondent directed the conveyance to be made to the appellant is to strengthen rather than rebut the presumption of gift, and the appellant's case finds further support in the subsequent declarations of the respondent. I agree with the conclusion of the learned trial judge.

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

Appeal allowed with costs.

Solicitors for the defendant, appellant: Miller, Miller & Witten, Edmonton.

Solicitors for the plaintiff, respondent: Maclean & Dunne, Edmonton.

FRANKEL CORPORATION LIMITED ....APPELLANT;

1959

May 7

*Jun. 25

AND

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income tax—Sale of one of taxpayer's operations including inventory—Whether sale of separate business—Whether profit on inventory taxable—The Income Tax Act, 1948 (Can.), c. 52, ss. 2(1), (3), 3, 4, 127(1)(e).

The appellant company carried on four business operations: (1) a steel operation; (2) a wreckage and salvage operation; (3) a scrap iron and steel operation; and (4) a non-ferrous smelting and refining operation. In 1952, the appellant sold its non-ferrous operation, including the inventory on hand. The price paid for the metals inventory was at a figure higher than that carried on the appellant's books. The Minister treated the difference as a taxable profit. The Income Tax Appeal Board allowed the appellant's appeal, but this judgment was reversed by the Exchequer Court.

Held: The amount in question was not taxable.

The sale of the inventory here in question was not a sale in the business of the appellant, but was made as a part of a sale of a business of the appellant, and consequently the proceeds of that sale were not income from a business within the meaning of s. 4 of the *Income Tax Act*. *Doughty v. Commissioner of Taxes*, [1927] A.C. 327, applied.

The submission, based on *Sharkey v. Wernher*, [1955] 3 All E.R. 493, that the inventory was removed or diverted from the appellant's stock-in-trade before it was sold so as to require the market value of the inventory to be placed in its trading account, could not be entertained. Here, the appellant received the consideration for the inventory as a part of the consideration for the whole transaction.

APPEAL from a judgment of Thurlow J. of the Exchequer Court of Canada[1], reversing a decision of the Income Tax Appeal Board. Appeal allowed.

R. L. Kellock, Q.C. and *H. C. Walker, Q.C.*, for the appellant.

W. R. Jackett, Q.C., J. D. C. Boland and *G. W. Ainslie*, for the respondent.

The judgment of the Court was delivered by

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

[1] [1959] Ex. C.R. 10, C T.C. 314, 58 D.T.C. 1173.

1959

FRANKEL CORPN. LTD. v. MINISTER OF NATIONAL REVENUE

MARTLAND J.:—This is an appeal from a judgment of the Exchequer Court, which allowed an appeal by the Minister of National Revenue from a decision of the Income Tax Appeal Board and which resulted in the addition to the taxable income of the appellant for the year 1952 of an amount of $78,095.68, described in the notice of re-assessment as "profit on sale of inventory".

The facts, as fully and clearly stated in the judgment of the Exchequer Court, are as follows:

The appellant was incorporated on October 30, 1950, and on the following day it took over the business assets and operations of Frankel Brothers Ltd. Thereafter the appellant carried on such operations in the same way as its predecessor had done until the events in question occurred. Frankel Brothers Ltd. had been operating since 1924 as a dealer in ferrous and non-ferrous scrap, and in the smelting and alloying of non-ferrous metals. The latter operation consisted of the recovering of certain non-ferrous metals from scrap material, alloying them with other non-ferrous metals to specifications required by the purchasers, and selling the products. The selling part of the non-ferrous metals operations was carried on under the name "National Metal Company" by Frankel Brothers Ltd. in its time and by the appellant in its turn, and both made use of a registered trade mark consisting of the letters "N.M.C." and also of the word "National" in connection with products. These operations had been expanded in 1942 to include the smelting and alloying of copper recovered from scrap material. During the time this operation was carried on by the appellant, its activities as a dealer in non-ferrous scrap metal were incidental to the smelting operation, purchases of non-ferrous scrap metal being made only for the purposes of the smelting operation and sales of such scrap materials being made only when the appellant was over-supplied.

The ferrous scrap operation consisted of acquiring the scrap, sorting and preparing it by breaking the iron and shearing the steel for use in iron foundries and steel mills and selling it.

In 1926 Frankel Brothers Ltd. had begun carrying on wrecking and salvage operations which consisted of the wrecking and demolition of buildings and structures and

the salvaging and sale of materials therefrom. The chief product of this operation was salvaged timber, but considerable quantities of ferrous scrap metal and minor quantities of non-ferrous scrap metal were recovered as well. When recovered, such ferrous scrap metal was transferred to the ferrous scrap metal operation and the non-ferrous scrap metal to the smelting operation.

In 1929 Frankel Brothers Ltd. had further expanded its activities to include a steel fabrication and erection operation consisting of the fabrication of steel for building in its plant and the erection of the steel on the site.

The appellant, on assuming these operations in October, 1950, also acquired the rights of Frankel Brothers Ltd. in the premises where the operations were carried on. These consisted of an area of land between Broadview and Lewis Avenues in Toronto devoted exclusively to the wrecking and salvage operation, and another area nearby at the corner of East Don Roadway and Eastern Avenue where the other three operations were carried on. The latter area was the larger of the two and was equipped with four crane runways and a number of buildings. It was also served by a railway line. Each of the remaining three operations had separate portions of this area where the machinery and equipment used in connection with them were located and the processing of the materials was carried out. In general, the portion used for the purposes of the non-ferrous smelting operation adjoined Eastern Avenue and was completely separated from that of the ferrous scrap metal operation by the area occupied by the steel fabrication operation which lay between the areas occupied by the other two operations and, by itself, held more than half of the whole area.

Not only were the areas and equipment of these operations separate, but the equipment of one was neither used nor usable in connection with any of the other operations. Goods or materials on the premises, for the purposes of these operations, were stored on the portion of the premises allotted to the particular operation and separate accounts of them were maintained, that of the non-ferrous metals being a complete list of each item with its weight and value. When scrap metal from the wrecking and salvaging

1959

FRANKEL CORPN. LTD. v. MINISTER OF NATIONAL REVENUE

Martland J.

operation was transferred to the ferrous or non-ferrous operation, the transfer was recorded by a voucher crediting the wrecking and salvaging operation and debiting the receiving operation with the market value of the scrap. Both the sources of material and the customers who bought the products of any of these operations were, in general, different from those of the other operations. The staffs who carried out the different operations were also separate and distinct from each other. Those employed in the non-ferrous smelting operation worked exclusively in that operation and consisted of some sixty-five persons, including a production supervisor, three salesmen, a purchasing agent, and laboratory and other workers.

The accounting practices followed by the appellant and its predecessor were not explained in detail, nor was detailed evidence given respecting the duties of clerical or accounting employees. In the annual statements, however, which accompanied the appellant's income tax returns, the profit and loss statement was broken down between what was headed "Metals Division", including both the ferrous and non-ferrous metal operations, and the "Structural Division", embracing the steel fabrication and the wrecking and salvage operations. A separate operating profit from each of these divisions was carried to the profit and loss statement, and overhead expenses, consisting of selling expenses, property expenses, and administrative expenses, were deducted generally to show the operating profit of the company for the year. To what extent these expenses were incurred separately for and charged to separate operations in the course of business does not appear, though there is evidence that the accounting for the structural steel operation and for the wrecking and salvage operation were separate from the others but that for the ferrous scrap and non-ferrous metals operations was combined. Nor does it appear to what extent, if any, items such as directors' fees, municipal taxes on the property occupied, and other items of an apparently overall nature, were in fact incurred exclusively for or charged to any of the several operations. All four operations were, however, under the control of a single board of directors, each operation having one person in charge responsible to the board.

There is also evidence that the appellant had a single union labour contract and insurance and pension plans covering employees of all the operations.

As a business field, the smelting and alloying of non-ferrous metals, such as copper, lead, zinc, tin and aluminum, is regarded by persons engaged in the trade as separate from that of iron and steel on the one hand and the precious metals such as gold, silver, and platinum on the other, the type of plant and equipment, the sources of raw material, the processing and the uses of the product being quite different and distinct in each field.

In August, 1951, the appellant became aware that American Smelting and Refining Corporation (hereinafter referred to as "Asarco"), a large organization controlling some fourteen non-ferrous metals smelting and refining plants in the United States, as well as mining and other allied enterprises, was seeking a favourable opportunity to establish a non-ferrous metals smelting and refining business in Canada, and negotiations ensued which led to the sale in question in these proceedings. From the point of view of the appellant, two principal reasons prompted the course which it took. First, the appellant was controlled by members of the Frankel family, the younger members of which were more interested in the structural steel operation and in its expansion than in the other operations, and more space on the premises was required to accommodate such expansion. The second and more important reason was the prospect of another large competitor in the Canadian market. Ultimately, on December 19, 1951, an agreement was reached by which the appellant sold to Federated Metals Canada Ltd. (hereinafter referred to as "Federated"), a subsidiary of Asarco, all the assets used in the non-ferrous metals operation other than the land and buildings, a number of overdue accounts, and a quantity of drosses representing about one per cent of the non-ferrous metals inventory. In the transaction the appellant leased the land and buildings to the purchaser for a four-year term and transferred to it, as well, the employees engaged in this operation. The assets transferred to the purchaser included machinery and equipment, laboratory equipment, inventories of raw, partly processed, and

1959

FRANKEL CORPN. LTD. v. MINISTER OF NATIONAL REVENUE

Martland J.

finished non-ferrous metals, supplies useful in the non-ferrous metals operation, accounts receivable, prepaid insurance and similar items, and

(*f*) *Good-will, Patents, Trade Marks, etc.* All the business, unfilled customers' orders, good-will, trade connections, patents, patent applications, inventions, licences, formulae, processes, trade names and trade marks of every nature and description owned or possessed by Frankel and pertaining to its non-ferrous metals business.

On completion of the transaction, the appellant ceased operating in the smelting and refining of non-ferrous metals and as a dealer in non-ferrous scrap metal, and the purchaser assumed and carried on that operation on the same portion of the premises which had theretofore been used by the appellant for that purpose. The appellant continued as before with its other three operations, save that non-ferrous scrap metal recovered in the wrecking and salvage operation was thenceforth disposed of to the purchaser, pursuant to a term of the contract. No new or other operation in the smelting or refining of non-ferrous metals or the sale of non-ferrous scrap metal was set up or carried on by the appellant.

The contract, pursuant to which the sale was effected, was made between the appellant and Asarco and, after reciting the nature of the appellant's non-ferrous metals operations and the general nature of the agreement between the parties, proceeded as follows:

NOW THEREFORE THIS AGREEMENT WITNESSETH that in consideration of the premises and the mutual promises hereinafter exchanged, it is agreed as follows:

1. Frankel agrees to sell, transfer and convey to Federated the following assets of its non-ferrous metals business, namely:

(*a*) *Machinery and equipment.* The machinery and equipment listed on Schedule "A" attached hereto and made a part hereof at the price for each item indicated on said Schedule "A", which Schedule is identified by the signature of E. L. Frankel on behalf of Frankel and by Max Robbins on behalf of Asarco.

(*b*) *Inventories of Raw Materials and Finished Metals.* All raw materials, such as scrap metals, drosses, skimmings and residues, and all new or finished metals on hand at the time of closing hereunder. The purchase price for scrap and other raw materials shall be the market price therefor at the time of closing, but should there be any dispute between the parties as to such market price, then Frankel shall offer such material for sale, privately or in any available market, and Asarco shall have the option of purchasing the same at a price equal to the best price bid therefor. Since Federated will take over Frankel's unfilled customers' orders at the time of closing and some of these may have been taken at prices

below the current market at the time of closing, it is agreed that a sufficient allowance from said purchase price for raw materials will be made to Federated for the quantity of raw materials required to fill such customers' orders which are below market price so that said allowance will result in a market price for such raw materials that would normally prevail therefor when the finished product is sold at the price at which such orders were taken. The puchase price of ingot and other finished product shall be determined by adding the cost of manufacture to the current market price at the time of closing of the scrap or other raw materials that went into the manufacture thereof, provided such purchase price shall not exceed the current market price for the finished product less a fair allowance for the cost of storing, selling and delivering the same. If any of such ingot or other finished product is required to fill customers' orders to be transferred to Federated and such orders are at prices below the current market prices at the time of closing, any necessary allowance will be made on the purchase price of the finished product to enable Federated to complete such customers' orders and make the normal profit which would accrue if such orders were at current market prices and made from currently priced raw material.

(*c*) *Supplies.* All supplies useful in the operation of said non-ferrous metals business, including laboratory supplies, at current market prices at the time of closing for the quantities heretofore regularly purchased by Frankel.

(*d*) *Accounts Receivable.* . . .

(*e*) *Prepaid Items.* . . .

(*f*) *Good-will, Patents, Trade Marks, etc.* . . .

* * *

2. The purchase price for all of the aforesaid property shall be:

(i) for the items specified in subparagraphs (*a*), (*b*), (*c*), (*d*) and (*e*) of paragraph 1 hereof, the aggregate of the sums specified therein which shall be payable in cash by Federated to Frankel at the time of closing, and

(ii) for the items set forth in subparagraph (*f*) of paragraph 1 hereof the amount of 150,000.00 which shall be payable in cash by Federated to Frankel at the time of closing, together with 49,000 shares without nominal or par value in the capital stock of Federated to be allotted and issued to Frankel or its nominee at the time of closing as fully paid and non-assessable and constituting 49% of the capital stock of Federated then authorized, issued and outstanding.

* * *

11. *Non-compete Agreement.* At or before closing Frankel shall deliver to Asarco agreements in form satisfactory to Asarco's solicitors respectively executed by such of the directors and officers of Frankel as may be required by Asarco to the effect that each of them, personally, covenants and agrees that he will not either individually or in partnership or in conjunction with any other person or persons, firm, association, syndicate, company or corporation as principal, agent, shareholder, creditor, or in any other manner whatsoever (except as a director, officer and/or shareholder of Federated or as a holder of listed securities purchased in the normal course of investment) carry on or be engaged in or concerned

1959

FRANKEL CORPN. LTD. v. MINISTER OF NATIONAL REVENUE

Martland J.

in or advise, lend money to, guarantee the debts or obligations of any person or persons, firm, association, syndicate, company or corporation engaged in or interested in, or permit his name to be used or employed in carrying on within Canada—

(a) the business of buying, selling or dealing in non-ferrous metals or non-ferrous metal scrap materials or in the smelting of such materials or the manufacture of brass ingots or other non-ferrous metal alloys—within the period commencing with the date of closing and ending with the completion of the purchase by Asarco of 49% of the capital stock of Federated as provided in paragraph 4 hereof (which period is herein referred to as "the period of joint ownership"),

(b) the business of smelting non-ferrous metal scrap materials or the manufacture of or dealing in brass ingots or other non-ferrous metal alloys—within the period of five years next following the period of joint ownership.

Provided, however, that should Frankel as incidental to its salvage and wrecking business acquire non-ferrous scrap, such acquisition will not be deemed a breach of this paragraph 11 so long as such scrap is offered to Federated at the market value thereof.

12. During the period of joint ownership and for five years thereafter neither Federated nor Frankel shall, directly or indirectly, approach any employee of the other company or of such other company's affiliated companies in any way that might reasonably be deemed to be a suggestion or invitation to such employee to leave his employment, except as specifically provided in paragraph 9 hereof.

13. During the period of joint ownership Asarco, through its Federated Metals Division, will not compete with Federated in the purchase or sale in Canada of scrap metals or products within the scope of Federated's normal activities and products.

14. *Closing.* The sale hereunder shall be closed as at the opening of business on January 2, 1952, with all adjustments made to that date, and the closing shall take place at the office of Messrs. Blake, Anglin, Osler and Cassels, 25 King Street West, Toronto, at 10 o'clock in the forenoon on December 27th, 1951, or at such other time and place as may be agreed upon between the parties hereto.

The contract also included indemnity clauses, provisions for the sale of the 49,000 shares to Asarco within certain times, a provision that, in the meantime, certain members of the Frankel family should be members of the Board of Directors of Federated, a clause respecting the leasing of the premises to Federated, and several clauses respecting the transfer of employees and the protection of the appellant in respect to their pension and insurance rights.

The whole of the appellant's inventory of non-ferrous metals was purchased by Federated pursuant to the contract, with the exception of certain drosses which accounted for some one per cent. of the whole. The aggregate amount

paid by Federated pursuant to paragraph 2(i) above included $822,611.15 in respect of inventory calculated as set out in the above paragraph 1(*b*). The same inventory was being carried at the end of 1951 at a cost of $744,515.47 and it is the liability of the appellant to income tax on the difference between these figures, i.e. $78,095.68, which is in issue in this appeal.

In the profit and loss statement accompanying the appellant's income tax return for 1951, the closing inventory for the metals division was shown at $767,191.01, of which $744,515.47 represented inventory of non-ferrous metals. This statement formed part of the report of the appellant's auditors which was dated May 15, 1952. In the report it was stated that subsequent to the year end the appellant disposed of the non-ferrous metals division of the business to Federated. In the profit and loss statement accompanying the appellant's 1952 income tax return, the opening inventory of the metals division was shown as follows:

Inventory December 31, 1951	$767,191.01
Less sold to Federated Metals Canada Limited	744,515.47
	$ 22.675.54

and only the difference was carried into the computation of gross profit for the year. The sum of $822,611.15 was not included as a receipt. The auditors' report stated that on January 2, 1952, the appellant disposed of the non-ferrous metals division of the business to Federated.

The respondent contends that the amount of $78,095.68 was part of the appellant's taxable income in 1952 on two main grounds:

1. That the sale made by the appellant to Federated, the subsidiary of Asarco, in so far as the inventory of non-ferrous metals is concerned, was a sale of current trading assets of its business and not a part of the sale of the appellant's business and, consequently, the profit on the sale of those assets was a profit from the appellant's business and is taxable.
2. That, if the non-ferrous metals business was a separate business of the appellant, sold by it to Federated, then the inventory of non-ferrous metals must have been removed from the appellant's stock-in-trade

1959

FRANKEL CORPN. LTD. v. MINISTER OF NATIONAL REVENUE

Martland J.

before it was sold and the amount which must be placed in the trading account of the appellant by reason of that removal is not the cost price, but the market value of the goods in question, that is, the amount for which they were sold, which results in a taxable profit to the appellant of $78,095.68.

Dealing with the first point, counsel for the respondent stated that he did not contend that the profit on the sale of a business is taxable, but that he did contend that the facts of this case did not establish that there had been the sale of a business. His argument was that the appellant only operated one business, even though it comprised four operations; i.e., (*a*) a steel operation; (*b*) a wreckage and salvage operation; (*c*) a scrap iron and steel operation; and (*d*) a non-ferrous smelting and refining operation.

His contention was that the appellant's business continued after the sale had been effected because the other three operations continued.

In support of this contention he pointed out that in the appellant's financial statements operations (*c*) and (*d*) above mentioned were dealt with together under a heading "Metals Division" and not separately.

Further, it was urged that the contract between the appellant and Asarco previously mentioned was not a contract for the sale of a business, but one for the sale of assets. In this connection reference was made to the preamble clause in the agreement, which refers to "the disposition by Frankel and the acquisition by Asarco, through its subsidiary hereinafter mentioned, of certain assets of such non-ferrous metals business", and to clause 1, which commences: "Frankel agrees to sell, transfer and convey to Federated the following assets of its non-ferrous metals business, namely: . . ."

It was also noted that clause 1(*b*), dealing with the non-ferrous metals inventory, says that "The purchase price for scrap and other raw materials shall be the market price therefor at the time of closing" and that "The purchase price of ingot and other finished product shall be determined by adding the cost of manufacture to the current market price".

The respondent, therefore, contends that, in so far as the inventory is concerned, the agreement contemplated a sale of current trading assets at the market price, that such sale was a part of the business of the appellant and that the profits of such sale are taxable.

The relevant sections of the *Income Tax Act*, 1948 (Can.), c. 52, are the following:

PART I—Income Tax

Division A—Liability For Tax

2. (1) An income tax shall be paid as hereinafter required upon the taxable income for each taxation year of every person resident in Canada at any time in the year.

. . . .

(3) The taxable income of a taxpayer for a taxation year is his income for the year minus the deductions permitted by Division C.

3. The income of a taxpayer for a taxation year for the purposes of this Part is his income for the year from all sources inside or outside Canada and, without restricting the generality of the foregoing, includes income for the year from all

(*a*) businesses,

. . . .

4. Subject to the other provisions of this Part, income for a taxation year from a business or property is the profit therefrom for the year.

. . . .

PART VI—Interpretation

127. (1) In this Act,

. . . .

(*e*) "business" includes a profession, calling, trade, manufacture or undertaking of any kind whatsoever and includes an adventure or concern in the nature of trade but does not include an office or employment.

Section 85E of the *Act* has no application to this case, as it became effective in respect of sales made after April 5, 1955.

Section 3 clearly contemplates that a taxpayer (which includes a corporation) may carry on more than one business. The question in issue is as to whether or not the profit realized on the sale of the inventory of non-ferrous

1959

FRANKEL CORPN. LTD. v. MINISTER OF NATIONAL REVENUE

Martland J.

metals as part of the assets sold by the agreement of December 19, 1951, was "income from a business" within the meaning of s. 4.

The test to be applied is the often quoted one stated by the Lord Justice Clerk in *Californian Copper Syndicate v. Harris*[1], which was last applied in this Court in *Minerals Ltd. v. Minister of National Revenue*[2]:

> It is quite a well settled principle in dealing with questions of assessment of Income Tax, that where the owner of an ordinary investment chooses to realise it, and obtains a greater price for it than he originally acquired it at, the enhanced price is not profit in the sense of Schedule D of the Income Tax Act of 1842 assessable to Income Tax. But it is equally well established that enhanced values obtained from realisation or conversion of securities may be so assessable, where what is done is not merely a realisation or change of investment, but an act done in what is truly the carrying on, or carrying out, of a business. The simplest case is that of a person or association of persons buying and selling lands or securities speculatively, in order to make gain, dealing in such investments as a business, and thereby seeking to make profits. There are many companies which in their very inception are formed for such a purpose, and in these cases it is not doubtful that, where they make a gain by a realisation, the gain they make is liable to be assessed for Income Tax.
>
> What is the line which separates the two classes of cases may be difficult to define, and each case must be considered according to its facts; the question to be determined being—Is the sum of gain that has been made a mere enhancement of value by realising a security, or is it a gain made in an operation of business in carrying out a scheme for profit-making?

To be taxable the profit must be one from the exercise of trading activity, not the profit from a sale of capital as such. Mere realization of assets does not constitute trading. *Commissioner of Taxes v. British-Australian Wool Realization Association, Ltd.*[3].

In *Doughty v. Commissioner of Taxes*[4], Lord Phillimore, at p. 331, says:

> Income tax being a tax upon income, it is well established that the sale of a whole concern which can be shown to be a sale at a profit as compared with the price given for the business, or at which it stands in the books, does not give rise to a profit taxable to income tax.

He goes on to say:

> It is easy enough to follow out this doctrine where the business is one wholly or largely of production. In a dairy farming business or a sheep rearing business, where the principal objects are the production

[1] (1904), 5 Tax Cas. 159 at pp. 165-6.
[2] [1958] S.C.R. 490 at 495, 14 D.L.R. (2d) 560.
[3] [1931] A.C. 224.
[4] [1927] A.C. 327.

of milk and calves or wool and lambs, though there are also sales from time to time of the parent stock, a clearance or realization sale of all the stock in connection with the sale and winding up of the business gives no indication of the profit (if any) arising from income; and the same might be said of a manufacturing business which was sold with the leaseholds and plant, even if there were added to the sale the piece goods in stock, and even if those piece goods formed a very substantial part of the aggregate sold.

Where, however, a business consists, as in the present case, entirely in buying and selling, it is more difficult to distinguish between an ordinary and a realization sale, the object in either case being to dispose of goods at a higher price than that given for them, and thus to make a profit out of the business. The fact that large blocks of stock are sold does not render the profit obtained anything different in kind from the profit obtained by a series of gradual and smaller sales. This might even be the case if the whole stock was sold out in one sale. Even in the case of a realization sale, if there were an item which could be traced as representing the stock sold, the profit obtained by that sale, though made in conjunction with a sale of the whole concern, might conceivably be treated as taxable income.

It is the proposition stated in the first of these last two paragraphs which appears to me to be applicable in the present case.

It is now necessary to apply these rules in the circumstances of the present case and the question to be determined is one of fact, namely: Was this the sale of a business, as contended by the appellant, or merely the sale of certain current trading assets, as contended by the respondent?

In the Court below this issue was determined in favour of the appellant. The learned trial judge says (and I have used the word "appellant" throughout this passage to indicate the appellant in the present appeal):

Turning now to the facts in the present case, it may be noted that, while the appellant's non-ferrous metals operation was not separate in all respects from its other operations, it was, nevertheless, separate in many of its features, and as a whole it was readily separable from the others. The sources of the material and supplies used in the operation, the employee of the appellant who bought them, the machinery and equipment used in the operation, and the employees who operated it, the portion of the premises where the operation was carried on, the customers who bought the products, and the employees of the appellant who sold them, the name under which the operation was carried on and the trade mark and trade name used on the products, as well as the supervision provided, were all almost entirely distinct from the other operations. Indeed, the whole process by which profit was earned seems to have been quite distinct from the others, save in respect of the acquisition of minor quantities of scrap material from the wrecking and salvage operation, the combination for some purposes of the accounting with that of the ferrous

1959

FRANKEL CORPN. LTD. v. MINISTER OF NATIONAL REVENUE

Martland J.

scrap operation and such general matters as control by the same board of directors, the arrangement of a single union contract for employees of the appellant, employees' pension and insurance plans, and the ultimate preparation of the profit and loss account for the operations of the company.

Next, the contract was, in my opinion, an indivisible one for the sale of the items mentioned in their entirety, rather than for the sale of the separate items by themselves. While the contract contained formulae for ascertaining the amount by which the aggregate sum to be paid by the purchaser would be increased according to the amount of inventory transferred to the purchaser in the transaction; and while the formula was, in the case of raw material, based on the prevailing price and, in the case of finished goods, on the lower of the cost of materials at prevailing rates plus the cost of manufacture, or market price, there was but one transaction in which, for the aggregate sums to be paid, the purchaser was to acquire not only the stock, equipment, good-will, business and other assets, but a right, as well, to a four-year term in the premises in addition to the benefit of the other covenants. Under this contract neither party could have held the other to any part of it while refusing on its part to carry out the whole and, despite the formulae above mentioned, I think it is impossible to say that the contract or the transaction shows that the sum calculated according to the formulae as forming part of the aggregate sum paid was paid or received for the inventory. The truth is that the whole consideration was paid and received for the assets and rights granted as a whole, and no part of the consideration was paid or received for inventory alone or for equipment alone or for any other single asset or right by itself. Now the assets sold included substantially the whole of the inventory of processed and unprocessed non-ferrous metals and partly processed metals as well. It also included the supplies provided for the processing of non-ferrous metals. Neither partly processed metals nor supplies had previously been sold in the course of the appellant's business. In the same transaction, substantially all of the tangible and intangible assets of the non-ferrous metals operation were also sold, including good-will, trade name and trade mark and—what is perhaps more significant—the unfilled customers' orders under terms which contemplated that they would be filled by the purchaser in the course of its own trading, and not on behalf of the appellant. The same contract provided for the transfer to the purchaser of the employees engaged in the operation and for the granting to the purchaser of a lease of the premises used in the operation. Finally, by or in conjunction with this transaction, the appellant put itself out of the non-ferrous metals trade. While none of these features would in itself be conclusive, in my opinion, taken together they distinguish this transaction from those of the appellant's business and classify this sale as one not in the business but outside and beyond the scope or course of that business. It follows, in my opinion, that no part of the receipts from this sale was a receipt from the appellant's business.

I agree with these conclusions. In my opinion the evidence establishes: (1) that the appellant ceased its trading in non-ferrous metals by December 31, 1951; and (2) that the sale of the inventory of non-ferrous metals as a part of the assets sold by the agreement of December 19, 1951,

by the appellant to Federated was not a sale in the business of the appellant, but was made as a part of a sale of a business of the appellant, and consequently the proceeds of that sale were not income from a business within the meaning of s. 4 of the *Income Tax Act*.

The second argument submitted by the respondent, which was successful in the Court below, was that, even if the sale of the inventory of non-ferrous metals was a part of the sale of a business, nevertheless, to effect such sale, such inventory was removed or "diverted" from the appellant's stock-in-trade before it was sold and such removal or diversion required that there be placed in the appellant's trading account the market value of the goods so sold, thus giving rise to a trading receipt equal to the amount realized upon such sale.

This submission is based solely on the authority of *Sharkey v. Wernher*[1].

The facts of that case were as follows: The taxpayer, Sir Harold Wernher, was assessed to income tax in respect of profits of his wife, Lady Zia Wernher, arising from her stud farm. In the year ending December 31, 1948, Lady Wernher transferred five horses from her stud farm to her racing stables, which she carried on as a recreation and not as a trade. The cost of breeding the horses had been debited in the stud farm accounts, and it was common ground that, for income tax purposes consequent on the transfer of the horses, some figure had to be brought into the stud farm accounts as a receipt. The market value of the horses was considerably in excess of their cost. The taxpayer contended that the figure proper to be brought into the accounts was the cost of breeding and not, as contended by the Crown, the market value of the horses.

The problem involved in that case is stated by Viscount Simonds, at p. 495, as follows:

> The problem, therefore, in all its simplicity is whether a person carrying on the trade of farming or, I suppose, any other trade, who disposes of part of his stock-in-trade not by way of sale in the course of trade but for his own use, enjoyment, or recreation, must bring into his trading account for income tax purposes the market value of that stock-in-trade at the time of such disposition.

[1] [1955] 3 All E.R. 493.

1959

FRANKEL CORPN. LTD. v. MINISTER OF NATIONAL REVENUE

Martland J.

The decision was that the horses must be treated as having been disposed of by way of trade and the sum which should be regarded as having been received on the disposal of the horses must be a sum equivalent to their market value.

With great respect, I do not see how the decision in that case has any application to the circumstances of the present one. In the *Sharkey* case nothing had, in fact, been received by the stud farm in respect of the five horses. The judgment was that for income tax purposes the stud farm should be regarded as having received, on the disposal of the horses, a sum equivalent to their market value. Had such sum, in fact, been received by the stud farm, it was obviously income derived from the business of the stud farm.

In the present case the goods in question were actually sold and the appellant received the consideration for them as a part of the consideration for the whole agreement between the appellant and Asarco. The issue here is not as to what amount should be deemed to be received by the appellant for those goods, but whether the actual amount received was income from the appellant's business, an issue which did not arise at all in the *Sharkey* case.

In my view the *Sharkey* case is not authority for the legal proposition for which it has been advanced by the respondent and no other authority has been cited to support that submission. The contention of the respondent on this point also fails.

In my opinion, therefore, the appeal should succeed and the appellant should be entitled to its costs both here and in the Exchequer Court.

Appeal allowed with costs.

Solicitors for the appellant: Blake, Cassels & Graydon, Toronto.

Solicitor for the respondent: A. A. McGrory, Ottawa.

GENERAL CONSTRUCTION COMPANY LIMITED ..... APPELLANT;

1959
May 12
*Jun. 25

AND

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income tax—Sale of interest to co-venturer when venture substantially completed—Whether taxable income or capital receipt—The Income Tax Act, 1948 (Can.), c. 52, ss. 3, 4.

The appellant company entered into an agreement in December, 1949, described as a "joint venture agreement", by which it advanced a percentage of the working capital required by a contractor to perform a pipe line construction contract. At the completion of the work, the funds advanced were to be refunded plus 15 per cent. of the profits. When the work was practically completed, the appellant sold its interest to the contractor and was paid the sum it had advanced plus $90,000. The Minister treated the $90,000 as income. The assessment was affirmed by the Income Tax Appeal Board and by the Exchequer Court of Canada.

Held: The $90,000 represented taxable income in the hands of the appellant. It was "a gain made in an operation of business in carrying out a scheme for profit-making". *Ducker v. Rees Roturbo Development Syndicate,* [1928] A.C. 132, applied.

It was clear that the appellant made a business of entering into joint ventures with a view to profit. It entered the joint venture agreement in question with the intention of investing moneys in the joint venture and of recouping the same, plus a profit, at the conclusion of the venture.

The agreement by which the appellant disposed of its interest in the joint venture was not made with the intention of disposing of a capital asset in a going concern. It was made with the intention of providing for a return of the appellant's invested capital plus a sum representing an estimate of the profit to which the appellant would become entitled upon the winding up of the joint venture.

APPEAL from a judgment of Dumoulin J. of the Exchequer Court of Canada[1], affirming a decision of the Income Tax Appeal Board. Appeal dismissed.

W. Murphy, Q.C., for the appellant.

W. R. Jackett, Q.C., F. J. Cross and *G. W. Ainslie,* for the respondent.

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

[1] [1958] Ex. C.R. 222, C.T.C. 148, 58 D.T.C. 1089.

1959

GEN. CONSTRUCTION CO. LTD. v. MINISTER OF NATIONAL REVENUE

The judgment of the Court was delivered by

MARTLAND J.:—The appellant was incorporated in the year 1923 and has carried on the business of constructing buildings, roads and dams and generally projects involving earth moving. In the course of its business it has entered into joint ventures with other contractors, sometimes as the sponsor of the venture and sometimes as a contributor of funds. In the period between 1949 and 1953 it was a party to some sixteen of such ventures. It had entered into similar ventures prior to 1949.

On November 12, 1949, an agreement was made by Interprovincial Pipe Line Company with Canadian Bechtel Limited, Bechtel International Corporation and Fred Mannix & Company Limited (hereinafter referred to as "Mannix") with respect to the construction for Interprovincial Pipe Line Company by the other three parties of a section of an oil pipe line comprising approximately 441 miles of twenty-inch pipe in the Provinces of Alberta and Saskatchewan.

On November 23, 1949, Canadian Bechtel Limited, Bechtel International Corporation and Mannix made an agreement, described as a "joint venture agreement", whereby it was agreed that the relative participation of the three companies in the construction agreement would be Canadian Bechtel Limited 40 per cent, Mannix 40 per cent, and Bechtel International Corporation 20 per cent. The initial working capital of the venture was to be $50,000 contributed by the parties in those proportions and further capital was to be provided, as and when needed, in the same proportions. Canadian Bechtel Limited was designated as sponsor of the joint venture and authorized to act for and bind the members in all matters relating to the joint venture and its affairs.

It was agreed that, upon receipt of final payment for the contract work, the assets and liabilities of the joint venture would be liquidated, the capital contributions of the joint venturers returned and the profits distributed to the joint venturers in the same proportions.

On December 19, 1949, Mannix entered into an agreement, also described as a "joint venture agreement", with Standard Gravel & Surfacing Co. Ltd. (hereinafter referred

to as "Standard") and the appellant, which referred to the fact that Mannix had entered into the joint venture agreement above mentioned dated November 23, 1949, as well as an operating agreement of the same date (together referred to as the "prime agreements") and that Mannix had a 40 per cent undivided interest in these prime agreements. It then went on to recite:

AND WHEREAS for the better procurement of the monies required for the performance of the said work the parties hereto have agreed to enter into this joint venture agreement.

This agreement contained, among others, the following provisions:

II

As between themselves and to the extent of the following percentages, respectively to wit:

FRED MANNIX & COMPANY LIMITED ..... 70 percent
STANDARD GRAVEL & SURFACING COMPANY LIMITED ..... 15 percent
GENERAL CONSTRUCTION COMPANY LIMITED ..... 15 percent

the joint venturers shall have and own an undivided interest in the Mannix interest, and in each and every asset thereof, including the profits which may be realized by the Mannix interest by virtue of the prime agreements; and likewise and to the same percentages, the said joint venturers shall assume and bear all of the obligations and liabilities arising from or out of the Mannix interest under the prime agreements, including losses, if any, which may be sustained by the Mannix interest under the prime agreements.

III

THE initial working capital of the joint venture shall be contributed in cash by the joint venturers upon the execution of this joint venture agreement, in the percentages set opposite their respective names in paragraph II above. It is agreed that additional working capital of the joint venture, as and when needed, shall be contributed by the joint venturers in the same percentages as set forth above.

* * *

VI

ADEQUATE books of account of the joint venture and its operations shall be kept by it and may be examined by any of the joint venturers at any time. Reports of the financial condition of the joint venture and the progress of the work shall be made to each joint venturer periodically or upon demand.

VII

UPON receipt of final payment for the contract work, the assets and liabilities of the joint venture shall be liquidated and the capital contributions of the joint venturers shall be returned and profits of the joint

1959

GEN. CONSTRUCTION CO. LTD. v. MINISTER OF NATIONAL REVENUE

Martland J.

venture shall be distributed to the joint venturers in proportion to their interests in the joint venture as specified in paragraph II hereinabove. By mutual agreement distribution of a portion of the profits of the joint venture may be made before receipt of final payment for the contract work.

VIII

IT is specifically understood and agreed by the parties hereto that this joint venture agreement extends only to the Mannix interest in the prime agreements. In no event shall this agreement extend to or cover any other or different work, and upon a final accounting and settlement of the parties hereto this agreement shall terminate.

IX

NONE of the parties hereto shall sell, assign or in any manner transfer its interest or any part thereof in this joint venture without first obtaining the written consent of the other parties hereto.

* * *

XI

FRED MANNIX & COMPANY LIMITED is hereby designated as the sponsor of this joint venture and, as such, is hereby authorized and empowered to act for and bind this joint venture and the members thereof in all matters relating to this joint venture and its affairs.

XII

THE joint venture shall purchase the equipment set out in Schedule "A" attached hereto at the then present day price and such other equipment as may be mutually agreed upon between the parties hereto from time to time. Such equipment shall be rented to BECHTEL-MANNIX under the terms of the prime agreements.

XIII

IT is understood and agreed that on the completion of the work contemplated under the prime agreements certain equipment will be acquired under the terms thereof. The choice of such equipment shall be made on consultation between the parties hereto; the final decision, however, remaining with the sponsor of the joint venture.

XIV

ON the conclusion of the operations of the joint venture the equipment acquired under paragraphs XII and XIII hereof and any other equipment the property of the joint venture, shall be disposed of in the following manner.

Each of the joint venturers shall have the right or option to acquire from the joint venture, at prices ascertained as hereinafter provided such portion thereof the option prices of which bear the same percentage to the aggregate prices thereof as their respective interests in the joint venture bear to the whole thereof. If the joint venturers cannot mutually agree as to the specific item or items to be acquired by each joint venturer,

determination shall be made by drawing lots as to each classification of items, or, if none of them desires to exercise its option, the joint venture may sell such item or items to third parties for the best price obtainable.

* * *

XVI

NOTHING in this agreement contained shall be read or construed as limiting FRED MANNIX & COMPANY LIMITED from fully performing all the terms and conditions of the prime agreement and making any and all decisions necessary to the performance of the work contemplated thereunder and such decisions shall be binding on the parties hereto.

The effect of the two joint venture agreements, so far as the appellant is concerned, was that Mannix had a 40 percent interest in the prime agreements of which Canadian Bechtel Limited was sponsor and that to assist in financing Mannix's share in those agreements the appellant would contribute 15 per cent of the working capital to be provided by Mannix and was to receive 15 per cent of Mannix's 40 per cent interest in the prime agreements.

The construction of the Interprovincial pipe line proceeded in the year 1950 and, by September of that year, the portion to be constructed by Canadian Bechtel Limited, Mannix and Bechtel International Corporation had been substantially completed. Early in that month Mannix advised the appellant that it would not be long before the work would be completed and that a decision would have to be made as to the disposal of the machinery and equipment which had been rented by Mannix to the Bechtel-Mannix joint venture. As a result, officials of Mannix, Standard and the appellant met in Calgary about the 25th or 26th of September, 1950. It was then suggested that, as the appellant was not engaged in and did not intend to enter the pipe line business, whereas Mannix was active in that business, Mannix would be the logical party to acquire the machinery and equipment.

Following discussions as to the amount to be paid, it was finally agreed that Mannix would acquire the interest of the appellant in the joint venture agreement of December 19, 1949, thereby taking over the appellant's interest in the machinery and equipment, and that Mannix would pay to the appellant the appellant's total capital contributions to the joint venture, less those sums which it had

1959

GEN. CONSTRUCTION CO. LTD. v. MINISTER OF NATIONAL REVENUE

Martland J.

already received back, plus an additional sum of $90,000. This agreement was reduced to writing on September 27, 1950, and provided as follows:

WHEREAS the parties hereto entered into a joint venture agreement dated the 19th day of December, A.D. 1949, relative to the construction of approximately 441 miles of pipe line in the Provinces of Alberta and Saskatchewan;

AND WHEREAS General is desirous of assigning to Mannix all its right, title and interest in the said joint venture agreement;

NOW THEREFORE THIS INDENTURE WITNESSETH:

1. MANNIX agrees that it will assume all liabilities of the joint venture and shall pay and discharge same, and General hereby assigns to Mannix absolutely all its interest in and to the joint venture and in consideration thereof Mannix shall pay to General all monies advanced by General to the joint venture less all monies paid by the joint venture to General, plus the sum of Ninety-Thousands ($90,000.00) Dollars;

2. IN CONSIDERATION of the premises Mannix and General do hereby release the other, their and each of their heirs, executors, administrators and assigns, and their and each of their estates and effects, from all sums of money, debts, duties, contracts, agreements, covenants, bonds, actions, proceedings, claims and demands whatsoever, which Mannix or General now hath or have against the other, for or by reason or in respect of the said joint venture agreement dated the 19th day of December, A.D. 1949, save and except the provisions of paragraph one (1) hereof.

The appellant had contributed $117,021.93 to the joint venture and had been repaid $68,772.19. This left a balance of $48,249.74, which amount, plus $90,000 was paid by Mannix to the appellant on November 3, 1950.

The question in issue in this appeal is as to whether or not the sum of $90,000 represents taxable income in the hands of the appellant, or whether it was a capital payment. Both the Income Tax Appeal Board and the Exchequer Court[1] have decided that it was taxable income.

Counsel for the appellant submits that the joint venture agreement of December 19, 1949, was a partnership agreement; that the agreement of September 27, 1950, between the appellant and Mannix was a sale by the appellant to Mannix of the appellant's interest in the partnership and that such a sale of a partnership interest is the sale of a capital item.

He cited a number of cases dealing with the sale of partnership interests in which it had been held that the proceeds of the sales were to be considered as capital and

[1] [1958] Ex. C.R. 222, [1958] C.T.C. 148, 58 D.T.C. 1089.

not as income. Some of these are cases in which a partnership has sold all its assets to a company incorporated to take over and to carry on the existing partnership business. Other decisions cited deal with cases in which a partner has disposed of his interest in a continuing business to others. However, in none of them were the circumstances similar to those in the present case.

I think the test which is to be applied to the facts of the present case is that which was stated by Lord Buckmaster, who delivered the judgment of the Court in *Ducker v. Rees Roturbo Development Syndicate*[1]:

> My Lords, I think it is undesirable in these cases to attempt to repeat in different words a rule or principle which has already been found applicable and has received judicial approval, and I find that in the case of the *Californian Copper Syndicate v. Harris,* 5 Tax Cas. 159, it is declared that in considering a matter similar to the present the test to be applied is whether the amount in dispute was "a gain made in an operation of business in carrying out a scheme for profit-making." That principle was approved in a judgment of the Privy Council in the case of *Commissioner of Taxes v. Melbourne Trust,* 1914 A.C. 1001, and it is, I think, the right principle to apply.

In this case it is clear that the appellant made a business of entering into joint ventures with a view to profit. It did so both before and after the making of the agreement of December 19, 1949. The appellant entered the agreement in question with the intention of investing moneys in the joint venture and of recouping the same, plus a profit, at the conclusion of the venture.

The joint venture in question here was practically completed and the time had arrived to consider the distribution to be made, on its completion, of the machinery and equipment which had been acquired for use in the performance by Mannix of its portion of the prime agreements. The agreement of September 27, 1950, was made for that purpose. It was not the intention of the appellant to sell, or of Mannix to buy, an interest in a going concern. Mannix did not intend to make a capital investment to acquire a capital asset, but did intend to make a payment in furtherance of the ultimate winding up of the joint venture. It was intended that an arrangement be effected whereby Mannix

[1] [1928] A.C. 132 at 140.

1959

GEN. CONSTRUCTION CO. LTD. v. MINISTER OF NATIONAL REVENUE

Martland J.

could acquire the machinery and equipment which otherwise the appellant would have acquired on the distribution to be effected on the completion of the joint venture.

That agreement spells out what represents a return of invested capital and what represents the appellant's profit in the enterprise. This is not the case of a total consideration being paid to acquire a partnership interest in a going concern. It provides specifically for a repayment of the balance of the appellant's capital interest, plus a further sum of $90,000, which, in my view, represented an estimate of the profit to which the appellant would become entitled upon the winding up of the joint venture.

It seems to me that in these circumstances the $90,000 is clearly "a gain made in an operation of business in carrying out a scheme for profit-making", under the test above mentioned, and that it represents taxable income in the hands of the appellant.

In my opinion the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: Campney, Owen, Murphy & Owen, Vancouver.

Solicitors for the respondent: J. A. MacDonald and F. J. Cross, Ottawa.

1959

Feb. 5

*Jun. 25

HER MAJESTY THE QUEEN (*Defendant*) ..... APPELLANT;

AND

LINCOLN MINING SYNDICATE LIMITED (*Plaintiff*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Companies—Company removed from register—Escheat of land—Company dissolved within The Escheats Act, R.S.B.C. 1948, c. 112—Company restored to register under The Companies Act, R.S.B.C. 1948, c. 58—Whether company entitled to claim land under The Quieting Titles Act, R.S.C.B. 1948, c. 282—Application of maxim generalia specialibus non derogant.

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

In 1944, the plaintiff company, incorporated under the laws of British Columbia, and which held title in fee simple to certain lands, was struck off the register of companies under what is now s. 208 of *The Companies Act,* R.S.B.C. 1948, c. 58, having failed to file annual returns. Some 12 years later, the company was restored to the register, application having been made under ss. 209 and 210 of the Act which allow such application if made within 20 years. Subsequently, the company sought a declaration as against the Crown that it was entitled in fee simple to the lands in question under *The Quieting Titles Act,* R.S.B.C. 1948, c. 282. The Crown opposed the application on the ground that the lands had escheated to it by virtue of s. 5 of *The Escheats Act,* R.S.B.C. 1948, c. 112, which provides that when a company is dissolved, its lands etc. are deemed to escheat to the Crown. The application was dismissed by the trial judge, but this judgment was reversed by the Court of Appeal.

Held (Cartwright and Martland JJ. dissenting): The company's application should be dismissed.

Per Kerwin C.J. and Taschereau and Judson JJ.: The provisions of *The Companies Act* are general in their nature and must give way to the particular enactments of *The Escheats Act.* Once the year provided for in that Act, following the dissolution, has expired the escheat was absolute.

Per Cartwright and Martland JJ., *dissenting*: A company dissolved, as was the plaintiff, as the result of being struck off the register under s. 208 of *The Companies Act* and thereafter, within 20 years, restored to the register pursuant to s. 209(1), does not at any time between those two events cease to exist or cease to be the owner of the property vested in it at the moment of the dissolution. The matter was not affected by s. 5 of *The Escheats Act,* because that section contemplates cases where a company is "dead for all purposes".

Even if the words "dissolved" and "dissolution" in s. 5 are wide enough to include dissolution in any manner, such as the one in this case, s. 209 should prevail as special legislation against s. 5 which is general legislation.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], reversing a judgment of Ruttan J.

Appeal allowed, Cartwright and Martland JJ. dissenting.

W. G. Burke-Robertson, Q.C., for the defendant, appellant.

C. C. Locke, for the plaintiff, respondent.

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

THE CHIEF JUSTICE:—This is an appeal by Her Majesty the Queen in the right of the Province of British Columbia against the judgment of the Court of Appeal of that province[1] which, by a majority, allowed an appeal from the

[1](1958), 14 D.L.R. (2d) 659, 26 W.W.R. 145.

1959

THE QUEEN v. LINCOLN MINING SYNDICATE LTD.

Kerwin C.J.

decision of Ruttan J. The latter had dismissed the petition of Lincoln Mining Syndicate Limited (Non Personal Liability) under *The Quieting Titles Act*, R.S.B.C. 1948, c. 252, seeking a declaration that it was entitled in fee simple to certain lands and premises.

The syndicate was incorporated October 23, 1920, under the laws of British Columbia as a public company and shortly thereafter title in fee simple to those lands including surface and mineral rights was granted to it out of the New Westminster Registry Office. Under *The Companies Acts* in force the syndicate filed annual returns down to and including 1939 but, having failed to file returns for 1940 and 1941, it was struck off the register on November 16, 1944, pursuant to s. 205 of *The Companies Act*, R.S.B.C. 1936, c. 42, as amended in 1943. This is now s. 208 of R.S.B.C. 1948, c. 58, the relevant parts of which read:

> 208. (1) Where a company or extra-provincial company has failed to file with the Registrar for two years the annual report or any other return, notice, or document required by this Act to be so filed by it, or the Registrar has reasonable cause to believe that a company or extra-provincial company is not carrying on business or is not in operation, he shall mail to the company a registered letter notifying it of its default or inquiring whether the company is carrying on business or is in operation, as the case may be. For the purposes of this section a company shall be deemed to be in default with respect to its annual report if it has not filed an annual report within two years from the date of its incorporation, or, after the first report has been filed has not filed an annual report for two years from the date of the last report filed: Provided that there shall be added to the period of two years any extension of time granted under section 164 and a company that under that section has filed a statutory declaration and been granted relief by the Registrar shall be deemed to have filed an annual report.
>
> (2) If within one month of mailing the letter no reply thereto is received by the Registrar, or the company fails to fulfil the lawful requirements of the Registrar, or notifies the Registrar that it is not carrying on business or in operation, he may, at the expiration of a further fourteen days, publish in the Gazette a notice that at the expiration of two months from the date of that notice the company mentioned therein will, unless cause is shown to the contrary, be struck off the register, and the company will be dissolved, or in the case of an extra-provincial company, will be deemed to be a company not registered under Part VII.
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> * * *
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> (4) At the expiration of the period of two months mentioned in subsection (2), the Registrar may, unless cause to the contrary is previously shown, strike the company off the register, and shall publish notice thereof in the Gazette, and on the publication of the notice in the Gazette the

company shall be dissolved, or, in the case of an extra-provincial company, shall be deemed to be a company not registered under Part VII: Provided that the liability (if any) of every director, manager, officer, and member of the company shall continue and may be enforced as if the company had not been struck off the register.

Sections 5 and 6 of *The Escheats Act*, R.S.B.C. 1948, c. 112, read:

5. (1) Where a corporation is dissolved, the lands, tenements, and hereditaments situate in this Province of which the corporation was seised, or to which it was entitled at the time of its dissolution, shall for all purposes be deemed to escheat to the Crown in right of the Province; and the law of escheat and the provisions of this Act shall apply in respect of those lands, tenements, and hereditaments in the same manner as if a natural person had been last seised thereof or entitled thereto and had died intestate and without lawful heirs.

(2) The Lieutenant-Governor in Council shall not, within a period of one year from the date of the dissolution of a corporation, make any grant or other disposition of any lands, tenements, or hereditaments of the corporation which escheat to the Crown.

(3) Where a corporation is, within a period of one year from the date of its dissolution, revived pursuant to any Act by order of any Court, the order shall have effect as if the lands, tenements, and hereditaments of the corporation had not escheated to the Crown, and, subject to the terms of the order, such lands, tenements, and hereditaments shall ipso facto vest in the corporation.

(4) The provisions of this section shall apply in respect of real estate of a corporation consisting of any estate or interest, whether legal or equitable, in any incorporeal hereditament, or of any equitable estate or interest in any corporeal hereditament, in the same manner as if that estate or interest were a legal estate in corporeal hereditaments.

6. The Lieutenant-Governor in Council may make any grant of lands, tenements, or hereditaments, which have so escheated or become forfeited, or of any portion thereof, or of any interest therein, to any person, for the purpose of transferring or restoring the same to any person or persons having a legal or moral claim upon the person to whom the same had belonged, or of carrying into effect any disposition thereof which such person may have contemplated, or of rewarding any person making discovery of the escheat or forfeiture, as to the Lieutenant-Governor in Council may seem meet.

In August of 1955 William F. McMichael petitioned the Lieutenant-Governor in Council pursuant to s. 6 to grant him the property here in question on the ground that it had escheated to the Crown and that he had a moral claim to it since he had paid the annual taxes thereon from 1939 to 1955 inclusive. In Order-in-Council no. 955, dated April 24, 1956, it was recited that the surface and mineral rights in the property had escheated to the Crown on November 16, 1945 and the Lieutenant-Governor in Council

1959

THE QUEEN v. LINCOLN MINING SYNDICATE LTD.

Kerwin C.J.

granted McMichael's petition but only so far as the mineral rights were concerned. The date November 16, 1945, was presumably inserted in view of the "one year from the date of the dissolution of a corporation" in subs. (2) of s. 5. McMichael has since renounced his claim to the mineral rights.

Less than a month later, on May 18, 1956, not the syndicate but McMichael, as a member thereof and who alleged he had been aggrieved by it having been struck off the register, applied to the Supreme Court of British Columbia for its restoration to the register under the provisions of ss. 209 and 210 of *The Companies Act*, R.S.B.C. 1948, c. 58, as amended. Paragraph 15 of the application states:

> 15. The Lieutenant-Governor in Council of the Province of British Columbia has alleged that the surface and mineral rights of the said Lots 186, 187 and 188 on November 16, 1945, escheated to Her Majesty the Queen in Right of the Province of British Columbia.

The application came on for hearing on June 4, 1956, but was adjourned to June 11 to permit service of notice of the application and the petition upon the Attorney-General of the Province. Service was effected but no doubt in view of the paragraph of the application set out above the Deputy Attorney-General wrote the solicitors for the applicant that he did not propose to oppose the application. The relevant parts of ss. 209 and 210, as amended, read as follows:

> 209. (1) Where a company or an extra-provincial company or any member or creditor thereof or any person to whom the company is under any legal obligation is aggrieved by the company having been struck off the register, pursuant to this Act or any former "Companies Act", the Court, on the application of the company or member or creditor, or any person to whom the company is under any legal obligation, may, subject to section 210 and if satisfied that the company was at the time of the striking-off carrying on business or in operation or otherwise that it is just that the company be restored to the register, order the company to be restored to the register, and thereupon the company shall be deemed to have continued in existence, or, in the case of an extra-provincial company, to be a company registered under Part VII, as if it had not been struck off: Provided that the Court shall not make an order:—
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> * * *
>
> (*d*) In the case of a company other than an extra-provincial company having been struck off the register for a period of twenty years or more.

(3) A company may for the purposes of its restoration to the register hold such meetings and take such proceedings as may be necessary as if the company had not been dissolved, or in the case of an extra-provincial company as if the company were registered under Part VII.

210. (2) The Court may by an order restoring a company to the register give such directions and make such provisions as seem just for placing the company and all other persons in the same position as nearly as may be as if the company had not been struck off, but, unless the Court otherwise orders, the order shall be made without prejudice to the rights of parties acquired prior to the date on which the company is restored by the Registrar.

I agree with Ruttan J. and Coady J. A. that the provisions of *The Companies Act* are general in their nature and must give way to the particular enactments of *The Escheats Act*. Section 5 of the latter relates to escheats of lands, tenements and hereditaments where they have been owned by a corporation which is dissolved. Special provision is made by subs. (3) where, within a period of one year from the date of its dissolution, a corporation is revived pursuant to any Act by order of any Court, that the order shall have effect as if the lands, tenements and hereditaments had not escheated to the Crown. Once the year has expired the escheat is absolute. These are special enactments referring only to escheats and the general provisions of *The Companies Act* above referred to cannot apply. As Coady J. A. points out, if s. 209 of *The Companies Act* applies, then in the event of a company being restored within one year subs. (3) of s. 5 of *The Escheats Act* is unnecessary because there would have been no need to provide by subs. (1) for an escheat which, by virtue of s. 209 of *The Companies Act,* had never occurred and for a re-vesting under subs. (3) of s. 5. I also agree with Coady J. A. that all the detailed provisions of ss. 8, 12, 13 and 15 of *The Escheats Act* were unnecessary if the argument on behalf of the respondent were to prevail.

I have not referred to the argument that *The Escheats Act* came into force later than *The Companies Act*. As pointed out by Lord Blackburn in *Garnett v. Bradley*[1], anybody who wishes to find an argument on either side about the repeal of a statute for inconsistency with a subsequent statute will find in two places in Plowden's Commentaries

[1] (1878), 3 App. Cas. 944 at 966.

1959

THE QUEEN v. LINCOLN MINING SYNDICATE LTD.

Kerwin C.J.

"many good and ingenious arguments, and he can pick out the arguments which make for the side he particularly wants to support". In the present instance the matter resolves itself into a consideration of the aims and objects of the sections referred to in *The Companies Act* and in *The Escheats Act* and in giving to them that construction which will best carry out the intention of the Legislature. It is perhaps needless to add that in *The Attorney General of the Province of British Columbia v. The Royal Bank of Canada and Island Amusement Company Limited*[1], this Court was concerned only with *The Companies Act* with respect to *bona vacantia* and that therefore that decision has no bearing on the matter here under discussion.

The appeal should be allowed without costs, the judgment of the Court of Appeal set aside and that of Ruttan J. restored.

TASCHEREAU J.:—On November 16, 1944, the Registrar for the Province of British Columbia struck the Lincoln Mining Syndicate off the Company's Register, pursuant to *The Companies Act,* for failure to file returns as required by the Act. At that time, the company was the registered owner in fee simple of lands described in a certificate of title issued by the department.

Under *The Companies Act,* when a company is struck off the register, it is *dissolved* (s. 208). Section 5 of *The Escheats Act,* R.S.B.C. 1948, c. 112, provides that when a company is dissolved, the lands, tenements and hereditaments of which the company is seized at the time of the dissolution, are deemed to escheat to the Crown in right of the Province, and the law of escheat, and all its provisions apply in respect of those lands, tenements and hereditaments.

On August 4, 1955, one William McMichael petitioned the Lieutenant-Governor in Council, pursuant to *The Escheats Act,* to grant him lots 186, 187 and 188, on the ground that the aforesaid lots had escheated to the Crown, and that he had a *moral claim* to the said lands, alleging that he, on behalf of the company, had paid taxes on the said lands for the years 1939 to 1955 inclusive, and by an

[1] [1937] S.C.R. 459, 3 D.L.R. 393.

Order in Council bearing date of April 24, 1956, Lieutenant-Governor granted to McMichael the mineral rights to the said three lots. On June 21, 1956, the company was restored to the register pursuant to the procedure outlined in ss. 209 and 210 of *The Companies Act* and amendments thereto.

In May, 1957, the Lincoln Mining Syndicate filed a petition under *The Quieting Titles Act* to obtain a declaration of title to the lands "which shall be conclusive as against all parties, including Her Majesty, and prayed that it be entitled to the lands in fee simple". This petition was dismissed by Ruttan J. but allowed by a majority judgment of the Supreme Court, Appeal Division[1].

I have come to the conclusion that this appeal should be allowed and the judgment of Ruttan J. restored. This case, I believe, must be governed by *The Escheats Act* which is a special enactment posterior to *The Companies Act*. It is true that the company was restored within twenty years, which is the limit provided in *The Companies Act,* and that s. 209 says that if restored, the company will be "deemed to have continued in existence as if it had not been struck off". But, on the other hand, under *The Escheats Act,* the company had to be revived within one year, and as this has not been done, there has been no reinvesting as provided for in s. 5, and the escheat became absolute. Eleven years elapsed between the date of the dissolution of the company and the date of its revival.

I therefore agree with the reasoning of the Chief Justice, and I would allow the appeal without costs and restore the judgment of Ruttan J.

The judgment of Cartwright and Martland JJ. was delivered by

CARTWRIGHT J. (*dissenting*):—The issues, the facts and the relevant statutory provisions are set out in the reasons of the Chief Justice and do not require repetition.

It will be convenient to examine first the effect of the order of McInnes J. made on June 11, 1956, restoring the respondent to the register, having regard to the terms of s. 208 (formerly s. 205) and s. 209 of *The Companies Act,*

1959

THE QUEEN v. LINCOLN MINING SYNDICATE LTD.

Cartwright J.

R.S.B.C. 1948, c. 58, and then to consider to what extent the matter is affected by the provisions of *The Escheats Act*, R.S.B.C. 1948, c. 112.

The case of *Attorney-General of British Columbia v. The Royal Bank of Canada et al*[1], dealt with the right of the Crown to claim as *bona vacantia* moneys of a dissolved company and not with the question of the escheat of lands but the judgments delivered in the Court of Appeal for British Columbia and in this Court contain statements as to the meaning and effect of s. 167 of *The Companies Act*, R.S.B.C. 1924, c. 38, and s. 199 of *The Companies Act*, 1929 (B.C.), c. 11, which are the predecessors of, and correspond in all material respects to, s. 208 and s. 209 of the present Act, which appear to me to be of assistance in the solution of the problem raised on this appeal.

In that case The Island Amusement Company Ltd. was struck off the register on October 25, 1928, under s. 167. On April 5, 1935, it was restored to the register by an order of Robertson J. which provided in part:

> It is ordered that the name of the above named Island Amusement Company Limited be restored to the register of companies for a period of one year from the date of its restoration to said register for the purpose of enabling the company to be wound up voluntarily, and that pursuant to the Companies Act the company shall be deemed to have continued in existence as if its name had never been struck off, without prejudice however to the rights of any rights which may have been acquired prior to the date on which the company is restored to the register.

Between the dates mentioned the Crown had asserted a claim to a sum of money standing to the credit of the company's account in The Royal Bank of Canada as *bona vacantia*. The action brought by the Attorney-General seeking to enforce this claim was dismissed by Robertson J. and his judgment was affirmed by the Court of Appeal for British Columbia and by this Court.

The judgment of the majority in the Court of Appeal was delivered by M. A. Macdonald J. A. It appears from his reasons at p. 261 that it had been conceded, or was assumed for the purposes of his judgment, that the result of the company being struck off the register was to give title to the Crown, "for the time being at all events" and

[1] (1937), 51 B.C.R. 241, 1 D.L.R. 637; affirmed [1937] S.C.R. 459, 3 D.L.R. 393.

the learned justice stated the question to be,—"by the terms of the statute, expressly or by implication did the money revert to the company on revival pursuant to the order?" He went on to hold that this question should be answered in the affirmative. At p. 263, he says:

It follows that the Crown's right depends upon the interpretation of the relevant sections of the Act. We turn therefore to the meaning of the words in section 199 providing that after the company is restored to the register it shall be "deemed to have continued in existence as if it has not been struck off." If it had not been struck off it would have continued in existence with all its assets and the intention was to enable it to resume its former status. If that is not obvious, for further light we may look at the whole Act to ascertain its general purport and if it is reasonably possible by interpretation to advance the object in view we should do so. Clearly the Legislature did not intend to stultify itself by providing for the restoration of a company to the register if, deprived of all its property, it would be quite useless to do so. I think, for the reasons given by the trial judge, the intention is clear. It was not intended that companies should be restored in a truncated form. Life, in its old form and stature was to be restored as if it had never ceased. To do so the custodian of the fund, His Majesty, in right of the Province, must restore it because that, in the language of the cases presently referred to, was the intendment of the Act.

In this Court, Kerwin J., as he then was, wrote reasons concurred in by Duff C. J. and Rinfret and Hudson JJ. Having decided, as did Macdonald J. A., that while the order restoring the company to the register was made under s. 200, (now s. 210) its effect was governed by s.199 (now s. 209), he continued at p. 469:

Reading these sections together, therefore, the effect of the order was, as stated in subsection 1 of section 199, that "thereupon the company shall be deemed to have continued in existence . . . as if it had not been struck off.

The enactment in subsection 2 of section 200 that "unless the Court otherwise orders, the order shall be made without prejudice to the rights of parties acquired prior to the date on which the company is restored by the Registrar," when read in the light of the terms of section 199 that "the company shall be deemed to have continued in existence" causes no difficulty as I have concluded that the making of the order in 1928, striking the company from the register, never gave the Crown a right to the money as *bona vacantia*. (It should be added that the insertion in the order restoring the company to the register, of the "without prejudice" clause adds nothing to the effect of subsection 2 of section 200.)

Such a right arises only when there is no other owner, and how can it be said that the money on deposit was without an owner when the company was not really dead for all purposes? By subsection 1 of section 199, the company itself may apply for the order, and by subsection 3 the company "may for the purposes of its restoration to the register hold such

1959

THE QUEEN
v.
LINCOLN MINING SYNDICATE LTD.

Cartwright J.

meetings and take such proceedings as may be necessary as if the company had not been dissolved . . ." Added to which is the explicit statement as to the effect of the order.

at pages 471 and 472:

The effect of the removal order of October 25th, 1928, was by the terms of section 167 of the Act then in force (R.S.B.C. 1924, chapter 38) that the company was struck from the register and "dissolved". In view of the provisions of section 168, which would apply to any order of the court restoring the company to the register, made while that Act was in operation, and of sections 199 and 200 of the relevant Act of 1929, can it be said that the "dissolution" was an end of the company for all purposes, and particularly for the purpose of the applicant's contention that the money on deposit in the bank ceased to have an owner, so as to permit the operation of the doctrine of *bona vacantia*? I conclude that the answer must be in the negative and that is sufficient to dispose of the present appeal.

(It should be noted that in this passage section 167 corresponds to the present s. 208 and sections 168 and 199 correspond to the present s. 209).

and at page 473:

However, for the reasons already given, I am of opinion that this money never was, under the circumstances, *bona vacantia*. On the proper constructions of sections 199 and 200 of the 1929 Act the doctrine of *bona vacantia* does not apply so as to include money of a company which, while "dissolved", cannot be taken to be dead for all purposes when, by the very Part of the Act that refers to dissolution, provision is also made for an order of revivor, with the consequence that the company is deemed to have continued in existence as if it had not been struck off.

Davis J. wrote a separate concurring judgment, in the course of which he says at p. 476:

Section 167 of the British Columbia statute permits the Registrar of Companies to strike off the register any company which has failed to "file any return or notice or document required to be filed with the Registrar." The language is sufficiently comprehensive to include defaults of the slightest nature—for instance, mere omission to make some annual or other return called for by the Act. Having regard to the provisions of the entire statute the dissolution referred to in section 167 necessarily excludes in my opinion "a general dissolution", to adopt the term used by Lindley on Companies, 6th ed. p. 821. The company does not "become extinct without successor or representative," to use the words of Wright J. in the Higginson case. The statute plainly negatives a complete dissolution whereby the company becomes extinct because the statute clearly recognizes that subsequent to the dissolution referred to in section 167 the company itself may apply to the court to be restored and for that purpose may hold meetings and take proceedings as if it had not been dissolved. In that view of the statute there was no such dissolution of the company in this case as to entitle the Crown to acquire ownership of the money on deposit at the bank as against the company and its creditors.

It will be seen that this case decides that, on their true construction, the effect of the words in what is now s. 208(4) of *The Companies Act* "the company shall be dissolved" is that, during the period of twenty years mentioned in s. 209(1)(*d*), the company "is not really dead for all purposes", that the "dissolution" resulting from being struck off the register is not an end of the company for all purposes and particularly does not result in its personal property ceasing to have an owner.

I find myself in complete agreement with this decision, but even were it otherwise I should feel bound to follow it not only because of its high authority but also because the Legislature has in the Revised Statutes of 1948 re-enacted the relevant sections without any alteration in wording which could affect this question of construction. The effect of such re-enactment after judicial construction was discussed in our recent judgment in *Fagnan v.Ure*[1], particularly at p. 382, where the following statement of James L. J. in *Ex parte Campbell; In re Cathcart*[2], was adopted:

> Where once certain words in an Act of Parliament have received a judicial construction in one of the Superior Courts, and the Legislature has repeated them without alteration in a subsequent statute, I conceive that the Legislature must be taken to have used them according to the meaning which a Court of competent jurisdiction has given to them.

While this rule of construction has been modified by Parliament and by some of the Provinces (e.g. by s. 21(4) of *The Interpretation Act*, R.S.C. 1952, c. 158) this has not been done in British Columbia.

It follows in my opinion that, if the relevant provisions of *The Companies Act* alone are considered, the respondent's existence never came to an end and it remained throughout the time between its "dissolution" flowing from its being struck off the register and the making of the order which resulted in its being "deemed to have continued in existence as if it had not been struck off" in a state, perhaps, of suspended animation but sufficiently alive to retain the ownership of all its property. I can find no basis in reason for holding that if it had sufficient existence to remain the owner in being of its personalty it would not also remain the owner in being of its realty.

[1] [1958] S.C.R. 377, 13 D.L.R. (2d) 273.
[2] (1870), L.R. 5 Ch. 703 at 706.

1959

THE QUEEN v. LINCOLN MINING SYNDICATE LTD.

Cartwright J.

Turning now to *The Escheats Act,* the appellant stresses the provisions of s. 5 and argues that when the respondent was struck off the register on November 16, 1944, it was "dissolved" within the meaning of that word in s. 5(1), that thereupon the lands in question in this action were "for all purposes deemed to escheat to the Crown in the right of the Province" and that the law of escheat and the provisions of the Act applied in respect of those lands "in the same manner as if a natural person had been last seised thereof or entitled thereto and had died intestate and without lawful heirs."

The argument proceeds that subss. (2) and (3) providing that escheated lands shall not be disposed of within a year from the date of the dissolution and that where a corporation is revived pursuant to any Act by order of any Court within such year the order shall have effect as if the lands had not escheated and the lands shall *ipso facto* vest in the corporation, show by necessary implication the intention of the Legislature that after the year has expired the escheat is absolute and is unaffected by any order reviving the corporation.

That there are difficulties in making a completely satisfactory reconciliation of the provisions of s. 5 of *The Escheats Act* with ss. 208 and 209 of *The Companies Act* is manifest from the differences of opinion in the Courts below; but a consideration of all the relevant provisions of the two acts leads me to the conclusion that the opening words of s. 5 of *The Escheats Act,*—"Where a corporation is dissolved" contemplate cases in which the corporation is, to borrow the words of Kerwin J. quoted above, "dead for all purposes" so that, in the words quoted by Davis J., it has "become extinct without successor or representative".

Lord Sumner in *The King v. Attorney-General for British Columbia*[1] comments on how closely analogous to *bona vacantia* is the case of escheats and continues:

> Except for the difference between a right to lands, the title to which is ultimately in the Crown, and a right to personalty, which is complete in a private person, if there be a private person entitled, the principle on which bona vacantia and escheats fall to the Crown is the same, that is that there being no private person entitled, the Crown takes.

[1] [1924] A.C. 213 at 219, [1923] 4 D.L.R. 690.

The right of the Crown to take, in the one case the goods and in the other the lands, is in both cases conditional upon there being no private owner in existence entitled thereto. I have already indicated my view that it has been authoritatively determined that a company "dissolved", as was the respondent, as a result of being struck off the register under what is now s. 208 of *The Companies Act* and thereafter, within twenty years, restored to the register pursuant to s. 209(1) does not at any time between those two events cease to exist or cease to be the owner of the property vested in it at the moment of dissolution. It would, in my opinion, require an explicit provision to bring about the startling result that lands owned by an existing person or corporation should while the owner continues in existence escheat to the Crown.

For the above reasons I have reached the conclusion that the appeal fails.

I wish to add, however, that if, contrary to the opinion that I have expressed, the right view should be that the words "dissolved" and "dissolution" in s. 5 of *The Escheats Act* are wide enough to include dissolution in any manner, I would nonetheless be of the opinion that the judgment of the Court of Appeal should be affirmed. On this hypothesis I would be in general agreement with the reasons of Davey J. A. In particular it appears to me that the case would be governed by the rule expressed in the maxim *generalia specialibus non derogant,* for, as between the two, s. 209 of *The Companies Act* appears to me to be the special and s. 5 of *The Escheats Act* the general legislation. The latter, on the present hypothesis, includes every type of dissolution of corporations seised of lands in British Columbia and provides relief from escheat within a year on certain conditions. The operation of s. 209, on the other hand, is confined to companies incorporated under *The Companies Act* of British Columbia and to such of the companies so incorporated as are "dissolved" in a particular manner that is being struck off the register. As to this special class s. 209 provides that on a company being ordered to be restored to the register it shall thereupon be deemed to have continued in existence as if it had not been struck off. If the company had not been struck off and had continued

1959

THE QUEEN v. LINCOLN MINING SYNDICATE LTD.

Cartwright J.

in existence it is obvious that there would have been no escheat. The result of the order under s. 209 in the special cases to which that section relates is that the company is to be regarded as never having been dissolved and it has no need to look for relief in the provisions of *The Escheats Act*.

One reason that s. 5 of *The Escheats Act* was framed in terms so wide as to cover *prima facie* every possible case of dissolution of a corporation seised of lands in British Columbia may be that its primary purpose was to remove the doubts which had long existed as to whether undisposed of lands of which the last owner was an extinct corporation escheated to the Crown or reverted to the grantor who had conveyed them to the corporation. As to this it is sufficient to refer to Halsbury, 1st ed., vol. 11, p. 25, s. 48:

> There is some conflict of authority on the question whether the freehold lands of a corporation which has been dissolved escheat to the Crown or the mesne lord, or whether they revert to the grantor. The weight of authority seems to be in favour of the latter view.

and to Armour on Real Property, 2nd ed. 1916, at p. 299:

> Before concluding this head of escheats there must be mentioned one singular instance in which lands held in fee-simple are not liable to escheat to the lord, even when their owner is no more, and hath left no heirs to inherit them. And this is the case of a corporation; for if that comes by any accident to be dissolved, whilst holding the lands and before alienation, the donor or his heirs shall have the land again in reversion, and not the lord by escheat; which is, perhaps, the only instance where a reversion can be expectant on a grant in fee-simple absolute.

Whether or not this was the reason for the form in which s. 5 or its predecessor s. 3(*a*), added by 1924 (B.C.), c. 18, s. 2, was drafted, it appears to me that, in relation to the question raised in this appeal, it is clear that s. 5 of *The Escheats Act* is the general and ss. 208 and 209 of *The Companies Act* are the special legislation.

I would dismiss the appeal without costs.

Appeal allowed without costs,

CARTWRIGHT *and* MARTLAND JJ. *dissenting.*

Solicitors for the defendant, appellant: Ellis, Dryer & McTaggart, Vancouver.

Solicitors for the plaintiff, respondent: Ladner, Downs, Ladner, Locke & Lennox, Vancouver.

LESLIE OSVATH - LATKOCZY (*Plaintiff*) ..... APPELLANT;

1959
Jun. 10
*Jun. 25

AND

CLARA OSVATH-LATKOCZY and PAUL GUNTHER SCHNEIDER (*Defendants*) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Domicile—Divorce—Whether domicile of choice acquired.

The plaintiff, a Hungarian refugee, residing in Ontario, was refused a divorce on the ground that he was not domiciled in the Province. He had been residing in Ontario for eighteen months, had obtained employment in his own line of work and had expressed the intention of setting up his own business in the province. He also had made an application under the Canadian Citizenship Act.

Held: The action for dissolution of the marriage should be maintained. There was a preponderance of evidence that the plaintiff came here as an immigrant intending to settle. The contingency of his return to Hungary was so remote and uncertain that it should not prevent the Court from declaring that he had acquired a domicile of choice in Ontario.

APPEAL from a judgment of the Court of Appeal for Ontario, affirming a judgment of Ferguson J. Appeal allowed.

R. P. Rendek, for the plaintiff, appellant.

No one appearing for the defendants.

The judgment of the Court was delivered by:

JUDSON J.:—The appellant's action for divorce was dismissed on the ground that he was not domiciled in the Province of Ontario. This dismissal was affirmed on appeal, MacKay J. A. dissenting. The marriage took place at the City of Budapest on October 31, 1955, where the husband and wife lived together until November 4, 1956. They then left Hungary for a refugee camp in Vienna where they lived until January 17, 1957. They left there for Canada on that date and arrived in Halifax on February 9, 1957. From Halifax they went to Toronto and lived together in a refugee centre until March 1, 1957. They

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

1959

OSVATH-LATKOCZY v. OSVATH-LATKOCZY et al.

Judson J.

separated when they left this centre and have not lived together since that date. The wife is now living with another man, who is her co-defendant in the action.

The husband, who had been trained as a forester in Hungary, obtained employment in his own line of work at Shelburne, Ontario. He was still so employed when he commenced this action on April 2, 1958, and at the date of the trial, November 3, 1958. He stated that he expected to continue to follow this occupation in Ontario and that he hoped eventually to get some land of his own and get into the business for himself. Up to a certain point in the evidence he made it very clear that he intended to remain in Ontario permanently or for an indefinite period. His expressed intention is strongly supported by the fact of his having secured work for which he was trained and by his early filing, under s. 10(1) (*a*) of the *Canadian Citizenship Act,* of the necessary declaration of intention to become a Canadian citizen.

The learned trial judge put to him the following questions and received the following answers:

Q. If the Russians were out of Hungary, you would go back to Hungary?
A. No, the Russians come in 1945.
Q. I mean, would you go back to Hungary if the Russians were out of Hungary?
A. Yes.

The learned trial judge then expressed the opinion that these answers ended the case. The witness, however, after further questioning by counsel, did state that he had no hope or expectation that political conditions would permit of his return.

With respect, in my opinion there was error in the judgment in attributing this conclusiveness to the one answer given by the plaintiff and in putting aside the other evidence of intention to reside permanently in Ontario, supported, as it was, by a residence of eighteen months at the time of trial and the declaration of intention filed under the *Canadian Citizenship Act.* In spite of the circumstances in which this man left his native land, there is a preponderance of evidence in this case that he came here as an immigrant intending to settle. Even if the answer does amount to a

declaration of intention to return to Hungary for permanent residence, of which I have serious doubt in view of qualifications subsequently made, the contingency of his return was, in his opinion, so remote and uncertain that it should not prevent the Court from declaring that he had acquired a domicile of choice in Ontario.

The principle to be applied is that stated in *Lord v. Colvin*[1], which was adopted in *Wadsworth v. McCord*[2], and followed in *Gunn v. Gunn*[3]:

> That place is properly the domicile of a person in which he has voluntarily fixed the habitation of himself and his family, not for a mere special and temporary purpose, but with a present intention of making it his permanent home, unless and until something (which is unexpected or the happening of which is uncertain) shall occur to induce him to adopt other permanent home.

I would allow the appeal without costs and direct that judgment be entered for the dissolution of the marriage with costs against the male defendant.

Appeal allowed without costs.

Solicitor for the plaintiff, appellant: F. Vass, Toronto.

GEORGE SELKIRK (*Defendant*) .....APPELLANT;

AND

J. A. WILLOUGHBY & SONS LIMITED AND A. E. LEPAGE LIMITED (*Plaintiffs*) ..... RESPONDENTS.

1959
May 4, 5
*Jun. 25

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Agency—Real estate sale—Undisclosed purchaser—Objection of vendor to purchaser after acceptance of offer—Refusal to pay agent's commission—Whether identity of purchaser material—Whether conflict of interest on part of the agent—Whether agent entitled to commission.

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

[1] (1859), 4 Drew. 366 at 376, 62 E.R. 141.
[2] (1886), 12 S.C.R. 466 at 475.
[3] (1956), 18 W.W.R. 85, 2 D.L.R. (2d) 351.

1959

SELKIRK
v.
J. A.
WILLOUGHBY
& SONS
et al.

The plaintiff, a real estate agent, obtained a prospective purchaser for the defendant's property at the price fixed by the defendant vendor, but the purchaser made it a condition of his offer that his identity would not be disclosed to the vendor. The offer was submitted by the agent, acting as the nominee for the undisclosed purchaser—a fact which was clearly set out in the offer. The defendant vendor accepted the offer, but refused to pay the agent his commission on the grounds that he would not have dealt with the purchaser in question if he had known his identity and that the agent had been working for such purchaser to the sacrifice of the vendor's interests. The trial judge dismissed the action taken by the agent, but this judgment was reversed by the Court of Appeal.

Held: The agent was entitled to his commission.

Assuming that the purchaser's identity was material, there was no evidence to support the finding of the trial judge that the agent had sacrificed in whole or in part the interest of the vendor. It was his duty to submit the offer to the vendor. There was the fullest disclosure of the fact that the agent was acting as the agent of an undisclosed principal and was under a duty to that principal not to disclose his identity. It was open to the vendor, (i) to refuse to consider the conditional offer, or (ii) to say that he would not acept the offer if the purchaser were a certain person, or (iii) to accept the offer. Having chosen to accept the offer, the vendor could not now be heard to say that the failure to disclose the name of the purchaser was a breach of the agent's duty to him.

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

W. B. Williston, Q.C., and *R. J. Rolls*, for the defendant, appellant.

J. T. Weir, Q.C., for the plaintiff J. A. Willoughby & Sons Ltd., respondent.

R. S. Joy, Q.C., for the plaintiff A. E. LePage Ltd., respondent.

The judgment of the Court was delivered by

CARTWRIGHT J.:—This is an appeal from a judgment of the Court of Appeal for Ontario[1] which by a majority set aside the judgment of Ferguson J. and directed judgment to be entered in favour of the respondents against the appellant for $15,890. Laidlaw J.A., dissenting, agreed with the reasons of the learned trial judge who had dismissed the action.

[1] [1958] O.R. 235, 11 D.L.R. (2d) 677.

In these reasons, I shall refer to the respondent J.A. Willoughby and Sons Limited as "Willoughby" and to the respondent A. E. LePage Limited as "LePage".

The action was brought to recover payment of commission on the sale of a parcel of land consisting of 132.4 acres owned by the appellant and sold through the agency of the respondents to one Joseph Tanenbaum. The land had been purchased by the appellant under an agreement made in May, 1954, which provided that the transaction should be closed on June 1, 1954: it appears to have been actually closed on June 11, 1954, on which date a deed to one Catherine Waters, a nominee of the appellant, was registered. The price stated in the agreement was $143,000, but in the affidavit under *The Land Transfer Tax Act* attached to the deed it was said that the total consideration was $125,000.

The appellant had had difficulty in raising funds to close this transaction and had been approached by one Donnelley, a salesman in the employ of the respondent LePage who put forward Joseph Tanenbaum as a possible purchaser. The appellant negotiated with Tanenbaum and thought that he had sold the property to him although no agreement in writing had been signed. Immediately prior to the closing of this supposed sale the negotiations with Tanenbaum broke off and the appellant was left with only a few days to raise the money to complete his purchase. He stated in his evidence that he was upset by this and resolved to do no further business with Tanenbaum.

On September 9, 1954, the appellant entered into an agreement with the respondent LePage giving it exclusive authority until the 10th day of November, 1954, to sell or exchange the property at a price of $1,450 per acre. The respondent LePage was unable to negotiate a contract for the appellant. The appellant then entered into an agreement dated February 19, 1955, with the respondent Willoughby giving it exclusive authority until the 23rd day of February, 1955, to sell or exchange the property at a price of $1,250 per acre. This agreement expired as did also a subsequent agreement dated July 20, 1955, giving the

1959

SELKIRK v. J. A. WILLOUGHBY & SONS et al.

Cartwright J.

respondent Willoughby exclusive authority to sell or exchange the property until the 10th day of August, 1955, at a price of $1,650 per acre.

On October 5, 1955, the appellant entered into a listing agreement with the respondent LePage giving it exclusive authority until the 5th day of December, 1955, to sell the property at a price of $227,000. This agreement reads as follows:

THE TORONTO REAL ESTATE BOARD
PHOTO CO-OP

Co-Operative—Exclusive Listing Agreement

To (name of the listing broker) A. E. LePage Limited, in consideration of your listing, photographing and agreeing to offer my property known as Part Lot 39 & 40 Cons. 4 Etobicoke for sale or exchange I hereby give you sole and exclusive authority, irrevocable until the expiration hereof to sell or exchange my said property at the price of $227,000 and upon the terms particularly set out on the reverse side of this authorization or at such other price or terms to which I may agree. You are authorized to distribute this listing through the photo-co-operative listing system and send to all members of the Toronto Real Estate Board who will act as your agents to offer my said property co-operatively.

I agree to pay you a commission of 7% of the sale of my property on any sale or exchange effected during the currency of this agreement from any source whatsoever. In case of a sale or exchange being effected by a co-operative agent, the agent shall pay all sub-agent's commissions.

All inquiries from any source shall be referred to you and all offers submitted to me shall be brought to your attention before acceptance. I will allow you to show prospective purchasers over the property during reasonable hours, and you may place your FOR SALE sign upon the property.

This agreement to list shall expire at one minute before midnight of December 5, 1955.

I have read and I clearly understand this agreement, and I acknowledge this date having received a copy of same.

DATED AT Toronto this 5th day of October, 1955.

(Sgd.) P. Donnelley — Witness.

(Sgd.) George Selkirk — Vendor's Signature.

BROKERS COPY

We were informed by counsel that, under the practice of the Toronto Real Estate Board, in the event of a sale being negotiated pursuant to this agreement through an agent other than the listing agent the commission of 7 per cent. would be divided in the ratio of 2.80 to the listing agent and 4.20 to the selling agent.

The respondent Willoughby received a copy of this co-operative listing agreement and their salesman Glaser continued his efforts to find a purchaser. He approached Joseph Tanenbaum whom he regarded as a good prospect and discussed the property with him several times but Tanenbaum said he would not deal with the appellant. Glaser without success tried to find another purchaser and again approached Tanenbaum who agreed to submit an offer of purchase through Willoughby on the condition that his identity should not be disclosed. The suggestion that the offer should be made in the name of Willoughby appears to have been made by Glaser.

More than one form of offer was prepared; each opened with the words "The undersigned J. A. Willoughby and Sons Limited or nominee (herein called "Purchaser") having inspected the real property hereby agrees to and with George Selkirk, Trustee for a Limited Company (herein called "Vendor") through J. A. Willoughby and Sons Limited and A. E. LePage agent for the vendor to purchase all and singular the premises . . .".

The agreement which was finally signed and carried out was prepared by Mr. Maldaver the appellant's solicitor. While in form it was an offer from Willoughby or nominee, it was in fact an offer from the respondent, the words towards the end of the document as drafted:— "This offer shall be irrevocable by the *purchaser* until one minute before midnight the tenth day of November, 1955" having been altered by deleting the word "purchaser" which I have italicized and substituting the word "vendor". What was in form the acceptance by the vendor was signed on November 5, 1955, by the appellant. This reads:

> The undersigned accepts the above offer and agrees with the Agent above named in consideration for his services in procuring the said offer, to pay him on the date fixed for completion, a commission of 7% of an amount equal to the above mentioned sale price, which commission may be deducted from the deposit, if and when sale completed.

The terms set out were: a deposit of $10,000, cash on closing $70,000, first mortgage to be assumed $62,700 and second mortgage to be given back by vendor $84,300, making a total of $227,000. It was also provided: "The Purchaser his nominee or directors of a limited company to give their personal covenants and guarantee for the second mortgage."

1959

SELKIRK v. J. A. WILLOUGHBY & SONS *et al.*

Cartwright J.

On November 7, 1955, Joseph Tanenbaum signed the following letter:

J. A. Willoughby and Sons Limited,
46 Eglinton Avenue East,
Toronto 12.

Dear Sirs:—

You are about to act as my nominee in signing an offer to purchase to George Selkirk part of Lots 39 and 40, in the Fourth Concession of the Township of Etobicoke containing 132 acres more or less at the price of $227,000 by offer to purchase dated November 5th, 1955.

In consideration of your so doing I hereby agree to provide the funds required to complete the purchase and to save, harmless and indemnify you against all payments, claims, actions and proceedings (including all legal costs that you may incur therein) which may arise or result from you so acting in my behalf.

Yours very truly,
(Sgd.) J. Tanenbaum.

There was some difficulty in locating the appellant and it was not until November 12, 1955, that the agreement, duly executed by the respondent Willoughby and a cheque for $10,000 were delivered to him. He at first took the position that this was too late but changed his mind and cashed the cheque.

By an assignment dated the 14th day of November, 1955, the respondent Willoughby assigned the agreement to Harold Wayne Tanenbaum, the son and nominee of Joseph Tanenbaum. The respondent refused to close the transaction and an action for specific performance was commenced by Tanenbaum. A settlement of this action was reached, under which Tanenbaum instead of giving back the second mortgage, paid cash less a discount of 30 per cent., and the transaction was closed. The record does not disclose the grounds on which the appellant had refused to complete or the defence pleaded by him in the action for specific performance.

The appellant refused to pay the commission of 7 per cent. of the sale price claimed by the respondents and this action followed.

The statement of claim alleged the making of the listing agreement of October 5, 1955, the obtaining of the offer of $227,000, described above, and the refusal of the appellant to pay the commission and claimed judgment accordingly.

A statement of defence was delivered on March 23, 1956, and was amended pursuant to an order of the Senior Master of April 13, 1956. It contains no hint of the defence now relied on. On January 8, 1957, on the application of the defendant the statement of defence was struck out and leave given to deliver a fresh statement of defence. This was done on January 10, 1957. The fresh statement of defence contained the following paragraphs:

8. The defendant says that the plaintiffs are experienced in real estate transactions and that it was their duty to obtain the best price possible for the defendant's property and to otherwise advance and protect the defendant's interests but that the plaintiffs were in fact at all material times representing and advancing the interests of the said Tanenbaum and themselves. The defendant says that contrary to the plaintiffs' obligation to him the plaintiffs induced him to sign as vendor a purported offer of a sum less than the actual value of the property at the time.

9. The defendant says that the plaintiffs had at the time the said document was presented to him been negotiating for the sale of the said property to Harold Wayne Tanenbaum referred to in paragraph 5 hereof and other persons the names of whom are not known to the defendant and failed to disclose any details of such negotiations to the defendant.

The other grounds of defence raised in this statement of defence do not require consideration as they were not substantiated. It will be observed that the appellant did not set up in his pleadings in any form the ground of defence upon which he now relies, until January 10, 1957.

The following facts are established by the appellant's own evidence: (i) that he knew that Willoughby was not the purchaser but was acting for the real purchaser who refused to have his identity disclosed, (ii) that both Donnelley and O'Rourke, a salesman in the employ of Willoughby, made it clear to the appellant that Willoughby was not at liberty to disclose the name of this purchaser, (iii) that the appellant stipulated that the purchaser had to be a person who could go through with the deal and whose guarantee on the second mortgage would be good, (iv) that Joseph Tanenbaum was such a person, and (v) that the appellant did not tell any representative of either respondent that he would not enter into the agreement for sale if the undisclosed purchaser were Tanenbaum.

1959

SELKIRK v. J. A. WILLOUGHBY & SONS et al.

Cartwright J.

The appellant, however, testified further that at the time of his abortive dealing with Tanenbaum in 1954 he had told Donnelley that he did not want to deal with Tanenbaum, that if he had known Tanenbaum was the undisclosed purchaser he would not have dealt with him through either of the respondents but would have dealt with him face to face and would have expected to get a better deal from him, that he thought that both Donnelley and Glaser were friendly to Tanenbaum and consequently would not make the best possible deal for the appellant in a transaction to which Tanenbaum was the other party.

Had I been called upon to decide the case upon the written record, I would have shared the view of Mackay J.A. that the proper inference to be drawn from the evidence was that the appellant did not consider that the identity of the purchaser (provided he was solvent) was a material circumstance and that this ground of defence was an afterthought advanced for the sole purpose of attempting to defeat the respondents' claim to commission. However, the learned trial judge has stated that he believes the respondent "when he says that it would have made a material difference to him had he known that Tanenbaum was in fact the purchaser"; and I propose to deal with the appeal on the assumption that that finding should not be disturbed.

It appears from the evidence of Donnelley that, at some time after the offer of $227,000 had been submitted to the appellant and after he had been told that Willoughby could not disclose the name of the purchaser, the appellant asked Donnelley if it was Tanenbaum who was making the offer and Donnelley replied:— "Well, I think if it was Mr. Tanenbaum, that he would be making an offer through me, don't you?"

It is argued for the appellant that this was the equivalent of a statement by Donnelley that Tanenbaum was not the purchaser and amounted to a false statement on a matter material to the principal made by the agent to the principal with knowledge of its falsity.

Donnelley testified that he did not know until after the agreement was entered into that the purchaser was Tanenbaum. I can find nothing in the record to indicate that his evidence on this point was weakened in cross-examination.

It is not contradicted by any direct evidence and the circumstantial evidence does not appear to me to raise any inference that Donnelley had this knowledge. On this point the learned trial judge said:

> I have no doubt that Mr. Bertram Elmore Willoughby was not personally familiar with the arrangements but Mr. Emil Glaser, who was in charge of the deal for the Willoughby firm, was intimately connected with the matter. He in fact had asked Donnelley of LePage's to procure Selkirk's signature as he had failed to do so, and both firms pressed Selkirk to sign and highly recommended the deal, well knowing that they were representing Tanenbaum whose interest was diametrically opposed to Selkirk's. Donnelley says that he did not know that Willoughby was acting for Tanenbaum. I do not believe him. The negotiations could not in my opinion have been carried on as they were without Donnelley's knowledge. At any rate he knew from Exhibit 6 itself that Willoughby was acting for someone. He knew Tanenbaum well; he had acted for him; and he was asked to procure Selkirk's signature to a document which on its face showed Willoughby acting for someone. If they intended to ask Selkirk for a commission it was their duty to inform Selkirk of that person's identity.

The learned trial judge quoted the following passage from the judgment of McRuer C.J.H.C. in *S. E. Lyons Ltd. v. Arthur J. Lennox Contractors Ltd.*[1]:

> If it turned out that a man was not acting entirely as agent for his principal, but was directly or indirectly working for the other party to the contract, in such a way as possibly to sacrifice, in whole or in part, the interests of his principal, he is not entitled to his commission.

and continued:

> It is my opinion that that principle is particularly applicable to this case.

He concluded his reasons as follows:

> The result of this case in my opinion does not depend on Selkirk's liability to close or whether he did or did not close, but whether the plaintiffs were working directly or indirectly for the other party to the contract in such a way as possibly to sacrifice in whole or in part Selkirk's interest. I find that they were so acting for the other party.

In the Court of Appeal, Mackay J.A. expressed his agreement with the statement of the general principles of the law of agency made by the learned trial judge but took a different view as to the application of those well settled principles to the facts of this particular case, and I agree with his conclusion that there was no breach of any duty owed by the respondents to the appellant.

[1] [1956] O.W.N. 624 at 627.

1959

SELKIRK v. J. A. WILLOUGHBY & SONS et al.

Cartwright J.

It was the duty of the respondents to use their best efforts to find a purchaser at the price fixed by the appellant and this they did; but their endeavours produced no purchaser who was willing to pay that price other than Tanenbaum and he would make the offer only on the condition that his identity should not be disclosed to the appellant. I think it was the duty of the respondents to submit this offer to the appellant. Had they failed to do so the result might well have been that no sale of the property would have been effected. They made full disclosure of the fact that the offer was made on behalf of a purchaser who had expressly stipulated as a condition of making it that his identity should be withheld. Under these circumstances it was open to the appellant, (i) to refuse to consider the offer unless the purchaser would withdraw his condition and disclose his identity, or (ii) to say that he would not accept the offer if in fact the purchaser were Tanenbaum, or (iii) to accept the offer. He chose the last mentioned course.

In my respectful opinion there is no evidence to support the finding of the learned trial judge that the respondents were working directly or indirectly for Tanenbaum in such a way as possibly to sacrifice in whole or in part the interest of the appellant. There was the fullest disclosure to the latter of the circumstance that Willoughby was acting as the agent of an undisclosed principal in submitting the offer and was under a duty to that undisclosed principal not to disclose his identity. Having accepted the offer with full knowledge of this circumstance the appellant cannot now be heard to say that the failure, and indeed the repeated refusal, of the respondents to disclose the name of the purchaser was a breach of their duty to him.

With respect, I am of opinion that the learned trial judge was in error in holding, in the passage from his reasons quoted above, that: "If they (the respondents) intended to ask Selkirk for a commission it was their duty to inform Selkirk of that person's (Tanenbaum's) identity". They could not give this information without violating the condition on which alone Tanenbaum authorized the making of the offer and that this was the situation was fully disclosed to the appellant. The only choice open to the agents was either not to submit the offer at all or to submit it on

the condition on which it was made making it perfectly clear to the appellant, as they did, that they could not disclose the purchaser's name. On this branch of the matter I am in substantial agreement with the reasons of Mackay J.A. for holding that the non-disclosure of Tanenbaum's name was not a breach of the respondents' duty to the appellant.

Any other breaches of duty which were suggested were negatived by the evidence.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

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

Solicitors for J. A. Willoughby & Sons, plaintiff, respondent: Evans, Noble & Hunter, Toronto.

Solicitors for A. E. LePage Ltd., plaintiff, respondent: Taylor, Joy, Baker & Hall, Toronto.

INTERPROVINCIAL PIPE LINE COMPANY ..... APPELLANT;

AND

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

1959
Jun. 19
*Oct. 6

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income tax—Foreign tax credit—Interest from U.S. sources—No business carried on there—Payment of U.S. withholding tax—Whether tax credit dependent on whether profit made in U.S.—Interest paid on borrowed money exceeding U.S. interest receipts—Canada-U.S. Tax Convention—The Income Tax Act, 1948 (Can.), c. 52, ss. 3, 4, 6(b), 11(1)(c), 38(1), 127(1)(av)—The Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4, 6(b), 11(1)(c), 41(1), 139(1)(az).

The appellant company's pipe lines were connected by a pipe running through the United States which was owned and operated by a wholly owned U.S. subsidiary company. The appellant carried on no business there. The appellant had raised all the capital needed for the construction of the pipe line largely through the issue of bonds and debentures in Canada. The appellant also financed the construction of the U.S. section of the line and took from its subsidiary

*PRESENT: Kerwin C.J. and Taschereau, Locke, Judson and Ritchie JJ.

1959

INTERPROVINCIAL PIPE LINE CO. v. MINISTER OF NATIONAL REVENUE

interest-bearing demand notes and bonds. In addition, the appellant made certain temporarily investments in United States Treasury bills. In the years 1950 to 1954 inclusive, the appellant received substantial amounts of interest in the U.S. from its subsidiary and the Treasury bills. A withholding tax of 15 per cent. of these amounts was paid by the appellant to the U.S. Government.

The Minister ruled that the appellant was not entitled to deduct from its taxes the amount of taxes paid to the U.S., on the ground that the interest received from the U.S. did not exceed the interest paid, and deducted as expenses, on the borrowed money used to acquire the U.S. investments; there being no profit from sources in the U.S., there was therefore no income. The Minister's ruling was upheld by the Exchequer Court.

Held: The appellant company was entitled to a tax credit.

Per Kerwin C.J. and Taschereau, Judson and Ritchie JJ.: The denial of the foreign tax deduction was contrary to s. 41(1) of the Act (s. 38(1) of the 1948 Act), and also offended Art. XV of the Canada-U.S. Tax Convention. To deprive the appellant of the right given by s. 38(1) to a deduction of the tax paid in the U.S. "on income from sources therein", it would be necessary to replace those words by the words "on profits from sources therein". Section 4 did not afford statutory authority for such a substitution. Section 4 is expressly made subject to the other provisions of Part I of the Act, one of which is s. 6(*b*) which imperatively requires that the whole of the interest from U.S. sources must be brought into account in the computation of income. The deduction against income given by s. 11(1)(*c*) is attributable to all sources of income, and there was no authority to break it up and relate various parts of the deduction to various sources. Having paid the U.S. tax on its income from U.S. sources, the appellant's right to the foreign tax deduction could not be destroyed by the unauthorized and artificial attribution of an offsetting expense tending to show that there had been no profit from such source.

The source of the income was property—an investment in a subsidiary company—, and was not income from a business, because the appellant did not carry on any business in the U.S. It was an error to hold that the appellant carried on business there and to use that finding as the basis for an allocation of expense and a refusal of the foreign tax deduction under s. 38(1).

The withholding tax was properly payable under the laws of the United States and the Canada-U.S. Tax Convention, and was a tax on income, not on profits. There would be double taxation if the deduction were not allowed.

Per Locke J.: Paragraphs (av) of s. 127 (1) and (az) of s.139(1) were intended to prevent a taxpayer who might be engaged in two separate businesses not related to each other by reason of their nature from taking into account losses or expenses incurred in one in computing the taxable income of the other. These subsections had therefore no application to this case.

There was no authority in either the Act of 1948 or of 1952 for splitting up the income of the business of the appellant into parts or segments for the purpose of applying the clear provisions of s. 11(1)(*c*), as was done

in this case. The income of the business of the appellant to be determined in order to ascertain what was taxable income was the entire income of the appellant and not that income split up into parts according to the situs of the source of that income.

APPEAL from a judgment of Thurlow J. of the Exchequer Court of Canada[1], affirming a ruling of the Minister. Appeal allowed.

L. Phillips, Q.C., R. B. Burgess, Q.C., and *P. F. Vineberg,* for the appellant.

A. S. Pattillo, Q.C. and *F. J. Cross,* for the respondent.

The judgment of Kerwin C.J. and Taschereau, Judson and Ritchie JJ. was delivered by

JUDSON J.:—The appellant, a corporation incorporated by special Act of the Parliament of Canada, owns and operates a crude oil pipe line running from Redwater, Alberta, to a point on the international boundary south of Winnipeg, and from a point on the international boundary near Sarnia to a point near the City of Toronto. The connecting link is in the United States and is owned and operated by Lakehead Pipe Line Company Inc., a wholly owned subsidiary company of the appellant incorporated in the State of Delaware and having its main office in Superior, Wisconsin. The appellant has no office or place of business or permanent establishment in the United States and carries on no business there.

For the purpose of construction of the pipe line the appellant raised all the capital, the greater part of which was borrowed from the public who purchased bonds and debentures. Lakehead, the United States subsidiary, did no independent financing. It borrowed from Interprovincial and this Company took from its subsidiary interest-bearing demand notes and bonds. Interprovincial also made certain investments in United States Treasury bills pending the need of these funds for construction purposes. Consequently, in the years 1950 to 1954 inclusive, Interprovincial received substantial payments of interest in the United States from its subsidiary and the Treasury bills. It paid on this interest a 15 per cent. withholding tax to the United

[1] [1959] C.T.C. 1, 59 D.T.C. 1018.

1959

INTERPROVINCIAL PIPE LINE CO. v. MINISTER OF NATIONAL REVENUE

Judson J.

States and the sole question in the litigation is whether it is entitled under s. 38(1) of the 1948 *Income Tax Act* to a tax credit for this withholding tax for the years 1950 to 1952, and under s. 41(1) of the *Income Tax Act* for the years 1953 and 1954. The Minister ruled that Interprovincial was not so entitled. This ruling was affirmed on appeal to the Exchequer Court[1] and Interprovincial now appeals to this Court. There is no difference in the wording of the section for these two periods which can affect these reasons.

The United States tax credit was disallowed because the Minister ruled that Interprovincial had no profit from the receipts of interest from United States sources, having paid interest on its own borrowings to an amount equal to or in excess of these receipts and these interest payments having been recognized as deductible expenses. The right to a tax credit was therefore made to depend upon the existence of a profit after setting off one item against the other and the basis for the decision was the interpretation of s. 4 of the *Income Tax Act,* which provides as follows:

> 4. Subject to the other provisions of this Part, income for a taxation year from a business or property is the profit therefrom for the year.

The reasoning is that s. 4 compels one to read the word "income" as meaning "profit" in s. 38(1) of the Act. This is indicated very clearly in the following paragraph from the reasons of the learned trial judge:

> By s. 4 of *The Income Tax Act,* however, income for a taxation year from a business or property is declared, subject to the other provisions of Part 1, to be the profit therefrom for the year and, since the source of the interest in question on which tax was paid to the United States was clearly either a business or property and no other provision of Part 1 declares that interest earnings are to be brought into the computation of income or taxed on any other basis, it follows, in my opinion, that what is to be regarded for the purposes of Part 1 of *The Income Tax Act* as the income from such business or property is not the gross amount of such interest for each year but the profit from such property or business for the year. If there is no profit from a business or property for any year, there is no income therefrom for that year. Section 38(1) of *The Income Tax Act* can thus afford a tax credit only in a year in which the appellant had a profit for the year from the business or property in the United States from which the interest in question flowed.

[1] [1959] C.T.C. 1, 59 D.T.C. 1018.

In my respectful opinion, there is error here in stating that "no other provision of Part I declares that interest earnings are to be brought into the computation of income or taxed on any other basis" for such a finding ignores the imperative provisions of s. 6(*b*) of the Act. In my opinion it is the payment of the withholding tax of 15 per cent. in the United States on this interest receipt—not profit—an interest receipt which the taxpayer is required to bring into the computation of income by s. 6(*b*), which gives the right to the foreign tax deduction under s. 38(1).

It is unnecessary to set out in full the provisions of s. 38(1). This section gives the right to a deduction from tax of the lesser of two amounts, namely, the foreign tax or an amount calculated according to the formula in subparagraph (*b*). There is no question here that the 15 per cent. withholding tax in the United States is the lesser of these two amounts and, consequently, I omit the complicated alternative provisions and confine my consideration to the meaning to be given to the first alternative. Section 38(1), so limited, reads:

> 38. (1) A taxpayer who was a resident in Canada at any time in a taxation year may deduct from the tax for the year otherwise payable under this Part an amount equal to the lesser of
>
> (*a*) the tax paid by him to the government of a country other than Canada on his income from sources therein for the year.

The appellant is a Canadian company. It did pay a 15 per cent. withholding tax to the United States on income from sources therein. To deprive the appellant of the right to the tax deduction it is necessary to substitute for "on his income from sources therein" the words "on his profits from sources therein" and I do not think that s. 4 affords the statutory basis for such a substitution.

First, s. 4 is expressly made subject to the other provisions of Part I of the Act. One of these, affecting the matter, is s. 6(*b*), which provides:

> 6. Without restricting the generality of section 3, there shall be included in computing the income of a taxpayer for a taxation year
>
> (*b*) amounts received in the year or receivable in the year (depending upon the method regularly followed by the taxpayer in computing his profit) as interest or on account or in lieu of payment of, or in satisfaction of interest;

1959

INTERPROVINCIAL PIPE LINE CO. v. MINISTER OF NATIONAL REVENUE

Judson J.

Section 6(*b*) imperatively requires that the whole of the interest from United States sources must be brought into account in the computation of income and on the other side of the account there is a deduction that must be allowed under s. 11(1)(*c*) for interest on "borrowed money used for the purpose of earning income from a business or property." This, in fact, is what has actually happened. The full interest receipt has been brought into account and the full interest payment has been claimed and allowed as a deduction without allocation, but, for the purpose of denying the appellant the right to the tax credit under s. 38(1), a subsidiary calculation has been made within this framework for the purpose of showing that when the allocable expense is set against the United States interest receipt, there is no profit on this branch of the appellant's activity and, consequently, no right to a tax credit.

I can see no basis for any allocation of the appellant's borrowings to its investment in its subsidiary for the purpose of producing this result under s. 38(1). The appellant's borrowings and the interest paid thereon were related to the business as a whole and no part of the borrowings and the interest paid thereon can be segregated and attributed to the investment in the subsidiary. The interest paid by the appellant to its own bondholders was, under s. 11(1)(*c*), a deduction given to the appellant for the purpose of computing its income from all sources. Sections 3 and 4 of the Act do not require a separate computation of income from each source for the taxpayer is subject to tax on income from all sources. The deduction against income given by s. 11(1)(*c*) is attributable to all sources of income and there is no authority to break it up and relate various parts of the deduction to various sources. For this reason I do not regard the interest paid and claimed and allowed as a deduction, as being related to the source of the United States interest receipt in this case, and consequently, s. 139(1)(*az*), formerly s. 127(1)(*av*) of the 1948 *Income Tax Act*, does not, in my opinion, authorize the allocation which the Minister has made in this case.

Returning then to s. 38(1), my conclusion is that the appellant has paid a tax on income to the United States from sources therein and that its right to the foreign tax

deduction cannot be destroyed by this unauthorized and artificial attribution of an offsetting expense which tends to show that there has been no profit from the source.

So far I have considered the source of this income to be property—an investment by the appellant in a subsidiary company. I think that this is the correct view of the matter and I turn now to a consideration of the finding of the learned trial judge, which, with respect, I also consider to be erroneous, that the appellant had only one source of income and that from the business of operating the Interprovincial Pipe Line. This finding is expressed in the following paragraph:

> The portion of the Appellant's income-producing process which I think can be regarded as carried on in the United States consisted of the holding of its investments in Lakehead and in United States Treasury bills and the *controlling* of Lakehead . . . . It is not easy to envisage a division of the Appellant's business on such lines, but it is clear that the revenues from the Appellant's investments in Lakehead and in United States Treasury bonds accrued to the Appellant in the United States, and taking the holding of these investments as the portion of the business carried on there and the revenues from them as the revenue from that portion of the business, one has a starting point for the necessary computation.

The fact is that the appellant carried on no business in the United States. Had it done so it would have been taxed there not on the basis of a withholding tax of 15 per cent. on interest received from sources in the United States (Art. XI(1) of the Convention) but in respect of its industrial and commercial profits attributable to its activity in the United States and determined in accordance with Art. I of the Convention. Industrial and commercial profits do not include interest. The business carried on in the United States was that of Lakehead and not the appellant, and the fact that Lakehead was wholly controlled by the appellant does not make it the appellant's business.

The appellant is, therefore, in this anomalous position. According to the United States view it does not carry on business and must pay a withholding tax of 15 per cent. on interest. According to the judgment under appeal it does carry on business in the United States, this business being the controlling of Lakehead and the holding of investments. There are no disputed facts in this case and it is, in my respectful opinion, error to hold that the activities of the

1959

INTERPROVINCIAL PIPE LINE CO. v. MINISTER OF NATIONAL REVENUE

Judson J.

appellant constitute the carrying on of a business in the United States and to use this finding as the basis for an allocation of expense and a refusal of the foreign tax deduction under s. 38(1).

I have no doubt that the 15 per cent. withholding tax was properly payable under the laws of the United States and Art. XI(1) of the Canada-U.S. Reciprocal Tax Convention in respect of income derived from sources in the United States and that this withholding tax is a tax on income not profits. Article XI(1) reads as follows:

> (1) The rate of income tax imposed by one of the contracting States, in respect of income derived from sources therein, upon individuals residing in, or corporations organized under the laws of, the other contracting State, and not having a permanent establishment in the former State, shall not exceed fifteen per cent for each taxable year.

Nevertheless, the judgment holds that the appellant's income from United States sources is nil notwithstanding the obvious fact of these large interest receipts. These are not industrial and commercial profits and, as such, allocable in accordance with Art. I of the Convention. Indeed, by Art. II, interest is expressly excluded from industrial and commercial profits and is left to be dealt with on an income, not a profits' basis by Art. XI(1) above quoted. I am therefore of the opinion that the denial of this foreign tax deduction is not only contrary to s. 38(1) of the Act but also offends Art. XV(1) of the Convention, which reads:

> (1) As far as may be in accordance with the provisions of The Income Tax Act, Canada agrees to allow as a deduction from the Dominion income and excess profits taxes on any income which was derived from sources within the United States of America and was there taxed, the appropriate amount of such taxes paid to the United States of America.

This interest receipt has been subject to double taxation and the appropriate foreign tax deduction has not been allowed. I would allow the appeal with costs both here and below and set aside the re-assessments complained of for the years 1950 to 1954 inclusive.

LOCKE J.:—On the argument of this appeal it was admitted by counsel for the appellant that the moneys used for the purchase of the bonds of its wholly owned subsidiary Lakehead Pipe Line Company Inc. and the United States Treasury bills were derived from the sale of its own debentures in Canada, the interest upon which was allowed as

a business expense for the taxation years in question under the provisions of s. 11(1)(*c*) of the *Income Tax Act*, 1948, c. 52, and of the *Income Tax Act*, R.S.C. 1952, c. 148.

There remains accordingly no disputed question of fact. The question of law is as to the proper interpretation of s. 127(1)(*av*) of the Act of 1948, reenacted *verbatim* as s. 139(1)(*az*) in c. 148.

The undertaking of the appellant company as originally contemplated was the construction of a pipe line for carriage of Canadian oil from various points in the Provinces of Alberta and Saskatchewan to the Port of Superior, Wisconsin, on Lake Superior, from which point it was contemplated that the oil would be transported by tanker to Sarnia or other Canadian ports. To accomplish this it was necessary that, for a considerable distance, the line should pass through the States of Minnesota and Wisconsin. Due, apparently, to the alien land laws of these states, it was not possible for the appellant to acquire in its own name the necessary rights-of-way and properties in the United States, and it was for this reason that it caused to be incorporated the Lakehead Company, all of the shares of which at all relevant times have been owned and controlled by it. The Lakehead Company has its head office at Superior, Wisconsin, and, by reason of its shareholdings, its operations have at all times been subject to the control and direction of the appellant.

The line was completed in Canada from the Redwater field in Alberta to the American border at Gretna, Man. and continued from that point through the states mentioned to Superior. At a later date, for reasons explained in the evidence of the witness Waldon, the line was extended from Superior to Sarnia and Canadian oil has since that time passed through the line owned by the Lakehead Company to Sarnia in bond.

Paragraph (*av*) of s. 127(1) of the Act of 1948, so far as it is necessary to consider it, read:

> a taxpayer's income from a business, employment, property or other source of income or from sources in a particular place means the taxpayer's income computed in accordance with this Act on the assumption that he had during the taxation year no income except from that source or those sources of income and was entitled to no deductions except those related to that source or those sources.

1959

INTERPROVINCIAL PIPE LINE CO. v. MINISTER OF NATIONAL REVENUE

Locke J.

and the terms of para. (*az*) of s. 139(1) of c. 148 are identical. No similar provision appeared in the *Income War Tax Act*, R.S.C. 1947, c. 97, as amended. We have not been referred to any decided case and I have not been able to discover any in which this language has been interpreted by the Courts.

The section of which this paragraph forms part appears under the sub-heading "Interpretation" in both statutes and defines various terms that are used in the Act.

Section 3 of both statutes, under the sub-heading "Computation of Income, General Rules", declares that the income of a taxpayer for the purposes of Part 1 of the Act is his income for the year from all sources inside or outside Canada from, *inter alia*, all businesses and property.

Section 6 of both Acts provides that there shall be included in computing the income of a taxpayer for a taxation year amounts received as interest or on account of or in lieu of payment of or in satisfaction of interest.

Paragraphs (*av*) of s. 127(1) and (*az*) of s. 139(1) were intended, in my opinion, to prevent a taxpayer who might be engaged in two separate businesess not related to each other by reason of their nature from taking into account losses or expenses incurred in one in computing the taxable income of the other. By way of illustration, if a person engages in business as a hardware merchant in a country town and, at the same time, engages in farming or ranching, losses sustained or expenditures incurred in operations of the latter nature may not be taken into account in computing the taxable income from the hardware business, and vice-versa. The reason is that these operations are not related one to the other in the sense intended. The taxpayer's income from the hardware business is to be reckoned as if he had during the taxation year no income except from that source, according to the subsection. If, on the other hand, the merchant's business was that of the sale of produce and he should operate a truck farm for the purposes

of obtaining supplies for his business, presumably these businesses would be considered to be related, within the meaning of the subsection.

As thus interpreted, I consider that the subsection has no application to the matters under consideration in this appeal. The learned trial judge has found that the appellant had only one business which was of the nature above stated. He has also found that part of the appellant's business was carried on in the United States by reason of its ownership and control of the Lakehead Company and the probability that it carried moneys on deposit in the State of Wisconsin, and otherwise engaged in business activities incidental to its receipt of income from its subsidiary. With respect, I disagree with this finding but I think it is an irrelevant consideration in determining the question to be decided. The finding that the appellant had but one business is, in my view, fatal to the contention advanced on behalf of the Minister.

I find no authority in either Act for splitting up the income of the business of a taxpayer into parts or segments for the purpose of applying the clear provisions of s. 11(1)(*c*), as has been done in the present case. In computing the taxable income, the appellant company, of necessity, brought into its accounts the full amount of the interest paid to it upon the securities of its subsidiary and the United States Treasury notes. The allowance permitted by subs. (1)(*a*) of s. 38 of the 1948 Act and subs. (1)(*a*) of s. 41 of c. 148 (which, while slightly amplified, is indistinguishable in meaning) is a deduction from the tax payable for the year in question. Accordingly, as the accounts show, the full amount received in the United States was entered as a receipt in the appellant's accounts and the 15 per cent. tax, which admittedly was properly levied by the Government of the United States and paid by the appellant in that country, was deducted from the tax otherwise payable.

1959

INTERPROVINCIAL PIPE LINE CO. v. MINISTER OF NATIONAL REVENUE

Locke J.

The judgment appealed from has interpreted the word "income" in these subsections as if it read "profit" and, admittedly, if that interpretation is correct, no profit resulted to the appellant from the receipt of these moneys, since the annual cost of it of the funds used in the purchase of the securities exceeded the amounts paid in the United States.

I can find no support for this interpretation either in s. 4 or elsewhere in either Act. The word "income" is used rather loosely in both of these statutes. The attempt to define "income" made in s. 3(1) of the *Income War Tax Act* was not repeated in either. Thus, in s. 3 the income of a taxpayer is stated to include all income, meaning all *receipts* from, *inter alia,* all businesses and property. In s. 4, however, income from a business is said to be the profit therefrom for the year, in this sense meaning the *taxable income.* The deductions allowed are not deductions from income in the sense that that expression is used in s. 3 but from the tax payable in Canada after all of the receipts from the business have been brought into account, as required.

The interest payable by the subsidiary was a receipt classified as income by s. 3, necessarily brought into account by reason of subs. (*b*) of s. 6. The income of the business in question to be determined in order to ascertain what is taxable income is the entire income of the appellant and not that income split up into parts according to the situs of the source of that income. It is income in the sense of s. 3 that is referred to in s. 127(1)(*av*) and in s. 139(1)(*az*), in my opinion.

For these reasons, I would allow this appeal with costs throughout.

It is common ground that the 15 per cent. withholding tax was properly payable under the laws of the United States and, in view of my conclusion, based upon what I consider to be the proper interpretation to be placed upon these sections of the *Income Tax Act,* I express no view as

to the bearing or the effect of the Reciprocal Tax Convention made between Canada and the United States upon the matters in dispute.

*Appeal allowed with costs***.

Solicitors for the appellant: Phillips, Bloomfield, Vineberg & Goodman, Montreal.

Solicitor for the respondent: A. A. McGrory, Ottawa.

1959
Apr. 30
May 1
*Oct. 6

ROLAND DOBSON (*Plaintiff*) .....APPELLANT;

AND

WINTON AND ROBBINS LIMITED (*Defendant*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Real property—Sale of land—Specific performance—Breach of contract—Vendor's claim for specific performance and damages—Vendor disposed of property while trial pending—Whether foundation for claim in damages gone—Right to elect remedy—Pleadings—Items of recoverable damages—The Judicature Act, R.S.O. 1950, c. 190.

The defendant agreed to purchase from the plaintiff a certain property for $75,000 and paid $4,000 as a deposit. The agreement was subject to a condition enabling the defendant to withdraw on giving notice within a defined time limit. The required notice was not given, and before the date of closing, the defendant advised the plaintiff of its repudiation of the contract. The plaintiff sued for specific performance and for damages for delay in carrying out the contract and in the alternative, for forfeiture of the deposit and punitive damages. While the trial was pending, the plaintiff sold the property for $70,000 to a third party. The trial judge dismissed the claim for damages and dismissed the counterclaim for the return of the deposit. Both decisions were affirmed by the Court of Appeal. The plaintiff appealed to this Court.

**Reporter's Note: On December 7, 1959, the judgment in this case was varied on consent to read: "The appeal is allowed with costs here and below, the Judgment of the Exchequer Court is set aside and the re-assessments for each of the years 1950 to 1954 inclusive are referred back to the Minister of National Revenue for further re-assessment by allowing as a deduction from the tax assessed in each of the said years the full amount of the tax paid by the Appellant to the Government of the United States of America in each of the said years on interest payments received from sources in the United States."

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

1959

DOBSON v. WINTON AND ROBBINS LTD.

Held: The action should be maintained and a reference directed to ascertain the damages.

The Supreme Court of Ontario has jurisdiction in every legal or equitable claim pursuant to s. 15(*h*) of *The Judicature Act*. The problem was not one of jurisdiction or substantive law but the narrow one of pleading, and this issue was decided wrongly against the plaintiff. The plaintiff's common law right of action was clear. On the purchaser's repudiation, the vendor could have forfeited the deposit and claimed for loss of bargain and out-of-pocket expenses. *The Judicature Act* gave him the right to join a claim of specific performance. At one stage of the proceedings he must elect which remedy he will take. But he is under no compulsion to elect until judgment, and the defendant is not entitled to assume that by issuing the writ for specific performance with a common law claim for damages in the alternative, the vendor has elected at the institution of the action to claim specific performance and nothing else. If a plaintiff sues in the alternative for specific performance or damages he must make sure that his claim for damages is identifiable as one at common law for breach of contract. The case of *Hipgrave v. Case*, 25 Ch. D. 356, was not authority for any principle that by doing this, the plaintiff has elected his remedy and is bound by his election. If the claim for specific performance alone is made, that constitutes an affirmation of the contract and, to that extent, an election to enforce the contract. But where the alternative common law claim is made, the writ is equivocal and there is no election. The pleading in the present case was clearly identifiable as a common law claim.

The plaintiff was entitled to the difference in price between the two sales against which the deposit must be credited. He was also entitled to the interest and the taxes payable during the period between the two sales. He was not entitled to punitive damages. It was a question of fact whether the course taken in mitigation of damages was reasonable. Having brought evidence showing a reasonable attempt to mitigate, it was up to the defendant to show that the steps taken were not reasonable. The plaintiff was not entitled to claim the real estate agent's commission since he was compensated on this head by the difference in price between the two sales. But he had a valid claim for the expenses of the second sale, including his solicitor's fee and any fee payable on the negotiation of that sale.

APPEAL from a judgment of the Court of Appeal for Ontario[1], affirming a judgment of McRuer C.J.H.C. Appeal allowed.

J. J. Robinette, Q.C., and *D. K. Laidlaw*, for the plaintiff, appellant.

H. H. Siegal, Q.C., and *L. S. D. Fogler*, for the defendant, respondent.

The judgment of the Court was delivered by

[1] (1958), 14 D.L.R. (2d) 110.

JUDSON J.:—The appellant, as vendor, sued the respondent, as purchaser, for specific performance of an agreement for the sale of vacant land. The agreement was subject to a condition enabling the respondent to withdraw on giving notice within a defined time limit that he did not wish to proceed. The respondent failed to give this notice both within the time and in the manner specified and the agreement, therefore, became unconditional and this aspect of the case needs no further consideration.

The date of closing was September 30, 1956. Before that date the defendant notified the plaintiff of its repudiation of the contract. Both at the trial and on appeal this notice has been so construed and the necessary inference drawn that it excused tender by the plaintiff. September 30 was a Sunday and the plaintiff tendered on Monday, October 1. In view of the repudiation of the purchaser, it is unnecessary to consider the validity of the tender either as to time or the sufficiency of the documents. The position taken by the parties at the date of closing was not in doubt. The contract made time of the essence, the vendor insisted on closing and refused an extension of time, and the purchaser had repudiated its obligation. Within a few days the vendor issued a writ for specific performance and damages.

The action came on for trial on October 31, 1957, and evidence was given by the first witness called by the plaintiff that a few days before, on October 18, 1957, the plaintiff had accepted an offer to sell the property for $70,000, which was $5,000 less than the purchase price provided for in his contract with the defendant. This transaction was actually closed on November 8, 1957, a few days after the trial. Any claim for specific performance had, therefore, disappeared and the action, if properly constituted, had become one for damages. The real question in the litigation emerged only at this time—whether the plaintiff, by selling as he did, could go on with a claim for damages and whether his pleading was adequate for this purpose.

1959

DOBSON v. WINTON AND ROBBINS LTD.

Judson J.

The plaintiff did ask for leave to amend his pleadings when the question was raised against him late in the trial. I have already mentioned that it became apparent early in the trial that there could be no claim for specific performance in view of the second contract. Both the trial judge and the Court of Appeal[1], McGillivray J.A. dissenting on this point, refused the amendment. Whether this discretion was properly exercised or whether it is reviewable in this Court is of no importance for counsel for the vendor is content to rest his appeal on the pleading as framed.

The trial judge dismissed the claim for damages but also dismissed the counterclaim for the return of the deposit, and both decisions were affirmed on appeal. The plaintiff appeals from the dismissal of his action and the defendant on appeal argued that his counterclaim for the return of the deposit should have been allowed.

The difficulty that the learned trial judge and the Court of Appeal found in this case is largely of historical origin. A plaintiff who elected to issue a Bill in Chancery for specific performance could get no damages in that Court until the *Chancery Amendment Act, 1858 (Lord Cairn's Act)*, which provided for the award of damages "either in addition to or in substitution for" specific performance. This legislation is still retained in *The Judicature Act*, R.S.O. 1950, c. 190, s. 18. Its application was never as wide in the Court of Chancery as might possibly have been expected. It did not confer upon the Court of Chancery the common law jurisdiction in an action for damages. The prerequisite in the Court of Chancery to the exercise of jurisdiction under this legislation in contract cases was the right to relief by way of specific performance. If, for any reason, a litigant was before the Court without any such right to relief, damages could not be awarded and the plaintiff was still left to his remedy, if any, in a court of law.

This jurisdictional difficulty disappeared with *The Judicature Act*. The Supreme Court of Ontario has jurisdiction in every legal or equitable claim and the purpose of the

[1] (1958), 14 D.L.R. (2d) 110.

legislation as expressed in the concluding words of s. 15(*h*) of the Act is that "all matters so in controversy between the parties may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided." The problem now is not one of jurisdiction or substantive law but the narrow one of pleading, and it is this issue that has been decided in this case adversely to the plaintiff. Both Courts have held that, as pleaded, this case contained nothing more than a claim for specific performance and that with the disappearance of this claim as a result of the second sale, the foundation of the action had gone and the Court could not award damages in addition to or in substitution for specific performance. The submission that an alternative common law claim for damages was pleaded was rejected and the application for amendment refused.

The plaintiff's common law right of action on the facts of this case, as found by both Courts, is clear. On the purchaser's repudiation of the contract, the vendor could have forfeited the deposit and claimed for loss of bargain and out-of-pocket expenses. *The Judicature Act* gives him the right to join this claim with one of specific performance. At some stage of the proceedings he must, of course, elect which remedy he will take. He cannot have both specific performance and a common law claim for loss of bargain. But he is under no compulsion to elect until judgment, and the defendant is not entitled to assume that by issuing the writ for specific performance with a common law claim for damages in the alternative, the vendor has elected at the institution of the action to claim specific performance and nothing else. The present position is clearly summarized in Fry on Specific Performance, 6th ed., p. 604, in these words:

> Accordingly, a plaintiff may now come to the Court and say, Give me specific performance, and with it give me damages, or in substitution for it give me damages, or if I am not entitled to specific performance give me damages as at Common Law by reason of the breach of the agreement.

1959

DOBSON v. WINTON AND ROBBINS LTD.

Judson J.

The judgment at trial is based in part upon the proposition that a claim for specific performance must be deleted by amendment before the alternative claim for damages for breach of contract can be considered. The foundation for this theory must be that by issuing a writ for specific performance the plaintiff has elected this remedy and that no other is open to him. *Hipgrave v. Case*[1], is cited in support of this principle and the plaintiff's action has failed in this case largely because of the construction which the Courts have put upon that decision. There the plaintiff sued for specific performance with a claim in damages under *Lord Cairn's Act* "in addition to or in substitution for specific performance". No common law claim for damages was pleaded in the alternative. By selling the property after the commencement of the action and before judgment, the plaintiff disentitled himself to specific performance and with it fell his claim for damages as framed under *Lord Cairn's Act*. The case is of narrow scope. No application was made at trial to amend the pleadings and the Court of Appeal refused to entertain the application. The case was, therefore, decided on the principles applicable under *Lord Cairn's Act* and the Court of Appeal refused to turn the action into a common law action for damages.

Taken at its face value, the case does emphasize the importance of practice and pleading. If a plaintiff sues in the alternative for specific performance or damages, he must make sure that his claim for damages is identifiable as one at common law for breach of contract. Otherwise he is in danger of having his claim for damages treated as if it were made in substitution for or as an appendage to the equitable remedy of specific performance and then his claim may be defeated by anything which may bar the equitable remedy, unless an amendment is permitted. This is the advice given by the learned editor of Williams on Vendor and Purchaser, 4th ed., p. 1025.

[1] (1885), 28 Ch. D. 356.

The case, however, is not authority for any principle that by issuing a writ for specific performance with an alternative common law claim for damages, the plaintiff has elected his remedy and is bound by the election. If the claim for specific performance alone is made, that constitutes an affirmation of the contract and, to that extent, an election to enforce the contract. But where the alternative common law claim is made, the writ is equivocal and there is no election. The distinction was clearly pointed out by Luxmoore L.J. in *Public Trustee v. Pearlberg*[1]. The matter is summarized in Williams on Vendor and Purchaser, 4th ed., p. 1054, as follows:

> Thus, if a purchaser of land makes default in carrying out the contract, and the vendor sues to enforce it specifically, it will be a good defence that the vendor has *subsequently* made some sale or other disposition of the land, which effectually prevents him from completing the contract. This would be no defence to a claim by the vendor for damages for the purchaser's breach of contract.

In view of the character of the pleading in this case, it is unnecessary to say much more about the decision in *Hipgrave v. Case, supra.* It is obviously a case of narrow application and one that should be confined strictly within its limits. Within a few years it was referred to as a "remarkable decision" by Kay J. in *Gas Light & Coke Company v. Towse*[2]. It appears to be out of line with the authorities, decided under *Lord Cairn's Act* and referred to in *Elmore v. Pirrie*[3], which held that where there was an equity in the bill at the commencement of the suit, the fact of its disappearance before judgment would not disentitle a plaintiff to relief in damages. *Davenport v. Rylands*[4] and *White v. Boby*[5], are to the same effect. Further, it appears to be unduly restrictive of the change brought about by *The Judicature Act.* Both *Elmore v. Pirrie, supra,* and *Tamplin v. James*[6] held that under *The Judicature Act,* whether or not the court could in a particular case grant specific

[1] [1940] 2 K.B. 1 at 19.
[2] (1887), 35 Ch. D. 519 at 541.
[3] (1887), 57 L.T. 333 at 335.
[4] (1865), L.R. 1 Eq. 302, 307.
[5] (1877), 26 W.R. 133, 134.
[6] (1880), 15 Ch. D. 215.

1959

DOBSON v. WINTON AND ROBBINS LTD.

Judson J.

performance, it could give damages for breach of the agreement. In *Tamplin v. James,* Cotton L.J., at p. 222, stated the effect of *The Judicature Act* as follows:

> It has been urged that if specific performance is refused the action must simply be dismissed. But in my judgment—and I believe the Lord Justice *James* is of the same opinion—as both legal and equitable remedies are now given by the same Court, and this is a case where, under the old practice, the bill, if dismissed, would have been dismissed without prejudice to an action, we should, if we were to refuse specific performance, be bound to consider the question of damages.

I turn now to the prayer for relief, which I set out in full:

> (*a*) Specific performance of the written contract entered into between the parties dated July 23rd, 1956.
>
> (*b*) Damages in the amount of $5,000 for delay in the defendant's performance of the contract.
>
> (*c*) In the alternative to (*a*) and (*b*), forfeiture of its deposit and punitive damages for failure to perform the contract.
>
> (*d*) In any event his costs of this action.
>
> (*e*) Such further and other relief as this Honourable Court deems meet.

Clause (*a*) disappears from the action. Clause (*b*) seems to me equally applicable to a common law claim as one for specific performance in the circumstances of this case. The plaintiff was selling vacant land and until he was able to mitigate his damages by a re-sale, he lost the interest on the purchase price that he should have received and he had to pay taxes that the defendant should have paid. The interest should be calculated at the rate of 5 per cent. on $71,000 from the date of closing, September 30, 1956, until October 18, 1957, the date of the re-sale, and he is entitled to the taxes.

In spite of the obviously untenable claim for punitive damages—a claim that could not mislead any pleader—clause (*c*) is clearly identifiable as a common law claim for breach of contract. The measure of damages in this case is the difference between the price provided for in the first contract, $75,000, and the price provided for in the second contract, $70,000. Counsel for the appellant admits that

against the difference of $5,000 must be credited the deposit of $4,000; (Mayne on Damages, 11th ed., p. 234; 29 Hals., 2nd ed., p. 378).

Both the learned trial judge and the Court of Appeal have held that the plaintiff failed to prove these damages. The evidence is that after the repudiation by the purchaser, he listed the property with two real estate agents who had special experience in the field of vacant commercial property. They submitted no acceptable offers. He then sold the property through his own efforts and negotiations. What is held against him is that he did not bring expert evidence of value from the real estate agents and did not show what efforts they had made to sell the property. In a common law action there is a duty upon the plaintiff to mitigate his damages and whether the course taken is a reasonable one is a question of fact; (Mayne on Damages, 11th ed., pp. 147-8). It is difficult to understand what more the plaintiff could have done in this case and he did adduce a considerable volume of evidence showing a reasonable attempt to mitigate his damages and, having done so, it is for the defendant to show that those steps were not such as a reasonable man would have taken in mitigating his damages and in disposing of the property; (Mayne on Damages, 11th ed., p. 150). The defendant made no such attempt in this case but was content to rely upon the pleadings and upon his opposition to any amendment. Neither party had examined for discovery and the defendant made no application for an adjournment to enable it to meet this claim. However, because a reference is necessary on the next point, I would give leave to the defendant to re-open this matter with the burden on it of showing that the plaintiff has failed in his duty to mitigate his damages.

The plaintiff also claims $3,500 for the real estate agents' commission. He is not entitled to this because if he gets damages for the difference in price between the first and second contracts, he is fully compensated on this head. But he has a valid claim for the expenses of the second sale, including his solicitor's fee and the fee, if any, payable on the negotiation of the sale. There must be a reference to

1959

DOBSON v. WINTON AND ROBBINS LTD.

Judson J.

ascertain these amounts and to this extent the plaintiff must pay the costs of the reference. I would leave any further costs of the reference to be dealt with on confirmation of the report.

I would allow the appeal with costs throughout and direct a reference to ascertain the damages in accordance with these reasons. Judgment should be entered for the plaintiff, on the confirmation of the report for the amount so found. The direction for the reference may also provide that the defendant shall have the option to question the reasonableness of the plaintiff's efforts in mitigation of damages, provided it so elects before the issue of this judgment.

Appeal allowed with costs.

Solicitor for the plaintiff, appellant: L. S. Evans, Toronto.

Solicitor for the defendant, respondent: H. H. Siegal, Toronto.

M. & W. CLOAKS LIMITED (*Plaintiff*) ..APPELLANT;

1959
Jun. 2, 3
*Oct. 6

AND

OSIAS COOPERBERG AND ARTHUR DAVIS (*Defendants*) ..... } RESPONDENTS.

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

Damages—Negligence—Flooding caused by failure of valve in steam generating system—"Gardien juridique"—Whether damage preventable by use of reasonable means—Whether onus under art. 1054 of the Civil Code satisfied.

The plaintiff and the defendants occupied the same building, with the plaintiff occupying part of the cellar and the ground floor, and the defendants, the floor above. The defendants had installed for their own business a steam generating system in the cellar some two years ago and had it regularly serviced and repaired. The plaintiff was furnished with the steam in return for an annual payment. In July 1949, both parties closed their establishments for the annual summer holidays. The defendants closed at noon on July 1, and the plaintiff, at 5 o'clock of the same day, it being agreed between the parties that the plaintiff could use the steam system for the rest of that day. The building was then left vacant for 10 days, and when the plaintiff returned, a flood, caused by a defective ball-float in a sealed tank forming part of the steam system, had caused extensive damages to its property. The trial judge dismissed the action, and this judgment was affirmed by the Court of Appeal.

Held (Taschereau and Fauteux JJ. dissenting): The action should be dismissed.

Per Kerwin C.J. and Judson J.: The defendants have satisfied the onus placed upon them by art. 1054 of the *Civil Code,* which provides that a person who has a thing under his care may be relieved of responsibility for damages caused by it by showing that he was unable by reasonable means to prevent the damages.

Per Abbott J.: The liability imposed by art. 1054 C.C. is not that of an insurer. The person can exculpate himself by proving that he was unable by reasonable means to prevent the damage complained of. In the circumstances of this case, the defendants, who were the "gardiens juridiques" of the steam generating system, have established that they were unable, by reasonable means, to prevent the damage complained of.

Furthermore, the plaintiff was precluded from recovering since the damage was a direct and immediate consequence of its failure to take the elementary precaution, before leaving the premises, of closing a valve shutting off the water supply.

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

1959

M. & W. CLOAKS LTD. v. COOPERBERG AND DAVIS

Per Taschereau and Fauteux JJ., *dissenting*: The liability under art. 1054 C.C. exists even in the absence of fault on the part of the person who has the thing under his care. The article enacts much more than a presumption of fault; it establishes liability unless the person can exculpate himself by establishing "force majeure", "cas fortuit", or that he was unable by reasonable means to prevent the damage.

In the present case, there was no question of "force majeure" or "cas fortuit", and the defendants have failed to establish that they had been unable by reasonable means to prevent the flooding. The contention that the plaintiff became the "gardien juridique" as the result of the permission to use the system during the afternoon of July 1, and that the plaintiff should have cut off the water supply, could not be entertained. The *causa causans* of the damage was the defective ball-float. The plaintiff did not become the "gardien juridique" to the extent of being obligated to inspect the functionning of the ball-float. That obligation remained constantly with the defendants.

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

A. L. Stein and *J. Greenstein,* for the plaintiff, appellant.

P. Carignan, Q.C., for the defendants, respondents.

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

THE CHIEF JUSTICE:—At the conclusion of the argument of counsel for the appellant we informed counsel for the respondents that we did not require to hear him on the claims advanced by the appellant under art. 1053 of the *Civil Code*. We are in agreement with the trial judge and Chief Justice Galipeault that there was no room for the application of the article in the circumstances of this case. Mr. Justice Gagné, who dissented in the Court of Queen's Bench (Appeal Side)[1], confined himself to a discussion of art. 1054.

Under art. 1054 the law is well settled that a person who has a thing under his care may be relieved of responsibility for damages caused by it by showing that he was unable by reasonable means to prevent the damage: *Quebec Railway Light, Heat and Power Co. Limited v. Vandry*[2]; *City of Montreal v. Watt and Scott Limited*[3]. In my view the

[1] [1956] Que. Q.B. *811.*
[2] [1920] A.C. 662, 26 R.L. 244, 52 D.L.R. 136.
[3] [1922] 2 A.C. 555, 69 D.L.R. 1.

respondents have satisfied the onus thus placed upon them. The boiler system was new when purchased and had been recently installed by a competent and reputable plumber. It was inspected at reasonable intervals and was repaired when needed. The damage was caused by a defective ball-float contained in a sealed tank and there was no reason for the respondents to open the tank.

For these reasons the appeal should be dismissed with costs.

The judgment of Taschereau and Fauteux JJ. was delivered by

TASCHEREAU J. (*dissenting*):—La demanderesse-appelante et les défendeurs-intimés étaient locataires de certaines parties d'un immeuble, situé au numéro 3794 Boulevard St-Laurent dans la cité de Montréal. L'appelante occupait le premier étage et une partie du soubassement, où elle entreposait sa marchandise.

Les intimés, locataires au second étage, avaient installé au soubassement, dans la chambre où se trouvaient les fournaises, un appareil dont ils étaient propriétaires, aux fins de se procurer la vapeur nécessaire à leur industrie, et moyennant la somme de $300 par année, ils en fournissaient également à l'appelante.

Ce système qui comprenait une bouilloire, chauffée par un brûleur, était alimenté par un réservoir, où la quantité d'eau nécessaire était régularisée automatiquement par un flotteur placé à l'intérieur, qui permettait l'afflux de l'eau, et qui en fermait l'entrée, lorsque le réservoir était rempli. Au début de juillet 1949, alors que les employés de l'appelante et des intimés étaient en vacances, le flotteur cessa de fonctionner, avec le résultat qu'une inondation se produisit, et causa à l'appelante des dommages substantiels, pour un montant de $13,500, que les parties en cause ne contestent pas.

L'action instituée par la demanderesse-appelante, pour réclamer ce montant, a été rejetée par le juge au procès, et ce jugement a été confirmé par la Cour du banc de la reine[1], M. le Juge Gagné étant dissident.

[1] [1956] Que. Q.B. *811*.

1959

M. & W. CLOAKS LTD. v. COOPERBERG AND DAVIS

Taschereau J.

La demanderesse fonde sa réclamation sur les arts. 1053 et 1054 du *Code Civil*. Elle allègue la faute d'omission des intimés qui auraient négligé de faire inspecter ce flotteur, dont la défectuosité a été la cause de l'inondation, et qu'étant propriétaires de ce système à vapeur, dont ils avaient la garde et le contrôle, ils doivent être tenus responsables des dommages subis. Selon l'appelante, les intimés ne se seraient pas libérés de la responsabilité imposée par l'art. 1054, et n'auraient pas démontré qu'ils pouvaient invoquer l'une des exceptions que la loi et la jurisprudence apportent à la rigoureuse application de l'art. 1054 C.C.

Il ne fait aucun doute que c'est un défaut dans le fonctionnement du flotteur qui a été la cause déterminante de cette inondation et des dommages subis par l'appelante. C'est l'application de l'art. 1054 C.C. seulement que je veux discuter pour la détermination du présent litige. D'ailleurs, à l'audition, le procureur des intimés a été informé par la Cour, que cette dernière ne désirait pas l'entendre sur la responsabilité qui pourrait découler de l'application de l'art. 1053.

L'article 1054 C.C., qui impose une responsabilité à toute personne qui a la garde d'une chose qui cause un dommage à autrui, a été pendant longtemps la source d'une jurisprudence hésitante et contradictoire, mais maintenant, les principes qui doivent en régir l'application sont clairement définis. C'est que le *gardien juridique* de cette chose est responsable des dommages qu'elle cause, mais il peut s'exonérer en démontrant l'intervention d'une force majeure, d'un cas fortuit, de l'acte d'un tiers, ou qu'il n'a pu par des moyens raisonnables empêcher le fait qui a causé le dommage. Cette responsabilité existe même en l'absence de faute attribuable au gardien de la chose. L'article 1054 édicte beaucoup plus qu'une présomption de faute; il établit une responsabilité, à moins que le gardien ne puisse se disculper en invoquant l'un des moyens que j'ai précédemment mentionnés. La jurisprudence sur ce point a été définitivement fixée par le Conseil Privé dans la cause de *Quebec Railway v. Vandry*[1] et ce jugement a été précisé encore par

[1] [1920] A.C. 662, pp. 676, 677, 26 R.L. 244, 52 D.L.R. 136.

le même tribunal dans la cause de *La Ville de Montréal v. Watt and Scott Limited*[1]. Dans la première de ces causes, Lord Sumner s'exprime de la façon suivante:

> Furthermore, proof that damage had been caused by things under the defendant's care does not raise a mere presumption of faute, which the defendant may rebut by proving affirmatively that he was guilty of *"no faute"*. It establishes a *liability*, unless, in cases where the exculpatory paragraph applies, the defendant brings himself within its terms. There is a difference, slight in fact but clear in law, between a rebuttable presumption of faute and a liability defeasible by proof of inability to prevent the damage.

Dans la seconde, Lord Dunedin, aux pages 562 et 563, dit aussi:

> It is indeed obvious that if this was not so then the first paragraph would, as regards the damage done by things, impose a most onerous liability on those who had those things under their control. The only addition to the views expressed in *Vandry's Case*, which was not necessary there but is necessary here, is that in their Lordships' view "unable to prevent the damage complained of" *means unable by reasonable means.*

Cette jurisprudence a été constamment suivie depuis qu'elle fut fixée par le Conseil Privé, et ses principes sont d'application quotidienne dans la province.

Dans le cas qui nous occupe, il ne peut évidemment être question de force majeure ni de cas fortuit, et je crois que les intimés n'ont pas démontré, pour se soustraire à l'application de l'art. 1054 C.C., qu'il leur a été impossible par des moyens raisonnables d'empêcher le fait qui a causé le dommage.

Les intimés prétendent qu'au moment de leur départ, ils avaient abandonné la garde et le contrôle de ce système à vapeur à l'appelante, et qu'en conséquence leur responsabilité n'est pas engagée. La preuve révèle que vers midi le 1er juillet, les défendeurs-intimés et leurs employés quittèrent les lieux pour commencer une vacance qui devait se prolonger jusqu'au 10 juillet. Avant leur départ, un nommé Goldbach, propriétaire de l'immeuble, et président de la compagnie appelante, rencontra l'un des défendeurs Davis, et il fut convenu que les employés de la compagnie appelante pourraient, dans l'après-midi du 1er, malgré l'absence des défendeurs, continuer à se servir du système à vapeur. Les employés de la compagnie appelante ne commençaient leurs propres vacances que le soir du 1er juillet, et durant une période d'environ dix jours l'immeuble devait rester vacant.

[1] [1922] 2 A.C. 555, 69 D.L.R. 1.

1959

M. & W. CLOAKS LTD. v. COOPERBERG AND DAVIS

Taschereau J.

C'est la prétention des intimés que, comme résultat de cette permission accordée de se servir du système à vapeur, l'appelante a assumé pour l'après-midi du 1er l'obligation de voir au bon fonctionnement du système à vapeur, et qu'elle en avait la garde et le contrôle. On lui reproche qu'au moment du départ le soir du 1er, elle, par ses employés, a négligé de fermer le conduit d'eau près du réservoir, afin d'empêcher l'eau d'y pénétrer. Il est établi qu'un employé de l'appelante a coupé le circuit du courant électrique, placé au second étage, mais que personne n'a fermé l'entrée de l'eau, et c'est à son retour, dix jours plus tard, que Goldbach a constaté l'inondation qui a causé les dommages réclamés.

Je ne crois pas que cette omission de la part de l'appelante d'avoir fermé le conduit d'eau, puisse libérer les intimés de leur responsabilité civile. Il est très rare que l'on ferme ainsi l'entrée de l'eau dans le réservoir. Le flotteur qui était à l'intérieur du réservoir, fonctionnait automatiquement lorsqu'il était en bon ordre, et fermait la valve quand il y avait une quantité d'eau suffisante, sans aucune intervention humaine. C'est parce que le jour de l'inondation, ce flotteur qu'on a trouvé détaché de sa tige, et au fond du réservoir, n'a pas fonctionné normalement que l'inondation s'est produite. S'il avait été en bon ordre de fonctionnement, malgré que la conduite d'eau au réservoir fût restée ouverte, il n'y aurait eu aucune pénétration d'eau en trop grande quantité, pour causer un débordement. C'est le fonctionnement anormal du flotteur qui est la *causa causans* du dommage subi par l'appelante.

Je ne puis admettre que, comme résultat de l'entrevue entre Goldbach et Davis, l'appelante ait assumé *le contrôle et la "garde juridique"* de ce système à vapeur, au point de l'obliger à vérifier le fonctionnement du flotteur, placé à l'intérieur du réservoir, où il n'était possible d'avoir accès, qu'en levant un couvercle tenu en place par plusieurs chevilles de métal. Les quelques instructions données au départ n'ont pas, à mon sens, et d'ailleurs, ceci est concédé par l'intimé, eu pour effet d'imposer à l'appelante l'obligation de déceler les défauts cachés dont ce système à vapeur pouvait être affecté. L'obligation de voir à son fonctionnement normal est toujours demeurée celle des intimés.

Je suis donc d'opinion que les intimés ne se sont pas libérés de la responsabilité imposée par l'art. 1054 C.C.

L'appel doit donc être accueilli, l'action maintenue jusqu'à concurrence de $13,500 contre les défendeurs conjointement et solidairement, avec intérêts et les dépens de toutes les cours.

The judgment of Abbott and Judson JJ. was delivered by

ABBOTT J.:—The relevant facts are set out in the reasons of my brother Taschereau which I have had the advantage of considering.

I share the view which he has expressed, that respondents' liability, if any, arose, under art. 1054 C.C., and that at the time of the flooding which caused the damage complained of, respondents were the "gardiens juridiques" of the steam generating system installed in appellant's premises. I am also in agreement with his statement of the legal principles which must be applied, in order to determine whether or not appellant can successfully invoke the liability imposed by art. 1054 C.C.

The liability imposed by that article upon a person who has a thing under his care is an onerous one, but it is not that of an insurer. He can exculpate himself by proving that he was unable by reasonable means to prevent the damage complained of—*Quebec Railway, Light, Heat and Power Co. Ltd. v. Vandry*[1] and *Watt and Scott v. The City of Montreal*[2].

As found by the learned trial judge, the steam generating system in question was an ordinary commercial type of equipment made by a well-known manufacturer, which was in common use, and which had been installed new, by a competent plumbing contractor, a little less than two years prior to the events complained of. The system had an expected life of from 10 to 25 years and had been kept in repair and regularly serviced by competent technicians, the last occasion being a few weeks prior to the flooding complained of. The flooding was caused by the failure of a ball-float valve located in the condensation reservoir forming part of the steam generating system. The ball-float was contained in a sealed tank, and could not be seen without

[1] [1920] A.C. 662, 26 R.L. 244, 52 D.L.R. 136.
[2] [1922] 2 A.C. 555, 69 D.L.R. 1.

1959

M. & W. CLOAKS LTD. v. COOPERBERG AND DAVIS

Abbott J.

removing the cover, and there was proof that the weakness or defect in the screw part of a lever arm which entered the ball-float was a latent defect, and one that could not have been discovered by any normal inspection prior to the breakdown. In these circumstances, I am in agreement with the finding of the learned trial judge and of Galipeault, C.J. in the Court[1] below, that the respondents have established that they were unable, by reasonable means, to prevent the damage complained of.

There is a further reason why, in my opinion, the appellant's action must fail. The steam generating system in question was equipped with a valve to shut off the supply of water to the system, and it is obvious that had this valve been closed when the premises were left unattended, the flooding and resultant damage could not have happened. The equipment was located in premises occupied by appellant. Evidence which was accepted by the learned trial judge and by the majority in the Court below, established that one of the respondents drew the attention of the president of the appellant company (who was also owner of the building) to the existence of the valve in question, and advised its use.

The respondents left the building on the morning of July 1, 1949. Appellant continued in occupation and operated its plant for the remainder of that day, and the steam generating system appears to have functioned normally during that time. Appellant then closed and locked the premises, retained the key in its possession, and the building was left vacant and unattended for a period of some ten days.

In my opinion, the flooding and resultant damage were a direct and immediate consequence of appellant's failure to take the elementary precaution of closing the valve in question, before leaving the premises vacant and unattended for a relatively long period of time, and appellant is therefore precluded from recovering for the loss which it sustained as a result of the flooding—See Sourdat. Responsabilité, 6th ed., vol. 1, no. 660.

[1] [1956] Que. Q.B. *811*.

I would dismiss the appeal with costs.

Appeal dismissed with costs, TASCHEREAU *and* FAUTEUX JJ. *dissenting.*

Attorneys for the plaintiff, appellant: Stein & Stein, Montreal.

Attorneys for the defendants, respondents: Carignan, Colas & Provost, Montreal.

1959

M. & W. CLOAKS LTD. *v.* COOPERBERG AND DAVIS

Abbott J.

AMEDEE LANGELIER (*Plaintiff*) .....APPELLANT;

AND

GERARD DOMINIQUE AND CAMILLE DOMINIQUE (*Defendants*) ..... } RESPONDENTS.

1959

Jun. 3, 4

*Oct. 6

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

Damages—Negligence—Dangerous premises—Garage—Customer falling in greasing pit—Customer aware of location of pit—Whether garage owner liable—Art. 1053 of the Civil Code.

The plaintiff brought his car to the defendants' garage for a minor repair. The defendant G drove the car into the garage and placed it with its front facing a greasing pit and about one foot short of it, so that 10 feet of the pit were left uncovered in front of the car. The defendant opened the hood of the car and made the repair while standing on the left of the pit. The plaintiff watched him for a while and then went outside for a few minutes. When he came back to the same side of the car, the defendant, having finished the repair, was at the counter situated on the other side of the pit. The plaintiff proceeded to go to the counter and instead of passing in back of the car, attempted to pass in front of it. He fell in the greasing pit and was injured. The trial judge dismissed the action, and this judgment was affirmed by a majority in the Court of Appeal.

Held: The accident was attributable exclusively to the fault of the plaintiff.

In the circumstances of this case, the careless mistake of the plaintiff was an inexcusable fault. The garage, the location of the pit and the pit itself had nothing unusual and did not constitute a danger which a reasonable man, taking the most ordinary precautions for his personal security, could not provide against. The absent-mindedness of the plaintiff, although a possibility, was not a probability, but an eventuallity which the defendant, as a reasonably prudent man, was not obliged to foresee.

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

1959

LANGELIER v. DOMINIQUE

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

J. Turgeon, Q.C. and *R. Bélanger,* for the plaintiff, appellant.

P. Langlois, Q.C., for the defendant, respondent.

The judgment of the Court was delivered by

FAUTEUX J.:—Dans l'avant-midi du 22 décembre 1954, l'appelant arrêta son automobile au garage des intimés pour en faire corriger le circuit d'éclairage. Gérard Dominique prit charge de l'affaire et, comme il commençait à pleuvoir, il entra la voiture dans le garage dont il convient de donner une description pour l'intelligence de l'accident qui s'y produisit et la question soulevée au litige en résultant.

Au centre de cet établissement mesurant 36 pieds en largeur et 70 pieds en profondeur se trouvait, dans le sens de la profondeur, une fosse, utilisée pour le graissage des voitures, ayant 12 pieds de longueur, presque 3 pieds de largeur et $4\frac{1}{2}$ pieds de profondeur et dont l'extrémité antérieure était à 16 pieds des portes d'entrée. Parallèlement à cette fosse et à 8 pieds et quatre pouces à droite d'icelle, il y avait, en entrant, un comptoir long de 28 pieds où étaient exposés les articles mis en vente et où se faisait le règlement des comptes pour marchandises ou services. Telle que placée par Dominique, l'avant de la voiture de l'appelant se trouvait vis-à-vis et à environ un pied de l'extrémité antérieure de la fosse. A l'autre extrémité de celle-ci se trouvait une voiture empiétant de deux pieds sur la fosse; de sorte qu'entre ces deux voitures, il y avait un espace libre de 11 pieds dont 10 représentant la longueur de la partie non couverte et bien visible de la fosse.

Dominique ouvrit le capot du moteur et se tenant du côté du volant, soit du côté gauche de la fosse, procéda à la réparation. Placé tout près de lui, l'appelant le regarda travailler pendant environ cinq minutes, puis il sortit du garage pour aller parler à l'un de ses amis. Ayant terminé la réparation, Dominique sortit lui-même, alla servir deux clients puis entra dans le garage en passant à droite de la

[1] [1958] Que. Q.B. 744.

fosse pour se diriger au comptoir et y préparer ses factures. Il était à ce faire lorsque l'appelant revint au point même d'où il avait regardé travailler le garagiste et constatant que ce dernier était au comptoir, voulut s'y rendre pour le payer. Au lieu de passer à l'arrière de sa voiture, comme il aurait dû, n'eût-il été distrait, il passa à l'avant, mit le pied dans le vide, tomba dans la fosse et se blessa. C'est alors qu'il s'exclama en des termes indiquant clairement qu'il se blâmait lui-même pour cet accident résultant du fait qu'il avait, suivant la teneur même de son exclamation, stupidement oublié la présence de la fosse à cet endroit.

Dans l'action qu'il intentait quelque neuf mois plus tard aux intimés, il allégua en substance que ce puits de graissage constituait une installation désuète, offrant un danger imprévisible, que rien n'en indiquait la présence, dans la plancher de ce garage sombre, à un endroit où il devait normalement passer pour se rendre au comptoir, et concluant, pour ces raisons, à la responsabilité des défendeurs intimés, demanda à ce qu'ils soient condamnés conjointement et solidairement à lui payer la somme de $10,898.75 à titre de dommages-intérêts. En défense, les intimés, ayant nié ces allégations, plaidèrent particulièrement que cette fosse était normale, bien visible, que le demandeur en connaissait l'existence et l'emplacement, que n'eût-il été distrait et eût-il regardé où il marchait, il n'y serait pas tombé, ainsi qu'il en avait lui-même fait l'admission.

Appréciant la preuve soumise au procès, le juge de première instance rejeta les prétentions du demandeur pour accepter celles des défendeurs. Bref, il exprima l'avis que l'appelant connaissait bien le garage des intimés pour l'avoir plusieurs fois fréquenté, avant et même le jour précédant celui de l'accident, que les lieux étaient suffisamment éclairés, qu'il connaissait non seulement l'existence mais l'emplacement de la fosse, que quelques instants mêmes avant d'y tomber, il s'en était tenu à proximité alors que Dominique travaillait sous le capot du moteur. Aussi bien et décidant que l'accident lui était exclusivement imputable, il rejeta l'action avec dépens.

1959

LANGELIER v. DOMINIQUE

Fauteux J.

Porté en appel, ce jugement fut confirmé par une décision majoritaire de la Cour du banc de la reine[1]. Tous les juges de cette Cour, cependant, acceptèrent, expressément ou implicitement, comme bien fondées, les constatations de faits du juge au procès. Tous ont retenu également la faute de l'appelant. Mais alors que MM. les Juges Pratte et Martineau, de la majorité, voient en cette faute la cause unique du fait dommageable, M. le Juge Taschereau, dissident, déclare qu'il était bien prévisible que des clients, tout naturellement préoccupés de leurs affaires, pourraient momentanément oublier la présence de la fosse et y faire une chute, que ce danger aurait pu être évité si cette fosse eût été placée au fond du garage à un endroit éloigné de celui où circulait le public, et, pour ces raisons, conclut que les intimés n'ont pas pris toutes les précautions possibles pour protéger le public, et qu'ils doivent, en conséquence, partager également avec la victime la responsabilité de cet accident.

A la lumière des faits révélés par la preuve, l'inattention momentanée de l'appelant constitue une faute certaine. Dans certains cas, illustrés par l'affaire *Dumouchel v. La Cité de Verdun*[2], cause récemment décidée par cette Cour, il se peut que l'inattention momentanée de la victime d'un accident soit la conséquence normale, sinon inévitable, d'une situation ou d'un état de choses attribuables à autrui et que retenir, en pareils cas, cette inattention pour conclure, en droit, à la responsabilité de la victime soit exiger de celle-ci un degré de prudence supérieur à celui qu'on attend de l'homme raisonnablement prudent, placé et agissant dans les mêmes circonstances. Tel n'est pas le cas qui nous occupe. En l'espèce, la faute d'inattention de l'appelant constitue, suivant la teneur de l'aveu spontané qu'il en fit lui-même l'instant suivant la chute en résultant, une faute inexcusable. Le plan, les photographies et les témoignages au dossier démontrent que le garage des intimés, la fosse et son emplacement n'avaient rien d'inusité et n'offraient aucun danger contre lequel ne pouvait se prémunir un adulte normal ayant pour sa sécurité personnelle le soin le plus ordinaire.

[1] [1958] Que. Q.B. 744.

[2] [1959] S.C.R. 668.

La distraction de l'appelant, comme l'indique M. le Juge Pratte en s'appuyant sur les commentaires de notre collègue, M. le Juge Taschereau, dans *Ouellet v. Cloutier*[1], pour possible qu'elle était, n'était pas une chose probable, mais une éventualité que les intimés, tout comme tout homme normalement prudent et avisé, réglant sa conduite d'après le comportement ordinaire des humains, n'étaient pas tenus de faire entrer dans leurs prévisions parce qu'elle dépasse ce à quoi l'homme prudent et avisé peut raisonnablement s'attendre.

On a cité, de la part de l'appelant, les causes de *Payette v. Duff*[2] *et Saint-Amant et vir v. Choinière*[3]. Les circonstances qui, dans ces causes, conduisirent MM. les Juges Archambault et Salvas, respectivement, à conclure à la responsabilité du garagiste pour la chute d'une personne dans le puits de graissage d'un garage, diffèrent essentiellement de celles qu'on trouve en la présente cause.

Partageant l'avis des deux Cours inférieures que ce malheureux accident est exclusivement attribuable à la faute de la victime, je renverrais l'appel avec dépens.

Appeal dismissed with costs.

Attorney for the plaintiff, appellant: R. Belanger.

Attorneys for the defendants, respondents: Raymond, Langlois, Bissonnet & DeGrandpré.

DAME CLORINTHE DAVID (*Defendant*) ..... APPELLANT;

AND

LA VILLE DE JACQUES-CARTIER (*Plaintiff*) ..... RESPONDENT.

1959
*Jun. 5
**Nov. 2

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

Municipal corporations—Expropriation—Streets—Property subdivided—Indemnity claimed for work done by subdiviser for opening streets—The Cities and Towns Act, R.S.Q. 1941, c. 233, as amended by 12 Geo. VI, c. 74.

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*PRESENT: Taschereau, Locke, Fauteux, Abbott and Martland JJ.
**Locke J., owing to illness, took no part in the judgment.

[1] [1947] S.C.R. 521.
[2] [1951] Que. S.C. 376.
[3] [1957] Que. S.C. 236.

1959

DAVID
v.
VILLE DE
JACQUES-
CARTIER

The defendant's property was subdivided into lots with streets set aside to serve these lots. The municipality passed a by-law to acquire these streets. As under s. 6 of 12 Geo. VI (1948), c. 74, no indemnity could be granted for land destined by the owner of a subdivision for the making or widening of a street, the defendant claimed an indemnity for the work which had been done for the opening of these streets. The Public Service Board allowed an indemnity of $3,579.50, and this judgment was homologated by the Superior Court. The judgment was reversed by the Court of Appeal.

Held: The appeal should be dismissed.

The author of a subdivision is presumed to include in the price of sale of his lots the value of the land set aside by him to serve as streets. *Cité de Montréal v. Maucotel,* [1928] S.C.R. 384. The reason for that presumption is generally equally present as regard to the ordinary work of opening a street, as was the work done in this case. The evidence supported the conclusion reached by the Court of Appeal that the presumption that the costs of this work had been included in the price of the lots sold, had not been rebutted.

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

F. Chaussé, for the defendant, appellant.

E. Brais, Q.C., for the plaintiff, respondent.

The judgment of the Court was delivered by

FAUTEUX J.:—L'appelante, étant aux droits de feu son époux, Joseph-Napoléon Lamarre, a repris l'instance en expropriation instituée contre ce dernier par la Cité. Elle se pourvoit à l'encontre d'une décision unanime de la Cour du banc de la reine[1] infirmant le jugement de la Cour supérieure, lequel, homologuant une sentence de la Régie des Services Publics, a condamné la Cité à payer à Lamarre, à titre d'indemnité, la somme de $3,579.50.

Les faits conduisant à cette expropriation et à ce litige sont les suivants.

Lamarre, propriétaire d'une terre alors connue et désignée sous le numéro 85 au cadastre de la paroisse de Saint-Antoine de Longueuil, maintenant la cité de Jacques-Cartier, en a, suivant les plan et livre de renvoi par lui déposés au bureau d'enregistrement, fait la subdivision pour l'établissement de lots à bâtir et de rues desservant ces lots, soit les rues Barthélemy, St-Michel, des Ormes et

[1] [1959] Que. Q.B. 175, *sub nom. Ville de Jacques-Cartier v. Lamarre.*

Dupont. Par la suite, il procéda à la vente de ces lots et à l'ouverture des rues prévues. Eventuellement la Cité, ayant considéré que le temps était venu de faire droit aux multiples demandes faites à ces fins par les acquéreurs des lots de cette et d'une autre subdivision, adoptait, le 13 juin 1950, un règlement décrétant l'acquisition, la confection ou amélioration, de même que l'entretien des principales rues de ces subdivisions, dont les rues ci-haut nommées.

Aux termes de l'art. 6 de la Loi 12 George VI (1948), c. 74, aucune indemnité ne peut être accordée par la Cité pour le terrain ainsi destiné par le propriétaire à l'établissement d'une rue. Cet article se lit comme suit:

> Nulle indemnité ne doit être accordée pour le terrain destiné à l'établissement ou à l'élargissement d'un chemin, d'une rue ou d'une ruelle suivant les plan et livre de renvoi déposés au bureau d'enregistrement par le propriétaire d'une subdivision. Cette destination peut s'inférer du site et de la configuration du terrain, de même que de toutes autres circonstances, la disposition ci-dessus a son effet à compter du premier janvier 1910, mais n'affecte pas quant aux frais, les causes pendantes, s'il en est.

Reconnaissant que cette disposition s'applique en l'espèce, Lamarre n'a réclamé aucune indemnité pour le terrain qu'il a destiné à l'établissement des rues. On a prétendu, cependant, qu'il avait droit à une indemnité quant aux travaux faits pour l'ouverture de ces rues; en fait, l'indemnité de $3,579.50 allouée en première instance représente le coût de ces travaux suivant une estimation faite d'accord entre les parties et sans préjudice à leurs droits. La Cité, d'autre part, a soumis que, selon l'interprétation qu'il convient de donner à la disposition de la loi précitée, le mot "terrain" comprend les travaux d'ouverture de la rue; et elle a ajouté que, de toutes façons, ces travaux n'ont aucune valeur commerciale, que leur coût est inclus dans le prix des lots desservis ou chargé à leurs propriétaires, et que tels travaux ne peuvent, ni physiquement, ni légalement, être séparés du terrain lui-même.

La Cour d'Appel a considéré, entre autres raisons retenues pour infirmer ce jugement de première instance, que le coût de ces travaux au propriétaire est, tout comme le coût du terrain, présumé avoir été inclus dans le prix de

1959

DAVID
v.
VILLE DE JACQUES-CARTIER

Fauteux J.

vente des lots ou, à tout événement, chargé à leurs acquéreurs et qu'en l'espèce, cette présomption n'a pas été repoussée, comme l'a prétendu la Régie des Services Publics, mais qu'au contraire, elle a été confirmée par la preuve au dossier.

Dans *La Cité de Montréal v. Maucotel*[1], cette Cour, composée de MM. les Juges Duff, Migneault, Newcombe, Rinfret et Smith, a déclaré que pour faire une opération profitable, l'auteur d'une subdivision doit inévitablement se rembourser, sur le prix des lots, de la valeur des rues et ruelles qu'il met à part et qu'il abandonne pour l'utilité de ces lots; et on a jugé que l'auteur d'une telle subdivision est, en conséquence, présumé avoir pourvu à ainsi se rembourser. La raison sur laquelle se fonde cette présomption, en ce qui touche le terrain destiné à l'ouverture des rues et ruelles est généralement, je crois, également présente en ce qui concerne les travaux ordinaires d'ouverture de ces rues et ruelles. La preuve manifeste que les travaux faits par Lamarre étaient d'un ordre pour le moins rudimentaire et limités à ce qui était strictement nécessaire pour que les rues soient ouvertes. Certains acheteurs ont dû eux-mêmes travailler à creuser, en partie, le fossé assurant l'égouttement de la rue. Cette preuve indique aussi que Lamarre, personnellement ou par son agent, a représenté aux personnes achetant ces lots pour s'y construire, qu'il procéderait à l'ouverture des rues, comme d'ailleurs il a fait. Le témoin Guérard l'affirme expressément et a, de plus, produit un reçu attestant un paiement fait pour "la confection" des rues. En somme, la preuve supporte la conclusion à laquelle en est arrivée la Cour d'Appel, savoir que la présomption voulant que le coût de ces travaux d'ouverture ait été inclus dans le prix de vente ou chargé aux acquéreurs des lots, n'a pas été repoussée.

Dans ces circonstances, il paraît bien évident que si l'intimée était condamnée à payer l'indemnité réclamée pour le coût de ces travaux, les contribuables, d'une part, et Lamarre ou ses ayants-droit, d'autre part, feraient et recevraient, respectivement, deux fois le paiement pour ces travaux.

[1] [1928] S.C.R. 384.

Ces raisons étant décisives du litige, il n'est pas nécessaire de s'arrêter à considérer les autres motifs supportant le jugement de la Cour du banc de la reine.

Je renverrais l'appel avec dépens.

Appeal dismissed with costs.

Attorneys for the defendant, appellant: Chaussé & Godin, Montreal.

Attorney for the plaintiff, respondent: E. Brais, Montreal.

THE PRELOAD COMPANY OF CANADA LIMITED (*Plaintiff*) ..... APPELLANT;

AND

THE CITY OF REGINA (*Defendant*) ....RESPONDENT.

1959
*May 18, 19, 20, 21, 22
**Nov. 2

HARRISON COOLEY HAYES, TRUSTEE (*Plaintiff*) ..... APPELLANT;

AND

THE CITY OF REGINA (*Defendant*) ...RESPONDENT.

THE CITY OF REGINA (*Plaintiff by Counterclaim*)

AND

HARRISON COOLEY HAYES AND THE GUARANTEE COMPANY OF NORTH AMERICA (*Defendants by Counterclaim*)

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Contracts—Agreement to manufacture and deliver concrete pipe—Bond furnished for performance—Defective pipe—Breach of contract treated by one party as a repudiation—Whether breach of implied conditions under s. 16(1) and (2) of The Sale of Goods Act, R.S.S. 1953, c. 353—Whether contract wrongfully repudiated—Damages.

*PRESENT: Locke, Cartwright, Fauteux, Abbott and Martland JJ.
**Locke J., owing to illness, took no part in the judgment.

1959

PRELOAD CO. OF CANADA v. CITY OF REGINA

Surety—Whether variations in contract without knowledge or consent of surety—Whether surety liable for breach of contract by principal.

The plaintiff company contracted with the defendant municipality to manufacture and deliver a type of prestressed concrete pipe. The defendant surety company bonded the plaintiff for the due performance of the contract. The pipe produced was defective, the cause of the failure being the use of calcium chloride in the manufacturing process. The municipal engineer, who by the contract was made the sole judge of all matters connected with the proper carrying out of the works, rejected the pipe. The municipality elected to treat the alleged breach of contract as a repudiation, and the plaintiff company sued for damages on the ground, *inter alia*, that the contract had been wrongfully repudiated. The municipality obtained the pipe from another source and, by counterclaim, sued for damages for breach of contract and also claimed against the surety the amount of the bond. Subsequently, the trustee for the plaintiff company, which had made an assignment in bankruptcy, commenced a second action.

The trial judge dismissed the actions and allowed the counterclaim for damages, and also directed payment by the surety in the amount of its bond. These judgments were affirmed by the Court of Appeal. The trustee and the surety appealed to this Court.

Held: Both appeals should be dismissed.

The contention, based on the municipality's conduct before entering the agreement and on the terms of the agreement itself, that s. 16(1) of *The Sale of Goods Act* did not apply because the municipality did not rely upon the plaintiff's skill or judgment, could not be entertained. That question of fact was decided by the Courts below in favour of the municipality. There was ample evidence on which to base such a finding and a preponderance of evidence justified the conclusion reached.

The Courts below found that there had been a breach of the implied condition contained in s. 16(2). The only issue remaining in this Court on this point was the question as to whether or not the goods had been bought by description. That question must be answered in the affirmative, and, therefore, there was a breach of the statutory condition. The use of calcium chloride, in itself, was not a breach of the specifications. The plaintiff made the decision to use it and informed the municipality which took no action. By the terms of the contract the municipality had the right to reject the pipe containing calcium chloride; furthermore, it had the right to refuse pipe which failed to satisfy the implied conditions of s. 16(1) and (2) of the Act. In the light of all the circumstances, the municipality was entitled to infer that the plaintiff did not intend to be any longer bound by the contract and, therefore, the municipality was justified in electing to treat the breaches as a repudiation.

On the issue of damages, the municipal engineer's right to take over the plant was optional. Furthermore, there was no evidence to conclude that the municipality was able to take over the plant and to produce satisfactory pipe.

As to the liability of the surety. The first main ground of defence on this point was that the municipality had improperly agreed to variations in the contract without the knowledge or consent of the surety. The use of calcium chloride did not involve a variation in the specifications relating to materials. As to the use of hot water instead

of steam in the curing process, this kind of variation was recognized by the bond as being permissible and, consequently, the rule in *Holme v. Brunskill* (1878), 3 Q.B.D. 495 at 505, did not apply so as to assist the surety in this case.

The further contention that the municipality, having acquiesced in the use of calcium chloride, could not as against the surety claim damages resulting from the defects in the pipe so processed, could not be entertained. The municipal engineer was not asked to make a decision as to its use or of that of hot water. He had no reason to forbid their use. The municipality did not acquiesce in the breaches of the contract which resulted from the failure to fulfil the implied conditions of s. 16(1) and (2) of the Act. All that the municipality was doing was to rely upon the plaintiff's skill and judgment, which it was entitled to do.

APPEALS from a judgment of the Court of Appeal for Saskatchewan[1], affirming a judgment of Graham J. Appeals dismissed.

C. F. H. Carson, Q.C., R. M. Balfour, Q.C., A. Findlay, Q.C., and *J. R. Houston,* for the plaintiff, appellant.

E. C. Leslie, Q.C., and *D. O'C. Doheny, Q.C.,* for the defendant by counterclaim Guarantee Co. of North America.

J. L. McDougall, Q.C., E. D. Noonan, Q.C., and *G. F. Stewart, Q.C.,* for the defendant City of Regina.

The judgment of the Court was delivered by

MARTLAND J.:—The respondent, the City of Regina (hereinafter referred to as "the City"), in order to augment its water supply, decided to construct a pipe line from Buffalo Pound Lake to Regina, a distance of some 36 miles. In 1949, its officials commenced to collect information in connection with this project, including the type of pipe proposed to be used.

On April 5 of that year Mr. Shattuck, the assistant superintendent of Waterworks for the City, wrote to the appellant, The Preload Company of Canada Limited (hereinafter referred to as "Preload"), at Montreal, requesting, for purposes of estimating and design, information as to prices on several sizes of pre-stressed concrete pipe. Information was

[1] (1958), 13 D.L.R. (2d) 305, 24 W.W.R. 433.

1959

PRELOAD CO. OF CANADA v. CITY OF REGINA

Martland J.

furnished by Preload and thereafter there was further correspondence between Shattuck and Preload respecting prestressed concrete pipe. Preload opened an office in Regina and discussions took place between City officials and officials of Preload.

During the course of these discussions Mr. Doull, the general manager and later the president of Preload, told Shattuck that the pipe they proposed to supply was a good quality product, would have a long life and would be satisfactory for the job. He stated that it would be as good as, or better than, steel pipe. He also stated that Preload was expert in prestressed concrete. Similar statements were made by Doull to Mr. Farrell, then the superintendent of Waterworks for the City.

In August, 1950, the City issued instructions to bidders who would tender on the supply of pipe for this line. The type of pipe specified in these instructions was steel pipe, or concrete pipe with a steel shell. The instructions then went on to say:

> Contractors may submit alternate bids. Where bids are submitted on pipe other than those specified, the contractor shall submit with his tender complete specifications. Where possible, reference should be made to American Water Works Association Standard Specifications.

The pipe proposed to be manufactured by Preload was concrete pipe without a steel shell. There were no specifications for this type of pipe recognized as standard.

A tender was submitted by Preload, accompanied by specifications for the supply of pipe for the project. In the letter, dated October 13, 1950, accompanying the tender it was stated, among other things:

> Our Company is the only one specializing in the design and construction of prestressed concrete on this Continent. Our associated companies operate in many parts of the world, including the United States, Great Britain, South America, South Africa and Australia, thus making available the technical knowledge and experience of many countries—through our organization.
>
> * * *
>
> We have provided a design utilizing the most up to date techniques available in this field of manufacture. Prestressed concrete, over the past decade, has been recognized by the engineering world as a material of ever increasing usefulness, and its application to pressure pipe and other circular structures is one in which we have played a major part in world development.

You will note that under our design a much smaller tonnage of steel is required. This we believe is a most important consideration, in view of the critical shortage of this material in our National economy. We are able to achieve this by the nature of our process and design; by the use of extremely high quality wire for the prestressing; and by the use of concrete of a much higher strength than that used in other processes. The reduction in steel tonnage will of course be reflected most favourably to you should there be an upward swing in freight rates or steel prices, necessitating the application of escalator clauses contained in your contract form.

Bids for the supply of pipe for the project were received by the City on October 16, 1950. Shortly afterwards Preload issued a letter, addressed to the councilmen and citizens of Regina, in which it was stated:

The pipe, proposed by the Preload Co. of Canada, is a high grade, durable concrete pipe, bound with finest grade spring steel wires and is fully responsive to all requirements set out by your engineers. Further, the performance of this proposed pipe is backed up by this company's bond for faithful performance in excess of one million dollars.

* * *

In these days of world preparedness we cannot overlook the importance of steel conservation in the natural interest. A steel pipe line for your project alone would require about 11,000 tons of critical steel plate. Our product employs much less critical material and the spring steel for our pipe, which, while being of a less critical variety, requires only 1,500 tons. This saving in critical steel in no way detracts from the quality of the finished product. This staggering fact is accounted for by the very great superiority of strength of the steel employed.

Messrs. Farrell and Shattuck, having received advice from a firm of consulting engineers, recommended to a meeting of the City council, held on October 23, 1950, in favour of the acceptance of the tender submitted by The Vancouver Iron Works, which had bid for the supply of steel pipe, although its bid (the second lowest) was, comparatively, some $275,000 in excess of that submitted by Preload. Their reason was the fact that the pipe proposed to be supplied by Preload was a comparatively new type of pipe and had not yet been widely accepted. On October 26, 1950, the Regina City Council resolved to accept the tender of The Vancouver Iron Works.

On October 23, 1950, Preload wrote a letter of protest to the City council, regarding the recommendation of the engineering department, in which it was stated:

We do not believe there are any technical objections applying to our product, which do not also apply to the pipe recommended. We do firmly believe there are many favourable features inherent in our product, which

1959

PRELOAD CO. OF CANADA v. CITY OF REGINA

Martland J.

are not common with the pipe recommended. We further believe that any objection brought forward, can be reasonably answered and we request that an opportunity be given us to provide these answers.

On October 26, 1950, Preload wrote to the Mayor of Regina, enclosing telegrams and reports received from various authorities regarding its design and pipe experience and a brief with respect to the experience and background of Preload. This letter concluded with the sentence:

> This clearly proves that this type of pipe has been in use for eight years and has been satisfactory in every way.

Because of a shortage of steel, The Vancouver Iron Works was unable to carry out its contract. Negotiations were then carried on by the City with Preload, which ultimately resulted in the submission of a bid by Preload on February 19, 1951. It was proposed by Preload that the pipe would be made, at the City's option, under one or other of the specifications already submitted. One of these was the set of specifications accompanying the tender of October 13, 1950; the other a set referred to as Canada Gunite Specifications, which had been sent to the City by Mr. Doull as president of that company on February 5, 1951.

Specimen pipe manufactured by Preload in Montreal was subjected to tests in that city in the presence of Mr. Shattuck and Professor de Stein of McGill University, an expert retained by the City.

Shattuck also corresponded with an engineer in Australia regarding the performance there of Rocla pipe, a type similar to that proposed to be manufactured by Preload. Prior to the execution of a contract with Preload, Shattuck visited Chicago to see the city engineer and his assistants there to discuss their experience in the use of prestressed concrete pipe.

A contract was finally made between the City and Preload on July 13, 1951. It consisted of a short agreement, a longer agreement, attached specifications and drawings. In the agreements Preload is referred to as "the Contractor".

Clause 2 of the short agreement provided as follows:

> 2. THAT the Contractor will manufacture and deliver to the City approximately One Hundred and Eighty-seven Thousand and Thirty (187,030) Feet of Thirty-six (36) Inch non-cylinder, prestressed concrete pipe, and specials, for the Supply Line from Buffalo Pound Lake Filtration Plant to Regina, as set out in the attached Specifications, Addendum and

Drawings, in accordance with the terms and conditions shown in the said Specifications and Addendum, for the sum of Two Million, Four Hundred and Eighteen Thousand, Five hundred and Seventeen Dollars and Thirteen Cents $2,418,517.13), subject to escalation occasioned by changes in the cost of labour, materials or freight rates referred to in the attached agreement.

The short agreement also provided that Preload should furnish a bond for the proper performance of its agreement, conditioned in the sum of 50 per cent. of the tender price and that time should be of the essence of the agreement.

The long agreement, which appears to have been patterned on a building contract, contained a number of provisions. I will refer only to those which were submitted by counsel to be material to the issues involved in this appeal.

Clauses 1, 3 and 4 read as follows:

1. *COVENANT TO DO WORK*

That in consideration of the mutual covenants herein contained the Contractor covenants and agrees to and with the City that he will well and sufficiently do, execute, perform and finish in a true, perfect, thorough and workmanlike manner all the works as set out in the plans, specifications and addenda hereto attached, for the prices stated in the tender as accepted by the City, which plans, specifications and addenda are incorporated in and form parts of this contract.

3. *WORK TO BE COMMENCED*

The work of setting up a pipe manufacturing plant shall be started within ten days of being awarded the contract. The sequence of operations shall be such as to insure the manufacture of completed pipe not later than Dec. 1, 1951.

4. *DELIVERY*

Delivery shall be made at the Contractor's plant in Regina, beginning not later than May 15, 1952. Pipe manufacture shall be completed by April 1, 1953 unless the period of completion is extended by the Engineer under the powers herein conferred on him. At least 1/16 of the total length of pipe and specials to be supplied under this contract shall be completed each month between Dec. 1, 1951 and April 1, 1953. The capacity of the Contractor's construction plant, sequence of operations, method of operation and the forces employed shall, at all times during the continuance of this contract, be subject to the approval of the Engineer and shall be such as to insure the completion of the work within the specified period of time.

Clause 6 empowered the engineer to grant extensions of time for the completion of the work. Clause 7 related to applications by the contractor for such extensions of time, which were to be made to the engineer in writing. It stated

1959

PRELOAD CO. OF CANADA v. CITY OF REGINA

Martland J.

that the failure or neglect of the contractor to make application for extensions as provided should constitute a waiver on his part of any right to the same.

Clause 8 provided:

8. *ENGINEER IN CHARGE FOR CITY*

The Engineer shall have full charge of the works and if not personally present he shall be represented by an assistant Engineer or Inspectors, and the Contractor at all times shall have on the works some competent person who he has advised the Engineer has full power to act for him in all matters pertaining to the contract.

Clause 9 empowered the engineer to appoint an assistant engineer or inspectors to aid him in carrying on the works.

Clause 10 provided that, in case of failure or neglect by the contractor to carry on the work with the expedition or in any other manner as directed by the engineer, or the contractor's refusal or neglect to do or abstain from doing anything which, by the terms of the contract, he was required to do when authorized, directed or required by the engineer, the engineer was entitled to take over the works or any part of them.

Clause 11, dealing with plans, specifications and details, provided, inter alia:

The plans and specifications will be supplemented by details when found necessary. Before proceeding with any part of the work the Contractor shall consult the Engineer as to whether details are necessary. In event of the Contractor failing to take such action he shall make good at his own expense any defect or alteration caused thereby.

All directions given by the Engineer to the Contractor or arrangements made adding to or varying the plans, specifications and details incorporated in the contract shall be in writing.

Clause 13 read as follows:

13. *THE CONTRACTOR TO SUPPLY MATERIALS, LABOUR AND PLANT*

The Contractor, unless it is herein specified otherwise, shall provide and furnish all materials, labour and plant together with all proper and required facilities for removing and transporting same that shall be necessary for the proper carrying out and completion of the works.

Clause 14 enabled the engineer to obtain samples of material required to be supplied by the contractor for approval before delivery of the same at the site of the works.

Clause 15 provided that plant or materials which the engineer decided were not in accordance with specifications or up to sample should not be brought upon the site of the works.

Clause 19 provided for the suspension of operations on the direction of the engineer, if he decided they could not satisfactorily proceed.

Clause 22 reserved the right to the City to change the alignment, grade, form, length, dimensions or materials of the work under the contract whenever any conditions or obstructions were met that rendered such changes desirable or necessary.

Clause 23 read, in part, as follows:

23. *PAYMENTS*

The Contractor shall receive monthly payments at the rate of eighty per cent (80%) of the estimated value of the pipe actually completed and shop tested. No payments shall be made for the cost of materials which have been delivered to the Contractor's fabrication plant, but which have not been fabricated into pipe. Payments will be made monthly at the rate of fifteen per cent (15%) of the estimated value of pipe which has been laid down and field tested. These payments will be made on Progress Certificates, which certificates shall not be taken or considered as an acceptance of the work or that portion of it then done, or as an admission of the City's liability to the Contractor in respect thereof. The operation or acceptance by the City of a portion of the work before the completion of the whole is not to be considered an acceptance of the same by the City.

Clause 31 dealt with the responsibility of the contractor regarding the laying of pipe. It was contemplated that the actual laying would be done by another contractor, but the contractor was required to furnish a competent representative to advise regarding the pipe laying. This clause contained the following provision:

The pipe manufacturer shall replace in site any materials furnished by him which shall have been proved to be defective at any time up to two years after the pipe line has been laid and tested and the Completion Certificate has been issued to the pipe-laying Contractor.

Pipe, specials, etc., so replaced shall be properly installed, jointed, and bedded in place by the pipe manufacturer.

Clause 40 provided as follows:

40. *ENGINEER SOLE JUDGE*

The parties to this contract have agreed each with the other that the Engineer shall be the sole judge of all matters connected with the proper carrying out by the Contractor of the works herein described and that all difference between the parties as to whether the Contractor has or

1959

PRELOAD CO. OF CANADA v. CITY OF REGINA

Martland J.

has not complied with the provisions of this contract are left to the judgment and decision of the Engineer as sole arbitrator, and his decision shall be final and shall not be varied or set aside on any grounds other than those on which the award of a sole arbitrator appointed under the "Arbitration Act" would be, and no action or suit shall be commenced by either party hereto to enforce any of the provisions of this contract until after the Engineer has given his decision with respect thereto, or has on request neglected or improperly refused same. No action shall be brought by the Contractor against the City to recover any portion of the contract price or for extras, except upon a Progress Certificate or upon the Completion Certificate.

The specifications attached to the contract were those submitted by Mr. Doull and referred to as the Canada Gunite Specifications, but varied to some extent as a result of meetings between Doull and Shattuck. Shattuck requested and obtained provision for more stringent test requirements, which were incorporated in an addendum to the agreement.

The provision for final inspection at the plant provided:

5. *FINAL INSPECTION AT PLANT*

The pipes shall be given final superficial inspection at the manufacturer's yard just prior to loading for delivery. This inspection to be made by a representative of the project engineer and his stamp shall signify his inspection.

This inspection shall not be considered a waiver of the responsibilities of the manufacturer for the ultimate performance of the pipe under the contract, but rather a check control of the handling of the pipes by the various parties involved in the work.

After execution of the contract, Preload proceeded with the construction of a plant at Regina and commenced the manufacture of pipe in February, 1952. A request for extension of the completion date was made on February 4, 1952, and as a result the completion date was extended from April 1, 1953, to June 15, 1953. No further request for extension of time was ever made by Preload.

Pipe production was carried on by Preload from February, 1952, to the beginning of December of the same year. There were many difficulties in production and Preload was never able to meet the delivery requirements of the contract. There was a high percentage of rejections of pipe in relation to the total pipe produced. Such rejections resulted from failure to pass the test requirements at the plant.

In November, 1952, some sections of line having been laid, line tests were conducted. Serious failures occurred in pipe in the line. By December 3, 1952, this situation had

become so serious that it was agreed that production should cease until the cause of the failures could be ascertained. Studies were then made by both Preload and the City, each of which called in experts to assist, and information was freely exchanged.

On the hearing of the present appeal it was not disputed by any party that the cause of the failure of the pipe was the use of calcium chloride in connection with its manufacture.

In making the pipe a steel mould was used to which were affixed 24 longitudinal steel wires, which were then placed under a condition of tension. A mixture of sand and cement was then placed on the steel mould by means of compressed air. The pipes were of the bell and spigot type and this latter process was effected while the pipe was standing on the bell end. After this first application of sand and cement to create the core of the pipe it was subjected to heat and humidity, a process called "curing". This involved the hardening of the substance. Following this, further steel wire was wound around the core in the form of a spiral. After this a further "covercoat" of cement sand mortar was applied by means of compressed air. Finally the steel mould was removed.

It was discovered that there was a tendency for the mixture for the core and for the covercoat to "slump" as the pipe stood upright if it did not set quickly enough. To counteract this difficulty Mr. Chiverton, then Preload's superintendent of the plant, in April, 1952, decided to use an admixture of calcium chloride in the mix, the result of which would be to hasten the setting process. The use of calcium chloride for the purpose of hastening the hardening of a concrete mixture was not novel, but, on the contrary, had often been used in practice for such a purpose.

It appeared later, however, that the result of its use in this particular process had created a condition in which corrosion of the spiral steel wires developed. No one had suspected, prior to the failure of the pipes, that such a consequence would result from the use of calcium chloride. Calcium chloride had been used in the manufacture of all pipes made between February and December of 1952, after the first 85 pipes.

1959

PRELOAD CO. OF CANADA v. CITY OF REGINA

Martland J.

Chiverton advised Shattuck of his intention to use calcium chloride about the time that it commenced to be used. Chiverton did not give evidence at the trial, but Shattuck described what occurred in the following portion of his examination for discovery:

Q. Preload considered it necessary? A. Yes.

Q. And did you . . . A. I didn't consider it in any way at all. They wanted to use it.

Q. Now I gathered from your evidence in chief, Mr. Shattuck, that you felt that if Preload wanted something done, like the addition of calcium chloride, it was really no concern of yours, subject to you having the right—but it wasn't really up to you, to use that expression, it was really up to Preload—they told you what they needed at the time, but it was really up to Preload to . . . A. I think that is a fair description of it.

In another portion of his examination for discovery, when asked whether he had approved of the use of calcium chloride, Shattuck said: "I knew of it. I did not approve of it or disapprove."

After the investigations into the cause of the pipe failures had been completed Shattuck, as project engineer, on May 1, 1953, wrote the following letter to Preload:

May 1, 1953.

Attention—Mr. R. M. Doull

Preload Company of Canada Ltd.,
7325 Decarie Blvd.,
Montreal, Quebec.
Gentlemen:

The causes of corrosion of prestressing wire have now been ascertained beyond reasonable doubt. As you have expressed the wish to resume work under your contract, you will no doubt be doing so shortly. When you do start operations, you are to commence the manufacture of class 2 pipe and continue with that class until further notice. The following points shall be observed in future operations;

1— Calcium chloride shall not be used in the making of either concrete cores or concrete covercoat. Calcium chloride was not specified so its elimination does not require a change in specification.

2— All curing of concrete shall be done using steam. Steam curing was specified, therefore reverting to steam curing requires no change in specification.

3— Your method of prestressing the circumferential wire shall be revised and improved. You have already taken steps to revise the prestressing procedure. No change in the specification is required for this.

4— The concrete cores shall be trowelled so as to offer a smooth and regular bearing to the circumferential prestressing wire in order to eliminate potential corrosion cells. I believe you have already taken

steps to provide for smoothing of the concrete cores. Here again, no change will be required in the specification which states that work shall be performed to the satisfaction of the Engineer.

There is no evidence to support the idea that Kalicrete cement had any part in the corrosion of the circumferential steel wire and provision for no contact between steel and kalicrete is therefore not considered necessary. If, however, you wish to apply ¼ inch of Portland cement gunite mortar over the prestressing wire before the Kalicrete covercoat is applied, you may do so at your own expense.

All of the pipe made with calcium chloride which have been examined show that the circumferential prestressing wire is corroded and the pipe are therefore defective. I consider that all the pipe made with calcium chloride do not conform to the requirements of the specifications for pipe to be provided under your contract with the City and they are hereby rejected.

The specifications call for the replacement of pipe found to be defective. You will therefore replace all the pipe which is now rejected. The pipe which are defective may be reconstructed by rewinding them and placing a new covercoat. Before rewinding they should have a thin coat of mortar shot on and trowelled smooth. The method of reconstructing these pipes has been discussed with you and I think we are in agreement regarding the method to be used.

Since at best the completion of this pipeline will be delayed far beyond the completion date as set out in the contract, you will be expected to make every effort to speed the manufacture of new pipe and the necessary reconstruction or replacement of pipe already made.

Further payments on new pipe will not be made until the pipe already paid for has been satisfactorily dealt with by the Company, or until the value of new pipe exceeds the value of pipe which was accepted on the basis of the shop test and which is now being rejected.

Yours very truly,

AS/mg
cc-Preload-Regina.
Airmail

A. SHATTUCK,
Project Engineer.

Preload replied, by letter dated May 18, 1953, as follows:

May 18th, 1953.

Mr. Allan Shattuck,
Buffalo Pound Project,
CITY OF REGINA,
Sask.

Dear Sir:—

This is to acknowledge receipt of your letter dated May 1st, 1953.

We note your comment: "The causes of corrosion of prestressing wire have now been ascertained beyond reasonable doubt." We would be glad if you would advise us specifically to what causes you refer.

You state that all the pipe made with calcium chloride does not conform to requirements of the specifications, that such pipe is rejected and you presume it to be defective. These allegations are unfounded. The use of calcium chloride was undertaken with all requisite consent and accordingly does not represent a departure from the specifications adopted by you.

1959

PRELOAD CO. OF CANADA v. CITY OF REGINA

Martland J.

There is no evidence that any substantial number of pipe is defective, we deny that they are, and in any event we deny your right retroactively to reject, without any examination, pipe which has been previously approved, tested, and accepted by you, both in all tests envisaged in these specifications and under other more onerous tests not therein contemplated.

As you have been previously advised, the City's actions have enormously accentuated the difficulties and expenses to which we have been subjected and have placed us in a position of sustaining heavy losses and operating costs during the protracted period in which you have withheld your approval to resume operations.

In dealing with your proposed changes as set forth in your letter of May 1st, we would again draw your attention to the recommendations of Dr. J. P. Ogilvie that the circumferential steel wire should be protected from contact with Kalicrete, but, naturally, this is a matter in respect of which final responsibility must rest with you.

We must respectfully submit that there is nothing in the agreement or otherwise to justify the arbitrary decision embodied in your letter of May 1st to withhold progress payments by reason of any claims that the City has or may have in respect to past operations on the production of pipe tested and approved by you.

Notwithstanding our difference of opinion we are as we always have been prepared to proceed with the completion of the contract in an expeditious manner following the manufacturing procedure set out in your letter of May 1st, provided that payments on your part conform to the contract. We would therefore invite you to reconsider your decisions not to effect progress payments.

We would also expect that the City honor its outstanding payments owing to us, payments of which has now been deferred for a considerable period of time, without any justification whatsoever.

In the event that we are unable to agree on these points and on the question of responsibility in respect of past operations, we are nonetheless prepared to continue production of pipe on the basis of the regular progress payments, with the elements of difference between us being submitted to adjudication by the Courts.

You will appreciate that the present communication is written without prejudice to our claims against the City of Regina.

We would appreciate a reply to these proposals at your earliest convenience.

Yours very truly,

THE PRELOAD COMPANY OF CANADA LIMITED

Per: (signed) R. M. Doull

R. M. Doull, President.

RMD:c

Further correspondence ensued, but neither party varied from the position which it had taken in these letters. No application for an extension of time was made by Preload and on June 16, 1953, the day after the extended date of final delivery, Shattuck, as project engineer, wrote to Preload referring to the unfulfilled delivery requirements of

the contract, to the fact that no new pipe had been manufactured after December 3, 1952, and stating that, in his opinion, for these reasons and those stated in his letter of May 1, 1953, Preload had not properly carried out the work in accordance with the contract. At that time Preload had delivered approximately 50,000 feet of pipe out of a total contract requirement of 187,030 feet.

On June 15, 1953, Preload had made a proposal of compromise or arrangement under *The Companies' Creditors Arrangement Act*.

On June 19, 1953, Preload commenced action against the City, seeking a declaration that pipe made with calcium chloride conformed to the requirements of the specifications contained in the contract, or as amended, that the responsibility for defects in the pipe was that of the City and that Preload was entitled to complete the contract and for a reasonable time to do so. Alternatively it asked for damages.

There were subsequent Court proceedings in relation to cl. 40 of the contract to determine whether the matter in dispute should be arbitrated, which resulted in a decision by the Court of Appeal of Saskatchewan that the clause did not have that effect.

On November 13, 1953, the City wrote to Preload, setting out alleged breaches by Preload of the contract going to the root of the contract and alleging that Preload had evinced an intention no longer to be bound by the contract. The City elected to treat this as a repudiation of the agreement.

On November 19, 1953, a contract was made by the City with Dominion Bridge Company Limited for the construction of a steel pipe line. Subsequently that company completed construction of the line.

The City filed a statement of defence and counterclaim, joining The Guarantee Company of North America (hereinafter referred to as "the Surety") as a defendant to the counterclaim, claiming against it the amount of its bond.

On January 22, 1954, Preload made an assignment in bankruptcy and the appellant Harrison Cooley Hayes (hereinafter referred to as "the Trustee") was appointed trustee.

1959

PRELOAD CO. OF CANADA v. CITY OF REGINA

Martland J.

The trustee was, by Court order, substituted for Preload as plaintiff in the action and later, on March 15, 1955, he commenced a second action against the City which, by Court order, was consolidated with the first action. The second action was launched because of the changed position of the parties since the first one had been commenced.

At the trial the two actions by the trustee against the City were dismissed. It was declared that the City had a debt provable against Preload in bankruptcy for $1,281,407.55 and another debt, likewise provable, in the amount of $3,296.74. Judgment was given in favour of the City against the surety for the amount of the bond, $1,209,258.57, or such lesser amount as remained unrealized by the City against Preload in bankruptcy. Costs were given to the City.

Appeals from this judgment by the trustee and the surety were dismissed by unanimous decision of the Court of Appeal of Saskatchewan[1]. From that judgment the trustee and the surety have appealed to this Court.

The learned trial judge and the Court of Appeal reached the conclusion that Preload had been in breach of the implied conditions contained in subss. 1 and 2 of s. 16 of *The Sale of Goods Act* of Saskatchewan, R.S.S. 1953, c. 353. Section 16 of that Act provides as follows:

> 16. Subject to the provisions of this Act and of any Act in that behalf there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale except as follows:
>
> 1. Where the buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required so as to show that the buyer relies on the seller's skill or judgment and the goods are of a description which it is in the course of the seller's business to supply, whether he be the manufacturer or not, there is an implied condition that the goods shall be reasonably fit for such purpose;
>
> 2. Where goods are bought by description from a seller who deals in goods of that description, whether he is the manufacturer or not, there is an implied condition that the goods shall be of merchantable quality:
>
> Provided that if the buyer has examined the goods there shall be no implied condition with regard to defects which such examination ought to have revealed;

[1] (1958), 13 D.L.R. (2d) 305, 24 W.W.R. 433.

3. An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade;

4. An express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith.

Each of these Courts found as a fact that the City made known to Preload, expressly or by implication, the particular purpose for which the goods were required, so as to show that the City relied upon the skill or judgment of Preload.

On the argument of this appeal counsel for Preload conceded that the contract was one for the sale of goods, that the City made known to Preload the particular purpose for which the goods were required, that the goods were of a description which it was in the course of Preload's business to supply and that the pipe produced by Preload was not reasonably fit for the purpose for which it was required. The only ground upon which it was contended that subs. 1 did not apply was the contention that the City did not rely upon Preload's skill or judgment.

This contention was based upon the submission that the City, by its conduct before entering the agreement and by the terms of the agreement itself, showed that it did not rely upon Preload's skill or judgment.

With regard to the City's conduct before entering the agreement, reference was made to the fact that Preload's first bid was not accepted, but, instead, the higher bid of The Vancouver Iron Works was accepted on the strength of the report by Farrell and Shattuck that the pipe proposed to be supplied by Preload was of a comparatively new type and had not yet been widely accepted. It was pointed out that the letters written by Preload to the City regarding its ability to produce the type of pipe required were all written to persuade the City to accept Preload's first bid and that no further such letters were written after the tender of The Vancouver Iron Works had been accepted. Reference was also made to Shattuck's having read all available material on the subject of prestressed concrete pipe, his correspondence with engineers in Australia and his visit to Chicago, as well as the expert advice obtained by the City from other engineers.

1959

PRELOAD CO. OF CANADA v. CITY OF REGINA

Martland J.

As against this, however, is the evidence of both Farrell and Shattuck, accepted by the learned trial judge, that they had both relied substantially on the statements of Preload, written and verbal, that it was expert in the manufacture of prestressed concrete and could make the pipe required for the project.

It seems to me that the studies and investigations of Shattuck were directed to the matter of the prior use in other places of prestressed concrete pipe. On the basis of this and the advice received from other engineers, the City concluded that it would be safer to purchase steel pipe where the difference in cost was some $275,000 on a job worth over $2,400,000. When steel was not available, the City decided to use prestressed concrete pipe, but, as to the ability to produce pipe of that kind satisfactory for the project, the City had to rely on the skill and judgment of Preload. Preload had said positively that it could produce satisfactory pipe and the officials of the City relied upon those statements.

Regarding the terms of the contract, reference was made to the wide powers which it conferred upon the project engineer and it was contended that it was Shattuck who was in charge of the whole operation, Preload's duty being merely to produce a product conforming with the contract specifications under his supervision.

The powers conferred on the project engineer were undoubtedly very broad, but, read as a whole, in my opinion the contract contemplated that Shattuck should have wide powers to supervise and to inspect, but that Preload was obligated itself to manufacture the pipe it had agreed to sell and to provide the necessary skill and judgment to effect that purpose.

The evidence would indicate that this was the view of the operation of the contract held by the parties themselves. There is no evidence that Shattuck ever managed the operation of the plant. In fact, prior to his letter to Preload of May 1, 1953, he gave no written directions regarding the plant's operations pursuant to the powers which he possessed under the contract. The process of manufacture was Preload's own. Plan no. 9, forming part of the contract, which detailed for each type of pipe the operating

pressure, test pressure, inside diameter, wall thickness and minimum wire spacing, uses the words "designed in accordance with the patented Preload System" and states that the particulars of design shown in it are fully covered by patents.

Referring to this point, the learned trial judge makes the following comments, with which I agree:

> The Company alone assumed the responsibility for the building of the plant, the securing and setting up of equipment, the supply of the necessary materials, the employment of staff, and workmen and the operation of the whole plant. At no time up to May 1st, 1953, by word or deed did the Preload Company ever suggest that the primary responsibility as outlined did not rest upon the Preload Company.
>
> Soon after production commenced the Project Engineer became concerned with the failure of the Preload Company to maintain a production schedule in conformity with the contract and complained to the Company. The Company replied setting out the unexpected difficulties that had arisen and stating that steps had been taken to eliminate these. The Company held out the full expectation that with these eliminated the Company could maintain the required schedule.
>
> Later when difficulties again arose the Company called in an expert in such matters, Mr. Knox from Texas, to find out the cause. His report was not filed as an exhibit nor was he called as a witness, but reference is made to it in the evidence of Mr. Hunter Nicholson. Still later Mr. Dobell, President of the Preload Enterprises Inc. of the United States came to Regina, made a survey of the plant operations and set out in a lengthy report to the Preload Company the changes that should be made in order to eliminate the difficulties.
>
> These steps were taken on the initiative of the Preload Company and without consultation with the City or the Project Engineer, and I think it is significant that such was the case. Some of the changes recommended by Mr. Dobell were made by the Preload Company, again without consultation with or approval by the Project Engineer. All of these, in my opinion, constituted an admission by the Preload Company of the responsibility of the Company for the operation of the plant and the production of pipe.
>
> Again, it should be noted that the Project Engineer never gave any specific direction as to the operation of the plant or the process of manufacture until he did so in his letter of May 1st, 1953. He did, as related, exercise his power to extend the time for completion of the contract at the request of the Preload Company. It is true that the Project Engineer and the managers of the plant had frequent discussions, and I have no doubt that on occasion he would make suggestions for improvements, but at no time is it suggested that these amounted to an exercise of his powers under the contract. This, in my opinion, strongly supports the conclusion that neither party to the contract considered the Project Engineer to be "in charge" of the plant operations or the production of the pipe.
>
> I have already pointed out that other than granting an extension of time the Project Engineer at no time exercised any of the powers of control and direction given to him under the contract until he wrote the

1959

PRELOAD CO. OF CANADA v. CITY OF REGINA

Martland J.

letter of May 1st, 1953. The discontinuance of production in December, 1952, was the result of an agreement rather than a direction by the Project Engineer.

The effect of subs. 1 of s. 14 of the English *Sale of Goods Act*, which, subject to the addition of a proviso not found in the Saskatchewan Act, is the same as subs. 1 of s. 16 of that Act, has been considered by the House of Lords in three cases.

Manchester Liners Ltd. v. Rea Ltd.[1] held that, if goods are ordered for a special purpose and that purpose is disclosed to the vendor so that, in accepting the contract, he undertakes to supply goods which are suitable for the object required, such a contract is sufficient to establish that the buyer has shown that he relies on the seller's skill and judgment. The mere disclosure of the purpose may amount to sufficient evidence of reliance on the skill and judgment of the seller.

In *Medway Oil and Storage Company, Limited v. Silica Gel Corporation*[2], Lord Sumner, giving the judgment of the Court, stated the following propositions in respect of the operation of this subsection:

> (1) The buyer's reliance is a question of fact to be answered by examining all that was said or done with regard to the proposed transaction on either side from its first inception to the conclusion of the agreement to purchase:— (2) The section does not say that the reliance on the seller's skill or judgment is to be exclusive of all reliance on anything else, on the advice, for example, of the buyer's own experts, or the use of his own knowledge or common sense nor would it ever be possible to be sure that the element of reliance on the seller entered into the matter at all, unless the buyer were so foolish as to volunteer some statement to that effect. It follows that the reliance in question must be such as to constitute a substantial and effective inducement, which leads the buyer to agree to purchase the commodity:— (3) This warranty, though no doubt an implied one, is still contractual, and, just as a seller may refuse to contract except on the terms of an express exclusion of it, so he cannot be supposed to assent to the liability, which it involves, unless the buyer's reliance on him, on which it rests, is shewn and shewn to him. The Tribunal must decide whether the circumstances brought to his knowledge shewed this to him as a reasonable man or not, but there must be evidence to bring it home to his mind, before the case for the warranty can be launched against him.

[1] [1922] 2 A.C. 74.

[2] (1928), 33 Com. Cas. 195.

In *Cammell Laird and Company, Limited v. The Manganese Bronze and Brass Company, Limited*[1], Lord Wright said:

> However the appellants are in my opinion entitled here to succeed on s. 14, sub-s. 1, on a narrower ground. I do not agree with the construction sought to be put by the respondents on s. 14, sub-s. 1: I do not agree that the reliance on the seller's skill or judgment must be total or exclusive. If it is conceded that in some cases under the section a distinction may be drawn, where articles are ordered to be made, between such part of the maker's obligation as is merely to follow precisely what is specified, and such part of his obligation as involves in its discharge the exercise of his skill and experience, then I think it follows that, to quote the language of Lord Macnaghten in *Drummond v. Van Ingen,* (1887) 12 App. Cas. 284, 297: "In matters exclusively within the province of the manufacturer the merchant relies on the manufacturer's skill."

Considerable reliance was placed by counsel for Preload on the actual decision in the *Medway* case, in which it was held that, on its facts, the appellant had not relied upon the skill or judgment of the respondent, but had relied upon its own judgment. In that case the appellant, a company whose business was that of refining petroleum, which had on its board of directors and in its employment persons whose scientific knowledge and practical experience made them highly competent to advise on and decide questions connected with oil and its treatment, after extensive investigations of its own, purchased from the respondent a product known as Silica Gel for use in its own refining process, known as the Cross patent cracking process. When Silica Gel was used in this process it was found that the petrol produced contained an excessive quantity of a gummy substance which rendered it unfit for use. The cause was later found to be that the Silica Gel did not have the same effect on the synthetic crude distilled by the Cross cracking plant which it would have had on a straight run petroleum. The question was whether there had been an implied condition by the respondent seller that Silica Gel was reasonably fit for the special process in which it was used by the appellant. It was held on the evidence, which included evidence regarding the negotiation of the terms of the agreement and the terms of the agreement for purchase itself, that the appellant had not relied upon the seller's skill or judgment.

[1] [1934] A.C. 402 at 427.

1959

PRELOAD CO. OF CANADA v. CITY OF REGINA

Martland J.

In the present case there was nothing special about the purpose for which the City desired to use Preload's product. Preload was a manufacturer of pipe and the City wished to purchase pipe to carry water from one place to another. The City was assured, in positive terms, by Preload that its pipe was satisfactory for that purpose and the circumstances were such as to indicate to Preload that the City was relying upon it to provide such pipe.

In my view the circumstances in this case are more closely akin to those in the *Cammell Laird* case than to those in the *Medway* case. The *Cammell Laird* case involved the sale of certain ships' propellers. The blue prints in relation to their production were furnished by the buyer and gave the information necessary to enable the work to be carried out, including the thickness required along the medial lines of the blades. Apart from the information furnished by the buyer, the manufacture of the propellers was left to the skill and judgment of the seller.

It was contended on behalf of the seller that the buyer had relied upon his own skill and judgment and not upon that of the seller and that, if the buyer received a product manufactured in accordance with the drawings which the buyer had furnished, the contract had been fulfilled.

It was held that, in order to bring subs. 1 of s. 14 of the English *Sale of Goods Act* into operation, it was not necessary that the buyer should rely totally and exclusively on the skill and judgment of the seller, but that it was sufficient if reliance was placed upon the seller's skill and judgment to some substantial extent. As the propellers supplied by the seller had not proved satisfactory for use on the vessels for which they were supplied, the buyer was entitled to claim against the seller for breach of the implied condition.

The question of the buyer's reliance on the seller's skill or judgment, under subs. 1 of s. 16, is, as stated by Lord Sumner in the *Medway* case, a question of fact. That question of fact has been decided by the Courts below in favour of the City. In my view there was ample evidence

on which to base such a finding and I think that a preponderance of evidence justifies the conclusion which has been reached.

It was also held by both the Courts below that there had been a breach of the implied condition contained in subs. 2 of s. 16 of *The Sale of Goods Act*.

It was conceded in argument by Preload that Preload held itself out as dealing in pipe of the kind provided by the contract, that the proviso to this subsection is not applicable in this case and that the pipe supplied was not of merchantable quality. The only issue, therefore, in relation to the application of this subsection, is as to whether or not the goods in question had been bought by description.

This was a sale of unascertained or future goods to be manufactured by Preload and in my opinion, under s. 2 of the short agreement, the contract constituted a sale of those goods by description. There was, therefore, a breach of the statutory condition provided for in subs. 2 of s. 16.

It was contended on behalf of Preload that Shattuck had approved of the use of calcium chloride in the manufacture of the pipes and that the City could not, therefore, claim that its use constituted a breach of the contract.

I agree with the view of the Courts below that the use of calcium chloride in the manufacture of the pipes by Preload did not, in itself, constitute a breach of the specifications forming part of the agreement. It is true that calcium chloride is not mentioned in those specifications relating to materials, but the evidence shows that it was used as a part of the manufacturing process in order to hasten the setting of the core and of the covercoat of the pipes. Its use was a part of the method of manufacture of the pipes decided upon by Preload as being proper and desirable. Shattuck was advised by Chiverton that it was being used. He was not asked to make a decision as to its use, but received this advice as a matter of information. Shattuck's position at that time was that Preload wished to use it and he had no reason to oppose its decision. It is clear that at that time no one contemplated the unfortunate consequences which did, in fact, later ensue as a result of its use.

1959

PRELOAD CO. OF CANADA v. CITY OF REGINA

Martland J.

The point is, therefore, in my view, that Preload made a decision, regarding its method of manufacture, of which the City was informed and in relation to which it took no action. Unfortunately the use of calcium chloride resulted in Preload having been in breach of subss. 1 and 2 of s. 16 of *The Sale of Goods Act*. The obligation of Preload under those subsections was the same, it seems to me, whether the City was informed of Preload's decision or not. Preload was under an obligation to provide pipe reasonably fit for the City's purpose and of merchantable quality. The matter of the use of calcium chloride would only have assisted the legal position of Preload, in my view, if it had been compelled by Shattuck, against its own better judgment, to use it. In fact, the use of the calcium chloride was a part of the judgment of Preload on which the City was entitled to rely under subs. 1 of s. 16.

The next point argued by Preload was that the City did not have the right to reject the pipe containing calcium chloride. This argument was based upon the proposition that the governing provision of the contract in this regard was cl. 31 and that this clause only imposed upon Preload the obligation to replace in site any materials furnished by it which were proved to be defective within two years after the pipe lines had been laid and tested and the completion certificate issued. It was urged that "materials" did not mean "pipe". With respect to this contention, it is my opinion that "materials" in this portion of cl. 31 did include pipe, in view of the next following paragraph in cl. 31, which reads:

> Pipe, specials, etc., so replaced shall be properly installed, jointed, and bedded in place by the pipe manufacturer.

This paragraph immediately follows the paragraph imposing on Preload the obligation to replace in site defective materials.

Furthermore, it seems to me that wiring on the pipe which had become corroded within the period limited would constitute defective material within the meaning of the clause.

In addition, it is my view that the City had the right to refuse pipe which failed to satisfy the implied conditions contained in subss. 1 and 2 of s. 16 of *The Sale of Goods*

Act. Clause 5 of that portion of the specifications headed "MARKING, INSPECTION AND TESTING", which clause is headed "FINAL INSPECTION AT PLANT", provided, after making provision for a final superficial inspection at the manufacturer's yard just prior to loading for delivery:

> This inspection shall not be considered a waiver of the responsibilities of the manufacturer for the ultimate performance of the pipe under the contract, but rather a check control of the handling of the pipes by the various parties involved in the work.

Benjamin on Sale, 8th ed., states the rules as to the right of the buyer to reject goods as follows:

At p. 752 he says:

> When goods are sent to a buyer in performance of the seller's contract, the buyer is not precluded from objecting to them by merely *receiving* them, for receipt is one thing, and acceptance another.

At p. 983 he says:

> After the property in the goods has passed to the buyer, it may happen that he discovers them to be different in quality from that which he had a right to expect according to the agreement. If the goods do not conform to their description, or if any *condition,* express or implied, of quality be broken, *the property will not have passed,* and the buyer will, as already explained, have a right to refuse to accept them.

Shattuck had abundant evidence to justify the rejection of pipe in which calcium chloride had been used in the manufacture when he made his decision on May 1, 1953, and it is not now in dispute that the use of calcium chloride was the cause of the pipe failures.

It was then urged that the City had wrongfully repudiated the contract.

With respect to this argument it will be recalled that, by his letter of May 1, 1953, Shattuck gave certain specific directions to be followed by Preload in the manufacture of further pipe. He also stipulated that further payments on new pipe would not be made until pipe already paid for had been satisfactorily dealt with by Preload, or until the value of new pipe exceeded the value of pipe then being rejected.

Preload, in its reply of May 18, 1953, disputed Shattuck's statement that pipe made with calcium chloride was defective and denied the right of Shattuck to take the position

1959

PRELOAD CO. OF CANADA v. CITY OF REGINA

Martland J.

which he had adopted regarding further payments. Preload was only prepared to resume the manufacture of pipe if it received payments from the City for the new pipe manufactured as it was delivered to the City.

No further pipe was, in fact, delivered to the City. No application was made for an extension of time, as provided in the contract. In June, 1953, Preload made a proposal under *The Companies' Creditors Arrangement Act* and sued the City.

I have already stated my conclusion that Shattuck had valid reason to reject pipe in which calcium chloride had been used in its manufacture.

Clause 40 of the contract provided that the engineer should be the sole judge of all matters connected with the proper carrying out by the contractor of the works therein described and that all differences between the parties, as to whether the contractor had or had not complied with the provisions of the contract, were to be left to the judgment and decision of the engineer as sole arbitrator.

The position was, therefore, that Preload had received payment for pipe which had been properly rejected by Shattuck, but refused to fulfil his direction as to the supply of further pipe unless it was paid for as manufactured, without any deduction for the payments already received by it for rejected pipe. It was already very much behind the contract schedule in the supply of pipe and, after June 15, 1953, was in default in relation to its contractual commitment for the completion of the work provided under the agreement.

In the light of all these circumstances, I think that the City was properly entitled to infer that Preload did not intend to be any longer bound by the provisions of the contract and that the City was justified in electing to treat the breaches of contract by Preload as a repudiation of the agreement, as it did by its letter to Preload of November 13, 1953.

I am, therefore, of the opinion, for the foregoing reasons, that Preload's appeal, in respect of the issue of liability, fails.

On the issue of damages, the only point taken in argument by Preload was that the City should have required Shattuck to exercise, pursuant to cl. 10 of the contract, his right to take over Preload's plant and either operate the plant or arrange for someone else to do so for him. It was argued that if this course had been followed the damage sustained by the City would have been reduced to such an extent that there would have been no damages payable to the City by Preload.

The short answer to this argument is that the project engineer's right, under cl. 10 of the contract, was optional to himself and that there was no duty imposed upon him to exercise it. The decision as to whether or not he would exercise those rights was entirely his own. I also agree with the view of the Court of Appeal that there was no evidence which would justify the conclusion that the City was able to take over the plant and to produce satisfactory pipe.

In my opinion, therefore, Preload's appeal should be dismissed with costs and the judgment of the Court of Appeal of Saskatchewan affirmed.

The next question is as to the liability of the surety. Preload and the surety executed a contract bond, dated July 17, 1951, in favour of the City, in the sum of $1,209,258.57, conditioned upon the carrying out by Preload of the work according to the terms and conditions of its contract with the City.

This bond contained the following provisions, which are of importance in connection with this appeal:

> Provided always and it is hereby agreed and declared that the said Surety will not be released or discharged from this Bond by any arrangements which may be made between the said Contractor and the said City of Regina either with the assent of the surety or without its assent after due written notice to it has been given at its principal office in the City of Montreal, Canada, and no written objection being made thereto, either for alteration of time or mode of payment or for variation of the works to be executed.
>
> And provided further that the said Surety shall be bound by all decisions, orders and directions of the Engineer referred to in said Contract, as if the said Surety were a principal party thereto.

It is admitted that the first written notice given by the City to the surety in relation to the bond was a letter dated December 12, 1952, which advised as to the failure of the

1959

PRELOAD CO. OF CANADA v. CITY OF REGINA

Martland J.

two pipes in the line, the closing of Preload's plant and the engaging by Preload of experts to ascertain the cause of the defect.

In addition to the defences raised by Preload which have already been considered, the surety raised two additional main grounds of defence. The first and chief one was that the City had agreed to variations in the contract without the knowledge or consent of the surety. The second was that the City was estopped from alleging as against the surety the breaches of the contract on which it had relied as against Preload.

The variations in the contract, in which it was argued the City had concurred, were in relation to the use of calcium chloride and in respect of the use of hot water instead of steam in the curing of the pipes.

I have already considered the matter of the use of calcium chloride and have agreed with the view of the Courts below that its use was a part of a method of manufacture which did not involve a variation in the specifications relating to materials. With respect to the matter of the curing process, clause 4 of the part of the specifications headed "MANUFACTURE OF PIPE" reads as follows:

4. *CURING CORES*

The concrete core shall be steam cured at a temperature of not less than 100 deg. F., and not more than 150 deg. F. and a humidity of not less than 90%, until its strength reaches the required minimum for prestressing. . . .

The evidence is that hot water curing instead of steam curing was used by Preload in the course of manufacture of pipe and that Shattuck had been made aware of this. When questioned about it at the trial, he was asked if he considered it to be a desirable change. He stated that he did not consider it in that way. Preload wished to use it and he had no objection.

The surety's argument is that this constituted a variation in the contract specifications of which, admittedly, the surety was not given notice and that, therefore, its obligation under the bond was determined. Reliance is placed on the proposition of the law stated by Cotton L. J. in *Holme*

v. Brunskill[1], and cited with approval by Davis J. in the majority decision of this Court in *Doe et al. v. Canadian Surety Company*[2]:

> The true rule in my opinion is, that if there is any agreement between the principals with reference to the contract guaranteed, the surety ought to be consulted, and that if he has not consented to the alteration, although in cases where it is without inquiry evident that the alteration is unsubstantial, or that it cannot be otherwise than beneficial to the surety, the surety may not be discharged; yet, that if it is not self-evident that the alteration is unsubstantial, or one which cannot be prejudicial to the surety, the Court will not, in an action against the surety, go into an inquiry as to the effect of the alteration, or allow the question, whether the surety is discharged or not, to be determined by the finding of a jury as to the materiality of the alteration or on the question whether it is to the prejudice of the surety, but will hold that in such a case the surety himself must be the sole judge whether or not he will consent to remain liable notwithstanding the alteration, and that if he has not so consented he will be discharged. This is in accordance with what is stated to be the law by Amphlett, L.J., in the *Croydon Gas Company v. Dickenson*, (1876) 2 C.P.D. 46 at 51.

The operation of the rule thus stated is, of course, dependent upon the variation in the contract provisions being made without the surety's consent. That consent may, however, be given before the variations are made, as well as after. This aspect of the operation of the rule in *Holme v. Brunskill* was considered, I think correctly, by Hodgins J. A. in *See v. London Guarantee and Accident Co.*[3], when he says:

> In the *Brunskill* case the basis of the contract was interfered with, and the rule laid down is a reasonable and proper one, namely, that where the contract between the parties which is the basis of the guaranty is to be varied the surety ought to be consulted.
>
> The case of *K. and S. Auto Tire Co. Ltd. v. Rutherford* (1915-16), 34 O.L.R. 639, 36 O.L.R 26 (affirmed in the Supreme Court of Canada), however, shews that where that basis is uncertain or is left to be arranged between the debtor and creditor, without requiring its details to be reported to the guarantor and made a basis of the guaranty, the guarantor is not entitled to set up what has been agreed upon as discharging him.

A similar view is stated by Anglin J. (as he then was) in *North Western National Bank of Portland v. Ferguson*[4], where he says:

> The guarantor's assent to an extension need be neither contemporaneous with it nor explicit. It may be implied in his own original contract assuming the liability. It may be involved in the arrangement or under-

[1] (1878), 3 Q.B.D. 495 at 505.
[2] [1937] S.C.R. 1 at 19, 4 I.L.R. 43, 1 D.L.R. 145.
[3] (1924), 56 O.L.R. 78 at 90.
[4] (1918), 57 S.C.R. 420 at 430, 44 D.L.R. 464.

1959

PRELOAD CO. OF CANADA v. CITY OF REGINA

Martland J.

standing between the principals which he has undertaken to guarantee—perhaps without sufficient inquiry. It must always be a question of the intention of the parties either expressed or, if not, to be inferred from the terms in which they have couched their agreement, construed, if they be "at all ambiguous," in the light of their relative positions and of the surrounding circumstances; . . .

This brings us to a consideration of the two terms of the contract bond which have already been cited. The first of these provisions relates to alteration of the time or mode of payment in the contract between Preload and the City or variation of the works to be executed. With respect to such alterations, notice to the surety is provided for and, unless the surety makes written objection, the variations bind the surety. In my opinion the variations in the contract suggested in argument by the surety are not within the provisions of this paragraph.

The next paragraph of the bond states that the surety shall be bound by all decisions, orders and directions of the engineer referred to in the contract, as if the surety were a principal party thereto. The bond itself, therefore, recognizes that there is an area within which the surety will be bound, as though a party, by the decisions, orders and directions of the engineer. The contract contemplated, by its terms, additions to or variations of the plans, specifications and details which form a part of it on the direction of the engineer, or by arrangement. With respect to variations of this type, the bond contemplates that the surety shall be bound by them. In other words, the surety has consented to variations of this kind in advance of their being made.

The change from steam to hot water curing was, it seems to me, the kind of variation recognized by the bond as being permissible and consequently I do not consider that the rule in *Holme v. Brunskill* applies so as to assist the surety in this case.

The defence of estoppel is based upon the proposition that the City, by reason of its acquiescence in changes made in the specifications, was estopped from saying as against the surety that Preload did not carry out its agreement.

In particular it was contended that the City, having acquiesced in the use of calcium chloride, could not then as against the surety claim damages resulting from the defects in pipes made in consequence of its use.

Reliance was placed by the surety upon the case of *The City of Oshawa v. Brennan Paving Company Limited*[1]. In that case, however, the engineer, while holding one view of the interpretation of the contract in question regarding quantities of material to be supplied by the contractor, knowingly permitted the contractor, who held an alternative view of such interpretation, to supply materials on the latter basis. That basis involved supplying greater quantities of material by the contractor than under the engineer's interpretation. The engineer then refused to certify the quantities of material supplied, except to the extent as calculated on his own interpretation of the contract. The engineer knew that the contractor was proceeding to perform the contract in a manner to its own detriment and permitted it to do so. In these circumstances the elements of an estoppel were present and the City was not permitted to refuse payment to the contractor for the quantities of material which it had, in fact, supplied.

I have already stated my view that the use of calcium chloride was the result of a decision by Preload as to its method of manufacture. The same can be said also of the method of curing by hot water. Shattuck was aware of both these procedures having been adopted, but there is no evidence that at the time he should have had any reason to think that the adoption of these procedures would involve harmful results. He was not asked to make a decision as to their use. He had no reason to forbid them. This being so, I cannot see how it can be successfully contended that the City acquiesced in the breaches of the contract which resulted from the failure of Preload to fulfil the implied conditions under subss. 1 and 2 of s. 16 of *The Sale of Goods Act*. All that the City was doing was to rely upon the manufacturing skill and judgment of Preload, which it was entitled to do.

[1] [1955] S.C.R. 76, 1 D.L.R. 321.

1959

PRELOAD CO. OF CANADA v. CITY OF REGINA

Martland J.

I am, therefore, of the opinion that the appeal of the surety should be dismissed, with costs, and that the judgment of the Court of Appeal of Saskatchewan should be affirmed.

Appeals dismissed with costs.

Solicitors for the plaintiff, appellant: Balfour & Balfour, Regina.

Solicitors for the defendant by Counterclaim Guarantee Co. of North America: MacPherson, Leslie & Tyerman, Regina.

Solicitor for the defendant the City of Regina: G. F. Stewart, Regina.

1959

*Jun. 11, 12
**Nov. 2

CANADIAN ADMIRAL CORPORATION LIMITED ..... APPELLANT;

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE AND CANADIAN ELECTRICAL MANUFACTURERS ASSOCIATION .....RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Excise tax—Value for duty of imported electric refrigerator—The Customs Act, R.S.C. 1952, c. 58, s. 35(1), (2), (3), (7).

Canadian Admiral Corporation, a wholly-owned subsidiary of Admiral Corporation of Chicago, U.S.A., imported in 1956 an electric refrigerator, model D800. This refrigerator was made by Midwest Manufacturing Corporation, also a wholly-owned subsidiary of U.S. Admiral. The only customers of the manufacturer, whose profit margin was set by U.S. Admiral, were the U.S. and the Canadian Admiral corporations which sold the refrigerators to distributors in their respective countries. The value for duty was set by the Deputy Minister at $110.18. The Exchequer Court found no error in law in the declaration of the Tariff Board which affirmed the decision of the Deputy Minister.

Held: The appeal should be dismissed.

*PRESENT: Taschereau, Locke, Abbott, Martland and Judson JJ.
**Locke J., owing to illness, took no part in the judgment.

The value for duty was properly ascertained according to s. 35(3) of the *Customs Act* on the basis of the sales between the U.S. Admiral corporation and its distributors, because the transaction between the manufacturer and the U.S. Admiral corporation did not reflect a fair market value in the country of origin.

APPEAL from a judgment of Thurlow J. of the Exchequer Court of Canada, affirming a declaration of the Tariff Board. Appeal dismissed.

G. F. Henderson, Q.C., and *J. M. Godfrey, Q.C.*, for the appellant.

R. W. McKimm, for the respondent.

The judgment of the Court was delivered by

JUDSON J.:—This is an appeal from the judgment of the Exchequer Court dismissing the appeal of the appellant from a declaration of the Tariff Board which affirmed a decision of the Deputy Minister on the value for duty of an electric refrigerator imported into Canada by the appellant. Leave to appeal was granted on this question of law by the Exchequer Court:

Did the Tariff Board err as a matter of law in deciding that the value for duty of the household electric refrigerator Model D800 imported under Windsor Customs Entry No. 816D, dated May 9, 1956, is $110.18?

The Exchequer Court found no error and dismissed the appeal. Leave to appeal was granted to this Court. In my opinion this appeal also fails.

These are the facts as found by the Board:

Evidence at the public hearing established as *fact* the following: The importation of an Admiral household electric refrigerator, Model D800, was made by Canadian Admiral Corporation Limited, Port Credit, Ontario (hereinafter called "Canadian Admiral") a wholly-owned subsidiary of Admiral Corporation of Chicago, Illinois (hereinafter called "Admiral"). The refrigerator in question had been manufactured by Midwest Manufacturing Corporation, Galesburg, Illinois (hereinafter called "Midwest"), also a wholly-owned subsidiary of Admiral which since 1953 has manufactured Admiral refrigerators for Admiral and for Canadian Admiral. Prior to Admiral's securing ownership of Midwest, Admiral refrigerators had been manufactured for it by American Central Manufacturing Company, Connorsville, Indiana (hereinafter called "American Central") and by Seeger Manufacturing Company, St. Paul, Minn. (hereinafter called "Seeger"). Prices paid for Admiral refrigerators by Admiral to American Central and to Seeger had been based upon "actual cost of production—materials, labor, and factory overhead—plus administration costs, which included selling costs, and a profit". All refrigerators so produced for Admiral had borne that company's trade-mark, "Admiral". The profit

1959

CDN. ADMIRAL CORPN. LTD. v. DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE *et al.*

Judson J.

margin in favour of American Central and of Seeger had been between 3 and 5 p.c. of selling. Following purchase of Midwest by Admiral, the latter had continued with the former the manufacturing arrangements which had prevailed, previously, with American Central and Seeger, the profit margin for Midwest being set by Admiral in 1953 at 3½ p.c. As of the present, Midwest, manufacturing for Admiral a refrigerator to Admiral's design, with Admiral's tools, has two customers for such refrigerators, viz.: Admiral and Canadian Admiral. The trade-mark, in the United States, is owned by Admiral; in Canada, by Canadian Admiral. Prices charged by Midwest for Admiral refrigerators are as follows:

To Admiral:	Base Price	$ 96.87 U.S.
	U.S. Excise	4.84 U.S.
		$ 101.71 U.S.
To Canadian Admiral:	Base price	$ 96.87 U.S.
	Tooling charge	3.39 U.S.
		$ 100.26 U.S.

all such prices being f.o.b., Galesburg, Ill. The Admiral refrigerator, Model D800, is sold in the United States by Admiral to distributors in that country; in Canada, by Canadian Admiral to distributors in Canada. As regards units sold to either Admiral or Canadian Admiral, Midwest applies the trade-mark "Admiral" solely as an agent.

The relevant provisions of *The Customs Act* at the time the matter arose were as follows:

35. (1) Whenever duty *ad valorem* is imposed on goods imported into Canada, the value for duty shall be determined in accordance with the provisions of this section.

(2) The value for duty shall be the fair market value, at the time when and place from which the goods were shipped to Canada, of like goods when sold in like quantities for home consumption in the ordinary course of trade under fully competitive conditions and under comparable conditions of sale.

(3) When the value for duty cannot be determined under subsection (2) for the reason that like goods are not sold under comparable conditions of sale, the value for duty shall be the fair market value, at the time when and place from which the goods were shipped to Canada, of like goods when sold in like quantities for home consumption in the ordinary course of trade under fully competitive conditions.

* * *

(7) Where the value for duty cannot be determined under the preceding subsections, the value for duty shall be the actual cost of production of like or similar goods at the date of shipment to Canada plus a reasonable addition for administration costs, selling costs and profit.

The appellant's argument is this: Subsection (2) does not apply because the sale between Midwest and Admiral U.S. was not made under fully competitive conditions. This prevents the application of subs. (3) because it is a

condition precedent to its application that inability to apply subs. (2) must be based upon lack of comparability of conditions of sale, not upon lack of fully competitive conditions. Subsection (3) having been ruled out, only subs. (7) is left, for the parties are agreed that none of the intervening subsections can apply. The argument is simple, clear and at first glance seemingly sound but, in my opinion, it fails because it is founded on the erroneous assumption that the Board, in considering subs. (2) must take as its standard the sale in the United States between Midwest and Admiral U.S. This the Board declined to do, correctly in my opinion, for two reasons—the first being that this transaction was not under fully competitive conditions, and the second being that it was not a sale at all, within the meaning of subs. (2), which could afford any guide to the determination of fair market value.

The first reason is unassailable but the second was attacked by the appellant. I accept the submission that the transaction was a sale in that it was a transfer of property in goods for a money consideration, called the price, but this does not end the argument. There are other characteristics which a sale must have to be of any use in the determination of fair market value and I think that this was all that the Board was saying in its reasons—that this transaction lacked these characteristics. In the words of the reasons given by the Board, "Determination under 35(2) of value for duty must be preceded by and predicated upon determination of fair market value of like goods in the country of origin." The statement of fact which I have quoted from the Board's reasons makes it plain why the sale from Midwest to Admiral U.S. does not qualify in this respect. The price was an arranged price between a parent company and a wholly-owned subsidiary. There may be sound and justifiable business reasons for the arrangements which were actually made but whatever they were they cannot make the transaction qualify as one "in the ordinary course of trade under fully competitive conditions". I therefore accept the opinion of the Board "that appraisal as to fair market value in the country of origin could not be

1959

CDN. ADMIRAL CORPN. LTD. v. DEPUTY MINISTER OF NATIONAL REVENUE FOR CUSTOMS AND EXCISE *et al.*

Judson J.

effected under the provisions of s. 35(2) in so far as the transaction between Midwest and Admiral U.S. is concerned".

The first point at which there could be a determination of fair market value of like goods in the country of origin is in the transaction between Admiral U.S. and its distributors. This is the sale that the appraiser took into consideration when determining whether s. 35(2) applied, for this was one "in the ordinary course of trade under fully competitive conditions". Having chosen this particular sale as the starting point for his appraisal, the appraiser could have proceeded under s. 35(2) except for one condition. The sale between Admiral U.S. and its United States distributors and that between Midwest and Canadian Admiral were not under comparable conditions of sale for the United States sales were to regional distributors and the sale to Canadian Admiral was to a national distributor. The appraiser therefore found, and the Board affirmed his finding in this respect, that s. 35(2) could not be applied because of lack of comparability of conditions of sale.

The appraiser then proceeded under s. 35(3), which is expressly made applicable where 35(2) cannot be used for lack of comparability of conditions of sale, and applied the terms of s. 35(3), which are exactly the same as those of 35(2) with the exception of comparability of conditions of sale. Comparability of conditions of sale is not a consideration under s. 35(3). The Board was of the opinion that this was the correct solution. The Exchequer Court was of the opinion that there was no error in law shown, and I am of the same opinion.

The appellant complains that the sale that must be taken in the United States is that between Midwest and Admiral U.S. because this is on the same level of trade as that between Midwest and Canadian Admiral, both Admiral corporations being national distributors. If this compulsion exists, the appellant's argument is sound. If these two

sales are compared the only possible reason for the rejection of s. 35(2) would be lack of fully competitive conditions, not lack of comparable conditions of sale. There would then be no room for the application of subs. (3) for that can only be put in action where there is lack of comparability of conditions of sale. If subss. (2) and (3) are so ruled out, only subs. (7), above quoted, could apply for the parties are agreed that the intervening subsections can have no possible application. The argument fails, in my opinion, because the transaction between Midwest and Admiral U.S. does not reflect fair market value in the country of origin and must, therefore, be disregarded. On the other hand, the transactions between Admiral U.S. and its distributors are sales which expressly fall within all of the conditions of s. 35(3) and, consequently, the value for duty was properly ascertained according to s. 35(3) on the basis of these sales.

The finding of the Board expressed in the following terms therefore stands:

> The *fair market value* in the country of origin of Admiral refrigerator Model D800, as established by sales, under fully competitive conditions, by Admiral to its distributive trade, we find, upon the evidence, to have been $115.57 U.S. The *value for duty* of Admiral Model D800 imported into Canada, as represented by the invoice and customs entry filed in the case at issue, we find to be $115.57 U.S. less United States excise tax of $4.84 U.S., a total of $110.73 U.S., or $110.18 Canadian. This figure of $110.18 Canadian, the Deputy Minister, in his review and confirmation of appraisal, reduced to $110.00 Canadian for reasons not brought out in evidence.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: Gowling, MacTavish, Osborne & Henderson, Ottawa.

Solicitor for the Deputy Minister: D. H. W. Henry, Ottawa.

Solicitors for the Canadian Electrical Manufacturers Association: Hume, Martin & Allen, Toronto.

1959

*Jun. 9, 10
**Nov. 2

CLAUDE PERRAS (*Defendant*) ..... APPELLANT;

AND

GEORGES HENRI BOULET AND EDGAR LUDGER BOULET (*Plaintiffs*) ..... RESPONDENTS;

AND

THE CALLWAY SASH & DOOR INCORPORATED ..... DEBTOR.

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

Bankruptcy—Trustee under proposal—Remuneration—Subsequent bankruptcy of debtor—New trustee appointed—Whether claim of former trustee under proposal privileged—The Bankruptcy Act, R.S.C. 1952, c. 14, Part III, ss. 34, 38, 95.

The plaintiffs, who were licensed trustees under the *Bankruptcy Act*, acted as trustees under two proposals made under Part III of the Act as approved by the debtor's creditors and the Court. The debtor was subsequently declared bankrupt and the defendant appointed trustee. The trial Court declared the plaintiffs entitled as their fee to $6,952.91 but to rank only as ordinary creditors. This judgment was varied by the Court of Appeal to the extent of declaring the plaintiffs to be entitled to be collocated and paid by preference the sum of $4,003.41 and to rank as ordinary creditors for the balance. In this Court it was agreed that the $4,003.41 represented the value of the services rendered under the proposals, and the sole question was as to whether it should be paid by preference.

Held: The appeal should be dismissed.

The fees and expenses of the plaintiffs, amounting to $4,003.41, came within the costs of administration contemplated in s. 95(1)(*b*) of the *Bankruptcy Act*, and therefore, the plaintiffs were entitled to be collocated and paid that sum by preference out of the proceeds realized from the property of the debtor. These costs were clearly incurred for the common interest of the creditors.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec[1], modifying a judgment of Montpetit J., sitting in bankruptcy. Appeal dismissed.

J. P. Bergeron, Q.C., and *B. M. Deschenes*, for the defendant, appellant.

*PRESENT: Taschereau, Locke, Fauteux, Abbott and Martland JJ.
**Locke J., owing to illness, took no part in the judgment.

[1] [1958] Que. Q.B. 823.

J. Turgeon, Q.C., for the plaintiffs, respondents.

The judgment of the Court was delivered by

ABBOTT J.:—This is an appeal by leave, from a judgment of the Court of Queen's Bench[1], modifying a judgment of the Superior Court for the district of Montreal, sitting in bankruptcy, dated June 5, 1956, declaring the respondents entitled to a claim against the estate of the debtor in the amount of $6,615.41, and holding that, of the said amount, respondents are entitled to be collocated and paid by preference the sum of $4,003.41.

The facts, which are not now in dispute, are briefly as follows:— On January 21, 1954, the debtor, The Callway Sash & Door Inc. lodged with respondents, who are licensed trustees under the *Bankruptcy Act,* a proposal for an extension of time, in accordance with the provisions of Part III of the *Bankruptcy Act,* R.S.C. 1952, c. 14. Under this proposal, the respondents were to act as trustees with full power to control the operations of the debtor company, the clauses in the proposal to this effect reading as follows:

> *a*) Messieurs Georges-Henri Boulet, C.A., et Edgar-Ludger Boulet, C.A., de la firme Boulet & Boulet, C.A., tous deux syndics licenciés, 115, rue St-Pierre, Québec seront les syndics nommés pour contrôler les opérations de la débitrice;
>
> *b*) Les contrôleurs auront pleins pouvoirs pour contresigner les chèques, contrôler et approuver les recettes et déboursés, les contrats, la tenue des livres, les salaires ainsi que tous les revenus et dépenses de la débitrice; le dit mandat pourra être exécuté par l'un ou l'autre des syndics aussi bien que par un membre de leur personnel sous leur directive.

The proposal was assented to by the creditors and approved by Superior Court for the district of Quebec, sitting in bankruptcy, on March 10, 1954, as required by s. 34 of the Act.

A subsequent proposal modifying the terms of payment, but containing identical provisions as to the duties and responsibilities of respondents, was submitted by the debtor on November 8, 1954, assented to by the creditors, and approved by the Court.

In December 1954, the debtor made the first payment called for under the amended proposal. There is no evidence that the debtor was ever in default under the terms

[1] [1958] Que. Q.B. 823.

1959

PERRAS v. BOULET et al.

Abbott J.

of this proposal; it was never annulled under the provisions of the Act, nor was any request made for such annulment. However it would appear that the financial position of the company deteriorated and on June 6, 1955, a receiving order was made against it by the Superior Court for the district of Montreal, sitting in bankruptcy, and in due course appellant was appointed trustee. Respondents thereupon filed with appellant claims for fees and expenses as trustees under the proposal, but these claims were disallowed.

On appeal to the bankruptcy Court for the district of Montreal, that Court declared respondents entitled to amounts totalling $6,952.91 but to rank for that amount only as ordinary creditors. As I have stated, on appeal by respondents to the Court of Queen's Bench, the judgment of the trial Court was modified and respondents declared entitled to be collocated and paid by preference the sum of $4,003.41 and to rank as ordinary creditors for the balance of their claims.

Various questions as to the portion of the respondents' claims representing ordinary accounting services, as distinct from their services as trustees under the proposal, were discussed in the Courts below, but these are no longer in issue. Before this Court, it was agreed that the sum of $4,003.41 represents the value of the services rendered by respondents as trustees under the proposal prior to the making of the receiving order. The sole question to be determined here, therefore, is whether or not, in the distribution of the assets of the debtor, respondents are entitled to be collocated and paid the said sum by preference.

The *Bankruptcy Act,* R.S.C. 1927, c. 11, as amended was repealed in 1949, the present Act (enacted at the same session of Parliament) came into force on July 1, 1950, and in the new Act the provisions of the former Act dealing with proposals were extensively revised. During the period from October 1, 1923 (the date of the coming into force of the amendments of that year) to July 1, 1950, a proposal for a composition, extension or scheme of arrangement might only be submitted after the making of a receiving order or authorized assignment, and the appointment of a trustee. Under the provisions of Part III of the present Act (which Part deals entirely with proposals), a proposal may

now be made by an insolvent debtor before a receiving order or authorized assignment has been made, or by a bankrupt after the making of such receiving order or authorized assignment.

Proceedings for a proposal are commenced in the case of an insolvent person by lodging with a licensed trustee—or in the case of a bankrupt, with the trustee of the estate—the proposal and supporting documents, (s. 27(2)).

Before becoming effective, a proposal must be accepted by the creditors and approved by the Court, and the conditions upon which such approval may be given by the Court, are set out in s. 34, which reads as follows:

34. (1) The court shall, before approving the proposal, hear a report of the trustees in the prescribed form as to the terms thereof and as to the conduct of the debtor, and, in addition, shall hear the trustee, the debtor, any opposing, objecting or dissenting creditor and such further evidence as the court may require.

(2) Where the court is of the opinion that the terms of the proposal are not reasonable or are not calculated to benefit the general body of creditors, the court shall refuse to approve the proposal, and the court may refuse to approve the proposal whenever it is established that the debtor has committed any one of the offences mentioned in sections 156 to 158.

(3) Where any of the facts mentioned in sections 130 and 134 are proved against the debtor, the court shall refuse to approve the proposal unless it provides reasonable security for the payment of not less than fifty cents in the dollar on all the unsecured claims provable against the debtor's estate or such percentage thereof as the court may direct.

(4) No proposal shall be approved by the court that does not provide for the payment in priority to other claims of all claims directed to be so paid in the distribution of the property of a debtor, and for the payment of all proper fees and expenses of the trustee on and incidental to the proceedings arising out of the proposal or in the bankruptcy, nor shall any proposal be approved in which any other person is substituted for the trustee to collect and distribute to the creditors any moneys payable under the proposal.

(5) In any other case the court may either approve or refuse to approve the proposal.

(6) The approval by the court of a proposal made after bankruptcy operates to annul the bankruptcy and to revest in the debtor, or in such other person as the court may approve, all the right, title and interest of the trustee in the property of the debtor, unless the terms of the proposal otherwise provide.

(7) No costs incurred by a debtor on or incidental to an application to approve a proposal other than the costs incurred by the trustee shall be allowed out of the estate if the court refuses to approve the proposal.

1959

PERRAS v. BOULET et al.

Abbott J.

The provisions contained in Part III, relating to proposals, form part of an enactment which—to adopt the words used by Lord Herchell in the *Voluntary Assignments Case*[1] is "designed to secure that in the case of an insolvent person his assets shall be rateably distributed amongst his creditors whether he is willing that they shall be so distributed or not". Moreover, the last section in Part III, 38(1) reads as follows:

38. (1) All the provisions of this Act, in so far as they are applicable, apply *mutatis mutandis* to proposals.

Sections 95 *et seq.* provide for the manner in which the proceeds realized from the property of a bankrupt shall be distributed, and, as I have said, the question here, is whether the sum of $4,003.41, admitted to be the value of the services rendered by respondents as trustees under the proposal, should be collocated and paid by preference as part of the costs of administration, as that term is used in s. 95(1)(*b*), which reads as follows:

95. (1) Subject to the rights of secured creditors, the proceeds realized from the property of a bankrupt shall be applied in priority of payment as follows:

* * *

(*b*) the costs of administration, in the following order,

(i) the expenses and fees of the trustee

(ii) legal costs.

In my opinion, these costs were clearly incurred for the common interest of the creditors. Under the terms of the proposal—as required by s. 34(4)—such costs were to be paid in priority to other claims and the proposal was accepted by the creditors and approved by the Court. These costs were part of the costs of administering the property of an insolvent person by licensed trustees, authorized to do so under the provisions of the Act. Reading the Act as a whole, and in particular in view of the provision contained in s. 38(1), which I have quoted, I share the opinion expressed in the Court below that the fees and expenses of the respondents, amounting to $4,003.41, come within the costs of administration contemplated in s. 95(1)(*b*), and

[1] [1894] A.C. 189 at 200. *The Attorney-General of Ontario v. the Attorney General for the Dominion of Canada.*

that respondents are entitled to be collocated and paid the said amount by preference out of the proceeds realized from the property of the debtor.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Attorney for the defendant, appellant: B. M. Deschenes, Montreal.

Attorneys for the plaintiffs, respondents: Lesage, Turgeon & Bienvenue, Quebec.

1959
Jun. 1, 2
*Nov. 2

LIONEL PERRAULT AND OTHERS (*Plaintiffs*) ..... APPELLANTS;

AND

CHARLES EMILE POIRIER (*Defendant*) ..... RESPONDENT;

AND

LOCAL 205 AND LOCAL 262, I.L.G.W.U. ..... MISES-EN-CAUSE.

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

Labour—Trade union funds—Monies stolen from association holding same for union—Association having no juridical existence—Whether members of association can sue—Trusteeship—Deposit—Mandate—Article 81 of the Code of Civil Procedure.

The plaintiffs, constituting an association called Montreal Joint Board, were the administrators of the affairs of two locals of an international union, and as such held monies placed with them by these locals. The defendant, a bookkeeper employed by the Board, stole some of these monies. As neither the Board nor the two locals had, as a group or association, any juridical existence to be a party to an action, the plaintiffs purporting to act as administrators and trustees of the two locals sued the defendant for the return of the monies. The action was dismissed by the trial judge on the ground, *inter alia*, that the plaintiffs had no legal capacity to sue. This judgment was affirmed by a majority in the Court of Appeal.

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

1959

PERRAULT *et al.* *v.* POIRIER *et al.*

Held: The action should be dismissed.

The plaintiffs have failed to discharge the onus placed upon them under art. 81 of the *Code of Civil Procedure* of establishing that they had the legal capacity to bring this action. The monies did not belong to them. They were at the most agents or mandataries of the locals and have failed to establish that they were trustees. Even if they had the obligation to account as business managers of the locals, that did not give them the right to sue in the name of the locals. This was not a case of a deposit, for the principal aim of the handing over of the object deposited must be solely the keeping of that object.

Assuming that the plaintiffs were responsible for the loss resulting from the delict of their employee and could be sued by the locals or the international union, it is personally and not as administrators and trustees, as was done in this case, that the plaintiffs could sue the defendant.

The fact that the plaintiffs constituted all the members of the Board and as such could be considered as one person having full capacity to be a party to an action, had no bearing on the question.

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

J. J. Spector, Q.C., for the plaintiffs, appellants.

J. Ste. Marie, Q.C., for the defendant, respondent.

B. Schecter, for the mises-en-cause.

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

FAUTEUX J.:—Les demandeurs-appelants, constituant, sous le nom de Montreal Joint Board, un groupe de vingt-deux personnes, chargé des affaires de deux associations ouvrières de Montréal, soit le Local 205 et le Local 262 de l'International Ladies' Garment Workers' Union, se sont joints comme demandeurs pour obtenir un jugement condamnant le défendeur-intimé à leur payer la somme de $14,193.34. Le Montreal Joint Board, le Local 205 et le Local 262, n'ont, comme groupe ou associations, aucune existence juridique leur permettant d'ester en justice. Et, tel qu'il appert au bref d'assignation, les demandeurs agissent, en l'espèce, non personnellement mais en qualité d'administrateurs et fiduciaires de ces deux associations qu'ils ont mises en cause sous leur nom collectif.

Dans la déclaration, ils allèguent en substance qu'ils sont administrateurs du Local 205 et du Local 262, gardiens et fiduciaires des fonds de ces deux associations, que le

[1] [1949] Que. Q.B. 447.

défendeur-intimé, alors employé comme teneur de livres du Montreal Joint Board, a frauduleusement converti à son usage partie de ces fonds, soit certaines débentures au porteur et sommes d'argent, qu'il leur a fait une restitution partielle, mais qu'il reste une balance non remboursée de $14,193.34. Ajoutant que le défendeur s'est engagé à leur payer cette somme de $14,193.34 et qu'eux-mêmes ont, à l'endroit des deux associations, l'obligation de rendre compte de leurs fonds, ils concluent qu'ils ont le droit d'obtenir et demandent un jugement condamnant le défendeur à leur payer cette somme. Ils demandent également à ce que les mises-en-cause soient assignées pour prendre connaissance de l'action et adopter toutes mesures jugées utiles à la protection de leurs droits.

Le défendeur a comparu et produit comme défense une dénégation générale. De la part des mises-en-cause, on a, le jour du procès, produit une déclaration signée par procureur en laquelle on allègue, en substance, supporter les allégations de la déclaration et consentir au jugement recherché.

La preuve a consisté uniquement dans celle qui a été soumise en demande lors du procès; le défendeur étant alors lui-même absent et non représenté, et la déclaration produite de la part des mises-en-cause ne constituant elle-même aucune preuve des faits qui y sont relatés.

Considérant la preuve au dossier, les juges des deux Cours inférieures n'ont éprouvé aucune difficulté à conclure que Poirier, l'intimé, avait, dans les deux dernières années de son emploi au Montreal Joint Board, frauduleusement converti à son usage certaines débentures au porteur et certains argents représentant en tout une somme de $18,926.57, dont il a remboursé $4,733.23, laissant une balance égale au montant réclamé par l'action. Mais le juge au procès, comme ceux de la majorité en Cour d'Appel, ont, pour diverses raisons, exprimé l'avis que les demandeurs n'avaient pas le droit de prendre eux-mêmes cette action contre le défendeur. Pour ces motifs, l'action fut rejetée par le jugement de la Cour supérieure dont le dispositif fut confirmé en Cour d'Appel. De là le pourvoi à cette Cour.

1959

PERRAULT et al. v. POIRIER et al.

Fauteux J.

Pour ainsi rejeter cette action, on s'est appuyé particulièrement sur les dispositions de l'art. 81 du *Code de procédure civile*, lequel édicte:

> 81. Personne ne peut plaider avec le nom d'autrui si ce n'est le souverain par ses officiers reconnus.
>
> Les tuteurs, curateurs et autres, représentant ceux qui n'ont pas le libre exercice de leurs droits, plaident en leur propre nom en leur qualité respective. Les corporations plaident en leur nom corporatif.

Les dispositions de cet article qui, sous l'ancien *Code de procédure civile* était l'art. 19, ont été considérées par le Comité Judiciaire du Conseil Privé dans *Porteous v. Reynar*[1]. Les faits de cette cause, comme d'ailleurs ceux des autres causes auxquelles réfère cette décision du Comité Judiciaire, diffèrent évidemment de ceux de la cause qui nous occupe. Mais, interprétant ces dispositions, Lord Fitzgerald déclare ce qui suit, à la page 131:

> Their Lordships entertain the view that art. 19 is applicable to mere agents or mandatories who are authorized to act for another or others, and who have no estate or interest in the subject of the trusts, but is not applicable to trustees in whom the subject of the trust has been vested in property and in possession for the benefit of third parties, and who have duties to perform in the protection or realization of the trust estate.

La prohibition édictée par l'art. 81 en est une d'ordre public et il appartient au plaideur qui prétend avoir qualité pour y faire exception, d'établir cette qualité. *Excipiendo reus fit actor.* De cette qualité, il doit fournir la meilleure preuve, à laquelle il ne peut suppléer par la preuve secondaire que lorsque l'impossibilité de fournir la meilleure a elle-même été établie. Le fait que le défendeur était absent et non représenté au procès n'atténue aucunement cette obligation qu'avaient les demandeurs. *S. Chalifoux Limitée v. Côté*[2].

La preuve établit que les biens dont s'est frauduleusement approprié le défendeur n'appartenaient pas aux demandeurs.

Il semble également que ces biens n'étaient pas non plus, comme allégué en la déclaration, la propriété des deux associations ouvrières mises-en-cause, le Local 205 et le Local 262, mais celle de l'International Ladies' Garment Workers' Union, dont le bureau-chef est dans l'État de New-York. A la vérité, c'est cette Union qui déléguait,

[1] (1888), 13 App. Cas. 120, (1890), 16 Q.L.R. 37.
[2] [1944] Que. K.B. 82.

chaque année, l'un de ses comptables agréés pour faire la vérification des livres du Montreal Joint Board. La preuve démontre bien que les demandeurs avaient une certaine gestion des affaires du Local 205 et du Local 262, mais rien ne permet d'affirmer qu'ils étaient plus que des agents ou mandataires des personnes constituant le Local 205 et le Local 262. Sans doute, et par une simple réponse affirmative à des questions suggestives, les témoins Manel et Nebel ont-ils déclaré que le Montreal Joint Board était fiduciaire (trustee) et qu'il détenait les fonds du Local 205 et du Local 262 comme fiduciaire (trustee) pour l'International Ladies' Garment Workers' Union. Mais, comme le signale M. le Juge Martineau, le mot fiduciaire (trustee) est susceptible de plusieurs sens dont chacun peut impliquer juridiquement, pour la personne désignée sous ce nom, des obligations et des droits différents.

Sous le droit civil de la province de Québec, les mots "fiducie" (trust) et "fiduciaire" (trustee) sont propres à ces actes de libéralité comportant transport de biens à des fiduciaires pour le bénéfice de personnes bénéficiant de la libéralité. Sous d'autres juridictions, on utilise aussi le terme "fiduciaire" (trustee) dans le cas du dépôt, de la consignation, du mandat ou certains autres contrats impliquant une administration. De toutes façons, la question de savoir si, dans un cas non déjà réglé par la loi, il y a fiducie, implique une question de droit qui ne peut être résolue par la simple affirmation d'un témoin qu'il y a fiducie, mais par la preuve légale d'une convention permettant aux tribunaux de décider si, en droit, il y a fiducie, et de déterminer les droits et obligations en résultant pour les parties. Ces précisions n'étant pas au dossier, les appelants ne peuvent prétendre avoir établi qu'ils étaient fiduciaires.

Pour justifier de leur qualité à intenter l'action, les appelants ajoutent qu'ils ont l'obligation de rendre compte de leur gestion et de remettre les biens réclamés qu'ils ont reçus comme gérants des affaires du Local 205 et du Local 262. Mais cette obligation de rendre compte et de remettre est également celle du simple mandataire lequel, suivant les dispositions de l'art. 1713 C.C. est tenu de rendre compte de sa gestion et de remettre et payer au mandant tout ce

1959

PERRAULT et al. v. POIRIER et al.

Fauteux J.

qu'il a reçu sous l'autorité de son mandat. Cette obligation, cependant, ne qualifie pas le mandataire pour plaider au nom du mandant.

On a soumis que les appelants étaient dépositaires des biens frauduleusement convertis par le défendeur et qu'ils avaient, en cette qualité, le droit de revendiquer en leur nom. Il ne s'agit pas ici d'une action en revendication mais d'une action en dommages. Pour qu'il y ait contrat de dépôt, il ne suffit pas qu'il intervienne une tradition de la chose déposée, mais il faut également que la principale fin de la tradition soit uniquement que celui à qui la tradition est faite, soit chargé de la garde de la chose. Cette fin fait le caractère essentiel du contrat de dépôt qui le distingue des autres contrats. Pothier, 3e éd., Bugnet, t. 5, pp. 125 *et seq.*

Et Pothier ajoute:

> Si la tradition est faite pour transférer à celui à qui elle est faite, la propriété de la chose, c'est une donation, ou une vente, ou un échange, ou quelque autre contrat semblable. Si c'est pour lui en accorder seulement l'usage pour son utilité, c'est un prêt ou un louage. Si c'est afin de faire quelque chose pour l'utilité de celui qui en fait la tradition, c'est, ou un *louage,* si celui à qui la tradition est faite, reçoit pour cela une *rétribution*; ou un *mandat,* s'il s'en charge gratuitement.

Les appelants ont aussi prétendu qu'ils étaient responsables de la perte résultant du délit de leur employé Poirier et exposés, pour cette raison, à être poursuivis par les mises-en-cause ou l'union elle-même; ils en concluent que ceci leur donne le droit de poursuivre le défendeur, en anticipation du recours dont ils peuvent être l'objet. Assumant que cette prétention soit fondée en droit et en fait, c'est personnellement, et non agissant comme administrateurs et fiduciaires du Local 205 et du Local 262, comme ils l'ont fait en cette cause, que les appelants pourraient poursuivre le défendeur.

Ils ont allégué, enfin, dans la déclaration, que le défendeur s'était engagé à leur payer la somme de $14,193.34. De cet engagement, il n'y a aucune preuve.

A l'issue de l'audition devant cette Cour, le procureur des appelants a demandé de remettre au régistraire un livret intitulé "Constitution and By-Laws of the International Ladies' Garment Workers' Union", ce que la Cour a permis sans décider particulièrement de l'admissibilité et de la

pertinence de ce document. La simple remise de ce livret ne fait pas la preuve de son contenu et ne saurait affecter la question ici considérée.

Je crois que c'est avec raison qu'on a jugé que les demandeurs n'avaient pas justifié leur droit d'intenter au défendeur la présente action et cette conclusion me dispense de considérer les autres raisons motivant cette décision.

Il se peut qu'en raison de cette disposition de l'appel, le défendeur échappe aux conséquences civiles de ses actes. On peut regretter ce résultat. Mais les associations ou unions ouvrières qui refusent de prendre avantage de la législation spéciale leur permettant d'obtenir, comme groupe, une existence juridique et de faire valoir, comme tel, leurs droits en justice, doivent accepter les conséquences de leur attitude. En toute déférence, le fait que les demandeurs-appelants soient tous et les seuls membres formant le Montreal Joint Board et qu'ils puissent être considérés et tenus comme s'ils étaient une seule personne en pleine capacité d'ester en justice est, je crois, étranger à la question ci-haut considérée; car ce fait n'autorise pas les demandeurs-appelants à ester en justice pour faire valoir le droit d'autrui en réclamant, en qualité de mandataires, la compensation qui est due à leurs mandants.

Je renverrais l'appel mais sans frais.

CARTWRIGHT J.:—While sharing the regret indicated in the reasons of my brother Fauteux, I find myself compelled to concur in the disposition of the appeal proposed by him.

Appeal dismissed without costs.

Attorney for the plaintiffs, appellants: J. J. Spector, Montreal.

Attorneys for the defendant, respondent: Beaulieu & Cimon, Montreal.

Attorney for the mises-en-cause: B. Schecter, Montreal.

1959

May 14, 15
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ROBERT B. CURRAN .....APPELLANT;

AND

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income—Lump sum paid under agreement to resign from position and accept new employment—Loss of pension rights and opportunity for promotion—Whether sum income or capital—The Income Tax Act, 1948(Can.), c. 52, ss. 2(1), 3, 5, 24A.

In 1951, under an agreement between the appellant and B, a substantial shareholder of Federated Petroleums which held a large number of shares of Home Oil Company, the appellant, who had been employed by Imperial Oil for many years, was paid by B $250,000 to resign his position and accept employment with Federated Petroleums. Under a separate agreement, signed on the same day, Federated Petroleums undertook to employ the appellant as its general manager, subject to the condition that he should serve as manager of any other company or companies in which Federated Petroleums had a financial interest. The appellant, after resigning from Imperial Oil, became president and managing director of Home Oil at the same salary that he was drawing before but with no superannuation benefits. The Minister assessed the $250,000 as income. The assessment was upheld by the Income Tax Appeal Board and by the Exchequer Court.

Held (Taschereau J. dissenting): The payment of $250,000 received by the appellant was income within s. 3 of the Income Tax Act. In view of *Cameron v. Prendergast,* [1940] A.C. 549, the House of Lords' previous decision in *Hunter v. Dewhurst,* 16 Tax Cas. 637, must be taken to have been decided on its very special facts. *Tilley v. Wales,* [1943] A.C. 386, distinguished.

Per Kerwin C.J. and Locke and Judson JJ. The true nature of the payment made to the appellant was to be found in the terms of the two agreements and the surrounding circumstances including the fact that it did not come from the former employer. The payment was made for personal service only and that conclusion really disposed of the matter as it was impossible to divide the consideration. While, from the point of view of the respondent, no assistance could be obtained from a consideration of s. 24A of the Act, the submission on behalf of the appellant that the section established non-taxability in this case, could not be agreed with.

Per Locke, Martland and Judson JJ.: Considering the two agreements together, the circumstances in this case made it clear that the payment constituted a payment for services to be rendered, and therefore, was income. The argument based upon the proposition that the agreement with B was to provide compensation for loss or relinquishment of a source of income, which source was of itself a capital asset,

*PRESENT: Kerwin C.J. and Taschereau, Locke, Martland and Judson JJ.

could not be entertained. The essence of the matter was the acquisition of services and the consideration was paid so that those services would be made available. The contention, urged by the appellant, that, since the payment was not made by Federated Petroleums or Home Oil, it could not be regarded as income within s. 3 of the Act because so to hold would make s. 24A meaningless in its application, could not be entertained.

Per Taschereau J, *dissenting*: A substantial part of the payment was a capital receipt in this case and was not taxable as such. The payment was divisible, and was made partly as a consideration of the loss of the benefits attached to his former position, and partly for personal services to his new employer. The matter should be referred back to the Exchequer Court so that the apportionment could be made.

APPEAL from a judgment of Dumoulin J. of the Exchequer Court of Canada[1], affirming a decision of the Income Tax Appeal Board. Appeal dismissed, Taschereau J. dissenting.

H. H. Stikeman, Q.C., and *P. N. Thorsteinsson*, for the appellant.

W. R. Jackett, Q.C., *F. J. Cross* and *G. W. Ainslie*, for the respondent.

The judgment of Kerwin C.J. and of Locke and Judson JJ. was delivered by

THE CHIEF JUSTICE:—This is an appeal by Robert B. Curran against the judgment of the Exchequer Court[1] affirming the judgment of The Income Tax Appeal Board, which had dismissed his appeal to it from a re-assessment made under the provisions of the *Income Tax Act* of the appellant's income for the taxation year 1951. The re-assessment thus confirmed was with reference to the sum of $250,000 received by the appellant in that year.

The appellant, a geologist and highly regarded in his field, was employed as manager of the producing department of Imperial Oil Limited. He had been connected with the latter for some years and in 1951 was earning $25,000 a year with the expectation that his salary would be increased, and had he continued until the retirement age of sixty-five he would have been entitled to a pension equal to approximately one-half the average of his salary for the five years immediately preceding his retirement. He had been offered a directorship in this company late in 1950 and

[1] [1957] Ex. C.R. 377, [1957] C.T.C. 384, 57 D.T.C. 1270.

1959

CURRAN v. MINISTER OF NATIONAL REVENUE

Kerwin C.J.

early in 1951 but declined because he preferred to remain in the position he then occupied and to live in Calgary. The salary attached to the position of a director in Imperial Oil Limited is considerable.

In the spring of 1951 Robert A. Brown Jr. approached the appellant with a view to inducing him to resign his position in Imperial Oil so that he might accept employment with Brown or one of the companies in which the latter was interested. Mr. Brown was a substantial shareholder of Federated Petroleums Limited and president and general manager of that company. The company itself held a large number of shares of Home Oil Company Limited. Calta Assets Limited was a small holding company, the shares of which were wholly owned by Mr. Brown and his brother and sister and it was a substantial shareholder in both Federated and Home Oil. Mr. Brown did not hold any office in Home Oil, of which Major Lowery was president and managing director and exercised both share and management control. Mr. Brown had become dissatisfied with the management of Home Oil and desired to secure the appellant's services as manager of Federated and Home Oil with the expectation that Major Lowery would then relinquish the active management of Home Oil. The negotiations between Brown and the appellant culminated in a written agreement, dated August 15, 1951, between Brown, called therein the grantor, and the appellant, referred to therein as the grantee. As the appellant emphasizes the terms of that agreement, it is set out in full:

WHEREAS the grantee is presently, at the age of 42 years, in charge of all Western Canadian Production for Imperial Oil Limited at a salary of $25,000 per year, having arrived at that position after eighteen years of service with the said Company or its affiliated companies (the said Company and its affiliates under the direction of the Standard Oil Company of New Jersey comprising together one of the largest groups of companies in the oil business with world wide production refining and marketing facilities).

AND WHEREAS the grantee has acquired the right to a pension on retirement from Imperial Oil Limited or any of its affiliates which if his present salary scale remains the same until his retirement will yield to him the sum of $12,500 per year, and the probabilties are that if he remains with his present employers his salary will increase substantially over the years with corresponding increases in the pension payable to him.

AND WHEREAS his pension rights will cease entirely if he voluntarily severs his connection with the said Company and its affiliates.

AND WHEREAS the grantee has been mentioned as a prospective member of the Board of Directors of Imperial Oil Limited which if he were to be so appointed would mean an immediate substantial increase in salary and would in the ordinary course of events lead eventually to one of the senior positions in the oil organization of which Imperial Oil Limited forms a part.

AND WHEREAS it is not the policy of Imperial Oil Limited and its affiliates to re-employ in any part of such world wide organization anyone who has voluntarily left the service of any of the companies in or affiliated therewith.

AND WHEREAS FEDERATED PETROLEUMS LIMITED, a comparatively small oil company operating only in Canada and having no connection with Imperial Oil Limited or any of its affiliates, has recently intimated its willingness to offer the grantee a position as Manager at a salary equivalent to that which he draws from Imperial Oil Limited, which proposed offer the grantee has intimated that he would refuse solely by reason of the fact that he would be obliged to give up his chances of advancement with his present employers and their affiliates, would lose the opportunity for re-employment with them or any of them, thereby greatly limiting his field of possible future employment, and would lose all accumulated and future rights to pension.

AND WHEREAS the grantor holds a substantial interest in Federated Petroleums Limited, is of the opinion that the grantee's experience, capabilities and connections would be valuable to that Company, and is very desirous of persuading the grantee to resign from his present position in order that he may then be free to accept an offer of employment from Federated Petroleums Limited.

AND WHEREAS the grantor recognizes what the grantee is obliged to give up in the way of chances for advancement, pension rights, and opportunities for re-employment in the oil industry if he resigns from his present position in order to be free to accept the offered employment and has agreed to compensate him liberally therefor.

NOW THEREFORE THIS INDENTURE WITNESSETH

1. The grantor hereby agrees to pay to the grantee the sum of $250,000 in consideration of the loss of pension rights, chances for advancement, and opportunities for re-employment in the oil industry, consequent upon the resignation of the grantee from his present position with Imperial Oil Limited, the said sum to be paid forthwith upon the grantee informing his present employers that he is leaving their employ and whether or not employment has been offered to him by Federated Petroleums Limited or accepted by him, prior to that time.

2. In consideration of the agreement of the grantor to pay the said sum, the grantee hereby agrees to resign his position with Imperial Oil Limited, such resignation to take effect not later than the 15th day of September, A.D. 1951.

Mr. Brown paid the $250,000 to the appellant, but Calta Assets Limited actually furnished the funds out of its own assets and from money borrowed from a bank. On the same day, August 15, 1951, the appellant entered into an agreement with Federated Petroleums to act as its general

1959

CURRAN
v.
MINISTER OF
NATIONAL
REVENUE

Kerwin C.J.

manager at a fixed salary of $25,000 per year and he was to serve as the directors of that company might determine from time to time as manager of any other company or companies in which Federated had a financial interest either in addition to or in lieu of serving as manager of Federated; but any salary from such other company or companies was to the extent thereof to be deemed satisfaction of the salary which under the terms of the agreement Federated was obligated to pay. The appellant was also given the option, within a limited time, to purchase twenty-five thousand shares of Home Oil Company at a given price.

The appellant resigned his position with Imperial Oil Limited shortly after August 15, 1951. He was never employed by Brown or Federated Petroleums or Calta Assets but became president and managing director of Home Oil at a salary of $25,000 per year with no superannuation benefits. Due to a disagreement with Brown the appellant resigned his position with Home Oil at the expiration of about one year.

Subsection (1) of s. 2 and s. 3 of the *Income Tax Act*, 1948, c. 52, provide:

> 2. (1) An income tax shall be paid as hereinafter required upon the taxable income for each taxation year of every person resident in Canada at any time in the year.
>
> * * *
>
> 3. The income of a taxpayer for a taxation year for the purposes of this Part is his income for the year from all sources inside or outside Canada and, without restricting the generality of the foregoing, includes income for the year from all
>
> (*a*) businesses,
>
> (*b*) property, and
>
> (*c*) offices and employments

As has been pointed out in the recent judgment of this Court in *Bannerman v. Minister of National Revenue*[1], there is no extensive description of income such as appeared in the *Income War Tax Act*. The word must receive its ordinary meaning bearing in mind the distinction between capital and income and the ordinary concepts and usages of mankind. Under the authorities it is undoubted that clear words are necessary in order to tax the subject and

[1] [1959] S.C.R. 562, 18 D.L.R. (2d) 492, [1959] C.T.C. 214, 59 D.T.C. 1126.

that the taxpayer is entitled to arrange his affairs so as to minimize the tax. However, he does not succeed in the attempt if the transaction falls within the fair meaning of the words of the taxing enactment.

The decision of the House of Lords in *Tilley v. Wales*[1] was relied upon by the appellant. Prior thereto their Lordships had decided *Hunter v. Dewhurst*[2] and *Cameron v. Prendergast*[3]. In the latter case they regarded the Dewhurst case as having been decided on its very special facts and in any event distinguished it on the ground that the payment there was not a profit of the directorship but was a compromise of a future contingent liability, i.e., to pay a lump sum upon Dewhurst's eventual retirement from office. In *Cameron v. Prendergast* the continuance in office was the essence of the bargain which contemplated that Cameron would not resign for at least a reasonable time thereafter. The sum there involved was very large but it was regarded as income since remuneration is still income even though paid once and for all in a lump sum instead of by instalments over a period of years.

When *Tilley v. Wales* came before the House of Lords, Viscount Simon, with whom Lord Atkin and Lord Russell of Killowen agreed, said, at p. 392, that the decision in Dewhurst was regarded and described as arising in very special circumstances, but he thought that the *ratio decidendi* was as he had described, i.e., that a certain sum of £10,000 was not a profit from Dewhurst's employment as director and did not represent salary but was a sum of money paid down by the company which had employed Dewhurst to obtain a release from a contingent liability as distinguished from being remuneration under the contract of employment. He pointed out that apart from previous authority he should take the view that a lump sum paid to commute a pension is in the nature of a capital payment, which is substituted for a series of recurrent and periodic sums which partake of the nature of income. He then continued:

> But can the same view be taken of an arrangement made between an employer and his servant under which, instead of the whole or part of a periodic salary, a single amount is paid and received in respect

[1] [1943] A.C. 386. [2] (1932), 16 Tax Cas. 637.

[3] [1940] A.C. 549.

1959

CURRAN v. MINISTER OF NATIONAL REVENUE

Kerwin C.J.

of the employment? Generally speaking, I think not. An "office or employment of profit"—to use the actual phrase in sch. E—necessarily involves service over a period of time during which the office is held or the employment continues. The ordinary way of remunerating the holder or the person employed is to make payments to him periodically, but I cannot think that such payments can escape the quality of income which is necessary to attract income tax because an arrangement is made to reduce for the future the annual payments while paying a lump sum down to represent the difference. My view seems to me to be supported by the decision of this House in *Cameron v. Prendergast.*

In the present case the substance of the matter was the engagement by the appellant to work for Mr. Brown or one of the companies in which the latter was interested and the agreement by the appellant with Federated Petroleums. It is true that in order to fulfil his obligations under the contracts the appellant was obliged to resign his position with Imperial Oil Limited and thereby gave up not only the annual salary, a like amount which he was to receive, but also his pension rights and further prospects. However, the payment of $250,000 was made for personal service only and that conclusion really disposes of the matter as it is impossible to divide the consideration. The mere fact that the first agreement of August 15, 1951, states that Brown agreed to pay the appellant $250,000 in consideration of the loss of pension rights, chances for advancement and opportunities for re-employment in the oil industry cannot change the true character of the payment. Its true nature must be found in the terms of the two agreements and the surrounding circumstances including the fact that the $250,000 did not come from Imperial Oil Limited. I have been unable to secure any assistance from the other cases referred to by Mr. Stikeman including *Van Den Berghs Ltd. v. Clark*[1], a decision of the House of Lords, and the judgment of Williams J. in the High Court of Australia in *Bennett v. Federal Commissioner of Taxation*[2]. I should add that while, from the point of view of the respondent, I obtain no assistance from a consideration of s. 24A of the Act, I cannot agree with the submission on behalf of the appellant that it establishes non-taxability of the appellant.

The appeal should be dismissed with costs.

[1] [1935] A.C. 431.

[2] (1947), 8 A.T.D. 265.

TASCHEREAU J. (*dissenting*):—All the material facts of this case have been fully recited by the Chief Justice and my brother Martland, and it is therefore unnecessary to deal with them once more.

The learned trial judge has reached the conclusion that the sum of $250,000 paid to the appellant in 1951, constituted income within the meaning of the Act and was properly assessed as such.

I cannot escape the conclusion that a substantial part of this amount paid to the appellant by Robert A. Brown Jr., was a capital receipt in the circumstances of this case, and not taxable as such.

The appellant had been with the Imperial Oil Company since 1933, with one short interval, and in August, 1951, was manager of the Producing Department. He enjoyed a very high reputation as a geologist, and was a man of extensive knowledge. He earned a salary of $25,000 a year, and on two occasions had been invited to become a director of the company. If the appellant had remained in the employment of Imperial Oil Co. or an affiliated company, he would have been entitled, when reaching the retirement age of 65, to an annual pension of approximately $12,500, and as an employee of the company, many other privileges were available to him, such as group insurance, sick benefits, and a stock purchase privilege. There were also great possibilities of salary increases.

It would indeed have been a very poor bargain for the appellant to enter into, without insisting upon a fair compensation, as he did in his written agreement with Brown, for foregoing such substantial actual and eventual benefits. I do not think however that the total of this amount of $250,000, which is in my view divisible, was paid to the appellant as consideration of the loss of those benefits. I believe that a proportion was for personal services to the new employer. As this division has not been made by the trial judge, I would allow the appeal with costs, and refer the case back to the Exchequer Court so that it may apportion the part of this sum of $250,000 which is income, and therefore taxable, and the other part which is of a capital nature.

1959

CURRAN
v.
MINISTER OF
NATIONAL
REVENUE

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

MARTLAND J.:—The facts of this case are contained in the judgment of the Chief Justice, including the contents of the agreement dated August 15, 1951, made between the appellant and Mr. R. A. Brown Jr. I agree with counsel for the respondent that this agreement must be considered in conjunction with the agreement of the same date, between the appellant and Federated Petroleums Limited (hereinafter referred to as "Federated"), which was executed immediately following the execution of the first-mentioned agreement. The agreement with Mr. Brown specifically recites that Brown, the holder of a substantial interest in Federated, is very desirous of persuading the appellant to resign from his position with Imperial Oil Limited in order to be free to accept an offer of employment from Federated. The employment contract with Federated enabled it to require the appellant to serve as manager of any other company or companies in which Federated had a financial interest.

Mr. Brown's evidence made it quite clear that his purpose in approaching the appellant and paying him the consideration of $250,000 was in order that the appellant would be available to become associated with Federated and that it was his wish, for the reasons which he gave, that, if possible, the appellant should become President and Managing Director of Home Oil Company Limited (hereinafter referred to as "Home"). At that time, though both Brown and Federated held substantial interests in Home, they did not have control of it and Brown was not then a director of Home. In due course, subsequently, the appellant did become president and managing director of Home and Brown became a director of that company.

These circumstances make it clear that the $250,000 payment was made by Brown to the appellant and received by the appellant to induce him to serve as manager of Federated or of Home and preferably, if possible, the latter. This being so, it seems to me that it constituted a payment for services to be rendered by the appellant.

For the appellant it is contended that the payment represented a capital receipt and not income. The argument is based upon the proposition that the agreement made by him with Brown was to provide compensation for loss or relinquishment of a source of income, which source was of itself a capital asset of the appellant.

In support of this submission several English decisions and an Australian case were cited. All of these were, however, cases in which an employer purchased from its employee a surrender by the latter of rights which he had previously held as against the employer. Thus, for example, in *Hunter v. Dewhurst*[1] (a case which has been regarded in later decisions as arising in very special circumstances) the employee, for a consideration, released the employing company from a contingent liability. The payment was distinguished by the majority of the House of Lords from being remuneration under the contract of employment.

Hose v. Warwick[2] was a case in which the employee, for a consideration, turned over to the employing company his extensive personal connection in the insurance business, which he had previously been entitled to retain for himself.

In *Tilley v. Wales*[3], the taxpayer had been employed by a limited company as Managing Director at a fixed salary of 6,000 pounds per annum and had a right to receive a pension of 4,000 pounds per annum for a period of ten years after cessation of his employment. He entered into an agreement with the company to release it from its obligation to pay the pension and to reduce the salary to 2,000 pounds per annum in consideration of 40,000 pounds paid to him by the company in two consecutive, annual instalments of 20,000 pounds each.

The House of Lords held that so much of the payment as represented consideration for a reduction in salary was income and subject to tax, but that the consideration received by the taxpayer for commutation of his pension rights was not income.

Duff v. Barlow[4] is a case in which the employee surrendered his right to remuneration for services being rendered by him to a subsidiary of the employing company

[1] (1932) 16 Tax Cas. 637.
[2] (1946), 27 Tax Cas. 459.
[3] [1943] A.C. 386.
[4] (1941), 23 Tax Cas. 633.

1959

CURRAN v. MINISTER OF NATIONAL REVENUE

Martland J.

in consideration of a lump-sum payment. The parent company had decided that it was in its interest to terminate the agreement under which these services were being rendered and it was determined. It was held that, as there was thereafter no obligation to perform services for the subsidiary, such services could not be any part of the consideration for which the lump sum was paid.

In *Beak v. Robson*[1], the money consideration received by the employee was for his covenant not to compete for five years within a certain radius if and when he terminated or caused to be terminated his contract of employment.

The Australian case cited was that of *Bennett v. Federal Commissioner of Taxation*[2]. The payments in question there were made to an employee for the cancellation of an employment agreement, which was replaced by another contract under which the term of employment had been reduced and the employee had been shorn of his previous absolute control of the company.

All of these are cases in which the money payments to an employee have been held not to constitute taxable income because they were not made in respect of the performance of services by the employee, but rather in order to acquire from him rights which he had previously held against the employer.

On the other side of the line are cases such as *Cameron v. Prendergast*[3], where the House of Lords decided that a lump-sum payment made to a Director to induce him not to resign his Directorship of a limited company was a profit from his Directorship and, as such, was liable to tax. In that case it was held that the payment was made so that the taxpayer would continue to perform services as a Director of the company. The contention that the payment was made merely to persuade the taxpayer not to exercise the right which he had to resign from office was rejected.

In the present case it is clear that Mr. Brown was not seeking to acquire any rights which the appellant had under his existing employment contract with Imperial Oil Limited. The agreement made by Brown with the appellant and Brown's evidence make it clear that he was seeking to

[1] (1942), 25 Tax Cas. 33. [2] (1947), 8 A.T.D. 265.
[3] [1940] A.C. 549.

acquire the skilled services of the appellant as a manager. In order that those services might be available it was necessary that the appellant should resign from his position with Imperial Oil Limited and such resignation resulted in the forgoing by him of various advantages which his employment with Imperial Oil Limited carried and which are referred to in the agreement. However, the essence of the matter was the acquisition of services and the consideration was paid so that those services would be made available.

I, therefore, think that the payment made to the appellant by Brown, under the agreement of August 15, 1951, was income to the appellant within the meaning of s. 3 of the *Income Tax Act*, which provides:

3. The income of a taxpayer for a taxation year for the purposes of this Part is his income for the year from all sources inside or outside Canada and, without restricting the generality of the foregoing, includes income for the year from all

(*a*) businesses,

(*b*) property, and

(*c*) offices and employments.

Reference was made in argument to s. 24A of the *Act*, as it applied in the year in question, which section refers to s. 5. The relevant portions of s. 5 and s. 24A provide as follows:

5. Income for a taxation year from an office or employment is the salary, wages and other remuneration, including gratuities, received by the taxpayer in the year plus . . .

* * *

24A. An amount received by one person from another,

(*a*) during a period while the payee was an officer of, or in the employment of, the payer, or

(*b*) on account or in lieu of payment of, or in satisfaction of, an obligation arising out of an agreement made by the payer with the payee immediately prior to, during or immediately after a period that the payee was an officer of, or in the employment of, the payer,

shall be deemed, for the purpose of section 5, to be remuneration for the payee's services rendered as an officer or during the period of employment, unless it is established that, irrespective of when the agreement, if any, under which the amount was received was made or the form or legal effect thereof, it cannot reasonably be regarded as having been received

(i) as consideration or partial consideration for accepting the office or entering into the contract of employment,

(ii) as remuneration or partial remuneration for services as an officer or under the contract of employment, or

1959

CURRAN v. MINISTER OF NATIONAL REVENUE

Martland J.

(iii) in consideration or partial consideration for covenant with reference to what the officer or employee is, or is not, to do before or after the termination of the employment.

Counsel for the respondent conceded that s. 24A was not applicable to the circumstances of this case. Counsel for the appellant, however, urged that s. 24A was enacted in order to broaden the scope of s. 5 so as to tax certain kinds of income not otherwise taxable under s. 5. He pointed out that s. 24A might have applied to the payment in question here if it had been made to the appellant by Federated or by Home. Since it did not apply, because the payment was not made by the appellant's employer, he contended that the payment could not be regarded as income within s. 3, because so to hold would make s. 24A meaningless in its application.

It seems to me, however, that s. 24A was essentially a provision dealing with onus of proof and deemed certain payments as therein defined to be payments within s. 5, unless the recipient could establish affirmatively that a payment did not reasonably fall within the provisions of paras. (i), (ii) or (iii) of s. 24A. I do not think that it follows that payments which would fall within s. 24A, except for the fact that they were made by someone other than the employer, of necessity cannot be income within the provisions of s. 3.

In my opinion the appeal should be dismissed with costs.

Appeal dismissed with costs, TASCHEREAU J. *dissenting.*

Solicitors for the appellant: Chambers, Might, Saucier, Milvain, Peacock, Jones & Black, Calgary.

Solicitor for the respondent: A. A. McGrory, Ottawa.

INDEX

71117-6—3½

COURTS

Supreme Court of Canada—Jurisdiction —Mandamus for issuance of licence to operate restaurant—Licence would have expired prior to notice of appeal—Restaurant sold prior to argument in this Court—Whether lis remains between parties.

VIC RESTAURANT INC. v. CITY OF MONTREAL, 58.

CRIMINAL LAW

1. Theft—Admissibility of statement of accused—Whether dissent on question of law—The Criminal Code, 1953-54(Can.), c. 51, s. 597(1)(a).

PEARSON v. THE QUEEN, 369.

2. Charge to jury—Drunkenness—Provocation—Rule in Hodge's case—Criminal Code, 1953-54(Can.), c. 51, ss. 201(a)(ii), 203.

SALAMON v. THE QUEEN, 404.

3. Acquittal at non-jury trial on charge of criminal negligence causing death—No evidence offered by accused after Crown's case—Crown nonsuited—Reasonable doubt —Duty of trial judge—Whether Crown entitled to appeal—Whether finding of non-criminal negligence question of law alone—Criminal Code, 1953-54(Can.), c. 51, ss. 191, 558, 584.

ROSE v. THE QUEEN, 441.

4. Juvenile delinquents—Whether notice of hearing served on parents—Conviction made in absence of parents—Certiorari—Lack of jurisdiction—Leave to appeal granted by Supreme Court of Canada—Criminal Code, 1953-54(Can.), c. 51, ss. 141, 414, 705, 708(1)—The Juvenile Delinquents Act, R.S.C. 1952, c. 160, s. 10(1)—The Supreme Court Act, R.S.C. 1952, c. 259, s. 41.

SMITH v. THE QUEEN, 638.

5. Possession of stolen bonds—Whether guilty knowledge—Evidence—Explanation —Whether reasonably true—Whether inconsistent with any rational explanation—Criminal Code, 1953-54(Can.), c. 51, s. 296.

GRAHAM v. THE QUEEN, 652.

6. Bribery—Conspiracy—Minister of the Crown—Whether an "official"—Offences under the old Code—Prosecution commenced after coming into force of new Code—Whether limitation period provided

CRIMINAL LAW—Concluded

by old Code applicable—Effect of transitional provisions in new Code—Criminal Code, R.S.C. 1927, c. 36, ss. 158, 1140—Criminal Code, 1953-54(Can.), c. 51, ss. 102(e), 745, 746.

SOMMERS AND GRAY et al. v. THE QUEEN, 678.

CROWN

1. Officers of the Crown—Powers and responsibilities—Prime Minister and Attorney-General—Quebec Liquor Commission—Cancellation of licence to sell liquor—Whether made at instigation of Prime Minister and Attorney-General—The Alcoholic Liquor Act, R.S.Q. 1941, c. 255—The Attorney-General's Department Act, R.S.Q. 1941, c. 46—The Executive Power Act, R.S.Q. 1941, c. 7.

RONCARELLI v. DUPLESSIS, 121.

2. Sunday observance—Information under the Lord's Day Act, R.S.C. 1952, c. 171, s. 4, laid against the Canadian Broadcasting Corporation—Whether Act binding on Her Majesty—Whether Act binding on Corporation—Immunity of Sovereign—Writ of prohibition to prevent further proceedings—The Canadian Broadcasting Corporation Act, R.S.C. 1952, c. 32—The Interpretation Act, R.S.C. 1952, c. 158, s. 16—The Criminal Code, 1953-54(Can.), c. 51, s. 2(15).

C.B.C. v. ATTY.-GEN. FOR ONTARIO, 188.

3. Petition of right—Claim for breach of contract—Tenant of former owner remaining in occupation of expropriated Crown land—Nature of tenancy—Absence of authority of Governor in Council—Destruction of chattels on direction of Crown servant by independent contractor —Whether Crown liable—Civil Code, art. 1053—The Exchequer Court Act, R.S.C. 1927, c. 34, ss. 18, 19(b), (c)—The Public Works Act, R.S.C. 1927, c. 166, s. 18.

PALMER et al. v. THE QUEEN, 401.

DAMAGES

1. Employee injured—Workmen's compensation paid by employer—Subrogation in favour of employer—Actions by employer and victim against tort-feaser—Apportionment of damages—Workmen's Compensation Act, R.S.Q. 1941, c. 160, ss. 7(3), 8

MINGARELLI v. MONTREAL TRAMWAYS Co. et al., 43.

STATUTES—Continued

STATUTES—Continued

STATUTES—Concluded

TAXATION

1. Income tax—Distributor of automobiles receiving rebates from supplier—Whether rebates forgiveness of debt or trading profit—The Income Tax Act, 1948 (Can.), c. 52, ss. 3, 4.

OXFORD MOTORS LTD. v. MINISTER OF NATIONAL REVENUE, 548.

2. Income tax—Capital cost allowance—Timber limit purchased by taxpayer in non-arm's-length transaction—Timber limit not operated by vendor—Whether "depreciable property"—The Income Tax Act, 1948 (Can.), c. 52, ss. 11, 17, 20.

CAINE LUMBER CO. LTD. v. MINISTER OF NATIONAL REVENUE, 556.

TAXATION—Continued

3. Income tax—Company funds diverted by president—Legal, telephone and travelling expenses paid by other shareholder to obtain winding-up order—Whether deductible from shareholder's income—The Income Tax Act, 1948 (Can.), c. 52, ss. 2, 3, 4, 12, 81.

BANNERMAN v. MINISTER OF NATIONAL REVENUE, 562.

4. Municipality—"Concentrator"—Assessment of an "iron ore recovery plant"—Whether exempt from assessment—Whether liable to busniess tax—The Assessment Act, R.S.O. 1950, c. 25, ss 6, 33.

TOWNSHIP OF WATERS v. INTERNATIONAL NICKLE CO. OF CANADA, 585.

5. Income tax—Sale of one's of taxpayer's operations including inventory—Whether sale of separate business—Whether profit on inventory taxable—The Income Tax Act, 1948 (Can.), c. 52, ss. 2(1), (3), 3. 4, 127(1)(e).

FRANKEL CORPORATION LTD. v. MINISTER OF NATIONAL REVENUE, 713.

6. Income tax—Sale of interest to coventurer when venture substantially completed—Whether taxable income or capital receipt—The Income Tax Act, 1948 (Can.), c. 52, ss. 3, 4.

GENERAL CONSTRUCTION CO. LTD. v. MINISTER OF NATIONAL REVENUE, 729.

7. Income tax—Foreign tax credit—Interest from U.S. sources—No business carried on there—Payment of U.S. withholding tax—Whether tax credit dependent on whether profit made in U.S.—Interest paid on borrowed money exceeding U.S. interest receipts—Canada-U.S. Tax Convention—The Income Tax Act, 1948 (Can.), c. 52, ss. 3, 4, 6(b), 11(1)(c), 38(1), 127(1)(av)—The Income Tax Act, R.S.C. 1952, c. 148, ss. 3, 4, 6(b), 11(1)(c), 41(1), 139(1)(az).

INTERPROVINCIAL PIPE LINE CO. v. MINISTER OF NATIONAL REVENUE, 763.

8. Excise tax—Value for duty of imported electric refrigerator—The Customs Act, R.S.C. 1952, c. 58, s. 35(1), (2), (3), (7).

CANADIAN ADMIRAL CORPORATION LTD. v. DEPUTY MINISTER OF NATIONAL REVENUE, 832.

9. Income—Lump sum paid under agreement to resign from position and accept new employment—Loss of pension rights