1937

CANADA LAW REPORTS

Supreme Court of Canada

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1937

JUDGES

OF THE

SUPREME COURT OF CANADA

DURING THE PERIOD OF THESE REPORTS

The Right Hon. Sir LYMAN POORE DUFF C.J., P.C., G.C.M.G.

" THIBAUDEAU RINFRET J.

" LAWRENCE ARTHUR CANNON J.

" OSWALD SMITH CROCKET J.

" HENRY HAGUE DAVIS J.

" PATRICK KERWIN J.

" ALBERT BLELLOCK HUDSON J.

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA:

The Hon. ERNEST LAPOINTE, K.C.

38407—1½

ERRATA

Page 127, at the 15th line from bottom, "two-yearly" should be "two half-yearly."

Page 251, at the third line of the head-note, add "238" after "p."

Page 266, at the 19th line, "21" should be "24" and at the 21st line, "such section" should be "section 21."

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

Attorney-General of British Columbia v. *The Royal Bank of Canada and Island Amusement Company Ltd.* ([1937] S.C.R. 459). Leave to appeal granted on condition the Attorney-General notifies the Registrar his willingness to pay respondent's costs (as between solicitor and client) in any event, 11th November, 1937.

General Dairies Ltd. v. *Maritime Electric Co. Ltd.* ([1935] S.C.R. 519). Appeal allowed with costs, 8th February, 1937.

Jalbert v. *The King.* ([1937] S.C.R. 51). Leave to appeal granted; leave to cross-appeal also given if petition lodged, 28th May, 1937.

MacMillan v. *Brownlee.* ([1937] S.C.R. 318). Leave to appeal granted, 17th June, 1937.

References in the matters of The Weekly Rest in Industrial Undertakings Act, The Limitation of Hours of Work Act and *The Minimum Wages Act.* ([1936] S.C.R. 461 to 538). Act in each case is *ultra vires* of the Parliament of Canada, 28th January, 1937.

References in the matters of The Employment and Social Insurance Act, The Natural Products Marketing Act, Section 498A of the Criminal Code, The Farmers' Creditors Arrangement Act, 1934, and The Dominion Trade and Industry Commission Act. ([1936] S.C.R. 363 to 461). Appeals dismissed and cross-appeal in *The Dominion Trade and Industry Commission Act* allowed, 28th January, 1937.

Sin Mac Lines Limited v. *Hartford Fire Insurance Co.* ([1936] S.C.R. 598). Leave to appeal refused with costs, 25th February, 1937.

Southern Canada Power Co. Ltd. v. *The King.* ([1936] S.C.R. 4). Appeal allowed and cross-appeal dismissed, 28th July, 1937.

Wake-Walker (Captain W. F.) v. *Steamer Colin W. Ltd.* ([1936] S.C.R. 624). Appeal dismissed with costs.

A TABLE

OF THE

NAMES OF THE CASES REPORTED

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SUPREME COURT OF CANADA

The attention of the profession is directed to the following amendment to the Rules of the Supreme Court of Canada, 1929:—

"CONFERENCE ROOM OF JUDGES

MONDAY, the 19th day of April, 1937.

GENERAL ORDER

It is hereby ordered, pursuant to the powers conferred by section 104 of the Supreme Court Act, as follows:—

Rules 1, 2, 3, 4 and 5 and the heading preceding them are hereby repealed and the following substituted therefor:—

MOTIONS TO QUASH APPEALS

Rule 1. At any time after an order has been made pursuant to the Supreme Court Act allowing the security required by the Act the respondent may apply to the Court for an order quashing the appeal.

Rule 2. In the event of the appeal being quashed the appellant may, in the discretion of the Court, be ordered to pay the whole or any part of the costs of the appeal.

Rule 3. Upon service of the notice of motion to quash all further proceedings in the appeal shall be stayed until the motion has been disposed of unless the Court or a judge shall otherwise order. Any such motion shall be brought on for hearing with no avoidable delay.

L. P. DUFF, C.J.
T. RINFRET, J.
OSWALD S. CROCKET, J.
H. H. DAVIS, J.
P. KERWIN, J.
A. B. HUDSON, J."

April 21st, 1937.

J. F. SMELLIE,
Registrar.

SUPREME COURT OF CANADA

The attention of the profession is directed to the following amendment to the Rules of the Supreme Court of Canada, 1929:—

"CONFERENCE ROOM OF JUDGES

SATURDAY, the 30th day of October, 1937.

GENERAL ORDER

It is hereby ordered, pursuant to the powers conferred by section 104 of the Supreme Court Act, as follows:—

The Rules of the Supreme Court are amended by adding the following rule as Rule 53A:—

On any appeal the Court may, on the application of any of the parties or without such application, direct that a party or parties respondent be added where, in the opinion of the Court, such order is just and convenient and necessary to enable the Court effectually and completely to adjudicate upon and settle the question involved in the appeal, and where, on the facts before it, the Court is of the opinion that such party or parties should have been added by the Court whose decision is appealed from.

Such order shall be made upon such terms and shall contain such consequential directions as to the Court seems just.

This rule shall apply to appeals now pending.

L. P. DUFF, C.J.
L. A. CANNON, J.
OSWALD S. CROCKET, J.
H. H. DAVIS, J.
P. KERWIN, J.
A. B. HUDSON, J."

November 3rd, 1937.

J. F. SMELLIE,
Registrar.

CASES

DETERMINED BY THE

SUPREME COURT OF CANADA ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

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THE REVEREND E. G. DOE (TRUSTEE) AND THE ROMAN CATHOLIC EPISCOPAL CORPORATION OF THE DIOCESE OF LONDON, IN ONTARIO (PLAINTIFFS) ..... } APPELLANTS;

AND

THE CANADIAN SURETY COMPANY (DEFENDANT) ..... } RESPONDENT.

*Mar. 25, 26.
*Nov. 27.

B. BLONDE (DEFENDANT) ..... APPELLANT;

AND

THE REVEREND E. G. DOE (TRUSTEE) ET AL. (PLAINTIFFS) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Building contract—Action for damages for alleged faulty performance by contractor—Terms of contract—Interpretation—Nature of work—Nature of alleged defects—Basis and measure of damages recoverable, if any—Surety company guaranteeing performance by contractor—Alleged alteration of contract without surety's consent—Alleged failure to notify surety of certain matters—Release of surety.

The defendant B. contracted with plaintiffs to erect for them a church building. It was of a design unique on this continent and of difficult work. The defendant surety company gave its bond to plaintiffs, guaranteeing performance by B. The time for completion under the contract was May 15, 1931. The building was completed by August 13, 1931, on which date the architect's final certificate was issued. There had been, and continued to be, leakages of rain into the building, which plaintiffs alleged were due to faulty workmanship and B. alleged were due to faulty design. On September 28, 1931, plaintiffs paid the balance of the contract price (which, by arrangement, was paid direct to unpaid sub-contractors), after obtaining on that date from B. a written undertaking as follows: "I hereby acknowledge having received notice from you and your architect * * * that certain defects have been discovered by your architect, and that there is water leaking into the church * * * , the cause of which has not been exactly determined. * * * I hereby acknowledge that

*PRESENT:—Duff C.J. and Rinfret, Crocket, Davis and Kerwin JJ.

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the said notice has been given to me in pursuance of the specifications which form part of the contract * * * . I further agree and covenant to repair same according to the directions given by your architect." The undertaking as drawn by plaintiffs had contained, after said words "to repair same," the words "according to the terms of the contract," but as B. (who denied faulty performance by him) would not sign it in that form, the latter words were deleted. Article 16 of the general conditions in the specifications read as follows: "Neither the final certificate or payment * * * shall relieve the contractor from responsibility for faulty materials or workmanship, which shall appear within a period of one year from the date of completion of the work, and he shall remedy any defect due thereto and pay for any damage to other work resulting therefrom which shall appear within such period of one year, but beyond that the contractor shall not be liable. * * *"

Plaintiffs sued B. and the surety, claiming for damages resulting from the leakages. At trial they obtained judgment against both defendants. B.'s appeal from this judgment was dismissed by the Court of Appeal for Ontario, which, however, allowed the surety's appeal and dismissed the action as against it. B. and the plaintiffs appealed to this Court.

Held (*per* the majority of the Court: Duff C.J., Crocket and Davis JJ.): (1) In view of the issue of the architect's final certificate and payment of the full amount of the contract moneys, and there being no suggestion of fraud or mistake, the question of B.'s liability must be confined to his said undertaking of September 28, and said article 16 (being the only relevant reservation in the contract available to plaintiffs, once the work was completed and accepted, the final certificate issued and the contract moneys paid).

(2) B.'s obligation under his undertaking of September 28 was limited to obeying directions of the architect; and in the absence of proof that directions were given and not obeyed, B. was not liable under the undertaking.

(3) B.'s responsibility under article 16 was limited to faulty materials or workmanship which did not "appear" until after the completion and acceptance of the work. Assuming (what plaintiffs contended) that B. had not properly bonded the bricks and tiles with the mortar, yet article 16 must be read in the light of the necessity for the architect's constant supervision of this particular work (the bricklaying being a job of more than ordinary difficulty) and of the fact that there was no suggestion of bad faith or fraud or concealment on B.'s part; (discussion of an architect's duties in such cases, and of the extent of a contractor's liability in damages if the architect fails to supervise properly and check defects and have them remedied as they occur); and if the defects complained of were such as the architect would observe if he gave the requisite supervision to the work, then it could not fairly be said that the defects were not apparent within the contemplation of article 16 before the completion and acceptance of the work. The date of the "appearance" of faulty workmanship or materials (if any) was important; and the case against B. had not really been dealt with, at trial, from that point of view. Further, if there was liability upon B. under article 16, it rested upon plaintiffs to establish upon a proper measure of damages what were in fact the actual damages; and the evidence was not such as could establish that. The principle of measuring damages on the basis of

the cost of repairing the building as it stood at the date of the trial (February, 1934) was clearly wrong, quite apart from the very unsatisfactory nature of the evidence adduced even on that basis. It was impossible to say from the evidence whether any liability had been incurred under article 16.

(4) For reasons aforesaid, the judgment against B. should be set aside; with liberty to plaintiffs to proceed to a new trial on the issue arising out of article 16.

(5) The action as against the surety should be dismissed. Acts of the plaintiffs in connection with the contract (anticipatory payments, the arrangement aforesaid for payment direct to sub-contractors owing to B.'s financial difficulties in completing the work, the settlement covered by said undertaking of September 28, etc.) which, under all the special circumstances of the case should have been, but were not, done with the knowledge and consent of the surety, operated to discharge the surety. (The law as to the effect of alterations in a contract as affecting a surety's liability, discussed, and *Holme* v. *Brunskill,* 3 Q.B.D. 495; *Calvert* v. *London Dock Co.,* 2 Keen's Rep. 638, *General Steam Navigation Co.* v. *Rolt,* 6 C.B. (N.S.) 550, and other cases, referred to. Any agreement or transaction between the principals in variation of the contract without the surety's consent, unless it is self-evident that the variation is unsubstantial or necessarily beneficial to the surety, operates to discharge the surety. The application of this principle with regard to the circumstances of the present case discussed).

(6) After B.'s bid had been accepted, he notified plaintiffs that he had made two substantial omissions in estimating costs for the purpose of it, and requested release or an increased contract price, which plaintiffs refused. B., faced with threatened forfeiture of deposit and loss of materials on the site of the work, decided to proceed with the work. It was subsequent to this that the surety delivered its bond in the blanket form in which plaintiffs required it. When these facts had come out at the trial (which had then proceeded for a week) counsel for the surety asked leave to plead non-disclosure thereof by plaintiffs to the surety and consequent release of the surety, which request was refused except on terms of adjournment and payment by the surety in any event of all costs of the trial up to that time, which latter term was declined. The majority of this Court expressed the opinion that under all the circumstances the surety should have been allowed to amend its pleadings unfettered by such an onerous term as to costs; and that, had judgment not been given for dismissal, on other grounds, of the action against it, a new trial would have been necessary to determine the issue sought to be raised. The questions involved in such an issue were to some extent discussed.

Per Rinfret J. (dissenting in part): The trial judge's finding that leakages were attributable to faulty workmanship of B. which did not "appear" until within one year after the completion of the work, within the contemplation of article 16, was fully warranted on the evidence. But in any case the undertaking of September 28, 1931, created a new and independent obligation on B., which was not qualified by restrictions in article 16, to repair the defects; and directions within the meaning of said undertaking were given by the architect. The judgment against B. should be affirmed. But said undertaking of September 28 was a material alteration in the contract, and the surety was thereby released of its liability under its bond, and the judgment of the Court of Appeal dismissing the action as against it should be affirmed.

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Per Kerwin J. (dissenting): Upon the evidence, the trial judge's findings against B. should not be interfered with. The leaks arose through B.'s failure to comply with the specifications. The conditions in the building shortly before the trial of the action, shewn in evidence, were, upon the evidence, substantially unchanged from those existing within a year after completion of the building; and the defects had arisen within that year. There was ample justification for the amount fixed as damages by the trial judge. Directions were given to B. to repair, within the meaning of the undertaking of September 28. The judgment against B. should be affirmed. As to the surety's liability:—Having regard to article 16 (aforesaid), and to other terms in the contract which (*inter alia*) required the work to be done in accordance with the plans, drawings, etc., and such "instructions as may from time to time be given" by the architect, the undertaking of September 28 did not subject B. to anything more onerous than had been required by the contract; it did not effect any change in the contract; nor, consequently, any release of the surety. As to B.'s alleged mistake in omitting to estimate certain costs for the purpose of his bid (even assuming the point was now open to the surety): there was no obligation on plaintiffs to notify the surety thereof; there was no charge of fraud or misrepresentation nor any suggestion that it occurred to plaintiffs or the architect to withhold the information as something of which the surety should be apprised; the error was not such a circumstance the mere non-disclosure of which would release the surety. As to certain matters which occurred during the work—including B.'s financial difficulties and the arrangement for making payment to sub-contractors—they did not give rise to any obligation on plaintiffs to notify the surety thereof. There was no alteration in the terms of the contract; nor was the surety prejudiced. The judgment at trial against the surety should be restored.

APPEAL by the plaintiffs and appeal by the defendant Blonde from the judgment of the Court of Appeal for Ontario.

The defendant Blonde contracted with the plaintiffs to erect for them a church building at Windsor, Ontario. The defendant The Canadian Surety Company gave its bond to the plaintiffs as security for payment of any loss or damage directly arising by reason of the failure of Blonde faithfully to perform the contract.

The action was brought to recover from the defendants damages for alleged faulty performance of the work by Blonde. At trial, Hope J. gave judgment against both defendants for $19,173.25 and a further sum of $330 against Blonde. Both defendants appealed to the Court of Appeal for Ontario, which (by a majority in each case) dismissed Blonde's appeal but allowed the appeal of The Canadian Surety Company (for dismissal of the action as against it). The plaintiffs appealed to this Court from the judgment of the Court of Appeal in so far as it allowed The Cana-

dian Surety Company's appeal, and the defendant Blonde appealed to this Court from the judgment against him.

The material facts of the case and questions in issue are sufficiently stated in the judgments now reported, and are indicated in the above headnote.

S. L. Springsteen K.C. and *A. Racine K.C.* for the plaintiffs (appellants).

D. L. McCarthy K.C. and *A. E. Knox* for the defendant (respondent) The Canadian Surety Company.

J. R. Cartwright K.C. for the defendant (appellant) Blonde.

The judgment of the majority of the Court (Duff C.J., Crocket and Davis JJ.) was delivered by

DAVIS, J.—This is a building contract case. The defendant Blonde entered into a contract in writing with the plaintiffs to erect a church building in Windsor, Ont., and the defendant, Canadian Surety Company, gave its bond to the plaintiffs guaranteeing the performance of the contract by Blonde. The building was in due course completed, the final certificate of the architect was issued and the then balance of the contract price was paid in full. The contract price was $88,500 and the surety bond was for half that amount. Though the building was completed on or before August 13, 1931, as found by the trial judge, it was not until April 5, 1933, that the plaintiffs commenced this action in the Supreme Court of Ontario against the contractor and the surety company claiming $44,695.15 damages for alleged negligence in construction. The trial judge gave judgment against both defendants in the sum of $19,173.25 and an additional sum of $330 against the contractor. Upon appeal to the Court of Appeal for Ontario, the judgment against the surety company was set aside and the action against it dismissed, but the judgment against the contractor was affirmed. The plaintiffs then appealed to this Court against the judgment in favour of the surety company and the contractor Blonde appealed against the judgment in favour of the plaintiffs against him. The two appeals were heard together.

The case should have been a fairly simple one if the parties had directed themselves to the only issues that

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were properly open and had confined themselves to relevant evidence on those issues. As between the contractor and the plaintiffs, in the absence of fraud or mistake, neither of which was suggested here, the issue of the architect's final certificate and the payment of the full amount of the contract moneys put an end to the matter except in so far as any rights and liabilities of the parties to the contract were expressly reserved by the terms of the contract itself or by some agreement made between the parties at the time of the final payment. That was a fundamental principle that should have been recognized and applied at the very outset of the trial of the action. Had that been done, it would have become at once apparent that the evidence should have been focussed on two points: firstly, on a special undertaking in writing (Exhibit 25) obtained by the plaintiffs from the contractor before the final payment was made, and, secondly, on article 16 of the General Conditions, which reads as follows:

> Neither the final certificate or payment, nor any provision of the contract document shall relieve the contractor from responsibility for faulty materials or workmanship, which shall appear within a period of one year from the date of completion of the work, and he shall remedy any defect due thereto and pay for any damage to other work resulting therefrom which shall appear within such period of one year, but beyond that the contractor shall not be liable. The owner shall give notice of observed defects with reasonable promptness. Questions arising under this article shall be decided as provided in Articles 10 and 44.

Firstly, then, the question is, what is the precise meaning of the written undertaking, and what, if any, liability arose under it? Secondly, what is the scope and extent of the reservation in article 16, and what, if any, liability arose under that article? The minds of those engaged at the trial of this action do not appear to have been focussed upon the fundamental points. The case was thrown wide open without regard to the fact that the building had been completed and accepted, the architect's final certificate issued and the contract moneys paid. The inevitable result was a mass of evidence that took thirteen days of the trial court at intervals during the months of January, February and March, 1934, and the vital points in the litigation were lost track of. Lord Tomlin (then Tomlin, J.) said in *Graigola Merthyr Co. Ltd.* v. *Swansea Corporation* (1):

(1) [1928] Ch. 31, at 38.

> Long cases produce evils; * * * In every case of this kind there are generally many "irreducible and stubborn facts" upon which agreement between experts should be possible, and in my judgment the expert advisers of the parties, whether legal or scientific, are under a special duty to the Court in the preparation of such a case to limit in every possible way the contentious matters of fact to be dealt with at the hearing. That is a duty which exists notwithstanding that it may not always be easy to discharge.

As far as the contractor's liability was concerned, there were only the two "irreducible and stubborn" points in the case. Firstly, was there any breach by the contractor of his written undertaking (Exhibit 25), and if so, what was the amount of damages; and secondly, did "faulty materials or workmanship" in the sense in which those words are used in article 16 "appear within the period of one year from the date of the completion of the work," and if so, the amount of the damages.

Before discussing these points in detail, it is convenient to mention here that it was "a very original design" for a church and "it was difficult brick work," in the words of the architect himself. The centre section of the church was a twelve-sided figure and the ornamentation for the building was in the brickwork itself. There appears to have been nothing like this design on this continent, though there is a considerable amount in northern Europe. Mathers, an experienced Toronto architect, said

> that the whole of the masonry work on that particular building would require very close supervision. I know I would be most interested in how it was done. I would want to take a hand in it—almost become the foreman on the job.

Having regard to the climatic conditions in western Ontario, it is evident that it was a bold move to attempt this extreme type of architectural construction there, and that those who undertook it were bound to give very close supervision to the masonry work during the progress of the work. The contract was taken at a very low figure by a man nearly seventy-five years of age who had built churches in many small towns, but was plainly without the skilled experience necessary to undertake the difficult work involved in the construction of this type of building.

Turning now to the written undertaking (Exhibit 25) that the contractor gave to the plaintiffs in order to secure payment of the balance of the contract moneys. There had been considerable leakages of rain into the building before the completion and acceptance of the building and the

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plaintiffs sought to "safeguard" themselves by obtaining from the contractor, before handing over the balance of the contract moneys, a written undertaking as follows:

I hereby acknowledge having received notice from you and your architect, Mr. Lothian, to the effect that certain defects have been discovered by your architect, and that there is water leaking into the church constructed by me, the cause of which has not been exactly determined.

I hereby acknowledge having received notice from your architect and from you of same. I hereby acknowledge that the said notice has been given to me in pursuance of the specifications which form part of the contract entered into between you and myself. I further agree and covenant to repair same *according to the terms of the contract* according to the directions given by your architect, Mr. Lothian.

Dated at Windsor, Ontario, this 28th day of September, A.D. 1931.

The words in italics, "according to the terms of the contract," were deleted before the document was signed by the contractor. The solicitors for the plaintiffs had drafted the document, but the contractor had consistently taken the position that the leakages were not due to any failure on his part to perform the contract but were inherent in the architect's faulty design and inadequate structural specifications. He would not give an undertaking with the words, "according to the terms of the contract" in it, and the plaintiffs finally accepted the undertaking from him without those words. There could be no misunderstanding of the position taken by the contractor. He was not affirming an obligation under the contract; he was undertaking a new obligation outside the contract. The court was entitled to definite evidence by the plaintiffs as to what directions, if any, were given by the architect, when they were given, and what, if any, failure in compliance therewith was made by the contractor. There is a singular dearth of evidence on this aspect of the case. Exhibit 36 is a letter from the plaintiffs' solicitors to the contractor under date of March 2, 1932, in which they say:

Referring to your letter of February 4, 1932, you mention in paragraph 2 of the said letter that the repair work has been done according to the instructions of Mr. Lothian. We have showed this letter to Mr. Lothian, and he has asked us to say that he gave no instructions to you as to how to make repairs. You have discussed the matter with him and he has only given suggestions, and not instructions.

This letter rather confirms the construction put upon the undertaking by counsel for the contractor that the undertaking necessarily involved the giving of future directions. The architect, Lothian, was asked in cross-examination:

I understood you to say you simply went up there when Mr. Blonde was there, and only went there if there was further evidence of leaking. Am I right?

to which he answered, "Yes, sir." There is really no evidence directed to show any breach by the contractor of his obligation under this written undertaking. We agree with what Mr. Justice Riddell said in the Court of Appeal:

> As against Blonde, his obligation was to obey the direction of the architect; the architect swears that he did not give any directions; and the solicitors for the plaintiffs say so specifically in their letter of March 2, 1932. It seems to me that no action lies against Blonde on this undertaking unless and until it is proved that he omitted to obey a direction of Lothian.

Now we turn to the reservation contained in article 16 of the General Conditions of the original contract itself. That is the only reservation in the contract (except article 28 respecting unpaid liens which are not involved in this case) available to the plaintiffs once the work was completed and accepted, the final certificate issued and the contract moneys paid. Very little precise evidence was directed to this provision. There are the most casual references here and there throughout the evidence to proof of the discovery of faulty materials or workmanship within the exact period of one year from the completion of the work, i.e., August 13, 1931. The plaintiffs did engage within the year two independent experts, one an architect and one an engineer, to examine the building and make a detailed report upon it, and this was done about February, 1932. The evidence discloses that these men made a careful and minute investigation and rendered a detailed report, but neither of these gentlemen was called at the trial nor was any part of their report disclosed. Instead of calling these men the plaintiffs called two expert witnesses from Montreal—Macdonald, an architect, and Harrington, a contracting engineer, both capable, experienced men, but neither of them saw the building until the time of the trial, which did not commence till January, 1934. The real complaint that the plaintiffs advanced was that during rainstorms water leaked in through the building at different places and caused a great deal of damage. That the building was leaking before the final payment was made and that the plaintiffs feared a continuance of that condition is perfectly plain from the very language of the written undertaking (Exhibit 25) which the plaintiffs sought and obtained from the contractor before the final payment was made. That the building continued to leak thereafter is

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beyond dispute. Leakages appear to have broken out in different parts of the building. The evidence is that in August, 1932, the clerestory wall was torn down and it was then discovered, the architect says, that the difficulty was due to the contractor not having properly bonded the bricks and tiles with the mortar. If this could be treated in law as something which "appeared" during the year within the contemplation of article 16 rather than something which in the progress of construction should have been observed and condemned by the architect and the work stopped to insure the proper execution of the contract (clause 2 of the contract, and article 9 of the General Conditions), then one would have expected something more definite in the way of proof of the exact date of this alleged appearance having regard to the date of the completion of the work. There was a good deal of competent evidence, however, that there were two real causes of this leakage. Firstly, that the combination of hollow tile, brick and mortar was a very serious mistake in the construction specified by the contract, in that the combination of them was inherently bad because the hollow tile naturally absorbed the moisture from the mortar with great rapidity and therefore the combination should never have been used in the construction of the building. And, secondly, that there was no bracing of the steel work in the roof of this building. There was much competent and reliable evidence that in a building of this sort there should have been adequate steel bracing of the trusses in the roof of the building. There was evidence by several witnesses that when a person stood in the building on his toes and let his heels come down, the building shook, and, further, that the heavy motor traffic on the street caused the building to shake. All that was attributed to lack of specification of adequate steel work. In fact it was admitted by the architect, in reply, that in the choir loft this vibration was apparent, but he did not think the vibration was "of a magnitude to endanger the building." Macdonald, in reply, said that he had noticed vibration in the choir gallery "by rising on the toes and striking the floor with my heels." If the building shook from time to time because of passing motor traffic or of some slight movement inside the building itself, it is quite apparent that the building would crack

here and there and that the cracks would increase with the passing of time and that rain water would very readily work itself into the building through the cracks and cause a progressive state of disturbance and damage. Those two problems, one the improper use of hollow tiles with brick and mortar, and the other the absence of bracing in the steel work, were vital matters in the case and deserved very special analysis and consideration, and we do not consider a bare finding of fact, inconsistent with these explanations of the causes of the trouble, presents any serious difficulty to a complete review of the evidence.

But assuming in favour of the plaintiffs that these cracks in the walls were caused by faulty masonry work of the contractor in not having properly bonded the bricks and tiles, is that "faulty materials or workmanship which shall appear within a period of one year from the date of completion of the work" within the contemplation of article 16? Is that the sort of thing that was covered or intended to be covered by that provision in the contract reserving the rights of the owner? The effect of article 16 is plainly to limit the responsibility of the contractor to faulty materials or workmanship which do not appear until after the completion and acceptance of the work. Manifestly no remedy is preserved against the contractor after completion and acceptance of the work if the defects had appeared before that time. What constitutes an "appearance" is a matter of construction, and, to determine whether or not faulty materials or workmanship did appear, one must know the facts. If the work was done in the open and the architect in the ordinary course would see the work and the fault was of such a character that it must have been apparent to any competent architect observing the work, it could not be said that the fault was not apparent within the meaning of article 16 before the work was accepted and paid for. The failure of an architect to note what was before his eyes, or to realize the possible ultimate consequences, is really of no relevancy to the question whether or not the fault was apparent. Assuming, and it was the basis of the plaintiffs' case, that the mortar was not properly laid and that that was the cause of the damages sought to be recovered, it was the duty of the architect to ascertain that at the time the mortar was being put into the building.

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Construction commenced about the middle of November, 1930, and by December 4 or 5 the architect had left for England and did not return till about January 7 or 8. It was the architect's duty to give close supervision to the construction. If he is now right in his contention that it was faulty masonry work and not defective design and specifications, that could have been observed and remedied during the progress of the building with very little, if any, expense or loss to any one. Architects are not required to do everything in the way of watching the construction of buildings under their charge, but they are required to give such care and attention to the work while it is in progress, as the nature and difficulties of the particular work reasonably demand. To check just such defects in masonry as it is suggested occurred during the progress of the work in this building was one of the very things under the special circumstances of this case that the architect was in duty bound to do. It was admittedly a bricklaying job of more than ordinary difficulty. Where an architect fails to do that which he ought to have done he may himself be liable to the owner for very large damages on the basis of the cost of tearing down and reconstructing that which may not become known to the owner for a very considerable time after the work is completed and at a time when the cost of remedying the defects has become very heavy, and yet the contractor himself may remain liable only for what it would have cost to have remedied those defects at the time they occurred had the architect done his duty and required the contractor then to remedy the faults. (Halsbury, 2nd ed., Vol. 3, pp. 277, 340 and 341.)

Article 16 must be read in the light of the necessity for the constant supervision of this particular work and of the fact that there is no suggestion of bad faith or fraud or concealment on the part of the contractor. If the defects now complained of were the sort of thing that the architect would observe if he gave the requisite supervision to the work, then it can not fairly be said that the defects were not apparent within the contemplation of article 16 before the completion and acceptance of the work.

If we can regard the physical conditions which permitted the water to leak through as in themselves constituting faults within article 16, then it is clear that they were

apparent before the completion of the work. If it is said that the leaks themselves did not constitute faulty workmanship within the meaning of article 16 and that it was not until after the completion of the work that the fact that they were due to faulty workmanship was ascertained, the fact of the faulty workmanship to which they were ascribed appeared during the progress of the work. If, on the other hand, the leaks are to be treated as the consequences of the fault found by the trial judge (the failure to bind the bricks and mortar), then that fault is one which became apparent during the progress of the work.

That the fact of substantial leakages, whatever the cause, was known to the owners before they accepted the work and paid the balance of the contract price, is made abundantly plain by the language of the letter, Exhibit 25. There is no finding by the trial judge that the architect did not know of the faulty materials or workmanship or that the circumstances were such that knowledge is not to be imputed to him. The trial judge dealt with the ascertainment of the cause of the leakages and so doing misdirected himself on the essential point on that branch of the case, which was the appearance rather than the cause of the trouble. A new building that is leaking throughout plainly indicates either bad workmanship or materials, on the one hand, or faulty design and inadequate specifications, on the other hand. Article 16 confines the contractor's responsibility to the former, and the date of the appearance thereof becomes of great importance. The case against the contractor has not really been dealt with from that point of view.

The precise scope of the letter, Exhibit 25, is really a question of fact, and, when the words which appear in the letter, "certain defects" and "water leaking into the church," are interpreted by reference to the circumstances under which the letter was delivered and accepted, it may well be that the undertaking covered by the letter had the effect of superseding, to the extent of the matters covered by the letter, the obligation of the contractor imposed by article 16; and as the action against the contractor is based entirely upon the claim for damages resulting from the leakages throughout the church, that would in itself be an end to the claim. In view of our conclusion to grant a new

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trial on the issues arising out of article 16, we refrain from further discussion of the meaning and effect of Exhibit 25 in this connection, as this aspect of the case will, no doubt, be fully developed on the rehearing.

But in any event the action was one for damages, and if there was liability upon the contractor under article 16, it rested upon the plaintiffs to establish upon a proper measure of damages what were in fact the actual damages. No such attempt was made in this case. The two expert witnesses of the plaintiffs at the trial never saw the building until January, 1934. Harrington admitted in cross-examination that time had its effect on the conditions as he saw them; that the defects would have been more easily dealt with in the spring of 1932; and that each application of frost unquestionably made the condition of the joints and bondings worse. Lothian, the architect, agreed with the statement in the Sheppard report that Blonde reported having flooded the roof about September, 1931, with the drains blocked, for a period of three hours, with no visible sign of leakage. Neither Macdonald nor Harrington, the two expert witnesses upon whose evidence the trial judge fixed the amount of damages, attempted to estimate the cost of making the repairs except at the date they were giving their evidence, February, 1934—two and a half years after the completion of the building. The cost of reconstruction at that date was not the measure of damages, but even if it were their evidence as to the amount of damages was entirely unsatisfactory. Harrington in examination in chief was asked

> Now then, from your observations, and having regard to your experience in these matters, what would you estimate as the cost of making what you consider the necessary repairs to remedy so far as possible the conditions of which you have spoken?
>
> Ans. I would not hazard making any estimate.

Pressed further by counsel, he said,

> I would not attempt to make an estimate of that,

and then proceeded to give some figures which

> I would think * * * would be necessary to put that work to some extent back to what it was intended to be originally. * * *

and gives as his explanation for not being able to make an estimate of costs, that you have

> to have something before you in the form of drawings or specifications from which you get your quantities and judge the amount of work.

Cross-examined on the figures he gave, he said,

I have made a few calculations here which I would not care to class as an estimate, but a guess.

Macdonald, when asked his opinion of the cost of making repairs to the conditions as he found them, said,

I must make the same statement as Mr. Harrington as regards that * * *

That was the evidence upon which the trial judge based his assessment of damages. The principle of measuring damages on the basis of the cost of reconstruction of the building as it stood at the date of the trial, was clearly wrong, quite apart from the very unsatisfactory nature of the evidence adduced even on that basis. Lothian, the architect, under cross-examination, after describing the conditions of the mortar and brick, gave this evidence:

Q. These conditions are the result of an examination in October?

A. Early in 1932.

Q. The attack from within had been made when?

A. Sometime late in 1931.

Q. If the investigation had been made before the final certificate was issued, it would have revealed the conditions we find now?

A. Yes, sir.

Ibbetson, a building contractor called by the plaintiffs, who had been employed by the plaintiffs to make repairs in the fall of 1932 and "a little work" the following spring, was asked why he did not go on and make what he considered the necessary repairs and alterations at the time. His answer was,

The main reason was the lack of funds available for the work

on the part of the plaintiffs. The plaintiff Doe, when asked by his own counsel why Ibbetson was not instructed to proceed and remedy the whole situation that appeared when Ibbetson was there, said,

Approaching winter would render his work imperfect. He had other work to do. I arranged with him to return the next year to finish the work.

Q. Anything else?

A. Yes, finances. I do not wish to mention that, though.

When Ibbetson was asked by the trial judge what would be the total cost of putting the building in proper repair, he answered,

I would ask to be excused from saying that.

Mr. Justice Riddell in the Court of Appeal said he was wholly unable from the evidence to say whether any liability had been incurred under article 16, and we entirely agree with that statement. He concluded that if the plaintiffs so desired, they should be allowed to have a new trial on that issue alone. Now after the whole matter has been

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heard again on appeal to this Court, it would be most unfortunate for all parties if there had to be a new trial. But what can we do? The evidence was never really directed to the vital issue. When a trial for any reason becomes abortive it is a privilege and the duty of the court to come to the assistance of the parties to prevent the defeat of rights that may actually exist (to adapt the words of Lord Shaw of Dunfermline in *Cameron* v. *Cuddy* (1). We cannot, however, in this case supply the defects that have occurred, and we can only hope that the parties may be able to agree upon a settlement of their differences. If not, the appeal of the contractor should be allowed and the judgment against him set aside, with liberty to the plaintiffs, if so advised, to proceed to a new trial on the issue arising out of article 16. There should be no costs of the first trial to either party, but the contractor should have his costs of his appeal to the Court of Appeal for Ontario and of his appeal to this Court. The costs of the new trial as well as of the action to be in the discretion of the trial judge.

Now as to the plaintiffs' appeal against the surety company. Article 25 of the General Conditions of the contract, under the heading "Application for Payments," expressly provided that the contractor should submit to the architect an application for each payment with receipts and vouchers showing payments made for materials and labour, including payments to sub-contractors as required by article 23. The plaintiffs paid the contractor on December 3, 1930, the sum of $4,000; on January 10, 1931, $5,000; on February 6, 1931, $12,000; on March 6, 1931, $10,000, and on April 8, 1931, $12,500 (a total of $43,500); and there is no evidence that the contractor submitted any application as contemplated by article 25 for any of these payments. The evidence does not disclose any progress application or estimate having been made until April 30, 1931. By a statement of that date the contractor showed $65,528 had been spent on materials and labour up to that date on a total contract of $88,500. As early as March it had become so evident that the building would not be completed within the specified time under the contract that the plaintiffs instructed the architect to write to the surety company call-

(1) [1914] A.C. 651, at 656.

ing its attention to the condition of affairs due to the unnecessary delays, but the architect did not do so. The plaintiffs kept paying moneys to the contractor. On May 8, 1931, they made a further payment of $12,500 and on June 3, 1931, another sum of $12,000, bringing the total payments then up to $68,000, with the work far from completion, although the date fixed by the contract for completion had been May 15. The evidence discloses that the work had been dragging on in an unsatisfactory manner for several months, and yet the contractor was allowed to go on with the work and the surety company was in no way notified of the really serious conditions that had developed. On June 2, 1931, the surety company wrote the architect that it was desirous of ascertaining what progress had been made with the work and asking for answers to specific questions on a form which the surety company supplied, which form called for a statement of the percentage of the work completed to that date, the amount retained by the owners on the contract, the amount of money paid on the contract, whether any extras had been allowed and whether any unusual conditions had been encountered. No answer was given to the enquiry.

During the month of June the situation became more serious. The time for completion of the contract had expired, the contractor was without funds to carry on the work, he was heavily indebted to his bank, and the sub-contractors and material men were pressing for payment. Meetings of sub-contractors were being held, and it was a question as to whether some kind of adjustment could be made between the contractor and his creditors or whether liens would be registered against the property. The whole situation had become acute but nothing was said to the surety company. Their requests for information were ignored until July 15, 1931, when the architect reported to the surety company that 98% of the work had been completed, that the owners were retaining $14,869, that they had paid to the contractor $74,250 and that the extras allowed to date were $619. In answer to the question of the surety, "Have any unusual conditions been encountered?" the architect wrote in the word "No" and then apparently drew his pen through it, and when asked the probable date of completion, he fixed it at August 1, 1931.

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Three days before giving this information to the surety company the architect had notified the contractor that unless progress was made immediately on the work the owners would, at the expiration of 72 hours, call in another contractor to complete the roofing work so as to avoid further damage. At that time it appears that the claims of the sub-contractors amounted to about $20,000 and that they had declined to do any more work. By the end of July the workmen had left the job and the sub-contractors had put their claims in the hands of one Roach, as trustee to whom they had assigned their accounts, and it was subsequently arranged between the plaintiffs, the contractor, the Royal Bank and Roach that the balance remaining unpaid under the contract, $14,990.33, should be paid direct to Roach for the sub-contractors. It would appear from the evidence of the witness Marcott that all work ceased on the church on July 31, 1931, except that the contractor and one or two of his workmen went there on one or two occasions to try to rectify the leaks. In any event the architect's final certificate was dated August 13, 1931. But trouble in regard to the walls and roofing still continued and the plaintiffs were pressing the contractor to take steps to remedy the situation. He was declining to do so, pointing out that in his opinion the difficulties were not due to faulty workmanship but to faulty design. Then, on September 28, 1931, the settlement of the matter between the plaintiffs and the contractor took place, which was covered by the letter (Exhibit 25), and the plaintiffs paid the balance remaining unpaid under the contract direct to Roach, with the consent of the contractor, and the moneys were distributed among the sub-contractors. The undertaking of the contractor (Exhibit 25) operated to discharge the original contract, save and except any obligations that might arise under article 16 thereof, and a new and independent obligation upon the contractor came into being.

In *Holland-Canada Mortgage Co. Ltd.* v. *Hutchings* (1), we had occasion recently to consider and discuss the authorities on the effect of alterations or changes in the contract as affecting the liability of the surety. It is desirable to again state the principles with particular

(1) [1936] Can. S.C.R. 165.

reference to the type of contract with which we are now dealing, the performance of which the surety guaranteed.

In *Holme* v. *Brunskill* (1), Cotton, L.J., said:

> The cases as to discharge of a surety by an agreement made by the creditor, to give time to the principal debtor, are only an exemplification of the rule stated by Lord Loughborough in the case of *Rees* v. *Berrington* (2): "It is the clearest and most evident equity not to carry on any transaction without the knowledge of him [the surety], who must necessarily have a concern in every transaction with the principal debtor. You cannot keep him bound and transact his affairs (for they are as much his as your own) without consulting him."
>
> 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* (3).

Materiality of any change or alteration in the contract is not a question of fact for the court—it is for the surety to judge—except in those cases where it can plainly be seen without inquiry that the change or alteration was unsubstantial or necessarily beneficial to the surety.

In *Blest* v. *Brown* (4), Lord Westbury said:

> It must always be recollected in what manner a surety is bound. You bind him to the letter of his engagement. Beyond the proper interpretation of that engagement you have no hold upon him. He receives no benefit and no consideration. He is bound, therefore, merely according to the proper meaning and effect of the written engagement that he has entered into. If that written engagement is altered in a single line, no matter whether it be altered for his benefit, no matter whether the alteration be innocently made, he has a right to say, "The contract is no longer that for which I engaged to be surety; you have put an end to the contract that I guaranteed, and my obligation, therefore, is at an end."

In *Miller* v. *Stewart* (5) it was remarked by Mr. Justice Story that it matters not

(1) (1878) 3 Q.B.D. 495, at 505.
(2) (1795) 2 Ves. J. 540.
(3) (1876) 2 C.P.D. 46, at 51.
(4) (1862) 4 deG. F. & J. 367, at 376.
(5) (1824) 9 Wheat. 680, at 703.

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that a surety may sustain no injury by a change in the contract, or that it may even be for his benefit. He has a right to stand upon the very terms of his contract; and if he does not assent to any variation of it, and a variation is made, it is fatal.

There is to be read into that general statement the qualification set out in *Holme* v. *Brunskill* (1) that where it is self-evident that the alteration or change was necessarily beneficial to the surety or utterly unsubstantial, the surety is not to be thereby discharged.

Calvert v. *The London Dock Company* (2) was a building contract case. The contractor, named Streather, undertook to perform certain works for The London Dock Company and it was agreed that three-fourths of the work as finished should be paid for every two months, and the remaining one-fourth upon the completion of the whole work. It was held that the sureties for the due performance of the contract were released from their liability, by reason of payments exceeding three-fourths of the work done, having, without the consent of the sureties, been made to the contractor before the completion of the whole work. Lord Langdale said:

> The defendants do not dispute the fact that their advances to Streather exceeded the sums which they were bound to advance under the contract, but they say, that the increased advances were made for the purpose of giving Streather greater facility to perform the contract. It is said that the performance of the work by Streather was impeded by his want of funds; and that by the advances made to him, he was enabled to do more, than he otherwise could have done—and that to assist him, was to assist his sureties; and it was only for the purposes of affording that assistance, that the company did more than they were obliged to do.
>
> The argument, however, that the advances beyond the stipulations of the contract, were calculated to be beneficial to the sureties, can be of no avail. In almost every case where the surety has been released, either in consequence of time being given to the principal debtor, or of a compromise being made with him, it has been contended, that what was done was beneficial to the surety—and the answer has always been, that the surety himself was the proper judge of that—and that no arrangement, different from that contained in his contract, is to be forced upon him; and bearing in mind that the surety, if he pays the debt, ought to have the benefit of all the securities possessed by the creditor, the question always is, whether what has been done lessens that security.
>
> In this case, the company were to pay for three-fourths of the work done every two months; the remaining one-fourth, was to remain unpaid for, till the whole was completed; and the effect of this stipulation was, at the same time, to urge Streather to perform the work, and to leave in the hands of the company a fund wherewith to complete the work, if he did not; and thus it materially tended to protect the sureties.

(1) (1878) 3 Q.B.D. 495. (2) (1838) 2 Keen's Reports, 638.

What the company did, was perhaps calculated to make it easier for Streather to complete the work, if he acted with prudence and good faith; but it also took away that particular sort of pressure, which by the contract, was intended to be applied to him. And the company, instead of keeping themselves in the situation of debtors, having in their hands one-fourth of the value of the work done, became creditors to a large amount, without any security; and under the circumstances, I think, that their situation with respect to Streather, was so far altered, that the sureties must be considered to be discharged from their suretyship.

Much of the same sort of argument was presented to us in this case—that the payments made facilitated the contractor in performing the contract and that what assisted the contractor was really a benefit to the surety. That argument, however, Lord Langdale said, could be of no avail in a case such as this.

In *The General Steam Navigation Co.* v. *Rolt* (1), A. contracted with B. to build for him a ship for a given sum to be paid by instalments as the work reached certain stages and C. became surety for the due performance of the contract on the part of B., the builder. A. allowed B. to anticipate the greater portion of the last two instalments, and, B. becoming bankrupt before the ship was finished, A. was compelled to spend a larger sum of money than the unpaid portion of the purchase money in completing her. Willes, J., at p. 599, said:

As to the first point, Mr. Knowles says, that, as the £2,000 was paid to Mr. Rolt or to his account, he sustained no prejudice from its being an anticipatory payment. But I must confess I do not see how the receipt of the money from Mare, or by means of Mare's order, in satisfaction of a debt due to him from Mare, can establish that proposition. A case of *Samuell* v. *Howarth* (2) was cited on the former argument (*ante*, p. 574), which is a decision of Lord Eldon's very much in point. His Lordship there says: "A creditor has no right,—it is against the faith of his contract,—to give time to the principal, even though manifestly for the benefit of the surety, without the consent of the surety." It is clear, therefore, that there must be an assent by the surety to the creditor's dealing with the principal debtor otherwise than in the manner pointed out by the contract: and it is no answer to say that it is for the advantage of the surety, or that he has sustained no prejudice. Here, there was an unauthorized payment of £2,000 to Mare; and, as this payment was made without Rolt's assent, that, according to *Samuell* v. *Howarth* (2), was such a prejudice to him as surety as to discharge him.

While that was a case of the giving of time, the same principle would apply to the unauthorized payments that were made in the case before us. Further, in the *General Steam Navigation Company* case (1) it was contended that if the surety had inquired he would have found that the instal-

(1) (1859) 6 C.B. (N.S.) 550. (2) (1817) 3 Meriv. 272.

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ments had been all paid more than two months before and, as he abstained from inquiry, he must in equity be presumed to have knowledge of, and consequently to have assented to, the payment. As to this Willes, J., said at p. 600:

> But no authority has been cited which goes that length: and the doctrine of constructive assent is not one which ought to be admitted, certainly not one which a court of law ought to extend. No case has been cited to shew that any such duty to inquire is imposed on a surety.

The real point in that case was that it was necessary to prove knowledge of the payments by the surety, and the judgment of Willes, J., practically negatived constructive notice. To the same effect were the judgments of Cockburn, C.J., and Crowder, J. The case went on appeal to the Exchequer Chamber and was heard by a powerful court composed of Lord Chief Baron Pollock, Wightman, J., Channell, B., Hill, J., and Blackburn, J. The appeal was dismissed.

Now it is to be observed that the anticipatory payments, the absence of the architect from the work during a critical stage of construction and the absence of the contractor himself through illness, the dealing with the sub-contractors and the payment of the total balance of the contract price to them, and the taking of the specific undertaking in writing (Exhibit 25) from the contractor as a condition to the payment of the balance of the contract price—were all positive acts done or sanctioned by the principal without notice to or knowledge of any of these acts by the surety. They cannot be said to be evidence of mere passive inactivity or of acts which by their very nature were so insignificant as to have no bearing on the surety's liability. It seems very plain that the plaintiffs should have brought in the surety and explained the whole matter to it and any arrangement or adjustments that were to be made, either with the sub-contractors or with the contractor himself leading to a final acceptance of the work and the payment of the balance of the contract moneys, should have been made, under all the special circumstances of the case, with the knowledge and consent of the surety. It cannot fairly be said that it is self-evident that these positive acts of the principal in dealing with the contract were not to the prejudice of the surety, and in the absence of any notice or knowledge on the part of the surety these acts operated to discharge the surety.

The majority of the Court of Appeal dismissed the action against the surety on these grounds, and the plaintiffs' appeal from that judgment to this Court should be dismissed with costs.

We would not care to be taken to have overlooked the very serious point raised at the trial by counsel for the surety company and renewed in the Court of Appeal and again in this Court, that the surety company was, in any event, entitled to be released upon the ground that before entering into its bond of indemnity in favour of the plaintiffs, the plaintiffs had knowledge of facts and circumstances materially affecting the position of him, the performance of whose contract the surety company proposed to guarantee to the extent of $44,250, and failed to disclose these facts to the surety company. The contractor put in his bid on the proposed building at $88,500. There were nine or ten other bidders, the next lowest to him was $10,000 in excess of his bid, and the other bids ran up as high as $130,000. The bid of the defendant contractor was immediately accepted and a contract was drawn up and signed at once. He had deposited a cheque for $4,450 with his bid, and, immediately the bid was accepted, he commenced putting substantial materials on the ground with which to proceed with the construction of the building. Within three or four days, he notified the plaintiffs that he had made two substantial omissions in estimating costs for the purpose of putting in his bid. He told them that he had entirely overlooked the glass for the windows and the labour of installing the glass which he said would cost him $6,000, and that he had entirely overlooked the cost of the tile, $7,000. He asked under the circumstances either to be released from his contract or to be given some increased amount to compensate him for these items. The plaintiffs declined to do either, telling him that if he threw up his contract he would not only lose his deposit of $4,450 but all the materials that he had delivered to the site of the proposed building. Faced with that alternative, he decided to go on and do the best he could. Even the architect on his own figuring at that time estimated the profit of the contractor on the contract figure would be only $637. Now the plaintiffs had in their hands at that time a bond from the surety company which contained special terms and conditions for the protection of the surety in a building con-

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tract of this kind. The plaintiffs, with the knowledge that they had acquired of the substantial errors on the part of the contractor in making up his bid, subsequently returned the bond to the surety company, refusing to accept it in that form and insisting upon a blanket form of bond. The surety company acceded to this request and delivered the bond upon which this action was brought. All this evidence was brought out by counsel for the plaintiffs in their examination of their own witnesses. There was no suggestion that the plaintiffs ever told the surety company anything about all this, and counsel for the surety company, when the facts had come out at the trial, very properly asked leave to expressly plead this non-disclosure. Counsel for the plaintiffs said they were taken by surprise by the proposed amendment and even in this Court suggested that they might have been able to prove that the surety company knew of the contractor's errors if the trial had been adjourned. It is difficult to conceive that any surety company carrying on a commercial business would have issued its bond for $44,250 (half the amount of the contract price) if it had even a suspicion that the contractor in his haste in making up his bid had overlooked items of cost aggregating $13,000. The trial had proceeded for a week before this matter came up, and the trial judge refused leave to the surety company to plead this non-disclosure except upon terms that the trial should stand adjourned and that the surety company should pay in any event all the costs of the trial up to that time. Counsel for the surety company very properly took the position that he was entitled upon the special circumstances to raise by amendment the defence of non-disclosure and that he could not submit his clients to such a burdensome term of costs as imposed. We should have thought, under all the circumstances, that there was not the slightest doubt of the right of the surety company to amend its pleadings without being fettered by a term as to costs so onerous as to be plainly unreasonable. If counsel for the plaintiffs had persisted in their position at the trial that they were taken by surprise and might be able to meet the proposed amendment if delay were granted, the case might appropriately have been adjourned for a convenient time, with costs reserved. If that course had been adopted, we suspect the action against the surety would have come to an end. Rowlatt on Principal and Surety, 3rd ed. (1936), p. 161, says that

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A creditor must reveal to the surety every fact which under the circumstances the surety would expect not to exist; for the omission to mention that such a fact does exist is an implied misrepresentation that it does not.

As Lord Blackburn (then Blackburn J.) put it in *Lee* v. *Jones* (1), it is a question of fact whether in the circumstances you ought to disclose and whether the non-disclosure amounts to misrepresentation—that is, with intent to mislead. The question we have to ask ourselves, as a question of fact, is: would persons in the position of the plaintiffs acting in good faith and with common sense, have thought the surety would enter into a qualified bond (i.e., without the protection afforded by the special provisions of the first bond tendered) if the surety had known of the contractor's substantial mistakes in calculating his costs, his request to withdraw from the contract, the plaintiffs' refusal of his request and their virtual enforcement of the contract under threat of forfeiture of both the deposit moneys and the materials on the ground? If the surety had known all this, would it have given such a bond as it did?

Workington Harbour & Dock Board v. *Trade Indemnity Company* (2) is a very recent case in the House of Lords. In delivering judgment Lord Atkin said that the case had to be decided on the footing that the contract sued on was a guarantee and that it is clear that in whatever way any duty to disclose arises, the duty or the implied representation will depend upon the particular circumstances of each transaction, and he made it plain that it had been unnecessary to pass any opinion on the general law as to disclosure in respect of guarantees and that the case was decided upon its own facts. Here we have communications passing between the creditor and the surety with reference to the formation of the guarantee contract, and nothing that is said by Lord Atkin in the *Workington* case (2) determines the point raised in this case. But if that issue had to be determined in this case, there would have to be a new trial, because that issue has not yet been specifically pleaded or tried. It is unnecessary, however, to send the action back for a new trial on this issue, because, upon the other grounds above mentioned, we have concluded that

(1) (1864) 17 C.B. (N.S.) 482, at 503-504.
(2) (1936) 54 Lloyd's List Law Reports 103.

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the judgment of the Court of Appeal dismissing the action against the surety should be affirmed and the appeal therefrom should be dismissed with costs.

RINFRET, J. (dissenting in part).—The appellant Blonde undertook to erect a church building in Windsor, Ontario, for the Corporation of the Diocese of London; and the Canadian Surety Company gave its bond to the latter, guaranteeing the performance of the contract.

The building was found by the trial judge to have been completed on August 13, 1931.

On the ground that the contractor had failed faithfully to perform his contract, this action was brought by the plaintiffs against the contractor and the Surety Company, claiming damages in the sum of $44,695.15.

The trial judge gave judgment against both defendants in the sum of $19,173.25 and an additional sum of $330 against the contractor.

In the Court of Appeal for Ontario, the judgment against the Surety Company was set aside, but the majority of the Court was of opinion that the judgment against the contractor should be affirmed.

In this Court, the plaintiffs appealed against the judgment dismissing the action so far as the Surety Company was concerned; and the contractor again appealed from the concurrent judgments against him.

The trial judge made the following findings of fact:

* * * that the specifications requiring the construction of the wall with the brick and tile thoroughly bonded throughout with mortar were not complied with by the contractor—the joints between the bricks themselves having been improperly and insufficiently filled with mortar and there being a very general absence of mortar fill between the brick and tile save for what was squeezed in as the brick was laid. * * * that this failure to comply with the specifications for the construction of the wall resulted in an opening up of the bonding between the bricks and mortar and was to a very large degree responsible for the leaking which caused so much damage and may ultimately seriously impair the safety of the building. * * * that the flashing around the clerestory and other windows was not in accordance with specifications and that the lead coping was not applied in compliance therewith. * * * that the cracks found in the building were not the result of vibration caused by the brick work being improperly tied into the steel frame.

He added:

On the fullest consideration of the evidence, I find as a fact that there was such non-compliance with the specifications and such faulty performance of the contract as would entitle the plaintiffs to damages.

He further found:

* * * as a fact, that the architect did exercise ample supervision throughout the construction as might be expected from a supervising architect, and that he did from time to time object to and reject certain work, but that he could not have been expected to have suspected the failure of the defendant Blonde to comply with the specifications in the brick work until weather conditions would reveal the same, or unless he had from time to time torn down work which from its external appearance did not disclose its inward deficiency.

In the Court of Appeal, these findings were not disturbed, and the majority of the Court found that there was no adequate reason for interfering with the judgment of the trial judge as against the defendant Blonde.

The contract (article 16 of the specifications) provided that, notwithstanding the issue of the final certificate or the payment of the balance due under it and notwithstanding any provision of the contract document, the contractor shall not be relieved from "responsibility for faulty materials or workmanship, which shall appear within a period of one year from the date of completion of the work." The contractor was bound to "remedy any defect due thereto and pay for any damage to other work resulting therefrom which shall appear within such period of one year."

The trial judge found "as a fact that the defects claimed by the plaintiffs did arise within one year from the 13th of August, 1931."

At the hearing in this Court, the appellant Blonde laid stress on the point that the above finding was contrary to the evidence and that the trial judge had misdirected himself as to the true interpretation of the specifications in that regard, because the defects which the trial judge found to have existed had really "appeared" before the final payment was made, and consequently, it was claimed by the contractor, they were not discovered "within a period of one year from the date of completion of the work," but they had really become apparent previous to that time; and they were not, therefore, within the contemplation of Article 16 of the specifications. It is true that, before the issue of the final certificate and before the final payment to the contractor, it had been discovered that there was water leaking into the building; but the cause of the leaking had not yet been ascertained. It was only subsequently that it was found out that the real cause was a defect in construc-

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tion properly attributable to the faulty workmanship of the contractor. And, in that respect, I think the finding of fact of the trial judge is fully warranted on the evidence.

But, in my view, that point has ceased to have any bearing on the case, on account of the document signed by the contractor on September 28, 1931, before the final payment was made, not to the contractor himself, but to certain subcontractors and material men, in order to help the contractor. Under that document (recited in full in my learned brothers' judgments), the contractor acknowledged having received notice that certain defects had been discovered by the architect and that the cause of these defects had "not been exactly determined." He further acknowledged that the said notice had been given to him "in pursuance of the specifications which form part of the contract entered into between" himself and the Corporation of the Diocese of London. And he further agreed and covenanted "to repair same according to the directions given by the architect, Mr. Lothian."

In my humble view, this undertaking created a new and independent obligation upon the contractor, no longer qualified by the restrictions contained in Article 16 of the specifications, and which, therefore, made it incumbent upon him to repair the defects, whether they appeared or not "within a period of one year from the date of completion of the work." As for the directions to be given by the architect, I am in agreement with Masten, J.A., in the Court of Appeal, both as to the interpretation he gives to those terms in the letter of September 28, 1931, and as to the fact that "such directions were given directly by the architect and also indirectly by him, through the solicitors who were acting as the agents of the Plaintiff and the architect."

For these reasons, I am of opinion that the appeal of the contractor Blonde from the concurrent judgments of the trial judge and the majority of the Court of Appeal should be dismissed with costs.

However, for the same reasons: viewing, as I do, the document of September 28, 1931, as a material alteration in the contract between the Corporation of the Diocese of London and Blonde, I think the respondent, the Canadian Surety Company, was thereby released of its liability under

the bond, and I would dismiss the appeal against it and affirm the judgment of the majority of the Court of Appeal in Ontario with costs.

KERWIN J. (dissenting)—This is an appeal by the plaintiffs from the judgment of the Court of Appeal for Ontario, which, reversing the trial judge, dismissed the appellants' action as against the defendant Surety Company; and a cross-appeal by the defendant contractor, Blonde, from the same judgment, which affirmed the judgment at the trial against him in favour of the appellants.

The action was brought by the appellants, as owners, for damages, against the contractor for the erection of a church in Windsor, Ontario, under the terms of a contract dated November 8th, 1930, and against the Surety Company under the terms of a bond dated November 15th, 1930, in the sum of $44,250, conditioned upon the company indemnifying the Episcopal Corporation of the Diocese of London (one of the appellants) against any loss or damage directly arising by reason of the failure of the contractor faithfully to perform the said contract.

So far as the cross-appeal by the contractor is concerned, the learned trial judge has dealt exhaustively with the voluminous evidence, and, after reading all of the evidence, I can see no reason to interfere with the findings of the trial judge and of the majority of the members of the Court of Appeal. Realizing that he had concurrent findings against him, the *cross*-appellant (the contractor Blonde) sought to escape liability by pointing to a document dated September 28th, 1931, which the appellants required Blonde to sign before the cheque for the final payment under the contract was delivered. This document, Exhibit 25, is as follows:

The Reverend E. G. Doe,
and The Roman Catholic
Episcopal Corporation
of the Diocese of London.

I hereby acknowledge having received notice from you and your architect, Mr. Lothian, to the effect that certain defects have been discovered by your architect, and that there is water leaking into the church constructed by me, the cause of which has not been exactly determined.

I hereby acknowledge having received notice from your architect and from you of same. I hereby acknowledge that the said notice has been given to me in pursuance of the specifications which form part of the

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contract entered into between you and myself. I further agree and covenant to repair same according to the directions given by your architect, Mr. Lothian.

Dated at Windsor, Ontario, this 28th day of September, A.D. 1931.

The argument on Blonde's behalf is that no directions were given by the architect Lothian subsequent to the execution of this document and that, therefore, he, Blonde, was not in default. For two reasons I am of opinion that this contention cannot prevail. First, the leaks arose, as the trial judge found (and I agree), from Blonde's failure to *use sufficient mortar* in the construction of the brick and tile walls and in the space between these walls and thus neglected to comply with the specifications. Second, on February 1st, 1932, the solicitors for the appellants wrote Blonde:

Re—St. Clare Church

We have been in communication with Mr. Lothian, the architect for St. Clare church, and have discussed the matter with him relative to the leaks which have occurred in many places, particularly around the clerestory windows on the side walls, on the east and west naves near the corners, at a point about five feet below the ceiling, and also at one point about six feet above the floor, on the ceiling of the Baptistery, beneath the window on the west side of the Sanctuary, and over the east Confessional. Mr. Lothian is of the opinion that all of these matters can be remedied, and that same are within the province of the specifications, and should be attended to immediately. Under the guarantee called for in the specifications, you are held responsible for this work for a period of one year from final acceptance of the same, and we are now calling on you to carry out this work within seventy-two hours from this date.

Mr. Lothian is of the opinion also that a good many of the leaks are due to flashings not properly embedded in the brickwork, others through the improper joining of the flashings, still others through brickwork wrongly constructed, and further, between the frames of the clerestory windows and the walls.

Blonde replied on February 8th, 1932

Received your letter dated Feb. 1st, re leaks in the St. Clare church. I have spent to date about $450 trying to repair the leaks in the clerestory brick work and around the windows. I have come to this point where I refused to do any more work on this roof constructed of brick. I have the opinion of other architect and bricklayers and I have been told and believe that the leaks can not be repaired.

All the repaired work has been done according to Mr. Lothian instruction to no results.

These letters by themselves indicate that Blonde was notified and that he had endeavoured to some extent to remedy the condition and then refused to do anything further.

It was also contended on Blonde's behalf that the opinion of the experts, called as witnesses by the appellants and upon whose evidence the trial judge based his assessment

of damages, was founded upon conditions as these witnesses saw them shortly before the commencement of the trial. However, it appears from the evidence of the architect that those conditions were substantially unchanged as compared with conditions that existed within a year after the completion of the building. On page 88 of the case appear the following questions and answers when the architect was being examined in chief.

Q. Have you recently made an inspection of the church?

A. Yes, sir.

Q. Have you or have you not a general knowledge of the extent of the work that has been done by Mr. Ibbetson in the attempt to make repairs?

A. Yes, I have a general knowledge.

Q. With the exception of the work which you understand to have been done by Mr. Ibbetson in the way of reconstruction what do you say as to the condition of the remainder of the church and rectory as compared with its condition within a year after the completion of the building?

A. Substantially unchanged, so far as I could see.

Mr. Ibbetson was the contractor subsequently engaged by the appellants to do certain repair work, and a comparison of that part of his evidence dealing with the conditions which he found at the time he did the repair work with the evidence of the experts as to the conditions they found, shows that the defects complained of had arisen within the year. In my opinion there is ample justification for the amount fixed as damages by the trial judge and the cross-appeal must be dismissed with costs.

In the Court of Appeal, Mr. Justice Riddell considered that the Surety Company was released by reason of the appellants having the contractor sign the letter of September 28th, 1931. Mr. Justice Masten was of opinion that the appeal to that Court by the Surety Company should be allowed. Mr. Justice Fisher dissented, being of opinion that the judgment of the trial judge was right on all grounds. The main contention of the Surety Company in support of the judgment in appeal was that the letter of September 28th, 1931, was a material alteration in the contract between the appellants and the contractor.

In my opinion this document did not effect any change in the contract. By the contract Blonde agreed to "complete in all its entirety all works" for the erection of the church with certain specified exceptions, "in the most sound, workmanlike and substantial manner, and in accordance with the plans, drawings, specifications and addenda

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to the specifications, and with such further drawings, details *and instructions as may from time to time be given"* by the architect.

Previous to the execution by Blonde of this letter, leaks had developed and certain repair work done. The architect was not satisfied that these leaks would not reappear and new ones be not discovered. He considered that flashings should be installed, while Blonde contended they were not specified. Article 16 of the specifications provides:

> Neither the final certificate or payment, nor any provision of the contract document shall relieve the contractor from responsibility for faulty materials or workmanship, which shall appear within a period of one year from the date of completion of the work, and he shall remedy any defect due thereto and pay for any damage to other work resulting therefrom which shall appear within such period of one year, but beyond that the contractor shall not be liable. The owner shall give notice of observed defects with reasonable promptness. Questions arising under this article shall be decided as provided in Articles 10 and 44.

Article 10, referred to is as follows:

> The architect shall within a reasonable time make decision on all claims of the owner or contractor, and on all other matters relating to the execution and progress of the work or the interpretation of the contract documents.
>
> The architect's decision in matters relating to artistic effect shall be final, if within the terms of the contract documents.

Article 44 referred to in Article 16 deals with the arbitration of disputes under the contract.

Accordingly we have this position at that time. The architect was not satisfied that the cause of the leaks had been located and the proper remedy applied, and as an added precaution he insisted on Exhibit 25 being signed. Under Article 16 of the specifications, the contractor was responsible for faulty materials or workmanship that might appear within one year from the completion of the work, which work was, according to the terms of the contract quoted above, to be done in accordance with the plans, drawings, etc., and such "instructions as may from time to time be given" by the architect. Under Exhibit 25, he was not subjected to anything more onerous, there was no change in the contract, and consequently the Surety Company is not released.

The next argument to be dealt with is based upon the alleged mistake of Blonde in omitting to estimate the cost of certain work and materials in the tender he submitted, and which was the tender finally accepted. It is doubtful if the point is open to the Surety Company, as an application by it for an amendment to its pleadings to cover

this feature was granted by the trial judge after the trial had been in progress for some time, but on terms, and these terms were declined by counsel for the Surety Company who stated he would proceed without the amendment.

However, assuming the pleadings are sufficient without amendment, I am unable to ascertain how the alleged mistake affects the matter. Blonde's tender exceeded the architect's estimate of the cost of the work, and while the appellants knew of Blonde's contention, there was no obligation on them to notify the Surety Company of the alleged error. Fraud or misrepresentation is not charged and there is no suggestion that it occurred to the plaintiffs or the architect acting for them to withhold the information as something of which the Surety Company should be apprised.

In *Railton* v. *Matthews* (1), a party became surety in a bond for the fidelity of a commission agent to his employers without having been informed that the agent had previously, while in partnership with another, misapplied the employers' funds while the partnership was acting as agents for the employers. It was held that the direction to the jury by the trial judge that the concealment by the employers of the previous defalcations to be undue must be wilful and intentional with a view to the advantages the employers were thereby to gain, was wrong in law and that mere non-communication of circumstances affecting the situation of the parties, material for the surety to be acquainted with and within the knowledge of the person obtaining a surety bond, is *undue concealment,* though not wilful or intentional or with a view to any advantage to himself.

However, in *Hamilton* v. *Watson* (2) it was held that an obligation to a banker by a third party to be responsible for a cash credit to be given to one of the banker's customers is not avoided by the fact that at the time the obligation was signed the customer was indebted to the bank, nor by the fact that, immediately after the execution of the obligation, the cash credit was employed to pay off an old debt due to the banker.

In *London General Omnibus Company Limited* v. *Holloway* (3), following *Railton* v. *Matthews* (1), it was

(1) (1844) 10 C. & F. 934. (2) (1845) 12 C. & F. 109.
(3) [1912] 2 K.B. 72.

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decided that the non-disclosure by an employer to a proposed surety on behalf of a servant that the latter had previously been guilty of dishonesty in his employment, prevented the employer from enforcing the bond against the surety in respect of the servant's subsequent dishonesty, although such non-disclosure was not fraudulent.

In my opinion the effect of these and other relevant cases is correctly set forth in Rowlatt on Principal and Surety, 2nd Ed., in two paragraphs at pp. 157 and 158 respectively.

> A surety is not bound by his contract if it was induced by any misrepresentation by the creditor, whether fraudulently made or not, of any fact known to him and material to be known to the surety.
>
> Misrepresentation may, of course, be made by mere silence or concealment. This may vitiate a security without it being wilful and intentional or made with a view to advantage to be gained by the creditor. But a guarantee is not an insurance, and there is no obligation on the creditor to disclose to the surety every circumstance within his knowledge material for the surety to know.

In my view, the contention of the Surety Company at present under consideration fails.

The architect was away for about five weeks, leaving an assistant in charge. The evidence of all witnesses who testified on the subject is to the effect that the architect devoted as much time to this work as is customary.

Shortly after the architect's return, the contractor became ill but he had a foreman on the work who had been with him for a considerable time. In my opinion, the company's contention that these matters,—the absence of the architect and the illness of the contractor—should have been brought to its attention, is without substance, as is also its complaint that it was not notified of certain letters sent by the architect to the contractor referring to delays in the prosecution of the work.

Blonde did have financial difficulties; the bank appropriated one payment made by the appellants and as a result Blonde was unable to pay the sub-contractors and material men. Under an arrangement made between these people and Blonde the last payment was made not to the contractor, but to a solicitor who had been appointed for that purpose by these parties so as to prevent any action by the creditors. The architect endeavoured to assist the contractor in doing certain work after the date for completion had passed, but no agreement was made extending the period allowed to Blonde to fulfil his contract.

Here again, complaint is made that the Surety Company should have been notified. But on what principle? A company such as this, undertaking the business of supplying bonds for a premium, is entitled to certain rights under the law, but to be kept advised of everything that transpires in connection with the bonded work is not one of them. I cannot find that there was any alteration in the terms of the contract, nor can I find, after reading all the evidence in the case, that the Surety Company was prejudiced in the slightest degree.

Because of the view I have taken of the facts, *Rees* v. *Berrington* (1), *Holme* v. *Brunskill* (2), *Egbert* v. *National Crown Bank* (3), *Smith* v. *Wood* (4), and the many other cases cited, have no application. The appeal should be allowed with costs throughout and the judgment of the trial judge restored.

Appeal of the plaintiffs dismissed with costs.

Appeal of the defendant Blonde allowed with costs and the judgment against him set aside, with liberty to plaintiffs to proceed to a new trial against him on the issue arising out of article 16 of the contract.

Solicitor for the plaintiffs (appellants): *A. Racine.*

Solicitor for the defendant (respondent) The Canadian Surety Company: *A. E. Knox.*

Solicitors for the defendant (appellant) Blonde: *Roach, Riddell & Dore.*

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(1) (1795) 2 Ves. J. 540.
(2) (1878) 3 Q.B.D. 495.
(3) [1918] A.C. 903.
(4) [1929] 1 Ch. 14.

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*May 27, 28, 29, 30, *Nov. 27.

COLONIAL FASTENER COMPANY, LTD., AND G. E. PRENTICE MANUFACTURING COMPANY (DEFENDANTS) ..... APPELLANTS;

AND

LIGHTNING FASTENER COMPANY, LTD. (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Patent—Damages for infringement—Matters and items of damages—Sale of product of infringing machine—Invention for manufacturing stringers to be used in fasteners—Loss caused from sales of completed articles (fasteners) made from stringers made on infringing machines—Damages for loss of profit on sales lost—Damages by way of royalty—Damages for loss from reduction in sale price—Pleadings—Raising question of right under s. 47 (6) of Patent Act (R.S.C. 1927, c. 150) on assessment of damages after judgment, when facts relied on not pleaded and proved in the action for infringement.

The sale of the product of an infringing machine is not too remote upon which to found a claim in damages, under s. 32 of the *Patent Act* (R.S.C. 1927, c. 150), by the owner of the patent of the machine infringed.

The object of the patented invention was to manufacture stringers to be used in fasteners.

Held: Plaintiff (owner of the patent) could not be properly compensated for infringement by reference only to the manufacturer's cost and sale price of the stringers and without regard to the cost and sale price of the completed articles (fasteners); the stringers were of importance only in their use in fasteners and what plaintiff lost was sales of fasteners; the principle set forth in *Meters Ld.* v. *Metropolitan Gas Meters Ld.*, 28 R.P.C. 157, should be applied; plaintiff was entitled to damages for loss sustained by reason of defendant's sales of fasteners from stringers made on infringing machines.

Held, further: On the evidence (and applying the "broad axe" referred to by Lord Shaw in *Watson* v. *Pott,* 31 R.P.C. 104), had defendant not sold such fasteners, plaintiff would have sold 60 per cent. of the number actually sold by defendant; and plaintiff was entitled by way of damages to the profit it would have made on what it would have sold as aforesaid. It was so entitled, even were it shown that in the period of infringement it did not manufacture stringers on its patented machine; it was deprived of the opportunity of using its patented machine to produce stringers for the said 60 per cent. As to the 40 per cent. of defendant's sales which plaintiff would not have made, plaintiff was entitled to damages by way of royalty (*Watson* v. *Pott,* 31 R.P.C. 104, at 120; *United Horse Shoe & Nail Co.* v. *Stewart,* 5 R.P.C. 260, at 267).

*Present at the hearing:—Rinfret, Cannon, Crocket, Kerwin and Hudson JJ. Cannon J., through illness, took no part in the judgment.

Damages were awarded also for loss to plaintiff by reason of reduction by defendant in the sale price of such fasteners (forcing reduction by plaintiff) (*American Braided Wire Co.* v. *Thomson*, 7 R.P.C. 152); but not where plaintiff was the first to act, even were plaintiff induced to act by its representatives having been told, falsely, by prospective or actual customers that they could purchase more cheaply from defendant—a claim for damages in such a case was too remote.

In the interval between lapse of plaintiff's patent for non-payment of fees and publication of notice of application to restore it, defendant shipped into Canada fasteners (not taken into account in plaintiff's statement of damages) made in the United States on machines identical with machines held to constitute infringement of the patent. On an assessment of damages, after judgment had been given for plaintiff in an action for infringement, defendant claimed that by virtue of the operation of s. 47 (6) of the *Patent Act*, it obtained the right to use the invention in Canada. *Held*, that the facts should have been pleaded and proved in the patent action as a defence, and it was now too late to raise the question on the assessment of damages.

APPEAL by the defendants, and cross-appeal by the plaintiff, from the judgment of Maclean J., President of the Exchequer Court of Canada (1), confirming, subject to a certain reduction in the amount of damages, the report of the Registrar of that Court (2) as to the damages which the plaintiff was entitled to recover from the defendants by reason of infringement of patent.

The action was for damages and other relief for alleged infringement of the plaintiff's patent, which was for machines and methods for producing straight and curved fastener stringers. By the judgment of the Exchequer Court of Canada (Maclean J. (3)), it was adjudged that the plaintiff's letters patent were valid, and infringed by the defendants; and (besides injunction, etc.) a reference was directed to the Registrar of the Court as to the damages recoverable by reason of the infringements, or as to the profits made by the defendants by reason of the infringements, as the plaintiff might elect before the Registrar. (The plaintiff subsequently elected to take damages.) This judgment was reversed by the judgment of the Supreme Court of Canada (4); but was restored by the judgment of the Judicial Committee of the Privy Council (5), subject to a variation that the declaration of validity made and the injunction and other relief granted be limited to certain claims.

(1) [1936] Ex. C.R. 1.
(2) [1936] Ex. C.R. 1, at 12-38.
(3) [1932] Ex. C.R. 89.
(4) [1933] Can. S.C.R. 363.
(5) (1934) 51 R.P.C. 349.

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By the report of the Registrar of the Exchequer Court of Canada as to damages (1), he recommended that judgment be rendered for the plaintiff in the sum of $50,663.26. The report of the Registrar was confirmed by the judgment of Maclean J., President of the Exchequer Court of Canada (2), subject to the variation that the amount of damages which the plaintiff should recover be reduced by the sum of $3,117.56 allowed by the Registrar as damage due to forced reduction in plaintiff's selling price.

The defendants appealed to the Supreme Court of Canada; and the plaintiff cross-appealed (against said disallowance of $3,117.56, and for increased damages).

By the judgment of this Court, now reported, the defendants' appeal was dismissed with costs; the cross-appeal was allowed to the extent of the said sum of $3,117.56, also with costs; the order of the President of the Exchequer Court in respect of the costs of the reference and of the costs of the appeals to him to stand.

S. A. Hayden K.C. and *James Woods Walker* for the appellants.

O. M. Biggar K.C. for the respondent.

The judgment of Rinfret, Crocket, Kerwin and Hudson JJ. (Cannon J., through illness, took no part in the judgment) was delivered by

KERWIN, J.—This is an appeal by the defendants and cross-appeal by the plaintiff from the judgment of the Exchequer Court (2) which, with one deduction, affirmed the report of the Registrar of that Court as to the damages suffered by the plaintiff by reason of the defendants' infringement of claims 1, 2, 3, 7, 8, 10 and 19 of the plaintiff's patent of invention. By an order of His Majesty in Council, approving the report of the Judicial Committee of the Privy Council, the original judgment of the Exchequer Court in this action (which had been reversed in this Court) was restored, subject to the variation that the declaration of validity made and injunction and other relief granted were limited to these claims.

The patent was for a new and useful improvement in a machine and method for producing fastener stringers.

(1) [1936] Ex. C.R. 1, at 12-38. (2) [1936] Ex. C.R. 1.

Claim 1 may be taken as representative of the machine claims held valid and is as follows:

A machine for making fasteners having means for feeding a tape step by step, means for feeding fastener members into position to be compressed on to said tape, and means for compressing the fastener members thereon.

Claim 19, dealing with the method, reads:

19. The method of making fasteners consisting in affixing jaw members in spaced groups on a continuous stringer in predetermined number and spacing, and cutting the stringer so that pairs of said groups co-operate in forming a fastener.

While the terminology used is not always exact throughout, it will be noted that the patent was granted for a machine and method for making fastener stringers. A fastener stringer consists of a row (of predetermined length) of metal elements fastened to the edge of a tape. Later the tape is cut between each row, two rows are connected by a sliding member, top and bottom stops are attached, and the other edge of each of the two lengths of tape is sewn to each side of an opening which is desired to be closed. The completed article is known as a fastener and its commercial importance lies in the uses to which it may be adapted. The patent is not on the fastener.

One of the defendants, G. E. Prentice Manufacturing Company, is a manufacturer of fasteners in the United States of America. It made stringers for some of these fasteners on machines of the type held in this action to be an infringement, and in 1927 commenced shipping its product to Canada. In 1930 it shipped to Canada three infringing machines and leased them to its co-defendant, Colonial Fastener Company, Limited. Since then the Prentice Company has continued to ship fasteners into Canada, but in greatly reduced quantities, and the Colonial Company has manufactured fastener stringers on the infringing machines leased by them from the Prentice Company and for which they paid the latter a rental, and a royalty based upon the sale of the total number of fasteners in which were incorporated the fastener stringers so made. No claim is made in this action against the Prentice Company in connection with any stringers that may have been made on similar machines in the United States and used in fasteners shipped by it into Canada.

After securing particulars of the number and output of the three infringing machines, the plaintiff elected to claim

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damages. The plaintiff has its head office at St. Catharines, Ontario, and has been manufacturing and selling fasteners since 1925. It claims that every sale by defendants of a completed fastener, the stringers for which had been made on the infringing machines, meant a loss to it for which it is entitled to compensation, while the defendants contend:

(*a*) That by the law of Canada the sale of the product of an infringing machine is not a wrongful act and that it is too remote upon which to found a claim in damages;

(*b*) That even if that be not so, the stringers are the only product and that the sale price of the completed fasteners should not be considered;

(*c*) That in any event the plaintiff, in fact, would not have sold all the fasteners that the defendants did and, in law, is not entitled to claim damages for any proportion of the defendants' sales.

It appears convenient to dispose now of (*a*) and (*b*), leaving (*c*) for consideration later.

(*a*) Admittedly the law in England is quite clear that the sale of the product of an infringing machine entitles the owner of the patent to damages for such sale. *United Horse Shoe and Nail Co.* v. *Stewart* (1). But it is urged that in England the Patent Act does not define the extent of the patent monopoly or the acts constituting infringement: that these continue according to the common law and that by the grant, "Our subjects" are commanded "that they do not at any time during the continuance of the said term of fourteen years either directly or indirectly make use of or put in practice the said invention, or any part of the same." Emphasis is placed on the words "directly or indirectly" and it is pointed out that they do not appear in section 32 of the *Patent Act,* R.S.C. 1927, c. 150. Section 32 is as follows:

> 32. Every person who, without the consent in writing of the patentee, makes, constructs or puts in practice any invention for which a patent has been obtained under this Act or any previous Act, or who procures such invention from any person not authorized by the patentee or his legal representatives to make or use it, and who uses it, shall be liable to the patentee or his legal representatives in an action of damages for so doing; and the judgment shall be enforced, and the damages and costs that are adjudged shall be recoverable, in like manner as in other cases in the court in which the action is brought.

(1) (1888) 5 R.P.C. 260, at 267.

I cannot find any difference in meaning between that wording and the phraseology of the English form of grant. If the damages claimed are not too remote, the wrongdoers must, as in every case of tort, compensate the injured party for such damages as he may have suffered. In my view the sale of the product of an infringing machine is not too remote.

Collette v. *Lasnier* (1), cited by counsel for the defendants, has no application. In that case there was no allegation or proof that the plaintiff suffered any loss or damage. He claimed baldly that defendants had realized a profit over and above the profits that would have been made without using the patented machine and demanded that extra profit as his damages. The Superior Court of Quebec granted the plaintiff as damages what the Court deemed to be the amount of such extra profit and the Court of Appeal affirmed that award. In this Court the lack of evidence of any loss or damage suffered by the plaintiff was pointed out, but rather than send the case back for a new assessment, the Court fixed the sum of one hundred dollars as the amount which the plaintiff should recover. This decision is not contrary to the views I have expressed.

(*b*) As to this branch of the defendants' contention, it suffices to remark that when one bears in mind that the object of the patentee's invention was, as expressed in his claims and specifications, to manufacture stringers to be used in fasteners, the plaintiff could not properly be compensated by reference only to the manufacturer's cost and sale price of stringers and without regard to the cost and sale price of the completed article. As has been pointed out previously, the stringers are of importance only in their use in fasteners and what the plaintiff lost was sales of fasteners. The principle set forth in *Meters Ld.* v. *Metropolitan Gas Meters Ld.* (2) should be applied. There the Court of Appeal had to consider the amount of damages the plaintiff was entitled to where the defendant infringed plaintiff's patents, one of which related to a particular kind of cam and spindle for opening the gas valve in a prepayment gas meter, and the other of which was for a particular kind of crown wheel in a like meter. It had been shewn before the Master and Eve J., to whom an appeal had been taken, that

(1) (1886) 13 Can. S.C.R. 563 (2) (1911) 28 R.P.C. 157.

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the plaintiff would have sold many more meters but for the defendant's intervention, and it was, therefore, awarded 13s. 4d. for the loss of profit on each of such meters. The Court of Appeal confirmed the judgment and made it clear that they agreed with the Master and with Eve J. that the proper method of assessing the damages was to take the profit on the sale price of the meters and not merely to consider the parts upon which the plaintiff held patents. Adopting this principle, the defendants' contention fails.

One other general defence raised by the defendant G. E. Prentice Manufacturing Company may be mentioned. The patent had been allowed to lapse for non-payment of fees on April 5th, 1927, and notice of the application to restore it was not published until June 11th of the same year. During the interval the defendant G. E. Prentice Manufacturing Company shipped into Canada fasteners made in the United States on machines identical with the machines held to constitute infringements of the patent. That defendant continued to make similar shipments from time to time, and it was urged that by virtue of the operation of subs. 6 of s. 47 of the *Patent Act*, R.S.C. 1927, c. 150, the Company obtained the right to use the invention in Canada. Subsection 6 is as follows:

> 6. In any case where a patent which has become void is restored and revived as aforesaid and during the period when such patent was void and before publication of notice of hearing on an application for its restoration and revival as aforesaid, any person has commenced lawfully to construct, manufacture, use or sell in Canada the invention covered by such patent, such person may continue to construct, manufacture, use or sell such invention in as full and ample a manner as if such patent had not been restored and revived.

None of the fasteners included in any of these shipments so made by the Company from the United States were taken into account in the plaintiff's statement of damages. Without dealing with the plaintiff's submission that this defendant cannot rely on the manufacture in the United States as giving it the right to manufacture in Canada, I agree with the Registrar and President of the Exchequer Court that the facts should have been pleaded and proved in the patent action as a defence, and that it is now too late to raise the question on the assessment of damages.

Before referring to the items in the plaintiff's statement of damages, it should be mentioned that included therein is a claim for loss in connection with stringers made by

defendants on two machines, or as they are called in the statement, " divided machines "; that is, instead of all the operations required to produce a stringer being on one machine the operations were divided between two machines. However, it is clear that what the Privy Council held the defendants had infringed was " the general mechanical idea of combining in this class of work all the necessary operations in one machine " (1), and not a method carried out by two machines. The plaintiff points to Claim 19 and to the following remarks of Lord Tomlin (2):

> There remains for consideration Claim 19. This is a method claim. It is said to be anticipated by Aaronson's Patent; but, even if the method is limited to fixing members on to stringers, the claim is for something which had never been done before, namely, producing stringers fitted with identical members so that a pair of stringers can co-operate to form a complete fastener. Their Lordships think that this is a novel claim with ample subject-matter and is valid and has been infringed.

But this language must not be divorced from the remainder of the judgment. This shows that the monopoly the plaintiff secured was on *a* machine of the type indicated; with means for producing the results mentioned,—but always on one machine (1). Read thus, Lord Tomlin's remarks as to Claim 19 are clear and unambiguous and the plaintiff's cross-appeal on this branch of the case fails.

Omitting all reference to the " divided machines " and the figures relating thereto used by the plaintiff in its statement, this summary so far as pertinent to the case at bar would now appear as follows:

(1) Loss due to sales made by defendant of fasteners made in Canada on machines calculated on the price actually obtained by the plaintiff.....	$87,593 72
(2) Loss due to first cut in minimum price calculated on defendant's sales.....	15,161 32
(3) Loss due to second cut in minimum price calculated on defendant's sales...	5,042 44
(4) Loss due to elimination of 5c. flat charge calculated on fasteners over 7½" lengths sold by defendant	1,210 50
(5) Loss due to first cut in minimum price calculated on plaintiff's actual sales of fasteners up to 7½".....	26,632 55

(1) 51 R.P.C. 349, at 367. (2) 51 R.P.C. 349, at 368.

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(6) Loss due to second reduction of minimum price calculated on plaintiff's actual sales of fasteners up to $7\frac{1}{2}$''.... 4,636 54

(7) Loss due to elimination of 5c. per piece on plaintiff's actual sales of fasteners over $7\frac{1}{2}$'' 4,081 95

Item 1. The defendants admitted making and selling 742,901 fasteners from stringers made on infringing machines. I have already pointed out that the plaintiff is entitled to damages for any loss it sustained by reason of these sales. The first problem is to determine whether the plaintiff would have made all these sales and even a cursory examination of the evidence would indicate that this is clearly a case where the broad axe referred to by Lord Shaw in *Watson* v. *Pott* (1) should be applied. I have read all the evidence and, without attempting to analyse it, which the Registrar has done with great ability and in detail, I cannot find that he omitted to take into consideration all proper elements and I agree with his conclusion, affirmed by the President, that the plaintiff would have sold sixty per cent. of the total number. It is contended that in the period during which infringement is shown the plaintiff did not manufacture stringers on its patented machine, but even if that were taken as proved, it does not operate in ease of the defendants. The plaintiff was deprived of the opportunity of using its patented machine to produce stringers for the 445,740 fasteners (i.e., 60 per cent. of 742,901), and, as I conclude it would have sold that number, it is entitled by way of damages to that profit on the sale of each of such fasteners that the evidence discloses. This disposes of defendants' contention (*c*) referred to above.

The Registrar found the plaintiff's loss of profit to be 10 cents per fastener. Not only did the defendants appeal, alleging that there was no basis upon which the allowance could be justified, but the plaintiff cross-appealed, alleging in turn that its calculation of its loss of profit was 11·79 cents per fastener; that the Registrar had found no fault with the correctness of its figures, and that the President, beyond adopting the Registrar's figure, had made no reference to the point. Even if the mathematical accuracy of

(1) (1914) 31 R.P.C. 104.

the plaintiff's statement of costs of manufacture be admitted, one must not lose sight of the contents of the plaintiff's letter to the Minister of Finance and of the methods of manufacture actually in use by it when its costs were compiled. These considerations serve to reduce the plaintiff's figures but at the same time leave them as a basis of computation. I might have adopted another figure, one probably a little lower in view of the matters mentioned, but I cannot say that there is sufficient to warrant interference with the Registrar's estimate, and the appeal and cross-appeal on this branch are dismissed.

As to the forty per cent. of the defendants' sales which the plaintiff would not have made, it is still entitled to damages by way of royalty. As Lord Watson points out in *United Horse Shoe and Nail Company* v. *Stewart* (1), "Every sale of goods manufactured, without licence, by patent machinery, is and must be treated as an illegal transaction in a question with the patentee." In *Watson* v. *Pott* (2), Lord Shaw said:

> If with regard to the general trade which was done, or would have been done by the respondents within their ordinary range of trade, damages be assessed, these ought, of course, to enter the account and to stand. But in addition there remains that class of business which the respondents would not have done; and in such cases it appears to me that the correct and full measure is only reached by adding that a patentee is also entitled, on the principle of price or hire, to a royalty for the unauthorized sale or use of every one of the infringing machines in a market which the infringer, if left to himself, might not have reached. Otherwise, that property which consists in the monopoly of the patented articles granted to the patentee has been invaded, and indeed abstracted, and the law, when appealed to, would be standing by and allowing the invader or abstractor to go free. In such cases a royalty is an excellent key to unlock the difficulty, and I am in entire accord with the principle laid down by Lord Moulton in *Meters Ltd.* v. *Metropolitan Gas Meters Ld.* (3). Each of the infringements was an actionable wrong, and although it may have been committed in a range of business or of territory which the patentee might not have reached, he is entitled to hire or royalty in respect of each unauthorized use of his property. Otherwise, the remedy might fall unjustly short of the wrong.

Under this subdivision the plaintiff has been allowed a royalty of 1 cent per fastener, i.e., 1 cent × 40 per cent. of 742,901 or a total of $2,971.60. Both parties have appealed as to this allowance, the plaintiff contending that it should be at least 2·3 cents per fastener, and the defendants contending that it was overly generous to the plaintiff.

(1) (1888) 5 R.P.C. 260, at 267. (2) (1914) 31 R.P.C. 104, at 120.
(3) (1911) 28 R.P.C. 157, at 163.

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I agree that the Registrar was correct in disregarding, on the one hand, the evidence that a departmental store had paid a royalty of 5 cents, as the fasteners there had been used on rather expensive articles; and in disregarding, on the other hand, the evidence of Mr. Prentice that in the United States he had granted licences and had been offered licences at the rate of $\frac{2}{3}$ cent per fastener, as the purchasing power of the public is much greater in the United States than in Canada. The main contention on the part of the plaintiff is that the Registrar in that part of his report which appears at the top of p. 754 of the Appeal Case before this Court, erred in stating that the Colonial Fastener Company, Limited, had paid its co-defendant, G. E. Prentice Manufacturing Company, Limited, a royalty of $12,737.02 on 742,901 fastener stringers. It would appear that the Registrar did err in that respect. It is undoubted that a royalty was paid, and, according to the evidence, it was fifteen per cent. of the gross sales price for the greater part of the time and ten per cent. for the remainder; but these percentages were of the gross sale price of the completed fasteners and not merely of fastener stringers.

Appendix I to the plaintiff's factum shows, with references to the pages where the evidence is to be found, that the total sum received from the sale of the fastener stringers, as mentioned by the Registrar, $84,930.50, is practically correct. This figure is obtained from Appendix I by adding to the total under Column 3 under the heading "Unitary Machines" the sum of $5,557.21, which appears opposite Period VI in the third column under the heading "Divided Machines." Although nothing is being allowed in connection with the product of these "divided machines," in this instance it is necessary to accept the plaintiff's calculations with reference to Period VI in order to arrive at the Registrar's total. In any event this does not prejudice either party. References are also given under column 5 in Appendix I to the evidence which indicates the amount of royalty paid according to defendants' own figures and this shows a total of $17,194.33 or $18,746.78, depending upon whether the total figures for Period VI are separated or kept intact. Adopting the former the rate of royalty per fastener would figure out to about 2·3 cents and not $1\frac{3}{4}$ cents, which the Registrar's calculation showed.

It is suggested that, having estimated the royalty paid by the Colonial Company to the Prentice Company at $1\frac{3}{4}$ cents per fastener, the Registrar unconsciously allowed this figure to be a guide to his final estimate that a fair royalty for the defendants to pay the plaintiff would be 1 cent per fastener. However, it must be remembered that, for the rental and royalty received by it from its co-defendant, the Prentice Company gave certain other services; and that while patentees may endeavour to impose all that the traffic will bear, in the instant case, the plaintiff, if it had adopted a system of licensing by demanding a royalty on each fastener, would have been obliged to set a figure in proportion to the sale price of a completed fastener. The rate adopted is one I would have accepted if the matter had come before me in the first instance.

In the result, therefore, the allowance of $47,545.70 under Item I in the plaintiff's statement remains undisturbed.

The remaining items deal with alleged damages due to reductions at different times by the defendants in the sale price of fasteners. Such a claim, if made out, is valid. *American Braided Wire Co.* v. *Thomson* (1). The evidence, however, fully warrants the finding that, in connection with the first reduction, the plaintiff was the first to act. It is then contended that, granting this to be so, the plaintiff was induced to such a course by reason of its representatives having been told, falsely, by prospective or actual customers that they could purchase more cheaply from the defendants. This claim, however, is too remote and Items 2 and 5 must be disregarded.

The second reduction was first made by defendants and, as damages under the headings in plaintiff's statement referring thereto, the Registrar allowed the sum of $3,117.56. The President disallowed this, as he considered that no "safe deduction can be made, in this case, from the fact that the defendants at any time sold their product at prices below that of the plaintiff, and which compelled the plaintiff to meet the reduction." After anxious consideration I have concluded that the plaintiff is entitled to something under this heading,—and not merely a nominal sum. After making every allowance for the effect of competition from

(1) (1890) 7 R.P.C. 152.

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imported fasteners, it must be admitted that any domestic manufacturer was in a privileged position to fill quickly the requirements of customers. It is true that there was a third concern in Canada producing fasteners, but the Registrar has allowed for this and I think I cannot do better than quote his remarks:

> On the whole, the United Carr Manufacturing Co. being in the same locality as plaintiff and the importations being lower in price, I have decided to divide the total losses to plaintiff in the ratio of 25 per cent; 37½ per cent and 37½ per cent, and would charge the defendants with 25 per cent of the losses.
>
> Now the figures involved are those numbered 3, 4, 6 and 7 on pages 3 and 4 hereof, namely,
>
> (3) $5042·44; (4) $1210·50—$6252·94 and
>
> (6) $4636·54; (7) $4081·95—$8718·49.
>
> These must be divided into two; first, the losses based on defendant's sales, namely, Nos. 3 and 4, $6252·94; and second, those based on plaintiff's own sales, namely, Nos. 6 and 7, $8718·49, for the following reason:
>
> In reference to losses from forced reductions based on defendant's sales the 25 per cent thereof to be charged against defendant must be taken on 60 per cent of the said sales, because it is only on 60 per cent of defendant's sales that plaintiff is entitled to get loss of profit; as on 40 per cent it is to be paid a royalty which is not affected by the reduction in prices. Now 60 per cent of $6252·94 is $3751·76 and 25 per cent of $3751·76 is $937·94, for which defendant is responsible regarding its own sales, and 25 per cent of $8718·49 is $2179·62 *re* plaintiff's sales, making a total of $3117·56 which I find plaintiff is entitled to recover from the defendants as damages resulting from the said forced reduction in price.

I believe that the Registrar has correctly appreciated the evidence and has properly applied the relevant principles. I do not say that I would have necessarily divided the total losses to the plaintiff in the same proportions, but on the whole I think the sum allowed is fair and reasonable under all the circumstances and that it should stand. The plaintiff's cross-appeal in this connection should be allowed.

There remains for determination one claim not included in the itemized statement. Plaintiff's counsel described this as "the loss sustained by reason of the disturbance of the market consequent upon the defendants' intervention," and argued that in addition to the substantial sums claimed in the itemized statement, the plaintiff should receive a further large amount. The plaintiff company at the outset adopted a restrictive sales policy. It considered that in order to induce manufacturers of articles to which the fasteners might be attached, to experiment with something that was new and untried, a campaign of education and persuasion had first to be undertaken together with the offer of a special

inducement. That inducement was that the plaintiff would supply only certain manufacturers with fasteners to be applied to specified purposes. In this way it was considered that the Company would be able to persuade some manufacturers not merely to try the new experiment but also to push the sales of their own product, which, of course, would result in additional sales of fasteners. It was argued that the effect of the defendants' intervention was to disrupt this scheme and that the plaintiff found it necessary to follow the defendants' example and sell to any manufacturer. However, the fact must not be lost sight of that there was no patent on fasteners and that stringers for them could be made in different ways. Besides the defendants' competition there was considerable importation from other countries and I am satisfied upon the evidence that without the defendants' intervention the plaintiff would not have been able to continue the policy it adopted at the outset. One of its own witnesses stated that the policy was deemed to be a satisfactory one at the outset, while two independent witnesses called by the defendants considered that the policy was not workable at any time. The plaintiff has been allowed all the damages to which it is fairly entitled in order to place it in the position it would have occupied if defendants had not infringed. There is nothing upon which to base any such claim as is here advanced and the plaintiff's cross-appeal on this point fails.

The net result is that the appeal is dismissed *in toto* and the cross-appeal allowed to the extent of $3,117.56. The Registrar recommended that the plaintiff be allowed the costs of the reference since it was entitled to damages and the defendants had contested each claim. That recommendation is adopted. Before the President the defendants succeeded in reducing the amount allowed by $3,117.56; the plaintiff failed to secure any higher amount, and no order was made as to the costs of the appeals to the President. The plaintiff was obliged to appeal from that judgment in order to recover its position before the Registrar, and the appeal to this Court should, therefore, be dismissed with costs and the cross-appeal (to the extent indicated) allowed with costs. But, in view of the many matters on which the

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plaintiff failed, the President's order as to the costs of the appeals to him might well stand.

Appeal dismissed with costs.
Cross-appeal (to the extent indicated) allowed with costs.

Solicitors for the appellants: *McCarthy & McCarthy.*
Solicitor for the respondent: *Harold G. Fox.*

GILMAN v. THE WORKMEN'S COMPENSATION BOARD

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* Nov. 13.

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

Workmen's Compensation Act, N.B., 1932, c. 36—Claim under the Act for death of workman—Nature of the industry in which the workman was engaged and whether it was one within the scope of Part I of the Act—Jurisdiction of the Workmen's Compensation Board.

APPEAL (by special leave granted by the Supreme Court of New Brunswick, Appeal Division) by the widow and infant children of John W. F. Gilman, deceased, from the judgment of the Supreme Court of New Brunswick, Appeal Division (1), dismissing their appeal from the decision of The Workmen's Compensation Board of New Brunswick disallowing their claim for a pension under the *Workmen's Compensation Act,* statutes of New Brunswick, 1932, c. 36, which claim was made on account of the death of the said John W. F. Gilman.

On the appeal to the Supreme Court of Canada, on conclusion of the argument of counsel for the appellants, the members of the Court retired for consultation, and on their returning to the Bench, the Court, without calling on counsel for the respondent, delivered judgment orally dismissing the appeal. The Chief Justice stated that the members of the Court were quite clear that there was no ground on which the Court could properly interfere with the judgment of the Court below. On hearing counsel as to costs, the Court dismissed the appeal without costs; the Chief Justice stating that the circumstances of the case were of a special character, but that it must be taken to be an order *sui generis.* *Appeal dismissed without costs.*

W. J West for the appellants.
W. A. I. Anglin for the respondent.

* PRESENT:—Duff C.J. and Rinfret, Crocket, Davis and Kerwin JJ.

(1) 10 M.P.R. 429; [1936] 3 D.L.R. 761.

HENRI JALBERT (SUPPLIANT) AND THE ATTORNEY-GENERAL FOR THE PROVINCE OF QUEBEC (INTERVENANT) ..... APPELLANTS;

AND

HIS MAJESTY THE KING, IN THE RIGHT OF THE DOMINION OF CANADA (RESPONDENT) ..... RESPONDENT.

1936
* May 1, 4,
* May 27.
** Nov. 27.

1937
** Feb. 2.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Crown—Land taken by Dominion for harbour purposes—Public domain—"Public harbour"—Interpretation—Evidence—Petition of right—Trespass—Land not property of Dominion—Damages—Determination of amount—Expropriation proceedings—B.N.A. Act, 1867, section 108, and third schedule—Exchequer Court Act, R.S.C., 1927, c. 34, s. 19, 19 (b), 31—Railway Act, R.S.C., 1927, c. 170, ss. 164, 166, 215, 219, 220, 221, 222, 232,—Chicoutimi Harbour Commissioners' Act, 1926, 16-17 Geo. V, c. 6.

The suppliant in his petition of right alleging to be the owner by letters patent from the province of Quebec of a certain water lot in the township of Chicoutimi and that the respondent entered into possession thereof, save for a small strip, for public purposes, claimed compensation for the land taken and for the damages suffered by such taking, to wit: $43,125. The respondent admitted the erection of a wharf on the property in question; but alleged that the suppliant was not the owner thereof, and that by virtue of section 108 of the *British North America Act* and its third schedule it formed part of the public domain of Canada in right of the Dominion, being, having been and forming part of a public harbour of the port of Chicoutimi in and before 1867. The province of Quebec intervened to support the letters patent issued by it to the suppliant, claiming that at such time it formed part of the public domain of the province. The Exchequer Court of Canada held that, from the evidence, the port of Chicoutimi was a public harbour in 1867 and previous thereto and it dismissed the suppliant's action and the intervention.

Held, reversing the judgment of the Exchequer Court of Canada ([1936] Ex. C. 127), that, upon the evidence, there was no ground for judicially finding that the beach lot owned by the suppliant appellant was at the time of Confederation part of "a public harbour" within the contemplation of that term in the *British North America Act*.—Without considering whether there was any "public" harbour within the meaning to be attributed to that term in the above Act, it is *held* that the beach lot in question became vested at Confederation in the province of Quebec, that the province had the right to convey it to the suppliant appellant as it did in 1897 and that therefore the latter is entitled to compensation in respect of the taking of the beach lot by the Dominion for the purpose of its public works.—Without

* PRESENT:—Duff C.J. and Rinfret, Cannon, Crocket, Davis, Kerwin and Hudson JJ.

** PRESENT:—Duff C.J. and Rinfret, Crocket, Davis and Kerwin JJ.

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attempting to define strictly what sort of locality by its natural formation or constructed works may properly be regarded as susceptible for use as a potential shelter for ships, it is obvious that there must be some physical characteristic distinguishing the location of a harbour from a place used merely for purposes of navigation; the mere fact that there are wharves and commercial activity along an open river cannot in itself constitute great stretches of the river a harbour. The provisions of the *British North America Act* dealing with harbours cannot have intended to include within the expression "harbour" every little indentation or bay along the shores of all inland lakes and rivers as well as along the sea coast and the shores of the Great Lakes, where private owners had erected a wharf to which ships came to load or unload goods for commercial purposes.

Held, also, on the question of damages or compensation to be awarded to the suppliant appellant, that, although in view of this Court's decision on the first branch of the case the suppliant's action in the Exchequer Court of Canada on the petition of right should be treated, if a technical rule is applied, as an action in trespass and the damages assessed as in any other action in trespass, nevertheless the lands were virtually expropriated; and the Court is of the opinion that the proper course is to proceed to determine the amount of compensation to which the suppliant would have been entitled as if expropriation proceedings had been taken. The suppliant is entitled to recover besides the value of the lands, substantial damages for the severance of his property and the subsequent interference with his right of access to the river; but, in order to arrive at a fair amount of damages, the Court should have some evidence of what was the fair value to the suppliant of his estate at the time of the commencement of the construction of the public work complained of and of what is the fair value of the estate he has now after such construction. If the Chicoutimi Harbour Commission commence within one month expropriation proceedings, the compensation to the suppliant should be fixed in accordance with the provisions of the *Railway Act,* 1919, made applicable *mutatis mutandis* by the provisions of the *Chicoutimi Harbour Commissioners' Act;* otherwise, a new trial should be held in the Exchequer Court of Canada limited to the ascertainment of the damages or compensation.

APPEAL from a judgment of the Exchequer Court of Canada, Angers J. (1) dismissing a petition of right by the suppliant appellant, claiming compensation for land taken by the Dominion Government for public purposes and for damages suffered by such taking, which the suppliant appellant fixed at a sum of $43,125.

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

At the first hearing of the appeal on May 1, 1936, the Court confined the argument to the question whether the lands of the suppliant appellant were part of a public

(1) [1936] Ex. C. 127.

harbour within the meaning of section 108 and the third schedule of the *British North America Act*, 1867, as property that passed at Confederation to the Dominion, leaving for later consideration, if necessary after the decision of this Court on that point, the question of damages or compensation to be awarded to this suppliant appellant.

J. A. Gagné K.C. for the suppliant appellant.

Louis St-Laurent K.C. for the Attorney-General for Quebec.

L. A. Pouliot K.C. and *M. L. Beaulieu* for the respondent.

On May 27, 1936, the Court made the following announcement:

For the information of the parties, we now announce our conclusion on the questions of right involved in this appeal before continuing the hearing of the argument on the question of damages.

The reasons of the judgment of the Court were delivered by

DAVIS, J.—Henri Jalbert, of the town of Chicoutimi, in the province of Quebec, claimed by petition of right against the King in the right of the Dominion of Canada, the sum of $43,125, alleging that he is the owner of a beach lot at Chicoutimi on the Saguenay River granted to him by letters patent of the province of Quebec dated June 16, 1907, and that he is the owner of other land of approximately 150 feet in width fronting on the Saguenay River and adjoining the beach lot at the rear thereof; that His Majesty in right of the Dominion of Canada, acting through the Chicoutimi Harbour Commission incorporated by 16-17 Geo. V (1926), chapter 6, has taken possession of the greater portion of the beach lot, has demolished the appellant's private wharf thereon used by him in connection with his lumbering business, and has erected on the beach lot a part of public wharves and that the Commission has, by the erection of such works upon the said beach lot, destroyed the right of access to the river from the adjoining land lot. The respondent admits having taken possession of the greater portion of the beach lot where the works of the Chicoutimi Harbour Commission have been erected but

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claims, in so far as the beach lot is concerned, that this was part of the foreshore within an area that constituted a public harbour before July 1, 1867, and therefore became Crown land, in right of the Dominion of Canada, by virtue of section 108 of the *British North America Act*, and that the province of Quebec had no right to convey the land in 1907 to the appellant, and, in so far as the land is concerned, the respondent claimed that such land did not in fact border on the Saguenay river and that the appellant had no legal right of access therefrom to the Saguenay river but in any event that the appellant could use the new wharves built by the Chicoutimi Harbour Commission in front of the said land and that, in the alternative, the appellant consequently did not suffer any damages even if his land lot enjoyed a right of access to the river, which was denied, and further, that any damage that might have been suffered by the appellant in respect of the land lot was compensated by the increased value of such land due to the advantages afforded by the public works of the Chicoutimi Harbour Commission in front of the land. The respondent further alleged that the appellant had not obtained authorization from the Dominion Government to build the private wharf he had built on the beach lot as required by the provisions of the *Navigable Waters' Protection Act*, R.S.C. 1927, c. 140, and that the appellant's private wharf upon the beach lot constituted an unauthorized work which the Minister of Marine and Fisheries under the Act could require to be removed or destroyed without compensation, and that in any event the claims of the appellant were grossly exaggerated.

The Attorney-General for the province of Quebec intervened in the case to support the validity of the letters patent granted by the province of Quebec in respect of the beach lot and alleged that the beach lot had become the property of the King, in right of the province of Quebec, at Confederation, that the letters patent granted to the appellant in 1907 were consequently legal, valid and operative and denied the plea of the respondent to the effect that the beach lot formed part of a public harbour at Confederation.

The action by petition of right was tried in the Exchequer Court of Canada by Mr. Justice Angers who dismissed

the petition and intervention with costs, holding that the portion of the Saguenay river and foreshore where the beach lot is located formed a constituent part of a public harbour at the date of Confederation and became vested in the King in right of the Dominion of Canada. From that judgment the appellant appeals to this Court and the Attorney-General of the province of Quebec intervenes in support thereof.

The appeal raises again the important and difficult question as to what in point of fact is to be regarded as a " public harbour " within section 108 and the third schedule of the *British North America Act*. The beach lot is entirely on the foreshore between high and low water marks. In the early stages of the argument we stated that we would not hear or consider the matter of damages until we had disposed of the legal questions as to whether or not the appellant had acquired title to the beach lot by virtue of the letters patent granted to him by the province of Quebec and as to whether or not the appellant had any right of access from the land lot to the river that had been interfered with by the works of the Chicoutimi Harbour Commission.

The Saguenay river has a length of about seventy-five miles from its mouth at Tadoussac on the St. Lawrence river. It is a tidal and navigable river and at Chicoutimi is about half a mile in width. Chicoutimi was an early settlement and trading post located at the head of navigation on the river and as early as 1857 was an active trading centre with a population of about 1,000. It is plain upon the evidence that before Confederation there was considerable lumbering business carried on at that point and extensive trade and transportation by water. Ships and schooners came up and down the Saguenay river, some of the ocean vessels sailing to and from Europe. Chicoutimi became a place where ships came for the purpose of loading and unloading goods, especially lumber which was the principal industry, and there being no railroads, the entire trade of the community was carried on by water transportation. There is no necessity to review the evidence in detail as to the commercial user of the Saguenay river up as far as Chicoutimi long before Confederation. That fact is clearly established. What we are mostly con-

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cerned about in this appeal is whether or not there was at the specific location of what is now the appellant's land a harbour within the meaning of that word as found in the third schedule of the *British North America Act*. Unless the particular land was within the area of what was in fact a harbour before Confederation, there is no necessity for us to go farther to ascertain what is precisely involved in the words "public harbours" in the third schedule of the *British North America Act* in relation to section 108 of the Act which provides that

> the public works and property of each province enumerated in the third schedule to this Act, shall be the property of Canada.

It is inexpedient to make general observations that may prejudice questions which may arise and come before us on other appeals, by any attempt to define strictly what sort of locality by its natural formation or constructed works may properly be regarded as susceptible for use as a potential shelter for ships. It is obvious that there must be some physical characteristic distinguishing the location of a harbour from a place used merely for purposes of navigation. The mere fact that there are wharves and commercial activity along an open river cannot in itself constitute great stretches of the river, a harbour. The provisions of the *British North America Act* dealing with harbours cannot have been intended to include within the expression "harbours" every little indentation or bay along the shores of all the inland lakes and rivers as well as along the sea coast and the shores of the Great Lakes where private owners had erected a wharf to which ships came to load or unload goods for commercial purposes. Lord Dunedin in delivering the judgment in the Judicial Committee in *Attorney-General for the Dominion of Canada* v. *Ritchie Contracting and Supply Company* (1), said:

> "Public harbour" means not merely a place suited by its physical characteristics for use as a harbour, but a place to which on the relevant date the public had access as a harbour, and which they had actually used for that purpose. In this connection the actual user of the site both in its character and extent is material.

The witnesses for the respondent located the limits of the harbour at Chicoutimi, as they termed it, as being from La Rivière du Moulin to the Basin, a distance of approximately two miles along the river shore. These witnesses

(1) [1919] A.C. 993, at 1004.

gave evidence, and it is not in fact disputed, that there were three wharves along the river between these points; one at La Rivière du Moulin, another one farther up the river at Rat River, and a third still farther up the river at the Basin. Several maps and plans were put in at the trial but plan 13 is a very good indication of the Saguenay river, its width and meanderings, between La Rivière du Moulin and the Basin. Plan 11 shews the town of Chicoutimi as surveyed in 1845 by Ballantyne and the town site as then surveyed includes the area surrounding Rat River and the Basin. The appellant's land lot is part of lots 3 and 22 on the said plan, approximately 300 feet from the Rat river. Now in the stretch of the river from Rivière du Moulin to the Basin, the distance between Rivière du Moulin and Rat River is about a mile and a half, and the distance between Rat River and the Basin is somewhat less than half a mile. It is plain on the evidence that big ships, that is, three-masters, did not proceed farther up the Saguenay river than La Rivière du Moulin but that smaller ships and schooners did go up as far as Rat river and the Basin, anchoring out in the river. At the junction of Rat river with the Saguenay was situated in early days the business of a general merchant, Johnny Guay, often referred to in the evidence, who had a sawmill and wharf and carried on a general merchant's business at that point. In the Basin were located the wharves of the family of Price, who were pioneers in the lumbering business in that part of the province of Quebec. There were admittedly no public works or undertakings by the province along this stretch of the river, before Confederation. Now having regard to the natural formation of the river in this vicinity, can we say there was a single harbour—from La Rivière du Moulin up to the Basin (a distance of some two miles) including the localities at the mouth of La Rivière du Moulin and at Rat river and at the Basin? Without laying down any criterion or test applicable to all cases I think we may safely say upon the evidence in this case that there is no solid ground for judicially finding that the small piece of land with which we are concerned in this appeal was within any harbour.

It is unnecessary in that view to consider whether there was any "public" harbour within the meaning to be

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attributed to that term in the *British North America Act* which transferred the public works and property of each province in public harbours to the Crown in the right of the Dominion, and we may conclude that the beach lot in question became vested at Confederation in the province of Quebec and that the province had the right to convey it to the appellant as it did in 1907. The appellant is therefore entitled to compensation in respect of the taking of the beach lot by the Dominion for the purpose of its public works.

There remains, apart from the ascertainment of damages, the question whether there was a right of access from the land lot, at the rear of the beach lot, to the river Saguenay and whether that right of access has been interfered with. The evidence leaves it perfectly plain that there was the right of access to the river from this land lot. A strip of land, about 40 feet in width, marked Street No. 1 on the Ballantyne plan of 1845, lying originally between the river and the land lot, was as a matter of fact never opened up as a street because in early days it disappeared by erosion and the river at high water came right up to the appellant's land lot. It is contended by the respondent that even if that is so, the appellant has now a right of access to the river across the public wharves erected in front of the property by the Chicoutimi Harbour Commission and has really suffered no damages in respect of interference, and, in any event, that the appellant's land has been increased in value by the advantages afforded by the new wharves of the Harbour Commission fronting on this land. All those matters, however, are matters to be considered in ascertaining the amount of damages.

The Court has for these reasons come to the conclusion that the appeal should be allowed but the learned trial judge unfortunately did not ascertain the damages, no doubt because of his conclusion that the suppliant was not entitled as a matter of law to any damages. Instead of sending the case back for the assessment of damages, the hearing of the appeal on the question of damages will be continued at the October sittings of the Court.

On November 27, 1936, the Court heard the argument of the counsel for the suppliant appellant and the respondent on the question of damages or compensation claimed by the suppliant.

J. A. Gagné K.C. and *B. Devlin K.C.* for the suppliant appellant.

L. A. Pouliot K.C. and *M. L. Beaulieu* for the respondent.

On February 2, 1937, the Court delivered the following judgment:

The appeal of the appellant Jalbert is allowed and the judgment appealed from set aside. Unless expropriation proceedings are commenced within one month judgment shall be entered declaring the rights of the suppliant and ordering a new trial in the Exchequer Court limited to the ascertainment of the damages or compensation. The suppliant shall be entitled to one-half of his costs (including counsel fees) here and below, together with all other disbursements in full, the costs of the new trial to be in the discretion of the trial judge. No order should be made with respect to the intervention and appeal of the Attorney-General for Quebec.

The reasons for judgment of the Court were delivered by

DAVIS, J.—This appeal was argued and considered by us in two steps. We first confined the argument to the question whether the lands of the suppliant were part of a public harbour within the meaning of the schedule of the *British North America Act* 1867 as property that passed at Confederation to the Dominion. If that was the true position of the land, and it was the conclusion of the learned trial judge, then the suppliant might have no right to damages or compensation in respect of lands taken or injuriously affected. Having taken time to consider that branch of the case we announced our conclusion that upon the evidence it could not be found that the lands in question were at Confederation part of a public harbour within the contemplation of that term in the *British North America Act*. That conclusion gave recognition to the suppliant's title and made it necessary for us to continue

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the hearing of the appeal on the question of damages or compensation.

A difficulty at once presented itself in the fact that, in the absence of expropriation proceedings, there has been technically a trespass on the part of the Dominion in the view that we had taken of the case that the lands were not Dominion property. That the Dominion, acting through its Harbour Commission at Chicoutimi, had actually taken possession of part of the suppliant's land and had constructed substantial and permanent public works upon it and had thereby injuriously affected by severance the remaining portion of the suppliant's land is really not in dispute. On the assumption that our conclusion on the first branch of the case was correct, counsel for the Dominion and for the suppliant merely disagree upon the proper measure to be adopted in ascertaining the amount of damages or compensation. Had expropriation proceedings been taken, the rights of the parties and the procedure for determining compensation would have been found to have been covered by statutory enactment. The *Chicoutimi Harbour Commissioners' Act*, 1926, 16-17 Geo. V, c. 6, provides for the appointment of commissioners by the Governor in Council who shall have jurisdiction within the limits of the harbour of Chicoutimi, as in the Act defined, and who shall likewise have administration and control of the harbour and all harbour property. By the said statute, the commissioners may, with the approval of the Governor in Council, acquire or expropriate such real estate or personal property as they deem necessary or desirable for the development, improvement, maintenance and protection of the harbour but all such real estate shall be acquired in the name of and vested in His Majesty. It is further provided that should the commissioners be unable to agree with the owner of lands to be acquired for any of the purposes of the Act as to the price to be paid therefor, the commissioners shall have the right to acquire such lands without the consent of the owner, and the provisions of *The Railway Act*, 1919, relating to the taking of land by railway companies shall, *mutatis mutandis*, be applicable to the acquisition of such lands by the commissioners, and in any such proceeding the powers of the Board of Railway Commissioners under *The Railway Act* shall be exercised by the Governor in Council.

The provisions of *The Railway Act*, 1919, relating to the taking of land by railway companies, are now contained in the Revised Statutes of Canada 1927, c. 170. By section 164 the railway company shall make

> full compensation in the manner herein and in the special Act provided, to all persons interested, for all damage by them sustained by reason of the exercise

of the powers of the company. By section 166 the railway company shall not, except as in the Act otherwise provided, commence the construction of the railway, or any section or portion thereof, until the general location has been approved by the Board of Railway Commissioners as hereinafter provided nor until the plan, profile and book of reference have been sanctioned by and deposited with the Board and duly certified copies thereof deposited with the registrars of deeds, in accordance with the provisions of the Act. The provisions relating to expropriation commence with section 215 of the Act. By section 219, when the parties cannot agree upon the amount of compensation or damages, either party may apply, in the province of Quebec, to a judge of the Superior Court for the district or place in which the lands lie, to determine the compensation to be paid. Section 220 provides that such judge shall, upon application being made to him as aforesaid, become the arbitrator for determining such compensation, and he shall proceed to ascertain such compensation in such way as he deems best and except as to the limited right of appeal given by section 232, his award shall be final and conclusive. Section 221 is what is sometimes called a betterment clause whereby the arbitrator shall take into consideration the increased value, beyond the increased value common to all lands in the locality, that will be given to any lands of the opposite party by reason of the construction of the railway, and shall set off such increased value that will attach to the said lands against the inconvenience, loss or damage that might be suffered or sustained by reason of the company taking possession of or using the said lands. Section 222 provides that the railway company may offer an easement in mitigation of any injury or damage caused or likely to be caused to any lands by the exercise of the company's powers.

Now had the Dominion or its statutory agent, the harbour commission, taken expropriation proceedings as pro-

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vided by the *Chicoutimi Harbour Commissioner's Act*, the amount of compensation would under that statute by virtue of the provisions of *The Railway Act* have been determined by a judge of the Superior Court of Quebec for the district in which the lands lie. The decisions upon *The Railway Act* have clearly established what is the proper measure of compensation within the language of the statute and applying the decisions a judge of the Superior Court would have fixed and determined in the expropriation proceedings the full compensation to which the suppliant would have been entitled. Expropriation would have been the simple and proper course for the Dominion to have taken had it not been for the fact that the Dominion claimed ownership of the property itself.

But the Dominion taking the view that it did that the lands in question were in fact the property of the Dominion as part of a public harbour at Confederation could not, nor could the harbour commission acting on its behalf, take expropriation proceedings without excluding the Dominion's claim that these lands were its own property and that the suppliant therefore was not entitled to compensation. When we announced our conclusion on the first branch of the case the Dominion could not then have commenced expropriation proceedings without acquiescing in that conclusion and thereby depriving itself of the right to have our judgment reviewed by the Judicial Committee if leave were given. The Dominion has not, in any case, commenced expropriation proceedings and we must therefore now deal with the petition of right as a claim for damages or compensation against the Crown for the actual taking of part of the lands of the suppliant and for the alleged injurious affection to the adjoining lands of the suppliant.

The first difficulty presented is to determine upon what basis the quantum is to be arrived at. Technically the acts of the Dominion are acts of trespass. There is no lawful authority for the actual taking possession of the lands in question. From that point of view the action in the Exchequer Court on the petition of right should be treated, if a technical rule is applied, as an action in trespass and the damages assessed as in any other action in trespass. But virtually the lands were expropriated and

we think the proper course is to proceed to determine the amount of compensation to which the suppliant would have been entitled had expropriation proceedings been taken. The authorities amply justify that course.

In *Parkdale* v. *West* (1), no land was taken but there was interference by a railway subway with the plaintiffs' enjoyment of their lands and the question at issue was whether the municipal corporation of Parkdale was liable to the plaintiffs for damage done to the premises of which the plaintiffs were owners. The effect of lowering the roadway in front of the plaintiffs' property had been to deprive the plaintiffs of the access to a public street which they had previously enjoyed and to injure their property seriously. At the trial the claims of the plaintiffs were amended by setting out that the corporation of Parkdale alleged that the work was done by the railway companies under the Dominion Act, 46 Vict., c. 24, but that in fact the subway was being constructed by the corporation of Parkdale and not by the railway companies, and by claiming that if the work was done by the corporation of Parkdale under the Ontario Act, 46 Vict., c. 45, a mandamus should issue to them to compel the assessment of compensation under that Act. The railway companies were not made parties to the action. In their defences, as amended, the corporation of Parkdale relied on the ground that the work was done by the railway companies, through the corporation of Parkdale as their agents, pursuant to the requirements of the railway committee acting under the Dominion Act, 46 Vict., c. 24, and denied that they had acted under the Ontario Act, 46 Vict., c. 45. Wilson, C.J., who presided at the trial, gave judgment for the plaintiffs on the ground that the acts complained of were wrongful, not being authorized by the Order in Council. This judgment was upheld by a Divisional Court of two judges on the ground that the corporation could not act as agents for the railway companies, and on the further ground that by proceeding under the Ontario Act the corporation of Parkdale could by taking the necessary steps have legally done the work, and that consequently " the matter could not be treated as one to all intents *ultra vires* " and that the cor-

(1) (1887) 12 App. Cas. 602.

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poration "were trespassers but within the scope of their authority." The judgment of the Divisional Court was reversed by the Court of Appeal of Ontario by a majority of three judges to one. The majority of judges held that the work was done by the railway companies under the order of the railway committee of the Privy Council of Canada and that the plaintiffs must look to the railway companies for compensation. This Court, upon further appeal, reversed this last-mentioned judgment and affirmed the judgment of the trial judge and of the Divisional Court. Gwynne, J. dissented, holding that the corporation of Parkdale was in fact acting under the Ontario statute and was liable thereunder to make compensation. The case was carried to the Judicial Committee and the appeal was dismissed. Lord Macnaghten in delivering the judgment of the Board said that their Lordships regretted that the railway companies had not been made parties to the action and that the litigation might have been disposed of more satisfactorily in the presence of the railway companies but that the absence of the railway companies did not relieve the corporation of Parkdale, which claimed to have acted as agent for the railways, from the obligation of showing that its principals were duly authorized to do the acts complained of. Their Lordships came to the conclusion that an order of the railway committee of the Privy Council for Canada under the 4th section of the Dominion Act of 1883 did not of itself, and apart from the provisions of law thereby made applicable to the case of land required for the proper carrying out of the requirements of the railway committee, authorize or empower the railway company on whom the order is made to take any person's land or to interfere with any person's rights. The provisions of law at the date of the order of the railway committee

applicable to the taking of land by railway companies and its valuation and conveyance to them and compensation therefor

were to be found in the *Consolidated Railway Act*, 1879, and in the opinion of their Lordships those provisions included the provisions contained in that Act for compensation in respect of land injuriously affected though not actually taken. Those provisions were so intermixed with the provisions applicable to the taking of land strictly so called, that their Lordships thought they might be properly included under the head of "provisions of law applicable

to the taking of land." It was admitted that no plan or book of reference relating to the alterations required by the railway committee had been deposited as required by the provisions of the *Consolidated Railway Act*, 1879, and as the provision as to the deposit of a plan or book of reference was the foundation of all steps for assessing compensation it appeared to their Lordships therefore that the railway companies had not taken the very first step required to entitle them to commence operations. Further, their Lordships held that under the provisions of the Act compensation had to be paid before the land could be lawfully taken or the rights over land interfered with and that the payment of compensation, or the giving of security, was a condition precedent. Their Lordships held on these grounds that the corporation of Parkdale could not justify its acts by pleading the statutory authority of the railway companies. The judgment proceeds at p. 615:

> If a person whose rights are injuriously affected is refused compensation, he may be compelled to bring an action for injunction. But even in that case the Court would probably not interfere with the construction of the works by an interlocutory injunction if the railway company acted reasonably, and were willing to put the matter in train for the assessment of compensation * * * As a general rule, it would only be right to grant an injunction where the company was acting in a high-handed and oppressive manner, or guilty of some other misconduct.
>
> Their Lordships were asked by the appellants to express an opinion as to the measure of damages in case the appeal should be dismissed. It appears to their Lordships that, as the injury committed is complete and of a permanent character, the respondents are entitled to compensation to the full extent of the injury inflicted.
>
> Their Lordships express no opinion as to the rights of the appellants to recover over again against the railway companies, either under the general law of principal and agent, or under the express provisions of their agreement with those companies. Whatever those rights may be, they are untouched by their Lordships' judgment.

Although the construction of the subway had not been lawfully undertaken, the work had actually been done, and though the municipal corporation were strictly trespassers "but within the scope of their authority" and as the injury committed was complete and of a permanent character, the Judicial Committee held that the plaintiffs were entitled in their action against the corporation of Parkdale to compensation "to the full extent of the injury inflicted."

Then in *Dominion Iron and Steel Company Ltd.* v. *Burt* (1), the Judicial Committee had to consider a Nova Scotia

(1) [1917] A.C. 179.

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case where the appellants owned a provincial railway which crossed a highway. In pursuance of an order made by the Governor in Council under section 178 of the Nova Scotia *Railways Act* (R.S.N.S. 1900, c. 99), the appellants altered the highway so as to pass under the railway, and thereby necessarily caused injury to the respondent's property. The appellants did not deposit a map or plan of the alteration under section 124 of the Act, nor did they take any steps to compensate the respondent. The respondent had brought a prior action against the city of Sydney to recover the damages which he had sustained but that action had been held not to be maintainable. *Burt* v. *The City of Sydney* (1). Then he commenced this action against the owners of the railway and it went to the Privy Council. Lord Parker, in delivering the judgment, said that the works had been carried out by the appellant company pursuant to a direction of the Governor in Council under the provisions of section 178 of the Nova Scotia *Railways Act* but that such a direction could not of itself confer on the company any power to interfere with the rights of others, though there could be no question that the appellant company had, under section 85 of the Act, general powers wide enough to enable them to carry out the works. Nevertheless the works, in their Lordships' opinion, had been commenced before the company had made a new map or plan of the alteration in the highway which alteration had been designed with the object of carrying such highway under the railway and getting rid of the dangerous level crossing which had previously existed, and that if such map or plan had been deposited it could not have failed to show that the access of the respondents to the highway from their adjoining lands must necessarily be interfered with and that the alterations could not properly be commenced until compensation for such interference had been paid or tendered under section 159. No such compensation was, in fact, paid or tendered. Their Lordships said:

> The result is that, in executing the works directed by the Governor in Council, the company acted illegally, not because they had no power to carry out the alterations, but because they did not trouble to observe the conditions precedent upon which alone their powers could be exercised. What they have done in Victoria Road constitutes, therefore, a nuisance

(1) (1914) 50 Can. S.C.R. 6.

in the highway, for which the respondents, who undoubtedly suffered special damage, had their common law remedy.

And their Lordships were therefore of the opinion that the respondents were entitled to damages in the action. "Indeed," their Lordships said,

the respondents might, strictly speaking, also claim a mandatory order for the restoration of Victoria Road to its former condition.

It had been suggested that, inasmuch as the Act contained a betterment clause, the measure of damages in an action of nuisance is not necessarily the same as the measure of compensation payable under the Act, but their Lordships said:

It is, however, difficult to see how the amount of damages to which the respondents are entitled can in any event exceed the amount which would have been payable to them by way of compensation if the appellant company had proceeded lawfully. The fact that it could have proceeded lawfully and that had it done so the betterment clause of the Act would have applied is not without materiality in assessing the damage.

In that case the Judicial Committee said the Court in its discretion would be entitled to refuse to make or to postpone the making of any mandatory order. Further, though it was a matter of indifference to the respondents whether what they received in respect of any injury to their land were by way of damage or by way of compensation, that was not necessarily so with regard to the appellant company, for in the one case it might have, and in the other it might not have, some remedy over against the corporation of Sydney under the order of the Governor in Council. It was "under these circumstances" that it appeared to their Lordships that while the judgments below ought to be affirmed, any proceedings thereunder for ascertaining the amount of damage sustained by the respondents ought to be stayed so as to give the appellant company an opportunity of doing what they ought to have done in the first instance. For this purpose a reasonable interval was allowed, within which time if the company deposited a proper map or plan and proceeded with due diligence to have the compensation payable to the respondents ascertained in accordance with the provisions of the Act, the stay would become absolute. If within the time limited the company did not take such proceedings to ascertain the compensation, the stay would be removed.

There is no necessity to stay the proceedings in the action before us because there is no third party against

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whom the Crown might have some remedy by indemnity or otherwise depending upon whether the matter had been treated by way of damage or by way of compensation. In *the Dominion Iron and Steel Company* case (1), their Lordships said that it was a matter of indifference to the respondents there whether what they received in respect of an injury to their land were by way of damage or by way of compensation. This indicates clearly, I think, that so far as the quantum is concerned it will be the same in a case such as this whether it be ascertained by way of damage or by way of compensation.

The authorities therefore clearly justify us in proceeding with the ascertainment of damages on the basis of the land having been expropriated.

The jurisdiction of the Exchequer Court of Canada is ample for this purpose. That court, by chapter 34 of the Revised Statutes of Canada 1927, section 19, is given jurisdiction to hear and determine

(*a*) every claim against the Crown for property taken for any public purpose;

(*b*) every claim against the Crown for damage to property injuriously affected by the construction of any public work;

The parties put in at the trial all the evidence they desired to give on quantum. The learned judge of the Exchequer Court who tried the case did not assess the amount of damages or compensation because of his conclusion that the land was the property of the Dominion and we are without the benefit of his consideration of the evidence as to damage. This is unfortunate. Even though a trial judge may take, as a matter of law, a view of a case which precludes the plaintiff from recovering damages, an appellate court is entitled to have, in case it should reach a different conclusion on the question of liability, the advantage and assistance of the trial judge's views as to the weight which should be attached to the evidence of the several witnesses who appeared before him.

The facts may be stated briefly. The suppliant owned a water lot adjoining his land lot. His upland ran back to a public street in the town of Chicoutimi. The suppliant used the entire property in the conduct of his lumber business. He had a small lumber mill upon the property

(1) [1917] A.C. 179.

and the location was especially advantageous for his business because he brought in timber from his own limits and unloaded it directly from the boats to the lumber piles on a small wharf that he had built upon the water lot. The wharf bordered on and was attached to the upland. It was not a deep water wharf; at very low tide the water receded some distance from it. But it was a convenient means specially built by the suppliant for unloading timber that was brought in by water on flat-bottomed boats. At low tide the boats were quite secure on the beach. When the boats rested on the bottom their decks remained only a few feet lower than the top of the suppliant's wharf, causing no inconvenience in the unloading. There is said to have been a minimum amount of labour and time required in the handling of the timber under the conditions that existed before the construction of the harbour works complained of. The suppliant's lands were therefore used as a *unum quid*. Now when the Dominion, acting through the local harbour commission, constructed the public wharves at Chicoutimi a portion of the water lot alone was actually taken. The suppliant's wharf was not within the area taken nor was any of the upland. The land actually taken was of course subject to the public right of navigation and probably had little value in itself to the suppliant. The suppliant asked before us for 50 cents a square foot for this land and there is some evidence that it might be worth that amount if it were filled in but that the fill might cost about as much as the land would then be worth. The value of the land actually taken has not yet been assessed. The substantial damage to the suppliant, however, obviously lies in the severance of his property and the consequent interference with his right of access to the river. The land taken was so connected with and related to the lands that are left that it is plain that the suppliant is seriously prejudiced. Lord Sumner in delivering the judgment of the Judicial Committee in *Holditch* v. *Canadian Northern Ontario Railway* (1) said:

> The basis of a claim to compensation for lands injuriously affected by severance must be that the lands taken are so connected with or related to the lands left that the owner of the latter is prejudiced in his ability to use or dispose of them to advantage by reason of the severance. The bare fact that before the exercise of the compulsory power to take

(1) [1916] 1 A.C. 536, at 542.

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land he was the common owner of both parcels is insufficient, for in such a case taking some of his land does no more harm to the rest than would have been done if the land taken had belonged to his neighbour. Compensation for severance therefore turns ultimately on the circumstances of the case.

The proper construction to be put upon the provision of section 164 of *The Railway Act* 1919 as to

full compensation * * * to all persons interested, for all damage by them sustained by reason of the exercise of

the powers of the company is too well established by decisions to be any longer open to question. The Privy Council in *Sisters of Charity of Rockingham* v. *The King* (1) gave to the words "injuriously affected by the construction of any public work" in the *Exchequer Act,* section 19 (*b*) the effect of the English decisions under the *Railways Clauses Consolidation Act,* 1845, and the *Lands Clauses Consolidation Act,* 1845. In *City of Montreal* v. *McAnulty Realty Co.* (2), the present Chief Justice of this Court carefully reviewed the authorities and showed that notwithstanding the obvious differences in language between the clause in the Dominion *Railway Act* and the clauses of the English statutes out of which the rules developed, it was settled law that generally speaking the principles governing the right of compensation under *The Railway Act* were the same as those which were established in England under the *Lands Clauses Consolidation Act.*

The City of Toronto v. *Brown* (3) was a case in this Court where the owner of property was held entitled to compensation for "injurious affection" though none of his land was taken. The present Chief Justice in that case at page 179 showed that the phrase "injuriously affected" used in the *Railways Clauses Consolidation Act,* 1845, and in the *Lands Clauses Consolidation Act,* 1845, imports something which, if done without the authority of the legislature, would have given rise to a cause of action.

It has, moreover, been settled that since a condition of the right to compensation is that the claimant's property has been "injuriously affected," it is incumbent upon him to establish that the injury he complains of was an injury to his estate and not a mere obstruction or inconvenience to him personally or to his trade; *Ricket* v. *Metropolitan Railway Co.* (4); and further that the damage complained of must be

(1) [1922] 2 A.C. 315.
(2) [1923] S.C.R. 273, at 285, 288
(3) (1917) 55 Can. S.C.R. 153.
(4) (1867) L.R. 2 H.L. 175.

in respect of the property itself (in its existing state or otherwise) and not in respect of some particular use to which it may from time to time be put. *Beckett* v. *Midland Railway Co.* (1).

In *Lake Erie and Northern Railway Co.* v. *Schooley* (2), it was held by this Court that

where property expropriated is, owing to its location and adaptability for business, worth more to the owner than its intrinsic value, he is not entitled to have the capital amount representing the excess added to the market value of his property. His proper compensation is the amount which a prudent man in the position of the owner would be willing to pay.

The principle applied was that laid down by the Privy Council in *Pastoral Finance Association* v. *The Minister* (3), that the special suitability of the lands expropriated for the carrying on of the business of the owner and the additional profits which the owner will derive from so carrying it on, are proper elements in assessing the compensation but the owner is not entitled to have the capitalized value of those savings and profits added to the market value of the land. Their Lordships said at p. 1088 of the report of that case:

That which the appellants were entitled to receive was compensation not for the business profits or savings which they expected to make from the use of the land, but for the value of the land to them. No doubt the suitability of the land for the purpose of their special business affected the value of the land to them, and the prospective savings and additional profits which it could be shewn would probably attend the use of the land in their business furnished material for estimating what was the real value of the land to them. But that is a very different thing from saying that they were entitled to have the capitalized value of these savings and additional profits added to the market value of the land in estimating their compensation. They were only entitled to have them taken into consideration so far as they might fairly be said to increase the value of the land. Probably the most practical form in which the matter can be put is that they were entitled to that which a prudent man in their position would have been willing to give for the land sooner than fail to obtain it. Now it is evident that no man would pay for land in addition to its market value the capitalized value of the savings and additional profits which he would hope to make by the use of it. He would, no doubt, reckon out those savings and additional profits as indicating the elements of value of the land to him, and they would guide him in arriving at the price which he would be willing to pay for the land, but certainly if he were a business man that price would not be calculated by adding the capitalized savings and additional profits to the market value.

In the case before us the serious claim, as we have said, is in the interference with the conduct of the suppliant's business on his lands but in order to arrive at a fair amount

(1) (1867) L.R. 3 C.P. 82, at 94, 95.
(2) (1916) 53 Can. S.C.R. 416.
(3) [1914] A.C. 1083.

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of damages for the "injurious affection" it is really necessary that the Court should have some evidence of what was the fair value to the suppliant of his estate at the time of the commencement of the construction of the public work complained of and of what is the fair value of the estate he has now after the construction of the public work. The possibility of the betterment of his property is by virtue of section 221 of *The Railway Act* something, in the words of Lord Parker in the *Dominion Iron and Steel* case (1), "not without materiality in assessing the damage."

Serious difficulty presents itself to us in the review of the evidence as to damage. Counsel for both parties admit that there was no evidence given at the trial by any one as to the value of the suppliant's estate in the lands before or of the value after the construction of the public work complained of. Counsel for the suppliant admitted that the evidence in support of the claim for damages was directed solely to showing an increased cost in operating the suppliant's lumber business on the property under the changed conditions and establishing some capitalized value of the loss. Now that is plainly the wrong principle to apply in the ascertaining of the damages and the case will have to go back for a new trial on that branch of the case.

The suppliant's appeal must be allowed and the judgment appealed from set aside.

If the Chicoutimi Harbour Commission should now desire to commence expropriation proceedings, in which case the compensation will be fixed by a judge of the Superior Court of Quebec for the district in which the lands lie in accordance with the provisions of *The Railway Act*, 1919, made applicable *mutatis mutandis* by the provisions of the special Act of the Chicoutimi Harbour Commissioners, and such proceedings are commenced within one month, the suppliant shall be entitled to a declaration of his rights but on account of the unsatisfactory and insufficient evidence of damage given in support of his claim he shall only be entitled to one-half of his costs here and below, together with his disbursements. If expro-

(1) [1917] A.C. 179.

priation proceedings are not so taken, then judgment shall be entered declaring the rights of the suppliant and ordering a new trial in the Exchequer Court limited to the ascertainment of the damages or compensation. In the latter event, the suppliant shall be entitled to the same order as above stated as to the costs here and below but the costs of the new trial shall be in the discretion of the trial judge.

The Attorney-General for the province of Quebec intervened in the proceedings in the Exchequer Court and took an independent appeal to this Court from the judgment of the Exchequer Court. Section 31 of the *Exchequer Court Act* provides that when the legislature of any province has passed an Act agreeing that the Exchequer Court shall have jurisdiction in cases of controversies between the Dominion and such province or between such province and any other province or provinces which shall have passed a like Act, the Exchequer Court shall have jurisdiction to determine such controversies and an appeal shall lie in such cases from the Exchequer Court to this Court. Provinces which have passed such legislation have more than once resorted to this jurisdiction of the Exchequer Court and have brought actions in the Exchequer Court to recover on claims against the Dominion, as for instance in *The Province of Ontario* v. *The Dominion of Canada* (1). The province of Quebec, however, has never passed the enabling legislation provided by section 31 of *The Exchequer Court Act.* But in any case it is plain that the Exchequer Court has no power to give relief to a province in a petition of right of a subject against the Dominion and although no exception was taken to the intervention or to the independent appeal the proper course is that no order should be made with respect to the appeal of the Attorney-General for Quebec.

Appeal allowed.

Solicitors for the suppliant appellant: *St-Laurent, Gagné, Devlin & Taschereau.*

Solicitor for the Attorney-General for Quebec: *Charles Lanctôt.*

Solicitor for the respondent: *Marie-Louis Beaulieu.*

(1) (1910) 42 S.C.R. 1.

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*Oct. 26, 27.

THE MORTGAGE CORPORATION OF NOVA SCOTIA v. LAW UNION & ROCK INSURANCE CO. LTD.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA IN BANCO

Fire insurance—Cause of loss—Statutory condition—Explosions—Nature of explosions—Whether fire preceded explosion or explosion preceded fire—Amount of damage recoverable under policy.

APPEAL by the Mortgage Corporation of Nova Scotia (one of the plaintiffs) from the judgment of the Supreme Court of Nova Scotia *in banco* (1).

The action was brought to recover payment from the defendant (the present respondent) under certain fire insurance policies on a certain building. The present appellant was mortgagee of the building and of the land on which it stood, and loss under the policies was made payable to it as its interest might appear.

Statutory condition 6 provided that:

The insurer will make good loss or damage caused by lightning or by the explosion of coal or natural gas in a building not forming part of gasworks, whether fire ensues therefrom or not; and loss or damage by fire caused by any other explosion; * * *

An explosion or explosions had occurred on the occasion of the fire. As between the present appellant and the defendant the main questions in dispute had to do with facts concerning the cause or causes of the destruction of the building and the amount recoverable under the policies, having regard to those facts and the statutory condition above quoted.

The trial judge, Graham J., after discussing the evidence, stated as follows:

I cannot find affirmatively that the explosions were coal gas explosions; I find the cause of the explosions not proven. So far, however, as this conclusion is concerned I have no advantage from having heard and seen the witnesses. I think that a fire which preceded and caused the first explosion or a fire caused by the first explosion, which was a minor one, and therefore did little or no damage probably caused the second explosion, which followed the first after the lapse of an appreciable time—a second or two—and which wrecked the building. That being the situation, the damage (both that caused by fire or by the second explosion) resulted from a fire ignited before, or by, the first explosion, which fire during its continuance (in the second event though brief, it was for an appreciable time) caused the second explosion * * *

*PRESENT:—Duff C.J. and Rinfret, Crocket, Davis and Kerwin JJ.

(1) 10 M.P.R. 483; [1936] 2 D.L.R. 593.

and he held that, therefore, the present appellant was entitled to judgment for its full claim (1). (He dismissed the claim of the other plaintiffs with regard to the loss of the building, on a finding as to a certain statement in the proof of loss; an appeal from his decision on this question was dismissed by the Court *in banco;* and no appeal was brought thereon to this Court).

The defendant's appeal from the said judgment of Graham J. in favour of the present appellant was allowed by the Court *in banco* (2), which rescinded and set aside the said judgment and held that the present appellant was only entitled to recover from the defendant the damage or loss caused by fire after the collapse of the building, and directed a reference as to the amount of such damage or loss by fire. The reasons of the Court *in banco* were delivered by Chisholm C.J., who, after referring to the trial judge's findings, stated that the question of fact which was important was "whether the fire preceded the explosion or the explosion the fire," and, after discussing the evidence, held that it was not "sufficiently persuasive to shew that a fire preceded the explosion"; and that "the plaintiffs have failed to prove their whole case"; and that what was recoverable was the damage caused after the collapse; to fix which damage there should be a reference.

On the appeal of the Mortgage Corporation of Nova Scotia to the Supreme Court of Canada, after hearing the argument of counsel for the appellant, the Court (on the following day), without calling on counsel for the respondent, gave judgment orally, dismissing the appeal with costs. The Chief Justice stated that the members of the Court had had an opportunity of considering over-night the very able and comprehensive argument of counsel for the appellant, and, after very carefully examining the evidence, they had come to the conclusion that there was no ground upon which the Court could properly reverse the judgment of the Supreme Court of Nova Scotia *in banco.*

Appeal dismissed with costs.

George E. Harris for the appellant.
L. A. Lovett K.C. for the respondent.

(1) 10 M.P.R. 483, at 484-488; [1936] 2 D.L.R. 593, at 594-597.
(2) 10 M.P.R. 483; [1936] 2 D.L.R. 593.

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*Nov. 12.
*Nov. 2.
** Nov. 26.

MONTREAL TRAMWAYS COMPANY (DEFENDANT) ..... APPELLANT;

AND

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*Feb. 2.

ROSARIO GUÉRARD, ÈS-NOM ET ÈS-QUAL. (PLAINTIFF) ..... RESPONDENT.

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

Practice and procedure—Petition in revocation of judgment (requête civile) —Effect of its filing—Suspension of proceedings or hearing before appellate courts—Return of record by appellate court to trial court—Granted at the discretion of the court—Preponderance of inconvenience—Jury trial—Answers to questions—Whether "special, explicit and articulated"—Findings of the jury—Arts. 1106, 1107 C.C.—Arts. 483, 502, 505, 1118, 1168, 1178, 1182 C.C.P.

A petition in revocation of judgment (*requête civile*) has not the effect, *ipso facto*, of suspending the proceedings in the case wherein the petition is presented, and more particularly the hearing before an appellate jurisdiction.—Stay of execution is the only consequence to result from the mere filing of the petition in revocation; and, moreover, such consequence does not follow as a matter of course, but only upon an order to that effect granted by a judge. A *fortiori*, the filing of a petition in revocation of judgment does not operate as a stay of proceedings in appellate jurisdictions as a matter of course.

As to the appellant company's application that, in view of the fact that a petition in revocation has been duly filed in the Superior Court in Montreal, the record ought to be returned to that Court for hearing on the petition, *held* that, such matter being entirely within the discretion of this Court, such application should be refused as, under the circumstances of this case, the respondent having been awarded damages by the judgment appealed from, the balance of inconvenience would be entirely on the respondent's side if the application was granted. *Kowal* v. *New York Central Railroad Co.* ([1934] S.C.R. 214) dist.

On the merits of the case, the judgment appealed from, affirming the judgment of the trial judge with a jury and awarding the respondent damages resulting from an accident due to collision, should be affirmed.—The jury's answer to the question, whether the accident has been the result of the sole fault of the appellant company and if so in what consisted that fault, was "Yes, excessive speed and *negligence of the watchman.*" Although the last underlined part of the answer should be disregarded, being clearly insufficient and irregular as not being "special, explicit and articulated" (art. 483, C.C.P.), the other part of the answer "excessive speed," taken separately—as it must be under the circumstances—is sufficient to meet the requirements of that article of the Code and render the verdict valid; and it is not the function of this Court under the circumstances of this case to review such finding (art. 501 C.C.P.).

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

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APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec, affirming the judgment of the trial judge, with a jury and awarding the respondent damages in the sum of $11,000 in all, being $8,000 in his capacity of tutor to his minor daughter and $3,000 personally, the damages resulting from an accident due to a collision between a tram-car belonging to the company appellant and an automobile in which the respondent's daughters were passengers.

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

Arthur Vallée K.C. for the appellant.

J. P. Charbonneau for the respondent.

The judgment of the Court, on the application of the appellant company to suspend hearing of the appeal by this Court and to order the return of the record to the trial court, was delivered by

RINFRET, J.—In this case, upon the verdict of a jury, the respondent recovered against the appellants a sum of $3,000 for himself personally and a further sum of $8,000 for his daughter Pauline, for damages resulting from an accident which happened in Montreal. The presiding judge gave judgment in accordance with the verdict, and his judgment was confirmed by the Court of King's Bench.

The Montreal Tramways Company thereupon appealed to this Court from the verdict and from the judgments confirming it.

The appeal was set down for hearing at the present session of the Court, when the appellants applied for postponement and asked that the record be returned to the prothonotary's office of the Superior Court, in Montreal, on the ground that they had filed in that Court a petition in revocation praying that the judgment be annulled and that the parties be replaced in the same position as they were in before that judgment, in view of the discovery of new evidence, unknown to the appellants or their attorneys at the time of the trial and of such a nature that if it had been brought forward in time, it would probably have changed the result (art. 505 C.C.P.), and also upon other grounds within the provisions of art. 1177 of the Code of Civil Procedure of the province of Quebec.

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On behalf of the appellants, it was urged that the filing of the petition in revocation of judgment, under the Quebec law, had the effect *ipso facto* of suspending all proceedings in the case and that the Court was precluded from hearing the appeal until the petition in revocation had been disposed of.

In the alternative, it was submitted that, in the exercise of its discretion, the Court ought to delay the hearing of the appeal until a final decision had been pronounced on the petition.

It is not necessary, in this case, to determine whether the jurisdiction of the Supreme Court of Canada to hear an appeal regularly entered before the Court may be interfered with by the effect of a proceeding lodged in the provincial courts, and that point will be reserved for our decision in a proper case.

We find however that, quite independently of that important objection which might possibly be found in the way of the appellants' present application and even under the law of the province of Quebec, the petition in revocation of judgment has not the effect *ipso facto* of suspending the proceedings in the case wherein the petition is presented.

The mooted question whether such a petition, before having any effect at all, ought to be received by a judge of the "same court" where the original judgment was pronounced has now been set at rest by the amendment to art. 1178 of the Code of Civil Procedure, introduced by s. 3 of chapter 97 of the statutes of Quebec 22 Geo. V (1931-32). By force of that amendment "the rules laid down by art. 1168" (and that is to say: the rules applicable in the case of oppositions to judgments) "shall govern as to the receiving of the petition in revocation of judgment." The result is that, since the amendment, the petition

is without effect and cannot be received by the prothonotary, unless it is accompanied by an order of the judge allowing it to be filed (and) no petition in revocation of judgment may be authorized by the judge without a previous notice thereof to the parties.

In the present instance, from the material filed before us, the petition appears to have been duly filed ("dûment produite") and to have been received by the prothonotary. But the filing of the petition, without anything more, does not operate as a stay of proceedings under the Quebec law.

There is no express provision to that effect to be found in the Code of Civil Procedure. If it had been the intention of the legislature that it should be so, and more particularly that the hearing before an appellate jurisdiction should be suspended, it is to be expected that the Code would have said so in express terms.

There is, in the Code of Civil Procedure, article 1182, which says that "the petition in revocation cannot prevent or stay execution, unless an order to suspend is granted by the judge"; and the logical inference to be drawn from that provision is that the stay of execution is the only consequence to result from the mere filing of the petition in revocation; and, moreover, such consequence does not follow as a matter of course, but only upon an order to that effect granted by the judge.

Our conclusion is that *a fortiori* the filing of a petition in revocation of judgment does not operate as a stay of proceedings in the appellate jurisdictions as a matter of course. That view is further supported by: Bioche, Dictionnaire de procédure civile et commerciale, 5th edition, vol. 5, *vbo.* Requête civile, p. 857, nos. 201 & 202; Garsonnet, Traité de procédure civile, 3rd ed., vol. 6, p. 828, no. 494; Glasson & Tessier, Précis de procédure civile, 3rd ed., vol. 3, p. 439; Japiot, Procédure civile et commerciale, 2nd ed., p. 686, no. 1114: "La requête civile ne produit pas d'effet suspensif."

It will be seen, therefore, that the filing in the Superior Court of the petition in revocation of the judgment now subject to appeal had not the effect *ipso facto* of staying proceedings in appeal and the appellants fail on the first ground put forward by them in support of their application.

There remains to decide whether, in view of the fact that the petition in revocation was duly filed in the Superior Court, in Montreal, we should return the record to that court where, no doubt, it will be heard in due course.

Looking at the application in that view and as a matter entirely within our discretion—(in the words of Bioche, *loc. cit.*: "La convenance du sursis est au surplus abandonnée à l'appréciation du juge")—we find that, in the present case, the balance of inconvenience would be entirely on the respondent's side. The respondent holds an award for a total sum of $11,000 and has secured a judgment for that

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amount, with interest and costs. The verdict and the original judgment date back to the month of January, 1935, and they have been confirmed by the appellate court. It is desirable that the appeal in this Court should be disposed of without further delay. If the record should be returned to the Superior Court for the purpose of allowing the appellants to proceed with their petition in revocation, the decision on the petition in that court will not necessarily bring the litigation to an end on that branch of the case; it may be further carried on appeal to several successive jurisdictions and the hearing of the appeal in this Court might possibly be delayed for a not inconsiderable period of time.

Under the circumstances, the wise course is to allow the appeal to proceed. We cannot see that, by following this course, the appellants will suffer prejudice in any way; and it must be understood that we are not expressing any opinion on the merits or the demerits of the petition in revocation.

A word ought to be said about the judgment of this Court in *Kowal* v. *New York Central Railroad* (1). In the special circumstances of that case, the proceedings in the appeal to this Court were suspended for fifteen days to allow the appellant to present a petition in revocation of judgment to the Superior Court; but the application to that effect was made by the plaintiff, whose action had been dismissed by the Superior Court and by the Court of King's Bench (appeal side); and it was thought that, under such conditions, the balance of convenience was in favour of granting the application. The situation, in our view, was practically the reverse of what it is in the present instance.

The application of the appellants to have the hearing of the appeal in this Court suspended and the record returned to the Superior Court will accordingly be dismissed with costs; but without prejudice to the right of the appellants to proceed with their petition in revocation of judgment before the Superior Court as they may be advised; and also with reserve of their right, should occasion arise, to pray before the Superior Court for a stay of execution under art. 1181 of the Code of Civil Procedure.

(1) [1934] S.C.R., 214.

The judgment of the Court, on the merits of the case, was delivered by

RINFRET, J.—Pauline and Lucienne Guérard, the daughters of the respondent, were passengers in an automobile driven by one Bastien, which was struck by a tramway belonging to the appellant. Lucienne Guérard died as a result of the accident. The other daughter, Pauline, was injured in that same accident. The respondent, both personally and as head of the community of property with his wife, sued the Montreal Tramways Company, its motorman, and Bastien, the driver of the automobile, to recover the damages resulting from the death of his daughter Lucienne. He also sued in his quality of tutor to his minor daughter, Pauline, to recover the damages resulting to the latter from her injuries.

The case was tried before a jury, who found that the accident was solely due to the fault of the motorman in charge of the tramway.

The driver of the automobile was exonerated by the jury.

In accordance with the jury's findings and assessment of damages, the action of the respondent against the driver Bastien was dismissed and his action against the appellant was maintained by the Superior Court for a sum of $3,000 allowed the respondent personally in respect of the death of his daughter Lucienne, and for another sum of $8,000 in his quality of tutor to his minor daughter Pauline.

The present respondent, Guérard, did not appeal from the judgment dismissing his action against Bastien.

Upon appeal by the present appellant, Montreal Tramways Company, the verdict of the jury and the judgment of the Superior Court were upheld in the Court of King's Bench (appeal side) by a majority of judges, Mr. Justice Dorion dissenting.

The Montreal Tramways Company then appealed to this Court, upon several grounds which, however, at the hearing, were limited to two: it contended that the verdict was contrary to the evidence and that the amounts awarded were excessive.

The material questions put to the jury and the answers respectively given by it to those questions were as follows:

Troisième question:—Cet accident a-t-il été causé par la seule faute d'Henri Bastien, chauffeur de l'automobile dans lequel avait pris place les

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dites Pauline Guérard et Lucienne Guérard, et si oui, dites en quoi a consisté telle faute?

Non, unanime.

Quatrième question:—Cet accident a-t-il été causé par la seule faute de la défenderesse Montreal Tramways Company et du wattman, Clébert Reumond, et si oui, dites en quoi a consisté telle faute?

Oui, excès de vitesse et négligence de la part du wattman—neuf pour et trois contre.

Cinquième question:—Cet accident a-t-il été causé par la faute commune des dites Pauline Guérard et Lucienne Guérard, d'Henri Bastien, de la défenderesse Montreal Tramways Company et du wattman, Clébert Reumond, et si oui, dites en quoi a consisté la faute de chacun?

Non. Neuf pour, trois contre.

The last part of the answer to the fourth question: "négligence de la part du wattman," may be disregarded, as it was not "special, explicit and articulated," as is required under article 483 of the Code of Civil Procedure whenever "there is an assignment of facts," as there was in the present case.

That part of the answer was clearly insufficient and irregular (*Pinsonnault* v. *Montreal Light, Heat & Power Company* (1); *Davis* v. *Julien* (2); and it is only necessary to read the reports in the cases of *Martineau* v. *Dumphy* (3), and of *Deslongchamps* v. *Montreal Tramways* (4), to see that they have no application here.

How far the insufficiency of that part of the jury's answer might have affected the regularity of the verdict as a whole is a point that was not taken and which need not, therefore, be discussed here.

But the other part of the answer to the fourth question, to wit: "excès de vitesse," taken separately—as it must be under the circumstances—is sufficient to meet the requirements of article 483 of the Code of Civil Procedure; and it is not the function of this Court to review that finding (See decision in *C.N.R.* v. *Muller* (5)). Under the Code, a verdict may not be considered against the weight of evidence unless it is one which a jury, viewing the whole of the evidence, could not reasonably find (art. 501 C.C.P.); and the appellant has not succeeded in showing to us that the answer came within that provision of the Code.

Likewise, on the question of assessment of damages, we cannot accede to the argument that the amounts awarded

(1) (1916) 23 R.L., N.S. 315.
(2) (1915) Q.R. 25 K.B. 35.
(3) (1909) Q.R. 19 K.B. 339.
(4) (1905) Q.R. 14 K.B. 355; (1906) 37 S.C.R. 685.
(5) [1934] 1 D.L.R. 768.

are so grossly excessive that it was evident that the jurors have been influenced by improper motives. Moreover, it was not shown that they had been led into error. In the absence of one or the other of these conditions, a new trial may not be granted under the Quebec law (art. 502 C.C.P.).

A word ought to be said, however, with regard to the answers of the jury to questions nos. 3 and 5. On the evidence, it seems abundantly clear that, before entering on Monkland Avenue (which he intended to cross and where the accident happened), Bastien failed to look, in order to ascertain whether traffic was coming in either direction on that avenue.

It may be a question whether he looked some 25 feet south of the avenue, where he was supposed to stop in obedience to the by-laws of Montreal, in line with a post specially erected to warn the auto drivers in that respect. But there could be no question that he never looked subsequently, as he admits himself:

J'étais intéressé à regarder en avant, pas regarder à chaque bord. J'étais intéressé à regarder en avant de mon char.

* * *

Q. Avez-vous regardé ou si vous n'avez pas regardé?
R. Je ne me souviens pas au juste d'avoir regardé.

* * *

Par la Cour:—
Q. En aucun temps, vous n'avez jamais vu le tramway qui vous a frappé avant qu'il vous frappe?
R. Non.
Q. La première fois que vous avez vu le tramway, c'est dans le trajet, je suppose, à aller au trottoir?
R. Après que j'ai été frappé, que j'ai été débarqué de mon char, c'est la première fois que je l'ai vu.
Q. Vous l'avez vu alors seulement?
R. Oui.

He failed entirely to observe the universally accepted rule of prudence so often referred to by the courts: "Stop, look and listen."

Under the circumstances, it is not easy to understand the answers of the jury to questions 3 and 5 entirely exonerating the driver Bastien of all responsibility whatever.

In the Court of King's Bench, all the judges expressed their surprise. Mr. Justice Dorion said:

Je ferais donc porter toute la responsabilité sur le chauffeur de l'automobile.

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Mr. Justice Bond said he had reached the conclusion that the verdict could be upheld "only after some hesitation." Mr. Justice Saint-Jacques said:

> Le moins que l'on puisse dire, c'est que cette conclusion ne peut pas manquer de causer quelque perplexité étant donnée la preuve sur la façon dont l'accident s'est produit.

And Mr. Justice Barclay (with whom Mr. Justice Saint-Germain concurred):

> Had I acted as trial judge, I might have been inclined to the view that there was common fault on the part of the Tramways Company and the driver of the automobile, but the jury having completely exonerated the latter, and there being sufficient evidence in the record to render such a finding reasonable, this Court cannot substitute a verdict for the verdict of the jury.

Of course, as observed by counsel for the respondent, the obligation arising from the common offence, or quasi-offence, of two or more persons is joint and several (art. 1106 C.C.); and if the answer to question no. 4 must stand against the appellant, the respondent may apply for payment of the whole amount of the awards against the appellant (art. 1107 C.C.), notwithstanding the fact that the driver Bastien ought also to have been held responsible.

But, in my view, that is not quite the point; and the respondent's contention does not meet the situation to my satisfaction. So far as the driver Bastien is concerned, I do not think the answers of the jury can be supported on the evidence; and there is no saying how far a proper consideration of Bastien's conduct by the jury might have influenced the whole verdict. I mean by that: that if the jurors had applied their minds reasonably to the admissions made by Bastien and had acted judicially thereon, they might well have come to the conclusion that the accident was due exclusively and solely to the fault of Bastien.

Of course, it is impossible to speculate as to what might have been the verdict, had the jury given proper and reasonable consideration to Bastien's admissions—a consideration which the answers to questions 3 and 5 suggest that was not given by them. And it seems to me that the consequence—that the jury's answers either to question 3, or at least to question 5, cannot be supported on the evidence—might have led to an order for a new trial.

But I do not think the order can now be made upon the present appeal, having regard to the state of the record before us.

The verdict of the jury in regard to Bastien has been definitely acted upon and acquiesced in. So far as Bastien is concerned, the action was dismissed by the trial judge and no appeal was taken from that dismissal. In this Court, he was kept outside the record. The inscription in appeal was served only upon the respondent. Not only was there no attempt to make Bastien a party to the appeal, but that could no longer be done as soon as the delays for an appeal to the Court of King's Bench had expired. As between the respondent and Bastien, the judgment then became *res judicata* in favour of the latter (*Corporation de la Paroisse de Saint-Gervais* v. *Goulet*) (1).

Under the circumstances, and in the absence of Bastien before us, the answers of the jury in regard to his responsibility can no longer be set aside. As a result, the jury's answer to question no. 4 stands and remains with its full effect.

But if such be the situation upon the record before us, there is no *chose jugée* as between the appellant and the driver Bastien. The appellant may yet have recourse against Bastien under article 1118 of the Civil Code; and, in the course of his address to the jury, the learned trial judge expressed himself several times in that sense. I think, therefore, it should be stated that the rights as between the Montreal Tramways Company and Bastien, whatever they may be, are untouched by the present judgment.

So far as the rights between the appellants and the respondent are concerned, the appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the company appellant: *Vallée, Beaudry, Fortier, Letourneau & Macnaughton.*

Solicitors for the respondent: *Lamothe & Charbonneau.*

(1) [1931] S.C.R. 437 at 441, 442.

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*Oct. 29, 30,
Nov. 2, 3.
*Feb. 2.

STANLEY JOHNSTON AND OTHERS (DEFENDANTS) ..... } APPELLANTS;

AND

DAME WINNIFRED BUCKLAND (PLAINTIFF) ..... } RESPONDENT.

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

Broker and client—Evidence—Marginal trading transactions—Accounts by mother and two daughters—Verbal agreement by mother with broker to treat all three accounts as one and as her own—Oral evidence—Whether commencement of proof in writing—Whether "commercial matters"—Necessary elements to constitute "commencement de preuve par écrit"—Trial judge's decision on the matter—Article 1233 C.C.—Article 316 C.C.P.

The appellants were stock brokers in Montreal and had a branch in the city of Sherbrooke, where the respondent resided. In the month of August, 1926, the latter entered upon the operation of a marginal trading account at that branch. About a year later, two daughters of the respondent opened similar accounts of their own at the same branch office. These became very large and most active accounts until came the break in the stock market in October, 1929. The accounts went under the margin and even under the market, and the respondent and her daughters were continually called upon to supply funds or securities to support their accounts. The respondent, after her daughters had given all they had for that purpose, was able to support them for a certain period. Finally, having tried and failed to raise funds to provide for further margins required by the branch manager, the respondent expressed to the latter the desire to have an interview with one of the appellants, Mr. Johnston, in Montreal. The interview took place; and, after a long discussion about the exact positions of all the accounts, the respondent, according to Mr. Johnston's version, authorized the latter verbally to treat all three accounts as one, and to close them, agreeing to hold herself responsible for them and that any balance due on the other accounts should be charged against her account The respondent brought an action against the appellants asking, *inter alia*, that the latter be condemned to pay her the sum of $58,793.98, being the total of two debit balances in the accounts of one of her daughters charged to the respondent in the final statement of account sent to her by the appellants; the respondent specifically denying the fact of her alleged authorization to treat all accounts as one and arguing further that this alleged agreement was not susceptible of being proven by oral testimony. The trial judge held that the agreement on which the appellants relied was susceptible of being proven by oral testimony as he found sufficient commencement of proof in writing, and that the evidence had established the existence of such agreement. The appellate court held that such evidence was not legal and maintained the respondent's action in part.

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

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Held that verbal proof of the agreement alleged by the appellants was admissible, as, upon the facts and circumstances of this case, sufficient commencement of proof in writing under article 1233 (7) C.C. could be found in order to let in oral evidence of the particulars of such agreement.

Held also that, whatever may be the correct legal description of the agreement alleged to have been made by the respondent, it does not come within the transactions made by stock brokers in the ordinary course of their business; and, therefore, verbal evidence was not admissible as constituting proof of "facts concerning commercial matters" within the meaning of those terms in paragraph 1 of article 1233 C.C.—The decision of *Forget* v. *Baxter* ([1900] A.C. 467) is not applicable to the present case.

The expression "commencement of proof in writing," although no definition of it is contained in the Civil Code, connotes a writing emanating from the party against whom it is to be used which tend to render probable (in French "vraisemblable") the existence of the fact which is desired to be proved—It is not necessarily required that the writing should be in the hand of the party against whom it is sought to be used or that it should be signed by that party; it is sufficient if it "emanates" from him.—The writing required for the commencement of proof may be replaced by the evidence of the party (article 316 C.C.P.)—The question whether there is a writing and the further question whether that writing emanates from the party against whom it is sought to be used are questions of law; but the question whether the writing, or the evidence of the party against whom it is used, tends to render probable the existence of the fact which it is desired to be proved, is a question of fact.

The trial judge's finding, in this case, was in favour of the appellants; and it is a well established practice that an appellate court should not disturb such findings, on questions of facts, unless there could be found evident error by the trial judge in appreciating the evidence; but the rule must even be more strictly adhered to when it is applied to the question of whether a commencement of proof in writing is sufficient to let in oral evidence.

The trial judge's finding, that "on important points, (respondent's) testimony was often evasive, confused and contradictory" was peculiarly within the province of the trial judge, who was in the best position to pass upon it; and such a situation has always been recognized as a valid basis of commencement of proof in writing.

APPEAL from a judgment of the Court of King's Bench, appeal side, province of Quebec, reversing the judgment of the Superior Court, Denis J. and maintaining the respondent's action in part.

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

L. A. Forsyth K.C. and *G. F. Osler* for the appellants.

J. T. Hackett K.C. and *J. E. Mitchell* for the respondent.

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The judgment of the court was delivered by

RINFRET J.—The real controversy between the parties, at the time when the action was brought, was whether or not Mrs. Buckland, at an interview with Mr. Johnston, head of the appellants (who are stock brokers), on October 14, 1930, authorized the appellants to consolidate her accounts with the accounts of her daughters and to charge to her any debit balances in her daughters' accounts.

This was not, however, the issue presented by the respondent in the original declaration accompanying the writ of summons served upon the appellants. In that declaration, the first conclusion was for an accounting; the second conclusion was that the appellants be jointly and severally condemned to return to the respondent any securities belonging to her which may still be in their possession; the third conclusion was that the appellants be ordered to pay to the respondent the value as of the dates of delivery by the respondent, or of purchase for her, of all her securities subsequently sold by the appellants illegally, wrongfully and improperly, as was alleged; and the fourth conclusion, which was only in the alternative, was that the appellants, upon their failure so to do,

be jointly and severally condemned to pay plaintiff the sum of one hundred and fifty thousand dollars ($150,000) with interest from the sale of the said securities.

It was only several months after the institution of the action and after the appellants had filed their plea that the respondent amended her declaration so as to ask that

in any event, (the appellants) be jointly and severally condemned to pay (the respondent) fifty-eight thousand seven hundred and ninety-three dollars and ninety-eight cents ($58,793.98), with interest from the 15th December, 1930, and costs.

This sum of $58,793.98 was the total of two debit balances in the accounts of one of Mrs. Buckland's daughters, Vera (Mrs. Webster), charged to Mrs. Buckland in the final statement of account sent to her by the appellants as of December 15, 1930.

Still at a later date—and, in fact, after *enquête* was closed at the trial—the respondent moved to further amend her declaration and to add the following words:

and that, in so far as necessary, the statements furnished by the defendants (appellants) to the plaintiff (respondent) be corrected by returning to the plaintiff's account the said sum of $58,794.48 and by deleting from the said account the said transfer (N.B., meaning the transfer of the debit

balances amounting to that sum of $58,794.48 from Mrs. Webster's account to Mrs. Buckland's account) and all interest charges in connection with it.

In truth, the conclusion implied in this last amendment was the only one aptly covering the facts and circumstances disclosed at the trial. Nevertheless, the new amendment was disallowed by the trial judge. While he permitted the respondent to amend in minor details some of the allegations of her declaration, he refused permission to amend her conclusions in the manner above set forth, on the ground that the new amendment was incompatible with the original conclusions and would "change the nature of the demand," contrary to the provisions of article 522 of the Code of Civil Procedure.

As a result, and treating the respondent's proceedings as they stood before him, the trial judge dismissed the action as unfounded. But, although one of the grounds of dismissal was, no doubt, that the action as brought (and as legally amended up to the date of the judgment) could not be maintained having regard to the evidence, a further ground held by the trial judge was that the appellants were entitled to succeed because they had established that they were authorized by Mrs. Buckland to consolidate the accounts of herself and of her daughters and to charge to her the debit balances in her daughters' accounts.

In that way, the trial judge, though disposing of the litigation on the declaration as drafted, at the same time passed upon the real issue between the parties and decided that issue against the respondent.

In the Court of King's Bench, on the main issue, the judges were of opinion that the evidence adduced to prove the agreement was not legal; and, as a consequence of that opinion, the judgment of the Superior Court was reversed. Though the conclusions of the respondent for an accounting and for the return of the securities or, in the alternative, for a condemnation of $150,000 were rejected; though it was found that the conclusions for the payment of the specific sum of $58,793.98 could not be maintained, it was held possible on the pleadings to treat the action as one in the nature of a demand *en réformation de compte*. Accordingly, on the appeal, the adjudication was that, not only the two items amounting altogether to the sum of $58,793.98 (representing the debit balances transferred from Mrs. Webster's accounts), but all the items similarly transferred

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should be deleted from Mrs. Buckland's account, and that her action ought to have been maintained to that extent, with costs, reserving to her all her rights against the appellants in respect of her own account with them.

The appellants, in this Court, met the judgment of the Court of King's Bench with two preliminary objections.

It was first said that it was not open to the appellate court to give the judgment it did on the pleadings as they stood. Indeed, it was urged that, in so doing, the Court of King's Bench had treated the action practically as if the last amendment prayed for by the respondent had been permitted, while, in fact, it had been disallowed by the trial judge.

In the second place, the appellants argued that, even assuming the action might be treated in that way by the appellate court, the adjudication made by it was *ultra petita,* since the respondent never asked for more than the striking out of the two particular debit charges transferred from Mrs. Webster's accounts and the judgment of the Court of King's Bench goes further and also strikes out several other items transferred from Mrs. Webster's accounts and in regard to which no conclusions appeared in the respondent's declaration, even if due allowance be made for all the amendments sought to be introduced by her.

To the first objection of the appellants in that respect, the answer is that, undoubtedly, as stated at the opening of the present judgment, the true controversy between the parties and the only one really discussed at the trial, was whether on October 14, 1930, when Mrs. Buckland met Mr. Johnston, an agreement was reached whereby the firm of Johnston & Ward was authorized to liquidate all the accounts and to charge to Mrs. Buckland any resulting debit balances in the accounts of her daughters. That it was so, clearly appears from the judgment of the Superior Court, where the trial judge states that such question was

> the only one in actual dispute and concerning which the rights of the parties can be seriously discussed.

True, the learned judge, in using those words, refers solely to the prayer for a condemnation to pay the specific sum of $58,793.98, but that condemnation was sought as a consequence of the respondent's claim that no agreement of the nature and character alleged by the appellants had ever been made by her. The existence of that agreement was

the bone of contention between the parties throughout the trial. Time and again, counsel on either side was heard to say that that question was "all that was before the Court at the moment in this case." The *enquête* centred almost exclusively on the point whether the alleged agreement existed and whether it could be proved by oral evidence. The appellants themselves, in the Court of King's Bench, acknowledged that the main question on the appeal before that court was:

> Whether or not the appellant (the present respondent) at the interview with Mr. Johnston of October 14, 1930, authorized the respondents (now appellants) to consolidate her accounts with her daughters and to charge any debit balances in the latter to her.

The whole case was fought on that ground, to such an extent that, in its formal judgment, the Court of King's Bench characterizes the litigation by saying:

> C'est à ce seul point que se réduit le litige et à cette seule fin que la cause a été faite.

And, on the record, the assertion is justified in the most undisputable way.

Under the circumstances, the judgment of the Court of King's Bench does not mean that, in a case such as this, the amendments made by the respondent should ordinarily be allowed consistently with the provisions of the Code of Civil Procedure, and we do not wish to be understood ourselves as sustaining any such proposition. But what the Court of King's Bench states—and that statement is fully warranted on the record—is that, in the special circumstances of this case and having regard to the way the trial was conducted by the parties, it was and it is perfectly open to the courts to treat the litigation as one to have it decided whether or not the agreement contended for by the appellants was made by the respondent. In that view of the question, the objection of the appellants resolves itself into one of pure practice and procedure; and this is not a case where this Court would interfere with the decision of the highest court of final resort in the province. The whole defence of the appellants on that question was gone into and everything in any way pertaining to it was before the Superior Court. No possible injustice can have resulted against the appellants, and the Court of King's Bench having decided that, in the premises, the controversy as presented by the pleadings and as submitted at the trial opened the way to the adjudication made by that Court,

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it would not be in accordance with our usual practice to reverse its judgment upon an objection of the nature of that made by the appellants.

Nor do the appellants fare better on their second preliminary objection to the effect that the adjudication made by the appellate court is bad because it grants *ultra petita.* Assuming, as the Court of King's Bench did, that the real issue in the case was whether the agreement of October 14, 1930, had taken place, and that the issue was sufficiently raised by the pleadings or, at all events, that such was the issue fought at the trial, it follows that the consequential prayer in respect to an amount of $58,793.98 fully covered an adjudication in respect to a reduced amount.

It was claimed by the respondent that there was no such agreement and that, as a consequence, she was not properly charged with the two debit balances of Mrs. Webster's accounts. It stands to reason that, upon that point, having come to the conclusion that no agreement to that effect had been legally proven, the Court of King's Bench could, at the same time, decide that the result was not that Mrs. Buckland should have her account reduced by the deletion solely of the sum of $58,793.98 (representing only the two debit balances), but that all the items transferred by the appellants from Mrs. Webster's account on the assumption that the agreement existed, had to be struck from the respondent's account. That was the logical consequence of the decision reached by the Court of King's Bench. Any other conclusion in the premises would have been unfair to the appellants and very much open to challenge. It appears from the record that the net result of the adjudication appealed from is that a sum considerably lower than $58,793.98 was thereby struck from the respondent's account. Indeed, we were told at bar that when the final adjustment would be made on the basis of the judgment rendered by the Court of King's Bench, the net amount whereof the respondent will benefit will prove to be in the neighbourhood of $10,000. We cannot see, therefore, how the appellants can contend that the judgment grants *ultra petita;* and, in our view, the effect of that judgment is exactly the other way.

But, for the same reason just stated, we think the respondent's preliminary objection to the jurisdiction of this

Court also fails. It is apparent that the amount or value of the matter in controversy exceeds the sum of $2,000 (s. 39 of the *Supreme Court Act*). The respondent cannot, in the same breath, ask us to uphold the judgment of the Court of King's Bench, on the ground that the issue was whether the agreement of October 14, 1930, had been consented to by her (an agreement which is shown to involve a sum of at least $10,000) and then turn around to claim that the action is merely one for accounting and that, therefore, on the strength of some decisions in this Court, we have no jurisdiction to hear the appeal. It is clear that the decisions on that score cited by the respondent (*Généreux* v. *Bruneau* (1); *Mathieu* v. *Mathieu* (2); *Canada Car* v. *Bird* (3)) in no way apply.

The preliminary objections made on behalf of both the appellants and the respondent must, therefore, be disregarded and we will now proceed to dispose of the main point in controversy.

The appellants were stock brokers in Montreal and had a branch in the city of Sherbrooke, where the respondent resided. In the month of August, 1926, the respondent entered upon the operation of a marginal trading account at that branch. As matters went on, the operations were made both on the New York and on the Montreal stock exchanges; and, for that purpose, an account was kept and known as the New York account and another account was kept and known as the Montreal account. About a year later, two daughters of Mrs. Buckland, Vera (Mrs. Webster), living in Sherbrooke, and Grace (later Mrs. Wasson, living in Boston), opened similar accounts of their own at the appellants' branch in Sherbrooke. They also traded in United States and Canadian securities and they also had each a New York account and a Canadian account. In addition to that and for reasons not material here, Mrs. Webster had a special New York account and a special Canadian account.

The accounts of Miss Grace never became of great importance; but Mrs. Buckland's and Mrs. Webster's gradually developed into heavy transactions, until they became

(1) (1910) 47 Can. S.C.R. 400. (2) [1926] S.C.R. 598.
(3) Cameron's Supreme Court Practice, 3rd ed., p. 164.

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what were probably the largest and most active accounts in the Sherbrooke branch.

Then came the break in the market, in October, 1929. The accounts went under the margin and even under the market. Mrs. Buckland and Mrs. Webster were continually called upon to supply funds or securities to support their accounts; and there came a time when Mrs. Webster had given all she could in the way of money and securities. Mrs. Buckland was able to support Mrs. Webster and Miss Grace for a certain period. Then, it was found necessary to call another sister, Mrs. Greenleaf, of Decatur, Alabama, to the rescue; and some of the latter's securities were placed in Mrs. Webster's accounts. Later, the assistance of Miss Grace (who had become Mrs. Wasson) was also invoked; and, on the eve of the crucial interview between Mr. Johnston and Mrs. Buckland at Montreal, on October 14, 1930, Mrs. Buckland had just returned from Boston with some of Mrs. Wasson's securities for the purpose of supporting the accounts. There is a controversy as to whether it was only for her own account or also for Mrs. Webster's accounts; but this will be dealt with later.

In fact, the trip to Boston had been prompted by the reason that the appellants were pressing both Mrs. Buckland and Mrs. Webster for further margin; and, as she admitted to McAnulty, the manager of the Sherbrooke branch, the respondent was finding it

> very heavy on her carrying those accounts * * * having to take care of them at that time.

Mrs. Buckland was a widow who had inherited from her husband the ownership of a newspaper known as *The Sherbrooke Record*. The paper was fairly prosperous and was bringing to Mrs. Buckland something like $11,000 annually. She had also owned interests in the O'Cedar Manufacturing Company, which she had sold for a large amount, so that admittedly when she started her speculations on the stock markets, she enjoyed considerable wealth.

After Mrs. Buckland returned from Boston, she went to the branch of the Canadian Bank of Commerce in Sherbrooke and endeavoured to borrow from that bank, on her *Sherbrooke Record* stock as collateral, a sum of between $245,000 to $250,000, with the avowed purpose of using that money to pay off all the accounts of herself and her daughters with the appellants. The local manager of the bank

said that he recommended the loan, but the head office was unwilling to put it through.

Having failed in her proposition to the Canadian Bank of Commerce, Mrs. Buckland expressed to McAnulty the desire to have an interview with Mr. Johnston; and this was arranged to take place in Montreal on October 14, 1930.

Before leaving for Montreal and in order to protect the accounts in the meantime, Mrs. Buckland deposited in the hands of McAnulty the securities belonging to Mrs. Wasson and which she had brought from Boston.

We have stated that there was a controversy as to whether the securities were left for the purpose of supporting only Mrs. Buckland's own accounts, or whether they were also deposited for the purpose of Mrs. Webster's accounts. As this point of fact is important, it may be cleared up at once. Unfortunately there is no express holding of the trial judge on that fact. McAnulty is positive that the securities were left for the protection of Mrs. Webster's account. Mrs. Buckland, in her deposition on discovery, referring to the incident, says in terms:

> Yes, I had taken in some securities to Mr. McAnulty to cover my account and my daughters'.

We are asked to disregard that answer, on the ground that it must be a mistake in the transcription of the stenographer's notes. It should be observed that this request could hardly be entertained in this Court. If there really was an error in the transcription of Mrs. Buckland's evidence, it should be pointed out that the alleged error appears in her deposition on discovery taken almost a year and a half before the trial, and that the so-called error was allowed to remain in the record since that time throughout the trial and throughout the proceedings before the Court of King's Bench, while a very simple procedure for correction is provided by the Code of Civil Procedure (art. 348), of which the respondent could have availed herself long before the hearing in this Court. We fear that, in the premises, we are not in a position to come to the relief of the respondent in that respect. It is true that the following questions and answers in the deposition on discovery lend some colour to the contention of counsel for the respondent; but even if Mrs. Buckland should be held to have stated on discovery that Mrs. Wasson's securities were

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deposited solely in support of her own account, there would stand against her statement the very positive assertion to the contrary made by McAnulty, whose evidence is supported by all the surrounding circumstances; for Mrs. Buckland had been in the habit of depositing securities to support Mrs. Webster's account; it was quite a usual thing for her to do, whether we call it a loan of the securities to Mrs. Webster or a straight pledge of the securities in aid of Mrs. Webster—a point to which Mrs. Webster seemed to attach a great deal of importance, but which is of no real consequence for the purposes of this case.

But, above all, the main reason for accepting Mr. McAnulty's version is that, before Mrs. Buckland left for Montreal, Mrs. Webster's account needed support; it was badly in want of additional margin; the appellants had notified her that, if margin was not forthcoming, the securities held in her account would have to be sold at once. If, therefore, Mrs. Wasson's securities, on the morning of the Montreal interview had not been deposited with McAnulty in support of Mrs. Webster's account, the purpose would not have been served; the account would have been left unprotected; and there would have been no reason why McAnulty would have held it until he got the report of what had happened in Montreal. We think it must be held that McAnulty was right when he testified that the securities brought from Boston had been deposited with him as well for Mrs. Webster's account as for Mrs. Buckland's. All the circumstances point in that direction.

We may now resume our recital of the trend of events interrupted by the digression just concluded.

For the purpose of the Montreal interview, Mrs. Buckland had caused McAnulty to prepare for her a list of all the securities held by the appellants for the accounts both of herself and of her daughters. She brought in that list with her in the office of Mr. Johnston and gave it to him. He called for his own record; and then proceeded to figure out what was the exact position of all the accounts. She offered to pledge her *Sherbrooke Record* stock in support of all the accounts This was discussed and Mr. Johnston advised her not to do so. The reason for this advice is thus stated by him:

> You made a substantial loss on those operations in which you have engaged, and it is my opinion you should hold out that *Sherbrooke Record*

stock. It gives you a revenue of $10,000 a year, and in Sherbrooke you could live on that.

We were asked by counsel on both sides to assume that Mr. Johnston had other reasons for refusing the *Sherbrooke Record* stock—other reasons which he, at least, did not disclose. We do not think we should be called upon to speculate on what he had in his mind, in view of the fact that a long cross-examination failed to detract in any way from his own version of the motive which prompted him on that occasion.

It is fair to say that Johnston admitted that the *Sherbrooke Record* stock was "not a type of security upon which he would lend", but one is often willing to accept security in support of an already existing debt, although not prepared to make a new loan on that security. We do not think much help comes to the respondent from that admission.

The suggestion of pledging the *Sherbrooke Record* stock in aid of all the accounts having been discarded, it was incumbent upon Mrs. Buckland to find other means of meeting the situation and, no other acceptable suggestion being forthcoming from her, it was then that Mr. Johnston advised the respondent to liquidate all the accounts and proceeded to make an estimate, as of that date's market values, of all the securities, in order to figure out what debit or credit balance would remain in each account and what mutual transfers would be required to balance them; whereupon, according to the appellant's version, Mrs. Buckland said:

> Never mind doing that. Treat them all as one. I am responsible for them all. Close out the accounts; and, if there is any balance in the others, charge it against my accounts.

This is positively asserted both by Mr. Johnston and by Mr. Murray, in charge of Johnston & Ward's branch office accounts, who was present at the meeting.

Mrs. Buckland returned to Sherbrooke and, the next morning, she telephoned to McAnulty the result of the interview. McAnulty's version of what she then told him is as follows:

> She said Mr. Johnston advised her not to put up any more collateral but to liquidate those accounts. She said they considered all the accounts in there as one and she instructed me to sell the accounts that morning, and that she would be down to see me later.

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As a matter of fact, Mrs. Buckland that morning did call on McAnulty. She is stated to have then repeated that: "In Montreal, they treat those accounts as one." McAnulty is asked whether he told Mrs. Buckland that the instructions he had received from Mr. Johnston were to put all the accounts together and charge them to her. His answer is:

> Yes, because that was the condition upon which I gave her back the securities. I could not give them back otherwise.

Counsel for the respondent may be right in pointing out that the latter part of that answer is argument rather than a statement of what McAnulty said. It is open to that interpretation. But the fact remains that Mrs. Wasson's securities left with McAnulty on the previous day for the purpose, as we have found, of supporting both Mrs. Buckland's and Mrs. Webster's accounts, were delivered back to Mrs. Buckland; and the appellants thus deprived themselves of securities estimated, that day, at $11,420 and which otherwise they would have been entitled to hold. McAnulty's assertion is that he returned those securities to Mrs. Buckland upon instructions from the head office.

When Mrs. Buckland came to McAnulty's office that morning, she brought with her a list of securities, which, at the trial, was marked "Exhibit D2." That was a list of securities belonging to Mrs. Greenleaf and which, from time to time, had been pledged to margin Mrs. Webster's account. The list also included certain securities supplied by Mrs. Buckland. The object of bringing that list to Mr. McAnulty was for the purpose, admitted by Mrs. Buckland, of asking him to keep those securities up to the last, that is: that Mrs. Buckland wished all the other securities in the accounts to be liquidated first and to keep the securities enumerated on the list D2 until it should be found necessary to sell them in order to balance the accounts.

Immediately after Mrs. Buckland's visit to McAnulty that morning, the appellants began to liquidate the accounts and to sell the securities. As the sales were made, sold notes would be sent, in each instance, to Mrs. Buckland or to Mrs. Webster, advising them of the particulars of the sales, in accordance with the usual practice of stock brokers. On October 21, 1930, Murray (already referred to as having been present at the Montreal interview of October 14, 1930), telegraphed to McAnulty:

Understand all accounts are to be consolidated. Also transfer funds as required.

It is established that this telegram had reference to what were known in the office as the "Channell accounts," meaning: the accounts of Mrs. Buckland, Mrs. Webster and Miss Grace Channell.

At the end of October and of November, 1930, the usual monthly statements of their accounts were sent to Mrs. Buckland and Mrs. Webster respectively. The liquidation and sale of the securities in all accounts was completed by the 15th of December, 1930; and then the consolidation was made, placing in the name of Mrs. Buckland the credit balance in Mrs. Webster's New York account, representing the very substantial sum of $37,113.47, and also charging to Mrs. Buckland's account the several debit balances shown in Mrs. Webster's other accounts (two items of which made up the sum of $58,793.98, in regard to which alone conclusions were taken in Mrs. Buckland's declaration), and, at the same time, transferring to Mrs. Buckland's account the debit balance against Miss Grace Channell (Mrs. Wasson), and transferring also to the credit of Mrs. Buckland all the securities remaining in her daughters' accounts and which had not been sold. The result was that, on that date, in the language of the stock exchange, the accounts of Mrs. Webster and of Miss Channell became "flat" or even and the account of Mrs. Buckland was charged with the debits of her two daughters, but at the same time benefited from the transfer of the credits in money and in outstanding securities from those accounts. As already mentioned, it was stated at bar that the whole of the transfers was equivalent to a debit charge to Mrs. Buckland of approximately $10,000.

By that time, however, Mrs. Buckland had already asked her solicitors to take charge of the matter; and, since December, 1930, the latter had been asking Messrs. Johnston & Ward

to replace and deliver to (their) client immediately all stocks which were sold after the credit balance in (her) American account was equal to the debit balance in (her) Canadian account.

In turn, Messrs. Johnston & Ward referred the matter to their solicitors; and, following the correspondence exchanged between the respective solicitors during the course of the month of December, 1930, and on the 2nd January, 1931,

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Mrs. Buckland was furnished with the monthly statements prepared at the end of each month, showing how her account stood as a result of the consolidation of all the accounts. Additional correspondence ensued for a month or so, Johnston & Ward, through their solicitors, putting forward that all they had done, as shown in the consolidated account, was done in accordance with the instructions of Mrs. Buckland, and the latter, through her solicitors, denying Johnston & Ward's

contention that she gave instruction to sell the securities so that accounts other than her own might benefit from the proceeds.

It will be seen, therefore, that, when Mrs. Buckland brought her action, she was fully aware of the appellants' contention, and, notwithstanding her being aware of that fact and that they were relying on such an agreement, she brought her action for an accounting and for the return of the securities which had been sold from her account, without in any way referring to the transfers from her daughters' accounts and without praying that these transfers and charges be struck from her account. It was only much later that she moved for the amendment already discussed at the beginning of this judgment, remotely referring to the transfers from Mrs. Webster's account and, at that, incorrectly describing them. She never squarely asked in terms to delete from her consolidated account the transfers made to it as of December 15, 1930, by the appellants. Even in her last motion, presented after the whole *enquête* was over, she moved for an amendment referring only to the two transfers of debit balances amounting to $58,793.98. And it was only through the adjudication made by the Court of King's Bench, in the circumstances already discussed, that the other transfers were ordered to be deleted. As for the transfers charged from Miss Grace's accounts, they have never, to the present date, been requested to be struck from the respondent's account; and she made it clear, in the course of the trial, that she was not objecting to them.

It was under those circumstances that the trial judge came to the conclusion that the evidence had established the existence of the agreement alleged by the appellants and whereby they were authorized to consolidate the accounts and to make to the respondent's account the

transfers in question from the accounts of both her daughters.

This finding made by the trial judge was not disturbed by the Court of King's Bench. Suffice it to say that, so far as we are concerned, we are of opinion that the finding could not be disturbed and that it is fully warranted by the evidence on record.

This means that the action of the respondent was rightly dismissed by the Superior Court, unless we should come to the conclusion, as the Court of King's Bench did, that the agreement on which the appellants relied was not susceptible of being proven by oral testimony; for the agreement was not made in writing and, in order to establish it, the appellants had to resort solely to verbal evidence.

The inadmissibility of that oral evidence was the ground on which the Court of King's Bench came to the conclusion that the judgment of the Superior Court ought to be reversed.

Under the law of Quebec (art. 1233 C.C.), proof may be made by testimony:

1. Of all facts concerning commercial matters;

* * *

7. In cases in which there is a commencement of proof in writing.

In all other matters, proof must be made by writing or by the oath of the adverse party.

We have omitted the other provisions of article 1233 C.C., limiting our citation to the paragraphs on which the appellants relied for their contention that verbal evidence was admissible in this matter.

Both courts below held that the verbal evidence was not admissible as constituting proof of "facts concerning commercial matters"; and, as we agree with them, we do not feel that we should discuss the point at any length.

It was held by the Judicial Committee of the Privy Council in the case of *Forget* vs. *Baxter* (1) that in an action by stockbrokers against their principal to recover the balance of their account in respect of sales and purchases on his account, these transactions were "commercial matters" within article 1233 of the Civil Code which the stockbrokers might prove by oral evidence; and, of course, this judgment was greatly relied on by the appellants. But it is well to look at the judgment and to see what were the

(1) [1900] A.C. 467.

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transactions that their Lordships of the Privy Council held to have been "commercial matters" in that case. Sir Henry Strong delivered the judgment of the Board; and, referring to this particular point, he said:

> Neither in this or in any other article of the code is there to be found any definition of the meaning of the term "commercial matters." It cannot be doubted that the business carried on by the appellants as stock-brokers was of a commercial nature, nor that the purchases and sales of shares by the appellants for the behoof of the respondent in the ordinary course of that business were operations of commerce. It does not appear to their Lordships that the fact that the respondent was not himself a dealer trading in shares, but that his object in buying and selling through the agency of the appellants was that of private speculation only, in any way detracts from the commercial character of these transactions as regards the appellants. Unless such a construction is adopted, very great inconvenience, if not actual obstruction, must result in the despatch of business according to the methods in general use, for it must be often impossible to obtain the strict literal proof required in ordinary civil matters. Their Lordships are, therefore, of opinion that the execution by the appellants of the respondent's commissions constituted "commercial matters" within art. 1233 which it was open to them to prove by oral evidence.

As will appear from the above passage, what their Lordships term "commercial matters within art. 1233" are

> the purchases and sales of shares by the appellants for the behoof of the respondent in the ordinary course of (their) business * * * as stock-brokers, (or) the execution by the appellants of the respondent's commissions.

But the judgment does not go any further; and it is clear that what is there called "operations of commerce" does not include any agreement such as the one now put forward by the appellants.

Whatever may be the correct legal description of the agreement alleged to have been made by the respondent, it does not come within the transactions made by stock-brokers in the ordinary course of their business. It is, on the part of the respondent, an undertaking to pay to the appellants a sum due by a third party and, as such, we have no doubt that it must be treated as a civil matter or, at all events,—and that is sufficient for the purposes of this case—that it does not come within the term "commercial matters" in paragraph 1 of article 1233 of the Civil Code.

It is not an undertaking in the ordinary nature of dealings between stockbrokers and their clients. On that point, we find ourselves in agreement with both the Superior Court and the Court of King's Bench.

The reason why the Superior Court held the proof of the agreement admissible was that it found sufficient com-

mencement of proof in writing under article 1233 (7) C.C., to let in oral evidence of the particulars; and, on that ground, we must say that, with great respect and contrary to the view entertained by the Court of King's Bench, we agree with the trial judge.

As we understand it—for there is in the Civil Code no definition of what should be understood by "commencement of proof in writing"—the expression connotes a writing emanating from the party against whom it is to be used which tend to render probable the existence of the fact which is desired to be proved. This agrees with the definition of Pothier (3e éd. Bugnet, vol. 2, Traité des Obligations, p. 430, no. 801):

> Lorsqu'on a contre quelqu'un, par un écrit authentique où il était partie ou par un écrit privé, écrit ou signé de sa main, la preuve, non à la vérité du fait total qu'on a avancé, mais de quelque chose qui y conduit ou en fait partie.

If one looks through the doctrine and the jurisprudence, he will find that the commentators and the courts all agree on a definition substantially in the above terms. It is not necessarily required that the writing should be in the hand of the party against whom it is sought to be used or that it should be signed by that party, it is sufficient if it "emanates" from him; and the French Civil Code (art. 1347) contains a definition which uses precisely the word "émaner." In some cases, this has been held to extend to a writing, though not in the handwriting of the party or though not signed by him, yet which is used by him as his own ("écrit qu'il fait sien et dont il use comme s'il était de lui").

So far, therefore, so as to have a commencement of proof in writing sufficient to let in oral evidence:

1st: there must be a writing;

2nd: the writing must emanate from the party against whom it is used;

3rd: the writing must tend to render probable (in French "vraisemblable") the fact which it is desired to be proved.

But it has come to be understood, both in the French doctrine and in the French jurisprudence, that the writing required for the commencement of proof may be replaced by the evidence of the party; and that question need not be

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discussed here, since the principle was incorporated in the Code of Civil Procedure of Quebec (art. 316):

> A party may be examined by the opposite party and his evidence may be used as a commencement of proof in writing.

Then, there is another principle which is generally accepted; and that is that the question whether there is a writing, and the further question whether that writing emanates from the party, are questions of law; but the question whether the writing, or the evidence of the party against whom it is used, tends to render probable the existence of the fact which it is desired to be proved, is a question of fact. The principle, we think, is well expressed in the following passage of Mignault, *Droit Civil Canadien*, vol. 6, pp. 79 & 80:

> La question de savoir si un écrit quelconque rend vraisemblable le fait allégué et peut être invoqué comme commencement de preuve par écrit est une question de fait entièrement abandonnée à l'appréciation du tribunal.

In the present case, there was both a writing (Ex. D2) which emanated from the respondent, at least in this sense that, to use the words of Aubry & Rau (tome VI, p. 451): "Elle se l'était rendu propre par son acceptation expresse ou tacite"—a passage cited with approval by Demolombe (Traité des contrats, tome 7, édit. par Paul Grevin, page 146, no. 132):—and there was also the evidence of the respondent which, by force of art. 316 of the Code of Civil Procedure, could be used as a commencement of proof.

The two first conditions required by law, therefore, existed; and there can be shown no misdirection on the part of the trial judge in these respects.

This being so, the further question whether the writing Ex. D2 or the respondent's evidence rendered probable the existence of the agreement which it was desired to be proved, was nothing but a question of fact for the decision of the trial judge. We need not dwell on the function of an appellate tribunal in respect to a question of fact. It has been stated in this Court as often as the question came up. We find it defined in a judgment of the Court of King's Bench (appeal side) of the province of Quebec, in the case of *Ruthman* v. *La Cité de Québec* (1). It is expressed thus:

(1) (1912) Q.R. 22 K.B. 147, at 150.

Sans doute, la loi permet l'appel sur le fait comme sur le droit. Mais lorsqu'il ne s'agit que d'une question de fait, le jugement de la cour de première instance ne doit être infirmé que s'il y a eu erreur manifeste du juge dans l'appréciation de la preuve.

Even if some allowance should be made to avoid too stringent an application of the practice on this subject, the passage just quoted shows that the principle is recognized in the jurisprudence of the Quebec courts.

And if it be so in ordinary practice, we have no doubt that the rule must be more strictly adhered to when it is applied to the question of whether the commencement of proof in writing is sufficient to let in oral evidence. In support of that proposition, let us refer to the commentators and the jurisprudence on that point. Pothier expresses it (Traité des obligations, no. 801, éd. Bugnet, vol. 2):

Il est laissé à l'arbitrage du juge de juger du degré de preuve par écrit pour, sur ce degré de preuve, permettre la preuve testimoniale.

The use of the word "arbitrage" so used by Pothier is so strong that it might even be understood to mean that the holding of the trial judge is decisive.

Among the more recent authorities, expressions are to be found of a somewhat similar character. Speaking on the same subject, Demolombe (vol. 30, no. 139) says:

L'appréciation du degré plus ou moins grand de vraisemblance appartient souverainement, en fait, aux magistrats.

Baudry-Lacantinerie & Barde, 3e éd. *Des Obligations,* tome 4e, no. 2614, after having stated that

Les caractères du commencement de preuve par écrit * * * i.e. si un écrit émané soit de celui à qui on l'oppose, soit de la personne qu'il représente ou par laquelle il était représenté, constitue une question de droit; et, par suite, la vérification de l'existence de cette condition rentre dans les attributions de la Cour de cassation.

then go on to say:

Mais le point de savoir si l'écrit invoqué à titre de commencement de preuve rend vraisemblable le fait allégué est, au contraire, une question de fait et, en conséquence, les juges du fond l'apprécient souverainement.

This is in accordance with the passage of Mignault already referred to.

Planiol & Ripert (*Traité pratique de droit civil,* tome 7, no. 1534) consider it as

une question de pertinence dont le juge du fond est le souverain appréciateur.

Aubry & Rau (5e éd. vol. 12, p. 362) do likewise.

As for Larombière (Théorie des Obligations, édition de 1885, tome 6e, at page 506) and Laurent (3e éd. tome 19e, p. 550), they go still further.

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Larombière says:

La question de savoir si l'écrit invoqué rend vraisemblable ou non le cas allégué est abandonné dans tous les cas à l'appréciation discrétionnaire du juge, qui n'a alors d'autre règle de décision que l'examen consciencieux des circonstances de la cause. A lui seul appartient de résoudre cette question de vraisemblance.

And Laurent:

Puisque l'article 1347 définit le commencement de preuve par écrit, le juge ne peut sans violer la loi s'écarter de cette définition en admettant, par exemple, comme faisant commencement de preuve par écrit un acte qui n'émane point de celui à qui on l'oppose, ni de celui qu'il représente ou par lequel il est représenté. Mais il y a aussi une question de fait; c'est celle de la vraisemblance qui résulte de l'écrit. Sur ce point, les juges du fait *jouissent d'un pouvoir discrétionnaire* et, par conséquent, ils décident souverainement.

The principle so expounded by the distinguished commentators to whom reference has just been made was applied, amongst other cases, in the province of Quebec, by the Court of Review, in the case of *Malenfant* v. *Pelletier* (1) where Sir François Lemieux, C.J., speaking on behalf of the full court, said

L'ancienne Cour d'appel a appliqué une règle légale dans l'affaire de *Fournier* v. *Morin* (2). C'est qu'en matière de preuve testimoniale admise vu l'existence d'un commencement de preuve par écrit, le juge de première instance exerce un pouvoir discrétionnaire et que les tribunaux d'appel ne doivent troubler l'existence de cette discrétion que dans le cas d'erreur manifeste. Cette règle basée sur le bon sens le plus élémentaire et sur la loi a été généralement suivie par les tribunaux d'appel; et lorsque ces tribunaux s'en sont écartés, ils ont, à notre avis, commis une erreur grave.

And, with due respect, it seems to us that from the very nature of the question it ought to be so for the reason so well expressed in Fuzier-Herman, Répertoire du droit français, vol. 31 *vbis.* Preuve par écrit (commencement de) p. 584, no. 232, and which we would like to adopt as our own:

Il n'est pas possible de tracer des règles précises d'après lesquelles on puisse reconnaître les cas où un écrit doit rendre vraisemblable le fait allégué. La vraisemblance est en effet un aperçu de l'esprit qui nous porte à penser qu'une chose a tout au moins l'apparence du vrai: elle est fondée sur la liaison ou la connexité plus ou moins grande qui existe entre l'écrit et le fait allégué, et comme cette liaison peut être plus ou moins éloignée, il est évident que la vraisemblance varie à l'infini, suivant les faits et suivant les esprits qui ont à les apprécier.—Toullier, t. 8, n. 293, et t. 9, n. 56; Bonnier (éd. Larnaude), n. 169; Laurent, t. 19 n. 527 et s.; Demolombe, t. 30, n. 138 et s.; Aubry et Rau, t. 8, 764, p. 340; Larombière, sur l'art. 1347 n. 27 et s.; Baudry-Lacantinerie, *Précis,* t. 2, n. 1275; Fuzier-Herman et Darras, sur l'art. 1347, n. 161.

We do not intend to lay down here such a strict rule as that which would seem to follow from the statements of

(1) (1914) Q.R. 45 S.C. 404. (2) (1885) 11 Q.L.R. 98.

the commentators or of Sir François Lemieux in the case of *Malenfant* v. *Pelletier* (1), for we do not believe it is necessary to go so far in the present case.

We are of opinion that there was ample justification for the trial judge to use the writing marked Exhibit D2, and more particularly the evidence of the respondent, as a commencement of proof in writing sufficient to permit the appellants to adduce verbal evidence of the agreement which they alleged.

It was pointed out by Mr. Justice Walsh that

a willingness to help support another is not necessarily the assumption of another's debt;

and by Mr. Justice Saint-Jacques that

Elle était prête à faire tous les sacrifices possibles pour empêcher la liquidation immédiate; * * * mais de là à conclure que * * * elle aurait entrepris de payer le déficit du compte de sa fille * * * il y a une marge * * *.

These propositions, of course, should probably be accepted, but such was not, in our view, the point upon which the trial judge had to make up his mind. He had to decide whether, in his opinion, these facts and the others admitted by Mrs. Buckland in her evidence or to be deduced from the use she was making of the writing Exhibit D2, were of such a character that they rendered probable ("vraisemblable") that, having failed to persuade Johnston to accept her other propositions, she had, in the end, agreed to what the appellants allege had been the final outcome of the interview in Montreal on October 14, 1930. And after having reached the conclusion that this was rendered probable by what was admitted in Mrs. Buckland's evidence or what could be deduced from Exhibit D2, the trial judge then declared the oral evidence of the agreement admissible in view of the commencement of proof in writing which he found in Mrs. Buckland's testimony and in the writing D2; and upon that evidence being adduced, he found that the agreement had been proven. As observed by Langelier, *De la preuve en matière civile et commerciale*, p. 241, no. 574:

L'écrit doit rendre vraisemblable le fait à prouver. Il n'est pas nécessaire que l'écrit le prouve; car, s'il le prouvait, ce ne serait plus un commencement de preuve, mais une preuve complète qu'il constituerait. Il n'est pas nécessaire, non plus, qu'il le fasse présumer, car alors il rendrait la preuve par témoins inutile.

(1) (1914) Q.R. 45 S.C. 404.

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And what is said there of a writing is, of course, equally true of the respondent's evidence, by force of art. 316 of the Code of Civil Procedure. This brings us back to the statement of Pothier (loc. cit.):

> La preuve, non à la vérité du fait total qu'on a avancé, mais de quelque chose qui y conduit.

and, as stated in Planiol (tome 7, no. 1534):

> Il n'est pas nécessaire que l'écrit établisse un des éléments du fait à prouver. Il peut être seulement le point de départ d'un raisonnement pour le juge. Le lien qui doit exister * * * lien de similitude * * * est laissé à son entière appréciation.

It would serve no purpose for us to enter into the details of the testimony of the respondent in order to point out wherein the learned trial judge was warranted in finding in it evidence which could be used as a commencement of proof in writing. It is not so much each single fact admitted by the respondent as the "ensemble" of the facts so admitted which justified the holding that the learned trial judge made. We would be prepared to say that, had we been in his place, we would have come to the same conclusion; but it is sufficient to state that, at all events, we cannot find any justification for reversing his decision on that question. It may be that he gave too much importance to certain facts testified to by the respondent; it would seem to us that, on the other hand, he may not have given proper importance to certain other admissions; but, on the whole, we think the result of his findings is not open to criticism, more particularly if we bear in mind the views of the doctrine and the jurisprudence on the subject. (See Mathieu J., *re Kay* v. *Gibeau* (1), and numerous authorities there referred to).

In addition to the commencement of proof which he found in the admissions of the respondent, the learned judge further declared

> that, on important points, plaintiff's testimony was often evasive, confused and contradictory.

Of course, a finding of that nature was peculiarly within the province of the trial judge, who was in the best position to pass upon it; and it is needless to recall that such a situation has always been recognized as a valid basis of commencement of proof in writing. (Demolombe, vo. 30, p. 139; Baudry-Lacantinerie, vol. 15, no. 2613; *Langlois* v.

(1) (1888) 16 Rev. Leg. 411.

Labbé (1); *Gagné* v. *Gagné* (2); *Boisclair* v. *Les Commissaires d'Ecoles de St. Gérard de Magella, Cour de Révision* (3).

For these reasons, we have come to the conclusion that the appeal ought to be maintained and that, in the result, but subject to a further question still to be discussed, the judgment of the trial judge should be restored with costs throughout against the respondent.

But, unfortunately for the parties, this does not dispose of the whole case; for, by an amendment to her answer to plea, the respondent raised the subsidiary point that, even if she had agreed to assume liability for the indebtedness of her daughter, Mrs. Vera Webster, to the appellants, the transactions of Mrs. Webster were null and void because they were entered into without the authority of her husband and the agreement, therefore, ought to be set aside and annulled.

The Court of King's Bench did not pass upon that point because it was unnecessary, having regard to the view that Court took on the question of the commencement of proof in writing. But the Superior Court, in order to dismiss the action, was evidently obliged to decide the point, and it dismissed the respondent's contention in that respect for the following reasons:

(1) the husband being the only person who could give or refuse the necessary authorization, his testimony was the only original source from which the information could be gathered;

(2) his wife, outside of the fact that she was necessarily interested in testifying on behalf of her mother, was not the real and legal source from which it can be gathered as to whether or not his authorization was ever given.

(3) the evidence of Mrs. Webster to the effect that she was not authorized did not adduce the best proof of which the case was susceptible (1204 C.C.);

(4) Mrs. Webster was "presumed to have been authorized"; and

(5) "the disposition of the law which renders invalid the acts of an authorized married woman was enacted for

(1) (1914) Q.R. 46 S.C. 373, at 375.
(2) (1915) 23 R. de J. 384, at 397 & 398.
(3) (1912) Q.R. 57 S.C. 335.

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the protection of such person alone and not for the protection of third parties, and, therefore, does not apply to the plaintiff."

We are of opinion that this important question may not be disposed of in that way.

In so far as it tends to dispute the right of Mrs. Buckland to raise the point, the decision of the learned judge would seem to be directly contrary to art. 183 of the Civil Code:

183. The want of authorization by the husband, where it is necessary, constitutes a cause of nullity which nothing can cover, and which may be taken advantage of by all those who have an existing and actual interest in doing so.

In so far as the decision of the learned judge was directed towards the proof of the lack of authorization adduced by the sole testimony of Mrs. Webster, it appears to us that the objection goes to the weight rather than to the legality of the evidence. (Taylor on Evidence, 12th ed., no. 393). But, in view of the conclusion to which we have arrived and presently to be announced, we prefer to refrain from expressing our own opinion on that whole question of the husband's authorization.

It is clear to us that no pronouncement can be made upon that point, which involves matters in which the appellants and Mrs. Webster are primarily interested, without Mrs. Webster being a party in the case; and she is not a party. This Court has always adhered to that principle (*Burland* v. *Moffatt* (1); *Laliberté* v. *Larue* (2); *Goulet* v. *Corporation de la Paroisse de St-Gervais* (3).

Of course, it was Mrs. Buckland's duty to call Mrs. Webster as a party, since she raised the point necessitating the latter's *mise-en-cause* and since the point could not be decided without Mrs. Webster being made a party in the case. On that account, following the precedent in *Burland* v. *Moffatt* (1), we might have disregarded that ground for the simple reason that the respondent, having failed to put the Court in a position to grant the relief prayed for by her, her demand must be dismissed. But while, generally speaking, we would probably do so in ordinary cases, we do not think it ought to be done in a case like the present one, where the question raised is one of public order and the law says that the want of authorization by

(1) (1884) 11 Can. S.C.R. 76, at 88-89.

(2) [1931] S.C.R. 7, at 11.

(3) [1931] S.C.R. 437.

the husband, where it is necessary, constitutes a cause of nullity which nothing can cover.

It is not so much that the undertaking of the respondent to pay the appellants and to assume liability for the indebtedness of Mrs. Webster to them must be set aside and annulled in so far as Mrs. Buckland is concerned (as was prayed for by the conclusions of the amended answer to plea), but the situation is that if Mrs. Webster's transactions can be brought within the prohibition contained in article 177 of the Civil Code, and that is to say: that those transactions cannot be held to have been authorized by her husband, within the meaning of that article, these transactions would be radically null; her debt to the appellants would be non-existent and, therefore, notwithstanding the agreement made by Mrs. Buckland, there would be nothing to pay for her. It would seem that, in that case, all of Mrs. Webster's transactions so unauthorized would have to be considered as not having taken place and both the credit and debit charges in her account would have to be assumed and borne by Johnston & Ward. (*Johnston* v. *Channell* (1).

The situation is still more compelling since it was alleged and it was common ground that Mrs. Webster has herself brought action to have all her transactions with Johnston & Ward set aside on account of the lack of authorization of her husband. It is easy to see the inconvenience that would result from a decision by us on that point in a case where she is not a party, if later, in her own case against the present appellants, the courts should decide in a different way. In truth, were Mrs. Webster one of the parties in the present case, the fact that she has a case of her own on the same point against the appellant would almost constitute a situation of *lis pendens* and it might, no doubt, be found proper, under such circumstances, to order that the present case should be suspended, at least so far as that issue is concerned, until the other case has been finally determined.

The consequence is that, much to our regret, we are constrained to adopt the course followed by this Court in the case of *Lamarre* v. *Prud'homme,* referred to at p. 441 in *La Corporation de la Paroisse de St-Gervais* v. *Goulet* (2);

(1) [1935] S.C.R. 297, at 301. (2) [1931] S.C.R. 437.

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and the case must be remitted to the Superior Court for the purpose of trying that issue—but it must be understood that it is so returned for that sole purpose.

On all the other questions, our decision is that the judgment of the Superior Court is, in the result, restored. On the issue arising out of the question of the authorization of Mrs. Webster's husband, if the respondent wishes to have a decision, she will have to take proper steps for the *mise-en-cause* of Mrs. Webster within one month from the date when the record is in due course returned to the Superior Court of the district of Montreal, where it belongs. Unless she adopts the necessary proceedings for that purpose within the delay now ordered, her action should stand finally dismissed for all purposes. The costs of the trial on this special issue will, of course, be in the discretion of the judge who will preside at the trial. In all other respects, the appeal is allowed and the judgment of the Superior Court is restored with costs throughout against the respondent.

The formal judgment of the Court was settled as follows:

The appeal is allowed with costs throughout; the judgment of the Court of King's Bench (appeal side) is reversed and set aside and, in the result, the judgment of the Superior Court for the province of Quebec, sitting in and for the district of Montreal, is restored, save in so far as the same purported to deal with the issues of fact and law raised by or arising out of the allegation made by the appellants and the respondent relative to the alleged lack of marital authorization of Dame V. C. Webster, as to which issues, the said Dame V. C. Webster not being a party to the present proceedings, the Court declines to adjudicate; and this Court further orders that this case be remitted to the said Superior Court for the sole purpose of enabling the respondent, if she so desires, to institute by impleading the said Dame V. C. Webster within one month from the date of the return of the record herein to the said Superior Court, the necessary proceedings to try the sole issue of whether the transactions of the said Dame V. C. Webster with the appellants referred to in the amended answer to plea herein, were null, and if they were null, what is the effect, if any, of such nullity, as between the appellants and the respondent; and this Court further orders

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that the appellants be permitted to raise or allege or plead, at or for the purpose of the trial of such issue, in addition to any ground or matter already raised or alleged or pleaded, any other ground or matter or thing whatsoever directed solely to the trial of such issue, the question whether Mrs. Webster's transactions with the appellants are null and void for want of marital authorization, together with the consequences which flow from it, being the sole issue to be submitted to the Superior Court, without any objection being allowed as to the questions of procedure already decided; and this Court further orders that unless the respondent adopt the aforesaid proceedings within the above-mentioned period of one month, the action should stand finally dismissed for all purposes.

Appeal allowed with costs.

Solicitors for the appellants: *Brown, Montgomery & McMichael.*

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

McKESSON & ROBBINS LIMITED (DEFENDANT) ..... APPELLANT;

AND

JOHN HUBERT BIERMANS (PLAINTIFF) ..... RESPONDENT.

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*Nov. 3, 4.

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*Feb. 2.

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

Assessment and taxation—Lease—Church assessment—Lessee to pay "all taxes, assessments and rates general and special"—Whether lessee bound to pay church assessment—Parish and Fabrique Act, R.S.Q., 1925, c. 195—Articles 471, 1021, 2011 C.C.—Articles 509 & seq. C.C.P.

The respondent leased to the appellant a property situated in the city of Montreal; and the lease contained, *inter alia*, the following stipulation under the heading "Conditions": "* * * the lessee binds itself * * * to pay all taxes, assessments and rates general and special which may be imposed on or in respect of the said property * * * ". The parties submitted a stated case, under article 509 *& seq.* C.C.P., as to whether "the appellant (was) liable for the

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

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payment of * * * church assessment under the provisions of the lease."

Held, Davis J. dissenting, affirming the judgment of the Appellate Court (Q.R. 60 K.B. 289), that the church assessment provided for in the *Parish and Fabrique Act,* R.S.Q., 1925, c. 195, of which the material provisions are outlined in the judgment of the court, is one of the "taxes, assessments or rates" in respect to which the parties have stipulated in the above clause of the lease; and, further, that such assessment is a tax *in respect of* the property leased to the appellant by the respondent.

Per Davis J. (dissenting): The church assessment, although a tax, assessment or rate imposed on or in respect of the property, is a statutory charge of a special and peculiar sort and is not something which may be fairly presumed to have been understood by the parties to the lease as covered and intended to be covered by the indemnity clause. As a matter of interpretation, the true sense and effect of the language of the clause, read as a whole, does not impose upon the lessee a burden of this sort.

APPEAL from a judgment of the Court of King's Bench, appeal side, province of Quebec (1), affirming the judgment of the Superior Court, Chase-Casgrain J. (2), condemning the appellant, a lessee, to pay to the Oeuvre et Fabrique de St. Francois d'Assise, Longue Pointe, or to the respondent for the purpose of making payment to the latter, the sum of $2,700, being the first instalment of an assessment for the erection of a church.

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

W. F. Chipman K.C. for the appellant.

A. R. Holden K.C. for the respondent.

The judgment of the majority of the Court (Rinfret, Crocket, Kerwin and Hudson JJ.) was delivered by

RINFRET, J.—The respondent leased to the appellant a property situated in the city of Montreal, for a period of five years from the first day of October, 1931.

The lease contained the following stipulations, under the heading "Conditions":

The present lease is made upon the following charges and conditions to the fulfilment of which the lessee binds itself, namely:—

1° From the first day of October nineteen hundred and thirty-one to pay all taxes, assessments and rates general and special which may be

(1) (1936) Q.R. 60 K.B. 289. (2) (1935) Q.R. 73 S.C. 251.

imposed on or in respect of the said property, during the said term of five years (excepting the instalments payable after the expiry of the said term, of special taxes payment whereof is permitted to be made over a term of years). The lessee has paid to the city of Montreal the proportion from the first day of October nineteen hundred and thirty-one of the taxes unpaid for the municipal year now current and a similar adjustment will be made at the end of the term in respect of the municipal year then current.

The property in question being situated in the parish of St. François d'Assise, in Montreal, has become liable, since the execution of the lease, for a church assessment, the first instalment of which, amounting to $2,700, became due and payable by the respondent, as owner of the property, on the 1st of May, 1934.

The assessment was duly imposed under an order of the authorized commissioners and by force of the provisions of the *Parish and Fabrique Act* of the province of Quebec (R.S.Q., 1925, c. 195).

The respondent, having received an account for the first instalment of $2,700, requested the appellant to pay the same; but the latter denied that he was liable for it under the provisions of the lease.

Accordingly the parties agreed to join in submitting the case for decision under art. 509 & seq. of the Code of Civil Procedure, stating that the question of law upon which they are at variance is as follows:

Is the appellant liable for the payment of said instalment of the said church assessment under the provisions of the said lease produced as exhibit number 1?

The respondent contended that the church assessment is a fixed "tax, assessment or rate, general or special" referred to in the lease; that this is confirmed by the provision of article 2011 of the Civil Code; that the assessment was imposed on the immovable leased or, in any event, it was imposed in respect of the said property—which is confirmed by the provisions of the *Parish and Fabrique Act,* and particularly by sections 55, 61, 63, 69 and 87 of that Act. These sections, so it was claimed, make it clear that the assessment in question is an assessment imposed on, or in respect of, the leased property, within the meaning of the stipulation contained in the lease. The appellant, therefore, expressly bound itself to pay the assessment, and the respondent is entitled to a judgment condemning the appellant to pay it.

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The appellant contended that, under the true construction of the foregoing quoted clause of the lease, the parties intended to deal only with taxes, assessments and rates imposed by the city of Montreal; that the words:

all taxes, assessments and rates, general and special which may be imposed on or in respect of the said property

are restricted by the words "general and special" and the words:

The lessee has paid to the city of Montreal the proportion from the first day of October nineteen hundred and thirty-one of the taxes unpaid for the municipal year then current

to taxes, assessments and rates imposed by the city of Montreal; that, under the provisions of the *Parish and Fabrique Act,* the assessment in question is a tax imposed upon the person and is secured only, and not imposed upon the property; that consequently it is not a tax, assessment or rate imposed on, or in respect of, the property as provided in the lease; that the assessment in question was not imposed upon the respondent until after the execution of the lease and there was no assessment of a similar kind or nature then in existence in so far as the leased property is concerned; that it is unreasonable that the appellant should be compelled to pay the assessment in question, which is an extraordinary charge that could not have been foreseen at the date of the execution of the lease and which increases the annual rental of $12,000 by almost twenty-five per cent; therefore, the appellant prayed that the contention submitted by the respondent be dismissed and that by the judgment to intervene it be declared that the appellant was not liable for either the first instalment or any further instalments of the said church assessment.

Both the Superior Court (1) and the Court of King's Bench (appeal side) (2) have unanimously decided in favour of the respondent's contention.

The question is one of construction both of the material sections of the *Parish and Fabrique Act* and of the lease, and more particularly of the stipulation contained in par. 1 of the "Conditions" of that lease, already quoted above.

Under the Act, whenever an order or decree has been made by the ecclesiastical authorities for the location, erection, alteration, removal or repair of a parish church, the majority of the inhabitants, being freeholders interested

(1) (1935) Q.R. 73 S.C. 251. (2) (1936) Q.R. 60 K.B. 289.

in such erection or repair, may apply, by petition to the commissioners (appointed by the Lieutenant-Governor under other provisions of the Act), praying that a meeting of the inhabitants of the parish be called to elect three or more trustees to carry out the decree (s. 42).

The trustees, having been elected and before entering on the duties of their office, must present a petition to the commissioners, praying that their election be confirmed and that they be authorized to assess the owners of lands and other immovable property, situate within the parish for which they have been elected and to levy the amount of the sum assessed on each person for his portion of the contribution, both for the erection and repairs in question, and for meeting the expenses thereby occasioned and deemed necessary by the said commissioners (s. 46).

It is provided, however, that nothing in the Act shall render any class of Protestants or any person whomsoever, other than persons professing the Roman Catholic religion, liable to be assessed or taxed in any manner for the purposes of this Act (s. 58).

As soon as the commissioners have made an order approving the election of the trustees and authorizing them to make an assessment and to levy the sums assessed, the trustees draw up an act of assessment comprising a specification of the work to be done and a detailed estimate of the expenses which they deem necessary for the erection or repairs in question; and also an exact statement of all the lands or other immovable property situate in the parish, showing the extent and value of each lot, the name of the real or supposed owner and the proportionate sum of money (and the quantity of materials, if any) which they have assessed on each lot towards the necessary expenses of such erection or repairs.

The act of assessment, when completed, is deposited in the parsonage of the parish; public notice of the deposit is given; a day is appointed to consider the act of assessment, when the trustees present the act to the commissioners for homologation; and the commissioners hear, judge and determine between the trustees and the persons interested, by rejecting, modifying or confirming the act of assessment altogether or in part, as they think just and reasonable (s. 55).

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When the act of assessment has been homologated by the commissioners, the trustees may exact from those assessed the payment of their rates or assessments and may sue for and recover the same (s. 59).

The secretary-treasurer of the trustees, in the month of November of each year, prepares a statement showing, in as many columns:

(*a*) The names, quality and residence of the persons indebted to the trustees for assessments as set forth in the act of assessment if they are entered therein;

(*b*) The amount of arrears of assessment then due by each of such persons or by persons unknown;

(*c*) The amount of costs of collection due by each of such persons;

(*d*) The description of all immoveable property liable for the payment of the assessments mentioned in such statement;

(*e*) The amount of assessments and costs affecting such immoveable property;

(*f*) All other information required by the trustees.

And the statement so prepared is submitted to the trustees and approved by them (s. 61).

The amount of any assessment on any land so to defray the expenses of the construction or repairs of a church is declared to be " the first charge on such land, and the first privileged debt affecting and binding the said land without its being necessary to register the act of assessment or the judgment of confirmation in any registry office " (s. 69).

There is a further provision to the effect that, whenever any land or immoveable property has already been taxed in the hands of the same owner for an edifice for religious purposes in another parish of which such land or immoveable then formed part, the commissioners, upon petition of the owner, and having regard to all the circumstances, shall exempt such land or immoveable property from the whole or part of the taxes in the new parish, and order, if necessary, that the sum so deducted be apportioned upon the other immoveable property comprised in the act of assessment (s. 87).

The Superior Court (1) and the Court of King's Bench (appeal side) (2) had no hesitation—and we have none in

(1) (1935) Q.R. 73 S.C. 251. (2) (1936) Q.R. 60 K.B. 289.

this Court—in deciding that the church assessment provided for in the *Parish and Fabrique Act*, of which the material provisions have just been outlined, is one of the "taxes, assessments or rates" in respect to which the parties have stipulated in the clause of the lease under discussion.

It is a tax, an assessment or rate from every point of view.

As was stated by Strong, J., in *Les Ecclésiastiques de Saint-Sulpice de Montréal* v. *The City of Montreal* (1):

> Every contribution to a public purpose imposed by superior authority is a "tax" and nothing less.

And see: *Lawson & Interior Tree Fruit and Vegetable Committee of Direction* v. *Attorney-General of Canada* (2).

This church levy is known as an assessment in the legal and statutory parlance of the province of Quebec. It is referred to in the Civil Code as "assesments for the erection and repair of churches" (art. 471), or:

> The assessments and rates which are privileged upon immoveables are:
> (1) Assessments for building or repairing churches, etc. (art. 2011).

And, as must have been noticed, it is also referred to as an "assessment" or "rate" throughout the sections of the *Parish and Fabrique Act* which we have already analysed. This church assessment is, therefore, one of those which, in the province of Quebec, is understood as being comprised in the words of the lease: "taxes, assessments and rates."

Under the lease, the appellant bound itself

> to pay all taxes, assessments and rates * * * which may be imposed;

and the particular assessment now in question is, therefore, included among the taxes, assessments and rates which the appellant undertook to pay, unless something in the language of the clause, or something to be inferred from the whole of the lease, may be construed as limiting or restricting the sweeping language in which is couched the undertaking to pay.

We agree with the courts below that

> there are no clauses in the lease which come in conflict with the clause above cited,

and that no restriction can be found in the context of the clause itself. The addition in the clause of the words "general and special," to the all-embracing words: "all

(1) (1889) 16 Can S.C.R. 399, at 403. (2) [1931] S.C.R. 357, at 363.

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taxes, assessments and rates," far from restricting the obligation to pay, as urged by the appellant, on the contrary, in our view, is there to emphasize the word "all." We need only refer to the holding in this court in *Les Ecclésiastiques de Saint-Sulpice* v. *The City of Montréal,* already adverted to (1), that the use of the word "taxes" alone would extend "to taxes imposed for special purposes."

The exception in the clause expressed thus

> excepting the instalments payable after the expiry of the said term, of special taxes payment whereof is permitted to be made over a term of years

are very apt words to cover the present church assessment, which, as provided for by s. 62 of the *Parish and Fabrique Act,* was made payable by instalments. This exception covers the exact case; and, in view of the fact that the assessment was made and imposed during the life of the lease, it removes any doubt as to whether the lessee might be called upon to pay the instalments coming due after the expiry of the term of the lease.

Reference in the clause under discussion is made to the fact that the lessee

> has paid to the city of Montreal the proportion from the first day of October nineteen hundred and thirty-one of the taxes unpaid for the municipal year now current, (and that) a similar adjustment will be made at the end of the term in respect of the municipal year then current.

It was argued by the appellant that the reference so made to the taxes due to the city of Montreal showed that, when dealing with taxes in this clause, the parties had in view only and solely municipal taxes imposed by the city of Montreal.

It is impossible for us, as it was found impossible by the courts below, to agree with that interpretation. The particular mention of the city of Montreal taxes rather suggests that, at the date of the signature of the deed of lease, these taxes were the only ones then in force extending over the period of a whole year; and the parties agreed that, as the lease was to begin on the 1st of October—a date which did not coincide with the "municipal year"—an adjustment would have to be made of the taxes for the then current year and a similar adjustment would be made,

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

under the same circumstances, at the expiry of the term of the lease. This is a very usual clause in all deeds in the province of Quebec, and so notorious that we would think the Court might almost take judicial notice of it. Be that as it may, it does not in any way limit the obligation imposed upon the lessee to pay "all taxes, assessments and rates general and special." In our view, it is nothing more than the application of article 1021 of the Civil Code:

1021. When the parties in order to avoid a doubt whether a particular case comes within the scope of a contract, have made special provision for such case, the general terms of the contract are not on this account restricted to the single case specified.

We are also of opinion that, whatever be the true nature of the church assessment under discussion, whether in a sense it is a personal tax or a tax imposed on property (as to which there is a great deal to be said), the assessment undoubtedly is an assessment "in respect of the said property."

We are reminded of the words of Lord Thankerton, in *Provincial Treasurer of Alberta* v. *Kerr* (1):

Generally speaking, taxation is imposed on persons, the nature and amount of the liability being determined either by individual units, as in the case of a poll tax, or in respect of the taxpayers' interest in property, or in respect of transactions or actings of the taxpayers. It is at least unusual to find a tax imposed on property and not on persons, etc.

and it is interesting to note how far Lord Thankerton's statement is true when applied to the facts of the present case.

It is not correct to say that the assessment is on the person in respect of his religion, though measured by the extent of his property, since a Catholic resident in the parish is not assessed if he has no property in the parish, whilst, on the other hand, although he may reside in another part of the world, he will be assessed if he owns property in the parish. Such is inevitably the effect of the *Parish and Fabrique Act;* and, in our view, it shows that the taxation here, though the statute uses certain words referable to the person of the owner, is unquestionably taxation, if not properly speaking imposed on property, at least imposed "in respect of the taxpayers' interest in property." It is a tax in respect of the property leased. The respondent could not otherwise be taxed. He could not be taxed unless he owned this property. The whole

(1) [1933] A.C. 710, at 718.

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structure of the Act shows it is an assessment in respect of the immovable, with the added requirement that the immovable be owned by a Catholic.

By force of the statute, it is

the owners of lands and other immoveable property situate within the parish

who are assessed. Those are the words of the charging section (s. 46).

It is only in another section (s. 58) that the further provision is introduced excluding all

Protestants or any person whomsoever, other than persons professing the Roman Catholic religion

from liability to assessment. Then, in section 61, requiring the secretary-treasurer of the trustees to prepare in November the statement already alluded to, it is significant that the statement must include, under subsection (*b*), the amount of arrears of assessment due "by persons unknown," a provision which can have no application unless the recovery is intended against the immovable property. Under subsection (*d*) of the same section, the immovable property is referred to as "liable for the payment of the assessments"; and in subsection (*e*) the amounts of assessment are mentioned as "affecting such immovable property"; and then, of course, there is the provision in section 69 whereby the amount of the assessment (referred to as being "on the land") is made

the first charge on such land, and the first privileged debt affecting and binding the said land.

It may be a question whether a Roman Catholic person, on whom the assessment has been imposed because he was owner of land in the parish on the date of the assessment, continues to be personally liable for the subsequent instalments of such assessment after he has sold the land in respect of which the assessment was made—a point which it is unnecessary to decide in this case—; while it is clear that once the assessment is imposed, the consequential charge on the land and the privilege which affects and binds the land under section 69 of the Act continues to affect it in the hands of a new owner, even if he be not a Roman Catholic and even if it be a joint stock company (*La Compagnie des Terrains Dufresne Limitée* v. *Paroisse de Saint-François d'Assisse* (1).

(1) (1926) Q.R. 41 K.B. 391.

As pointed out by Barclay, J., in the Court of King's Bench,

> Roman Catholics as such are not taxed, but Roman Catholics who are proprietors of land or other immoveable property within the parish are taxed, and taxed because they are proprietors and not because they are Roman Catholics. It is true that the Act would not apply to them if they were not Roman Catholics, but being Roman Catholics, the Act does apply and taxes them in respect of their property in the parish and in proportion to its value.

Even if the assessment should be styled an assessment imposed on the person, it would nevertheless be an assessment "in respect of the property" leased. That point of view is well expressed in the words used in *Brett* v. *Rogers* (1), which we make our own:

> The words "in respect of the premises" are used in contradistinction to the words "on the premises," and an assessment of duty made or imposed not on the premises, but in respect of the premises, must be made or imposed upon some person in respect of the premises; and an assessment duly made or imposed upon any person in respect of the premises seems to us to come within the meaning of the covenant.

and again by Lindley, J., in *Hartley* v. *Hudson* (2):

> There is a distinction to be drawn between a charge upon premises and a charge upon a person, as the former would be binding on the realty, whilst the latter would be a mere personal liability for expenses incurred in respect of the premises; but in this case it may be said that there was a charge upon the premises and a charge upon the person, namely, upon the plaintiff as owner of the premises * * * Now, these expenses paid by the plaintiff were incurred in respect of the demised premises, and by the terms of the above section were a charge upon the premises until payment. The fact of the plaintiff paying them because he was compellable by law to do so, does not make them any the less a charge on the premises within the meaning of the covenant in the lease; and hence I am of opinion that the plaintiff is on this ground entitled to recover.
>
> But I think the plaintiff is also entitled to recover because these expenses were a charge upon "a person in respect of the premises," i.e., they were a debt payable by the plaintiff in respect thereof. The plaintiff, by the *Public Health Act*, 1848, had a duty cast upon him to pave, &c., and he neglected to perform that duty, and in consequence this expense was incurred by the corporation; this expense then became chargeable by the corporation to the plaintiff, and it was so chargeable in respect of these premises.

Nor can the appellant contend that the parties could not have contemplated the passing of such an imposition which, he says, at the time of the signature of the deed, must have been entirely unforeseen. The whole tenor of the lease points in a direction contrary to the appellant's contention in that regard. It is clear that the respondent intended to divest himself of all concern about the property. Incidentally, let it be mentioned that it is not in accord-

(1) [1897] L.R. 1 Q.B. 525. (2) (1879) 48 L.J.C.P. 751, at 752.

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ance with the terms of the lease to say that this church assessment would increase the annual rental by almost 25%. It is incorrect to say that the lease was for a sum of $12,000 per year. The rent was stipulated at $12,000 a year, plus all taxes, assessments and rates; and, in addition to that, the appellant

> agreed to do a great deal more than is ordinarily incumbent upon a lessee and they were almost (as pointed out by Barclay, J.) in the position of owners under the terms of the lease.

Above all, the *Parish and Fabrique Act* already formed part of the statutory law of the province where the lease was made. In the words of Walsh, J., in the Court of King's Bench:

> Its application was an eventuality which could have been foreseen by the parties.

This assessment could be no more unexpected than any other special assessment, such as that for the building of a school or for the construction of sewers. The terms of the lease are clear and unambiguous; and it cannot be said that the appellant could not have contemplated the occurrence as a result of which he is now called upon to pay this church assessment during the existence of the lease.

For all those reasons, we are of opinion that the appeal should be dismissed with costs.

Solicitors for the respondent: *Meredith, Holden, Heward*

DAVIS J. (dissenting)—This appeal turns solely upon the proper interpretation to be given to an indemnity clause in a lease of an immoveable property situate in the city of Montreal. The lessee undertook with the lessor,

> From October 1st, 1931, to pay all taxes, assessments and rates general and special which may be imposed on or in respect of the said property during the said term of five years (excepting the instalments payable after the expiry of the said term, of special taxes payments whereof is permitted to be made over a term of years). The lessee has paid to the city of Montreal the proportion from October 1st, 1931, of the taxes unpaid for the municipal year now current and a similar adjustment will be made at the end of the term in respect of the municipal year then current.

While the lease was not executed by the parties until the 18th of March, 1932, the term of the lease was for a period of five years from the first of October, 1931, and in consequence an adjustment of taxes was necessarily involved at the time of the execution of the lease and a further adjustment of taxes would become necessary at the expiration of the lease.

The facts are not in dispute. The property is within the municipality of the city of Montreal and is within the parochial limits of the Roman Catholic parish of St. François d'Assisse in the said city of Montreal. It was admitted before us that school rates in the city of Montreal are collected by the city as part of the municipal taxation, and further that the taxation period of the city of Montreal is not the calendar year. Now the words "general and special" with reference to municipal taxation are well understood in this country. By "general" is meant those taxes which are imposed throughout the entire municipality for the purpose of raising money for the general expenses of the municipality. By "special" is meant those taxes which are imposed from time to time upon particular properties benefited by special services such as local improvements in the nature of streets, sidewalks, sewers, etc.

The problem raised in this appeal is whether a tax imposed by the Roman Catholic parish within which the property in question is situate, for the purpose of defraying the cost of a new parish church, is a tax intended to be covered by the clause of the lease above set out. The owner (lessor) is a Roman Catholic and I am satisfied that it is a tax, assessment or rate imposed on or in respect of his property. It is an impost under a statute that was in existence at the time of the making of the lease upon property owned by Roman Catholics within a defined area and is a tax within the true significance of the term. But did the parties, upon the fair construction of the language they used, intend that the lessee was to pay this sort of tax? Though the parties may not testify as to their intention, the clause in the lease should be read in its entirety for the purpose of assisting in the judicial determination of the real intention of the parties. Particular expressions or provisions which may be subordinate to the general object may throw light upon the general object and intention of the parties and supply the guidance required for dealing with disputes as to the application of the terms of an agreement to unforeseen questions which arise during the currency of the agreement.

For the purposes of this case it has been assumed that the Roman Catholic parish church properly made an allot-

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Davis J.

ment of a portion of the cost of its new edifice against the lessor because he was a Roman Catholic who owned property within the parochial limits and that the church had statutory authority to impose the amount thereof against his property. It is not a mere incident in the ownership of property but rather a personal matter arising out of the particular religious faith of the individual owner. It is a statutory charge of a special and peculiar sort and the question we have to determine is whether or not it was something which may be fairly presumed to have been understood by the parties to the lease as covered and intended to be covered by the indemnity clause. In my opinion, as a matter of interpretation, the true sense and effect of the language of the indemnity clause, read as a whole, does not impose upon the lessee a burden of this sort.

Having regard to what I have said as to the significance of the use of the words "general and special" (which words follow immediately after the words "all taxes, assessments and rates") in relation to municipal taxation and having regard to the use of the words "municipal year" in the declaration that

> The lessee has paid to the city of Montreal the proportion from the October 1st, 1931, of the taxes unpaid for the municipal year now current

and in the undertaking that

> A similar adjustment will be made at the end of the term in respect of the municipal year then current

all of which expressions occur in the one clause, I think it plain that the parties were contracting only within the sphere of municipal taxes. That construction excludes the church tax sought to be brought within the ambit of the clause because it is admitted that the church tax is not any part of the municipal taxation.

I would therefore allow the appeal, with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Brown, Montgomery & McMichael.*

Solicitors for the respondent: *Meredith, Holden, Heward & Holden.*

NEW YORK LIFE INSURANCE COMPANY (DEFENDANT) ..... APPELLANT; * Nov. 11, 12.

AND

DAME JENNIE HANDLER (PLAINTIFF) ..... RESPONDENT.

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* Feb. 2.

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

Insurance, accident—Policy—Disability clauses—Total and permanent disability—Admitted by insurance company—Income payments made for a period of time—Discontinuance of payments on ground of cessation of disability—Payment of premiums under protest—Action for arrears of income payments and return of premiums paid under protest—Jury trial—Verdict—Findings in favour of insured as to disability—Prescription—Applicability of sub-sections 2 and 3 of section 216 of Quebec Insurance Act, R.S.Q., 1925, c. 248.

The appellant company, on March 3, 1927, issued a policy insuring the life of the respondent's husband, in her favour, for $15,000 or for $30,000 in the event of his death by accident, such policy also providing for an indemnity of $150 a month in the event of the insured suffering total and permanent disability. The stipulated premium was $375.90 payable half-yearly of which $34.35 was stated to be for the disability benefits. On the 31st of March, 1927, the insured assigned the policy to his wife, the respondent in this case. On the 17th of February, 1930, the insured met with an accident which so crippled his right hand that he was incapable of doing any manual work. The appellant company then admitted total disability within the meaning of the policy and paid the total disability benefit of $150 a month for a period of nineteen months, namely, until the 17th of October, 1931; it also waived the payment of all premiums falling due during that period under the terms of the policy. On November 12, 1931, the appellant company wrote the insured that, as he was no longer continuously totally disabled, it would discontinue making further disability payments. In 1932, the company appellant demanded payment of the two-yearly premiums of $375.90 falling due respectively on March 3 and September 3, 1932, which were paid under protest with an additional sum of $75.18 as exchange for United States money. On April 3, 1933, the respondent brought the present action to recover from the appellant company seventeen monthly disability benefit payments of $150 each from November 17, 1931, to March 17, 1933, plus $382.40 for excess value in United States over Canadian currency and for the return of the two half-yearly premiums paid under protest, with exchange, in 1932, i.e., $826.98. An incidental demand was made for seven additional monthly disability payments from March 17, 1933, to October 17, 1933, i.e., $1,050, plus $95 for excess value in United States over Canadian currency and also for the recovery of $834.38 being the amount of two additional premiums and exchange paid under protest in March and September, 1933: the total sum claimed being $5,738.76.

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

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The appellant company pleaded generally and, in particular, denied that from and after October 17, 1931, the respondent's husband was continuously and totally disabled within the conditions and terms of the policy. At the trial, the jury found that the insured had been totally disabled from February 17, 1930, up to the date of the verdict. The appellant's counsel, in support of a motion for the dismissal of the action, raised for the first time a point taken in the factum that, under subsections 2 and 3 of section 216 of the Quebec *Insurance Act*, R.S.Q., 1925, c. 243, the respondent's right of action was prescribed, because more than one year had elapsed since "the happening of the event insured against." The trial judge held that the action was so prescribed as far as the disability payments were concerned, but maintained it as to the claim for the return of premiums paid under protest in 1932 and 1933, i.e., the sum of $1,661.36. The appellate court added to the above judgment the sum of $2,066.38, arrears of disability payments which became due within the year of the institution of the action and, under the incidental demand, the sum of $1,145 arrears of disability payments which became due after the institution of the action, April 17 to October 17, 1933, the court holding that the five payments due from November 17, 1931, to March 17, 1932, were barred under the above-mentioned provision of the Quebec *Insurance Act*, thus increasing the amount awarded to the respondent from $1,661.36 to $4,872.74.

Held, that the prescriptions of subsections 2 and 3 of section 216 of the Quebec *Insurance Act* are not applicable to the state of facts as found in this case and cannot be held to bar any part of the respondent's action; and that the respondent is entitled to recover a further indemnity for the five months from November, 1931, to March, 1932, as well as for the nineteen months from April, 1932, to October, 1933, allowed by the Appellate Court. Therefore the respondent's action should be maintained for the full amount claimed therein, i.e., $5,738.76—The appellant company could only invoke the prescription contained in the Quebec *Insurance Act* by disproving the claim which was the subject of the respondent's action; this it has completely failed to do. On the contrary, the respondent has obtained from the trial court a verdict which has not been challenged in this Court, that the insured was totally disabled, within the meaning of the insurance policy sued on, at the time of the trial and had been continuously so totally disabled from February 17, 1930. This verdict was the outcome of the trial of the whole merits of the action. It must be taken as conclusively negativing the appellant's contention that the total disability, which the appellant company, the insurer, had recognized as continuing uninterruptedly and for which it had paid up to October 17, 1931, had ceased at any time thereafter, and, therefore, as negativing also its submission that the action was barred by the provisions of s. 216 (2) (3) of the Quebec *Insurance Act* on the assumption that the prescription there enacted might be treated as beginning to run against the plaintiff from the cessation of the total disability insured against. Upon the true construction of this insurance policy, in so far as it relates to the total disability benefits sued for, the risk insured against was the continuance of a condition of total and presumably permanent disability on the part of the insured, resulting from bodily injury or disease, and the statutory prescription relied on could have no application to the respondent's claim so long as the insured, once found to have been totally dis-

abled within the meaning of the policy, continued in that condition without interruption; the happening of the accident was not the event insured against, either within the meaning of this insurance contract or within the intendment of s. 216 (2) (3) of the Quebec *Insurance Act*.

Per Rinfret J.—The effect of the prescription resulting from subsections 2 and 3 of section 216 of the Quebec *Insurance Act* in respect to similar insurance policies has been dealt with by the appellate court in Quebec in three other cases besides the present one: *North American Life Insurance Co.* v. *Hudon* (Q.R. 55 K.B. 273), *Gagné* v. *New York Life Insurance Co.* (Q.R. 57 K.B. 60), and *Canada Life Insurance Co.* v. *Poulin* (Q.R. 57 K.B. 78). In the *Hudon* and the *Poulin* cases, the facts were different, as there the insurance company had not acknowledged the existence of the conditions of invalidity which entitled the insured to the benefits accruing under the policy and had not made a single payment of the monthly income to the insured; (the decision on the points raised in those cases should be reserved for future consideration)—In the *Gagné* case, the insurance company had admitted, as in this case, the "happening of the event insured against" and had acted upon the proof thereof submitted by the plaintiff and had made several monthly income payments, and the prescriptions of section 216 (2 and 3) of the *Insurance Act* are not, in that case as in the present one, applicable to such a state of facts. Moreover, the circumstances in the present case are more favourable to the claimant than in the *Gagné* case.

APPEAL from a judgment of the Court of King's Bench, appeal side, province of Quebec, maintaining the judgment of the trial judge for $1,661.36 representing the return of premiums paid on an insurance policy during the period of the insured's disability and maintaining a cross-appeal by the respondent and ordering the appellant to pay the respondent a further sum of $3,211.38 for arrears of total and permanent disability payments. Cross-appeal by the respondent claiming a further sum of $866.02, as demanded by her action, for another period of total and permanent disability.

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

W. B. Scott K.C. and *J. F. Chisholm* for the appellant.

Brooke Claxton and *N. L. Rappaport* for the respondent.

The judgment of the court was delivered by

CROCKET J.—The appellant by its insurance policy under date of March 3, 1927, insured the life of the respondent Dame Jennie Handler's husband, a silk manufacturer, then resident in New Jersey, in the United States, in favour of

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his wife for $15,000 or for $30,000 in the event of his death by accident, and also agreed thereby upon receipt of due proof that the insured was "totally and presumably permanently disabled before age 60" as defined under the Total and Permanent Disability clauses thereof to pay to the insured one hundred and fifty dollars each month and to waive payment of premiums as provided in the said Total and Permanent Disability clauses. The stipulated premium was $375.90, payable half-yearly, of which $34.35 was stated to be for the disability benefits.

The material portions of the Total and Permanent Disability clauses of the policy are as follows:—

Disability shall be considered total whenever the insured is so disabled by bodily injury or disease that he is wholly prevented from performing any work, from following any occupation, or from engaging in any business for remuneration or profit, provided such disability occurred after the insurance under this policy took effect and before the anniversary of the policy on which the insured's age at nearest birthday is sixty.

Upon receipt at the company's home office, before default in payment of premium, of due proof that the insured is totally disabled as above defined, and will be continuously so totally disabled for life, or if the proof submitted is not conclusive as to the permanency of such disability, but establishes that the insured is, and for a period of not less than three consecutive months immediately preceding receipt of proof has been, totally disabled as above defined, the following benefits will be granted.

(*a*) Waiver of premium.—The company will waive the payment of any premium falling due during the period of continuous total disability.

(*b*) Income payments.—The company will pay to the insured the monthly income stated on the first page hereof for each completed month from the commencement of and during the period of continuous total disability.

Before making any income payment or waiving any premium, the company may demand due proof of the continuance of total disability, but such proof will not be required oftener than once a year after such disability has continued for two full years. Upon failure to furnish such proof, or if the insured performs any work, or follows any occupation, or engages in any business for remuneration or profit, no further income payments shall be made nor premiums waived.

The policy was duly assigned on March 31, 1927, to the insured's wife, the present respondent.

On February 17, 1930, the insured, who had removed to Canada, met with an injury to his right hand in the mill of the Canada Silks Limited at Actonville, Quebec. Proofs of the accident and the resulting disability were filed with the appellant in June after the lapse of three months from the occurrence of the accident. These were accepted as establishing total and presumably permanent disability under the terms of the policy, and the appellant paid the

total disability benefit of $150 a month for a period of nineteen months from February 17, 1930, the date of the accident, until October 17, 1931. It also waived the payment of all premiums falling due during this period under the terms of the policy. On November 12, 1931, it wrote the insured that no further income payments would be made as the insured was no longer continuously totally disabled within the meaning of the Disability Benefit provision of the policy and that the premiums thereafter due would become payable as before in conformity with the terms of the policy. It thereupon discontinued making further disability payments. In 1932 the appellant demanded payment of the two half-yearly premiums of $375.90 falling due respectively on March 3 and September 3 of that year. These two premiums were therefore paid under protest with an additional $75.18 to account for the difference in the existing exchange rates between Canadian and United States money, in which last-mentioned currency the premiums were payable under the terms of the insurance policy.

The action was brought by the present respondent and her husband on April 3, 1933, to recover seventeen monthly disability benefit payments of $150 each, from November 17, 1931, to March 17, 1933, plus $382.40—the aggregate excess value of these monthly benefit payments in United States over Canadian currency at the respective dates when such monthly income payments were alleged to have become due—and for the return of the two half-yearly premiums paid under protest in 1932.

An incidental demand was subsequently served for seven additional monthly disability payments from March 17, 1933, to October 17, 1933, plus $95—the aggregate excess value of these payments in United States over Canadian funds at the respective dates when it was claimed they should have been paid—and for the recovery as well of $834.38—the amount of two additional premiums and exchange thereon paid under protest in March and September, 1933. The total sum claimed in the principal action and the incidental demand was $5,738.76.

The action was tried before Chief Justice Greenshields and a jury on November 13, 1933. In answer to questions submitted by His Lordship the jury found that the insured

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is so disabled by a bodily injury or disease that he is wholly prevented from performing any work, from following any occupation or from engaging in any business for remuneration or profit;

that he was so totally disabled from February 17, 1930, and that he had been totally disabled continuously to the then present date.

The defendant's counsel having moved for the dismissal of the action the point was taken in the defendant's factum in support of this motion for the first time in the case that the action was barred by the provisions of s. 216, s. ss. 2 and 3 of the Quebec *Insurance Act,* R.S.Q., 1925, c. 243. These provisions are as follows:—

2. Any stipulation or agreement to the contrary notwithstanding any action or proceeding against the insurer for the recovery of any claim under or by virtue of a contract of insurance of the person may be commenced at any time within one year next after the happening of the event insured against, or within the further term of six months, by leave of a judge of the Superior Court, granted upon a petition, upon its being shown to his satisfaction that there was a reasonable excuse for not commencing the action or proceeding within the first-mentioned term.

3. But no such action or proceeding shall be commenced after the expiration of the year and additional six months, except in cases where death is presumed from the insured not having been heard of during seven years, in which case any action or proceeding may be commenced within one year and six months from the expiration of such period.

The learned Chief Justice, feeling himself bound by the decision of the Court of King's Bench in *The North American Life Insurance Co.* v. *Hudon* (1), decided that the action was prescribed by the above quoted provisions of the Quebec *Insurance Act,* so far as the disability payments claimed for were concerned, and accordingly dismissed the action for these payments. He maintained the action, however, as regards the claim for the return of the two premiums paid under protest in 1932, and the incidental demand for the two additional premiums paid in 1933, holding that the statutory prescription did not apply to any of these claims, and condemned the defendant to pay the plaintiff the sum of $1,661.36 therefor.

A majority of the Court of King's Bench (Rivard and Bond, JJ. dissenting) dismissed an appeal taken by the defendant from the Superior Court judgment, and maintained in part the plaintiff's cross-appeal thereon, adding to the judgment of the trial court a condemnation of the defendant to pay to the plaintiff under the principal action

(1) (1933) Q.R. 55 K.B. 273).

the sum of $2,066.39, arrears of disability payments which became due within the year of the institution of the action with interest from April 3, 1933, and under the incidental demand the sum of $1,145 arrears of disability payments which became due after the institution of the action, April 17 to October 17, 1933, with interest thereon from October 26, 1933.

The effect of the two appeals was to entitle the plaintiff to all the monthly disability payments claimed for in the principal action and incidental demand except those for the five months' period from November 17, 1931, to March 17, 1932, which were held to be barred under the provisions of s. 216, s. ss. 2 and 3 of the Quebec *Insurance Act,* and thus to increase the trial judgment in favour of the plaintiff from $1,661.36 to $4,872.74, with interest on the first twelve disability payments allowed from the date of the commencement of the action, and interest on the other seven payments claimed in the incidental demand from the date of that demand.

The only question involved in the present appeal is that of the construction of the above quoted provisions of the Quebec *Insurance Act* and its application to an action for the recovery of indemnity for such disability as that described in the insurance policy here sued on.

We are of the opinion that, upon the true construction of this insurance policy, in so far as it relates to the total disability benefits sued for, the risk insured against was the continuance of a condition of total and presumably permanent disability on the part of the insured, resulting from bodily injury or disease, and that the statutory prescription relied on could have no application to the plaintiff respondent's claim so long as the insured, once found to have been totally disabled within the meaning of the policy, continued in that condition without interruption. We cannot at all accede to the contention that the happening of the accident was the event insured against, either within the meaning of this insurance contract or within the intendment of s. 216 (2) of the Quebec *Insurance Act.*

Under no possible construction of the policy could any action or proceeding be taken against the insurer until the insured has continued to be totally disabled for a period of not less than three consecutive months. The accident or

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injury itself clearly affords no ground of action against the insurer. Nor do the results of any accident or injury or disease afford any ground for action unless those results totally disable the insured for at least three consecutive months, which continuous disability, though not conclusive as to the permanency thereof, the insurer expressly agrees to accept as *prima facie* proof of such permanency. Accordingly it agrees to

> waive the payment of any premium falling due *during the period of continuous total disability,*

and to pay the stipulated monthly income

> for each completed month from the commencement of and *during the period of continuous total disability.*

This agreement is subject to the proviso that the insurer before making any income payment or waiving any premium may demand due proof of "the continuance of total disability," but that such proof will not be required more than once a year after such disability has continued for two full years. These provisions and the others above quoted, we think, conclusively show that the existence and uninterrupted continuance of total disability as defined by the insurance policy alone affords a ground of action for the recovery of any of the unpaid indemnity contracted for. How can either the commencement or the cessation of such a condition of continuous total disability be said to be "the happening of the event insured against" by this policy? The legislature must be taken to have contemplated some specific event, which can be definitely fixed in point of time, when it prescribed a period

> of one year next after the happening of the event insured against

as a limitation for the bringing of any action against an insurer for the recovery of any claim under or by virtue of a contract of insurance of the person—such, for example, as the death of the insured, whether as the result of accident or disease—not, we think, a continuous condition of total and presumably permanent disability such as is insured against by the provisions of the policy sued on in this action and for which no action or proceeding of any kind could be maintained for the recovery of the unpaid indemnity contracted for without proof that the insured was still totally disabled within the meaning of the definition of total disability set out in the policy and had continuously been so disabled from the initial development of

such disability. If the legislature had so intended it can hardly be supposed that it would have sought to bar such an action as this by limiting the period within which it could be brought to "one year from the happening of the event insured against." The only suggested possibility in the case of total and presumably permanent disability such as that which is the ground of this action is that the prescription might be held to begin to run from the cessation of the alleged disability. It is not, however, the cessation of the disability which is insured against but its continuance without interruption. If it were true that the prescription period began to run on the cessation of the total disability the appellant defendant could avail himself of the statutory prescription only by proving that the total and presumably permanent disability, for which it had paid for nineteen months, had ceased when it stopped its monthly payments in October, 1931, or at some time thereafter and more than one year before the commencement of the action. In other words, it could invoke the prescription only by disproving the claim which was the subject of the plaintiff's action. This it completely failed to do. On the contrary, the respondent plaintiff has obtained from the trial court a verdict, which has not been challenged in this Court, that the insured was totally disabled within the meaning of the insurance policy sued on at the time of the trial and had been continuously so totally disabled from February 17, 1930. This verdict was the outcome of the trial of the whole merits of the action. It must be taken as conclusively negativing the defendant's contention that the total disability, which the insurer had recognized as continuing uninterruptedly and for which it had paid up to October 17, 1931, had ceased at any time thereafter, and, therefore, as negativing also its submission that the action was barred by the provisions of s. 216 (2) of the Quebec *Insurance Act* on the insupportable assumption that the prescription there enacted might be treated as beginning to run against the plaintiff from the cessation of the total disability insured against. Whether or not therefore that enactment applies at all to actions for the recovery of indemnity for total disability under any other form of total disability insurance, we have no doubt for the reasons stated that it cannot rightly be held to bar this action, and that the plaintiff was entitled to recover indemnity for the five months, Novem-

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ber, 1931, to March, 1932, as well as for the nineteen months, April, 1932, to October, 1933, allowed by the Court of King's Bench.

The appeal will therefore be dismissed and the respondent's cross-appeal allowed so as to vary the judgment of the Court of King's Bench, by allowing the plaintiff an additional sum of $866.02, in the principal action and thus to maintain both the principal action and incidental demand in full with interest, the respondent to have her costs on both the appeal and cross-appeal in this court and throughout.

RINFRET J.—I fully concur with the judgment of my brother Crocket.

Within the last three years, the Court of King's Bench in Quebec has had occasion to examine, in no less than four cases and in respect to similar insurance policies, the effect of the prescription resulting from subsections 2 and 3 of section 216 of the Quebec *Insurance Act* (R.S.Q., 1925, c. 243). Those cases, in addition to the present one, were *North American Life Insurance Co.* v. *Hudon* (1), *Gagné* v. *New York Life Insurance Co.* (2), and *Canada Life Insurance Co.* v. *Poulin* (3). In the *Hudon* and the *Poulin* cases the facts were different and gave a somewhat different aspect to the legal problem arising out of the application of the statutory prescription. I mean that in both those cases—so far, at least, as appears from the reports—the insurance company had not acknowledged the existence of the conditions of invalidity which entitled the insured to the benefits accruing under the policy. In neither of those two cases had the insurance company ever made a single payment of the monthly income to the insured, before the action was brought; so that it could be said, as to each of those cases, that "*le droit* découlant du *fait*" (to use the words of Mr. Justice Létourneau in the *Poulin* case—p. 186) and that is to say: the right to the monthly income resulting from the fact of the continuous total disability, had yet to be ascertained. I see the strength of the argument that the prescription applies in such a case. It may be contended that, by force of the statute, the question

(1) (1933) Q.R. 55 K.B. 273. (2) (1934) Q.R. 57 K.B. 60.
(3) (1934) Q.R. 57 K.B. 78.

whether "the event insured against" has happened must be established within one year (or "the further term of six months") by agreement or by judgment resulting from an action instituted and served within that delay.

That is not the point which we have to decide in the present case; and it should be understood that the decision of such a point is reserved for future consideration.

Here as in the *Gagné* case, the company had admitted the "happening of the event insured against." It had acted upon the proof thereof submitted by the plaintiff and it had made several monthly income payments. As expressed by Sir Mathias Tellier, C.J., in the *Gagné* case (p. 68): the company "était liée par sa convention." And I think it must be agreed that, in those circumstances, the conclusion reached by my brother Crocket is the correct one; the prescriptions of section 216 (2 and 3) are not applicable to that state of facts.

There was however a distinction between the *Gagné* case and the present one. In the former case, the company had ceased the monthly payments "parce qu'il (Gagné) l'avait informée que son invalidité avait cessé d'être totale" (1). There was nothing of the kind here and the jury found that the condition of total disability had been continuous to the present date. I would share the view of Chief Justice Tellier (2) that, under those circumstances,

après avoir reconnu cette invalidité comme totale et permanente * * * la compagnie n'avait pas le droit, si ce n'est après l'accomplissement des formalités indiquées dans la police N.B.

(and which are referred to by my brother Crocket)

d'enlever au demandeur son revenu mensuel et l'exonération des primes.

Appeal dismissed with costs.

Cross-appeal allowed with costs.

Solicitors for the appellant: *MacDougall, Macfarlane, Scott & Hugessen.*

Solicitor for the respondent: *N. L. Rappaport.*

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(1) (1934) Q.R. 57 K.B. 60, at 66.

(2) (1934) Q.R. 57 K.B. 60, at 66 and 67.

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*Oct. 20, 21.
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*Feb. 2.

THE PROVINCIAL TREASURER OF MANITOBA ..... APPELLANT;

AND

HELEN HUNT BENNETT AND OTHERS, EXECUTORS OF THE LAST WILL AND TESTAMENT OF RUSSELL MERIDAN BENNETT, DECEASED ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Succession duty—Deposit receipt issued by bank in Province of Manitoba and held by person who died domiciled in State of Minnesota and then held by his executors in Minnesota—Claim by Government of Manitoba (under Succession Duty Act, Man., 1934, c. 42) for succession duty in respect of the sum represented by the deposit receipt—Situs of debt—Terms and nature of the deposit receipt—Collateral attack on validity of instrument as regards authority of officials signing it.

B. died domiciled and resident in the State of Minnesota and having in his possession there a deposit receipt issued by a bank in the Province of Manitoba, reading as follows: "Received from [B.] the sum of $50,000 which this bank will repay to [B.] or order with interest at the rate of 2½% per annum until further notice. Fifteen days' notice of withdrawal to be given and this receipt to be surrendered before repayment of either principal or interest is made. No interest will be allowed unless the money remains in the bank one month. This receipt is negotiable." Probate of B.'s will issued to his executors in Minnesota, where the deposit receipt was reduced into possession and held by them. None of the executors or beneficiaries under the will resided in Manitoba. The Provincial Treasurer of Manitoba claimed from B.'s estate succession duty under the *Succession Duty Act*, Man., 1934, c. 42, in respect of the sum deposited and represented by the deposit receipt. The evidence was that the bank treated that form of deposit receipt as negotiable; that in general practice, if it was endorsed in accordance with the way it was made payable, it would be negotiated and paid; if the payee endorsed it, the bank considered it was properly transferred; it was the bank's practice to honour indorsement by the payee; and it could come through another bank with another party; the bank admitted its liability to pay the deposit receipt in question.

Held: The deposit was not subject to succession duty under said Act. (Judgment of the Court of Appeal for Manitoba, 44 Man. R. 63, affirmed).

The situs of the deposit receipt for the pertinent purposes was not the Province of Manitoba. It came within the well recognized exception to the rule that the situs of a simple contract debt is the jurisdiction where "the debt is properly recoverable and can be enforced." It came within the exception notwithstanding that it might not properly be called a "negotiable instrument" within the strict definition of that term as found in Bills of Exchange Acts or as that term has come to be regarded in English mercantile custom and usage. The exception is not restricted, in its application, to "negotiable in-

*PRESENT:—Duff C.J. and Rinfret, Crocket, Davis and Hudson JJ.

struments" strictly as so defined. The deposit receipt in question was, after endorsation, capable of being transferred by delivery and of being sold in Minnesota, passing a valid title to the debt, by acts done entirely in Minnesota. It was in effect a saleable chattel, therefore situate where it was found, and it followed the nature of chattels as to the jurisdiction to grant probate. It was capable of being reduced into possession by the executors in Minnesota, by virtue of the probate and letters testamentary there issued, and, when that was done, the executors held a marketable security, saleable and, after endorsation, transferable by delivery, with no act outside of Minnesota being necessary to render the transfer valid. The executors or their transferee could maintain an action, if necessary, against the bank in the Manitoba courts without taking out ancillary letters of administration in Manitoba. The document, and the debt of which it was the title, was locally situated in Minnesota, and was not subject to the succession duty claimed.

Attorney-General v. *Bouwens*, 4 M. & W. 171; *Crosby* v. *Prescott*, [1923] S.C.R. 446; *The King* v. *National Trust Co.*, [1933] S.C.R. 670; *Richer* v. *Voyer*, L.R. 5 Priv. Cou. App. 461, and other cases and authorities cited. *The King* v. *Lovitt*, [1912] A.C. 212, distinguished.

Held, also: It was not open to the Provincial Treasurer to attack collaterally the validity of the deposit receipt as regards the authority of the bank officials who signed it.

APPEAL by the Provincial Treasurer of Manitoba from the judgment of the Court of Appeal for Manitoba (1), which reversed the judgment of Montague J. given upon the reference of the matter in question to a judge of the Court of King's Bench by the Provincial Treasurer under s. 21 (1) of the *Succession Duty Act*, Man., 1934, c. 42.

The question was whether or not the Province of Manitoba was entitled to succession duty in respect of the sum of $50,000 and interest, which sum of $50,000 had been deposited by Russell M. Bennett, now deceased, with a branch in Winnipeg of the Royal Bank of Canada and was represented by a deposit receipt dated August 15, 1934, issued by the said bank, in the form set out in the judgment now reported. The said deceased died at the city of Minneapolis in the State of Minnesota on October 31, 1934, resident in said city of Minneapolis and domiciled in said State of Minnesota. The executors of his will were granted probate and letters testamentary in said State, and said deposit receipt was reduced by them into their possession there. The executors and beneficiaries under the deceased's will all lived outside Manitoba. The material facts and circumstances of the case are sufficiently stated in the judgment now reported, and are indicated in the above headnote.

(1) 44 Man. Rep. 63; [1936] 1 W.W.R. 691; [1936] 2 D.L.R. 291.

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The Court of Appeal for Manitoba held that the Government of Manitoba was not entitled to the succession duty claimed. The Provincial Treasurer of Manitoba appealed to this Court. By the judgment now reported the appeal was dismissed with costs.

G. L. Cousley for the appellant.

W. P. Fillmore K.C. for the respondents.

The judgment of the court was delivered by

RINFRET J.—This is a submission, in accordance with section 21 (1) of the *Succession Duty Act*, 1934, by the Provincial Treasurer of the Province of Manitoba for the decision of certain questions raised in connection with the estate of Russell Meridan Bennett, late of the city of Minneapolis, in the State of Minnesota, U.S.A.

The facts are agreed upon as set out in an affidavit of the executors of the estate:

Bennett died at Minneapolis on the 31st day of October, 1934, being domiciled and having his residence, at the time of his death, at Minneapolis.

By his last will he appointed the respondents his executors. The will was duly proved and recorded in the Probate Court of the County of Hennepin, in the State of Minnesota, and letters testamentary issued to the executors by the Probate Court on the 17th day of December, 1934.

None of the executors or of the beneficiaries under the will reside in the Province of Manitoba.

Among the property in the possession of the deceased in Minneapolis, at the time of his death, and which was vested in the executors under his last will, was found a deposit receipt in the following words and figures:

THE ROYAL BANK OF CANADA
Incorporated 1869

$50,000.00 No. 9209

$\frac{11}{8}$ WINNIPEG, MAN., August 15th, 1934.

Received from Russell M. Bennett the sum of Fifty Thousand 00/100 Dollars which this Bank will repay to the said Russell M. Bennett *or order* with interest at the rate of 2½ per cent. per annum until further notice. Fifteen days notice of withdrawal to be given and this Receipt to be surrendered before repayment of either Principal or Interest is made.

No interest will be allowed unless the money remains in the Bank one month.

This Receipt is negotiable.

For the Royal Bank of Canada,

F. S. Purse, Accountant. J. H. Strafford, Manager.

This deposit receipt has been reduced into possession by the executors at Minneapolis, where, at all material times, it has been held by them.

The branch of the Royal Bank of Canada wherein the money was deposited, and where the deposit receipt was issued, being in Manitoba, the Provincial Treasurer of that province claimed from the Bennett estate a total duty of $8,671.09 in respect of the moneys so deposited and represented by the deposit receipt; the executors denied any liability; and, as the parties could not agree, it was decided to refer to the courts, in the words of the submission, "the liability of the above estate for succession duty."

Montague, J., in the Court of King's Bench, found and determined that the deposit was subject to succession duty and adjudged accordingly; but, in the Court of Appeal, this judgment was unanimously reversed, the appeal was allowed; and it was decided that the deposit was not subject to any duty under the *Succession Duty Act*.

The learned judge of the Court of King's Bench delivered no reasons for his decision.

Trueman, J.A. (with whom the Chief Justice of Manitoba concurred) held that the deposit receipt was "negotiable by virtue of the estoppel resulting from its own representation"; and that

this being the nature of the receipt, the executors have title to it by virtue of the Minnesota letters testamentary and are independent of ancillary probate or any other act in this Province [of Manitoba] to render legal their endorsement and delivery up of the receipt to the Bank against payment or their negotiation of it to a purchaser whether within the Province or elsewhere, proof being made to the Bank of their Minnesota authority.

He found accordingly that the money in question was not subject to the Crown's claim.

Robson, J.A., came to the same conclusion, but on different grounds which it will not be necessary to discuss here, in view of the conclusion we have reached on the other point and which is sufficient to uphold the result arrived at by the Court of Appeal.

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Richards, J.A., gave no written reasons and, as we were told, merely declared that he was for allowing the appeal.

It must first be noted that the Manitoba enactment, in terms, affects only "all property situate within the province" (subs. 1 of s. 8 of c. 42 of the Statutes of Manitoba, 1934). Under the statute, property having a situs in the province is alone declared "subject to duty." Indeed, property within the province is the only property that the province has the constitutional power to tax (*Lambe* v. *Manuel* (1); *Woodruff* v. *Attorney-General for Ontario* (2); *The King* v. *Lovitt* (3); *Alleyn* v. *Barthe* (4)). The deposit receipt which is the subject of the present litigation is primarily a document which constitutes evidence of a debt owing by the Royal Bank of Canada to the deceased, Russell M. Bennett. It is a simple contract debt and, as such, its situs, at least for the purposes of this case, would be the jurisdiction where the debtor is domiciled, and that is to say: where "the debt is properly recoverable or can be enforced" (*New York Life Insurance Company* v. *Public Trustee* (5); *The King* v. *National Trust Company* (6)).

But there is a well recognized exception to that rule, and that is that certain instruments capable of being transferred by delivery, and of being sold for money, in the jurisdiction where they are found and without it being necessary to do any act outside of that jurisdiction in order to render the transfer of them valid, are considered as instruments of a chattel nature or, in effect, saleable chattels which follow the nature of other chattels as to the jurisdiction to grant probate (*Attorney-General* v. *Bouwens* (7); Dicey, Conflict of Laws, 5th ed., pp. 342 & 343).

The only point, therefore, for our decision is whether the deposit receipt now in question can be regarded as an instrument of such a nature that it was capable of being reduced into possession by the executors in Minneapolis, by virtue of the probate and letters testamentary there issued to them, in such a way that their title to the

(1) [1903] A.C. 68.
(2) [1908] A.C. 508.
(3) [1912] A.C. 212.
(4) [1922] 1 A.C. 215.
(5) [1924] 2 Ch. 101.
(6) [1933] S.C.R. 670, at 676.
(7) (1838) 4 M. & W. 171, at 192.

debt represented by the deposit receipt was as valid as a title to corporeal chattels reduced into possession in similar circumstances.

In the case of corporeal chattels, there can never be any dispute, for they have an actual local situation; but it was argued—and with great ability—by counsel for the provincial treasurer that the exception applies only to those instruments which, by statute or by custom of the English mercantile world, are recognized as "entitled to the name of a negotiable instrument," to use the words of Lord Blackburn, in *Crouch* v. *Credit Foncier of England Ltd* (1).

We do not think, however, that such a restriction follows from the pronouncements made upon that point in the decided cases.

It may be assumed in this discussion that the deposit receipt held by the respondents is not, in its nature, a "negotiable instrument" within the limited meaning put forward by the appellant. It may be conceded that it lacks some of the characteristics of a promissory note, as, for example, it is not made for "a sum certain," in view of the power reserved to the bank to modify the rate of interest. Moreover, there may be a question whether the instrument is such that the property in it may be acquired free of any defect of title in the transferror or free of the equities existing between the immediate parties to the instrument.

But we do not understand the doctrine to be that, in order to be taken out of the rule with regard to simple contract debts, the instruments which represent them and of which they are the titles must necessarily answer to the strict definition of "negotiable instruments" as it is to be found in the Bills of Exchange Acts, or according as they have come to be regarded by the custom and usage of the English mercantile world.

Let us refer to the language of Lord Abinger, C.B., in *Attorney-General* v. *Bouwens* (2). The instruments in that case were Russian, Danish and Dutch bonds. The dividends due on the Russian and Danish government bonds respectively could be collected from agencies in England; but the dividends on the Dutch bonds were payable solely at Amsterdam. Lord Abinger stated first that

(1) (1873) L.R. 8 Q.B. 374. (2) (1838) 4 M. & W. 171.

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The special verdict gives a description of these instruments, which are called, though incorrectly, bonds; and finds that all these were marketable securities within this kingdom, transferred by delivery only, and that it never has been necessary to do any act whatsoever out of the kingdom of England, in order to make the transfer of any of the said bonds valid.

He then points out that the rules for the determination of situs for the pertinent purposes were derived from those which define the jurisdiction of the ordinary to grant probate (p. 191); and, after having referred "to the locality of many descriptions of effects," he goes on to say (p. 192):

> But, on the other hand, it is clear that the ordinary could administer all chattels within his jurisdiction; and if an instrument is created of a chattel nature, capable of being transferred by acts done here, and sold for money here, there is no reason why the ordinary or his appointee should not administer that species of property. Such an instrument is in effect a saleable chattel, and follows the nature of other chattels as to the jurisdiction to grant probate.

As can be seen, no reference is there made to instruments recognized as negotiable instruments by the statutory law, or by the usage and custom of merchants. All that is said about the instruments, in order to hold them and the debts which they represent as having a local situs in England, is that they are "capable of being transferred by acts done [in England], and sold for money [there]."

The principle so laid down was adopted by this Court in the case of *Crosby* v. *Prescott* (1). Mrs. Crosby, domiciled in Massachusetts, died there, leaving, among the assets of her estate, promissory notes payable to her order, but not endorsed. The maker lived in Manitoba. The Probate Court of Massachusetts appointed one Prescott administrator of Mrs. Crosby's estate. No grant of letters of administration, ancillary or otherwise, was ever received by the administrator from Manitoba. It was held that the situs of the notes was in Massachusetts, they being transferable by acts done solely there, and the administrator, or his transferee, alone being able to sue on them. It was also held that the administrator could maintain an action against the maker of the notes in the Manitoba courts, without taking out ancillary administration in that province.

In the course of his reasons in support of that judgment, the present Chief Justice of this Court said (p. 448):

(1) [1923] S.C.R. 446.

It is, of course, a perfectly well settled doctrine of English law that simple contract obligations due to the deceased by a debtor residing in England are deemed for the purposes of administration and collection to have a situs within the jurisdiction where the debtor resides, and consequently no action can be maintained in England to enforce such obligations against a debtor residing there by a foreign administrator who is not clothed with authority to administer the assets of the deceased in England by an English grant. *Commissioner of Stamps* v. *Hope* (1).

But the Chief Justice then added:

The Court of Appeal in Manitoba has held, rightly as I think, that there is an exception to this rule in the case of negotiable instruments; and that, as regards these, if they are reduced into possession by a foreign administrator within the territory from which he has received his grant and where they were at the time of the death of the creditor, it is competent to him to enforce them by action in the English courts, even in the absence of an English grant.

And, at p. 449:

It is beyond question also that the debts due upon negotiable instruments held in England at the time of his death by a creditor dying abroad are English assets in respect of which probate duty is payable; *Attorney-General* v. *Bouwens* (2); *Winans* v. *Attorney-General* (3); and this on the ground that such instruments are of a chattel nature capable of being transferred in England and "sold for money" in England.

The proposition thus expounded by the Chief Justice is supported on Story's Conflict of Laws, par. 517, and Westlake, a passage of whose work on Private International Law, at page 126, is said to state the true rule and which reads thus:

96. But to the rule in par. 95*a* the debts due on negotiable instruments are an exception, because they can be sufficiently reduced into possession by means of the paper which represents them. They are in fact in the nature of corporeal chattels. Hence the negotiable instruments of a deceased person, and his bonds or certificates payable to bearer, belong to the heir or administrator who first obtains possession of them within the territory from the law or jurisdiction of which he derives his title or his grant. He can indorse them if they were payable to the deceased's order, and he or his indorsee can sue on them in any other jurisdiction without any other grant.

And the conclusion of the Chief Justice was (p. 451):

* * * such instruments * * * are transferable by delivery, and such delivery has the effect of transferring not only the document, but the debt as well, and in that respect the resemblance to corporeal moveables is complete;

The reasons of Mr. Justice Mignault were to the same effect. The then Chief Justice of this Court, Sir Louis Davies, and Mr. Justice Anglin adopted the reasons of the Chief Justice of Manitoba and of the late Mr. Justice

(1) [1891] A.C. 476. (2) (1838) 4 M. & W. 171.
(3) [1910] A.C. 27.

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Cameron in the Appeal Court, which were also to the same effect.

The passage from Story's Conflict of Laws, par. 517, referred to in his reasons by Chief Justice Duff (Story, 8th ed., p. 736) is in these terms:

> The like principle will apply where an executor or administrator, in virtue of an administration abroad, becomes there possessed of negotiable notes belonging to the deceased, which are payable to bearer; for then he becomes the legal owner and bearer by virtue of his administration, and may sue thereon in his own name; and he need not take out letters of administration in the state where the debtor resides, in order to maintain a suit against him. And for a like reason it would seem that negotiable paper of the deceased, payable to order, actually held and indorsed by a foreign executor or administrator in the foreign country, who is capable there of passing the legal title by such indorsement, would confer a complete legal title on the indorsee, so that he ought to be treated in every other country as the legal indorsee, and allowed to sue thereon accordingly, in the same manner that he would be if it were a transfer of any personal goods or merchandise of the deceased, situate in such foreign country.

Now, the point about the doctrine in Story and in Westlake is that, for the pertinent purposes, these instruments are treated in the same manner as corporeal chattels, or moveables, not necessarily because they are, in their nature, what is known in the Law Merchant and under mercantile custom and usage as being "entitled to the name of a negotiable instrument," but because they are marketable securities within the jurisdiction where they are found, transferable by delivery only, saleable for money "without it being necessary to do any act out of that jurisdiction in order to render the transfer valid." Nowhere is the rule predicated upon the necessity of these documents or securities being negotiable instruments in the restricted sense that the appellant contends for.

This was further emphasized by the Chief Justice of this Court in the judgment which he delivered on behalf of the Court in the case of *The King* v. *National Trust Company* (1).

At pp. 676 and 677, after referring to Mr. Dicey's book at p. 342, he says:

> The judgment in *Attorney-General* v. *Bouwens* (2), at the pages mentioned in the judgment delivered in this court (pp. 191-2) (3), distinguishes simple contract debts from debts by specialty, as well as from debts embodied in negotiable instruments, that is to say, instruments the delivery of which effects a transfer of the debt. Negotiable instruments

(1) [1933] S.C.R. 670.
(2) (1838) 4 M. & W. 171.
(3) [1923] S.C.R. 578, at 586.

are treated as instruments "of a chattel nature capable of being transferred by acts done here, and sold for money here," as "in fact a simple chattel"; therefore, it is said, "such an instrument follows the nature of other chattels as to the jurisdiction to grant probate." The criterion expressed in Mr. Dicey's words may fairly be said to be that approved in the judgment in *Attorney-General* v. *Bouwens* (1) as respects negotiable instruments and other kinds of intangible property which are "dealt with" ordinarily and naturally by transferring them.

The Chief Justice says in this passage, it will be noticed, that the criterion applies not only to "negotiable instruments" but also to "other kinds of intangible property which are 'dealt with' ordinarily and naturally by transferring them."

The necessary consequence, and we may say the logical consequence, is that the rule applies, not only to negotiable instruments so-called, but also to instruments which are marketable securities, saleable and transferable by delivery only, without it being necessary to do any act outside of the jurisdiction where they are found, in order to render their transfer valid.

It remains only to consider whether the deposit receipt under discussion is such an instrument.

As long ago as *Richer* v. *Voyer*, decided in the Privy Council in the year 1874 (2), Sir Montague Smith, delivering the judgment of the Board upon a bank deposit receipt in most respects similar to the present one and payable to order as this one is, but not marked: "This receipt is negotiable," said (p. 475):

> It appears that certificates of this kind are in common use among bankers in Canada and the United States, and considerable discussion has taken place in those countries as to their legal character.

P. 476:

> The word "payable" in the certificate in question unquestionably imports a promise to pay the sum deposited, and interest at 4 per cent., and "à l'ordre" are the apt words to constitute a negotiable instrument transferable by indorsement (see Art. 2286). So far the essential attributes of a negotiable promissory note are obtained; but it was said that the provisions that the money should not carry interest unless it remained at least three months in the bank, and that the holder of the certificate should not withdraw the money until after fifteen days' notice, the interest ceasing from the day of notice, imported conditions and contingencies incompatible with the certainty required in such an instrument. The answer given to this objection was, that the provision as to interest only prescribed the time when it was to commence and cease; and that the stipulation for fifteen days' notice introduced no more uncertainty into the promise than occurs in a bill payable so many days after sight.

(1) (1838) 4 M. & W. 171. (2) L.R. 5 Priv. Cou. App. 461.

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Sir Montague Smith afterwards refers to, as he says, an American text writer of high authority, Mr. Parsons, who, in his Treatise on Promissory Notes and Bills of Exchange, after stating that certificates of this nature were in common use and had given occasion to much discussion, and after referring to numerous cases containing conflicting decisions, and among them *Patterson* v. *Poindexter* (1), says: "We think this instrument (of which he gives the form) possesses all the qualities of a negotiable promissory note, and that seems to be the prevailing opinion." (vol. 1, p. 26). It is to be observed, however, that the form given by Mr. Parsons omits the provisions as to interest and notice which appear in the present certificate.

From the evidence given by bankers and others who were called in this case to prove a custom, it certainly appears that these certificates have been commonly treated as transferable by indorsement, but whether with recourse to the indorser does not appear.

The only essential difference between the deposit receipt under consideration in *Richer* v. *Voyer* (2) and the deposit receipt now in question is that in this case the bank reserved unto itself the right to change the rate of interest. Otherwise, the wording of the present receipt is really more favourable to the respondents' contention, in view of the provision therein that "This receipt is negotiable."

Here, the evidence is that, so far as the bank is concerned, this form of deposit receipt is called negotiable; and it is regarded and treated by it as negotiable. It was stated by the officers of the bank who testified in the case that,

in general practice, if it [i.e., the deposit receipt] is indorsed in accordance with the way it is made payable, it will be negotiated and paid. * * * if the payee indorses it, the bank considers it is properly transferred. * * * It is the practice for the bank to honour indorsement by the payee. * * * [and] it could come through another bank with another party.

As a consequence, indorsation of the document in this case operates as a transfer both of the instrument and of the debt to which it is a title. After indorsation, the receipt is capable of being transferred by delivery only and sold in the foreign jurisdiction where it was found; and the stipulation is as between obligor and obligee that the obligor will pay to anyone who holds the document. Such a stipulation is perfectly good. Such payment would be good as against the obligee (Willis, Law of Negotiable Securities, p. 32). It may be that the stipulation falls short of negotiability within its restricted meaning; but undoubtedly the document is capable of being transferred by delivery. Its sale transfers a valid title to the debt

(1) (1843) 6 Watts and Sargent, 227.

(2) (1874) L.R. 5 Priv. Cou. App. 461.

itself. It is a saleable chattel within the meaning of the judgments above referred to; and, therefore, it is situated where it is found and it follows the nature of other chattels as to the jurisdiction to grant probate. Even if the receipt does not possess the incidents of a promissory note, of a bill of lading or of other negotiable instruments in the restricted sense, it was meant to be transferred by endorsement. It is so far negotiable as to pass a good and valid title to the debt; and it follows inevitably from the evidence that, in the words of Lord Abinger (*Attorney-General* v. *Bouwens* (1)), the "instrument has been clearly framed with a view to its becoming a subject of sale and easily transmissible from hand to hand."

It may be further added that, in the circumstances, the deposit receipt could be completely reduced into possession for all material purposes in Minneapolis, where it was and is transferable by acts done solely in the State of Minnesota; that when so reduced into possession by the executors, they held a marketable security saleable and, after indorsation, transferable by delivery only; that it was not necessary for them to do any act out of Minnesota in order to render the transfer of the instrument valid; and that the executors, or their transferee, could maintain an action, if necessary, against the Royal Bank of Canada, in the Manitoba courts, without taking out ancillary letters of administration in that province.

In those circumstances, our opinion is that the deposit receipt, and the debt of which it is the title, is locally situated in Minneapolis, in the State of Minnesota; that it is not, therefore, property situate within the province of Manitoba; and, accordingly, it is not subject to succession duty under the *Succession Duty Act* of Manitoba, as claimed by its Provincial Treasurer.

A secondary point was raised by the appellant as regards the authority of the bank officials who signed the deposit receipt. But, on the evidence, it was made clear that the Bank admits its liability; and we do not think it is open to the appellant thus collaterally to attack the validity of the instrument in that respect.

This disposes of the appellant's contentions, except, perhaps, that a word should be added concerning the *Lovitt*

(1) (1838) 4 M. & W. 171, at 190.

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case (1), strongly relied on by him at the argument. In our view, the decision in that case does not apply here. The deposit receipt there under discussion was marked "not transferable." It lacked, therefore, the essential element on which lies the whole foundation of our judgment in the premises.

It has been said of the *Lovitt* case (1) (see: *Provincial Treasurer of Alberta* v. *Kerr* (2)) that it was one of a local probate duty charged by the Province, where the property was locally situate, for the collection or local administration of the particular property, and was not a case of pure taxation.

In fact, in that case, the point here put forward by the respondents and with which this Court agrees, was neither raised nor discussed; and, in view of the non-transferable character of the deposit receipt there in question, the point did not arise.

The appeal ought to be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *John Allen.*

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

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*Nov. 20, 23, 24.

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*Feb. 2.

IN THE MATTER OF THE BANKRUPTCY OF GENERAL FIREPROOFING COMPANY OF CANADA, LTD.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Bankruptcy—Distribution—Priorities—Claims by Provincial Treasurer (for tax under Corporations Tax Act, R.S.O., 1927, c. 29); City of Toronto (for business tax); Toronto Electric Commissioners (for supply of electrical energy); Landlord; Custodian and Trustee (costs, fees and expenses); Workmen's Compensation Board; Minister of National Revenue (for sales tax)—Bankruptcy Act, R.S.C., 1927, c. 11, ss. 121, 125, 126, 188; Assessment Act, R.S.O., 1927, c. 238, s. 112; Public Utilities Act, R.S.O., 1927, c. 249, s. 26 (2); Landlord and Tenant Act, R.S.O., 1927, c. 190, s. 37; Special War Revenue Act, R.S.C., 1927, c. 179—Costs.

In the distribution of the assets of a bankrupt company (consisting of personal property, insufficient to pay in full all claims now in question), which company had carried on business in Toronto, Ontario,

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

(1) [1912] A.C. 212. (2) [1933] A.C. 710, at 726.

the following claimants were, for reasons stated below, held entitled to payment according to the following order of priority: (1) The Treasurer of the Province of Ontario (for tax under the *Corporations Tax Act*, R.S.O., 1927, c. 29); (2) The City of Toronto (for business tax imposed under the *Assessment Act*, R.S.O., 1927, c. 238), and The Toronto Electric Commissioners (for supply of electrical energy under the *Public Utilities Act*, R.S.O., 1927, c. 249); (3) The landlord; (4) The custodian and the trustee (for costs, fees and expenses); (5) The Workmen's Compensation Board (for indebtedness under the *Workmen's Compensation Act*, R.S.O., 1927, c. 179); (6) The Minister of National Revenue (for sales tax imposed under the *Special War Revenue Act*, R.S.C., 1927, c. 179).

(1) The head priority of the Ontario Provincial Treasurer's claim was held not to be open to attack on this appeal, as it was virtually conceded in the courts below; otherwise, as expressed by this Court, it might have presented difficulty.

(2) The claim of the City of Toronto for business tax took its aforesaid priority by virtue of s. 125 of the *Bankruptcy Act* and s. 112 of the Ontario *Assessment Act*.

The effect of s. 125 of the *Bankruptcy Act* is to leave undisturbed the provincial law in respect of the "collection of any taxes, rates or assessments" payable by the debtor; and thus leaves available to the City s. 112 (11) of the Ontario *Assessment Act*, which provides in effect—without the amendment in 1922 hereinafter mentioned—that where personal property liable to seizure for taxes has passed into possession of a third person through seizure, attachment, execution, assignment for the benefit of creditors, or liquidation, it shall be sufficient for the tax collector to give notice of the amount due for taxes, and requires payment thereof to him "in preference and priority to any other and all other fees, charges, liens or claims whatsoever." Even if the amendment in 1922 (12-13 Geo. V, c. 78, s. 24), extending the wording to include any authorized trustee in bankruptcy, be deemed *ultra vires*, the City's reliance on s. 112 (11) is not defeated. In its original form without the amendment it is not bankruptcy legislation and is competent provincial legislation, and (by force of s. 125 of the *Bankruptcy Act*) covers the present case. The amendment in 1922 may be disregarded or severed.

Per Duff C.J.: At the date of the adjudication in bankruptcy the bankrupt's goods and chattels were liable to seizure and sale by the City under s. 112 (2) of the Ontario *Assessment Act*. S. 112 (11) of that Act (and disregarding said amendment in 1922) provided procedure by notice in the circumstances therein mentioned and required the amount due for taxes to be paid "in preference and priority," etc., (see *supra*). The City's right under the law of Ontario to seize and sell and to pay the taxes out of the proceeds, and, in proceedings under provincial statutes for the distribution of the debtor's goods for the benefit of creditors, to be paid the amount due for taxes in preference and priority as aforesaid, is a right in the nature of a "lien or charge" within the contemplation of the second branch of s. 125 of the *Bankruptcy Act*, a right which, by force of s. 125, it is the trustee's duty to recognize. In this view, the validity of said amendment in 1922 is immaterial.

(3) The Toronto Electric Commissioners are merely the statutory agent and manager of one of the City's public utilities, and their charges for supply of electrical energy come within the words "taxes, rates

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or assessments" in s. 125 of the *Bankruptcy Act*, and by the *Public Utilities Act*, R.S.O., 1927, c. 249, s. 26 (2), may be entered on the tax collector's roll; therefore they stand in the same position as the City.

(4) The rights and priorities of the landlord, upon the bankruptcy of a lessee, are left by s. 126 of the *Bankruptcy Act* to be determined by the laws of the province regulating the rights and priorities of the landlord consequent upon an abandonment or voluntary assignment by a lessee for the benefit of creditors. The "preferential lien of the landlord for rent" mentioned and restricted by s. 37 (1) of the *Landlord and Tenant Act*, R.S.O., 1927, c. 190, is, as created or given effect to therein, a statutory lien as a substitute for distress (*Re Fashion Shop Co.*, 33 Ont. L.R. 253, *Lazier* v. *Henderson*, 29 Ont. R. 673, and other cases in the Ontario courts, referred to). This preferential lien is preserved by force of s. 126 of the *Bankruptcy Act*, and, as s. 121 of that Act is expressly made subject to the provisions of s. 126, the landlord's claim takes precedence over the claims of those creditors given certain priorities by virtue of s. 121, including the custodian and the trustee and the Workmen's Compensation Board. But the landlord's claim is subject in priority to that of the City of Toronto (and to that of the Toronto Electric Commissioners), as the consequence that "would have ensued under the laws of the province" (s. 126 of the *Bankruptcy Act*), on a voluntary assignment for benefit of creditors, would have been that the City took priority over the landlord by virtue of s. 112 (11) of the Ontario *Assessment Act*.

(5) The custodian's costs and expenses and the trustee's fees and expenses (all, for the purpose of priority, treated as one claim) and the claim of the Workmen's Compensation Board rank next (in the order given), in accordance with the priorities specifically given by s. 121 of the *Bankruptcy Act*.

(6) As to the claim of the Minister of National Revenue for sales tax: The Crown in right of the Dominion is, by s. 188 of the *Bankruptcy Act*, bound by the priorities set up by that Act; and, having no lien or charge to secure the payment of its sales taxes, cannot rank ahead of those creditors or of the trustee who are by that Act secured or given a special priority. It takes first among ordinary creditors by virtue of the prerogative.

Judgment of the Court of Appeal for Ontario, [1936] O.R. 510, varied.

The orders granting special leave to appeal to this Court expressly provided that the appellants should not be required to give any security for the costs of their appeals. No security was in fact given, and s. 174 (4) of the *Bankruptcy Act* provides that in such circumstances an appellant "shall not be awarded costs in the event of his success upon such appeal." S. 174 (4) does not prevent costs being given against such an appellant when unsuccessful.

APPEALS (by special leave granted by a Judge of this Court) from the judgment of the Court of Appeal for Ontario (1) affirming, with one variation as to priority of claims, the judgment of McEvoy J. (2) on an application by the trustee in bankruptcy to the Judge in bankruptcy

(1) [1936] O.R. 510; 17 C.B.R. 371; [1936] 4 D.L.R. 88.

(2) [1936] O.R. 255; 17 C.B.R. 246; [1936] 2 D.L.R. 348.

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for directions and to determine the priority in which the claims in question should be paid.

General Fireproofing Company of Canada Ltd., which carried on business in Toronto, Ontario, made an authorized assignment under the *Bankruptcy Act* on August 1, 1935. The assets of the estate (other than those pledged to a bank) consisted of cash on hand and machinery, equipment and shop supplies. These assets (other than cash) were sold, and, after payment of an amount owing under a conditional sale agreement and certain disbursements, the balance in the estate for distribution was $4,318.65. The claims now in question (claimed as preferred claims) in the aggregate exceeded the said amount, and therefore the trustee made the aforesaid application for directions to determine priority of payment.

The claimants and the nature of the claims in question are sufficiently stated in the judgments now reported, more particularly in the judgment of Davis J., and are indicated in the above headnote.

D. L. McCarthy K.C. and *J. P. Kent* for the City of Toronto and the Toronto Electric Commissioners.

L. Duncan K.C. for the Trustee.

G. A. Urquhart K.C. and *H. H. Ellis* for the Attorney-General of Canada and the Minister of National Revenue.

L. A. Richard for the Treasurer of the Province of Ontario.

R. M. Fowler for Gibson Bros. (landlord).

W. F. Spence for the Workmen's Compensation Board.

DUFF C.J.—I have had the advantage of reading the judgment prepared by Mr. Justice Davis with which I fully agree. In the observations which follow I am putting my views on the points discussed in a slightly different form.

It will be convenient to consider first the claims of the Corporation of the City of Toronto and the Toronto Electric Commissioners. The amount due to the Corporation by the bankrupt for business tax for 1935 was $330.67, and the amount due to the Tax Collector of the same Corporation for Hydro-Electric rates by the bankrupt was $319.35. It is contended that, by force of section 125 of the *Bankruptcy Act*, it is the duty of the trustee to pay these claims

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in priority to all other claims (other than the claim of the Treasurer of the Province of Ontario) now in question out of the moneys in his hands for distribution. It was conceded in the Court below that the claim of the Treasurer for the Province takes priority over other claims; and effect must be given to that concession here.

Section 125 is in these words:

> Nothing in the four last preceding sections shall interfere with the collection of any taxes, rates or assessments payable by or levied or imposed upon the debtor or upon any property of the debtor under any law of the Dominion, or of the province wherein such property is situate, or in which the debtor resides, nor prejudice or affect any lien or charge in respect of such property created by any such laws.

The four preceding sections mentioned are, first of all, s. 123 which enacts that, subject to the provisions of the statute, all debts proved in the bankruptcy or under an assignment shall be paid *pari passu*.

Section 121 (1) provides for certain priorities: in respect of the costs and expenses of the custodian and fees and expenses of the trustee; in respect of certain costs of garnishing, attaching, execution and judgment creditors; in respect of the indebtedness of the bankrupt under any Workmen's Compensation Act and in respect of wages, salaries and compensation payable to employees.

With section 122, which deals with the application of the joint and separate assets of partners, and section 124, which provides for the payment of interest where there is a surplus, we are not concerned.

It will be observed that s. 125 enacts two things. First of all, that these provisions for distribution *pari passu* and for priorities shall not interfere in any way with the collection of taxes, rates or assessments chargeable against the bankrupt personally or against his property under any law of a province where such property is situate or where the bankrupt resides; and, further, that nothing in these provisions shall prejudice or affect any lien or charge in respect of such property created by any such laws.

It is not necessary for the purposes of this case, in my view of it, to consider the effect of the first branch of this section in cases to which the second branch has no application, that is to say, where no lien or charge upon the property of the debtor attaches to the obligation of the taxpayer in respect of the tax or assessment in question. My conclusion is that, by force of the enactments of the

Assessment Act of Ontario, such a lien or charge is created and is attached to the right of the municipality to be paid the tax known as business tax. It is not disputed that, in this respect, no substantial distinction exists between moneys payable as business tax and moneys payable as hydro-electric rates.

I turn then to the provisions of the *Assessment Act*. By section 9 (11):

Every person assessed for business assessment shall be liable for the payment of the tax thereon and the same shall not constitute a charge upon the land occupied or used.

Subsection 2 of section 112 reads:

Subject to the provisions of section 111, in case of taxes which are not a lien on land remaining unpaid for fourteen days after demand or notice made or given pursuant to sections 107, 109 or 111, the collector, or where there is no collector, the treasurer, may by himself or his agent (subject to the exemptions provided for in subsection 4) levy the same with costs by distress:

1. Upon the goods and chattels of the person taxed wherever found within the county in which the municipality lies for judicial purposes;

2. Upon the interest of the person taxed in any goods to the possession of which he is entitled under a contract for purchase, or a contract by which he may or is to become the owner thereof upon performance of any condition;

3. Upon any goods and chattels in the possession of the person taxed where title to the same is claimed in any of the ways defined by sub-clauses *a, b, c* and *d* in subsection 1 of this section, and in applying the said sub-clauses they shall be read with the words "or against the owner though his name does not appear on the roll," and the words "or such owner," and the words "on the land" omitted therefrom;

(The sub-clauses here mentioned are in these words:

(*a*) By virtue of an execution against the person taxed or against the owner, though his name does not appear on the roll; or

(*b*) By purchase, gift, transfer or assignment from the person taxed, or from such owner, whether absolute or in trust, or by way of mortgage or otherwise; or

(*c*) By the wife, husband, daughter, son, daughter-in-law or son-in-law of the person taxed, or of such owner, or by any relative of his, in case such relative lives on the land as a member of the family; or

(*d*) By virtue of any assignment or transfer made for the purpose of defeating distress;)

* * *

4. Upon goods and chattels which at the time of making the assessment were the property and on the premises of the person taxed in respect of business assessment and at the time for collection of taxes are still on the same premises, notwithstanding that such goods and chattels are no longer the property of the person taxed.

The right created by these provisions, it will be observed, is a right (*inter alia*) to take possession of and sell by process of distress any goods of the taxpayer within the county in which the municipality for judicial purposes lies.

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The same right is given in respect of any interest under any contract of purchase or any contract under which the taxpayer is entitled to acquire ownership on the performance of any condition. The right is operative notwithstanding the fact that title to the goods and chattels is claimed by virtue of an execution against the person taxed or that such title is claimed by purchase, gift, transfer or assignment from the person taxed, or that such title is claimed by virtue of any assignment or transfer made for the purpose of defeating distress; and the right is operative also in certain cases where the title is claimed by relatives.

Where goods liable to seizure under these provisions have been attached or seized under an attachment or execution, the procedure is provided for by subsection 11; and in that case it is sufficient to give a notice to the sheriff or bailiff stating the amount due for taxes; and it is then the duty of the sheriff or bailiff to pay such amount "in preference and priority to any other and all other fees, charges, liens or claims whatsoever."

The same procedure obtains and has the same legal consequences where the goods have come into the possession of a liquidator or an assignee for the benefit of creditors.

I confine my attention for the present to the statute as it stood prior to the amendment of 1922 by which it was in express terms made applicable to trustees in bankruptcy. The result was that, as regards goods and chattels falling within the classes mentioned, the municipality had the right to take possession and sell for the purpose of obtaining payment and to pay itself out of the proceeds of the sale; and in those cases in which process by execution had intervened or there had been an assignment for the general benefit of creditors or winding-up proceedings were in progress, there was a right to be paid in priority to other creditors. The winding-up proceedings contemplated by the statute prior to the amendment of the section in 1922, no doubt, were winding-up proceedings under the authority of the provincial law.

Turning again to s. 125 of the *Bankruptcy Act*. It would appear that this right given by the law of Ontario to seize and sell and to pay the taxes out of the proceeds of the sale and to require in the cases mentioned payment of the amount due for taxes in preference and priority over "all

other claims, fees, charges and liens" is a right in the nature of a "charge or lien" within the contemplation of that section, a right which, by force of the section, it is the duty of the trustee to respect and to acknowledge. It follows that the claim of the municipality must take priority over the claim of the trustee and the claim under the *Workmen's Compensation Act* and over the claims of ordinary creditors which are to be paid *pari passu.*

As regards the claim of the Minister of National Revenue, he has no lien or charge, and his privilege in virtue of the prerogative is only available as against ordinary creditors.

As to the landlord's claim, different considerations arise. His claim rests upon his right of distress and his cognate "preferential lien"; but it becomes operative solely by force of s. 126. It is not necessary for us to consider for our present purpose the relative rights of the landlord and the taxing authority under the law of Ontario when both have distrained or attempted to do so, because s. 126 provides explicitly that the landlord's place in the distribution in bankruptcy—his rights and priorities—is to be determined by ascertaining what his rights and priorities would have been if the debtor had made a voluntary assignment of his property for the benefit of his creditors under the law of the Province of Ontario. Now, in this respect, the enactments of subsection 11 seem to be unambiguous as well as explicit. In such a case the taxing authority is entitled to be paid in preference and priority over all other claims, liens and charges. This language is broad enough, and I have no doubt was intended, to embrace the claim of the landlord.

In this view it is unnecessary to discuss the question whether the amendment of section 112 (11) of the *Assessment Act,* which was effected in the year 1922, and which professed to extend the provisions of the section to "any trustee or authorized trustee in bankruptcy," is *ultra vires.* I am unable to perceive any valid ground for attacking the section as it stood prior to that amendment as an incompetent exercise of the legislative authority of the Legislature of Ontario. Assuming the amendment to have been *ultra vires,* that cannot, in the view expressed above, affect the substance of the matter. The substance of the matter is that, at the date of the adjudication in bankruptcy the

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goods and chattels of the bankrupt affected by the statute were liable to seizure and sale by the municipality to enable the municipality to obtain payment of taxes and, generally, in proceedings under the provincial statutes for the distribution of the goods of the debtor for the benefit of creditors, the municipality was entitled to be paid before anybody else.

This right being, in my view, in the nature of a lien or charge within the contemplation of section 125 of the *Bankruptcy Act*, it is the duty, as already observed, of the trustee under that section in the distribution of the bankrupt estate to recognize it.

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

DAVIS J.—This is a contest in bankruptcy among several creditors and the trustee, each seeking priority of payment against the others in the distribution of the property of the bankrupt company which is insufficient to pay all in full.

Sec. 123 of the *Bankruptcy Act* provides that, subject to the provisions of the Act, all debts proved in the bankruptcy shall be paid *pari passu*. Sec. 121 creates priorities in respect of four classes of creditors, only two of which, the custodian and the trustee treated as one, and the Ontario Workmen's Compensation Board as the other, are involved in this dispute. If they were the only creditors claiming priority and sec. 121 were held entirely to govern the priority of payment of their claims, the costs and expenses of the custodian and the fees and expenses of the trustee would be paid first and the Workmen's Compensation Board would have to look for payment to what, if anything, was left of the estate.

But the difficulties arise in that there are several creditors who claim a position higher even than that of the trustee and who further contend for certain priorities among themselves.

The landlord asserts a special priority on the assets of the estate by virtue of section 126, because section 121 is expressly made "subject to the provisions of section 126 as to rent." Section 126 reads as follows:

126. When a receiving order or an assignment is made against or by any lessee under this Act, the same consequences shall ensue as to the

rights and priorities of his landlord as would have ensued under the laws of the province in which the demised premises are situate if the lessee at the time of such receiving order or assignment had been a person entitled to make and had made an abandonment or a voluntary assignment of his property for the benefit of his creditors pursuant to the laws of the province; and nothing in this Act shall be deemed to suspend, limit or affect the legislative authority of any province to enact any law providing for or regulating the rights and priorities of landlords consequent upon any such abandonment or voluntary assignment; nor shall anything in this Act be deemed to interfere or conflict with the operation of any such provincial law heretofore or hereafter enacted in so far as it provides for or regulates the rights and priorities of landlords in such an event.

When the *Bankruptcy Act* was first enacted in 1919, 9-10 Geo. V, ch. 36, the Parliament of Canada made its own law with respect to the rights of landlords by section 52 thereof, but that section was repealed in 1923, 13-14 Geo. V, ch. 31, sec. 31, and the present section 126 was substituted. It is plain that Parliament decided to leave the rights and priorities of the landlord, upon the bankruptcy of any lessee, to be determined by the laws of the province, in which the land is situate, regulating the rights and priorities of landlords consequent upon an abandonment or voluntary assignment by a lessee for the benefit of creditors. The landlord in this case asserts by virtue of sec. 37 of the Ontario *Landlord and Tenant Act,* R.S.O., 1927, ch. 190, a preferential lien for the arrears of rent due during the period of three months next preceding and for three months following the date of bankruptcy. Sec. 37, subsec. (1), reads as follows:

37. (1) In case of an assignment for the general benefit of creditors, or an order being made for the winding-up of an incorporated company, or where a receiving order in bankruptcy or authorized assignment has been made by or against a tenant, the preferential lien of the landlord for rent shall be restricted to the arrears of rent due during the period of three months next preceding, and for three months following the execution of the assignment, and from thence so long as the assignee retains possession of the premises, but any payment to be made to the landlord in respect of accelerated rent shall be credited against the amount payable by the assignee, liquidator or trustee for the period of his occupation.

The Treasurer of the Province of Ontario claims to rank ahead of all the other creditors and the trustee in respect of a small claim under the *Corporations Tax Act,* R.S.O., 1927, ch. 29. Sec. 20 of that Act reads as follows:

20. Every tax and penalty imposed by this Act shall be a first lien and charge upon the property in Ontario of the company liable to pay the same.

Counsel for the Provincial Treasurer not only claimed priority by prerogative of the Crown, in right of the Province,

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but claimed that the Province was by virtue of said sec. 20 a secured creditor and its rights as such preserved by secs. 24 and 25 of the *Bankruptcy Act;* and further that the Province's claim to taxes is in any case preserved by sec. 125 of the *Bankruptcy Act,* which reads as follows:

> 125. Nothing in the four last preceding sections shall interfere with the collection of any taxes, rates or assessments payable by or levied or imposed upon the debtor or upon any property of the debtor under any law of the Dominion, or of the province wherein such property is situate, or in which the debtor resides, nor prejudice or affect any lien or charge in respect of such property created by any such laws.

The Attorney-General of Canada and the Minister of National Revenue also claim to take first place in respect of sales taxes due by the debtor to the Crown in right of the Dominion. The claim for sales taxes arose under sec. 86 of the *Special War Revenue Act,* R.S.C., 1927, ch. 179, and amending Acts, and more particularly subsec. 1 (*a*) thereof which, speaking generally, imposed a sales tax of six per cent. on the sale price of all goods produced or manufactured in Canada, payable by the producer or manufacturer at the time of the delivery of such goods to the purchaser thereof. Sec. 107 of this Act imposes certain duties on trustees in bankruptcy in the distribution of estates. Counsel for the Attorney-General and the Minister of National Revenue contended that by virtue of sec. 125 of the *Bankruptcy Act* and of the prerogative of the Crown, in right of the Dominion of Canada, the claim for sales taxes is a preferred claim payable by the trustee in priority not only to the claim of the Province of Ontario and the claim of the trustee but in priority to all other claims. It may be observed here that at one time the payment of sales taxes was specifically secured by a statutory lien or charge but such provision was repealed and is not now available to the Minister of National Revenue in the collection of sales taxes.

The Ontario Workmen's Compensation Board claims priority by virtue of sec. 121 of the *Bankruptcy Act* and alternatively as an agency of the Crown in right of the Province.

The City of Toronto and the Toronto Electric Commissioners assert the right to come first for their claims for business taxes and for the supply of electrical energy, respectively, by virtue of the combined effect of sec. 125 of the *Bankruptcy Act* and of subsec. (11) of sec. 112 of

the Ontario *Assessment Act,* which latter provision reads, since its amendment in 1922 by 12-13 Geo. V, ch. 78, sec. 24, as follows:

112 (11). Where personal property liable to seizure for taxes as hereinbefore provided is under seizure or attachment or has been seized by the sheriff or by a bailiff of any court or is claimed by or in possession of any assignee for the benefit of creditors or liquidator or of any trustee or authorized trustee in bankruptcy or where such property has been converted into cash and is undistributed, it shall be sufficient for the tax collector to give to the sheriff, bailiff, assignee or liquidator or trustee or authorized trustee in bankruptcy notice of the amount due for taxes, and in such case the sheriff, bailiff, assignee or liquidator or trustee or authorized trustee in bankruptcy shall pay the amount of the same to the collector in preference and priority to any other and all other fees, charges, liens or claims whatsoever.

This provincial enactment is relied upon as available to the municipality in the collection of its taxes, rates or assessments by virtue of sec. 125 of the *Bankruptcy Act.*

The trustee claims to rank first upon the estate as a fund in his hands impressed with a trust out of which he is entitled to be paid, as a first charge thereon, his compensation and disbursements.

It is convenient to dispose of the Dominion and the Province before proceeding to discuss the difficult question of the municipality's claim to priority over both the landlord and the trustee. So far as the Dominion is concerned, sec. 188 of the *Bankruptcy Act* expressly enacts that, save as provided in the Act, the provisions of the Act relating to remedies against the property of a debtor and the priorities of debts shall bind the Crown. The Crown in right of the Dominion is bound, therefore, by the priorities set up by the *Bankruptcy Act,* and, having no lien or charge to secure the payment of its sales taxes, cannot rank ahead of those creditors or of the trustee who are either secured or given a special priority by the *Bankruptcy Act.* The contention of the Province of Ontario might present considerable difficulty but for the fact that the Province was given by the courts below the first position and its claim is not open to attack on this appeal because the Province was virtually conceded in the courts below priority over all others, perhaps because its claim was only $116.76.

Now as to the City of Toronto. The Toronto Electric Commissioners are merely the statutory agent and manager of one of the city's public utilities and will stand in the same position as the city unless the charges for the supply

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of electrical energy cannot be said to come within the words "taxes, rates or assessments" in sec. 125 of the *Bankruptcy Act*. This question may be passed over for the moment. The real dispute is between the municipality and the landlord. The trustee did not appeal to this Court but is respondent in the appeals of the Attorney-General of Canada, the Ontario Workmen's Compensation Board and the City of Toronto and Toronto Electric Commissioners, and if any variation of the allocation of the claims of the several creditors and of the trustee to priority as fixed in the judgment appealed from is to be made in this Court upon the appeals of those creditors who did appeal, we should examine the whole matter, including the true position of those parties who would be affected adversely by any re-allocation.

The City's contention is based, as already noted, upon sec. 112 (11) of the Ontario *Assessment Act*, which, it is argued, is available to the city by virtue of sec. 125 of the *Bankruptcy Act*. The city's claim is for business taxes. There is no lien or charge upon the property of the taxpayer to secure the payment of business taxes as there is in the case of land taxes, nor is there any lien or charge to secure the payment of the charges of the Toronto Electric Commissioners. The city therefore has to rely upon the provisions of sec. 112 (11) of the Ontario *Assessment Act*. This remedy is really a substitute for distress where personal property liable to seizure for taxes, or the undistributed cash proceeds thereof, are taken or held in the course of execution or liquidation. It is contended against the city, and this view prevailed in the court below, that sec. 112 (11) is *ultra vires* the province in so far as by the amendment of 1922 the provisions of the then section were extended to include any trustee in bankruptcy. But Parliament plainly intended by sec. 125 of the *Bankruptcy Act* that the Act should not interfere with "the collection of any taxes, rates or assessments" payable by or levied or imposed upon the debtor or upon any property of the debtor under any law of the province wherein such property is situate or wherein the debtor resides. The provincial law in that respect was preserved and there was to be no interference by the Parliament of Canada, dealing in bankruptcy matters, with the collection of taxes. Sec. 112 (11)

of the Ontario *Assessment Act* was in full force and effect before the passing by the Parliament of Canada of the *Bankruptcy Act,* except as to the amendment made in 1922 by the Ontario Legislature adding throughout the subsection the words "or of any trustee or authorized trustee in bankruptcy." Plainly sec. 112 (11) in its original form is not bankruptcy legislation and is competent provincial legislation. It covered every possible condition known to the Legislature at the time of its enactment that might occur whereby the goods of the debtor would pass into the possession of some third person owing to seizure, attachment, execution or liquidation. That was the remedy available for the collection of municipal taxes under the provincial law, and the effect of sec. 125 of the *Bankruptcy Act* was to leave the local law in respect of the collection of taxes undisturbed. There was no real necessity for the amendment of the Ontario Act; it was broad enough itself to cover a case such as this, provided the Dominion statute left the provincial law unaffected and this it did by sec. 125. If, however, it be thought that the amendment was beyond the power of the province in that it directs that the trustee in bankruptcy "shall pay the amount of the [taxes] to the collector in preference and priority to any other and all other fees, charges, liens or claims whatsoever," the amendment may be disregarded or the subsection severed. The service of the notice would remain and be sufficient in itself because sec. 125 of the *Bankruptcy Act* provides that the collection of taxes imposed by provincial laws is not to be interfered with by the *Bankruptcy Act.*

Counsel for the landlord argued that, even in this view of sec. 112 (11) of the Ontario *Assessment Act,* the City is not entitled to rank ahead of the landlord, because sec. 125 relating to the collection of taxes commences with the words "Nothing in the four last preceding sections shall interfere with" and not with such words as "Nothing contained in this Act shall interfere with," and sec. 121, the first of the "four last preceding sections," expressly commences with the words "Subject to the provisions of section 126 as to rent." By virtue of sec. 126 "the same consequences shall ensue as to the rights and priorities of his landlord," when a receiving order or an assignment is made against or by any lessee under the Act, "as would

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have ensued under the laws of the province in which the demised premises are situate" if the lessee had made an abandonment or voluntary assignment of his property for the benefit of his creditors pursuant to the laws of the province. Counsel for the landlord further calls our attention to the concluding words in sec. 126, that

> nothing in this Act shall be deemed to suspend, limit or affect the legislative authority of any province to enact any law providing for or regulating the rights and priorities of landlords consequent upon any such abandonment or voluntary assignment; nor shall anything in this Act be deemed to interfere or conflict with the operation of any such provincial law heretofore or hereafter enacted in so far as it provides for or regulates the rights and priorities of landlords in such an event.

The entire section, 126, has already been set out and it is unnecessary to repeat it.

It becomes necessary now to examine the question raised against the landlord by counsel for the city that the "preferential lien," so-called, referred to in sec. 37 of the *Landlord and Tenant Act*, above set out, is not in reality a security in the nature of a charge or lien upon the property, but is merely a preference, and that, accordingly, the city, with its statutory right under sec. 112 (11) of the *Assessment Act* to payment "in preference and priority to any other and all other fees, charges, liens or claims whatsoever," is entitled to rank ahead of the landlord whose claim, it is argued, is only that of a preferred creditor without security. The settled jurisprudence of the province of Ontario in relation to the words "the preferential lien of the landlord for rent" was stated by the late Chancellor Boyd in *Re Fashion Shop Co.* (1):

> The phrase "the preferential lien of the landlord for rent" means * * * that the landlord has a statutory lien upon goods available for distress, independent of actual distress or possession, for the amount of the rent as limited by the section.

This conclusion was based upon the decision and the reasoning of Street, J., in *Lazier* v. *Henderson* (2), especially at pp. 678-9, where it is observed that any other construction would make the words of the section meaningless. The decision in *Tew* v. *Toronto Savings & Loan Co.* (3) followed the *Lazier* decision (2), as did also the case of *Re D. S. Paterson Co.* (4). As early as 1879 the Ontario Court of Appeal in *Re McCracken* (5) discussed the same

(1) (1915) 33 Ont. L.R. 253.
(2) (1898) 29 Ont. R. 673.
(3) (1898) 30 Ont. R. 76.
(4) [1932] O.R. 432.
(5) 4 Ont. A.R. 486.

phrase "the preferential lien of the landlord for rent" as it appeared in the then *Insolvent Act* of 1875. I know of no decision that has ever reduced the substance and effect of the language of the statute, "the preferential lien of the landlord for rent" to a mere preferred claim in liquidation and I am quite satisfied, consistent with the decisions as I read them, that it is perfectly plain that the landlord was given a statutory lien as a substitute for distress. Underlying the right to the lien there must be a contractual obligation for the acceleration of rent in the events specified, but the statute, while creating or giving effect to the lien to secure the payment of rent, expressly limits and restricts the lien to the arrears of rent during the period of three months next preceding and for three months following the execution of the assignment. This preferential lien is preserved by force of sec. 126 of the *Bankruptcy Act* and as sec. 121 of the *Bankruptcy Act* dealing with priority of claims is expressly made subject to the provisions of sec. 126, the claim of the landlord plainly takes precedence over the claims of those creditors given certain priorities by virtue of sec. 121 of the *Bankruptcy Act.*

That does not yet determine the question of priority as between the municipality and the landlord. Sec. 126 only gives to the landlord "the same consequences" as would have ensued under provincial law if the lessee had made an abandonment or a voluntary assignment of his property for the benefit of his creditors pursuant to the laws of the province. That section entitles us, in considering the conflict between the municipality and the landlord, to exclude bankruptcy legislation in arriving at the rights of the landlord and the municipality between themselves. If the debtor here had not in fact become bankrupt but had made in Ontario an abandonment or a voluntary assignment of his property for the benefit of his creditors, the claim of the municipality would have taken priority over the claim of the landlord because under provincial law the landlord, while entitled to "the preferential lien" to which we have referred, would have had to give way to the right of the municipality under sec. 112 (11) of the Ontario *Assessment Act* to collect the amount due for taxes "in preference and priority to any other and all other fees,

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charges, liens or claims whatsoever." That undoubtedly would have been the consequence that "would have ensued under the laws of the province" if the lessee had made an abandonment or a voluntary assignment of his property for the benefit of his creditors pursuant to the laws of the province. Can it be said that under the *Bankruptcy Act* the landlord is entitled to a better position as between himself and the municipality than he would have had, if the lessee had made a voluntary assignment? Sec. 125 of the *Bankruptcy Act* says, "nothing in the four last preceding sections shall interfere with" the collection of taxes nor prejudice or affect any lien or charge in respect of the property of the debtor created by any law of the province wherein such property is situated. The consequence that would have ensued, as between landlord and the city, on a voluntary assignment under provincial laws would have been that the city would have taken priority over the landlord by virtue of sec. 112 (11).

But the landlord takes, by virtue of sec. 126 of the *Bankruptcy Act,* priority over the custodian, the trustee, and the Ontario Workmen's Compensation Board, who are specifically given certain priorities by virtue of sec. 121 and cannot claim a better position than that given to them by the express language of the *Bankruptcy Act.*

The charges of the city's statutory agent, the Toronto Electric Commissioners, for the supply of electrical energy come within the words "taxes, rates or assessments" in sec. 125 of the *Bankruptcy Act,* and by the Ontario *Public Utilities Act,* R.S.O., 1927, ch. 249, sec. 26 (2), may be entered on the tax collector's roll. Therefore the Toronto Electric Commissioners stand in the same position as the city.

The respective priorities of the parties involved in these proceedings should be settled as follows:

(1) The Province of Ontario.

(2) The City of Toronto and the Toronto Electric Commissioners.

(3) The landlord.

(4) The custodian and trustee.

(5) The Ontario Workmen's Compensation Board.

The Minister of National Revenue takes first among ordinary creditors by virtue of the prerogative.

In the circumstances of this case it is impossible to fix equitable debits and credits as to costs. The City of Toronto and the Toronto Electric Commissioners, appellants, have succeeded in the appeal in gaining second place, after the Province of Ontario (whose claim is only $116.76), whereas they were given no priority and treated as ordinary unsecured creditors in the judgments of both McEvoy J. and the Court of Appeal. The landlord, Gibson Bros. Limited, who were given the second place in both courts below for their claims totalling $2,812.50, are now put in the third position, immediately after the City of Toronto and the Toronto Electric Commissioners, whose claims total $650.02. In the ordinary course the City of Toronto and the Toronto Electric Commissioners, having succeeded in their appeal, would be entitled to their costs, but the order of my brother Kerwin in granting special leave to appeal to this Court expressly provided that these appellants should not be required to give any security for the costs of their appeals, and no security was in fact given. Sec. 174 (4) of the *Bankruptcy Act* provides that in such circumstances an appellant "shall not be awarded costs in the event of his success upon such appeal." Therefore the appellants the City of Toronto and the Toronto Electric Commissioners, though successful, are not entitled to be awarded the costs of their appeal. A similar order dispensing with security for costs was made when special leave to appeal was granted to the Attorney-General of Canada and the Minister of National Revenue for Canada, and again when leave was granted to the Ontario Workmen's Compensation Board. The former appellants do not succeed. They were given sixth place by McEvoy J. and were raised to fifth place by the order of the Court of Appeal but are now put in the class of ordinary creditors subject only to the prerogative right of being paid first among the ordinary creditors. The City of Toronto and the Toronto Electric Commissioners as well as the Workmen's Compensation Board have gained priority over them. The appellant, the Workmen's Compensation Board, did not succeed in its main contention on its appeal and, though it remains in the sixth place, it finds the City of Toronto and the Toronto Electric Commissioners now ahead of it, but the priority of the Minister of National Revenue has disappeared. Sec. 174 (4) does not prevent costs being

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given against such appellants when they are unsuccessful. But the total claim of the Workmen's Compensation Board was only $82.51, while the claim of the Minister of National Revenue for sales taxes was $1,566.74. It is quite impossible to work out any equitable scheme for the apportionment or distribution of the costs, and, under all the circumstances, justice, I think, will be done in directing that there be no costs in the appeals for or against any of the parties, except that the trustee shall have his costs, as between solicitor and client, out of the estate.

But we must consider the disposition of costs in the courts below. The Court of Appeal ordered the City of Toronto and the Toronto Electric Commissioners to pay to the trustee and to the Treasurer of Ontario and to Gibson Bros. Limited, the landlord, one-half of their costs in the Court of Appeal, and the Attorney-General of Canada and the Minister of National Revenue to pay to the trustee and to the Treasurer of Ontario and to Gibson Bros. Limited one-half of their costs in the Court of Appeal. As to the costs before McEvoy J., the Court of Appeal, with some hesitation, left the disposition of the costs of the application for directions as McEvoy J. had disposed of them, that is, to be paid out of the assets of the estate in priority to the payment of the claims of the several creditors.

In view of the re-allocation of priorities made by this Court, it would be unfair to the City of Toronto and the Toronto Electric Commissioners to leave undisturbed the order of the Court of Appeal whereby they were ordered to pay one-half of the costs of the trustee and of the Treasurer of Ontario and of the landlord. Obviously that provision, in view of our disposition of the appeals, should not stand. On the other hand, the Attorney-General of Canada and the Minister of National Revenue, having failed in their appeals to this Court, are not entitled to have the order of the court appealed from disturbed.

The order of this Court as to costs will be, therefore, that there be no costs for or against any party either in this Court or in the Court of Appeal for Ontario except that the trustee shall have his costs, as between solicitor and client, of the appeals to this Court, and that the Attorney-General of Canada and the Minister of National Revenue shall remain liable to pay to the trustee and to the Treasurer of Ontario and to Gibson Bros. Limited one-

half of their costs of the appeal to the Court of Appeal for Ontario, and that so much of the costs of the trustee, as between solicitor and client, of the appeal to the Court of Appeal which may not be recovered from the Attorney-General of Canada and the Minister of National Revenue shall be paid out of the assets of the estate. The trustee's costs shall take priority over payment of the claims of those creditors represented in these proceedings. The order of McEvoy J. as to the costs of the application before him shall remain as affirmed by the Court of Appeal.

Judgment appealed from varied as to the respective priorities of the parties.

Solicitor for the City of Toronto and the Toronto Electric Commissioners: *C. M. Colquhoun.*

Solicitor for the Trustee: *L. Duncan.*

Solicitor for the Attorney-General of Canada and the Minister of National Revenue: *G. A. Urquhart.*

Solicitor for the Treasurer of the Province of Ontario: *L. A. Richard.*

Solicitors for Gibson Bros. Ltd. (Landlord): *McMaster, Montgomery, Fleury & Co.*

Solicitors for the Workmen's Compensation Board: *Spence, Shoemaker & Spence.*

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THE CANADIAN BANK OF COMMERCE (PLAINTIFF) ..... } APPELLANT;

AND

JOHN H. MOTHERSILL AND THE TRUSTS AND GUARANTEE COMPANY LTD., EXECUTORS AND TRUSTEES OF THE WILL OF CHARLES W. HOARE, DECEASED (DEFENDANTS) ..... } RESPONDENTS.

* Nov. 24, 25.
* Feb. 2.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Executors—Trustees—Administration of estate of deceased person—Possible deficiency of assets—Notice by executors to secured creditor to place specified value on securities—Creditor not doing so—Creditor selling securities and suing estate for deficiency—Right to recover—Trustee Act, Ont. (R.S.O., 1927, c. 150, as amended in 1931, c. 23, s. 7), ss. 56 (2), 57 (1).

At the time of his death (November 10, 1931) H. was indebted to the plaintiff bank, which held as collateral security hypothecations by H.

* PRESENT:—Duff C.J. and Rinfret, Crocket, Davis and Kerwin JJ.

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of share certificates and bonds. The terms of the hypothecations gave the right to the bank upon default in payment to realize on the securities, without prejudice to its claims for any deficiency. Defendants were executors and trustees under H.'s will and obtained probate thereof. The bank demanded payment and threatened to sell the securities and look to defendants for payment of any deficiency. The defendants, on December 23, 1933, notified the bank that they were of opinion that there might be a deficiency of assets to meet creditors' claims and required it, within 30 days, to prove its claims and give particulars of, and place a specified value on, each of its securities. This notice was given pursuant to s. 56 (2) of the *Trustee Act*, R.S.O., 1927, c. 150, as amended in 1931, c. 23, s. 7 (but which fixes no period of time for running of the notice). The bank, on January 4, 1934, wrote to defendants stating the amount due, a list of securities and its intention, failing some satisfactory arrangement, to proceed to realize thereon. On January 23, 1934, it filed its claim with particulars of securities. It did not place a value on the securities. The defendants did not apply under s. 57 (1) of said Act (as amended as aforesaid) for an order requiring the bank to value its securities or be barred from sharing in the estate. The bank sold the securities, commencing on January 15, 1934, and, after notice by defendants of contestation, and pursuant to a court order obtained, sued defendants for the amount of the deficiency.

Held: The bank was entitled to recover. The notice of December 23, 1933, the bank's failure to value, and its sale of the securities, did not bar its right to judgment. (Judgment of the Court of Appeal for Ontario, [1936] O.R. 402, reversed).

Per Duff C.J.: The effect of the amendment in 1931 enacting ss. 56 and 57 of the *Trustee Act* was not to abrogate the right theretofore existing of a creditor to rank upon the estate of a deceased person and substitute a new right—but to modify the right,—attaching certain incidents to it and giving certain rights to the legal personal representative. As to the right to call upon the creditor to value his security, the statute provides a sanction and nominates the procedure for enforcement, and, by well known principles, the legal personal representative must resort to this procedure in the enforcement of the right. The defendants could have proceeded under s. 57; they could have taken steps to prevent the sale of the securities; it might be that they had an action for damages; but the effect of the statute was not to put the bank, after the notice of December 23, to its election to value its securities or rely exclusively upon them without remedy for any deficiency, nor, merely by reason of said notice and the course taken by the bank, to cause the bank to lose its contractual right to claim for a deficiency.

The statutory provisions in question, postulating, as they do, a possible deficiency of assets, are intended for the protection of the creditors and, where creditors' rights are not in any way in jeopardy, those provisions cannot be resorted to for the sole benefit of the beneficiaries of the estate.

Per Rinfret, Crocket and Kerwin JJ.: Where it says in s. 56 (2) that the personal representative "may require" a creditor to place a specified value on his security, the word "require" has not an imperative force, but is merely descriptive of one step in the proceedings that may be taken to secure a valuation by the creditor. As defendants had not followed the notice by securing an order under

s. 57 (1), the bank was never called upon to choose between relying only upon the securities and placing a value upon them, and had never lost its right under the terms of the hypothecations to sell the securities and claim for any deficiency.

Per Davis J.: The defendants, not having obtained the relief provided by s. 57 (1) for breach by the bank of its duty under s. 56 (2) (which relief, being that expressly provided by the same statute which created the new duty, is the only one available), had no defence upon the ground of said breach to the bank's action to recover the amount of the contractual debt.

On an application under s. 57 (1) the judge is not bound to make the order provided for therein; he may exercise his discretion, having regard to all the facts and circumstances brought to his attention.

APPEAL by the plaintiff from the judgment of the Court of Appeal for Ontario (1) which (reversing the judgment of McFarland J. (2)) held that the plaintiff's action claiming against the estate of which respondents were the executors should be dismissed.

The material facts of the case and the questions in issue on this appeal are sufficiently stated in the judgments now reported and are indicated in the above headnote. The plaintiff's appeal to this Court was allowed with costs.

G. R. Munnoch K.C. for the appellant.

S. L. Springsteen K.C. for the respondents.

DUFF C.J.—I agree that the appeal should be allowed.

If I may say so with the greatest respect, it appears to me that there is a fallacy in the judgments in the courts below in this sense: it is assumed, I think, that the right of a creditor to rank upon the estate of a deceased person which obtained at the time of the passing of the enactment now under consideration was by that enactment abrogated and that there was substituted for it a new right, the right given by the statute.

I am unable myself to read the statute in that way. I think the effect is that the right of the creditor is modified, that certain incidents are attached to it and certain rights given to the legal personal representative. Broadly speaking, there is a right to call upon the creditor to value his security and a right to take over the security on the terms mentioned in the statute.

(1) [1936] O.R. 402; [1936] 3 D.L.R. 205.

(2) [1936] 1 D.L.R. 394.

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As regards the first of these rights, the statute provides a sanction, nominates the procedure by which it is to be enforced, and, I think, by the well known principles, the legal personal representative must resort to this procedure in the enforcement of that right.

I am not saying that, as regards the option to take over the security, the ordinary common law remedies are not available, or that, if the creditor is dealing with his securities in such a way as to prevent the legal personal representative exercising his option, the latter is without a remedy.

In the case before us, the creditors, in May, 1932, demanded payment of the liabilities of the deceased and, after having received a notice on the 23rd of December, 1933, from the legal personal representatives requiring the creditors to value their securities, the creditors notified them that unless some arrangement satisfactory to the creditors should be made they would proceed to realize the securities commencing on the 10th of January, 1934. There could be no doubt that the legal personal representatives were apprized of the position taken by the creditors and they chose to rest upon their position under the statute which they conceived to be, as they are contending on this appeal, that, after the notice of December, the creditors were put to their election to value their securities and prove their claims or to rely exclusively upon their securities without remedy in respect of any deficiency.

I do not think that the effect of the statute is to put the creditors in this position. The legal personal representatives might have proceeded under section 57. They might have taken steps to prevent the sale of the securities, and it may be that they have or had an action for damages against the creditors; but there is no warrant in the statute, I think, for saying that the contractual rights of the creditors have been lost by reason of the course they took, in the absence, at all events, of any proceeding under section 57 by the legal personal representatives.

There is one further point which I think ought to be mentioned. These provisions, in my judgment, postulating, as they do, a possible deficiency of assets, are intended for the protection of the creditors of the estate and, where the rights of creditors are not prejudiced, they cannot, I think,

be resorted to by the legal personal representatives for the sole benefit of the beneficiaries of the estate. There is no ground, I think, for imputing to the legislature an intention that, where the claims of creditors are not in any way in jeopardy, the contractual right of any particular creditor shall be impaired for the benefit of the beneficiaries.

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

KERWIN J.—This is an appeal by the plaintiff, the Canadian Bank of Commerce, from the judgment of the Court of Appeal for Ontario which, reversing the judgment at the trial, dismissed the action against the respondents, the executors and trustees of the will of Dr. Charles Westlake Hoare.

The testator had incurred liabilities to the Bank and, from time to time, as collateral security therefor had hypothecated to the Bank a number of share certificates and bonds. This action was brought to recover the amount claimed to be due under the various obligations after crediting thereon the proceeds of the sale of the securities. The correctness of the sum for which judgment was entered after trial is not in question, but liability is disputed by reason of the sale by the Bank of the securities under circumstances now to be explained.

The form of hypothecation signed by Dr. Hoare on each occasion contained a list of the particular securities deposited therewith and continued:

> The above mentioned securities and any renewals thereof and substitutions therefor and the proceeds thereof are hereby assigned to and are held by the Canadian Bank of Commerce (hereinafter called the Bank) as a general and continuing collateral security for the payment of the present and future indebtedness and liability of the customer to the Bank wheresoever and howsoever incurred and any ultimate unpaid balance thereof, and such securities, or any part thereof from time to time, may be realized, sold, transferred and delivered by the Bank in such manner as may seem to it advisable and without notice to the undersigned, in the event of any default in such payment, or prior to any such default in the event that the said securities, or any part thereof from time to time shall, in the opinion of the Bank, depreciate in value. The proceeds may be held in lieu of the securities realized and may, as and when the Bank thinks fit, be appropriated on account of such parts of the said indebtedness and liability as to the Bank seems best, without prejudice to its claims upon the customer for any deficiency.

Dr. Hoare died November 10th, 1931, and on April 10th, 1932, letters probate of his last will and testament were granted to the respondents. By a letter of May 14th, 1932,

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addressed to the respondents, the Bank demanded payment of all the deceased's liabilities to it, concluding its letter as follows:

> Without prejudice to or limiting the effect of the above demand further notice is hereby given that if payment is not provided forthwith or adequate collateral security furnished, we will sell the securities we hold at our discretion and look to you for payment of any deficiency.

Discussions ensued as to the possibility of the Bank holding the pledged securities for a rise in the market, or placing a valuation on them with the understanding that the estate would bear any loss or reap any appreciation that might occur by reason of changing market conditions; but these proposals were deemed unsatisfactory by the superior officers of the Bank and of the Trusts and Guarantee Company Limited, one of the executors. On December 23rd, 1933, the executors gave the Bank a notice, which will require consideration later, but which is inserted at this point in order to complete the narrative:

> In the Surrogate Court of the County of Essex.
>
> In the matter of the Estate of Charles W. Hoare, late of the Town of Walkerville, County of Essex, Deceased.
>
> To— The Canadian Bank of Commerce.
>
> The Executors of the Will of Charles W. Hoare, Deceased, being of the opinion that there may be a deficiency of assets to meet the claims of creditors against the said estate, hereby give you notice that you are hereby required pursuant to the provisions of The Trustee Act, R.S.O., 1927, Chapter 150, and amendments thereto, and more particularly the Statute Law Amendment Act, 1931, Section 7 thereof, to prove your claim, if any, against the estate of the said Deceased, within thirty (30) days from the date hereof.
>
> And further take notice that you are required, within thirty days from the date hereof, to state whether you hold any security for your claim or any part thereof, and to give full particulars of the same, and if such security is on the estate of the Deceased, or on the estate of the third person for whom the estate of the Deceased is only indirectly or secondarily liable to place a specified value on each and every such security.
>
> Dated this 23rd day of December, A.D. 1933.
>
> The Trusts and Guarantee Company Limited
> Per "O. H. Birchard"
> Manager.
> and "J. H. Mothersill,"
> Executors of the Will of
> Charles W. Hoare, Deceased.

By letter dated January 4th, 1934, the Bank notified the executors of the amount of its claim and of its determina-

tion to realize the securities, commencing January 10th, 1934, unless arrangements satisfactory to the Bank were made in the meantime, but did not "place a specified value" on the securities. No such arrangements being made, the Bank commenced to realize the securities on January 15th, 1934, and continued from time to time until they were all sold. After crediting the proceeds of the sales a balance remained, for which the Bank is admittedly entitled to judgment in this action against the executors unless the latter are able to escape liability by virtue of the combined effect of the notice of December 23rd, 1933, and of the provisions of sections 56 and 57 of the Ontario *Trustee Act* as enacted by section 7 of chapter 23 of 21 Geo. V. These sections are as follows:

56. (1) On the administration of the estate of a deceased person, in case of a deficiency of assets, every creditor holding security on the estate of the deceased debtor or on the estate of a third person for whom the estate of the deceased debtor is only indirectly or secondarily liable, shall place a value on such security and the creditor shall rank upon the distribution of assets only upon the unsecured portion of his claim after deducting the value of the security, unless the personal representative shall elect to take over the security as hereinafter provided.

(2) Where the personal representative of a deceased person is of the opinion that there may be a deficiency of assets, he may require any creditor to prove his claim and to state whether he holds any security for his claim or any part thereof, and to give full particulars of the same and if such security is on the estate of the deceased debtor or on the estate of a third person for whom the estate of the deceased debtor is only indirectly or secondarily liable, to place a specified value on such security and the personal representative may either consent to the creditor ranking for the amount of his claim after deducting such valuation or may require from the creditor an assignment of the security at an advance of ten per centum upon the specified value to be paid out of the estate as soon as the personal representative has realized upon such security or is in a position to make payment out of the assets of the estate and in either case the difference between the value at which the security is retained or taken, as the case may be, and the amount of the claim of the creditor, shall be the amount for which he shall rank upon the estate of the deceased debtor.

(3) Where inspectors have been appointed as hereinafter provided or where the estate is being administered under the direction or by a court, the personal representative in making his election shall act under the direction of the inspectors or of the court, as the case may be, and the remuneration of the inspectors shall be determined by the surrogate court judge on the passing of accounts.

(4) If the claim of the creditor is based upon a negotiable instrument upon which the estate of the deceased debtor is only indirectly or secondarily liable and which is not mature or exigible, the creditor shall be considered to hold security within the meaning of this section and shall put a value on the liability of the person primarily liable thereon as his security for the payment thereof, but after the maturity of such liability and its non-payment he shall be entitled to amend and revalue his claim.

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57. (1) Where a creditor fails to value any security held by him which under the provisions of this Act he is called upon to value, the personal representative may apply to the judge of the surrogate court from which probate or letters of administration were issued in a summary way for an order that unless a specified value shall be placed on such security and notified in writing to the personal representative, within a time to be limited by the order, such claimant shall, in respect of the claim or the part thereof for which security is held, be wholly barred of any right to share in the proceeds of the estate unless the judge upon the application of the creditor extends the time for the valuation of the security.

(2) Where an estate is being administered by or under the direction of a court, such court shall exercise the jurisdiction conferred by this section upon the judge of the surrogate court.

It will be observed that the executors' notice was given under subsection 2 of section 56, as it is stated therein that the executors are "*of the opinion* that there may be a deficiency of assets to meet the claims of creditors." The heading "In the Surrogate Court of the County of Essex" is in error, as the notice was not given in the course of any proceedings in that court. The only other remark that might be made with reference to the form of the notice is that there is no authority in sections 56 and 57 of the *Trustee Act* whereby the executors might limit the Bank to "thirty days from the date hereof" to give particulars of its claim and to value its securities. It was suggested that the Court should declare the period a reasonable one, but in my view of the matter the point need not be considered.

It is admitted that in fact the assets of the estate are about sufficient to liquidate all claims against it and certainly are more than ample to pay all claims except the one in suit. However, presuming good faith on the part of the executors in forming their opinion as to the possibility of a deficiency of assets, the question still remains as to whether the giving of the notice and the subsequent sale of the securities by the Bank debar the latter from recovering judgment.

It is undoubted that, at the date of the death of Dr. Hoare, under the power given by the various hypothecations, the Bank could have sold its securities and claimed for any deficiency; and that right continued down to the receipt by it of the notice of December 23rd, 1933. However, it is argued that subsection 2 of section 56 of the Act is imperative where it states that the personal representative "may *require* any creditor to prove his claim, etc." While it is admitted that if the creditor abstains

from valuing his securities, the only remedy of the personal representative to compel valuation is to secure an order under subsection 1 of section 57, nevertheless it is contended that in this case, by selling the securities subsequent to the receipt of the notice, the Bank has elected to rely upon such securities. With great respect to the opinions of the learned judges in the Court of Appeal, who so construed the statute, I am unable to agree.

In view of the opening phrases of subsection 1 of section 57, "Where a creditor fails to value any security held by him which under the provisions of this Act he is called upon to value," the executors could not, without a prior request, obtain the order mentioned in a later part of the subsection. That request is provided for by subsection 2 of section 56, as the Bank is not "called upon to value" except when the executors have required the Bank so to do. The words "may require" are not imperative but merely descriptive of one step in the proceedings which the executors may take to secure a valuation by the creditor. This conclusion is fortified by the words "called upon to value" in subsection 1 of section 57.

Under the hypothecations, the Bank had the right to sell the securities "without prejudice to its claims upon the customer for any deficiency." The Bank never gave up its right under these documents, and, in my view of the statute, it was never called upon to choose between relying only upon the securities and placing a value upon them. I fail to see that the respondents' argument is strengthened by stating that, by reason of the Bank's neglect to value its securities, the executors lost their right either to consent to the Bank ranking for the amount of its claim after deducting such valuation, or to require from the Bank an assignment of the securities at an advance of ten per centum upon the specified valuation (subsection 2 of section 56). That right is given only if the creditor, in pursuance of the notice or of an order obtained under subsection 1 of section 57, actually does value.

The members of the Court of Appeal considered they were bound by *In Re Beaty* (1), a decision under the *Insolvent Act* of 1875 (38 Vict., chapter 16), but I am unable to find any analogy between the provisions of any

(1) (1880) 6 A.R. 40.

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insolvency legislation, crystallising, as they generally do, the rights of creditors as of the date of insolvency, and the legislation here in question. Moreover, section 82 of the Act under consideration in the *Beaty* case (1) provided that

> no dividend shall be allotted or paid to any creditor holding security from the estate of the insolvent for his claim, *until the amount for which he shall rank as a creditor upon the estate as to dividends therefrom, shall be established as hereinafter provided.*

Section 84 then provided that a creditor holding security

> shall specify the nature and amount of such security * * * in his claim, and shall therein, on his oath, put a specified value thereon.

It is true that section 82 is not specifically mentioned in the judgments, but the decision was arrived at after a consideration of the scope of the whole Act and the intention of Parliament in dealing with secured creditors. Even in comparing various Insolvency Acts, the differences in the schemes adopted must be borne in mind. In the *Beaty* case (1) the Court distinguished a previous decision, *In Re Hurst* (2), under the *Insolvent Act* of 1864, and the present *Bankruptcy Act* deals with secured creditors in a manner quite different from that in either the statutes of 1864 or 1875.

The sections of the *Trustee Act* replaced by 21 Geo. V, chapter 23, section 7, dealt only with the estates of deceased persons "in case of a deficiency of assets" and these provisions may be traced back to 59 Vict. (Ont.), chapter 22, *An Act respecting the Estates of Insolvent Deceased Persons.* It was in 1931 that the legislature for the first time undertook to deal with the situation where the personal representative was of the opinion that there might be a deficiency of assets. For the reasons already given, it is impossible to find in the legislation an intention that a holder of securities (which may include, as in this case, those having a fluctuating value) is compelled to decide, upon the receipt of a notice from the personal representative of a deceased debtor, whether to value his securities or to realize upon them; at the risk, in the latter event, of losing his right to rank upon the estate for any deficiency.

The appeal should be allowed and the judgment of the trial judge restored with costs throughout.

(1) (1880) 6 A.R. 40. (2) (1871) 31 U.C.R. 116.

DAVIS J.—The Ontario Legislature, in its *Statute Law Amendment Act, 1931* (21 Geo. V, ch. 23, sec. 7), enacted new sections 56, 57 and 58 of the *Trustee Act*. New sec. 56 (1) deals with the administration of the estate of a deceased person in case of a deficiency of assets; new sec. 56 (2) deals with the case where the personal representative of a deceased person "is of the opinion that there may be a deficiency of assets." This subsection is as follows:

56. (2) Where the personal representative of a deceased person is of the opinion that there may be a deficiency of assets, he may require any creditor to prove his claim and to state whether he holds any security for his claim or any part thereof, and to give full particulars of the same and if such security is on the estate of the deceased debtor or on the estate of a third person for whom the estate of the deceased debtor is only indirectly or secondarily liable, to place a specified value on such security and the personal representative may either consent to the creditor ranking for the amount of his claim after deducting such valuation or may require from the creditor an assignment of the security at an advance of ten per centum upon the specified value to be paid out of the estate as soon as the personal representative has realized upon such security or is in a position to make payment out of the assets of the estate and in either case the difference between the value at which the security is retained or taken, as the case may be, and the amount of the claim of the creditor, shall be the amount for which he shall rank upon the estate of the deceased debtor.

The respondents, the personal representatives of the late Charles Westlake Hoare, deceased, who died on or about the 10th day of November, 1931, gave a notice to the appellant, the Canadian Bank of Commerce, a secured creditor of the deceased, under date of December 23rd, 1933, wherein they expressed their opinion that there might be a deficiency of assets to meet the claims of creditors against Dr. Hoare's estate and, pursuant to the amendments of the *Trustee Act* made by the *Statute Law Amendment Act, 1931*, "required" the appellant to prove its claim, if any, against the estate of the said deceased within thirty days from the date thereof. It is to be noticed in passing that new sec. 56 (2) does not fix any period of time for the running of the notice contemplated by that subsection. The notice continued:

And further take notice that you are required, within thirty days from the date hereof, to state whether you hold any security for your claim or any part thereof, and to give full particulars of the same, and if such security is on the estate of the deceased, or on the estate of the third person for whom the estate of the deceased is only indirectly or secondarily liable to place a specified value on each and every such security.

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In partial compliance with the said notice, the appellant filed its claim, dated the 23rd day of January, 1934, with particulars in detail of the numerous securities held by it, but did not value such securities. By a letter dated the 4th day of January, 1934, the appellant had advised the respondents of the then amount of the indebtedness, $67,249.85, and had given a list of all the securities, and, after referring to an earlier demand for payment dated May 14, 1932, which had not been met, had stated:

> Unless some arrangement satisfactory to the Bank is made in the meantime, the Bank has determined to proceed to realize these securities commencing on the 10th of January, 1934, and as to the proceeds realized the Bank will exercise its right to apply the same on such part or parts of the indebtedness of the late Dr. Hoare to the Bank as the Bank may see fit.

No arrangement was made by the respondents satisfactory to the appellant and the appellant commenced to realize on the securities on or about 15th January, 1934. The realization was substantially completed during the month of January, though the sale of some of the securities did not occur until February. On the 26th of February, 1934, the respondents served notice on the appellant, pursuant to sec. 62 of the *Surrogate Courts Act*, that they contested the appellant's claim. The notice, entitled "In the Surrogate Court of the County of Essex," continued:

> You may apply to the Judge of this Court for an Order allowing your claim and determining the amount of it; and if you do not make such application within thirty days after receiving this notice or within such further time as the judge may allow you shall be deemed to have abandoned your claim and the same shall be forever barred.

On the 17th day of April, 1934, the appellant, pursuant to an order made by the Judge of the Surrogate Court, dated the 19th day of March, 1934, which had ordered and directed the appellant to bring an action in the Supreme Court of Ontario within thirty days for the purpose of establishing or recovering its claim against the respondents, issued the writ of summons in this action to recover payment of the amount of the deficiency following upon the sale of the securities. There is no dispute between the parties as to the amounts involved, $26,828.45 in respect of a claim upon a guarantee bond and $882.55 upon a promissory note.

The learned trial judge gave judgment in favour of the appellant, but that judgment was set aside on appeal by

the Court of Appeal for Ontario. The appellant in this Court seeks to have the trial judgment restored.

The respondents have really only one defence to the action; that is, that the appellant failed to value the securities in accordance with the respondents' demand or notice dated the 23rd December, 1933, given pursuant to new sec. 56 (2) of the *Trustee Act*, and, having sold and disposed of all or substantially all of the securities before the expiration of the time limited by the demand or notice for complying therewith, thereby lost its right to recover the amount of the deficiency resulting from the sale of the securities.

Now sec. 57 (1) of the *Trustee Act* as enacted by the *Statute Law Amendment Act, 1931*, provides as follows:

> 57. (1) Where a creditor fails to value any security held by him which under the provisions of this Act he is called upon to value, the personal representative may apply to the judge of the surrogate court from which probate or letters of administration were issued in a summary way for an order that unless a specified value shall be placed on such security and notified in writing to the personal representative, within a time to be limited by the order, such claimant shall, in respect of the claim or the part thereof for which security is held, be wholly barred of any right to share in the proceeds of the estate unless the judge upon the application of the creditor extends the time for the valuation of the security.

The respondents never applied to the Judge of the Surrogate Court for an order barring the appellant of any right to share in the proceeds of the estate. No such order is set up as an answer to the action, and it is frankly admitted that no such order was ever sought by the respondents. It is suggested that because the securities, or at least some of them, had been actually sold before the expiration of the thirty days' notice, nothing was to be gained to the respondents in applying for the order. There was some suggestion during the argument that under section 57 the Surrogate Court is bound to make an order such as provided in that section when there has been a failure on the part of the secured creditor to value securities, but I do not read the section in that way. While the personal representative may apply "in a summary way" for the order, that does not mean that the order is to be granted *ex parte* as a matter of right. It merely means that the application is to be dealt with in an expeditious manner, the same as an application for summary judgment in an action. The Surrogate Judge undoubtedly may exercise

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his discretion, having regard to all the facts and circumstances which may be brought to his attention. But no such application was made and no such order obtained and yet the respondents set up the failure of the appellant to value the securities, pursuant to the written demand of the respondents, as a bar to the action to recover the debt.

There is no dispute that by written contract the deceased gave the appellant an express right not only to sell the securities but to look to him for any deficiency on the sale of the securities. The contractual rights and obligations are perfectly plain, and the appellant is entitled to recover the debt sued for unless there is some statutory bar arising out of the failure of the appellant to place a value on the securities in compliance with the respondents' demand of December 23, 1933. The only statutory bar is provided by sections 56 (2) and 57 (1) of the *Trustee Act* above set out. In my opinion, the respondents had no defence to the action upon the debt unless they could produce an order of the Surrogate Judge properly made under sec. 57 (1) wholly barring the appellant of any right to share in the proceeds of the estate of the deceased. That there was a breach on the part of the appellant of the statutory duty, I think is plain. The statute gave the right to the respondents in the circumstances (the good faith of the respondents' opinion that there might be a deficiency of assets is not questioned) to require the appellant to place a specified value on the securities. But this was an entirely new statutory duty imposed by sec. 56 (2) upon secured creditors of deceased persons in cases where the personal representative is of the opinion that there may be a deficiency of assets, and the statute which imposed the duty expressly provided by sec. 57 (1) a remedy for a breach of the duty. In my opinion, that is the only available relief.

Lord Esher, M.R., in *Robinson* v. *Workington Corporation* (1), said:

> It has been laid down for many years that, if a duty is imposed by statute which but for the statute would not exist, and a remedy for default or breach of that duty is provided by the statute that creates the duty, that is the only remedy.

Craies on Statute Law (4th ed., 1936), at p. 220, states the general rule in these words:

> If a statute creates a new duty or imposes a new liability, and prescribes a specific remedy in case of neglect to perform the duty or dis-

(1) [1897] 1 Q.B. 619, at 621.

charge the liability, the general rule is "that no remedy can be taken but the particular remedy prescribed by the statute."

The respondents, not having obtained the statutory relief that may be given in the event of a breach of the statutory duty, had no defence upon that ground to the appellant's action to recover the amount of the contractual debt. And no other ground of defence than the breach of the statutory duty was relied upon.

The appeal must be allowed and the judgment at the trial restored, with costs to the appellant throughout.

Appeal allowed with costs.

Solicitors for the appellant: *Blake, Lash, Anglin & Cassels.*

Solicitors for the respondents: *McTague, Springsteen & McKeon.*

G. MARGOLIUS (PLAINTIFF) .....APPELLANT;

AND

A. DIESBOURG (DEFENDANT) .....RESPONDENT.

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ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Contract under seal—Action at law thereon against a person not a party to the contract.

No person can sue or be sued in an action at law upon a contract under seal unless he is a party to the contract. Authorities reviewed.

Plaintiff sued K. and D. for damages for alleged breach of a contract to purchase goods, which contract was made under seal between plaintiff and K. Plaintiff alleged that subsequent to the contract K. introduced D. as the principal on whose behalf K. had entered into it, and that D. confirmed that representation. The trial judge dismissed the action (on ground of illegality of the contract) and an appeal from his judgment was dismissed by the Court of Appeal for Ontario. K. had not been represented at trial or on the hearing of the appeal, and plaintiff's notice of appeal to this Court was directed only to the defendant D. and asked for judgment against him. At the hearing of the appeal before it this Court pointed out that the contract was under seal and D. was not a party to it, and referred to the principle first above stated.

Held: The action, being solely one at law to recover damages for alleged breach of contract under seal, was not maintainable against D., on the principle first above stated.

The Court could not disregard the said point of law, though D. had not raised it at any time in the proceedings. It appeared upon the very document sued upon and put in at the trial. Nor could the Court entertain the argument that K. was merely an agent for D. and

*PRESENT:—Duff C.J. and Rinfret, Crocket, Davis and Kerwin JJ.

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exceeded his authority in attaching a seal to the contract and in making the contract to purchase himself for his own benefit—that was not the basis of the action. Nor could plaintiff succeed upon an alternative contention that D. subsequently ratified the contract and might accordingly be sued upon it. Nor was there any foundation for the application of the doctrine of novation. Nor was this a case where D. had himself received the benefit under the contract and was bound in equity to pay for the same.

APPEAL by the plaintiff from the judgment of the Court of Appeal for Ontario dismissing his appeal from the judgment of Rose, C.J.H.C., dismissing his action. The action was brought to recover damages for alleged breach of a contract to purchase whiskey. The material facts of the case for the purposes of the judgment of this Court are sufficiently stated in that judgment, now reported. The appeal to this Court was dismissed—but without costs, as the ground for dismissal by this Court (namely, that the appellant's action, being solely one at law to recover damages for alleged breach of a contract under seal, was not maintainable against the respondent who was not one of the parties to the contract) had not been raised by the respondent at any stage of the proceedings. (The point was raised by this Court during the argument and opportunity was given to counsel to submit argument upon it).

I. F. Hellmuth K.C. and *J. R. Cartwright K.C.* for the appellant.

A. Racine K.C. and A. F. Gignac for the respondent.

The judgment of the court was delivered by

DAVIS J.—The appellant commenced this action in the Supreme Court of Ontario against the respondent Diesbourg and one Kellner, defendants, by writ of summons issued June 1st, 1934. The material portions of the Statement of Claim are as follows:

2. On or about the 10th day of October, 1933, the defendant Edward H. Kellner, representing himself to the plaintiff as one of a syndicate who are in the market to buy liquor in bond in bonded warehouse for export to the United States, entered into a contract with the plaintiff herein, and the plaintiff alleges that he then told the said defendant that he had an arrangement with Consolidated Distilleries Limited whereby he could sell its brands of whiskey and he also disclosed to the defendant that he, the plaintiff, was making 17 cents per American gallon on said whiskey.

The plaintiff prays leave to refer to contract entered into between George Margolius and Edward H. Kellner which contract is dated the 10th day of October, 1933.

3. The plaintiff further alleges, and the fact is, the defendant Edward H. Kellner subsequently introduced the defendant Arthur Diesbourg to the plaintiff as the principal on whose behalf he had entered into the contract, which representation was confirmed by Arthur Diesbourg and the plaintiff also disclosed to the defendant Arthur Diesbourg the source of his supply and that he was making 17 cents on each and every gallon.

4. According to the agreement the defendant Edward H. Kellner contracted to purchase 200,000 gallons of whiskey at the price of $4.55 per American gallon, wood included, in bonded warehouse which contract the defendants failed to carry out.

5. The plaintiff alleges and the fact is that the defendant Edward H. Kellner and the defendant Arthur Diesbourg failed to fulfil the agreement with the plaintiff, in that they did not carry out the contract pursuant to the terms thereof, in which contract the defendant Arthur Diesbourg is the undisclosed principal and furthermore the said defendant refused to carry out the contract.

6. As a result of the facts set forth in the foregoing paragraphs the plaintiff by reason of breach of contract suffered damages to the extent of 17 cents per American gallon on 200,000 gallons of whiskey which was to be purchased by the defendants.

7. The plaintiff therefore claims from the defendants herein

(*a*) $34,000 damages for breach of contract.

(*b*) The costs of this action.

(*c*) Such further and other relief as to this honourable Court may seem just.

The contract sued upon dated October 10, 1933, is as follows:

THIS AGREEMENT made in duplicate this 10th day of October, A.D. 1933.

BETWEEN: GEORGE MARGOLIUS, of the City of Toronto, in the County of York, Gentleman,

Hereinafter called the Vendor,

Of the FIRST PART;

and

E. H. KELLNER, of the City of Windsor, in the County of Essex, Gentleman,

Hereinafter called the Purchaser,

Of the SECOND PART:

WITNESSETH that in consideration of the sum of TWO DOLLARS ($2) now paid by the purchaser to the vendor (the receipt whereof is hereby by him acknowledged), and of these presents, the parties hereto agree as follows:

1. The purchaser hereby agrees to buy from the vendor and the vendor hereby agrees to sell to the purchaser one hundred thousand gallons (100,000) of Consolidated Distilleries Limited American Type Rye Whiskey and One Hundred thousand gallons (100,000) of Consolidated Distilleries Limited Bourbon Whiskey (measurement to be in American Gallons—128 ounces to the gallon) (Virgin Whiskey four years old or older to test 116 American Proof Gallons), at the price or sum of $4.55 per gallon, wood included, in bond in bonded warehouse in the Province of Ontario, in the Dominion of Canada.

2. The purchaser agrees to pay a deposit of 25 per cent. of the total sale price not later than 3 o'clock in the afternoon of Monday, October

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16th, 1933; the said deposit to be paid to the Canadian Bank of Commerce, Head Office, Toronto, Ontario, to the order of the vendor; to be paid to the said vendor on the said Bank's guarantee of delivery in accordance with the terms hereof.

3. The purchaser hereby undertakes to take delivery of the said whiskey and pay the balance of the purchase price not later than March 31st, 1934; provided that the purchaser may from time to time, before March 31st, 1934, take delivery of any part of the said whiskey, but in not less than carload lots, upon payment in full of the sum of $4.55 per gallon therefor; the intention being that the 25 per cent. deposit to be paid as hereinbefore set forth shall remain as a deposit until the final completion of this contract.

4. The vendor agrees to store the said whiskey in a bonded warehouse in the Province of Ontario, without charge, up to January 31st, 1934, after which date the purchaser shall pay the storage charges.

5. Delivery shall be completed by transferring to the purchaser Government Certificates or other documentary evidence showing the whiskey to be in bond in Ontario.

IN WITNESS WHEREOF the parties hereto have hereunto set their hands and seals.

SIGNED, SEALED AND DELIVERED
in the presence of
"Samuel Ciglen."

"Edward H. Kellner." (seal)
"G. Margolius." (seal)

The action came to trial before the Chief Justice of the High Court without a jury. No one appeared for the defendant Kellner. At the conclusion of the trial, for reasons stated at some length, the learned trial judge dismissed the action with costs to be paid by the plaintiff to the defendant Diesbourg. The learned trial judge thought it ought to be found that Diesbourg was a principal and Kellner his agent and that Diesbourg was liable on the contract if anybody was liable. But the learned judge based his dismissal of the action upon the ground of the illegality of the contract. Secs. 72 and 77 of the Ontario *Liquor Control Act*, R.S.O. 1927, ch. 257, provide that, except as provided by the Act, no person shall within Ontario sell or offer to sell liquor and no person shall within Ontario attempt to purchase or purchase liquor. The trial judge could find no provision in the Act that takes the plaintiff out of the prohibition of sec. 72. Further, the trial judge refused to entertain the argument of counsel for the plaintiff that the plaintiff was not acting for himself but was a representative of distillers, and in any event was unable to find any section in the Act that gives a distiller the right within Ontario to sell to any person other than the Ontario Liquor Control Board. Even if a distiller

had any right to sell, the trial judge did not see how the plaintiff, who is suing upon a contract which professes to evidence a sale by the plaintiff in Ontario, could suggest that the case ought to be treated as if the contracting party, the distiller, were the plaintiff and entitled to have judgment against the purchaser for the purchase price. The contention that the ultimate destination of the liquor was intended to be the United States was considered by the trial judge but he concluded that under the Dominion statute as it stood at the time (the *Export Act,* R.S.C. 1927, ch. 63, as amended 1930—20-21 Geo. V, c. 19) it was not possible for a distiller to sell even to a person in the United States. Under the amending section, notwithstanding the provisions of any other statute or law or regulation, no intoxicating liquor held in bond or otherwise under the control of officials of the Dominion Government under the provisions of the *Excise Act,* the *Customs Act* or any other statute of Canada could be released or removed from any bonding warehouse, distillery, brewery or other building or place in which such liquor was stored in any case in which the liquor proposed to be removed was destined for delivery in any country into which the importation of such liquor was prohibited by law, and the trial judge found that the importation of liquor into the United States at the time the contract was made was prohibited and the parties to the transaction knew it. The trial judge further found that the expectation of the parties that within a short time importation into the United States might become legal made no difference. The transaction at the time that it was entered into was a transaction respecting liquor that could not be released from the bonded warehouse. Further, the trial judge put the disposition of the case upon the ground that the seller, the buyer and the liquor were all in Ontario and the sale was made there, and that the use that the buyer intended to make of the liquor was unimportant, as was also the manner in which under the contract delivery was to be made.

From that judgment the plaintiff served notice of appeal to the Court of Appeal for Ontario. The appeal was heard by the Chief Justice in Appeal, Mr. Justice Riddell and Mr. Justice Fisher, and was dismissed with costs. No written reasons for judgment appear to have been given. The

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formal order of the Court of Appeal recites the presence of counsel for the defendant Diesbourg and that no one appeared for the defendant Kellner. The costs of the appeal were directed to be paid by the plaintiff to the defendant Diesbourg. From that judgment the plaintiff then gave notice of appeal to this Court, and the notice of appeal, which was directed only to the defendant Diesbourg, asked that the said judgment of the Court of Appeal for Ontario "may be reversed and that judgment be entered in favour of the plaintiff against the defendant Diesbourg for the relief claimed in the statement of claim." It is plain that no appeal to this Court was taken against the judgment in so far as the action as against the defendant Kellner had been dismissed.

Mr. Hellmuth in a very able argument presented the facts of the case as the purchase and sale of liquor in bond in Ontario to be exported into the United States when prohibition in that country had ceased. He pointed to clause 5 of the contract which provided that it was only the government certificates and not the liquor itself that were to be delivered to the purchaser, and contended that the transaction was plainly one necessarily involving the export of liquor under Dominion regulations and control and did not fall within the purview of the Ontario statute, if, indeed, anything in that statute could be read in the sense of attempting to interfere with the exportation of liquor, a subject-matter of Dominion legislation. Mr. Hellmuth contended further that, the necessary States of the Union having voted in favour of the repeal of prohibition, the parties were only awaiting the formalities of Congress to give effect to the repeal and that was the reason why March 31, 1934, was specifically mentioned in paragraph 3 of the contract. Mr. Hellmuth stressed the presumption against illegality and argued that if a contract could be performed legally it was not sufficient to show that it could be performed illegally, and that the evidence in this case did not show that it was the intention of the parties to do something with the liquor contrary to law.

It becomes unnecessary for us to determine the grounds of appeal advanced by Mr. Hellmuth and Mr. Cartwright so forcibly on behalf of the appellant. During the argument the Court called attention to the fact that the con-

tract sued upon was a contract under seal made between the appellant and Kellner. The respondent Diesbourg was not a party to the contract. It has long been settled that no person can sue or be sued in an action at law upon a contract under seal, unless the person is a party to the contract. Pollock on Contracts, 10th ed. (1936), at pp. 97 and 98 states the rule thus:

> When a deed is executed by an agent as such but purports to be the deed of the agent and not of the principal, then the principal cannot sue or be sued upon it at law, by reason of the technical rule that those persons only can sue or be sued upon an indenture who are named or described in it as parties.

The cases cited in the foot-note in support of that statement are: *Lord Southampton* v. *Brown* (1); *Beckham* v. *Drake* (2).

The rule was applied in this Court in *Porter* v. *Pelton* (3), where it was held that no action could lie on an agreement under seal that had not been signed by the defendant, even if it were an agreement for his benefit and a seal was not necessary.

The rule, of course, only applies to actions at law. In a proceeding in equity in respect of a contract involving a trust, different considerations prevail, as Pollock says at p. 98:

> But where a trustee contracts in his own name alone, even under seal, and afterwards repudiates the trust, the beneficiary can enforce the contract, making him a defendant without a separate application to the Court for authority to sue in the trustee's name.

The action here is solely one at law to recover damages for alleged breach of contract under seal. Newcombe J. in the *Vandepitte* case (4), carefully reviewed and discussed the well-known cases of *Tweddle* v. *Atkinson* (5); *Gray* v. *Pearson* (6); *Gandy* v. *Gandy* (7); and *Dunlop Pneumatic Tire Co.* v. *Selfridge & Co.* (8). The *Vandepitte* case went to the Privy Council (9), and Lord Wright delivering the judgment said in part at p. 79:

(1) (1827) 6 B. & C. 718, 30 R.R. 511.
(2) (1841) 9 M. & W. at p. 95, affirmed sub nom. *Drake* v. *Beckham*, 11 *ib.* 315, 12 L.J. Ex. 486, 60 R.R. 691.
(3) (1903) 33 Can. S.C.R. 449.
(4) *Preferred Accident Ins. Co. of New York* v. *Vandepitte*, [1932] S.C.R. 22, at 30-31.
(5) (1861) 1 B. & S. 393.
(6) (1870) L.R. 5 C.P. 568.
(7) (1885) 30 Ch. D. 57.
(8) [1915] A.C. 847.
(9) *Vandepitte* v. *Preferred Accident Ins. Corpn. of New York*, [1933] A.C. 70.

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No doubt at common law no one can sue on a contract except those who are contracting parties and (if the contract is not under seal) from and between whom consideration proceeds: the rule is stated by Lord Haldane in *Dunlop Pneumatic Tyre Co.* v. *Selfridge & Co.* (1): "My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of a *jus quaesitum tertio* arising by way of contract. Such a right may be conferred by way of property, as, for example, under a trust, but it cannot be conferred on a stranger to a contract as a right to enforce the contract *in personam*." In that case, as in *Tweddle* v. *Atkinson* (2), only questions of direct contractual rights in law were in issue, but Lord Haldane states the equitable principle which qualifies the legal rule, and which has received effect in many cases, as, for instance, *Robertson* v. *Wait* (3); *Affréteurs Réunis Société Anonyme* v. *Leopold Walford (London) Ld.* (4); *Lloyd's* v. *Harper* (5)—namely, that a party to a contract can constitute himself a trustee for a third party of a right under the contract and thus confer such rights enforceable in equity on the third party. The trustee then can take steps to enforce performance to the beneficiary by the other contracting party as in the case of other equitable rights. The action should be in the name of the trustee; if, however, he refuses to sue, the beneficiary can sue, joining the trustee as a defendant.

In the more recent case of *Harmer* v. *Armstrong* (6), Lord Maugham (then Maugham J.) fully considered what he called "a curious exception" to the general rule that an undisclosed principal may sue or be sued in his own name on any contract duly made on his behalf,

in the case of a contract under seal entered into by an agent, even where the agent is described as acting on behalf of a named principal.

In such a case

the principal can neither sue nor be sued upon it, the rule being that the parties are determined exclusively by the form of the instrument. The reason for the rule is not to my mind a very satisfactory one, but the rule itself is perfectly well settled * * *

Upon appeal the Court of Appeal, while affirming the decision that the agreement was entered into by the defendant Armstrong as agent and trustee for the plaintiffs and himself, reversed the decision that the fact that the agreement was under seal prevented the plaintiffs from enforcing it in the action. Both Lord Maugham (as he now is) and the Court of Appeal came to the conclusion on the facts that the defendant Armstrong had acted in a fiduciary capacity in relation to the agreement—he was a trustee of the agreement for the plaintiffs and as trustee had committed a breach of trust in not enforcing the con-

(1) [1915] A.C. 847, 853.
(2) (1861) 1 B. & S. 393.
(3) (1853) 8 Ex. 299.
(4) [1919] A.C. 801.
(5) (1880) 16 Ch. D. 290.
(6) [1934] 1 Ch. 65.

tract. In those circumstances the Court of Appeal held that the case was plainly one in which the court ought to act on the equitable rule and decree specific performance of the contract.

In the case before us the appellant's action is solely one at law to recover damages for alleged breach of contract under seal. It is not the case of a *cestui que trust* seeking to enforce a contract when the trustee has committed a breach of trust.

The point was not raised by the respondent Diesbourg at any time in the proceedings, and counsel for the appellant contends that the respondent should not now be allowed to set it up in answer to the appellant's claim. But the appellant sued upon the contract and in his statement of claim prayed leave to refer to it at the trial and the first exhibit put in at the trial on behalf of the appellant was the contract itself, plainly under the seals of both parties to it. The Court cannot disregard the point of law, even at this stage of the proceedings, when it plainly appears upon the very document upon which the action is brought. Nor can we entertain the ingenious argument of counsel for the appellant that Kellner was merely an agent for Diesbourg and exceeded his authority in attaching a seal to the contract and in making the contract to purchase himself for his own benefit. That might entitle Diesbourg to an action against Kellner for damages but it is not the basis of the appellant's action. Nor can the appellant succeed upon his alternative contention that Diesbourg subsequently ratified the contract and may accordingly be sued upon it. Nor is there any foundation for the application of the doctrine of novation urged upon us by counsel for the appellant. Nor is this a case where the respondent has himself received the benefit under the contract and is bound in equity to pay for the same.

The action is not maintainable against the respondent. On this ground alone the appeal must be dismissed, but without costs, as the respondent never raised the point at any stage of the proceedings.

Appeal dismissed, without costs.

Solicitors for the appellant: *Smith, Rae, Greer & Cartwright.*

Solicitors for the respondent: *Racine, Gignac & Fleming.*

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*Nov. 25.
1937
*Feb. 2.

CAPITAL TRUST CORPORATION LTD. AND DANIEL J. COFFEY, EXECUTORS OF THE ESTATE OF JOSEPH M. MACKENZIE, DECEASED ..... APPELLANTS;

AND

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Income tax—Direction in will for payment of sum monthly to testator's son, an executor—Construction of will—Whether monthly sum a legacy or remuneration as executor and, as such, taxable income—Payment in one year of lump sum covering arrears for previous years—Imposition of tax in respect of the lump sum—Income War Tax Act, R.S.C. 1927, c. 97, ss. 3, 9, 11.

A testator by his will named three executors including his son J. Subsequently one of the named executors died. Later, by codicil, the testator appointed two additional executors. By a subsequent codicil he directed that his son J. be paid $500 a month "in addition to any sum which the courts or other proper authorities may allow him in common with the other executors." The testator died on December 5, 1923. Nothing was paid to J. in connection with said direction for payment of $500 a month, until March 5, 1927, when a lump sum of $19,500 was paid him to cover the period from the testator's death to that date. From that date until his death in 1932, J. received the $500 a month. The Minister of National Revenue claimed, under the *Income War Tax Act*, R.S.C. 1927, c. 97, for income tax in respect of the payments so received by J.

Held: (1) On interpretation of the will, the $500 a month directed to be paid to J. was not a legacy, but additional remuneration to him as executor, and, as such, was taxable income.

(2) The said lump sum of $19,500 was assessable for income tax in respect of 1927, the taxation year in which it was actually received, notwithstanding that $18,000 of that sum represented arrears that had fallen due during preceding years (the result being that, under the Act, a higher percentage of taxation was imposed than if $6,000 had been allocated to each of the preceding three years). S. 3 (defining "income") and s. 9 (imposition of tax) of the Act, referred to. S. 11 had no application to the facts of the case.

Judgment of the Exchequer Court of Canada (Angers J.), [1936] Ex. C.R. 163, affirmed.

APPEAL by the executors of the estate of Joseph M. Mackenzie, deceased, from the judgment of Angers J. in the Exchequer Court of Canada (1) affirming the assessment for income tax in respect of certain payments made to the said deceased as set out in the judgment now reported

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(1) [1936] Ex. C.R. 163.

and in the above headnote. The appeal to this Court was, by the judgment now reported, dismissed with costs.

D. J. Coffey K.C. for the appellants.

W. S. Fisher for the respondent.

The judgment of the court was delivered by

DAVIS J.—This is an income taxation case. The late Sir William Mackenzie of Toronto died on December 5, 1923. By his last will and testament, dated May 20, 1909, he gave and devised all his estate unto three named executors and trustees upon the trusts therein mentioned and provided that his estate should be divided ultimately among his wife and children, and children of any deceased child, as if he had died intestate, with authority to his executors and trustees to make divisions of the estate from time to time when and as in their discretion they should think suitable having regard to the general position of the estate and its future requirements.

This will remained unchanged from 1909 until November 14th, 1923, at which time, one of his sons named as an executor and trustee having died, Sir William appointed by codicil two additional executors and trustees, thereby increasing the number from two to four. The following day, November 15th, 1923, by a second codicil he bequeathed the sum of $5,000 to each of his grandchildren then living. On November 28th, 1923, he made a third codicil, upon which the questions in issue in this case have arisen. This codicil was as follows:

> This is a codicil to the last will and testament of me, William Mackenzie, of Benvenuto, Toronto.
>
> WHEREAS by my said will I appointed my son Joseph Merry Mackenzie and Sir Edmund Byron Walker, President of the Canadian Bank of Commerce, to be two of the executors thereof, AND WHEREAS by codicil to my said will made on the fourteenth day of November, one thousand nine hundred and twenty-three, I appointed Robert John Fleming, formerly General Manager of the Toronto Railway Company, and my son-in-law Frank H. McCarthy to be additional executors of my said will Now I DIRECT that my son Joseph Merry Mackenzie shall be paid Five hundred dollars a month in addition to any sum which the courts or other proper authorities may allow him in common with the other executors. AND in all other respects I confirm my said will, and the codicils thereto made.

Then on December 4th, 1923, another codicil was made providing for the use of the testator's Toronto home by his

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daughters upon certain terms and conditions. The following day Sir William died.

Joseph M. Mackenzie, a son of the testator and one of the executors named in the will, survived his father and died some time in 1932. It was apparently inconvenient for some years for the estate to pay to Joseph M. Mackenzie the $500 a month provided by the third codicil, and nothing appears to have been paid to him in this connection until the 5th of March, 1927, when a lump sum of $19,500 was paid to him to cover the period from the date of the testator's death to that date. During the balance of the year, 1927, the payments amounted to $4,916.67, making a total sum received by him in that year of $24,416.67. During the succeeding years 1928, 1929, 1930 and 1931, and up to the date of his death in 1932, he appears to have received his $500 a month. None of this money was reported by the late Joseph M. Mackenzie in his income tax returns upon the ground, it is said, that he treated these moneys as a legacy to him. Under section 3 (*a*) of the Dominion *Income War Tax Act* these moneys, if a legacy out of capital, would not be taxable, because income as defined by the Act excludes the value of property acquired by gift though not the income from such property.

The first question, then, that arises in this case is whether or not, as a matter of interpretation, the $500 a month directed to be paid to the son was a legacy or additional remuneration to him as an executor and trustee over and beyond whatever his portion might be of the compensation which would be allowed by the Surrogate Judge to the executors and trustees upon the passing of their accounts. If it be determined that these moneys were not a legacy but remuneration, then the further question is raised in this appeal as to whether or not the Department of National Revenue was entitled to assess Mr. Mackenzie for the taxation period 1927 the whole of the sum of $19,500 received by him on March 5, 1927, notwithstanding that $18,000 of that amount represented arrears of monthly payments that had fallen due during the preceding three years. The obvious objection to treating the whole amount as income in the particular year in which it was actually received is that it results in a higher percentage

of taxation upon the total amount than could have been imposed had the payments been made as they fell due month by month during the preceding years. The appellants, the executors of the will of the late Joseph M. Mackenzie, contend that if, contrary to their main contention, the payments are not to be treated as a legacy but as additional remuneration, then the assessments should be revised so as to allocate $6,000 to each of the years in respect of which the amounts were payable, and the tax levied accordingly.

Dealing now with the first question, as to whether or not the $500 a month was a legacy or additional remuneration *qua* executor. It is not unreasonable to assume that the testator realized, or that his attention was called to the fact, that increasing the number of executors from two to four would necessarily involve his son in a substantial decrease of compensation as one of the executors. The codicil does not in precise language say that the $500 a month is additional remuneration to the son as an executor but it is sufficiently definite to express that to be the intention of the testator. The words are,

> Whereas * * * by codicil * * * I appointed * * * additional executors * * * Now I direct that my son * * * shall be paid Five hundred dollars a month in addition to any sum which the courts or other proper authorities may allow him in common with the other executors.

A fair test to apply is to ask oneself, what would have been the position if the son had renounced his executorship? Could he have enforced payment of this monthly sum while declining, as he would have been quite free to do, to act as an executor of his father's will? It must be held, I think, that he could not. If that is so, then it was not a legacy but additional remuneration and as such was taxable income.

But should the total payment of $19,500 have been assessed in respect of the taxation year in which it was actually received? If so, it is apparent that it works an injustice to the taxpayer, but it is almost inevitable that every general taxation statute will in its application to some particular case create an injustice while in its wide application to normal conditions it will work satisfactorily. The statute here by section 3 defines income as "income received" and by section 9 imposes the tax upon "the

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income during the preceding year." Unfortunately in this case the taxpayer is bound to pay a larger amount than could have been levied and collected upon the same income had it been paid in instalments month by month as it became due and payable, but that cannot affect the liability plainly imposed by the statute.

We were pressed to apply the provisions of section 11 to this income as something that "accrued to the credit" of the taxpayer each month, but section 11 has no application to the facts of this case. It relates only to income of a beneficiary of any estate or trust.

We cannot escape from the conclusion, which seems a rather harsh one, that the appeal must be dismissed with costs if asked.

Appeal dismissed with costs.

Solicitors for the appellant: *Coffey & McDermott.*
Solicitor for the respondent: *W. S. Fisher.*

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*Oct. 26

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*Mar. 19.

THE HALIFAX SCHOOL FOR THE BLIND (PLAINTIFF) ..... APPELLANT;

AND

LEWIS CHIPMAN AND OTHERS, TRUSTEES UNDER THE WILL OF THOMAS E. KELLEY, DECEASED (DEFENDANTS)..... RESPONDENTS.

IN THE MATTER OF THE ESTATE OF THOMAS E. KELLEY, DECEASED

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA IN BANCO

Will—Construction—Direction to trustees to pay the "net annual interest and income" of fund to charitable institution—Latter claiming right, as sole beneficiary of income, to corpus of the fund.

A testator by his will appointed trustees, providing also for appointment of new trustees in place of those dying, etc., and gave them his residuary estate in trust to convert into money and stand possessed of all moneys in trust for certain uses and purposes, including, as to $20,000, to invest it and pay the net annual interest and income therefrom to his sister for life if remaining unmarried, and from and after her death or marriage to keep invested said sum and "pay and apply the net annual interest and income thereof," one-half to appellant, a charitable institution (incorporated by statute), "to be

*PRESENT:—Duff C.J. and Rinfret, Crocket, Davis and Kerwin JJ.

used for the general purposes of that institution," and, as to another $20,000, to invest it and pay and apply the net annual interest and income thereof for the benefit of a certain church, and should (*inter alia*) said church cease to exist or change its adherence, "then and thereafter" to "annually pay over the whole of the net annual interest and income" of said sum to appellant "to be used for the general purposes of that institution." In events which occurred since the testator's death, appellant became entitled to said gifts in its favour. It claimed the right, as sole beneficiary of the income, to receive from the trustees the corpus (one-half and the whole respectively) of said sums.

Held: Appellant was not entitled to receive the corpus. Judgment of the Supreme Court of Nova Scotia *in banco,* 11 M.P.R. 65, affirming, on equal division, judgment of Mellish J., *ibid,* affirmed.

Per Duff C.J. and Davis J.: The testator's intention was plainly that the corpus should not be handed over to the beneficiary. *Wharton* v. *Masterman,* [1895] A.C. 186 (applying to charities the rule in *Saunders* v. *Vautier,* 4 Beav. 115, that where a legacy is directed to accumulate for a certain period, or where the payment is postponed, the legatee, if he has an absolute indefeasible interest in the legacy, is not bound to wait until the expiration of that period, but may require payment the moment he is competent to give a valid discharge) discussed; that case does not cover the present one. Where, as here, a testator has clearly settled a fund for the benefit of a particular charitable institution, from which fund the annual income is to be paid over by the trustees, whose perpetual succession is expressly provided for, that fund is a capital endowment, or in the nature of a capital endowment, created and settled for the benefit of the particular charity so long as it lasts, but no longer. It cannot be treated as an absolute and presently vested gift of the corpus of the fund which the beneficiary at any time may lawfully demand to be paid over to it and the trust in respect thereof arrested and extinguished without reference to the contrary intention of the testator. In the present case it is income that is given and not capital, and to make the order sought would be to vary the trust (*In re Blake's Estate; Berry* v. *Geen,* 53 T.L.R. 411, cited and discussed).

Per Rinfret and Crocket JJ.: The rule that where there is an unlimited and unrestricted gift of income, the gift carries with it the corpus from which the income is derived, has no application where the will clearly shews, expressly or impliedly, that the testator intends that the gift should not absolutely vest the corpus in the beneficiary. It is not sufficient to carry the corpus that the annual payments of the income therefrom to the beneficiary are intended to continue in perpetuity (which they may be in the case of charitable gifts), if it clearly appears on a perusal of the entire will that, notwithstanding this fact, the testator intended that the beneficiary should not itself take possession of the corpus. (*Coward* v. *Larkman,* 56 L.T.R. 278; 57 L.T.R. 285; 60 L.T.R. 1, cited and discussed. *In re Morgan,* [1893] 3 Ch. 222, discussed). The rule laid down in *Saunders* v. *Vautier,* 4 Beav. 115, and the basis of its application in *Harbin* v. *Masterman,* [1894] 2 Ch. 184, and (on appeal therefrom) *Wharton* v. *Masterman,* [1895] A.C. 186, discussed. Construing, as a whole, the will now in question, it was the testator's intention to create a perpetual trust in the hands of his trustees, and not to have the trust extinguished and the capital funds taken out of their hands.

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Per Kerwin J.: If this were a case where the testator had made a gift of income indefinitely to an individual, the latter would be entitled absolutely to the corpus. *Wharton* v. *Masterman,* [1895] A.C. 186 (discussed) cannot be relied on as indicating that the same rule applies where the legatee is a charity; that case, on the questions there arising, does not cover the point now in question. The law is correctly stated in Tudor on Charities, 5th ed., at p. 76, as follows: "A charitable trust may be made to endure for any period which the author of the trust may desire. It may therefore be created for the application of the income in perpetuity to the charitable purpose * * *" (Reference also to the same work at p. 78 as to the true application of the rule in *Saunders* v. *Vautier* in the case of charities. Reference also to other authorities). The gift of the income in perpetuity to the charity in the present case was entirely valid and proper.

APPEAL by the plaintiff from the judgment of the Supreme Court of Nova Scotia *in banco* (1), which, on an equal division of the court, dismissed the plaintiff's appeal from the judgment of Mellish J. (2) holding against the plaintiff's claim (in proceedings begun by originating summons) for payment and transfer to it of the principal of a fund, and one half the principal of another fund, created and dealt with in the will of Thomas E. Kelley, deceased.

The plaintiff, appellant, The Halifax School for the Blind, is a charitable institution, incorporated by statute. The defendants, respondents, are the present trustees of the will of the said deceased, who died in 1904.

By his will the deceased appointed certain persons to be his executors and trustees of his will and declared that if and whenever any trustee for the time being should die or resign, etc., the surviving or continuing trustee or trustees should, with the approval of a Judge of the Supreme Court of Nova Scotia, in writing appoint a new trustee or new trustees in the place of the trustee or trustees so dying, etc.

Then, after providing for certain specific gifts, he gave, devised and bequeathed his residuary estate to his trustees in trust for conversion into money, and directed that his trustees should stand possessed of the moneys "in trust for the uses and purposes hereinafter declared and expressed."

Then followed a number of clauses, including the following:

"Third. In trust as to the sum of [$20,000] of the trust moneys to invest the same and pay the net annual

(1) 11 M.P.R. 65; [1934] 4 D.L.R. 309.
(2) 11 M.P.R. 65, at 66-69; [1934] 4 D.L.R. 309, at 309-312.

interest and income thereof" to the testator's sister for and during her life if she so long remained unmarried.

"Fourth. In trust as to the sum of [$20,000] of the trust moneys to invest the same and to pay and apply the net annual interest and income thereof for the benefit of the Congregational Church at Cheboque" in manner set out. This clause concluded as follows:

> Should said Church * * * cease to exist or change its adherence then and thereafter my Trustees shall annually pay over the whole of the net annual interest and income of said sum of [$20,000] to [appellant] to be used for the general purposes of that institution.

The next clause read in part:

> Fifth. Upon Trust that my Trustees from and after the death or marriage of my sister * * * do keep invested the sum of [$20,000] mentioned in the section or paragraph hereof numbered "Third" and do pay and apply the net annual interest and income thereof in the manner following, that is to say, one half thereof to [appellant] to be used for the general purposes of that institution, and the other half thereof in and towards the maintenance and support of a Free Public Library or Free Public Library and Museum at Yarmouth * * *

Among further provisions was one for investment of the residue of the trust moneys and annual division of the income and interest equally among his trustees as a recompense for their extra care and careful management, and to be in addition to the remuneration or commission thereinafter named, provided that any loss or depreciation happening to any of the trust moneys was to be made good out of said residue. Another provision was that the trustees should receive and retain for themselves from the interest and income of the trust moneys as remuneration in addition to the aforesaid recompense and to all costs, etc., a commission (to be divided according to labour bestowed or responsibility incurred) of 6% per annum on the gross annual interest and income of the trust moneys, but that they were to receive no commission on any portion of the principal. The provisions for remuneration were to be in full satisfaction of all claim for remuneration or compensation by the trustees whether as executors or trustees.

The said Congregational Church at Cheboque entered and became a part of the United Church of Canada in 1925. Subsequently, in proceedings in the Supreme Court of Nova Scotia, an order was made that, upon that church having become part of the United Church of Canada, the whole of the net annual interest and income of the sum of $20,000 bequeathed under clause 4 of the will, upon the

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conditions therein set out for the benefit of said church, became and was thereafter payable to the present appellant to be used for the general purposes of that institution.

The said sister of the deceased, mentioned in the aforesaid clause "Third" in the will, died in 1930.

The appellant claimed that the defendants should pay and transfer to it the fund created and dealt with by said clause "Fourth" in the will, and one-half of the fund created and dealt with by said clauses "Third" and "Fifth" in the will; together with the income accrued thereon in each case.

Mellish J. held that the present appellant was not entitled to the payment and transfer to it of the principal of said funds, and an appeal from his judgment was dismissed as aforesaid. The present appeal to this Court was (by the judgment now reported) dismissed.

T. W. Murphy K.C. for the appellant.

T. R. Robertson K.C. for the respondents.

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

DAVIS J.—In the happening of events which have occurred since the date of the death of the testator in 1904, two funds have become separated from the general estate and the net annual income from one of these funds and the net annual income from one half of the other of these funds is now payable by the provisions of the will of the testator

to The Halifax School for the Blind, a corporation incorporated by Act of the Legislature of the Province of Nova Scotia, to be used for the general purposes of that institution.

The Halifax School for the Blind applied to the court for an order directing the trustees of the will to hand over to it the corpus upon which the income is payable, upon the ground that, being the sole beneficiary of the income, it has in law the right to terminate the trust without reference either to the intention of the testator or to the wishes of the trustees of the will in this regard.

The testator, in making a gift for the benefit of the Congregational Church at Cheboque, contemplated the possibility that that church might "cease to exist or change its adherence" and specifically provided that "then and thereafter" the whole of the net annual income of the

fund set aside for the benefit of that church should be paid to The Halifax School for the Blind. The non-continuance at some future time of The Halifax School for the Blind was not apparently in contemplation of the testator. The result is that the gift of the income from that fund, as well as the gift of the income from one half of a fund that fell in on the death of a sister of the testator, is unlimited as to time and unqualified as to conditions. There is no gift over and there is no discretion left in the trustees of the will as to the giving or withholding, in whole or in part, in any year of the total net annual income. The beneficiary being a charitable institution, the rule against perpetuities does not apply. The intention of the testator, however, is plainly that the corpus should not be handed over to the beneficiary and the will expressly provides for a perpetual succession of trustees in whom the execution of the trust is to be vested.

On the construction of the will, the gift to The Halifax School for the Blind is a particular and special charitable bequest to which effect must be given so long as the institution lasts. But should it come to an end nothing beyond that is declared. In that event, by operation of law, the particular trust must fall into and be dealt with as part of the residuary personal estate unless the court can collect from this and the other specific trusts an over-riding general charitable intention, in which case the trust property would be applied *cy-près* to another charitable purpose *ejusdem generis* with that which has failed or approaching it in character. The specific gifts for the benefit of a particular church at a particular place and for the establishment of a free library in a particular place can scarcely be treated as indicating, with respect to the particular fund with which we are concerned, a general charitable intention. In view of the considerations about to be mentioned, it does not appear to be necessary to determine that question.

There is unquestionably a rule of law that where a legacy is directed to accumulate for a certain period, or where the payment is postponed, the legatee, if he has an absolute indefeasible interest in the legacy, is not bound to wait until the expiration of that period, but may require payment the moment he is competent to give a valid discharge. That rule is sometimes called the rule in *Saunders*

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v. *Vautier* (1), where Lord Langdale said that that principle had been repeatedly acted upon. In that case, the testator by his will had bequeathed to his executors and trustees certain East India stock standing in his name at the time of his death, upon trust to accumulate the interest and dividends which should accrue due thereon, until his grand-nephew Daniel Wright Vautier should attain the age of twenty-five years, and then to pay or transfer to him the principal of such stock together with such accumulated interest and dividends. Upon the grand-nephew attaining twenty-one years of age, he presented a petition to have a transfer of the fund made to him. The cause stood over, with liberty to apply to the Lord Chancellor, when the Lord Chancellor held the legacy vested, and ordered the transfer (2).

The application of The Halifax School for the Blind is really founded upon the decision in *Wharton* v. *Masterman* (3), where the House of Lords applied the principle of *Saunders* v. *Vautier* (1) to charities. The testator had directed the surplus income of his residuary estate, after satisfying annuities which he had provided for, to be accumulated, and after the death of the surviving annuitant he bequeathed the capital and the accumulations upon trust for certain named public charities. Some of the annuitants were still living. The testator undoubtedly intended to postpone the enjoyment of his bounty by these charities until the death of the last annuitant. The courts below had, notwithstanding this intention, determined that the charities were entitled to the immediate enjoyment of all that was not made by the will subject to the payment of the annuities. Lord Herschell said that was to his mind the only point of any difficulty in the appeal. After setting out the language of Wood, V.C., in *Gosling* v. *Gosling* (4) (in expounding the doctrine acted upon in *Saunders* v. *Vautier* (5)), Lord Herschell concluded, at p. 193:

> Wickens, V.C., when this case came before him in 1871, intimated an opinion that the rule in *Saunders* v. *Vautier* (2) was inapplicable where the beneficiaries were charitable corporations or the trustees of charities. I have carefully considered the reasons which he adduced for this opinion with the respect due to any opinion of that learned Judge, and certainly

(1) (1841) 4 Beav. 115.

(2) See 1 Cr. & Ph. 240.

(3) [1895] A.C. 186.

(4) (1859) Johnson's Chy. Rep. 265, at 272.

(5) (1841) 4 Beav. 115; 1 Cr. & Ph. 240.

with no indisposition to give effect to the intention of the testator if I could see my way to do so. But I am unable to find any sound basis upon which a distinction can be rested in this respect between bequests to charities and those made in favour of individual beneficiaries.

Lord Macnaghten was of the same opinion. He said in part at p. 194:

* * * it is clear on the face of the will that the testator did not mean the residuary legatees to receive any part of what the will gives them until the death of the last annuitant.

Now if the residuary legatees were individuals, there could not be the slightest doubt that they would be entitled to call upon the trustees to hand over to them at the end of each year the surplus income of the testator's residuary estate. Does the fact that the residuary legatees are charities make any difference? Notwithstanding the doubt expressed by Wickens V.C., when the case was before him in 1871, I do not think that it does. The charities alone are interested in the surplus income accruing from year to year. Their interest is vested and indefeasible. And they may legally apply what they take under the bequest either as capital or as income. That being so, I agree with the reasoning of Stirling J. and the Court of Appeal. In regard to the questions which have arisen on this will, I am unable to see any substantial distinction between the case of an incorporated charity and a charity not incorporated, or between the case of a charity and an individual.

Lord Davey was also of the same opinion. After setting forth the doubt of Wickens, V.C., as to the application of the principle of *Saunders* v. *Vautier* (1) in the case of charities, Lord Davey proceeded to say at p. 199:

Your Lordships will, I am sure, regard any dictum, or even doubt, expressed by Wickens V.C. on a subject of this kind with the greatest respect and attention. But I must confess that I do not, on the fullest consideration, find sufficient grounds for the Vice-Chancellor's doubt.

Lord Davey specifically pointed out that there was no condition precedent to happen or to be performed in order to perfect the title of the legatees and that there was no other person who had any interest in the execution of the trust for accumulation or who could complain of its non-execution. He speaks of the gift as "an absolute vested interest."

It was plain in that case that the gift to the charities was an absolute vested gift made payable at a definite future event, the death of the last surviving annuitant, with a direction to accumulate the income in the meantime and pay it with the principal. Applying the principle of *Saunders* v. *Vautier* (1), the House of Lords declined to enforce the trust for accumulation in which no person had any interest but the charities.

But *Wharton* v. *Masterman* (2) does not cover this case

(1) (1841) 4 Beav. 115; 1 Cr. & Ph. 240.

(2) [1895] A.C. 186.

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unless by some rule of law which yields to no contrary intention the unqualified gift here of the income of the fund must be treated as a present absolute gift of the corpus. Lord Davey may have had such a problem in mind when in his judgment he made this guarded reservation, at p. 200:

> We have not to deal with a fund to be created by accumulations and settled as a capital endowment at a future time, as to which different considerations would arise.

The question we have to deal with here seems to me to have been left open. Now, there can be no doubt that a charitable trust may be made to last for any period, whether perpetual, indefinite or limited, and that the rule against perpetuities is not applicable to a charitable trust. But that relates to the question of remoteness and the validity of the trusts. In Ashburner's Principles of Equity, 2nd ed., (1933) it is said at p. 119:

> Gifts to charitable uses are, in one sense, not subject to the rule against perpetuities. This expression must not be misunderstood; a gift to a charity upon a remote event is (except in one case hereafter to be mentioned) incapable of taking effect just as if it had been to an individual, and so is a gift over from a charity to an individual on a remote event. But a gift to a charity is good, although the result of the gift is to fetter the free circulation of property, while a gift for a non-charitable purpose is void if the gift cannot be carried out without keeping the corpus intact for an indefinite period. Moreover, it has been held in several cases, that where property is given to one charity, it may be validly given over to another charity upon a remote event, e.g., if the first charitable donee neglects to maintain the donor's tomb.

Where, as here, a testator has clearly settled a fund for the benefit of a particular charitable institution, from which fund the annual income is to be paid over by the trustees of the will, whose perpetual succession is expressly provided for, that fund is a capital endowment, or in the nature of a capital endowment, created and settled for the benefit of the particular charity so long as it lasts, but no longer. It cannot, I think, be treated as an absolute and presently vested gift of the corpus of the fund which the beneficiary at any time may lawfully demand to be paid over to it and the trust in respect thereof arrested and extinguished without reference to the contrary intention of the settlor.

Since this appeal was argued, the English Court of Appeal has had to consider a somewhat similar case in which residuary legatees which were charities sought on an application to the court to put an end to certain trusts

and to obtain the transfer of the property. Judgment in that case was delivered on February 5th last—*In re Blake's Estate—Berry* v. *Geen and others* (1). The testator there, by his will, after disposing of certain specific property, devised the residue of his property, real and personal, to trustees on trust to pay out of income a large number of annuities, with surplus income to be accumulated during the lives of all the annuitants, and after the death of the last of the annuitants the testator gave the whole of his property, subject to the annuities, to the Congregational Union of England and Wales to be invested as capital and, as to one half of the net income thereof, on trust to pay the same to the Devon Congregational Union. Both charities were unincorporated bodies. The Secretary of the first of these charities, suing on behalf of the charity, had taken out an originating summons asking that the trust for accumulations under the will should be determined and that either the surplus income arising in each year from the estate, after the payment of the annuities directed by the will, should be paid to that body, or that proper provision should be made for payment of the legacies and annuities and that, subject thereto, the residuary estate should be transferred to that body. The matter came before Mr. Justice Bennett and it was by him declared (1) that the gift in the will to the Congregational Union of England and Wales of the whole of the testator's property included the accumulations of income and the income resulting therefrom, but (2) that the Congregational Union was not entitled to determine any future accumulations, and that in the event of any of the annuities continuing beyond January 1, 1946 (i.e., 21 years from the testator's death, when the accumulations will cease by virtue of section 164 of the *Law of Property Act,* 1925) the surplus income of the residuary estate and of the accumulations from that date until the cesser of the last annuity would be undisposed of and would devolve as on an intestacy.

The plaintiff appealed from the order so far as it declared that the charity was not entitled to have the accumulations determined. The unanimous considered judgment of the Court of Appeal (Slesser and Scott, L.JJ., and Farwell J.) was read by Mr. Justice Farwell. It was held that

(1) [1937] W.N., 85; 53 T.L.R. 411.

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in certain circumstances the heir-at-law and next-of-kin of the testator may become entitled to the enjoyment of the surplus income for a limited period. If any of the annuitants survive the period of 21 years from the testator's death, the accumulations will cease at that date by virtue of section 164 of the *Law of Property Act*, 1925, and the surplus income from that date down to the death of the last surviving annuitant will be undisposed of and pass as on an intestacy. In those circumstances the residuary legatees were held not entitled to the relief which they sought. The court, it was said, will never make such an order unless it is satisfied that the persons having any interest in the property consent, or, if they do not consent, that their interests are amply and fully protected. The persons seeking immediate enjoyment in such a case have no legal right to it and it is a matter for the court in each case to consider whether the order can properly be made. Apart from any question of the heir-at-law and next-of-kin, the annuitants who have a charge on the residue of the testator's estate were objecting, and, there being no legal right in the residuary legatees to possession, the court held it was not a case where it ought to make the order asked for.

Farwell J. concluded (1):

> The effect of any such order would be to prejudice and possibly defeat altogether the possible interests of the persons taking under an intestacy. Those persons do not take directly under the will, but as a result of its provisions and the operation of law they may become entitled to the enjoyment of a part of the income of the estate, and there is no means of preventing the possibility of those interests being prejudiced except by refusing to make the order.

The court referred to *In re Deliotte* (2) as a case where all the persons presently interested desired to obtain immediate enjoyment of the property, but, although the possibility of any other person ever coming into existence who would be entitled to participate was extremely remote, the order had been refused. Mr. Justice Farwell proceeded to say:

> The present case is in some respects a stronger one than that, because the possibility of the heir-at-law and next-of-kin becoming entitled to receive a part of the income of the estate is by no means very remote. Moreover, there is a further difficulty in the way of the appellant here which was not present in that case. Here the residue is given to the appellant on charitable trusts and there is no power to vary those trusts by treating as income that which by the trust is to be capital, or *vice*

(1) 53 T.L.R. at 413.

(2) [1926] Ch. 56.

versa. The order sought would have that effect, and that alone is sufficient to disentitle the appellant to the order unless and until the necessary variation of the trust has been duly sanctioned.

In the case before us it is income that is given to the charity and not capital, and for us to make the order sought on this appeal would be to vary the trust.

The appeal should be dismissed. Each party will pay its own costs.

The judgment of Rinfret and Crocket JJ. was delivered by

CROCKET J.—This appeal arises out of an action which was brought in the Supreme Court of Nova Scotia by originating summons to determine the right of the appellant, as beneficiary of the whole of the net annual interest and income of one fund of $20,000, and one half of the net annual interest and income of a second fund of $20,000, to receive from the trustees under a will the whole capital of the one fund and half that of the other.

Mr. Justice Mellish, before whom the case was heard, refused to make the order asked for, holding in effect that on the true construction of the will the testator did not intend to vest the funds themselves in the appellant. An appeal from the learned trial Judge's decision to the Supreme Court of Nova Scotia *en banc* was dismissed on an equal division of the four Judges who heard it, Hall and Carroll, JJ., affirming the trial judgment, and Graham and Doull, JJ., dissenting.

Apart from the testator's directions to his trustees, in the events which happened, to annually pay to the appellant the whole of the net annual interest and income of the first fund of $20,000 and one half of the net annual interest and income of the second fund of $20,000, there was no indication in the will of any desire or intention that the appellant should at any time receive the capital moneys from which the income was derivable, and I think it may fairly be said that the appellant, in seeking to have these capital moneys paid and transferred to it, relied entirely upon these directions and the general principle that where there is an unlimited and unrestricted gift of rents and income of real or personal property, the gift carries the corpus as well as the rents and income of the property.

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There is no doubt that such a rule has long been recognized. The respondents do not question it, but contend that it is a rule of construction only and that it is predicated upon the assumption, in the case of a devise or bequest, that there is no indication in the will of a contrary intention on the part of the testator.

Whatever else the rule may involve, it is plain, I think, from the leading cases in which it has been applied and considered, that it is one which has no application to a bequest of income which the will itself clearly shews, either expressly or impliedly, the testator intends should not absolutely vest the income-producing corpus or capital in the beneficiary to whom the income is directed to be paid. As I apprehend the rule as expounded in the various cases to which we have been referred, it is not sufficient to carry the corpus or capital that the annual payments of the income derivable therefrom, directed to be made to the beneficiary, are intended by the testator to continue in perpetuity, which they may be in the case of charitable gifts such as those now in question, if it clearly appears on a perusal of the entire will that, notwithstanding this fact, the testator intended that the beneficiary should not itself take possession of the corpus or capital. It will be noticed that the rule is seldom stated, either in text books or judicial dicta, without the addition of the proviso mentioned. See *Coward* v. *Larkman* (1), and the same case in the Court of Appeal (2), and the House of Lords (3). Kay, J., in his trial judgment said:

> The question is, what interest the widow takes in the testator's real and personal property. It is argued that she takes only a life interest, and that subject to this there is an intestacy. On the other hand, it is said that, in a will dealing as this does with all the testator's real and personal property, the court leans against an intestacy, and that a gift of the income of real or personal estate without any expressed limit is a gift of the absolute interest. This is no doubt so; but the rule as stated by the late Parker, V.C. in *Blann* v. *Bell* (4) is *one which will yield to expressions in the will indicating a contrary intention.* Such intention, however, should be very clearly shown to induce the court to decide that there is an intestacy.

Cotton, L.J., in the Court of Appeal, stated the rule as follows:

> Where there is an unlimited and unrestricted gift of rents and income of realty or personalty, that carries the absolute interest [in the property]

(1) (1887) 56 L.T.R. 278.
(2) 57 L.T.R. 285.
(3) (1888) 60 L.T.R. 1.
(4) (1852) 5 De G. & Sm. 658; affirmed 2 De G. M. & G. 775.

unless there is sufficient expression in the will to cut down and limit the effect of those words.

Bowen, L.J., said:

The first thing, as Cotton, L.J., says, is to clear one's mind about this rule of construction. There is, to my mind, a *prima facie* rule of construction that, when you have an unlimited gift of rents and income of real and personal property, *in the absence of a contrary intention appearing,* that is a gift of the absolute and entire interest in the real and personal property. It is a rule of construction—that is, only a *prima facie* rule—*which disappears at once if a contrary intention appears.*

Fry, L.J., said:

Having come to that conclusion with regard to his intention, the only point to be observed is this: Is the rule which has been so much discussed in this case one of construction, or is it, as Mr. Vaughan Hawkins insinuated rather than ventured to argue, a rule of law which operates in defiance of intention? In my opinion, it is a rule of construction; it is a rule, therefore, which may be overcome by evidence of an intention to the contrary. It is not like certain rules which operate, however clear the intention of the testator may be to the contrary. In my opinion, rules of construction and rules of law differ very broadly in this point of view; that one is a rule which points out what a court shall do *in the absence of express or implied intention to the contrary;* the other is one which takes effect when certain conditions are found, although the testator may have indicated an intention to the contrary. It is therefore in defiance of the intention of the testator. Mr. Vaughan Hawkins has argued that there is a rule that the words which repel the application of the presumption arising from an antecedent gift of the income must express the limitation to which the absolute estate is to be cut down and reduced. No authority can be cited for such a proposition, and I can find no reason for holding it. On the contrary, it appears to me to be one of those suggestions which from time to time are thrown out to the court, which only result in drawing the mind of the court away from the primary enquiry, what was the intention of the testator? If that intention is to be found, it is immaterial in what part of a will it is to be found, and I for one will be no party to introducing a fresh rule of construction which would fetter the simple enquiry in the case, what was the intention of the testator?

In *Coward* v. *Larkman* (*supra*) the question for decision was as to whether it was intended by the will that the testator's widow, his sole executrix, to whom the rents and income of all his freehold, copyhold and leasehold properties and all other the income of his estate and effects, real or personal, had been devised and bequeathed, was thereby entitled to an absolute interest in the whole estate or to a life interest only. Kay, J., while expounding the rule as to gifts of income as in the passage first above quoted, held that the widow took an absolute interest in all the property on the ground that the rule in question applied to all the property specified, as well as to the residuary estate, because there was no indication in the will sufficient to shew that the widow took only a life interest therein. He

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accepted the argument that the presumption that an unlimited and unrestricted gift of income carries with it an absolute interest in the corpus or capital can be met only by an indication in the will sufficiently clear to enable the court to determine what interest the testator intended that the donee should take, whether for years or during widowhood or for life, and held that it was not enough that the court should consider merely that the testator did not intend an absolute interest.

As will be seen from the passages already quoted from the judgments of Cotton, Bowen and Fry, L.JJ., the Court of Appeal distinctly disapproved that view of the rule. There being nothing in the will to indicate a contrary intention with respect to two of the properties and the household furniture, they held that the widow was absolutely entitled to these; but that there was sufficient to indicate a contrary intention with respect to the gift of the income of another specified property (Elmsleigh) and with respect to the residuary and personal property, and varied the trial judgment accordingly.

In the House of Lords, Halsbury, L.C., and Lords Watson and Fitzgerald affirmed the judgment of the Court of Appeal, Halsbury, L.C., dissenting only as to the property at Elmsleigh. There is, I think, no suggestion in any of the reasons given for the judgment of the House of Lords that the exposition of the rule in the Court of Appeal, or by Kay, J., in the trial judgment, was erroneous in any particular except as to that passage in the trial judgment, to which I have already alluded and which was overruled in the Court of Appeal. Indeed, Lord Fitzgerald explicitly states that,

> there seems to be no disagreement about the rule referred to by Kay, J. or as stated in terms by Cotton, L.J.

as reproduced above. He refers to Sir Edward Sugden's explanation of the rule for treating a gift of the produce of a particular fund, whether it be interest or dividends, as a gift of the principal in perpetuity, because the interest or dividends represent the capital from which the produce is to flow, and adds himself:

> It is always, however, subject to this "unless a contrary intention shall appear by the will."

He then quotes the concluding portion of that passage from the trial judgment which I have already set out and which he describes as an accurate statement of the law.

In the course of his reasons Lord Halsbury said:

> Now, the testator in this case has undoubtedly given all the rents and income of his property in Herts, and in Gordon-Road, Peckham. There is no qualification or limit *in point of time*, and it is manifest, therefore, that the appellant is absolutely entitled to the properties in question.

The appellant relies upon this pronouncement as laying down the doctrine that, if the rents and income are given without any such qualification or limit as is spoken of, i.e., a qualification or limit in point of time, the gift of the rents and income without such a qualification entitles the donee of the income to the corpus of the property absolutely. The particular question which their Lordships were considering was as to whether there was anything in the will to indicate that the gift of the rents and income of the two properties mentioned was intended to be limited to the lifetime of the widow or to be in perpetuity, and naturally Lord Halsbury spoke of the qualification or limit contended for as a qualification or limit in point of time. I do not think he had any thought of laying down the principle that a gift of income without a qualification or limit in point of time entitles the donee to the corpus or capital, as well as to the income.

The appellant also stresses the following statement from Lord Watson's speech:

> It is necessary to read them [the bequests] in connection with the whole context of the will, with the view of ascertaining whether it was the testator's intention to give his widow an interest in perpetuity or for life only. If the gifts were meant to be in perpetuity, the rule must be followed; if for life only, there is no room for its application.

As in the case of the Lord Chancellor's dictum just referred to, this pronouncement of Lord Watson must also, I think, be looked at in the light of the particular question which their Lordships were considering, viz, whether upon an examination of the entire provisions of the will the testator's intention was to give his widow an interest in perpetuity or for life only. If the gifts were not meant to be for life only, the effect in that particular case would necessarily be that they would be in perpetuity, and consequently the application of the rule in that event, as Lord Watson so plainly indicates, could not be doubted. I cannot think that he at all thought of enunciating a principle that the application of the rule in question always depends upon whether the intention of a testator is to make a gift of rents and profits of real or personal property for life

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only or in perpetuity, and that if the gift of the income be found to be intended to continue in perpetuity the rule must always apply, notwithstanding any intention on the part of the testator to the contrary.

If this argument in behalf of the appellant is accepted, it would mean the establishment of an entirely new principle, viz, that the gift of the income of a definite portion of any fund to a charitable institution for charitable purposes in perpetuity constitutes, as a matter of law, a gift of the capital from which the income accrues; and that a testator, who makes such a gift, cannot lawfully provide, even by the clearest and most express terms, that the trustees, to whom the capital moneys are directly bequeathed, shall retain the fund in their own hands, invest and reinvest its moneys and proceeds in a specified class of securities and pay only the income to the beneficiary. In other words, we should have a new rule which, in the case of a bequest of income in perpetuity to a charitable organization for charitable purposes, excludes all enquiry on the part of the courts into the basic question of what was the intention of the testator with regard to the corpus as indicated by the provisions of his will.

If such had been the view of either the Lord Chancellor or Lord Watson, so contrary to that expressed in all three judgments in the Court of Appeal, one would hardly expect that both these eminent law lords would have failed to express any disapproval whatever of the grounds upon which the Appeal Court judgment proceeded, viz, that the rule there in question was a rule of construction and not such a rule of law as always applies, no matter what the intention of the testator might be with respect to it.

The appellant also relies upon the case of *In re Morgan* (1), in which it is claimed that it was held that a gift of the income of the residue of an estate to certain charities in equal shares amounted to a gift of the corpus of the residue to the charities in the same proportions. Stress is laid particularly in this regard upon two isolated statements made in the course of the reasons of Lindley, L.J., and of Lopes, L.J. The first of these statements (that of Lindley, L.J.) is as follows:

(1) [1893] 3 Ch. 222.

> I think the indications are that he [the testator] did not intend anybody to have the corpus, not even the charitable institutions. I think his own notion was that they should have the income.

In that case, the testator gave all his real and personal property upon trust to pay *out of the interest and rents arising from the same* certain sums of money per year to different named persons or (in the case of three of them) to their descendants. With regard to the residue of the interest and rents after the stated payments had been made, he gave it in tenths and twentieths to certain charitable purposes in England and the United States. In a suit for the administration of the testator's estate, Stirling, J., held that, according to the true construction of the will, the yearly sums given to the various named persons were not perpetual but were payable to them for their respective lives only, and that the gifts in favour of the charities included the corpus of the residuary estate. Two of the annuitants appealed against the first part of the decision and claimed that they were entitled to a capital sum which, if invested, would produce £250 a year, which was the amount required to be paid to each of them, so that when the case came before the Court of Appeal the only question with which it was really concerned was as to whether the yearly sums given to these annuitants were payable to them in perpetuity or for their respective lives only.

Lindley, L.J., in discussing this question, said:

> Now, I confess that, applying our minds to the will, which is the first thing to look at, and without troubling ourselves at all with cases, I cannot find apparent in it any intention to give these persons anything more than an annuity. I cannot see any sign of an intention to give them a portion of the corpus of the testator's property. On the contrary, I think the indications are that he did not intend anybody to have the corpus, not even the charitable institutions. I think his own notion was that they should have the income. He never thought anything about the corpus, and was not dwelling upon the disposal of the corpus at all. He was giving these persons what he says is an annuity.

The words "*or* their descendants," relied upon as giving a perpetual interest, were held not to have the same effect as if they had been "*and* their descendants." "Then it is said," he continued,

> that, inasmuch as the testator only disposed of property by reference to the interest and rents, that expression was used by him as equivalent to or as another mode of dealing with the securities. I do not so read it. It may be speculative; but I cannot help thinking that the scheme of his will is to leave all he has got to charity, subject to such provisions as he has made for his nephews and niece. He gave them £250 a year or their

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descendants, if they died. Except to that extent, the testator intends everything to go to the charities.

Lopes, L.J., said:

It is to my mind very difficult indeed to determine what the intention of the testator was; but I agree with what has already been said, that he intended in all probability not to dispose of the corpus, but to create a perpetual trust. I think that is what he contemplated. I am inclined to think it is very probable indeed that he would be more likely to desire to benefit his relations, such as the Morgans are, than the charities which are mentioned in the latter part of his will. It is also perfectly true that if his intention is such as I have stated, namely, to create a perpetual trust, we are defeating his intention with respect to the different charities, though I think, having regard to the strength of the language, we cannot put any other interpretation than that we have placed on the earlier part of the will.

Looking at these extracts from their judgments, I cannot see how it can be even so much as suggested that either Lindley, L.J., or Lopes, L.J., in determining the question as to whether the trust to pay the annual sums to the beneficiaries named amounted to gifts of any portions of the principal estate, disregarded the intention of the testator, as that intention was to be inferred from the provisions of the entire will, in respect of the disposition of the corpus or capital of the estate or any part thereof. The effect of the passages quoted, in my opinion, is quite the contrary, and certainly there is nothing in any part of either judgment, which in any manner extends or modifies the rule regarding testamentary gifts of income, as expounded in *Coward* v. *Larkman* (*supra*).

The basis of the judgment in the *Morgan* case (1) was that the trust was to pay the stated yearly sums "*out of the interest and rents*" of all the testator's property, and that this and other provisions of the will clearly indicated that they were not to be paid out of the corpus of the estate, which had been devised and bequeathed to the trustees, whereas with regard to the residuary estate, loosely described as consisting of "the residue of the interest and rents after the above payments have been made," that was expressly given to the charities in the proportion of one-tenth to each.

The question whether the rule regarding gifts of income carrying with it the estate or capital from which the income is derived is or is not applicable to any particular devise or bequest, whether to a charitable institution or to an

(1) [1893] 3 Ch. 222.

individual, is, in my opinion, always subject to the intention of the testator as disclosed in the will.

It is true that in *Saunders* v. *Vautier* (1); *Gosling* v. *Gosling* (2); *Wharton* v. *Masterman* (3), and other cases, to which we were referred by the appellant's counsel, where there were absolute vested gifts of real estate and capital funds, entitling the donees to complete ownership and possession at a future event, the courts disregarded express directions of the testators to accumulate the rents and income in the meantime. This doctrine, which is generally spoken of as the rule laid down in *Saunders* v. *Vautier* (1), has been so often recognized that, as Herschell, L.C., said in *Wharton* v. *Masterman* (3), it would not be proper now to question it.

Various reasons have been ascribed for its establishment. Lindley, L.J., in *Harbin* v. *Masterman* (4), which went to the House of Lords on appeal under the name of *Wharton* v. *Masterman* (3), above cited, described it as "a remarkable exception" to "the general principle that a donee or legatee can only take what is given him on the terms on which it is given." He explained it as follows:

> Conditions which are repugnant to the estate to which they are annexed are absolutely void, and may consequently be disregarded. This doctrine, I apprehend, underlies the rule laid down in *Saunders* v. *Vautier* (5) and enunciated with great clearness by Vice-Chancellor Wood in *Gosling* v. *Gosling* (2).

Herschell, L.C., said:

> The point seems, in the first instance, to have been rather assumed than decided. It was apparently regarded as a necessary consequence of the conclusion that a gift had vested, that the enjoyment of it must be immediate on the beneficiary becoming *sui juris*, and could not be postponed until a later date unless the testator had made some other destination of the income during the intervening period.

Lord Davey said:

> The reason for the rule has been variously stated. It may be observed, however, that the Court of Chancery always leant against the postponement of vesting or possession, or the imposition of restrictions on the enjoyment of an absolute vested interest.

Whatever the origin or reason of this particular rule may be, it is clear, I think, that its application in *Harbin* v.

(1) (1841) 4 Beav. 115.
(2) (1859) Johnson's Chy. Rep. 265, at 272.
(3) [1895] A.C. 186.
(4) [1894] 2 Ch. 184, at 196-7.
(5) (1841) 4 Beav. 115; 1 Cr. & Ph. 240.

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Masterman (1) and *Wharton* v. *Masterman* (2) was based on the conclusion that the gifts of the residue of the personal property to the five charities named definitely included the surplus income remaining each year after the payment of certain specified annuities, and that neither the annuitants nor the next-of-kin had any interest whatever therein. So far as the conclusion itself, upon which the application of the rule proceeded, is concerned, viz, that the gift of the surplus income as it accrued was intended to vest and had actually vested in the charities, that conclusion was apparently reached upon a consideration of the provisions of the entire will, including the special direction for its accumulation. There is nothing, therefore, in the fact that the principle of *Saunders* v. *Vautier* (3) was applied in those cases, which necessarily conflicts with the view already expressed that the question of the applicability or non-applicability of the general rule regarding a gift of income carrying with it a gift of the capital from which the income is derived, depends always on the intention of the testator, as expounded in *Coward* v. *Larkman* (4) and other cases.

Wharton v. *Masterman* (2) does decide that, where it is concluded that an absolute gift of the residue of personal property includes the surplus income of a definite portion thereof, it makes no difference, so far as the futility of a repugnant direction for the accumulation of that income is concerned, whether the donee of the surplus income is a charitable corporation or an individual; but, as I read the case, it by no means decides that a gift of surplus income to a charitable corporation itself constitutes, as a matter of law, a gift of the property or capital from which it is derived, notwithstanding that the will clearly shews the testator's intention to be otherwise. As a matter of fact, the charities did not claim that they were entitled to the capital out of which the surplus income arose, before the death of the last annuitant—only that they were entitled to that income as it accrued each year and the accumulations thereon, for the reason that upon the true construction of the will the testator intended that it should vest

(1) [1894] 2 Ch. 184.
(2) [1895] A.C. 186.
(3) (1841) 4 Beav. 115.
(4) (1887) 56 L.T.R. 278; 57 L.T.R. 285; (1888) 60 L.T.R. 1.

absolutely in the charities as it was received, and that neither the annuitants nor the next-of-kin were given any charge on or interest in this income or its accumulations. Stirling, J., the trial Judge, thus construed the will as Wickens, J., had done in a previous administration suit, and this judgment was unanimously affirmed, both in the Court of Appeal and in the House of Lords.

Here there is no question as to the appellant being entitled to receive each year the net annual income of the two funds mentioned. The question is as to whether it is entitled to have the trust extinguished and the capital funds paid into its own hands by the trustees under the will. This depends, as I take the established law to be, upon whether or not the testator has clearly indicated by the provisions of his will that he intended that the appellant should not have the right to extinguish the trust and take the capital funds out of the hands of his own trustees.

After a careful consideration of the provisions of the entire will, I have concluded that they cannot be read consistently with any other hypothesis than that the testator intended that the appellant should not have that right, and that his real desire and intention was to create a perpetual trust in the hands of the three trustees he appointed to administer his estate, and their successors for whose appointment he provided. There are numerous provisions throughout the will indicating this intention. Among them I mention the following:

1. The appointment of three trustees with his provision for the filling of any vacancy occurring so that the triple trusteeship may continue indefinitely.

His directions for the raising of the two $20,000 trust funds, and another for the benefit of the trustees themselves, of which they are "to annually divide the income and interest equally" among them as "a recompense for their extra care and careful management" of the estate, in addition to a remuneration or commission of 6% per annum, which they are to retain for themselves from the interest and income of all the trust moneys, including the two $20,000 funds.

2. His direction that the trustees "shall stand possessed" of all "the trust moneys" so raised, "in trust for the uses and purposes hereinafter declared and expressed."

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3. The language in which the particular gift of income to the appellant of the first $20,000 fund is couched, viz, that upon the cessation of the antecedent trust, the trustees then and thereafter "shall *annually* pay over the whole of the *net* annual interest and income of said sum of twenty thousand dollars to said The Halifax School for the Blind *to be used for the general purposes of that institution.*"

4. His directions that the trustees "keep invested" the whole of the second fund of $20,000, and to divide the net annual interest and income of the whole—one half thereof to the appellant to be used for the general purposes of that institution, as in the case of the whole of the net annual interest and income of the first $20,000 fund,—and to pay and apply the other half "in and towards the maintenance and support of a Free Public Library or Free Public Library and Museum" to be otherwise established at Yarmouth to the satisfaction of the trustees.

5. The provision that any loss or depreciation resulting from time to time to any of the trust moneys shall be made good out of the residue of the trust moneys, the income and interest of which are directed to be divided equally among the trustees.

6. The empowering of the trustees to invest and re-invest the trust moneys in designated classes of securities and alter the investments without the consent and concurrence and without reference to the beneficiaries or any of them.

It seems to me, if there were nothing else in any of the other provisions to indicate that the trust funds themselves claimed by the appellant were not intended to vest in it, that, having regard to the annual charge of 6% imposed on the entire income of all the trust moneys, the language of the two gifts of income itself cannot properly be held to import an intention to vest the whole of the first $20,000 fund or the entire half of the second $20,000 absolutely in the appellant. The gifts are not of the whole income but of "the whole of the net annual income" and are expressly directed to be paid annually. In the light of the 6% annual charge upon the whole income of all the trust moneys, in favour of the trustees, and the gift to the trustees as well of the annual interest and income of the residuary trust, how can it possibly be said that no one else than the appellant has any interest in either of the two funds

claimed, and that the principle of *Saunders* v. *Vautier* (1), as confirmed by *Wharton* v. *Masterman* (2), is applicable to this case?

I think the appeal should be dismissed. Each party will pay its own costs.

KERWIN J.—If this were a case where the testator had made a gift of income indefinitely to an individual, the latter would be entitled absolutely to the corpus. Reliance was placed upon *Wharton* v. *Masterman* (2), as indicating that the same rule applies where the legatee is a charity, but in that case there was an absolute vested gift made payable at a future event with a direction to accumulate the income in the meantime and pay it with the principal, and it was decided that the court would not enforce the trust for accumulation in which no person had any interest but the legatee. In other words, it was held that the legatee might put an end to an accumulation which is exclusively for its benefit. It will be noticed, however, that the direction was "in trust to pay and divide," and part of the discussion arose because the testator had directed that this paying and dividing be according to certain amounts set after the respective names of the charities, and it was argued that the charities were to receive only such amounts. It was held that it was impossible to suppose that the testator intended to limit the rights of the charities to the specific sums mentioned, and that their claim to be residuary legatees was valid.

A further application was made in the same administration action, the report of which appears under the name of *Harbin* v. *Masterman* (3). This application was for payment out to the charities, in equal shares, of the fund, other than certain sums set apart to answer the annuities. The motion was granted by Stirling J., and his decision was affirmed by the Court of Appeal.

In view of the provision in the will in question "to pay and divide," these decisions do not touch the point.

In my opinion a correct statement of the law is set forth in Tudor on Charities, 5th ed., p. 76:—

> A charitable trust may be made to endure for any period which the author of the trust may desire. It may therefore be created for the application of the income in perpetuity to the charitable purpose, or it

(1) (1841) 4 Beav. 115.
(2) [1895] A.C. 186.
(3) [1896] 1 Ch. 351.

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may be so framed as to require the immediate distribution of the capital, or the exhaustion of capital and income, during a limited or indefinite period.

And at page 78, the author points out the true application of the rule in *Saunders* v. *Vautier* (1) where charities are concerned, as follows:

There is no exception from the statutory provisions restricting accumulations in the case of charities. And if a charitable fund is directed to be accumulated beyond the limit allowed, a scheme may be settled by the Court for the proper application of the fund.

Moreover, the rule in *Saunders* v. *Vautier* (1) applies in the case of charities, so that if an accumulation is directed, and the capital and accumulations are given absolutely to a particular charitable institution, whether corporate or unincorporate, the institution has the same right as an individual would have under similar circumstances to stop the accumulations and call for the immediate payment of the gift.

Jarman on Wills, 7th ed., p. 250, thus states the rule:

Charitable gifts are an exception to the rule which forbids the creation of perpetuities in the primary sense of the word.

and Theobald on Wills, 8th ed., p. 406:

A charitable gift does not necessarily involve a perpetuity. It may be a gift of a capital sum divisible at once. But more commonly it involves the investment of a fund and the application of the income in perpetuity to a charitable purpose. Such gifts, being for the public good, are not subject to the rule against perpetuity.

Of the various cases in which the rule is referred to, it is perhaps sufficient to refer to *Goodman* v. *Saltash* (2), where Lord Chancellor Selbourne, at p. 642, states that "no charitable trust can be void on the ground of perpetuity."

The gift of the income in perpetuity to the charity in the present case is, therefore, entirely valid and proper, and the appeal should be dismissed, but without costs.

Appeal dismissed.

Solicitor for the appellant: *T. W. Murphy.*

Solicitor for the respondents: *T. R. Robertson.*

(1) (1841) 4 Beav. 115; 1 Cr. & Ph. 240.
(2) (1882) 7 App. Cas. 633.

THE B. V. D. COMPANY, LIMITED (PLAINTIFF) ..... APPELLANT;

AND

CANADIAN CELANESE LIMITED (DEFENDANT) ..... RESPONDENT.

1936
* Nov. 5, 6, 9, 10.

1937
* Mar. 19.

Patent—Validity—Anticipation—Prior art—Specification—Definite claims—May be so broad as to be invalid—Their construction by the courts—The Patent Act, 13-14 Geo. V, c. 23, s. 14, ss. 1; 25-26 Geo. V, c. 32, s. 35, ss. 2.

The appellant company is manufacturing a collar of the same material as used in a soft shirt, made semi-stiff and yet comfortable for personal wear and sufficiently porous to absorb perspiration and to be easily washed and ironed. The appellant's process for making that collar is as follows: Two plies of the particular shirt material, forming outside and inside layers of the collar, are taken and there is placed between them a ply of other woven material in which all the weft threads and two out of three of the warp threads are cotton, the remaining one in three of the warp threads being of cellulose acetate. These cellulose threads are partly dissolved by a volatile (acetone-alcohol) solvent applied through one of the outer fabrics after the collar is partly finished. The result of the rapid driving off of the volatile solvent is that the dissolved cellulose acetate does not spread; the knuckles only of the cellulose acetate yarn melt and form an adhesive which united all three plies at a series of spaced spots, staggered on opposite sides of the lining material, the result being a semi-stiff composite fabric. This process was put into use in Canada by the appellant about June, 1935. The respondent then alleged that the process infringed the Dreyfus Canadian patent no. 265,960, granted November 16, 1926, on an application filed December 18, 1925, and owned by the respondent, and the present action was brought before the Exchequer Court of Canada, the patent not appearing to have been put into commercial use prior to the adoption by the appellant of its process. The patent is recited to be an invention of "certain new and useful improvements relating to fabrics and sheet materials and the manufacture thereof." The invention is stated to concern the manufacture of new fabrics or sheet materials having waterproof to gas-proof properties or capable of other applications. According to the invention, a fabric or sheet material is made by uniting under appropriate conditions of temperature and pressure, woven, knitted or other fabrics, composed of or containing filaments or fibres of thermoplastic cellulose derivative or derivatives with woven, knitted or other fabric composed of or containing filaments or fibres of non-thermoplastic or relatively non-thermoplastic material. In this way the fabrics are united and a composite sheet material is obtained in which the pores or interstices are reduced to extremely minute dimensions, or closed completely, by the melting or softening effect produced by the heat and pressure upon the filaments and fibres of the thermoplastic cellulose derivative or derivatives and by the uniting of the fabrics under the heat and

* PRESENT:—Duff C.J. and Rinfret, Crocket, Davis and Kerwin JJ.

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pressure. Further specifications are fully described in the judgment reported. The invention of Dreyfus was, in effect, to make an ordinary fabric or sheet material waterproof or gas-proof without detracting from the appearance of the original material. Although there were some twenty-five claims set up the appellant's arguments were confined to claims 1 and 4 which were as follows: "1. A process for the manufacture of composite sheet material which comprises subjecting a plurality of associated fabrics, at least one of which contains a thermoplastic derivative of cellulose, to heat and pressure, thereby softening said derivative and uniting said fabrics. * * *. 4. A process for the manufacture of composite sheet material which comprises treating a fabric containing a thermoplastic derivative of cellulose with a softening agent, associating it with another fabric, and uniting the fabrics by subjecting them to heat and pressure." The inventor, Dreyfus, in defining his claims in his British application, expressly mentioned "woven, knitted or other fabric composed of or containing filaments or fibres of a thermoplastic cellulose derivative or derivatives," and in defining his claims in the United States application also expressly mentioned "a fabric containing yarns comprising a thermoplastic derivative of cellulose"; but he entirely omitted such words in his subsequent application in Canada. Amongst many British and United States patents referred to by the parties, the Van Heusen, which was granted in the United States January 1, 1924, was the most relevant one to this case. It disclosed the manufacture of a three-ply collar consisting of a lining and two outer plies which caused to combine into a single composite sheet by the application to the lining of a cellulose derivative in solution to act as a "cementing agent," whereupon the outer plies and the lining were treated * * * by heat and pressure to cause the cementing material to be converted into its final form and thereby secure the separate layers of fabric together." One of the grounds upon which the validity of the Dreyfus patent was challenged by the appellant company was that the Claims were not confined and limited to the use of the cellulose in yarns, filaments or fibres, woven, knitted or worked into the intermediate material, but extended to the use of a cellulose derivative in any form. The Exchequer Court of Canada upheld the validity of the patent.

Held, reversing the judgment of the Exchequer Court of Canada ([1936] Ex. C.R. 139), that the patent was invalid.

Unless the claims in the Canadian Dreyfus patent can properly be narrowed by the introduction of a limitation to the use of the cellulose derivative in the form of yarns, filaments or fibres, they have been clearly anticipated by the United States patent of Van Heusen and two other British patents referred to in the judgment. Van Heusen clearly disclosed the process of taking the separate pieces of fabric and securing them together "into what is in effect an integral composite fabric" by the use of an intermediate binding layer containing solutions of cellulose derivatives. It constitutes a complete anticipation of the claims of the respondent unless those claims can be modified by incorporating the limitation that the thermoplastic derivative of cellulose be in the form of yarns, filaments or fibres woven into the intermediate fabric.

As a general rule, the ambit of the invention must be circumscribed by definite claims. It is a question of law, then, whether or not the claims in this case read in the light of the specification may be

limited. If they cannot, the claims remain so broad as to be invalid because of the prior art. If limited, they have not been anticipated. Throughout the specification of the Dreyfus patent, there is a continuous reference to the use of the thermoplastic derivative of cellulose in the form of yarns, filaments or fibres and it is plainly the very essence of the disclosure in the specification; but the inventor did not state in his Claims the essential characteristic of his actual invention. The Court is invited to read through the specification and import into the wide and general language of the claims that which is said to be the real inventive step disclosed. The claims are unequivocal and complete upon their face; it is not necessary to resort to the context and as a matter of construction the claims do not import the context. In no proper sense can it be said that though the essential feature of the invention is not mentioned in the claims the process defined in the claims necessarily possesses that essential feature. The Court cannot limit the claims by simply saying that the inventor must have meant that which he has described. The claims in fact go far beyond the invention and upon that ground the patent is invalid. The *Patent Act* specifically requires that the specification shall end with a claim or claims stating distinctly the things or combinations which the applicant regards as new and in which he claims an exclusive property and privilege. *The Patent Act*, 1923 (13-14 Geo. V, c. 23, s. 14, ss. 1); *The Patent Act*, 1935 (25-26 Geo. V, c. 32, s. 35, ss. 2).

APPEAL by the plaintiff from the judgment of Maclean J., President of the Exchequer Court of Canada (1) dismissing its action for a declaration either that a patent no. 265,960, granted to one Dreyfus and owned by the defendant was invalid and void or that it was not infringed by the plaintiff's manufacture of certain shirt collars.

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

O. M. Biggar K.C. and *R. S. Smart K.C.* for the appellant.

W. F. Chipman K.C. and *H. Gérin-Lajoie K.C.* for the respondent.

The judgment of the court was delivered by

DAVIS J.—A difficult question is raised in this patent case as to whether or not the process used by the appellant in the manufacture of collars for men's shirts infringes the Dreyfus Canadian patent no. 265,960 granted November 16, 1926, on an application filed December 18, 1925, and owned by the respondent. The validity of the patent is directly put in issue.

(1) [1936] Ex. C.R. 139.

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The appellant's process for making a collar of the same material as used in a soft shirt is stated as follows. Two plies of the particular shirt material, forming outside and inside layers of the collar, are taken and there is placed between them a ply of other woven material in which all the weft threads and two out of three of the warp threads are cotton, the remaining one in three of the warp threads being of cellulose acetate. These cellulose threads are partly dissolved by a volatile (acetone-alcohol) solvent applied through one of the outer fabrics after the collar is partly finished. The solvent is immediately driven off by pressing the collar (at about 10-20 pounds pressure per square inch) between heated platens one of which is covered with a textile material. The platens are kept at a temperature of about 125° C. The result of the rapid driving off of the volatile solvent is that the dissolved cellulose acetate does not spread; the knuckles only of the cellulose acetate yarn melt and form an adhesive which unites all three piles at a series of spaced spots, staggered on opposite sides of the lining material. The result is a semi-stiff composite fabric. The appellant claims that the softening of the cellulose acetate is not brought about by heat but by the application of the volatile solvent by which the cellulose acetate is partly dissolved and that the volatile solvent is quickly driven off the partly dissolved cellulose acetate yarns by submitting the collar to the pressure and at the temperature above mentioned. If all the cellulose were retained it would tend to fill up the pores in the material to such an extent that the collar might become waterproof. The obvious need in a collar is that it should remain porous so as to absorb perspiration and lend itself to being easily laundered. The appellant's process proved a great commercial success; the manufacture of shirt collars according to the process extended, in the United States and Canada, to as many as twenty-eight millions in one year.

This process was put into use in Canada by the appellant about June, 1935. The respondent then alleged that the process infringed the Dreyfus Canadian patent held by it and this action was commenced in the Exchequer Court of Canada. The patent does not appear to have been put into commercial use prior to the adoption by the appellant of its process.

We turn now to an examination of the patent. It is recited to be an invention of

certain new and useful improvements relating to fabrics and sheet materials and the manufacture thereof.

The invention is stated to concern the manufacture of new fabrics or sheet materials having waterproof to gas-proof properties or capable of other applications. According to the invention, a fabric or sheet material is made by uniting under appropriate conditions of temperature and pressure, woven, knitted or other fabrics, composed of or containing filaments or fibres of thermoplastic cellulose derivative or derivatives with woven, knitted or other fabric composed of or containing filaments or fibres of non-thermoplastic or relatively non-thermoplastic material. Further, according to the invention woven, knitted or other fabric made of yarns composed of filaments or fibres of a thermoplastic cellulose derivative is associated with woven, knitted, or other fabric made wholly or partly of yarns composed of filaments or fibres of a non-thermoplastic or relatively non-thermoplastic material, and the associated fabrics are subjected to heat and pressure, with or without employment, assistance or application of plasticising or softening agents or solvents of the thermoplastic cellulose derivative or derivatives. In this way the fabrics are united and a composite sheet material is obtained in which the pores or interstices are reduced to extremely minute dimensions, or closed completely, by the melting or softening effect produced by the heat and pressure upon the filaments and fibres of the thermoplastic cellulose derivative or derivatives and by the uniting of the fabrics under the heat and pressure.

The specification further states that

The extent of the melting or softening effect, degree of closing the pores or interstices, and intimacy of union of the fabrics, and therefore the degree of impermeability of the compound fabric or material produced, can vary with the degrees and duration of heat and pressure employed, and with whether plasticisers, or softeners or solvents are employed, and with the number of fabrics united together, or other circumstances.

The manner in which the invention may be carried into effect is illustrated in the specification by the following more detailed description,

it being understood that this can be varied widely without departing from the invention.

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A woven or warp knitted fabric made of cellulose acetate yarn is associated with woven or knitted fabric of silk, cotton, linen or other fibre, preferably after being coated or treated with a plasticising or softening agent or solvent on the face that is to contact with the latter fabric, and the associated fabrics are subjected to heat and pressure to unite the component fabrics together and give a material possessing a desired degree of resistance to penetration by water or gases, according to the degree and duration of temperatures and pressure, the conditions of heat, pressure and time being interdependent. The less the heat, the greater or the longer is the pressure required to produce a given effect, or the same conditions of heat and pressure may be applied for more or less time to produce the effect in a greater or less degree.

The application of plasticising or softening agents or solvents of the cellulose acetate or other thermoplastic cellulose derivatives to assist the melting effect and the union of the component fabrics, as referred to in the specification, is stated to be

especially of advantage where a high degree of impermeability to water is desired or for obtaining gas-proof properties in the compound material.

The process is said to produce

a compound material having waterproof to gas-proof properties according to the degree of dissolving or melting effect, etc., produced on the cellulose acetate by the condition of heat, pressure and time employed.

The concluding words of the specification are:

The compound materials made according to the invention may be employed more particularly for applications where resistance to penetration by water or gases is desired, for instance, as waterproof materials for garments, coverings, etc., etc., or as materials for airships or other gas container, but materials made according to the invention may be employed for any other technical or industrial applications.

Although there are some 25 claims set up, counsel for the appellant mainly confined their arguments to claims 1 and 4. Claim 1 is as follows:

1. A process for the manufacture of composite sheet material which comprises subjecting a plurality of associated fabrics, at least one of which contains a thermoplastic derivative of cellulose, to heat and pressure, thereby softening said derivative and uniting said fabrics.

Claim 4 is as follows:—

4. A process for the manufacture of composite sheet material which comprises treating a fabric containing a thermoplastic derivative of cellulose with a softening agent, associating it with another fabric, and uniting the fabrics by subjecting them to heat and pressure.

The first impression one gathers from a reading of the patent is that what the inventor was really aiming at was the making of new fabrics or sheet materials having waterproof or even gras-proof properties—the extent of the impermeability depending upon the amount of the cellulose acetate used and the appropriate application of heat and pressure. To obtain different degrees of impermeability according to the different requirements—a very slight

waterproof condition or a complete waterproof condition or even such a condition of impermeability that gas could not penetrate—appears at first glance to be the purpose and object sought to be attained by the inventor. He described the intermediate material as "composed of or containing" filaments or fibres of thermoplastic cellulose derivative or derivatives. That, I take it, involves that the material, depending upon the degree of impermeability sought to be obtained, will be almost entirely or only partially of cellulose. And the thermoplastic cellulose derivative, whether almost the entire or only a small part of the intermediate layer, is to be in yarns, filaments or fibres in the woven, knitted or other fabric used. It is not a coating or embedding process. The cellulose is not spread upon or embedded in the cloth. Those were old and well-known processes but they left a rigid material difficult to shape or cut. The invention of Dreyfus made an ordinary fabric or sheet material waterproof or gas-proof without detracting from the appearance of the original material.

But the appellant did not desire a waterproof, much less a gas-proof, material for its shirt collars. That was a condition that the appellant says in fact had to be avoided if the collar were to be comfortable for personal wear and capable of being laundered in the ordinary course. What was desired by the appellant was a collar, of the same material as the shirt itself, made semi-stiff and yet sufficiently porous to absorb perspiration and to be easily washed and ironed. The appellant attained that result in the process it adopted and the process naturally became of great commercial value.

What is said against the appellant is this. You made a composite fabric by the use of an intermediate material containing threads of cellulose acetate and the application thereto of heat and pressure, and that is exactly the invention covered by the Dreyfus patent. Impermeability is not an absolute but a relative term and it is contended by the respondent that a condition of more or less impermeability is only an incidental result obtained under the patented process. The principal aim and the very substance of Dreyfus' invention was, it is argued, to make a composite textile material by taking a plurality of fabrics and uniting them by the use of a fabric composed of or con-

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taining yarns, filaments or fibres of a thermoplastic cellulose derivative and the application thereto of heat and pressure. That, it is submitted, was the real invention of Dreyfus and the invention that the appellant substantially adopted. In that view, impermeability to water or even to gas becomes unimportant and attention is focussed on the contention that the very basis and substance of the invention of Dreyfus was the making of a composite textile material by the method set out in the patent. There is really no denial of the statement that before Dreyfus this method of uniting two or more materials into one composite fabric was unknown. Prior user is not even set up against the patent but prior art is relied upon. When the prior art is examined, it consists entirely in different methods of coating or embedding cellulose or other adhesives. In every case the cellulose is spread over, or squirted upon, or embedded in the material leaving a glassy and stiff surface. There is nothing in the prior art of a process for the manufacture of a composite sheet material made by subjecting a plurality of associated fabrics, at least one of which contains a thermoplastic derivative of cellulose in the form of yarns, filaments or fibres, to heat and pressure, thereby softening the derivative and uniting the fabrics in a composite material. If that process was the real invention of Dreyfus, then there was nothing in the prior art that undermined it.

A formidable objection to the validity of the patent is advanced by counsel for the appellant upon the ground that the claims are not limited to the use of woven cellulose yarns but extend to the use of a cellulose derivative in any form. Claims 1 and 4 above set out are taken for discussion on this point. It is to be observed that while claim 1 asserts a monopoly of the use of a thermoplastic derivative of cellulose not combined with any softening agent, claim 4 requires that the cellulose derivative should be combined with a softening agent, thus carrying into the claims the alternatives emphasized in the disclosure.

The objection, then, to the validity of the claims is that they omit any reference to what counsel for the respondent at the trial described in the opening statement as "the new * * * and all-important feature of the invention,"

namely, the form in which the thermoplastic derivative of cellulose to be acted upon is to be present in the layers of fabric to be united.

Dr. Dreyfus taught the use of thermoplastic yarns of a cellulose derivative woven into the fabric. That was new and that is the all-important feature of the invention. We are not concerned with the uniting of fabrics otherwise than by the presence of a cellulose derivative in the form of yarn woven into the fabric.

And in the carefully prepared factum of the respondent the following statement is made as to the main feature of the patentee's invention:

The novelty of the invention rests mainly in the use of a cellulose derivative in the form of yarns woven into a fabric, as a means of uniting fabrics under the action of heat and pressure, due to the thermoplastic nature of such cellulose derivative and either with or without the assistance or application of a plasticizer, softening agent, or solvent. No adhesive substance is added for the purpose of uniting, but use is made of the properties of thermoplastic yarns of a cellulose derivative woven into one of the associated fabrics.

And again in the argument in the respondent's factum as to the nature of the invention, the following statement appears:

The reference to "filaments" and "fibres" in the patent therefore necessarily implies a cellulose derivative in the form of yarns or threads woven into the fabric. A mere coating or application of a cellulose derivative in some form other than yarns would not contain "filaments or fibres" of such derivative.

Again, after discussing the Segall (United States) patent, the following statement is made:

The problem under that patent is quite different from that under respondent's patent which deals with a composite material made of plies of fabric in one of which are yarns of a cellulose derivative used for uniting the fabrics.

And in referring to the Van Heusen (United States) patent the factum continues:

This patent covers primarily the use of a cement or binding agent to unit the plies of fabrics in the making of collars. Such cement or binding agent is used in the form of a coating and not in the form of yarns forming part of the intermediate layer.

* * *

Van Heusen, therefore, resorts to a coating of nitro-cellulose for the purpose of uniting and does not resort to a cellulose derivative in the form of yarns, filaments or fibres.

And again in discussing the Green patent (British) the factum continues:

This patent has no analogy with respondent's patent, as it relates to the application of octo-nitro-cellulose in the form of a coating, or in the form of a stream in thin form on the fabric. There is no yarn used for the purpose of uniting.

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And in discussing the patent of Henry Dreyfus (British) the factum states:

> The relevancy to the patent in issue is extremely remote. It does not show the use of cellulose derivative in the form of yarns, but rather in the form of sheets or coatings.

The learned trial judge obviously regarded the use of the cellulose derivative in the form of yarns, filaments or fibres as of the very essence of the invention, for in discussing the Van Heusen patent in his reasons for judgment he said:

> Now there is no reference in Van Heusen to the use of a thermoplastic cellulose derivative in the form of yarns, woven into one of the two or more fabrics to be united and which may be cut and sewn and handled like any other fabric, and this, I think on grounds of utility, would be much more desirable and convenient than dealing with pieces of fabrics that were coated with a cementing material. Van Heusen, in my opinion, is not an anticipation of Dreyfus.

The specification refers to the thermoplastic derivative of cellulose being present only in the form of yarns, filaments or fibres woven, knitted or worked into one or more of the layers constituting the final composite product but no mention of this essential characteristic being included in the patentee's claims counsel for the appellant submit that the claims cannot be narrowed by the introduction into them by the Court of a limitation which they do not contain.

The claims in the British patent, no. 248,147, contain the limitation in the words:

> woven, knitted or other fabric composed of or containing filaments or fibres of a thermoplastic cellulose derivative or derivatives,

and a similar limitation also appears in the claims of the corresponding United States patent no. 1,903,960 in the words:

> a fabric containing yarns comprising a thermoplastic derivative of cellulose.

Both the British and the United States applications were made prior in date to the application in Canada.

Unless the claims in the Canadian patent can properly be narrowed by the introduction of a limitation to the use of the cellulose derivative in the form of yarns, filaments or fibres, they are, we think, clearly anticipated by the United States patent of Van Heusen and the British patents of Green and Henry Dreyfus.

Van Heusen (U.S. no. 1,479,565, application filed November 16, 1921, patent granted January 1, 1924) discloses the manufacture of a three-ply collar consisting of a lining and two outer plies. These are caused to combine into a single

composite sheet by the application to the lining of a cellulose derivative in solution to act as a "cementing agent," whereupon the outer plies and the lining are treated

> * * * by heat and pressure to cause the cementing material to be converted into its final form and thereby secure the separate layers of fabric together.

The specification recites that according to the invention two or more pieces of fabric are taken and secured together by means of an intermediate cementing or binding medium that is waterproof or water insoluble and which does not affect in any objectionable way the outside appearance of the fabric but which nevertheless

> combines the different layers of fabric together into a composite integral whole.

The cementing agent for securing the different layers or plies of fabric together is described as capable of variation. Agents such as cellulosic binding materials can be used. For example, solutions of cellulose derivatives such as cellulose nitrate in suitable solvents, or solutions of cellulose in cellulose solvents can be used. The binding material can be applied in different ways. The separate pieces of fabric may thus, for example, be folded in folding machines and the separate pieces of the fabric, with their edges turned in, can then be coated with the adhesive material and treated to convert the layer of adhesive into a permanent bond. The fabric can similarly be coated before the edge is turned so that the turned-in edge will similarly be secured in place. After the fabric has been coated, and either before or after the collar has been built up therefrom, the coating can be modified to convert it into a form better adapted for securing the layers of fabric together. The specification continued:

> In the case of a solution of a cellulose derivative in an organic solvent, the solvent may be partly evaporated before the layers of the fabric are secured together. In other cases, the pieces of fabric may be put together and pressed in a heated press to modify or change the binding material and convert it into its final form.

The Van Heusen patent presents a real difficulty to the respondent. Counsel for the appellant argue that the respondent is on the horns of a dilemma—if it asserts that its process is different from Van Heusen because Van Heusen did not adopt yarns, filaments or fibres of the cellulose derivative in the intermediate layer then the respondent's claims are too broad in that the claims are not confined

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and limited to the use of the cellulose in yarns, filaments or fibres woven, knitted or worked into the intermediate material; whereas on the other hand, if the respondent relies on the claims as they stand without reference to the use of the cellulose in the form of yarns, filaments or fibres, the process was anticipated by Van Heusen.

Green (British no. 9,879 of 1889) refers to the use of cellulose and particularly octo-nitro-cellulose as forming "a good substitute for silk" and suggests as one alternative its being used as a coating for ordinary yarns and, as another, either its direct extrusion on to an ordinary fabric through capillary tubes in the form of threads or ribbons, or, its being wound in the form of threads on bobbins, these threads being subsequently affixed to an ordinary fabric

> by pressure with or without heat * * * in order to insure the more perfect union of the filament or ribbon to the fabric.

The resulting products are described as "compound fabrics" capable of use for

> articles of dress * * * and numerous other articles * * * to which silk and mixtures of silk * * * are now applied, (including) collars, cuffs, hats or bonnets.

Green's patent has for its object to impart to fabric threads and other articles a silk-like lustre. Octo-nitro-cellulose is used for this purpose in the form of a coating applied to the article. The solution of this octo-nitro-cellulose is forced through jets, i.e., squirted, on the surface of the fabric. There is no yarn used for the purpose of uniting.

Henry Dreyfus (British no. 173,021, 1921) refers to previous proposals for the use in the production of glass substitutes of cellulose esters in the form, among others, of a "web" combined with a "metallic or textile fabric" and proposed the analogous use of cellulose ethers, suggesting as one alternative that an ordinary fabric

> may be embedded by heat and pressure into a solidified film, sheet or web of the ether or ether composition or between two such films, sheets or webs.

This patent does not show the use of cellulose derivatives in the form of yarns, but in the form of sheets or coatings.

There is no necessity for us to examine closely other British and United States patents referred to during the argument. Van Heusen clearly disclosed the process of taking the separate pieces of fabric and securing them together "into what is in effect an integral composite

fabric" by the use of an intermediate binding layer containing solutions of cellulose derivatives. It constitutes a complete anticipation of the claims of the respondent unless those claims can be modified by incorporating the limitation (which modification the appellant's counsel contend cannot be made) that the thermoplastic derivative of cellulose be in the form of yarns, filaments or fibres woven into the intermediate fabric.

It may be stated as a general rule that the ambit of the invention must be circumscribed by definite claims. It is a question of law, then, whether or not the claims in this case read in the light of the specification may be limited. If they cannot, the claims remain so broad as to be invalid because of the prior art. If limited, they have not been anticipated. It is difficult to understand why the inventor in defining his claims in his British application should have expressly mentioned

> woven, knitted or other fabric composed of or containing filaments or fibres of a thermoplastic cellulose derivative or derivatives,

and in defining his claims in the United States application should have expressly mentioned

> a fabric containing yarns comprising a thermoplastic derivative of cellulose

and should have entirely omitted such words in his subsequent application in Canada. Why do the claims omit what counsel for the respondent contended at the trial was the "new * * * and all-important feature of the invention," namely, the use of thermoplastic yarns of cellulose derivative woven into the fabric? We cannot say. Throughout the somewhat long specification there is a continuous reference to the use of the thermoplastic derivative of cellulose in the form of yarns, filaments or fibres and it is plainly the very essence of the disclosure in the specification. Why, then, was it left out of the claims? It may have been a slip of the draftsman or it may have been a deliberate omission in an effort to secure a wider field of protection than the disclosure warranted.

The Patent Act, 1923 (13-14 Geo. V, c. 23) in force at the time of the application and grant of the patent expressly required by subsection (1) of section 14 thereof that the specification

> shall end with a claim or claims stating distinctly the things or combinations which the applicant regards as new and in which he claims an exclusive property and privilege.

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Subsection (2) of section 35 of *The Patent Act*, 1935 (25-26 Geo. V, c. 32) is substantially in the same language.

Lord Cottenham, L.C., in *Kay* v. *Marshall* (1) said:

> The claim is not intended to aid the description, but to ascertain the extent of what is claimed as new.

and Lord Chelmsford in *Harrison* v. *The Anderston Foundry Co.* (2) said:

> The office of a claim is to define and limit with precision what it is which is claimed to have been invented and therefore patented.

As Lord Cairns put it in the *Anderston* case (2), "Everything which is not claimed is disclaimed."

Terrell on Patents (8th ed., 1934) at p. 134 states the rule that

> if the words of the claim are plain and unambiguous, it will not be possible to expand or limit their scope by reference to the body of the specification.

In *Ingersoll Sergeant Drill Company* v. *Consolidated Pneumatic Tool Company* (3), in the House of Lords the Lord Chancellor, Lord Loreburn, said:

> Obviously, the rest of the specification may be considered in order to assist in comprehending and construing a claim, but the claim must state, either by express words or by plain reference, what is the invention for which protection is demanded. The idea of allowing a patentee to use perfectly general language in the claim, and subsequently to restrict, or expand, or qualify what is therein expressed by borrowing this or that gloss from other parts of the specification, is wholy inadmissible. I should have thought it was also a wholly original pretension.

Later, in *Natural Colour Kinematograph Co. Ld.* v. *Bioschemes, Ld.* (2), Lord Loreburn practically repeated what he had said in the *Ingersoll* case (4):

> Some of those who draft specifications and claims are apt to treat this industry as a trial of skill, in which the object is to make the claim very wide upon one interpretation of it in order to prevent as many people as possible from competing with the patentee's business, and then to rely upon carefully prepared sentences in the specification which, it is hoped, will be just enough to limit the claim within safe dimensions if it is attacked in court. This leads to litigation as to the construction of specifications, which could generally be avoided if at the outset a sincere attempt were made to state exactly what was meant in plain language. The fear of a costly law suit is apt to deter any but wealthy competitors from contesting a patent. This is all wrong. It is an abuse which a court can prevent, whether a charge of ambiguity is or is not raised on the pleadings, because it affects the public by practically enlarging the monopoly, and does so by a kind of pressure which is very objectionable. It is the duty of a patentee to state clearly and distinctly, either in direct words or by clear and distinct reference, the nature and limits of what he claims. If he uses language which, when fairly read, is avoidably

(1) (1836) 1 Myl. & C. 373.
(2) (1876) 1 App. Cas. 574.
(3) (1908) 25 R.P.C. 61, at 83.
(4) (1915) 32 R.P.C. 256, at 266.

obscure or ambiguous, the patent is invalid, whether the defect be due to design, or to carelessness, or to want of skill.

In *Erickson's Patent* case (1), it was held that the patentee had failed so to limit his first claim as to confine it to that which was the novelty (if any) of the invention, and that accordingly the claim was so wide as to render the patent invalid. Pollock, M.R., said at p. 486:

> We cannot construe the specification as necessarily leading to the conclusion that the feature of novelty is claimed. Claim 1 certainly, fairly construed, appears to admit of any claim in relation to a perforated cylinder being included in it, and on the ground, therefore, that the matter of novelty, which is the sole matter and pith of the invention, is not indicated, and also on the ground that the claim is so wide that it would include any claim in relation to a perforated cylinder, it appears to me that the claim is bad.

In *British Hartford-Fairmont Syndicate, Ld.* v. *Jackson Bros. (Knottingley) Ltd.* (2), Lord Justice Romer said:

> What justification there can be for altering the language of the claim in this or in some similar manner I am at a loss to conceive. One may, and one ought to, refer to the body of the specification for the purpose of ascertaining the meaning of words and phrases used in the claims or for the purpose of resolving difficulties of construction occasioned by the claims when read by themselves. But where the construction of a claim when read by itself is plain, it is not in my opinion legitimate to diminish the ambit of the monopoly claimed merely because in the body of the specification the patentee has described his invention in more restricted terms than in the claim itself. The difference may well have been intentional, and created with the object—to use the words of Lord Loreburn in the *Natural Kinematograph* case—of holding in reserve a variety of constructions for use if the patent should be called in question, and in the meantime to frighten off those who might be disposed to challenge the patent.

In the judgment of P. O. Lawrence, L.J., there occur (at pp. 550 and 551) passages of almost similar effect. That case went to the House of Lords and the appeal was dismissed (3). Lord Tomlin, whose judgment was concurred in by Lord Buckmaster and Lord Warrington, said in part, at p. 260:

> The object of letters patent is to secure to the patentee during the continuance of the grant the absolute monopoly of the manner of manufacture which the patent is designed to protect. It removes the invention from the open field of competition. It follows that it is essential that the protected matter should be accurately defined in order that those familiar with the industry to which the invention relates should have clear warning of what is forbidden to them.

In *R.C.A. Photophone, Ld.* v. *Gaumont-British Picture Corporation Ld. and British Acoustic Films, Ld.* (4), Lord Justice Romer at p. 195 said:

(1) (1923) 40 R.P.C. 477.
(2) (1932) 49 R.P.C. 495, at 556.
(3) (1934) 51 R.P.C. 254.
(4) (1936) 53 R.P.C. 167.

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In the days before it was obligatory on a patentee to set out his claims in his specification, it was often possible to find in it the statement of some principle that the patentee claimed to have discovered and a description of some method of putting the principle into practice. In such cases the invention might well be regarded as being an invention of all such methods; but now that claims are obligatory it is, in my judgment, essential that the patentee should claim all such methods in unambiguous terms, making it quite clear what the principle is. As was said by Lord Shaw in *Ridd Milking Machine Company* v. *Simplex Milking Machine Company* (1): "If any claim for a principle is made it must undoubtedly appear in the claim as that claim is stated, and must not be left to an inference resting on a general review of the specification or a general search among the language employed therein for the meritorious element of principle or idea." It is the duty of a patentee by his claim to make quite clear what is the ambit of his monopoly in order that workers in the art may be left in no doubt as to the territory that is forbidden them during the life of the patent. If he fails to do this, his patent becomes a public nuisance. It is equally incumbent upon him to describe at least one way, and the best way known to him, of carrying his invention into effect, in order that, when his monopoly comes to an end, the workers in the art may turn the invention to account. This is the consideration he pays for his monopoly.

And in the *Mullard Radio Valve Co. Ld.* v. *Philco Radio and Television Corporation of Great Britain, Ld. and Others* (2), in the House of Lords, Lord MacMillan said at p. 345:

A patentee may make a most meritorious discovery and may give an entirely adequate description of his inventive idea and of the manner of putting it into practice, but when he comes to formulate the claim to his invention he may claim a monopoly wider in extent than is warranted by what he has invented. The patentee has told us quite definitely that his invention deals with the case of a final amplifier which comprises a screening grid between the control grid and the anode and that he has invented means by which, in such a case, the screening grid current is prevented entirely or partially from increasing at the expense of the anode current when the anode potential falls. The problem which he set out to solve and the disadvantages which he professes to overcome relate solely to discharge tubes with a screening grid between the control grid and the anode. His discovery was that, if in a discharge tube with a screening grid between the control grid and the anode he inserted between the screening grid and the anode an additional "suppressor" grid, he achieved the advantageous results which he describes. That is the ambit of his invention and for that he is entitled to protection. But claim 2 makes no reference to screening grids or control grids at all. It simply speaks of three or more electrodes irrespective of their function as screening grids or control grids or suppressor grids or of their arrangement relatively to each other.

And at p. 346:

A patentee is granted his monopoly in order to protect the invention which in his specification he has communicated to the public. He is not entitled to claim a monopoly more extensive than is necessary to protect

(1) (1916) 33 R.P.C. 309, at 317. (2) (1936) 53 R.P.C. 323.

that which he has himself said is his invention. In the present case I think that in claim 2 the patentee has claimed more than his inventive idea entitles him to protect.

And at p. 347:

If an inventor claims an article as his invention but the article will only achieve his avowed object in a particular juxtaposition and his inventive idea consists in the discovery that in that particular juxtaposition it will give new and useful results, I do not think that he is entitled to claim the article at large apart from the juxtaposition which is essential to the achievement of those results.

And further, on p. 347:

It is undoubtedly the case that a claim may be too wide, in the sense that it claims protection for that for which the patentee is not entitled to protection, or that it gives him a wider protection than his discovery entitles him to receive. In the present instance the patentee has claimed a monopoly of all valves with a certain feature of construction although the merit of his invention does not lie in that feature but in the utilisation in a particular and limited way of a valve containing that feature of construction. In so doing he has in my opinion over-reached himself and his claim is wider than the law will support.

And Lord Roche, at p. 351:

It is true that an inventor need not state in a claim the reasons that have led him to his invention or the stage or stages by which he has arrived at it. But the essential characteristics of his actual invention he must state.

In the Canadian patent involved in this appeal before us the inventor did not state in his claims the essential characteristic of his actual invention though it does appear in the claims in his British and United States patents. No explanation is offered. We are invited to read through the lengthy specification and import into the wide and general language of the claims that which is said to be the real inventive step disclosed. But the claims are unequivocal and complete upon their face. It is not necessary to resort to the context and as a matter of construction the claims do not import the context. In no proper sense can it be said that though the essential feature of the invention is not mentioned in the claims the process defined in the claims necessarily possesses that essential feature. The Court cannot limit the claims by simply saying that the inventor must have meant that which he has described. The claims in fact go far beyond the invention. Upon that ground the patent is invalid.

The appeal should be allowed with costs and the judgment appealed from should be varied by declaring the respondent's patent no. 265,960 to be invalid and by direct-

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ing the respondent to pay to the appellant its costs of the action.

Appeal allowed with costs.

Solicitors for the appellant: *Smart & Biggar.*

Solicitors for the respondents: *Lajoie, Lajoie, Gélinas & MacNaughton.*

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*Mar 19.

HIS MAJESTY THE KING, ON THE INFORMATION OF THE ATTORNEY-GENERAL OF CANADA (PLAINTIFF)..... APPELLANT;

AND

THE SMITH INCUBATOR COMPANY AND THE BUCKEYE INCUBATOR COMPANY (DEFENDANTS).. RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Patent—Validity—Prior public knowledge and prior use—Subject-matter—Breadth of claims.

It was *held* that the letters patent in question, for alleged new and useful improvements in incubators, were invalid and void, and they were declared cancelled and set aside (reversing judgment of Angers J. in the Exchequer Court of Canada, [1936] Ex. C.R. 105), on grounds as follows:

The subject-matter of the alleged invention and the validity in that respect of the patent must be envisaged within the ambit of the claims accompanying the specification. As to the "method" claims (those relating to the "method of hatching"): Bearing in mind that, in order to have the character of an invention in the patentable sense, it would not be sufficient for the patentee's conception to consist in the adoption of the principle of air circulation in a room for the purpose of maintaining in it uniformity of temperature (which principle was not new), that a further step was required, viz., a novel method of utilizing air circulation (involving "a degree of ingenuity * * * which must have been the result of thought and experiment"—*Thomson* v. *American Braided Wire Co.*, 6 R.P.C. 518), it was to be noticed that nowhere in the claims was there claimed precisely as material any particular method of utilizing the air circulation, except, perhaps, the statement that the current of heated air is "created by means other than variations of temperature"; also that there was nothing in the claims to restrict the patent to any particular order of arrangement of the eggs or any particular direction or means of control of the current of air, other than its velocity, and nothing to estop the patentee from asserting that the claims were not restricted by such features; and it followed that, in view of the operations of one Hastings and prior public use (as

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

established in evidence) at Muskogee, Oklahoma, in 1912 (the date of the alleged invention now in question carried back to 1915), the patentee's claims in question were too wide; also the greater part of them, if not all, were already anticipated and precluded by Hastings' public use.

The Supreme Court of the United States in *Smith* v. *Snow* (294 U.S. R. 1), dealing with the first of the method claims, held it to be valid, but the record before that Court lacked evidence of Hastings and evidence of what his prior use had been, and the record before this Court in the present case was so widely different that a different conclusion must be reached.

As to the claims relating to the apparatus: Upon the evidence, it was impossible to regard the advance, if any, over the prior knowledge and prior user as good and sufficient subject-matter of a patent. Any difference that might exist between the structure now in question and that of Hastings consisted only in mechanical details. The apparatus claims were defeated by Hastings' prior public use; they must be regarded as invalid and void, as embracing more than the patentee could claim as new; and, indeed, as claiming something which, having regard to Hastings' prior public use, did not amount to an invention in the pertinent sense.

APPEAL by the Crown from the judgment of Angers J. in the Exchequer Court of Canada (1) dismissing the action, which was brought by information filed on behalf of the Crown by the Attorney-General of Canada to impeach the letters patent in question, which were issued on April 18, 1922, for alleged new and useful improvements in incubators, of which letters patent the defendant (respondent) The Smith Incubator Company was owner and the defendant (respondent) The Buckeye Incubator Company was a licensee. Angers J. held that the patent was valid and dismissed the action. By the judgment now reported, the appeal to this Court was allowed, with costs both in this Court and in the Exchequer Court, and judgment was given for a declaration that the letters patent in question are invalid and void, and that the same be cancelled and set aside.

E. G. Gowling and *R. A. Olmstead* for the appellant.

O. M. Biggar K.C. and *R. S. Smart K.C.* for the respondents.

The judgment of the court was delivered by

RINFRET J.—The Canadian letters patent no. 217,777, issued to Samuel B. Smith on the 18th day of April, 1922,

(1) [1936] Ex. C.R. 105.

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for alleged new and useful improvements in incubators, are impeached by the Attorney-General of Canada who alleges that the respondents, respectively owner and licensee thereunder, in attempting to enforce their alleged rights granted by the said letters patent, are seriously and detrimentally affecting the welfare of the Canadian poultry industry. The Attorney-General is acting under s. 60 of the *Patent Act, 1935* (25-26 Geo. V, chap. 32).

The information prays that the letters patent be declared invalid and void and that the same be cancelled and set aside.

In the Exchequer Court, the patent was held valid (1); and the Attorney-General appeals from that judgment.

Several grounds of impeachment set out in the particulars of objection filed with the information were abandoned at the trial. In this Court, the grounds upon which the patent was sought to be impeached were:

(*a*) That there was no invention, having regard to the prior art and to the prior knowledge and use of a similar device in the year 1912 by one Milo Hastings, at Muskogee, Oklahoma, U.S.A.;

(*b*) That the claims of the patent embraced more than the applicant invented, if he invented anything.

The apparatus and method disclosed in the specification is there stated to be

> particularly designed for extensive operations wherein a chamber of large dimensions is adapted to contain thousands of eggs in separate trays arranged in tiers and the method of heating is such that the heated air is adapted to the eggs in various stages of incubation. There is a forced circulation of hot air through the chamber which is adapted preferably to maintain all eggs at temperatures between 100° and 105° Fahrenheit approximately and this improved system contemplates that fresh eggs will be placed in a horizontal plane, preferably by means of trays supported in horizontal planes, and after the eggs have been subject to the circulation of hot air for a predetermined time (the air circulating largely around the eggs) they will be placed in a tilted or inclined position in a different location but still subject to the same column of air and at this period of incubation they will be tilted in different planes at regular intervals during the time they remain in this latter position, and after they have remained for a predetermined time they will be again moved to a different position with reference to the forced circulation of hot air and so placed therein that the air will tend to keep the eggs below 105° temperature, and in this last named position the air will be forced to pass between the different eggs and will in effect act as a cooling medium for the eggs. The temperature of circulating air should be such as will prevent the eggs in the early stage of incubation from falling below 100° and the speed of velocity of the circulating air should be such as to carry the heat away from the eggs

(1) [1936] Ex. C.R. 105.

in the later stage of incubation and thereby hold the temperature of those eggs at 105° or slightly below that. It is manifest that the temperature will remain practically the same throughout the column of the eggs, but the air is impelled with sufficient velocity to carry the heat away from the eggs which happen to be in the advanced stage of incubation.

A detailed description of the apparatus and of its method of work is then given by reference to the figures and numbers on the accompanying drawings.

The "forced circulation of hot air through the chamber" is provided by means of fans, or series of fans, of which it is said that they

can be so arranged and can be operated at such speed as to cause the hot air to circulate fast enough to keep the temperature throughout the chamber between the limits of 100° and 105°.

The specification then goes on:

It, therefore, appears that the improved apparatus and method contemplates the application of hot air circulating in a column with such speed as to keep the temperature substantially uniform and so arranging the eggs that the fresh eggs are placed at one point in the column of air and held in a horizontal plane until they reach a predetermined stage of incubation and then put at a different point in the same column of air and kept in planes inclined to the horizontal and thereafter placed at such a point in the column of air that the forced draft of air acts to hold the eggs at a uniform temperature and to prevent them from becoming overheated and thereafter placing the eggs into final position for the hatching operation.

The specification further provides that

Any suitable thermostatic means may be employed for regulating the temperature such for instance as a thermostat commonly employed in incubators of a well known construction, [etc.].

There are five claims. Claims 1, 2 and 3 relate to "the method of hatching." Claims 4 and 5 relate to the apparatus. Claim 1 is typical of the three claims relating to the method; and, for our purposes, it will be sufficient to set it out in full:

The method of hatching a plurality of eggs by arranging them at different levels in a closed chamber having restricted openings of sufficient capacity for the escape of foul air without undue loss of moisture and applying a current of heated air, said current being created by means other than variations of temperature and of sufficient velocity to circulate, diffuse and maintain the air throughout the chamber at substantially the same temperature whereby the air will be vitalized, the moisture conserved and the units of heat will be carried from the eggs in the more advanced stage of incubation to those in a less advanced stage for the purpose specified.

Whatever difference may exist between this claim and claims 2 and 3 is not material and may be pointed out as we proceed.

The claims relating to the apparatus read as follows:

4. In an incubator, a closed chamber having a central corridor provided with an air-distributing space in its upper portion and a power-

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driven fan in said space, curtains at each side of said corridor, arranged to permit the air to circulate from the bottom of the chamber into the part of the chamber behind the curtains, passageways connecting the air distributing space with the corridor and the parts of said chamber behind the curtains, separate stationary and tilting racks behind said curtains, egg trays having open-mesh bottoms removably mounted upon said racks, and means to heat the air circulated through said chamber.

5. In an incubator, a closed chamber with a vertically disposed partition to provide a corridor having upper and lower passageways to said chamber, egg trays arranged at different levels in said chamber, a power driven fan creating a current in said corridor to circulate through said passageways and egg trays, said chamber having restricted openings of sufficient capacity for the discharge of foul air without undue loss of moisture and means to heat the air circulated through said chamber.

Evidence, including several prior patents and publications, was adduced for the purpose of establishing prior knowledge and the advance of the art up to the date of Smith's alleged invention which, by mutual consent, was agreed as carrying back to the year 1915.

Now, it was in the fall of 1911 and the winter of 1912 that Milo Hastings installed and organized a large hatchery at Muskogee, Oklahoma.

Mr. Hastings was heard as a witness in the present case. He said he had become "interested in incubation" as early as the year 1896. After graduating from college, he was employed as a poultry man by the United States Department of Agriculture. He was called upon to investigate the cold storage industry of eggs and chickens; and thus he became acquainted with the fact that for the successful storage of eggs and chickens it was necessary to have the control of humidity, as well as of temperature, in cold storage chambers. When working upon the cold storage industry, he noticed the use of fan circulation of air in a chamber to equalize heat and also to control humidity. It occurred to his mind that the essential problem of incubation upon a large scale involved the same series of natural conditions and natural laws, the circulation of air, the equal distribution of heat and humidity; and that if, by means of a fan, he could equalize the temperature of eggs when holding them cold, the same thing could be done for an incubator with the same large room structure and superimposed trays. He developed that conception while working for the Department of Agriculture as a poultry expert during the year 1908. He described in a rough and general way what he considered his invention in a book entitled "The Dollar Hen," which was copyrighted in the year

1909. In the early winter months of 1911, he built an incubator along the lines of his conception for Mr. Walter D. Davis, of Brooklyn, and he operated it during the hatching season, in the spring of 1911. The total capacity of this incubator was 6,000 eggs. In this incubator, he used a fan for the circulation of air.

This first attempt of Mr. Hastings to reduce his conception to practice need not, however, be developed, as it is not relied on by the Attorney-General. We may pass at once to the Muskogee plant, in respect to which alone prior user is alleged as defeating the validity of the respondents' patent.

The room-sized incubator at Muskogee was erected, as already mentioned, in the late fall of 1911 and the early winter of 1912. It was operated by Hastings during the hatching season of 1912. The construction of that hatchery was explained in detail by Hastings. He filed three diagrammatic drawings of the incubator which he built and operated. They show a series of seven incubating chambers all contained in a single room. At one side of the chambers is a corridor into which they open and from which the eggs enter, the chickens are taken out, etc. A panel door is set up, not hinged but buttoned, in front of each hatching chamber when the operator is not working it. An entry way leads into the corridor from which the chambers are worked. A fan or blower is provided for air circulation through a passageway over the incubating chambers leading to the chamber where the heater is located. The air rising through this chamber, impelled by the pressure from the fan or blower, goes into another large opening at the top of the seven incubating chambers, the air is driven by the impulsion of the blower or fan down through the incubating chambers into a passageway which is merely an opening along the floor. The air is then drawn by suction to the fan or blower from which the circuit is repeated indefinitely. The hatching or incubating chambers are made to contain screen bottom trays with special millwork slides. In each chamber there is room for twenty trays; each tray has a capacity of 250 eggs; which gives 5,000 egg capacity for the chamber, or 35,000 capacity for the whole plant of seven chambers.

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Although seven incubating chambers are shown, it was one hatching operation all carried on in the same room.

Hastings testified that the diagrams produced by him correctly showed the hatchery actually in use and operated by him at Muskogee. Ventilation, he stated,

> was definitely assured by the fact that the heater was a gas flame burning in the bottom of a vertical pipe and to support its combustion must draw in and consume a steady stream of air.

He made provision for controlling the moisture; and

> the eggs were turned as the art required; in this case they were turned by hand.

Hastings admits he did not distribute the eggs in any particular way; but, being skilled in the art of incubation and being aware of the fact that the eggs, in the early stages of incubation, absorb heat (or they are endothermic), while, in the later stages, they generate heat (or they are exothermic), he knew that the heat or the temperature of the eggs was "a factor of conductivity from the circulating air." He declares positively that "observing that, he would naturally place his eggs as they were in the various stages so that he did not have too many eggs in the latter stages of incubation in one general mass." In his own words: his "fundamental invention had been to equalize the air in a large hatchery by the forced draft or fan system of circulating the air." He explains the conception of his invention was "to equalize the temperature in a large room" through the means adopted and used by him.

Hastings' hatchery was open to the public. It was extensively advertised; and there was no attempt to keep secret any detail of construction or operation.

Of course, it must be admitted that Hastings' enterprise did not meet with financial success. He attributed that to two particular factors: the low cost at which the hatching was done; and the incidental expense of a new and untried venture.

Be that as it may, commercial success may be due to many factors. The reasons given by Hastings for the failure in the present case seem plausible; and the evidence here "cannot afford a basis for refusing to give effect to the conclusion necessitated by the facts." (*Guettler* v. *Canadian International Paper Company* (1)). As observed by Parker, J., in *Robertson* v. *Purdey* (2):

(1) [1928] S.C.R. 438.

(2) (1907) 24 R.P.C. 273, at 299.

If I am satisfied that the evidence of prior user is trustworthy evidence, I am not at liberty to disregard it merely because the prior user was not attended with any commercial success, more especially if the want of such success can be otherwise explained.

In this case, we have no reason to decide that Hastings' evidence was not trustworthy. We are not unaware of the principle that evidence of prior user should be subjected to the closest scrutiny and that it should not be accepted without the greatest caution. But Hastings' description of his apparatus and his story of his method of operation is corroborated by the witness Norman Hickox, who visited the Muskogee hatchery at the time it was in use, took photographs of it, and wrote an article about it early in 1912. The photographs and a photostatic copy of the article are filed in the case. It is reasonably evident from the description contained in that article that Hastings' conception, in the form testified to by him at the trial, was reduced to practice, as he outlined it, in the fall of 1911; and that his operations at Muskogee carried out the idea of forced circulation of air and of staged incubation.

To our mind, this is definitely supported by the language used in the brief on the appeal to the Examiners in Chief, when Hastings' application for a patent was filed on May 3, 1911, in the United States Patent Office. The conception claimed by Hastings in the course of his evidence was implicitly disclosed in the specification written by himself to accompany his original application (dated April 20, 1911). It is expressly stated in the brief to the Board of Examiners in Chief on appeal (December 20, 1912), where Hastings developed his ideas; and, among other, used the following language:

> The problem has been to enable the incubating operations to be carried on continuously, if so desired, with eggs at all stages of development, and with all of a vast number of eggs subjected to the same temperature and atmospheric conditions best adapted for the development of the embryo. An incubator such as is contemplated is in sharp contrast to the ordinary incubator in that it is designed to handle simultaneously hundreds of thousands of eggs and, therefore, requires a relatively large chamber for accommodating them.

The documentary evidence in the record—evidence of writings and publications contemporaneous with Hastings' user—constitutes the most satisfactory corroboration of Hastings' testimony in this respect. In fact, it was believed by the trial judge and it was accepted by him. His judgment proceeds on the assumption that Hastings' evidence

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is true; and he found the Smith patent valid only because, in the view he took of the situation, there was some slight difference between Smith's conception and Hastings' conception. This difference the learned judge described as consisting "in the manner in which the air is driven and circulated through the egg chambers in the Smith incubator" and "to a lesser degree, in the arrangement of the tilting racks whereby the eggs may be turned conveniently and with a considerable saving of time and labour."

But, of course, the subject-matter of Smith's alleged invention and the validity in that respect of the patent in suit must of necessity be envisaged within the ambit of the claims accompanying the specification.

There are, as we have pointed out, what may be called the method claims and the apparatus claims. Of the former, claim no. 1 has already been set out. There is no material difference between it and the other two method claims. The only change consists in substituting a slightly differently worded definition of the "current of heated air." In claim no. 1, the phraseology runs thus:

applying a current of heated air, said current being created by means other than variations of temperature.

In no. 2:

applying a power driven current of heated air in an adjacent chamber through openings into the egg chamber.

In no. 3:

applying a vertically directed current of heated air in an adjacent chamber to circulate in said egg chamber through upper and lower openings between said chambers.

Otherwise, the three claims are verbatim the same.

Now, as observed in the judgment appealed from, "the principle of air circulation in a room to maintain uniformity of temperature is not new." The invention, if any, cannot consist in the adoption of this principle. In order to reveal the exercise of the inventive faculties and thereby to bear the character of an invention in the patentable sense (*Crosley Radio Corporation* v. *Canadian General Electric Company* (1)), it would not be sufficient for Smith's conception to consist in the adoption of the principle of air circulation in a room for the purpose of maintaining in it uniformity of temperature. It would require a further step, to wit, a novel method of utilizing air circulation involving "a degree of ingenuity * * * which must have

(1) [1936] S.C.R. 551, at 556.

been the result of thought and experiment." (Lord Watson in *Thomson* v. *The American Braided Wire Co.* (1)).

Now, if the claims in the patent in suit be examined, the first characteristic therein to be noticed is that nowhere is there claimed precisely as material any particular method of utilizing the air circulation, except, perhaps, the statement that the current of heated air is "created by means other than variations of temperature."

This was pointed out, and, indeed, insisted upon, by the Supreme Court of the United States, in the case of *Smith* v. *Snow* (2), where "only so much of the patent as relates to a method for incubation" was involved; and the only question presented was "What scope may rightly be given to claim 1 of the patent?" The opinion of the Court was delivered by Mr. Justice Stone; and, in the course of his judgment, the following statements occur:

> Moreover, while the specifications and drawings show a particular arrangement of the eggs and a particular direction of the current, nowhere, in specifications or claim, is it stated either that the direction of the current is material or, what is the equivalent, that the order in which it reaches the eggs is material.
>
> * * * The specifications and claim both contemplate a continuous circulation of the current of heated air through the chamber, which, regardless of its direction, would continuously operate, by repeated contacts with the eggs in all stages, to equalize the temperature throughout the chamber by carrying heat units from the warmer to the cooler eggs. [p. 12.]
>
> * * * Such continuous circulation of the air at constant temperature, lower than that of the more advanced eggs and higher than that of the less advanced, tends to produce the equalization of the temperature of the eggs by flow of heat units from the warmer eggs to the cooler, regardless of the direction of the current in the circuit, and regardless of the particular stage of the eggs which it reaches first. * * *
>
> * * *
>
> It is evident that claim 1 does not prescribe that the current of air shall be propelled by any particular means, except that it shall be by means other than variation of temperature, nor does it prescribe that the means of propulsion shall be given any particular location, or that the current of air shall be guided by any particular means or given any particular direction. [p. 13.]

In the judgment, these statements in regard to claim 1 are subsequently qualified by pointing out that the other claims of the patent (N.B. Meaning, no doubt, no. 4 of the apparatus claims) speak, in particular, of a power driven fan and of curtains "arranged to permit the air to circulate from the bottom of the chamber into the part of

(1) (1889) 6 R.P.C. 518. (2) (Jan. 7, 1935) 294 U.S.R. 1.

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the chamber behind the curtains"; but that refers only to the structure of the apparatus. The arrangement, so it is claimed, is only "to permit the air to circulate from the bottom." Nowhere is it prescribed as an essential integer of the claimed invention that the eggs should be placed in any particular order in the incubator, "or that the propelled current should reach them in any particular order" (p. 14).

The conclusion of the United States Supreme Court on that feature of the case was that there was nothing in claim 1

> to restrict the patent to any particular order of arrangement of the eggs or any particular direction or means of control of the current of air, other than its velocity, and nothing to estop the patentee from asserting that the claim is not restricted by such features. [p. 16]

This conclusion, with which we agree, is, in our view, decisive in respect to the main ground upon which the learned trial judge based the validity of the respondents' patent; for what was said of claim 1 by the United States Supreme Court is also true of the other claims; and it follows that, having regard to Milo Hastings' operations and prior public use in Muskogee, as established in the present case, Smith's claims in the patent in suit are obviously too wide.

In *Smith* v. *Snow* (1), claim no. 1 was held valid by the Supreme Court of the United States; but it was distinctly stated that it was upheld on the ground that Smith "was the first to apply mechanically circulated currents of air to eggs * * * arranged * * * in staged incubation." It was said that he had "thus solved the major problem of artificial incubation" by replacing "the old type of incubator, with eggs arranged at a single level, all in a single stage of incubation." But it was also stated that the question whether "it was invention [was] not seriously disputed here" and "that the method employed in the Smith type of incubator was novel and revolutionary in the industry [was] not challenged."

This was as between Samuel B. Smith and E. H. Snow in the particular case presented to the Supreme Court of the United States. In that case, Hastings was not a witness, nor was there any evidence of what his prior use had been. The judgments of the Supreme Court of the United

(1) (1935) 294 U.S.R. 1.

States carry the greatest weight and are entitled to the greatest respect. But because the record now before us is so widely different from the record in *Smith* v. *Snow* (1), we feel that the conclusion reached by us must also be different. Indeed, and more particularly in view of the opinion delivered by Mr. Justice Stone on behalf of the Court, we are led to believe that had the prior public use of the patented method and knowledge thereof by Milo Hastings been adduced in evidence in the *Snow* case, the result would have been different.

We may add that our view in that respect is shared by the United States Circuit Court of Appeals for the Second Circuit in *Smith* v. *Hall* (2), which is the most recent judgment on the questions at issue and where it is stated:

> This is the first time the prior uses at the Davis Place and at Muskogee have been so fully presented and substantiated.
>
> On the record now before the court, it is impossible to agree that Smith's discovery was "not known or used by others in this country before his invention or discovery thereof."

What was said of the situation in the United States in the latter judgment equally applies to Canada as the law stood at the time when the disputed patent was issued.

What are, after all, the essential features of the invention contended for by Smith as he has himself expressed them in his claims:

(1) A method of hatching a plurality of eggs,

(2) By arranging them at different levels,

(3) In a closed chamber;

(4) The chamber having restricted openings of sufficient capacity for the escape of foul air without undue loss of moisture; and

(5) Applying a current of heated air;

(6) Said current being created by means other than variations of temperature (or—claim 2—"power driven in an adjacent chamber through openings into the egg chamber"; or—claim 3—"being vertically directed in an adjacent chamber to circulate in the egg chamber through upper and lower openings between said chambers");

(7) The current of air being of sufficient velocity to circulate, diffuse and maintain the air throughout the chamber with substantially the same temperature;

(1) (1935) 294 U.S.R. 1.

(2) (1936) 83 Federal Reports (2nd Series) 217.

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(8) Whereby the air will be vitalized (i.e., a process of ventilation),

(9) The moisture conserved,

(10) And the units of heat will be carried from the eggs in the more advanced stages of incubation to those in a less advanced stage for the purpose specified.

We have the large capacity, the eggs at different levels in a closed chamber, the circulation of air created by means other than variation of temperature (the fan or the blower), the ventilation, the moisture and the staged incubation—all present in Hastings' prior use and venture and all reading into the claims as they were expressed and made by Smith. We are not asking ourselves for the present whether there were divergences between Hastings' public use and practice and Smith's actual method. We are taking Smith's method as he has claimed it and we are forced to the conclusion that undoubtedly, as expressed, the claims are too wide and the greater part of them, if not all, was already anticipated and precluded by Hastings' public use.

So far as the apparatus claims are concerned, it is doubtful if, standing alone and independently of the prior knowledge and prior user, they would have been regarded as sufficient in themselves to support a grant of letters patent. But we would say that upon the evidence in this case we do not find it possible to declare that the advance, if any, can be regarded as good and sufficient subject-matter of a patent. The closed chamber, the corridor provided with air distributing space in its upper portion, the power driven fan, the partition between the air distributing spaces and the egg chambers, the passageways, the egg trays with mesh bottoms removably mounted upon racks and means to heat the air circulating through the adjacent chamber, were all present in Hastings' user and method. No particular claim is made by Smith for "the arrangement of the tilting racks" which the learned trial judge found subject-matter to a lesser degree than the main point concerning the method of utilizing "the air driven and circulated through the egg chambers in the Smith incubator."

Any difference that might exist between the Smith structure and the Hastings structure consists only in mechanical details. So far so that it would seem to us that had Hastings been successful in securing a patent for his struc-

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ture as described in the evidence in this case, claims 4 and 5 of Smith's patent would be regarded as infringements. And, of course, the reverse conclusion follows that Smith's claims 4 and 5, coming, as they do, several years after it, are defeated by Hastings' prior public use.

A fortiori, claims nos. 4 and 5 ought to be regarded as invalid and void as embracing more than Smith could claim as new; and, indeed, as claiming something which, having regard to the prior public use of Hastings, did not amount to an invention in the pertinent sense.

The appeal must, therefore, be allowed, with costs both here and in the Exchequer Court of Canada. The information of the Attorney-General of Canada shall be maintained and there will be a declaration that the letters patent no. 217,777 issued to Samuel B. Smith, on the 18th day of April, 1922, are invalid and void and that the same are cancelled and set aside.

Appeal allowed with costs.

Solicitor for the appellant: *E. G. Gowling.*

Solicitors for the respondents: *Smart & Biggar.*

THE SMITH INCUBATOR COMPANY (PLAINTIFF) ..... APPELLANT;

AND

ALBERT SEILING (DEFENDANT) ..... RESPONDENT.

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* Nov. 17.

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* Mar. 19.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Patent—Validity—Claims—Construction of claims—Determining scope of patent monopoly—Matter embraced in the claims—Specification—Infringement.

The action was for damages, etc., for alleged infringement of the same patent that was considered in the judgment of this Court in *The King* v. *Smith Incubator Co. et al., ante,* p. , and, so far as it applied, the evidence in that case was made part of the evidence in the present case.

Held: The issue as to the validity of the plaintiff's patent must follow the decision, against the validity of the patent, in *The King* v. *Smith Incubator Co. et al., supra,* and on this ground the plaintiff's appeal (from the judgment of Angers J. in the Exchequer Court of Canada, dismissing the action on the ground of no infringement) must be dismissed.

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

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The claims at the end of the specification in a patent must be regarded as definitely determining the scope of the patent monopoly, having regard to the due and proper construction of the expressions they contain. They must be construed in the light of the rest of the specification; that is to say, the specification must be considered in order to assist in comprehending and construing the meaning—and possibly the special meaning—in which the words or the expressions contained in the claims are used; but, on the issue either of validity or of infringement, the criterion must be determined according to the scope of the monopoly as expressed in the claims (though it is not necessary, to justify a holding of infringement, that the infringing article be found identically, or in every respect, the same as the patented article; it is sufficient if the infringer has borrowed the substance or spirit of the invention as it can be ascertained from the claims, except in details which could be varied without detriment to the successful working of it).

Discussion by Duff C.J. with regard to pertinent principles as to the requisites of a specification, the construction of claims, what constitutes the essence of infringement, and grounds on which a plaintiff in an action for alleged infringement may fail, having regard to the claims or to the specification as a whole. References to authorities. It was pointed out that, in construing and applying judgments on such subjects, it is important that the judgment be read as a whole, and, still more, that it be read in light of the issues of fact and questions of law to which the judge is addressing himself.

APPEAL by the plaintiff from the judgment of Angers J. in the Exchequer Court of Canada (1) dismissing its action. The action was for a declaration, injunction, etc., and damages for alleged infringement of plaintiff's rights under certain letters patent for alleged new and useful improvements in incubators. Angers J. dismissed the action on the ground that there was no infringement. By the judgment now reported, this Court dismissed the plaintiff's appeal on the ground of invalidity of the patent, in accordance with its decision in *The King* v. *The Smith Incubator Co. et al.* (2) dealing with the same patent.

O. M. Biggar K.C. and *R. S. Smart K.C.* for the appellant.

E. G. Gowling for the respondent.

DUFF C.J.—I am in complete agreement with Mr. Justice Rinfret in his reasons for judgment in *The King* v. *Smith Incubator Co.* (2) and in the present appeal in which I have formally concurred, as well as with those of Mr. Justice Davis in *B.V.D. Co. Ltd.* v. *Canadian Celanese, Ltd.* (3), with which I have also formally concurred; but, having regard to the judgment of the learned trial judge now under

(1) A note thereof is in [1936] Ex. C.R. at p. 114.

(2) *Ante*, p. 238.

(3) *Ante*, p. 221.

review, as well as to some of the observations in the factums of the appellants and the respondent in the same case, I think it advisable to say something touching upon the pertinent principles in respect of the construction of the claims as well as upon what constitutes the essence of infringement; although what I have to say on the former topic more fully appears in the judgments delivered by Mr. Justice Rinfret and Mr. Justice Davis in behalf of the Court in the above-mentioned appeals.

First of all, it is convenient to cite some passages from Hindmarch on Patents (Edition 1846) (p. *157):

> The patentee is required to enrol a specification of his invention, because the public is entitled to know what the patent has been granted for, what they are prohibited from doing during the existence of the patent privilege, and what they are to become entitled to when it expires, as the consideration for the grant which has been made by the Crown on their behalf.

He then proceeds to enlarge on this general statement thus:

> The vague description of an invention in the title of it contained in a patent, gives little if any notice to the public of the real nature of the manufacture they are prohibited from using, and unless some specific information were to be given to persons respecting what they are commanded by the patent to refrain from doing, they could not be punished for any violation of the patent right committed in ignorance of its nature and extent.
>
> Whenever therefore an action is brought against a party for infringing a patent, in order to ascertain whether he is guilty of an infringement or not, it is necessary to ascertain whether the thing which is complained of as a contravention of the patent, is really or substantially described in the patentee's specification, as the whole or part of the invention for which the patent was granted. And if the specification does not sufficiently describe some art of manufacturing which is substantially the same as that used by the party charged with the infringement, no action can be maintained against him for such an alleged violation of the patent privilege.
>
> In the case of *Morgan* v. *Seaward,* Mr. Baron Alderson (1) held that the patentee ought to state in his specification the precise way of doing every thing which is part of his invention; and that if any thing cannot be completely done by following the specification, then a person will not infringe the patent by doing it.

Again the author proceeds at page *161:

> 2. The patentee must in his specification make a full and complete disclosure of the nature of his invention, and of the manner in which it is to be performed.
>
> * * *
>
> In considering the requisites of a specification, it is necessary to have regard not only to the words of the proviso in the patent, but also to the object with which a specification is required, and which has already been mentioned, viz: *the furnishing of sufficient and certain information to the public respecting what they are prohibited from doing whilst the*

(1) (1836) 1 Webs. R. 182.

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privilege continues, and what they will be enabled to do after it is expired. [p. *159]

* * *

6. When an inventor applies for his patent, he describes the nature of his invention in general terms, and it is to be presumed, in the absence of any thing to show the contrary, that he has contracted to give the public the whole of his discovery, and all his knowledge on the subject, as the consideration for the privilege granted to him by the Crown. It is indeed absolutely essential for the protection of the public, that this rule should be adopted and acted upon, for patentees would otherwise be enabled to commit great frauds, by concealing the most important parts of their inventions.

The specification must therefore describe the invention according to the best of the patentee's knowledge. [pp. *165-6.]

Subject to one observation, I think, these passages are entirely in accord with the law under the modern statutes. The observation (which has no relevancy to the present appeal) is this: the words of the author at page *157 do not, in terms at all events, make allowance for cases in which precisely detailed instructions in relation to the manner in which the invention is to be put into effect, touching, for example, proportions and dimensions, might unduly limit the scope of the protection to which the patentee is entitled and where the information that would be given by such precise instructions would, through his own skill and knowledge be at the command of a competent practitioner in the art with which the invention is concerned, without the necessity of exercising invention (*British Thomson-Houston Co. Ld.* v. *Corona Lamp Works Ld.* (1)).

While the duties set forth in these passages of Hindmarch on Patents still rest upon patentees, a further duty is imposed upon them by the modern statutes. Section 14 (1) of the Canadian Act is in these terms:

14. (1) The specification shall

(*a*) correctly and fully describe the invention and its operation or use as contemplated by the inventor;

(*b*) set forth clearly the various steps in a process, or the method of constructing, making or compounding, a machine, manufacture, or composition of matter;

(*c*) end with a claim or claims stating distinctly the things or combinations which the applicant regards as new and in which he claims an exclusive property and privilege.

I think the general effect of this subsection is stated by Lord Halsbury, who himself was the author of the treatise

(1) (1922) 39 R.P.C. 49.

on "Patents" in the first edition of Halbury's Laws of England, in paragraph 338 of that treatise in these words:

> 338. In order that the public may have sufficient and certain information respecting what they are prohibited from doing whilst the privilege continues, the patentee must particularly describe and ascertain the nature of his invention. In order that, after the privilege is expired, the public may be enabled to do what the patentee has invented, he must particularly describe and ascertain the manner in which the same is to be performed; and the ambit of his invention must be circumscribed by definite claims.

But there is something more to be said about the effect of clause (*c*) in the subsection of the *Patent Act* quoted above. To use Lord Halsbury's language, that clause requires that the ambit of the invention must be circumscribed by a claim or claims at the end of the specification. It is to these claims that the public are entitled to look in order to ascertain the limits of the monopoly granted to the patentee, and unless these limits are prescribed distinctly in the claims themselves, without unnecessary ambiguity, vagueness or obscurity, having regard to the nature of the subject-matter, the patentee can found no title to relief upon his patent in respect of any alleged infringement; nor can he, assuming that the claims are not objectionable on the ground of ambiguity, vagueness or obscurity, obtain any title to relief in respect of any act which does not infringe the monopoly marked out by the claims when properly read. Where, moreover, as in the two cases mentioned at the outset, a claim so read embraces matter which is old in the sense of the patent law, the claim is invalid.

It is now settled law that, for the purpose of ascertaining the meaning of the claims, the language in which they are expressed must be read in light of the specification as a whole, but it is by the effect of the language employed in the claims themselves, interpreted with such aid as may properly be derived from the other parts of the specification, that the scope of the monopoly is to be determined. This, I think, is best put in a passage at the end of Lord Loreburn's judgment in *Ingersoll Sergeant Drill Co.* v. *Consolidated Pneumatic Tool Co. Ld.* (1). There is a passage at the beginning of the judgment which is well known and which I do not quote, but the following passage, which is quoted in the complete statement of authorities on this

(1) (1907) 25 R.P.C. 61, at 83-84.

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point by Mr. Justice Davis, indicates very clearly the manner in which the principle was applied:

According to Mr. Bousfield, the piston means the piston with the circumferential groove and projecting stem described on page 3 of the specification, or as altered in accordance therewith. The piston chamber also, it seems, means one complying with the description on page 2 of the specification. So as regards the passages, because the specification at page 4 describes the two passages as opening into the piston chamber at about the same point in its length, the claim must also, we are told, be read as conveying that they are to be at about the same point. Again, because, at page 6, the specification informs us that the rearward movement of the piston closes both the passages, we are to read that also into the claim. And the reason urged for so qualifying the language of the claim is that these things are essential to the success of the plaintiffs' hammer as a working hammer. That would have been a very good reason for inserting them expressly or by plain reference in the claim had it been thought safe or wise to do so, but is no reason at all for reading them into the claim when they are not there. One or two more glosses are sought to be added by Mr. Bousfield, but they are all on the same footing and need not further be discussed.

Mr. Walter put it a little differently. He attributed a very special meaning to the words "independently of the piston," and said they were put in to show that no part of the live air passage is to be in the piston, meaning by the live air passage the whole distance from the source of supply to the valve. All I can say of this is that I can extract nothing of the kind out of the words used, even when illuminated by the rest of the specification.

Accordingly it comes to this. We are asked to construe the claim with reference to the specification, not in order to understand what the former says, but to make it say things which in fact it does not say at all.

If such a process were admitted all certainty would vanish. No one in construing a claim would know how far he could rely on the words used or how to pick from the specification the qualifying phrases. Patents are not unconditional grants of a monopoly. The patentee must, in return for his privilege, say plainly what is the invention for which he asks protection, so that others may learn that and its limits. And if he chooses separately to claim a subordinate invention he must make plain the metes and bounds of that also. I think the patentee has made it plain in claim 13, if it be fairly construed, and there is no novelty if the interpretation be as I think it is.

Lord Haldane's judgment in *British Thomson-Houston Co. Ld.* v. *Corona Lamp Works Ld.* (*supra*) (1) at page 67, affords an illustration of the manner in which expressions used in the claim may be interpreted by reference to the body of the specification. *Western Electric Co. Inc.* v. *Baldwin International Radio of Canada* (2) is another case in which the description in the body of the specification of the invention provided a lexicon interpreting the phrases in the claim.

(1) (1922) 39 R.P.C. 49. (2) [1934] S.C.R. 570.

But, while the plaintiff in an action for infringement must fail unless he can prove an invasion of the monopoly delimited by the claim so construed, it is equally true that he may fail on the broad ground that the defendant has not taken any part of any invention in respect of which the specification "fully describes the invention and its operation or use as contemplated by the inventor," or any "process" of which the specification "sets forth clearly the various steps," or any "machine, manufacture, or composition of matter" of which the specification "sets forth clearly * * * the method of constructing, making or compounding." That such things shall be "correctly and fully" described or "set forth clearly," as the case may be, is just as essential, by force of clauses (*a*) and (*b*), to enable the patentee to protect himself against alleged infringements as is compliance with clause (*c*) which relates to claims only.

The court, called upon to deal with the issues in an action for infringement, may find it quite unnecessary to apply itself to the construction of the claims for the purpose of ascertaining the limits of the monopoly defined by the claims, because it is plain on the face of the specification as a whole that, on any construction of the claims, the defendant has not taken any part of any invention properly described and set forth pursuant to the requirements of section 14.

Then, the defendant may attack the specification on the ground that the monopoly delimited in the claims relates to an invention which, on the specification as a whole, is not the thing invented by the patentee. He may say that though the patentee has described in the body of his specification an invention and the manner of its working, yet his claim or claims relate to a different invention which is not fully described and set forth in the specification as a whole or in any part of it within the meaning of section 14. Obviously, the plaintiff may fail on the ground, either that the patent is invalid because of non-observance of the conditions of section 14, or that the alleged infringement does not invade the monopoly defined, or because the defendant has not taken any part of the only invention fully set forth and described in the specification, in compliance with section 14.

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The action may be defeated on (*inter alia*) any one of these grounds, and the tribunal, which is not under any obligation to write a treatise upon, or an exposition of, patent law or of any branch of patent law, will, in the ordinary course, confine itself to a discussion of the particular ground upon which it is proceeding. Hence, the importance, in construing and applying judgments on such subjects, of reading the judgment as a whole, and, still more, of reading the judgment in light of the issues of fact and questions of law to which the judge is addressing himself.

It may be that the statutory provision requiring the definition of the ambit of the monopoly claimed to be given in claims at the end of the specification has, in greater or less degree, affected in practice the application of some doctrines of patent law, such as the doctrine of mechanical equivalents and, indeed, the application of the general principle that infringement consists in taking the substance of the plaintiff's invention; but there is no good ground for a conclusion that these doctrines have been abrogated. *Electrolier Manufacturing Co. Ltd.* v. *Dominion Manufacturers Ltd.* (1) is a recent illustration of the proper application of the rule that, where the essence of the invention is taken, an action for infringement is not defeated by reason of the fact that the infringing structure discloses some "small variation in unimportant features or in non-essential elements."

RINFRET J. (All other members of the Court concurring)—This is an appeal from the judgment of the Honourable Mr. Justice Angers, in the Exchequer Court of Canada, dated the 29th day of January, 1936, dismissing the appellant's action for an injunction and damages for the infringement of its patent no. 217,777. The patent involved is the same as was considered in the judgment of this Court in the case of *His Majesty the King* v. *Smith Incubator Company* (2) delivered at the same time as the present judgment.

So far as it applied, the whole of the evidence in the former case was made part of the evidence in the present case. The issue in respect of the validity of the appel-

(1) [1934] S.C.R. 436. (2) *Ante*, p. 238.

lant's patent must, therefore, follow the decision in *The King* v. *Smith Incubator Company* (1).

In his judgment, the learned trial judge in this case did not pass upon the validity of the patent already upheld by him in the judgment in the other case. But, having formally held that

> the only element of novelty in the Smith patent, as set forth in the [former] case, is the method of circulating the hot air in the incubator and the method of turning the eggs periodically during the incubation process,

he found that the method in this respect used by the defendant was quite different; and, accordingly, he failed to see any infringement by the respondent.

The Smith patent having been held invalid by our judgment (1), delivered upon the information of the Attorney-General of Canada, it becomes unnecessary for us to pass upon the issue of infringement. It should only be stated that the respondent Seiling himself holds a patent covering his incubator (Canadian Patent no. 310,061); and, had there been occasion for it, we would not have been prepared to decide that his patent infringes that of the appellant.

However, for the reasons already stated in *The King* v. *Smith Incubator Company* (1), patent no. 217,777 must be declared invalid and void and must be set aside. As the patent is the only ground upon which the appellant can claim infringement, the foundation for his action is thereby removed; and we must decide, therefore, that the action was rightly dismissed by the learned trial judge.

In view of this result, there remains no longer any necessity of discussing at length the appellant's contention that:

> There are two separate lines of authority suggesting what are * * * mutually inconsistent attitudes towards * * * the definition of the scope of a patent monopoly in the patent claims.

The appellant proceeds:

> According to one of these it is proper to consider what is "the pith and substance" or the "spirit" of the invention and to give effect to the patent accordingly. The other is to regard the claims as definitely determining the scope of the monopoly which the patent purports to grant and to give or refuse them effect according to the expressions they contain when these expressions are properly construed and their meaning determined.

In our view, the rule is that the claims must be regarded as definitely determining the scope of the monopoly, hav-

(1) *Ante*, p. 238.

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ing regard to the due and proper construction of the expressions they contain. Such was the direction given and the rule followed by this Court in *Mailman* v. *Gillette* (1); *Gillette* v. *Pal* (2); *Burt* v. *Autographic* (3); and *Schweyer* v. *New York Central* (4). And, notwithstanding the suggestion to the contrary, such was also the rule applied in *Electrolier* v. *Dominion Manufacturers* (5).

As often observed, of course, the claims must be construed in the light of the rest of the specification; and that is to say, that the specification must be considered in order to assist in comprehending and construing the meaning—and possibly the special meaning—in which the words or the expressions contained in the claims are used (*Ingersoll* v. *Consolidated* (6)). But, as was said in the *Electrolier case* (7),

> infringement is a matter depending on the construction of the claims, for there it is that the inventor is required to state "the things or combinations * * * in which he claims an exclusive property and privilege."

Generally speaking, actions for infringement are met with two distinct defences: one being that the plaintiff's patent is invalid; the other being that, whether the plaintiff's patent is invalid or not, the defendant does not infringe. And it may be that, to borrow the words of Frost (Patent Law and Practice, 4th Ed., Vol. 1, p. 349), "the criterion of novelty and infringement in this respect are not the same." But, in each case, the criterion must be determined according to the scope of the monopoly as expressed in the claims; although it is not necessary, to justify a holding of infringement, that the infringing article should be found identically, or in every respect, the same as the plaintiff's patented article. It is sufficient if the infringer has borrowed the substance or spirit of the invention as it can be ascertained from the claims, except in details which could be varied without detriment to the successful working of it.

The appeal is dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Smart & Biggar.*

Solicitors for the respondent: *Riddell & Murray.*

(1) [1932] S.C.R. 724.
(2) [1933] S.C.R. 142.
(3) [1933] S.C.R. 230.
(4) [1935] S.C.R. 665.
(5) [1934] S.C.R. 436.
(6) (1907) 25 R.P.C. 61, at 82-83 (H.L.).
(7) [1934] S.C.R. 436, at 442.

CANADIAN NATIONAL STEAMSHIPS (DEFENDANT) ..... APPELLANT;

AND

WILLIAM BAYLISS (PLAINTIFF)..... RESPONDENT.

1936
*Nov. 4.
1937
*Feb. 2.

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

Shipping—Damage to goods—Peril of the sea—Negligence—Fault of carrier or of his agent or servant—Burden of proof—Barbados Carriage of Goods by Sea Act, 1926—Clause q, rule 2, article 3 of the schedule of the Act.

Upon an action against a carrier for damages to goods shipped under bills of lading which specifically stated that the vessel should not be liable for damage caused by perils of the sea, the grounds of defence were, first that, the carrier having established at the trial a *prima facie* case of loss by a peril of the sea, the burden of proving negligence consequently rested on the respondent, and secondly, that the carrier had discharged the burden of proof resting on him under clause *q*, rule 2, article 3 of the schedule of the Barbados Carriage of Goods by Sea Act, 1926, which was made applicable to the contract.

Held that, the issue raised by the first ground being an issue of fact, it was incumbent upon the carrier to acquit himself of the onus of showing that the weather encountered during the voyage was the cause of the damage and that it was of such a nature that the danger of damage to the cargo arising from it could not have been foreseen or guarded against as one of the probable incidents of the voyage—In this case, the concurrent findings of fact, on that issue, by the trial and appellate courts in favour of the respondent must stand.

Held, also, that under clause *q*, rule 2, article 3 the burden rests upon the carrier to show that neither the actual fault nor the privity of the carrier, nor the fault or neglect of the agents or servants of the carrier, contributed to the loss or the damage; and the carrier does not acquit himself of this onus by showing that he has employed competent stevedores to stow the damaged cargo, or that proper directions as to the stowage of the cargo have been given.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec, affirming the judgment of the Superior Court, E. M. McDougall J. and maintaining the respondent's action in damages for $4,549.03.

On the 25th February, 1931, the ss. *Lady Drake,* a vessel belonging to the appellant company, received at Barbados, in the British West Indies, a shipment of molasses in puncheons, barrels and half-barrels for delivery at the port of Saint John, New Brunswick. The vessel called at several intermediate points, among others, Hamilton, Bermuda,

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where she arrived on the 4th of March, after having passed through some heavy weather. The master caused the shipment of molasses which had been placed in no. 2 hold, to be inspected, when everything was found to be in satisfactory condition. Leaving Hamilton on the afternoon of the same day, with the weather much as it had been upon arrival, the vessel ran into somewhat heavier weather during the night, and in the early morning of the 5th March. At 7.30 on that morning, it was discovered that the barrels and puncheons of molasses had been completely broken up, and the hold was awash with a mass of bulk molasses, the barrel staves floating on the surface. The respondent, on the failure of the appellant company to deliver the molasses in accordance with the contract of carriage, instituted the present action, claiming the sum of $4,549.03, which the parties agreed represent the extent of the damage.

I. C. Rand K.C. for the appellant.

E. Languedoc K.C. for the respondent.

The judgment of the court was delivered by

DUFF C.J.—The appeal is concerned with the judgment recovered by the respondent against the appellants in the Superior Court of the district of Montreal for damages to molasses shipped on February 26, 1931, in the steamship *Lady Drake* from Barbados for delivery at Saint John, New Brunswick, and the judgment of the Court of King's Bench affirming it. The molasses damaged was part of five separate consignments shipped by Messrs. Jones & Swan of Barbados and stowed in no. 2 hold of the vessel as part of an aggregate quantity of 268 puncheons, 238 barrels and 80 half-barrels.

The vessel left Hamilton, Bermuda, at 1.30 p.m. on the afternoon of the 4th of March, 1931, and met with heavy weather. On the morning of March 5th, about 7.30, it was discovered that no. 2 hold was virtually awash with molasses and floating barrel staves.

The goods were shipped under bills of lading which specifically stated that the vessel should not be liable for damage caused by perils of the sea. The bills of lading contained a term importing the provisions of the Barbados *Carriage of Goods by Sea Act*, 1926.

The appellants in this court contended that they were entitled to judgment on the grounds, first, that the damage was attributable to a peril of the sea, and, second, that the appellants had discharged the burden of proof resting on them under clause *q*, rule 2, article 3 of the schedule of the Act. It will be convenient to deal with these contentions in the order in which I have stated them.

Counsel for the appellant accepted the definition of "perils of the sea" given in the last edition of Scrutton on Charter Parties (p. 261) as follows:

> Any damage to the goods carried, by sea-water, storms, collision, stranding, or other perils peculiar to the sea or to a ship at sea, which could not be foreseen and guarded against by the shipowner or his servants as necessary or probable incidents of the adventure.

His main contention was that the appellants having established at the trial a *prima facie* case of loss by a peril of the sea within this definition, the burden of proving negligence consequently rested on the respondent on the authority of *The Glendarroch* (1). At the trial the defence raised under this head was that the heavy seas that were encountered after leaving Hamilton and before the discovery of the loss and damage on the following morning were of such a character as to bring the damage within the words quoted above, that is to say,

> damage caused by * * * storms * * * or other perils peculiar to the sea or to a ship at sea which could not be foreseen and guarded against by the ship owner or his servants as necessary or probable incidents of the adventure.

The issue raised by this defence was, of course, an issue of fact and it was incumbent upon the appellants to acquit themselves of the onus of showing that the weather encountered was the cause of the damage and that it was of such a nature that the danger of damage to the cargo arising from it could not have been foreseen or guarded against as one of the probable incidents of the voyage. The trial judge and the Court of King's Bench have unanimously held that this issue must be decided against the appellants on the ground that, upon the evidence, the proper conclusion is that the dangers arising from such weather as the ship encountered could be guarded against and that they ought to have been foreseen. There is no satisfactory reason for impeaching these concurrent findings of fact and they must, therefore, stand. They constitute a complete

(1) [1894] Prob. 226.

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answer to the contention that the appellants have brought themselves within the exception "perils of the sea."

The contention founded upon clause *q*, rule 2, article 3, remains to be dealt with. That clause is in the following words:

> Any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier, nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

The judges below have unanimously held that the burden of proof under this clause has not been discharged. It was very vigourously urged by counsel on behalf of the appellants that he had established a *prima facie* case of absence of negligence by proving proper stowage. But it will be observed that the burden resting upon the carrier under this clause is a very heavy one. He has to show that neither the actual fault nor the privity of the carrier, nor the fault or neglect of the agents or servants of the carrier contributed to the loss or the damage. The carrier does not acquit himself of this onus by showing that he has employed competent stevedores to stow the damaged cargo, or that proper directions as to the stowage of the cargo have been given; and, if the fact is, as in this case it has been found, that no peril was encountered that could not have been provided against by proper care, the fact that the puncheons and barrels containing this cargo of molasses in no. 2 hold were broken is a fact concerning which the courts below, as judges of fact, necessarily asked themselves the question: How is this to be accounted for? I agree with the courts below in thinking that the more reasonable hypothesis, in all the circumstances, is that in this particular hold there was some inattention to precautions which would, it is not unreasonable to consider, have, probably, had the effect of preventing the loss.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Beauregard, Phillimore & St. Germain.*

Solicitor for the respondent: *Erroll Languedoc.*

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*Feb. 3, 5.
*Mar. 19.

MASSIE & RENWICK, LIMITED (DEFENDANT) ..... } APPELLANT;

AND

UNDERWRITERS' SURVEY BUREAU LIMITED AND OTHERS (PLAINTIFFS).. } RESPONDENT;

AND

J. E. CLEMENT, INC., AND OTHERS (INTERVENANTS).

UNDERWRITERS' SURVEY BUREAU LIMITED AND OTHERS (PLAINTIFFS).. } APPELLANTS;

AND

MASSIE & RENWICK, LIMITED (DEFENDANT) ..... } RESPONDENTS;

AND

J. E. CLEMENT, INC., AND OTHERS (INTERVENANTS).

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Copyright—Fire insurance plans—Infringement—Conversion—Injunction—Defence—Conspiracy—Combine—Relevancy—Right of action barred—Sections 21 and 24 of the Copyright Act, R.S.C., 1927, c. 32—Section 82 of the Exchequer Court Act.

The action is one for infringement and conversion of copyright which the plaintiffs claim in fire insurance plans, and also for an injunction, damages and delivery up of infringing reproductions. The defendant pleaded *inter alia* that the plaintiffs combined and conspired together to prevent defendant from obtaining copies of the plans in question. Plaintiffs applied to have struck out those paragraphs of the statement of defence relating to the alleged combine and conspiracy; and the Exchequer Court of Canada granted such application. The defendant also alleged that the plaintiff's right of action, as to most of the works upon which the action was brought, had been barred by section 24 of the *Copyright Act* and the Exchequer Court of Canada held that such section was applicable to claims made under section 21 of the Act for the recovery of possession or in respect of conversion.

Held, reversing the first part of the judgment of the Exchequer Court of Canada ([1937] Ex. C.R. 15), that this Court should not be called upon, on the pleadings as they stand, to say whether or not the allegations in the above-mentioned paragraphs would be sufficient to justify the court in withholding an injunction and that the matter in dispute should be referred back to trial. The question whether a court will grant an injunction or not is a question of discretion, but limited; every threatened violation of a proprietary right which, if it were committed, would entitle the party injured to an action at law, entitles him,

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

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prima facie, to an injunction, and the onus is upon the defendant of rebutting such presumption by showing that damages will be adequate compensation to the plaintiff for the wrong done him or that on some other ground he is not entitled to equitable relief. In considering whether such grounds exist for refusing such relief in this case, the trial court ought to have regard to the conduct of the plaintiffs and especially to the fact, if such fact were established, that the application for the injunction was merely one step in the prosecution of a scheme in which the plaintiffs had combined to further some illegal object injurious to the defendant.

Held, also, affirming the second part of the judgment of the Exchequer Court of Canada, that, without expressing any opinion on the question whether section 24 of the *Copyright Act* would in all cases affect a claim under section 21, inasmuch as the language of section 24 cannot be said to be capable of only one necessarily exclusive meaning precluding its application to claims under section 21 of the character hereinafter mentioned, there is reasonable ground for deciding that such application was within the probable intention of Parliament. The words "in respect of infringement of copyright" in section 21 are capable of a construction by which the phrase would extend to a claim under such section, as in the present case, where the infringing copy with which the claim is concerned is a copy the making and importing of which constituted infringement in the pertinent sense.

APPEALS from the judgment of the President of the Exchequer Court of Canada (1), on questions of law stated for determination in advance of the trial of the action.

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

O. M. Biggar K.C. and *H. Cassels K.C.* for the defendant, appellant and respondent.

J. A. Mann K.C. and *W. D. Herridge K.C.* for the plaintiffs, respondents and appellants.

W. B. Scott K.C. for the intervenants.

DUFF C.J.—In addition to the judgment delivered by Mr. Justice Hudson on behalf of the Court, it is, perhaps, advisable that I should add a word on the question of jurisdiction.

No objection was taken to the jurisdiction by the respondents in either appeal and, during the course of the argument, it was stated from the bench that, notwithstanding the unfortunate wording of section 82 of the *Exchequer Court Act,* the judgments appealed from might be considered as judgments in the nature of a judgment on demurrer and the appeals proceeded accordingly.

(1) [1937] Ex. C.R. 15.

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The judgment of the Court was delivered by

HUDSON J.—This action was brought by the plaintiffs in the Exchequer Court of Canada, alleging among other things an infringement of copyright by the defendant and claiming an injunction, damages and delivery up of infringing reproductions. The defendant admitted that it had obtained and used reproductions of certain of the documents of the kind referred to in the statement of claim but denied that the plaintiffs had any copyright in them. It also alleged that the plaintiffs' right of action, if any, had been lost by laches and acquiescence and that it was in any event barred as to most of the works upon which the action was brought by section 24 of the *Copyright Act* or alternatively by certain provincial statutes of limitation. It also pleaded that the plaintiffs were disentitled to succeed on the ground that they had combined and conspired together to prevent the defendant from competing with the plaintiffs in the business of fire insurance and that the course they had pursued for some twenty-five years, particularly in relation to certain agreements with the original holders of the copyright in question, and certain legal proceedings including the present action, had been adopted in order to attain the object of such conspiracy and combination. The defendant invokes section 498 of the Criminal Code and the provisions of the *Combines Investigation Act,* both of which specifically refer to conspiracies and combines in respect of insurance (1). The plaintiffs moved to strike out the allegation with respect to conspiracy and on the return of this motion this question and also a question as to the application of the statutes of limitation pleaded by defendant with respect to infringing documents were directed to be heard as preliminary questions of law.

The first of these questions was answered by the President of the Exchequer Court of Canada in favour of the plaintiffs and the second in favour of the defendant. Both parties appeal to this court.

The first question submitted was—

Whether the plaintiffs would be disentitled to succeed in this action if the defendant established the allegations contained in paragraphs 7, 8, 10, 11, 12, 13, 14, 15, 18, 19, 22 and 23 of the statement of defence which relate to acts done by the plaintiffs or some of them in combination.

(1) *Reporter's note:*—The above thirteen lines are a summary of the paragraphs of the statement of defence mentioned in the first question submitted, stated *infra.*

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The plaintiffs seek the aid of the court to protect a property right, but the remedy sought is in part an equitable one, i.e. an injunction.

The law governing the court in granting or refusing an injunction is correctly stated in Ashburner's Principles of Equity (2nd Ed. 1933), page 343:

> Where the court has jurisdiction to grant an injunction, the question whether it will grant it or not is a question of discretion. It is not bound to grant an injunction merely because A threatens and intends to violate a legal right of B. But the tendency of the decisions in recent years is to limit the discretion of the court, and it may be laid down that every threatened violation of a proprietary right which, if it were committed, would entitle the party injured to an action at law, entitles him, *prima facie*, to an injunction, and the onus is upon the defendant of rebutting the presumption in favour of an injunction, by showing that damages will be an adequate compensation to the plaintiff for the wrong done him, or that on some other ground he is not entitled to equitable relief.

In considering whether such grounds exist for refusing this relief, the court would, unquestionably, have regard to the conduct of the plaintiffs and, especially to the fact, if such fact were established, that the application for the injunction was merely one step in the prosecution of a scheme in which the plaintiffs had combined to further some illegal object injurious to the defendant. Taking this view, I do not think that this court should be called upon at the present time to say whether or not the allegations in the above-mentioned paragraphs of the statement of defence would be sufficient to justify the court in withholding an injunction. The matter should be referred back to trial without expressing at present any opinion one way or the other as to the sufficiency of the allegations in the statement of defence.

This course was adopted by the Privy Council in dismissing an appeal from the decision of this court in the case of *McLean* v. *The King* (1). The decision of the Privy Council is not reported but was given on the 10th July, 1908. The judgment delivered by Lord Loreburn, L.C., was as follows:

> The question in this appeal arises on a demurrer. If, on any reasonable construction of the respondent's petition of right, a cause of action could be proved, then the respondent (the suppliant) would be entitled to succeed. It will be for the learned judge who hears the case, when the facts have been proved, to decide whether a cause of action has or has not arisen, but it is not for their Lordships to express an opinion beforehand, on the pleadings as they stand.

(1) (1907) 38 Can. S.C.R. 542.

Accordingly their Lordships will humbly advise His Majesty to dismiss this appeal. In accordance with the undertaking given on behalf of the Attorney-General for Canada when special leave to appeal was granted, the appellant will pay the respondent's costs of the appeal as between solicitor and client.

The appeal in respect of the first question should, therefore, be allowed and the order of the learned President should be set aside—with costs in the cause.

The second question submitted was—

Whether any of the statutory provisions set up in paragraph 20 of the statement of defence constitute a bar to the plaintiffs' action in respect of any of the documents referred to in the schedules to the statement of defence and if any of them constitute such a bar, which of them do so, and to which of the remedies prayed by the plaintiffs do they respectively apply.

The learned President gave only a partial answer to this question, holding that section 24 of the *Copyright Act* was applicable to claims made under section 21 for the recovery of possession or in respect of conversion. From this decision the plaintiffs appealed.

Section 21 reads as follows:

21. All infringing copies of any work in which copyright subsists, or of any substantial part thereof, and all plates used or intended to be used for the production of such infringing copies, shall be deemed to be the property of the owner of the copyright, who accordingly may take proceedings for the recovery of the possession thereof or in respect of the conversion thereof.

and section 24 as follows:

24. An action in respect of infringement of copyright shall not be commenced after the expiration of three years next after the infringement.

These sections are part of a group of sections in the Act under the heading of "Civil Remedies," section 24 being at the end of this group. There is in the Act no other limitation or prescription in respect to actions arising thereunder.

It would appear to be unnecessary to express any opinion on the question whether section 24 of the *Copyright Act*, which is a reproduction of section 10 of the English Act, would, apart from the considerations about to be mentioned, affect a claim under section 21 of the Canadian Act, which is section 7 of the English Act.

The words "in respect of infringement of copyright," although by no means an apt description of a claim made under section 21, are capable of a construction by which the phrase would extend to a claim under such section if the infringing copy with which the claim is concerned is a

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copy the making and importing of which constituted infringement in the pertinent sense.

The Canadian statute must be assumed to contemplate proceedings in the Exchequer Court of Canada for the purpose of enforcing the rights created by section 21 as well as proceedings in provincial courts. This circumstance suggests various considerations which would appear to be of no inconsiderable weight. First of all, it would seem to be improbable that Parliament contemplated a uniform period of limitation throughout Canada in respect of actions admittedly falling within section 24 and differing periods of limitation as regards claims asserted in the provincial courts under section 21. Then, there is a great practical difficulty if section 24 has no application to claims under section 21. It is at least plausibly debatable whether such proceedings under the statute would be within the field of operation of provincial statutes of limitation; and as regards one of the provinces, especially having regard to the terms of the French version, it is at least arguable whether the period of prescription would not be thirty years.

We think we are entitled to assume that the Parliament was not entirely oblivious to these considerations and, as the language of section 24 cannot be said to be capable of only one necessarily exclusive meaning precluding its application to claims under section 21 of the character mentioned, there would appear to be reasonable ground for holding that such application was within the probable intention of Parliament.

The appeal in respect of the second question should be dismissed with costs. There will be no costs to or against the intervenants.

Defendant's appeal allowed, costs in the cause. Plaintiffs' appeal dismissed with costs.

Solicitors for the defendant: *Cassels, Brock & Kelly.*

Solicitors for the plaintiffs: *Mann, Lafleur & Brown.*

Solicitors for the intervenants: *MacDougall, Macfarlane, Scott & Hugessen.*

THE PROVINCE OF NOVA SCOTIA AND OTHERS ..... APPELLANTS;

AND

THE CANADIAN NATIONAL RAILWAYS AND OTHERS ..... RESPONDENTS.

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*Feb. 2, 3.
*Feb. 21.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA

Railways—Maritime Freight Rates Act, R.S.C., 1927, c. 79, section 8—Freight rates—Select territory—Reduced rates outside—Competitive or reduced tariffs—Board of Railway Commissioners—Powers and duties—Administrative and judicial—Prejudice or non-prejudice—Question of fact.

The appellants made an application to the Board of Railway Commissioners for Canada for an order requiring the respondent railway company to reduce the freight rates on potatoes in carloads from shipping points within "select territory" in the Maritime Provinces to points within certain areas of Ontario and Quebec in which the respondents had published reduced rates for the express purpose of meeting motor-truck competition. The Board found that the appellants had failed to establish that the competitive tariffs complained of had resulted in the destruction of, or to the prejudice of, the advantages given by the *Maritime Freight Rates Act* to shippers in the "select territory" in favour of persons or industries located elsewhere and dismissed the application.

Held that the judgment of the Board should be affirmed.

Competitive tariffs established outside of the "select territory" are within the contemplation of section 8 of the Act, and when such tariffs prejudicially affect "the statutory advantages," then "the Board shall not approve nor allow" such tariffs; and these words necessarily imply authority to cancel any rates having such effect; but whether any particular competitive rate has that effect must in each case be a question of fact to be determined by the Board itself.

The onus of establishing prejudice does not rest always upon the shipper or the complainants. The Board itself is a body invested with administrative as well as judicial powers and duties; and when a complaint is presented to the Board that any particular tariff constitutes an infraction of section 8, it is the duty of the Board to determine the question of prejudice or non-prejudice, keeping in mind that it is the intention of the Act to maintain the statutory advantages in rates given thereby to persons and industries located in the "select territory."

The authority of the Board under section 8 is limited to that which is given by or implied in the words "shall not approve nor allow any tariffs which may destroy or prejudicially affect such advantages"; and the Board, having decided the issue of fact adversely to the appellants, as regards the particular tariffs in question in this appeal,

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was right in concluding that those tariffs ought not to be disallowed.

APPEAL by leave of the Board of Railway Commissioners for Canada, from a decision of that Board dismissing the appellants' application for an order under the *Maritime Freight Rates Act* directing a specific or a percentage reduction in rates on potatoes from the "select territory" as defined by that Act to points in an area of the province of Ontario within which reduced rates had been made effective in the Canadian National and Canadian Pacific Railways for the express purpose of meeting motor-truck competition.

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

C. J. Burchell K.C. and *J. L. Ralston K.C.* for the appellants.

I. C. Rand K.C. for the Canadian National Railways.

G. A. Walker K.C. for the Canadian Pacific Railway Company.

C. H. Bowyer K.C. for the Ontario Potato Growers' Association.

A. G. Blair K.C. for the Board of Railway Commissioners for Canada.

The judgment of the court was delivered by

HUDSON J.—This is an appeal by leave from a judgment and order of the Board of Railway Commissioners delivered on the 3rd of January on an application by the appellants, upon the following questions of law and jurisdiction:

1. Whether, upon the facts as found by the Board, the Board was right—

(*a*) In holding that the *Maritime Freight Rates Act* does apply to competitive tariffs established by railway companies between points outside the "select territory" as defined in the Act, and that Maritime shippers, in respect of "preferred movements" over the "eastern lines" of the Canadian National Railways as defined in the Act, or in respect of movements similar to "preferred movements" over the railways of other companies which have filed with the Board tariffs of tolls meeting the statutory rates referred to in section 7 of the Act, are entitled to a reduction in the freight rates on such preferred movements proportionate to the reductions effected by such competitive tariffs in order to maintain the ratio of advantage accorded to them under the terms of the Act: provided, however, that it can be established that any such competitive tariff issued by a railway company outside the "select territory" "may destroy or prejudicially affect" the advantages given by the Act to Maritime shippers in favour of persons or industries located elsewhere than in the "select territory" as provided by section 8 of the Act;

(*b*) In adding the foregoing proviso to the decision giving rise to question (*a*), namely:—

"Provided, however, that it can be established that any competitive tariff issued by a railway company 'may destroy or prejudicially affect' the advantages given by the Act to Maritime shippers in favour of persons or industries located elsewhere than in the 'select territory' as provided by section 8 of the Act."

(*c*) In holding that the mere production of such competitive tariffs showing reductions in rates outside the select territory was insufficient, without more, to establish the contention of Maritime shippers, but that it is necessary to prove some actual or probable destruction of Maritime trade or some prejudicial effect thereupon, either heretofore sustained or likely to ensue as a result of such competitive tariffs;

(*d*) In holding that, if rates under such a competitive tariff outside the "select territory" are found to be such as the Board should not approve or allow, under section 8 of the Act, the Board has authority under the Act only to cancel such rates, and has not the authority to adjust or vary rates on the railway lines in the "select territory" by allowing a reduction therein proportionate to the reduction effected by the competitive tariff in the outside territory.

The railway companies established competitive tariffs reducing freight rates upon shipments of potatoes within certain areas in Ontario and Quebec but outside of the "select territory" as defined in the *Maritime Freight Rates Act*. While the immediate question before the Board was confined to this particular commodity and particular territory, it was admitted that the principle involved affected over 300 competitive freight rate tariffs having effect in various points of Canada outside of such "select territory."

The appellants contended that the shippers from points on the "eastern lines" in the Maritime Provinces were entitled to a proportionate rate reduction in respect of all competitive tariffs which have been filed by the railway companies pertaining to freight traffic outside of the Maritime provinces. On the other hand, it was contended on behalf of the Canadian Pacific Railway Company that the above-mentioned Act was not applicable to competitive tariffs between points outside of the "select territory."

The Canadian National Railways agree that the authority of the Board under section 8, which is reproduced below, is sufficiently comprehensive to bring such tariffs within its scope, and this view the Chief Commissioner accepted.

The purpose and the general provisions of the *Maritime Freight Rates Act* were fully discussed in the judgment of

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this Court delivered by the Chief Justice on the reference reported under that name (1).

The question immediately before this Court turns on the interpretation of section 8 of the Act as follows:

> 8. The purpose of this Act is to give certain statutory advantages in rates to persons and industries in the three provinces of New Brunswick, Nova Scotia and Prince Edward Island, and in addition upon the lines in the province of Quebec mentioned in section two, together hereinafter called "select territory," *accordingly the Board shall not approve nor allow any tariffs which may destroy or prejudicially affect such advantages in favour of persons or industries located elsewhere than in such select territory.*

It is conceivable that competitive tariffs as well as other tariffs outside of the select territory "might destroy or prejudicially affect," in favour of persons or industries located outside of such select territory, "the statutory advantages" which are given by the Act and which the rule prescribed by section 8 is intended to protect.

We agree that competitive tariffs established outside of the "select territory" are within the contemplation of this section, and when such tariffs prejudicially affect "the statutory advantages," then "the Board shall not," the statute directs, "approve nor allow" such tariffs, and we agree with the Chief Commissioner that these words necessarily imply authority to cancel any rates having such effect; but whether any particular competitive rate has that effect must in each case be a question of fact to be determined by the Board itself.

One of the main contentions of the appellants assumes that the onus of establishing prejudice rests always upon the shipper or the complainants. We do not think that this is so. The Board itself is an administrative body with very wide experience and assisted by a skilled technical staff and is invested with administrative as well as judicial powers and duties; and, when a complaint is presented to the Board that any particular tariff constitutes an infraction of section 8, it is the duty of the Board to determine the question of prejudice or non-prejudice, always keeping in mind that it is the intention of the Act to maintain the statutory advantages in rates given thereby to persons and industries located in the select territory.

We agree with the Chief Commissioner that the authority of the Board under section 8 is limited to that which

(1) [1933] S.C.R. 423.

is given by, or implied in, the words "shall not approve nor allow any tariffs which may destroy or prejudicially affect such advantages."

The Board having decided the issue of fact adversely to the appellants, as regards the particular tariffs now in question, rightly concluded that those tariffs ought not to be disallowed. The issues of law substantially involved in the questions submitted are determined conformably to the views expressed in this judgment. There will be no costs.

Appeal dismissed, no costs.

Solicitor for the appellants: *C. J. Burchell.*

Solicitor for the Canadian National Railways: *I. C. Rand.*

Solicitor for the Canadian Pacific Railway Co.: *G. A. Walker.*

Solicitor for the Ontario Potato Growers' Association: *C. H. Bowyer.*

STANLEY JOHNSTON AND OTHERS (DEFENDANTS) ..... } APPELLANTS;

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*March 8.
*March 30.

AND

DAME VERA CHANNELL (PLAINTIFF) ... RESPONDENT.

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

Husband and wife—Brokers—Stock exchange transactions—Marital authorization—Nullity—Action by married woman for accounting—Plea alleging enrichissement sans cause and direct loss—Articles 177, 183, 406, 983, 1011 and 1057 c.c.

In an action brought against a broker by a married woman for the annulment of stock transactions on the ground that the plaintiff had entered into such transactions without the authorization of her husband, and also for an order for accounting and further for the payment of the balance shown to be due as a result of such accounting, the defendant cannot set up in his plea allegations that the moneys and securities received did not enrich him in any way and that if he is ordered to pay them over to the plaintiff, such moneys or securities will represent a direct loss to him.

The case of a person suffering from a fundamental incapacity to do a juridical act and attempting to create obligations beyond its powers must be distinguished from the case of a person capable *bona fide* of creating obligations which become inoperative by reason of causes

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

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recognized by the law. In the latter case, the law merely seeks the most equitable solution to the situation, while in the first case, so that the incapable person may receive the full protection which the law seeks to give it, it is inevitable and imperative that the law shoud order full restitution when decreeing nullity.

Accordingly, when once it has been found that a married woman acted without the participation or the consent of her husband, as required by law (arts. 177, 183, C.C.), the consequence is that her deed or her act is the equivalent of non-existent. And, applying this principle to the present case, the supposed contract or agreement with the appellants being absolutely null on account of the legal incapacity of the respondent to act as she alleged she did, it is not susceptible of any effect; the appellants derived thereby no legal right to deal as they have done with the monies and securities. They acquired no title to these moneys and securities; they never had any legal right to hold them; and, therefore, the monies and securities still belong to the respondent. And if, on account of the fact that the monies and securities are no longer in the appellants' possession, it has become impossible to return them to the respondent, then she is entitled to get the equivalent from the appellants.

Moreover, without deciding whether the doctrine of unjustified enrichment (*enrichissement sans cause*) forms part of the law of the province of Quebec, even if the attempt to place the demurrer on such a ground could have been entertained in the present case, it could not have supported the allegations of the appellants' plea, as that doctrine could not be invoked to defeat either the principle or the effect of the precept of public order embodied in article 183 C.C.

Judgment of the Court of King's Bench (Q.R. 61 K.B. 42) aff.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), affirming the judgment of the Superior Court, Curran J. and maintaining in part respondent's inscription in law against certain paragraphs of appellants' plea.

The respondent instituted proceedings against the appellants, a firm of stock brokers, to have declared null and void certain transactions in stocks and bonds and also transfers or delivery by the respondent of money and securities in connection therewith. The respondent prayed for a declaration of nullity and for an order for accounting by the appellants, and further that the latter be condemned to pay to the respondent the balance shown to be due as a result of such accounting. By her declaration the respondent set forth that she was a married woman, separate as to property from her husband, and that she had entered into the transactions in question without the authorization of her husband, as required by law, and that consequently such transactions were absolutely null and void. The

(1) (1936) Q.R. 61 K.B. 42.

appellants' plea was, in effect, a denial of the allegations of the declaration, coupled with an averment that the accounts in question, now repudiated, were opened by the respondent with the knowledge, consent and approval of her husband, and in so far as his authorization was necessary the same was given. The plea, moreover, contained two paragraphs, the text of which are recited in the judgment now reported. The respondent inscribed in law against these paragraphs, and by the judgment now appealed from they were rejected from the plea as being irrelevant.

L. A. Forsyth K.C. and *G. F. Osler* for the appellants.

John T. Hackett K.C. and *J. E. Mitchell* for the respondent.

The judgment of the Court was rendered by

RINFRET J.—The respondent instituted proceedings against the appellants, a firm of stock brokers, to have declared null and void certain transactions in stocks and bonds and also transfers or delivery by the respondent of money and securities in connection therewith, on the ground that the respondent, being a married woman, engaged in the transactions in question without the knowledge or authorization of her husband. She prayed for a declaration of nullity and for an order for accounting by the appellants:

(*a*) of all sums of money paid to them;

(*b*) of all securities delivered by her or on her behalf; and, in default, that the appellants be condemned to pay the sum of $162,000.

The plea filed by the appellants was, in effect, a denial of the allegations of the declaration; but, moreover, it contained the two following paragraphs, among others:

22B. Receipt by the defendants of the securities and moneys referred to in plaintiff's declaration did not and has not enriched or benefited defendants in any way, all such securities and moneys having been set apart by defendants as a fund at the disposal of the female plaintiff, and subject to her instructions, and credited to one or the other of the four accounts, exhibits D-1, D-2, D3 and D-4.

22C. That if defendants are ordered by the judgment to be rendered herein, to pay to female plaintiff any money or securities, such money and/or securities will represent a direct loss to defendants, and will not and cannot have the effect of replacing the parties in the respective posi-

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tions occupied by them before the opening of the four said accounts, exhibits D-1, D-2, D-3 and D-4.

Upon inscription in law by the respondent, these two paragraphs were ordered by the Superior Court to be struck from the appellants' plea; and this judgment was unanimously confirmed by the Court of King's Bench (1).

The appellants did not for a moment suggest that either paragraph was in any way relevant to or that it affected the respondent's allegations of nullity. They conceded at bar that all transactions in respect of which no sufficient authorization was given by the respondent's husband are null and void and must be so declared by the courts.

It must also be admitted that, if the transactions be declared null, neither paragraph, even if proven, would relieve the appellants of the obligation to account to the respondent. The appellants' contention may, we think, be condensed as follows:

> The action is based upon a *supposed* rule of the civil law which says that where a contract is annulled by the courts, or declared to have been null, the parties to that contract must be put back as nearly as may be in the respective positions in which they were before the contract and that whatever has been paid by either party in execution of that contract must be restored. The appellants do not deny that such a rule exists, * * * but they submit that the facts alleged in the paragraphs of their plea which have been struck out on respondent's inscription-in-law, if they should be proven, are of a nature to exclude the operation of the rule.
>
> * * * *
>
> In whatever form the rule may be stated, however, and whatever its limitations, it is submitted that the source of the obligation to restore which is imposed in virtue of the rule must be found within one of the categories enumerated in art. 983 of the Civil Code. The obligation must arise either from a contract, a quasi-contract, an offence, a quasi-offence, or from the operation of the law solely. The enumeration is limitative (*Desruisseaux* v. *Desruisseaux* (1)), and therefore, if there is any obligation to restore in the present case, and regardless of whether or not the rule applies, that obligation must have arisen in one of the manners enumerated. * * * Obviously the obligation does not arise either from contract, delict or quasi delict, and therefore, if we can succeed in eliminating "the operation of the law solely" as a source of the alleged obligation, it follows that, if there is an obligation, it must be the result of a quasi-contract.

The appellants then refer to art. 1057 of the Civil Code, which enumerates the obligations resulting from the operation of the law solely; and they say that the

> examination of the various authorities confirms the view that that class of obligations * * * is not broad enough to include an obligation such as is alleged in the present case.

(1) (1936) Q.R. 61 K.B. 42.

It is the appellants' submission

that the Court of King's Bench was in error in holding that the obligation forming the basis of the present action arises from the sole operation of the law.

This is followed by a lengthy reference to the Roman law, to a few English cases and to the opinion of English and French commentators, on the strength of which the appellants submit

that the rule as to restoration of what has been paid by reason of a contract subsequently declared to be null is restricted to those cases where there has been both an enrichment of the defendant and an impoverishment of the plaintiff, and that the enrichment of the defendant is the measure of the amount which must be repaid.

The appellants go on to say:

We admit that in so far as the respondent asks for the nullity of certain transactions, it is an "action in nullity" and is founded on articles 177 and 183 C.C., but we submit that neither of these articles deal in any way with the question of what shall be done once the nullity is declared, and that the solution of that problem must be looked for elsewhere. * * *

The judgment under appeal proceeds on the basis that where there is a declaration of nullity, something else follows as a matter of course. But what that something else is, is not clear. Whether it is that the plaintiff shall be indemnified against loss, or that both parties shall be replaced in the respective positions occupied by them before the deliveries (which is impossible), or that everything delivered shall be returned (which is equally impossible), or that some other action should be taken, is not stated. We submit that what in fact should be done is that the defendant should be prevented from making an unjustified enrichment and be ordered to repay whatever amount is necessary to effect that end. We further submit that the date as of which the enrichment must be tested is the date of the taking of the action.

* * * *

It is respectfully submitted that the learned judges of the Court of King's Bench did not deal with the real point in issue in this case, namely, what is the result of a declaration of nullity, but merely applied the rule as to restitution without any consideration of its source or limits.

We trust we have correctly and completely stated the problem as presented by the appellants. For the most part, we have endeavoured to do it in the words they have used in their written argument. And we thought we would transcribe it as fully as possible because of the evident attempt to introduce in the case allegations based on the doctrine of unjustified enrichment so much discussed in later years in France.

There are many points, however, in the argument submitted which are clearly irrelevant to the issue in this case and which need not retain our attention. As a whole, the

(1) (1920) Q.R. 57 S.C. 430.

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appellants' contention arises from a confusion of the case of a person suffering from a fundamental incapacity to do a juridical act and attempting to create obligations beyond her powers with the case of a person fully capable *bona fide* of creating obligations which become inoperative by reason of causes recognized by the law. As rightly observed by counsel for the respondent, in the case of a person fully capable whose obligation becomes inoperative, the law merely seeks the most equitable solution to the situation; but in the case of the incapable person, so that it may receive the full protection which the law seeks to give it, it is inevitable and imperative that the law should order full restitution when decreeing nullity.

Whether the doctrine of "enrichissement sans cause" forms part of the law of the province of Quebec and whether it should be recognized as part of the legal rules under which a Quebec case ought to be solved, is unnecessary to decide here and the respondent has no need to support her case on any such ground. The allegation of the respondent was that she acted without the authorization or the consent of her husband (art. 177 C.C.). By force of art. 183 of the Code,

> The want of authorization by the husband, where it is necessary, constitutes a cause of nullity which nothing can cover, and which may be taken advantage of by all those who have an existing and actual interest in doing so.

In no part of the Code can a pronouncement of nullity be found in stronger terms. Both in the doctrine and the jurisprudence, it is universally regarded as a matter of public order.

Limiting the discussion to the case of the incapable married woman claiming under the prohibition of art. 177 C.C. and the resulting nullity declared by art. 183 C.C., it is clear that, when once it has been found that she acted without the participation or the consent of her husband, as required by law, the consequence is that her deed or her act is the equivalent of non-existent. And if, for example, one should apply the principle in a case such as that which is brought by the respondent, the necessary result is the following:

The respondent deposited monies or securities with the appellants under a supposed contract or agreement with them. Exclusively as a consequence of that contract, the

appellants became entitled to hold or to deal with these monies and securities. But the contract being absolutely null on account of the legal incapacity of the respondent to act as she did, it is not susceptible of any effect; the appellants derived thereby no legal right to deal as they have done with the monies and securities; they acquired no title to these monies and securities; they never had any legal right to hold them; and, therefore, the monies and securities still belong to the respondent.

Under the circumstances, it is a complete fallacy to say that the obligation incumbent upon the appellants to restore or to return the monies and securities results from some quasi-contract unknown to the Quebec Civil Code and which must be looked for in the Roman law or in the old French law. It is clear that the obligation to restore or to return results from the simple fact that the respondent is the owner of these monies and securities, and that she has always been the owner. These monies and securities were physically transferred to the appellants by the respondent under a supposed agreement which proves to be non-existing in law. Her right to repossess herself of these monies and securities is strictly based on her title of ownership. It is the undisputed right of every proprietor to hold and to possess his property in the most absolute way (art. 406 C.C.). If, on account of the fact that the monies and securities are no longer in the appellants' possession, it has become impossible to return them to the respondent, then she is entitled to get the equivalent from the appellants; and that is the nature of the prayer in the conclusion of the respondent's declaration. The purpose of the accounting is to ascertain whether the monies and securities are still in the appellants' possession, in which case the respondent would be authorized to take possession of them, as her property, in the hands of the appellants. And the alternative purpose of the accounting, if the monies and securities have ceased to be in the possession of the appellants, is to establish what is the equivalent that they should pay to the respondent in lieu of her property.

That is what Messrs. Colin and Capitant observe in their treatise (1931, 7th ed., vol. 1, at p. 80):

> La recevabilité de cette action en revendication ou en répétition est subordonnée à l'inefficacité du titre en vertu duquel le possesseur a été mis en possession.

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The situation was explained in a most satisfactory way by the Court of Review, in the case of *Martin* v. *National Real Estate and Investment Company of Canada* (1).

Quant aux sommes payées par la demanderesse ou pour elle, cette partie de la demande n'est que l'accessoire de la demande en nullité qui est la demande principale; et le remboursement des dites sommes n'est que la conséquence de la nullité demandée et prononcée. Il s'agit moins, quant à cette restitution, dans l'espèce, d'une action en répétition de l'indû pour défaut de cause, que du règlement de la situation faite aux parties par cette déclaration de nullité.

It may be stated that the object of this subsidiary conclusion in the declaration of the respondent's action is to reduce the state of fact into conformity with the legal position of the parties resulting from the nullity of their agreement.

Such, in our view, is the real situation and, under the circumstances, it follows that the judgments appealed from ought to be confirmed.

But we would not like to part with this case without pointing out that, even if the attempt to place the demurrer on the ground of "*enrichissement sans cause*" could have been entertained in this case, it could not have supported the two paragraphs of the appellants' plea which are the subject of this appeal.

Even amongst its most ardent supporters, it is well recognized that the doctrine of

enrichissement sans cause, as in the case of all other legal doctrines, must not be employed for the purpose of defeating the principles of positive law.

(Cambridge Law Journal, 1934, vol. 5, p. 220; Rouast, Revue Trimestrielle de Droit Civil, 1922, vol. 21, p. 35, at page 86.)

We have already observed that nowhere in the Civil Code could stronger language be found than that in which is couched article 183. The doctrine of unjustified enrichment cannot be invoked to defeat the purpose of that article. It cannot be permitted to defeat either the principle or the effect of the precept of public order embodied in that article. As counsel for the respondent well said: As a result, if the person dealing with the incapable suffers impoverishment or cannot be put in the same position as he was, he is suffering the sanction of the infringement of the prohibition in favour of the incapable. To admit other-

(1) (1921) Q.R. 60 S.C. 148, at 153.

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wise would be to remove the very protection the law gives to the incapable and to his property.

An instance of this may be derived from art. 1011 of the Civil Code by force of which

> When minors, interdicted persons or married women are admitted in these qualities to be relieved from their contracts, the reimbursement of that which has been paid in consequence of these contracts, during the minority, interdiction or marriage, cannot be exacted, unless it is proved that what has been so paid has turned to their profit.

For be it noticed that what this article contemplates is the possibility of obtaining from the incapable person "the reimbursement of that which has been paid," to that person. It may not be exacted from the incapable person and it will be legally lost "unless it is proved that what has been so paid has turned to (the) profit" of the incapable person. The reverse, however, is not true; and the very existence of that article negatives any such principle as is advanced by the appellants. It is clear that if the reverse were true the principle would apply in every case to a capable as well as to an incapable person; and article 1011 C.C. would have been quite unnecessary; it would serve no purpose.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Brown, Montgomery & McMichael.*

Solicitors for the respondent: *Hackett, Mulvena, Foster, Hackett & Harmer.*

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* Mar. 10.
* April 21.

ARMAND COMEAU AND ANOTHER (DEFENDANTS) ..... APPELLANTS;

AND

DAME ALPHONSINE TOURIGNY (PLAINTIFF) ..... RESPONDENT.

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

Husband and wife—Marriage contract—Universal community as to property—Matrimonial agreements—Nullity of one clause—Whether whole contract null—Whether obligation imposed by such clause is null—Arts. 818, 819, 820, 1013, 1018, 1292 et seq. C.C.

The terms "tous les biens qu'il possèdera alors" contained in a clause of a marriage contract reading as follows: "Advenant la mort du "futur époux avant la future épouse sans laisser d'enfants du dit

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

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"futur mariage, *tous les biens qu'il possèdera alors* appartiendront à "ses enfants du premier lit, mais ils seront obligés de payer à la "dite future épouse une somme de deux mille piastres qu'elle gardera "en pleine propriété à toujours, à moins qu'elle ne convole en secondes "noces; car dans ce cas, elle ne garderait en pleine propriété que cinq "cents piastres et le reste retournerait aux dits enfants du premier lit" —means "tous les biens dont il sera *propriétaire* alors"; and in that sentence the word "alors" relates to the date of "la mort du futur époux." In the language customarily used in the province of Quebec, the terms "tous les biens qu'il possèdera alors" are not intended to apply to possession in the legal sense of the word, but they refer to ownership. Consequently, when a marriage contract stipulates a universal community of property between the husband-to-be and the wife-to-be, those terms ("tous les biens qu'il possèdera alors") will not lump together all the goods which formed the universal community provided in the marriage covenant: they include only the share of the husband in the community.

Moreover, in the present case, that stipulation which constitutes a donation made in contemplation of death is not authorized by law although included in a marriage contract, because it was not made in favour of the children to be born of the future marriage as required by the law, but was a stipulation in favour of children born from a first marriage and therefore illegal.

On the other hand, the nullity of such a stipulation does not involve the nullity of the whole contract. The material agreement of the marriage contract was the stipulation that a universal community of property would exist between the parties. The stipulation as to the property of which the husband would be the owner at his death relates solely to the succession of the deceased husband. Therefore there is not, between the whole of the marriage contract and the special clause above quoted, such dependency that the nullity of that last clause should involve the nullity of the marriage contract itself. The intentions of the contracting parties would be violated if, because the stipulation as to the succession of the husband is illegal, the agreement as to a universal community of property would consequently cease to exist. These are two distinct covenants, and the existence of one is not dependent upon the existence of the other. The marriage contract remains valid as to the remainder.

But the same cannot be said as to the obligation imposed upon the children born from the first marriage to pay to the surviving wife "une somme de deux mille piastres qu'elle gardera en pleine propriété à toujours * * *." This obligation is included in a clause of which the main object is to give over to the children born from the first marriage the property of which the husband would be the owner at his death. It constitutes, properly speaking, a charge in connection with the disposition made in favour of the children born from the first marriage; and it follows that the illegality of the stipulation in favour of these children involves as a consequence the nullity of the obligation imposed upon them by reason of such stipulation.

APPEAL from a judgment of the Court of King's Bench, appeal side, province of Quebec, affirming a judgment of the Superior Court, Fortier J. and maintaining the respondent's action and ordering a partition between the appellants

and the respondent of the universal community of property alleged to have existed between the respondent and her deceased husband.

The question at issue is the proper construction and application of the ante-nuptial marriage agreement entered into between the respondent and her late husband Anthime Comeau. The respondent had an inventory made of her late husband's property where she contended that all the property formed part of the community which she alleged existed between herself and her late husband. The appellants concurred in this inventory but expressly stated in signing it that in so doing they were not in any way admitting that the said community had ever existed. The respondent then renounced her share in her late husband's intestate succession. By virtue of this renunciation the deceased's four children became his sole heirs at law and, two of them having renounced their share, the present appellants became Anthime Comeau's sole heirs at law. None of these children were born of Anthime Comeau's marriage with respondent; they were all born from a previous marriage. In her action the respondent alleged that the marriage contract created a conventional universal community of property between herself and her late husband, or, in other words, that by virtue of this contract, all her late husband's property, moveable and immoveable, acquired before or after the marriage, became common to the two consorts. She contended that by reason of the death of her husband she became entitled to half of that community of property and prayed that the appellants as sole heirs at law of her husband, be obliged to divide with her all the property, moveable and immoveable, of Anthime Comeau. The appellants contested the action contending that under the marriage contract they were entitled to all the estate of their late father and that the respondent was only entitled to receive a sum of $2,000, her personal effects and "préciput" together with the right to reside in the family's home. They alleged that this is what the marriage contract provided in the event of the husband dying first without issue from his marriage with the respondent.

Ls. St. Laurent K.C. for the appellants.

Gustave Poisson and *Hamilton Heaton* for the respondent.

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The judgment of the court was delivered by

RINFRET J.—L'intimée, qui est la veuve de Anthime Comeau, autrefois de la paroisse de Bécancour, a poursuivi les appelants en compte et partage de la communauté de biens qui a existé entre elle et son défunt mari.

Les appelants sont les fils de Anthime Comeau par un premier mariage, et ils sont ses seuls héritiers légaux.

L'action de l'intimée s'appuie sur un contrat de mariage établissant entre elle et son mari une communauté universelle de tous les biens qu'ils possédaient lors de leur mariage, ou qui devaient leur écheoir à quelque titre que ce soit pendant le mariage.

A ce contrat, il était stipulé que

Advenant la dissolution de la communauté, soit par la mort ou autrement, il sera permis à la future épouse et aux enfants qui naîtront du présent mariage de l'accepter ou d'y renoncer.

En cas de renonciation, l'intimée avait droit de "remporter" tout ce qu'elle justifierait avoir apporté à la communauté, ainsi que ses douaire et préciput. Puis viennent les clauses du contrat sur lesquelles porte le litige et qu'il vaut mieux citer textuellement:

Il est convenu que si le futur époux meurt le premier, sa succession sera partagée entre tous ses enfants tant du premier mariage que du dernier mariage.

Advenant la mort du futur époux, avant la future épouse, sans laisser d'enfants du dit futur mariage, tous les biens qu'il possèdera alors appartiendront à ses enfants du premier lit, mais ils seront obligés de payer à la dite épouse une somme de deux mille piastres qu'elle gardera en pleine propriété à toujours à moins qu'elle ne convole en secondes noces, car dans ce cas elle ne garderait en pleine propriété que cinq cents piastres et le reste retournerait aux dits enfants du premier lit.

En ce cas du prédécès du dit futur époux, la future épouse aura droit de reprendre en outre tout ce qu'elle aura emporté en mariage et tout ce qui lui sera échu par succession, donation, legs ou autrement et de continuer à habiter dans la maison de la famille tant qu'elle voudra.

Et si c'est la future épouse qui décède la première sans qu'elle laisse d'enfant de ce mariage ses parents de son côté estoc & ligne pourront réclamer ses hardes & linge de corps, et tout le reste des biens de la dite communauté sera la propriété des dits enfants du dit futur époux.

La future épouse s'engage à prendre le soin de la maison du futur époux et de ses biens et d'élever leurs enfants tant du premier mariage que du second mariage.

Voici maintenant quelles sont les prétentions des appelants:

Le contrat de mariage stipule une communauté de biens universelle entre les époux.

Le mari est mort le premier. Il n'y a pas eu d'enfants de son mariage avec l'intimée. Il en résulte que la femme a le droit de reprendre tout ce qu'elle a "emporté en mariage" et tout ce qui lui est échu pendant le mariage, par succession, donation, legs ou autrement. Elle a, en outre, le droit de continuer à habiter dans la maison de la famille tant qu'elle voudra. Les "enfants du premier lit" de son mari défunt seront obligés de payer à l'intimée "une "somme de deux mille piastres qu'elle gardera en pleine "propriété à toujours" (sauf le cas de son convol en secondes noces, pour lequel une stipulation spéciale est faite). Mais c'est tout ce que l'intimée a droit d'avoir. Tous les autres biens de la communauté appartiennent aux enfants du premier mariage. Ces mots: "enfants du premier mariage," sont employés dans le contrat de mariage dans le sens "d'héritiers légaux" du mari; et, par suite, il n'y a pas lieu au partage entre les appelants et l'intimée.

La Cour Supérieure et la Cour du Banc du Roi ont toutes deux donné tort aux appelants; et, après avoir accordé l'attention la plus minutieuse à l'argumentation du savant et habile avocat des appelants, nous sommes d'avis que les jugements de ces deux cours doivent être confirmés.

Il convient premièrement de bien établir le sens des clauses du contrat de mariage qui sont en discussion.

Il est clair, tout d'abord, que les époux ont stipulé une communauté de biens universelle. C'est là la base de leur contrat. Les clauses relatives au douaire et au préciput ne sont que subsidiaires et sans importance, au moins pour les questions que nous avons à décider.

Dans la clause qui pourvoit à la distribution des biens au cas où le mari décéderait avant l'intimée et sans laisser d'enfants du futur mariage, la phrase dont il est essentiel de pénétrer le sens est: "tous les biens qu'il possédera alors appartiendront à ses enfants du premier lit."

Les appelants, qui sont les personnes visées par cette disposition, prétendent que, par là, les époux ont entendu déclarer que tous les biens faisant l'objet de la communauté universelle appartiendraient aux enfants du premier lit. Pour appuyer cette prétention, ils font remarquer que, dans la communauté de biens, le mari administre seul et il peut disposer des biens sans le concours de sa femme. Les actions relatives au patrimoine de la communauté sont exercées en

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son nom; et il en est de même des actions mobilières et possessoires qui appartiennent à sa femme (art. 1292 et suiv. C.C.). Il est donc bien le seul et véritable possesseur des biens de la communauté; et lorsque le contrat de mariage emploie l'expression: "tous les biens qu'il possèdera", il entend englober absolument tous les biens de la communauté universelle, sauf ceux qui, dans cette clause, sont spécialement attribués à l'épouse intimée.

Tous les juges appelés jusqu'ici à décider cette question ont repoussé l'interprétation soumise par les appelants; et nous n'avons aucune hésitation à concourir dans leur opinion.

Pour rechercher l'intention des parties dans un contrat, la règle primordiale est de s'attacher d'abord au "sens littéral des termes du contrat" (art. 1013 C.C.); et c'est ce que fait observer le Conseil Privé dans la cause de *Lampson* v. *City of Quebec* (1):

The intention by which the deed is to be construed is that of the parties as revealed by the language they have chosen to use in the deed itself.

Quand une convention est exprimée en termes clairs et précis, il n'est pas permis au juge de la modifier en supposant aux parties une intention contraire au sens littéral de la clause.

Or, l'expression dont il s'agit ici ne nous paraît pas entachée d'ambiguité. Dans le langage usuel et courant de la province de Québec, l'expression: "Tous les biens qu'il possèdera", n'entend pas s'adresser à la possession dans le sens légal du mot. Cette expression se réfère à la propriété. Elle veut dire: Tous les biens dont il sera propriétaire alors; et ici le mot "alors" a trait à la date de "la mort du futur époux".

Cette expression ne prend pas un autre sens lorsqu'elle concerne une communauté de biens. En vertu de ce régime, dans la province de Québec, il y a vraiment trois patrimoines: le patrimoine personnel du mari; le patrimoine personnel de la femme; et le patrimoine de la communauté. On n'a jamais songé à désigner le patrimoine de la communauté par l'expression: "Les biens que le mari possèdera à sa mort"; et personne, suivant le sens usuel des mots, ne comprendrait que, par là, on a voulu entendre les biens de la communauté.

(1) [1921] 1 A.C. 294, at 301.

Suivant leur sens usuel, les termes de cette clause signifient donc que, advenant la mort du mari avant celle de l'intimée et sans qu'il y ait d'enfants de leur mariage, les biens du mari défunt appartiendront "à ses enfants du premier lit". Par cette stipulation, les époux n'ont pas voulu déroger au partage des biens de la communauté en la façon dont la loi y pourvoit. Ils paraissent, au contraire, avoir voulu se conformer à l'article 1293 C.C., en vertu duquel

L'un des époux ne peut, au préjudice de l'autre, léguer plus que sa part dans la communauté.

Cette interprétation qui ressort du sens usuel des mots et des expressions employées par les parties est d'ailleurs corroborée par les autres clauses du contrat (art. 1018 C.C.).

Il convient de remarquer que la clause qui contient l'expression: "Tous les biens qu'il possèdera", vient immédiatement à la suite de celle où il est convenu que si le futur époux meurt le premier

sa succession sera partagée entre tous ses enfants tant du premier mariage que du dernier mariage.

Si l'on rapproche de cette clause celle qui fait l'objet de la discussion en ce moment, l'on voit que la première dispose des biens du mari en pourvoyant au cas où il aurait des enfants tant du premier que du second mariage; tandis que la seconde clause dispose de ses biens en pourvoyant au cas où il n'y aurait pas d'enfants du second mariage. On y voit que l'intention a été de pourvoir à tous les enfants du mari. S'il y a des enfants des deux mariages, ils doivent recevoir, en termes bien précis, seulement les biens de "sa succession". Il est logique que, dans la seconde clause, lorsqu'il ne s'agit plus que des enfants du premier mariage, l'intention soit de leur laisser les mêmes biens et que l'expression: "tous les biens qu'il possèdera", soit employée dans le même sens que les mots: "sa succession".

Au contraire, lorsque, dans une clause suivante, l'intention a été d'englober tous les biens de la communauté, les parties n'ont pas été en peine pour l'exprimer; et ils l'ont indiquée par les mots: "tout le reste des biens de la dite communauté"—stipulation qui prévoit le cas où la future épouse décèderait avant le mari.

Mais il reste une considération qui nous paraît plus décisive encore que cette comparaison entre les expressions contenues dans les clauses relatives à la distribution des biens après la mort de l'un des époux.

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Si l'on devait donner à l'expression: "tous les biens qu'il possèdera alors", le sens que soumettent les appelants, la conséquence serait que la communauté universelle de biens n'aurait subsisté que pendant la vie commune des époux, ou la durée du mariage lui-même. Elle cesserait dès la dissolution du mariage par la mort de l'un des époux. En effet, d'après les appelants, dès la mort du mari, tous les biens de la communauté seraient allés aux enfants; et la femme n'aurait reçu que les dons spécialement mentionnés en sa faveur, annulant ainsi et par anticipation tous les résultats du partage de la communauté. Or, cette conséquence ne paraît ni logique, ni vraisemblable; car il est difficile de voir l'intérêt que peuvent avoir des époux à se mettre sous le régime de la communauté de biens pour la durée du mariage seulement et à faire cesser ce régime juste au moment où, le mariage étant dissous, le régime de la communauté apporte ses véritables avantages sous forme de l'attribution à l'époux survivant et aux ayants-droit de l'époux décédé de la moitié de la propriété des biens qui composent ce patrimoine commun.

On peut tirer, par ailleurs, d'une autre clause du contrat de mariage, et à l'encontre des prétentions des appelants, un argument auquel ces derniers n'ont pu trouver de réponse satisfaisante. Le contrat stipule que

> Advenant la dissolution de la communauté, soit par la mort ou autrement, il sera permis à la future épouse et aux enfants qui naîtront du présent mariage de l'accepter ou d'y renoncer, * * *

On ne voit pas très bien la raison de cette clause s'il était vrai que, par suite de la mort du mari, tous les biens de la communauté devraient appartenir aux enfants du premier mariage. La clause serait parfaitement inutile, puisque l'épouse survivante n'aurait rien à accepter de la communauté ou rien à y renoncer.

Nous sommes donc d'accord avec les jugements dont appel pour considérer l'expression: "tous les biens qu'il possèdera alors" comme signifiant: les biens faisant partie de la succession du mari, et pas autre chose.

Cette conclusion adoptée, il en résulterait que la clause où se trouve l'expression que nous avons discutée aurait pour effet d'attribuer aux appelants la moitié des biens de la communauté universelle qui a existé entre l'intimée et son défunt mari, puisque "tous les biens qu'il possèdera alors" comprennent cette moitié; et, en plus, les appelants

seraient obligés de payer à l'intimée une somme de deux mille piastres qu'elle garderait en pleine propriété à toujours, à moins qu'elle ne convole en secondes noces (ce dont nous n'avons pas à nous occuper pour le moment). L'intimée reprendrait, en outre, ce qu'elle a apporté au mariage, tout ce qui lui est échu par succession, donation, legs ou autrement; et elle continuerait à habiter dans la maison de la famille tant qu'elle voudra.

Mais les appelants soulèvent alors une autre question. Ils disent que la disposition en vertu de laquelle " tous les biens (que le mari) possèdera alors appartiendront à ses enfants du premier lit " constitue une donation à cause de mort qui, à vraiment parler, bien qu'elle se trouve dans un contrat de mariage, n'est pas autorisée par la loi, parce que la stipulation n'est pas en faveur des enfants à naître du futur mariage, ainsi que la loi l'exige (arts. 818 et 819 C.C.), mais qu'elle est une stipulation en faveur des enfants du premier lit; et que le futur époux n'avait pas le droit d'ainsi disposer à cause de mort. Seuls, en vertu de l'article 820 C.C., les ascendants d'un futur époux peuvent faire, dans un contrat de mariage, des donations à cause de mort aux frères et soeurs de ce futur époux qui est aussi avantagé par la disposition. Les autres donations à cause de mort faites en faveur des tiers sont nulles. Tel a été l'avis du savant juge de la Cour Supérieure et également celui de tous les juges de la Cour du Banc du Roi; et nous partageons cet avis. (Baudry-Lacantinerie, Des donations entre vifs et des testaments, 3e éd. t. 2, nos. 3879 et 3892).

Du point de vue pratique, l'illégalité de cette disposition entraîne des conséquences qu'il s'agit maintenant d'envisager.

Les appelants sont à présent les seules personnes en faveur de qui a été faite la stipulation; et ils sont également les seuls héritiers légaux du mari défunt de l'intimée.

Comme, ainsi que nous le décidons, " tous les biens qu'il possèdera alors " veulent dire: la succession du mari défunt, il s'ensuit que, soit en vertu de la clause (si elle est légale), soit par l'opération de la loi en matière de successions (si la clause est illégale), ce sont toujours les appelants qui sont devenus propriétaires des biens de leur père, à la mort de ce dernier.

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Mais, d'autre part, il existe une différence si la clause est illégale, parce que, dans ce cas, il peut en résulter que le don de $2,000 en faveur de la future épouse disparaît avec la clause; et les appelants prétendent même que la conséquence est encore plus générale et que l'illégalité de la clause entraîne la nullité de tout le contrat de mariage.

A ce sujet, nous voudrions citer Baudry-Lacantinerie 3e éd. *Du contrat de mariage*, t. 1, no. 205, pp. 215 et 216:

> On peut prétendre, il est vrai, et l'on a soutenu, que les conventions matrimoniales forment un ensemble toujours indivisible. Mais on a beaucoup abusé de l'idée d'indivisibilité en ces matières. Assurément il n'est pas rare que le contrat de mariage forme un tout, dont aucune partie ne puisse être supprimée, sans qu'on coure le risque, en voulant maintenir le surplus, de violer les intentions des parties contractantes. Dès lors, toutes les fois qu'il paraîtra en être ainsi, le contrat violé dans une de ses parties doit périr en entier. Mais d'autres fois, le juge peut très bien constater l'indépendance de certaines stipulations, par exemple de *certaines libéralités*. Pourquoi donc leur annulation entraînerait-elle la chute totale du contrat de mariage? On ne le voit pas. Les meilleurs auteurs et la jurisprudence semblent se fixer en ce sens.

Et l'auteur cite à l'appui Aubry et Rau, Guillouard et différents arrêts.

Dans le cas actuel, nous ne croyons pas que la nullité de la clause que nous avons examinée entraîne la nullité du contrat tout entier. Comme nous l'avons dit, la base de la convention des époux a été la stipulation d'un régime de communauté de biens universelle. Et les parties ont clairement indiqué leur intention dans ce sens.

D'autre part, la clause qui pourvoit au cas de survie de la future épouse, sans qu'il y ait d'enfants du futur mariage, envisagée comme nous l'avons interprétée, n'est plus une stipulation relative aux biens de la communauté; elle est uniquement une stipulation concernant la succession du mari défunt. Il ne nous paraît donc pas y avoir entre l'ensemble du contrat de mariage et la clause particulière en question la dépendance dont parle Baudry-Lacantinerie, ainsi que les autres auteurs et les arrêts sur lesquels il s'appuie, pour arriver à la conclusion que le tout forme un ensemble indivisible. Ce ne serait pas " violer les intentions des parties contractantes " que de déclarer que la communauté de biens universelle est maintenue entre l'intimée et les ayants-droit de son défunt mari, bien que la clause en vertu de laquelle ce dernier déclarait céder à ses enfants du premier lit tous les biens qu'il possèderait lors de sa mort soit retranchée du contrat de mariage comme illégale et nulle.

Nous croyons, au contraire, que nous violerions les intentions des parties contractantes si, sous prétexte que la stipulation relative à la succession du mari est nulle, nous déclarions que cette nullité entraîne également la disparition de la convention de communauté universelle.

La communauté universelle et la disposition de la succession du mari sont deux conventions distinctes; et l'annulation de la dernière n'affecte pas l'existence de la première. Le contrat de mariage reste valable pour le surplus (Mignault, Droit Civil Canadien, vol. VI, p. 141). C'est, d'ailleurs, la conclusion à laquelle en sont venus le juge de la Cour Supérieure et quatre des juges de la Cour du Banc du Roi.

Quant à la question de savoir si, malgré la nullité de la donation à cause de mort en faveur des enfants du premier mariage, qui sont maintenant les appelants, l'obligation demeure pour eux de payer à l'intimée une somme de $2,000 qu'elle gardera en pleine propriété, nous sommes d'avis, comme la majorité de la Cour du Banc du Roi, que cette obligation a été imposée aux enfants en considération de la donation à cause de mort qui leur était faite par la clause elle-même, et que, la donation étant nulle, la nullité de l'obligation de payer $2,000 en résulte nécessairement.

Les appelants ont demandé que, à tout événement, les frais du présent appel soient chargés contre la masse de la communauté, sous prétexte qu'il s'agit ici d'une interprétation du contrat dont toutes les parties sont appelées à bénéficier. Les appelants, lorsqu'ils ont décidé de porter la présente cause devant cette Cour, avaient déjà à l'encontre de leurs prétentions, les jugements de la Cour Supérieure et de la Cour du Banc du Roi; et, dans les circonstances, nous n'aurions pas de justification pour adjuger les frais ainsi que les appelants le demandent.

L'appel sera donc rejeté avec dépens.

Appeal dismissed with costs.

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

Solicitors for the respondent: *Bourgeois, Poisson & Heaton.*

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UNITED MOTORS SERVICE, INCORPORATED (DEFENDANT)..... APPELLANT;

AND

J. T. HUTSON AND H. HUTSON, CARRYING ON BUSINESS AS J. T. & H. HUTSON, AND J. T. & H. HUTSON; AND OTHERS (FIVE FIRE INSURANCE COMPANIES) (PLAINTIFFS)..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Landlord and tenant—Negligence—Evidence—Fire occurring in building occupied by lessee—Claim by lessor against lessee for amount of loss—Fire starting during cleaning operations in which gasolene used—Cause of fire uncertain—Res ipsa loquitur.

Defendant was in possession of a building under a lease from the plaintiffs H. (hereinafter called the plaintiffs), who had erected it for defendant's use as an automobile service garage and in sale of automobile parts. While defendant's employees (on a hot day, when the windows and doors were open) were cleaning a cement floor on the ground floor of the building, using gasolene, and scraping and scrubbing, and washing with oakite, heated in a tank on the ground floor by means of two gas jets under the tank, and washing off with water from a hose, a "whoof" (so described) occurred and flames appeared over said cement floor and a fire occurred which damaged the building. Plaintiffs sued to recover from defendants for the loss.

In the lease plaintiffs covenanted to pay taxes and insurance premiums; defendant covenanted to "repair, according to notice in writing, reasonable wear and tear and damage by fire, lightning and tempest * * * only excepted" (but was not required to make repairs to the roof, nor exterior or structural repairs) and that it would "leave the premises in good repair, reasonable wear and tear and damage by fire, lightning and tempest only excepted." The lease provided that if the building should be "so damaged by fire or other casualty or happening as to be substantially destroyed," then the lease should cease and any unearned rent paid in advance should be apportioned and refunded to defendant; but in case the building was not substantially destroyed, the premises should be restored by plaintiffs and a just proportion of the rent should abate until such restoration.

The exact cause of the ignition was not shown. Expert witnesses for plaintiffs testified that gasolene when vaporized was dangerous and that, given the proper proportions of air and gasolene vapour, ignition might be caused by a naked flame or an electric spark or a hot body such as a red-hot iron. Witnesses for defendant testified that, in such cleaning, it was customary to use gasolene and scrapers and brushes followed by an application of some cleansing substance, the whole washed off with water; but, as found in this Court, the evidence fell short of proving that it was the usual practice to clean such an area as that in question in the elapsed time under the conditions that existed that day.

* PRESENT:—Duff C.J. and Rinfret, Crocket, Davis and Kerwin JJ.

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Held (affirming judgment of the Court of Appeal for Ontario, [1936] O.R. 225) that defendant should be held liable.

Per Duff C.J. and Davis J.: The circumstances established in evidence afforded reasonable evidence of negligence in the sense that, in the absence of explanation, the proper inference was that the damage caused was the result of defendant's negligence; and the explanations advanced were not of sufficient weight either to overturn or to neutralize the force of the inference arising from the facts proved.

The application and effect, in certain classes of cases, of the principle called *res ipsa loquitur* discussed and explained.

Per Rinfret, Crocket and Kerwin JJ.: A tenant is liable in damages to his landlord for waste, voluntary or permissive (*Yellowly* v. *Gower*, 11 Ex. 274; *The Conveyancing and Law of Property Act*, R.S.O. 1927, c. 137, ss. 28, 31). By virtue of *The Accidental Fires Act*, R.S.O. 1927, c. 146, in the absence of any relevant stipulation between a landlord and tenant, the latter would not be liable for any damage occasioned by a fire which should "accidentally begin" on the premises. The words "accidentally begin," as used in the Act, do not include a fire caused by negligence (*Filliter* v. *Phippard*, 11 Q.B. 347; *Canada Southern Ry. Co.* v. *Phelps*, 14 Can. S.C.R. 132; *Port Coquitlam* v. *Wilson*, [1923] S.C.R. 235). The effect of the above-mentioned clauses of the lease (discussed) was to leave defendant liable for damage by a fire caused through its negligence. The evidence established negligence on its part: the operations being under its control and the accident being such "as in the ordinary course of things does not happen if those who have the management use proper care", the maxim *res ipsa loquitur* served to make the circumstances "reasonable evidence, in the absence of explanation by the defendant that the accident arose from want of care" (*Scott* v. *London & St. Katherine Docks Co.*, 3 H. & C. 596); defendant did not show that at the time of the explosion the gas jets were not lighted, and it failed to suggest any explanation or warrantable inference as to the cause of the fire, and plaintiffs were entitled to rely on said maxim.

APPEAL by the defendant from the judgment of the Court of Appeal for Ontario (1) reversing the judgment of Rose, C.J.H.C., dismissing the action.

The action was brought to recover for damage to a building by a fire which occurred while the building was in the defendant's possession under a lease to it from the plaintiffs Hutson. The action was brought in the names of the said plaintiffs Hutson and of certain fire insurance companies who alleged that they had paid the plaintiffs Hutson the sum of $19,493 for and in respect of the loss and damage caused to the plaintiffs Hutson by the fire in certain proportionate amounts and that the insurance companies respectively had demanded and accepted subrogation of all rights of recovery against the defendant to the extent of the payments made by said insurance companies

(1) [1936] O.R. 225; [1936] 2 D.L.R. 390.

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respectively to the plaintiffs Hutson. The plaintiffs claimed judgment for said sum of $19,493 in such proportionate amounts to the insurance companies and alternatively damages in the sum of $19,493.

Rose C.J.H.C. dismissed the action. The Court of Appeal allowed the plaintiffs' appeal and directed judgment for the plaintiffs in the sum of $11,000 (which amount had been suggested, upon reasons given, though not definitely fixed, by the trial judge, for assistance in settlement in case of a reversal of his finding upon the general question of liability. This amount was not in dispute in the appeals).

The material facts of the case are sufficiently stated in the judgment of Kerwin J. now reported. The appeal to this Court was dismissed with costs.

D. L. McCarthy K.C. and *W. J. Beaton K.C.* for the appellant.

W. N. Tilley K.C. and *F. Erichsen-Brown K.C.* for the respondents.

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

DUFF C.J.—I agree that this appeal should be dismissed.

On the argument of the appeal before us the respondents' case was put upon the ground of negligence and the sole question argued was whether or not the evidence justified the judgment of the Court of Appeal upon that basis. I am satisfied that the circumstances established in evidence afford reasonable evidence of negligence in the sense that, in the absence of explanation, the proper inference is that the damage caused was the result of the negligence of the appellants; and that the explanations advanced are not of sufficient weight either to overturn or to neutralize the force of the inference arising from the facts proved.

This is sufficient to dispose of the appeal, but it is desirable, perhaps, to add a word upon the principle which is often called *res ipsa loquitur*.

In truth, that phrase is comprehensively applied to cases widely differing in their essential characteristics. Most frequently it is applied where the principle stated in *Scott* v. *London and St. Katherine Docks Co.* (1) comes into play. It is there expounded in these words:

(1) (1865) 3 H. & C. 596, at 601.

There must be reasonable evidence of negligence. But where the thing is shewn to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care.

Broadly speaking, in such cases, where the defendant produces an explanation equally consistent with negligence and with no negligence, the burden of establishing negligence still remains with the plaintiff. That is necessarily involved in the following passages from the judgment of Lord Halsbury in *Wakelin's* case (1):

My Lords, it is incumbent upon the plaintiff in this case to establish by proof that her husband's death has been caused by some negligence of the defendants, some negligent act, or some negligent omission, to which the injury complained of in this case, the death of the husband, is attributable. That is the fact to be proved. If that fact is not proved the plaintiff fails, and if in the absence of direct proof the circumstances which are established are equally consistent with the allegation of the plaintiff as with the denial of the defendants, the plaintiff fails, for the very simple reason that the plaintiff is bound to establish the affirmative of the proposition; "*Ei qui affirmat non ei qui negat incumbit probatio.*" * * *

If the simple proposition with which I started is accurate, it is manifest that the plaintiff, who gives evidence of a state of facts which is equally consistent with the wrong of which she complains having been caused by—in this sense that it could not have occurred without—her husband's own negligence as by the negligence of the defendants, does not prove that it was caused by the defendants' negligence. She may indeed establish that the event has occurred through the joint negligence of both, but if that is the state of the evidence the plaintiff fails, because "*in pari delicto potior est conditio defendentis.*" It is true that the onus of proof may shift from time to time as matter of evidence, but still the question must ultimately arise whether the person who is bound to prove the affirmative of the issue, i.e., in this case the negligent act done, has discharged herself of that burden.

The phrase *res ipsa loquitur* is, however, used in connection with another class of cases where, by force of a specific rule of law, if certain facts are established then the defendant is liable unless he proves that the occurrence out of which the damage has arisen falls within the category of inevitable accident. One of these cases is that in which a ship in motion has run into a ship at anchor. The rule of

(1) *Wakelin* v. *London & South Western Ry. Co.*, (1886) 12 App. Cas. 41, at 44, 45.

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law in such a case is set forth by Fry, L.J., in *The Merchant Prince* (1):

> It is a case in which a ship in motion has run into a ship at anchor. The law appertaining to that class of case appears to be clear. In the case of *The Annot Lyle* (2) it was laid down by Lord Herschell that in such a case the cause of the collision might be an inevitable accident, but unless the defendants proved this they are liable in damages. The burden rests on the defendants to shew inevitable accident.

That appears to be the kind of case contemplated by the passage in the judgment of the Judicial Committee delivered by Lord Wright in *Winnipeg Electric Co.* v. *Geel* (3). There appears to be no satisfactory ground for thinking that their Lordships in that passage intended to say that where the circumstances, in the absence of explanation, afford reasonable ground for negligence, the onus is in the strict sense always shifted and that, in point of law, the burden always rests upon the defendant to establish affirmatively that he is not guilty of negligence. The fair construction of that passage seems to be that their Lordships there are dealing with cases in which there is a presumption of law established by the law itself that, certain facts being established, the defendant is liable. When that is so, to recur to the passage quoted above from Fry, L.J., the onus is upon the defendant to establish affirmatively inevitable accident or, in other words, absence of negligence on his part.

The appeal should be dismissed with costs.

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

KERWIN J.—The appellant company (defendant) is the lessee of certain premises in Toronto owned by Hutson Brothers (two of the respondents), by virtue of a lease under seal. Only the following provisions of the lease need be mentioned:

> And the said Lessee covenants with the said Lessor to pay rent and to pay water and gas rates, electric lighting charges and accounts for power used for any purpose by the Lessee.
>
> And the said Lessor covenants to pay all taxes in connection with the demised premises and all premiums of insurance upon the buildings erected thereon.
>
> And the said Lessor may enter and view state of repair.

(1) [1892] P. 179, at 189. (2) (1886) 11 P.D. 114.
(3) [1932] A.C. 690.

And that the said Lessee will repair, according to notice in writing, reasonable wear and tear and damage by fire, lightning and tempest, riot or public disorder or act on the part of any governmental authority only excepted; provided nevertheless that the Lessee shall not be required to make repairs to the roof, nor exterior or structural repairs.

* * *

And that it will leave the premises in good repair, reasonable wear and tear and damage by fire, lightning and tempest only excepted.

* * *

If the building or buildings hereby let shall be so damaged by fire or other casualty or happening as to be substantially destroyed, then this lease shall cease and come to an end and any unearned rent paid in advance by the Lessee shall be apportioned and refunded to it, but in case the building or buildings are not substantially destroyed, then the demised premises shall be restored to their condition immediately prior to such damage or destruction with due diligence by the Lessor and a just proportion of the rent hereinbefore reserved, according to the extent of the injury or damage sustained by the demised premises, shall abate until the demised premises shall have been so restored and put in proper condition for use and occupancy. * * *

On June 16th, 1934, while the appellant was in possession under the lease, the building on the land was damaged. This building had been erected by Hutsons for the appellant company, to be used by the latter in its business of servicing automobiles and the sale of automobile parts. The building is on the south side of St. Albans street, and the westerly part of the ground floor has a cement floor. About eleven o'clock in the morning of the day the damage occurred, certain employees of the appellant company commenced to clean this floor. While counsel for the appellant strenuously argued that the sketch prepared by the present respondents and placed before the Court of Appeal for Ontario was misleading, and incorrectly indicated the lay-out of this portion of the building and the positions at the relevant time of three witnesses (employees of the appellant), and while he indicated before us, by reference to a plan filed at the trial, where in his opinion the various sections on the ground floor numbered from one to ten in the sketch used before the Court of Appeal should be, I have come to the conclusion that that sketch correctly shows the situation. It appears as part of the reasons for judgment of Mr. Justice Masten, and may be found on page 233 of the Ontario Reports for 1936.

It should be explained that the squares are not separated by partitions, but apparently correspond to the division lines in the cement floor as it was originally constructed. The cleaning operation consisted of applying approximately

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one gallon of gasolene to each square, and scraping the surface where necessary with a metal scraper and scrubbing with a stiff brush; after which the surface would be washed with a preparation known as oakite. This oakite was heated in a tank at the south end of the ground floor by means of two gas jets under the tank. After the application of the hot oakite, water from a hose would be turned on each square and the loose material washed into the sewer. Work had commenced at the southwest corner and had proceeded square by square to the north on the west side, and the workmen had then dealt similarly with the other squares on the east side, but proceeding from north to south. As workmen were available, and considering that some, if not all, would be away for lunch, work continued in this way until about three o'clock in the afternoon. The weather on the day in question was hot, and the windows and doors were open. The evidence discloses that the witness, Legassicke, was at the point indicated on the sketch; at his request another witness, Bailey, poured gasolene in front of Legassicke, so that the latter might brush the floor with the gasolene. Either he had commenced to brush or was about to do so, when what is described as a "whoof" occurred, and the entire westerly ground floor appeared to be in flames. From the time of the pouring of the gasolene, Bailey had time to walk but a few steps to the east. Best, another workman, also called as a witness, was a little further to the north and considerably east of the other two workmen, and he was burned and was forced to run through the battery room and thence through a window. Bailey and Legassicke ran through the door on the west side of the building, adjoining a lane. It is true that Jones, the appellant's service manager, gives a different version as to the positions of these men and as to where the fire first occurred. However, Jones was at the front or north end of the building, and, without referring further in detail to the evidence, I am satisfied that Jones is mistaken.

Professor Rogers and Professor Bain, called as expert witnesses for the plaintiffs (respondents), testified that gasolene when vaporized was dangerous, and that, given the proper proportions of air and gasolene vapour, ignition might be caused by a naked flame or an electric spark or a hot body such as a red-hot iron. The exact cause of the

ignition of the fumes is not shown, but the learned trial Judge concluded that it appeared sufficiently from the evidence that it might have been caused by a spark originated by the scraping or brushing of the floor; and he considered that the testimony of various witnesses called by the defendant showed that the method used by the defendant on the day in question was an ordinary and proper means of cleaning cement floors in garages. It is true that these witnesses testified that, where it was required to clean oil and grease from such floors, it was customary to use gasolene and scrapers and brushes followed by an application of some cleansing substance, the whole washed off with water. But the evidence falls short of proving that it was the usual practice to clean such an area in the elapsed time under the conditions that existed that day. This being so, I am left with the situation that, under the circumstances described, a fire occurred, and no definite explanation is forthcoming as to the cause.

Various grounds of liability were suggested by the respondents but a consideration of the relationship between the lessor and lessee and of the rights and duties flowing from that relationship and under the lease will, I believe, resolve the question.

By the common law lessees for years were not answerable to their landlords for the accidental or negligent burning of buildings upon the demised premises; but this was altered by the Statutes of Marlebridge and Gloucester, making such tenants liable in damages for waste. This included permissive as well as voluntary waste—*Yellowly* v. *Gower* (1); and see also the provisions of *The Conveyancing and Law of Property Act*, R.S.O. 1927, ch. 137, ss. 28 and 31:

> 28. A tenant by the curtesy, a dowress, a tenant for life, or for years, and the guardian of the estate of an infant, shall be impeachable for waste, and liable in damages to the person injured.
>
> 31. Lessees making or suffering waste on the demised premises without licence of the lessors shall be liable for the full damage so occasioned.

If there had been any doubt as to the decision in *Yellowly* v. *Gower* (1), the word "suffering" in s. 31 of the Ontario statute would seem to have removed it.

The Statutes of Marlebridge and Gloucester were followed by those of 6 Anne, ch. 31, and 14 Geo. III, ch. 78,

(1) (1855) 11 Ex. 274.

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which formed the basis of the Ontario statute now found as *The Accidental Fires Act,* R.S.O. 1927, ch. 146:

> No action shall be brought against any person in whose house or building or on whose land any fire shall accidentally begin, nor shall any recompense be made by him for any damage suffered thereby; but no contract or agreement made between landlord and tenant shall be hereby defeated or made void.

In the absence of any relevant stipulation between a landlord and tenant, the latter, by virtue of the provisions of this Act, would not be liable for any damage occasioned by a fire which should "accidentally begin." Many years ago it was decided that this expression did not include a fire caused by negligence—*Filliter* v. *Phippard* (2), and this decision has been followed ever since. For two examples in this Court see *Canada Southern Ry. Co.* v. *Phelps* (3), and *Port Coquitlam* v. *Wilson* (4).

The concluding portion of the Act, "but no contract or agreement made between landlord and tenant shall be hereby defeated or made void," renders it necessary to consider the terms of the lease.

That document contains the lessee's covenant to repair according to notice in writing. No question, however, was raised as to the absence of notice; in fact, the pleadings and the argument before this Court contain no reference as to the effect of the covenants, the respondents alleging liability on the ground of waste and on other grounds unconnected with the provisions of the lease. But the question of negligence was fought out at the trial and argued in the successive courts.

Certain exceptions to the obligation to repair are contained in the covenant, viz.:

> reasonable wear and tear and damage by fire, lightning and tempest, riot or public disorder or act on the part of any governmental authority only excepted;

and by the last of the clauses extracted from the lease it is provided that if the building is

> so damaged by fire or other casualty or happening as to be substantially destroyed

then the lease should cease,

> but in case the building or buildings are not substantially destroyed, then the demised premises shall be restored * * * by the Lessor.

and a provision is added for the proportionate abatement

(2) (1847) 11 Q.B. 347. (3) (1884) 14 Can. S.C.R. 132.
(4) [1923] S.C.R. 235.

of the rent until such restoration. The effect of these various clauses is to leave the appellant liable for damage by a fire caused through its negligence. Even without the clause last referred to, the appellant could not be relieved from such liability under the exception in the covenant to repair. It would require much stronger language to permit the appellant to escape payment for damages caused by its negligence; and while the terms "casualty or happening" in the last clause may be susceptible of an innocuous meaning in this connection, so far as the appellant is concerned, they may certainly not be treated as assisting it in any contrary interpretation.

So far as the courts of Ontario are concerned, the view here expressed was set forth in a judgment of the Divisional Court as long ago as 1907 in *Morris* v. *Cairncross* (1), as appears from the judgment of that court delivered by Sir William Meredith at page 570,—in this respect agreeing with the opinion of Chancellor Boyd, as expressed at p. 549.

In *Port Coquitlam* v. *Wilson* (2), which was not a dispute between landlord and tenant, it was stated at page 243 that,

> On principle, since the statute creates an exception to the general rule, the onus ought to be upon the defendant alleging that the statute applies to shew that the fire did accidentally begin; but the point is no doubt an arguable one with the weight of *dicta* probably in favour of an answer in the opposite sense.

It was found unnecessary to pass upon the point in that case and it is also unnecessary in the case at bar, since the evidence clearly establishes negligence on the part of the appellant.

Presuming the onus to rest upon the respondents, the record discloses that the appellant used gasolene in the manner and under the circumstances already specified and that a mixture of gasolene fumes and air is dangerous and will ignite in the ways described by Professors Rogers and Bain; an explosion did occur; gasolene had been used in the past in other garages to clean cement floors without an explosion; at the time of the fire the appellant's servants were working near the gas jets. The operations being under the control of the appellant and the accident being such "as in the ordinary course of things does not happen if those who have the management use proper care," the

(1) 14 Ont. L.R. 544. (2) [1923] S.C.R. 235.

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doctrine *res ipsa loquitur* serves to make these circumstances "reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care." *Scott* v. *London & St. Katherine Docks Co.* (1).

The appellant did not show that at the time of the explosion the gas jets were not lighted, and, as already indicated, I agree with the Court of Appeal that there is nothing to warrant the inference that the fire occurred in the manner suggested by the appellant and mentioned by the trial Judge. The appellant therefore failed to suggest any explanation of the cause of the fire and the respondents are entitled to rely on the maxim.

It was argued that, because, subsequent to the fire, the Hutsons and the appellant had entered into an agreement whereby the latter would, during the course of repairing the building or the demised premises, use another building in which the Hutsons were interested, and that the rent paid for the latter should be deducted from the rent agreed upon by the lease in question, the Hutsons must be held to have agreed that the fire had occurred without negligence. It suffices to say that there is nothing in the document warranting any such conclusion, and it is therefore unnecessary to consider what would be the position if it were otherwise, in view of the fact that several insurance companies are plaintiffs (respondents) as well as the Hutsons. These companies had insured the building in question against loss or damage by fire, and, after notice to the appellant, had paid the Hutsons a sum which had been agreed upon to indemnify the latter against the loss.

The fact that the owners as well as the insurance companies are plaintiffs renders it unnecessary to consider the two cases cited by Mr. Justice Masten of *Mason* v. *Sainsbury* (2), and *Darrell* v. *Tibbitts* (3), and also the doctrine that a right of action for damages in the nature of waste, being in respect of a tort, is on grounds of public policy not capable of assignment (see *Defries* v. *Milne* (4)).

The appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Beaton, Bell & Ross.*

Solicitors for the respondents: *Erichsen-Brown & Strachan.*

(1) (1865) 3 H. & C. 596.
(2) (1782) 3 Dougl. 61.
(3) (1880) 5 Q.B.D. 560.
(4) [1913] 1 Ch. 98.

IN RE CRÉDIT CANADIEN INCORPORÉ
IN LIQUIDATION

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* Feb. 16.
* April 21.

THE SUN TRUST COMPANY LIMITED (PETITIONER) ..... APPELLANT;

AND

WILFRID BÉGIN AND OTHERS (CONTESTANTS) ..... RESPONDENTS.

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

Company—Winding-up—Resolution of directors making a call on shareholders and declaring forfeiture of shares for non-payment—Whether illegal or irregular—Fiduciary obligations of directors—Breach of trust—Good faith—Collusive transaction between directors and shareholders—Forfeiture to be in the interest of the company and not for the benefit of the shareholders—Quebec Companies Act, R.S.Q., 1925, c. 223, ss. 58, 59, 60.

Upon a petition by the appellant, as liquidator of the Crédit Canadien Incorporé, alleging the illegality and irregularity of certain resolutions of its directors making a call on the shareholders and later declaring the forfeiture of these shares when the call was not paid, and further asking for a declaration that the directors had thus acted *ultra vires* and against the interests of the company,

Held that, upon the evidence, no adequate ground was disclosed for holding the call was not a valid call of which payment could have been enforced, that the charge has not been established by evidence that, in exercising the power of forfeiture, the directors had been availing themselves of that power for some purpose for which it could not be legitimately employed, and that, under the circumstances of this case, it was impossible to conclude that the forfeiture was not in the interest of the company.

Per Duff C.J. and Davis and Hudson JJ.—The directors of a company, in putting into effect the discretionary authority to declare the forfeiture of shares, are under the obligations which govern persons acting in a fiduciary capacity.—An act which is *ultra vires* of the company when done by its directors is void *ipso facto*. As regards acts within the scope of the company's objects and, therefore, *intra vires* of the company and belonging to a class of acts within the powers of the directors, the latter, by reason of their fiduciary obligations in the exercise of such powers, are bound to act with the utmost good faith for the benefit of the company.—Acts of the directors within the scope of the powers of the company, although impeachable by the company as a breach of trust, are binding on the company if done with strangers acting in good faith and without knowledge or notice of the breach of trust.—Where the transaction is one between a company represented by the directors and a shareholder, then somewhat different considerations may apply. Where the validity of a forfeiture

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

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of shares is called in question in a winding-up on the ground that the act of the directors in professing to forfeit the shares is not binding upon the company, there is an important distinction which ought not to be overlooked. If the proceeding against the shareholder, i.e., a proceeding which in form is one of the kind contemplated by the authority to declare a forfeiture, is in reality in that respect fictitious, *aliud simulatum aliud actum,* if there has been no call the payment of which could have been enforced, and if in truth the real transaction was a collusive transaction between the directors and a shareholder or group of shareholders to enable a shareholder to surrender his shares and withdraw from the company, then, as between the company and the shareholder who is implicated in the breach of trust, the transaction cannot stand and the shareholder in a winding-up proceeding will properly be treated as a contributory.—The present case is not in any way analogous to such cases and there was in it nothing fictitious about the forfeiture of the shares by the resolution of the directors.

Held, also, that the rule, laid down in *Spackman* v. *Evans* (L.R. 3 H.L. 171) and approved by this Court in *McArthur* v. *Common* (29 Can. S.C.R. 239), that a forfeiture can be declared only when it is in the interests of the company and not when it is for the benefit of the shareholders whose shares are declared to be forfeited, is binding and, where the circumstances warrant it, should be followed; but the circumstances of this case take it out of the operation of that rule.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec, affirming the judgment of the Superior Court, Surveyer J. and dismissing the appellant's petition with costs.—A winding-up order having been delivered against the Crédit Canadien Incorporé and the appellant having been appointed liquidator, the object of the petition was to have certain resolutions of the directors of the company in liquidation conducive to forfeiture of shares for non-payment of a call made by them declared null and void and the beneficiaries therefrom reinstated as shareholders.

The material facts of the case are stated in the judgment of Kerwin J.

Jos. Blain K.C. for the appellant.

L. Forest K.C. for the respondents.

The judgments of Duff C.J. and Davis and Hudson JJ. were delivered by

DUFF C.J.—I fully agree with the conclusions at which my brother Kerwin has arrived, and also with what, as I understand it, is the basis of that conclusion, viz.: that the evidence discloses no adequate ground for holding the call was not a valid call of which payment could have been

enforced; and, further, that the charge is not established by evidence that, in exercising the power of forfeiture in relation to the shares in question in respect of which the call was not paid, the directors were availing themselves of that power for some purpose for which it could not be legitimately employed.

There were, it seems, something like one hundred shareholders who failed to pay the call and these were domiciled in different parts of the province. There is no evidence as to the circumstances of these shareholders; and it is impossible to say on the evidence that the directors in the exercise of their responsibility may not have thought that a notice that shares would be forfeited on non-payment would on the whole (especially in view of the fact that the forfeiture would still leave the shareholders liable to the then creditors for the full amount unpaid on their shares) be more productive of results financially than the recovery of judgment against the defaulters with the attendant expense, and with, possibly, barren results.

Nothing more is strictly necessary for the disposition of the appeal; but, in view of some observations in the judgments in the courts below, it is, perhaps, desirable to consider briefly some of the legal principles involved.

It is, perhaps, needless to say that, in putting into effect the discretionary authority to declare the forfeiture of shares, the directors are under the obligations which govern persons acting in a fiduciary capacity. Directors have been said to be the "agents of the company" and, again, they have been said to be "in the position of a managing partner," and, still again, it has been often said that they are "trustees of their powers."

Of course, an act which is *ultra vires* of the company when done by the directors of the company is void *ipso facto*. As regards acts within the scope of the company's objects and, therefore, *intra vires* of the company and belonging to a class of acts within the powers of the directors, the directors, by reason of their fiduciary obligations in the exercise of such powers, are bound to act with the utmost good faith for the benefit of the company.

The position of directors is, perhaps, in respect of the execution of their powers, most satisfactorily put in a passage in Lord Lindley's book on Companies (6th edition) at pp. 509, 510:

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> Directors are not only agents, but to a certain extent trustees for the company and its shareholders * * * , they are not the masters but the servants of the shareholders; and the power of the directors is limited, and accompanied by a trust, and is to be exercised *bona fide* for the purposes for which it was given, and in the manner contemplated by those who gave it * * * So the powers which the directors have, e.g., of calling meetings, electing members of their own board, allotting, transferring and forfeiting shares, making calls, &c., &c., are reposed in them in order that such powers may be *bona fide* exercised for the benefit of the company as a whole; and any exercise of such powers for other purposes is regarded as breach of trust, and is treated accordingly.

Generally speaking, acts of the directors within the scope of the powers of the company, although impeachable by the company as a breach of trust, are binding on the company if done with strangers acting in good faith and without knowledge or notice of the breach of trust. If directors, for example, enter into a contract with a stranger which is within the scope of the objects and powers of the company and, therefore, *intra vires* of the company, but inconsistent with their fiduciary obligations to the company and the shareholders, as, for example, to procure a profit for themselves, the contract is nevertheless binding upon the company if the other party to the contract is acting in good faith.

Where the transaction is one between a company represented by the directors and a shareholder, then somewhat different considerations may apply. Where the validity of a forfeiture of shares is called in question in a winding-up on the ground that the act of the directors in professing to forfeit the shares is not binding upon the company, there is an important distinction which ought not to be overlooked.

If the proceeding against the shareholder, that is to say, a proceeding which in form is one of the kind contemplated by the authority to declare a forfeiture, is in reality in that respect fictitious, *aliud simulatum, aliud actum,* to employ Lord Westbury's phrase, if there has been no call the payment of which could have been enforced, and if in truth the real transaction was a collusive transaction between the directors and a shareholder or group of shareholders to enable a shareholder to surrender his shares and withdraw from the company, then, as between the company and the shareholder who is implicated in the breach of trust, the transaction cannot stand and the shareholder in a winding-up proceeding will properly be treated as a contributory.

The transactions in the liquidation of the Agriculturist Cattle Insurance Company, in which the forfeiture was held to be invalid, were of this character. In *Spackman's* case (1), Lord Westbury said:

> If a declaration of forfeiture proceeds upon and is the result of a collusive agreement, but is entered by the directors in the books of the company as if it were a *bona fide* adverse proceeding, the entry is a false statement involving a fraudulent concealment of the trust, for the suppression of the truth is a form of falsehood, and falsehood is fraud, and it is impossible under such circumstances of imposition on the other shareholders that the shareholder who sets up the forfeiture can make a case of acquiescence or derive any benefit from lapse of time whilst the truth remains unknown.

It should be observed here that the ground upon which such transactions are held invalid is not because of *mala fides* in the sense that the directors are not acting as they conceive in good faith for the good of the company as a whole. The ground is that there has been, in the words of that great judge, Turner L.J., in *Bennett's* case (2) "an illegal exercise of a legal power"; and, such being the case, the act of the directors will effectuate nothing notwithstanding that they honestly believed they were acting in the best interests of everybody.

The case before us is not in any way analogous to such cases. There was nothing fictitious about the forfeiture here, as I have already pointed out.

The forfeiture proceedings may be affected by a breach of trust in other ways. A proceeding may be taken by the directors in violation of the good faith they owe to the company and to the shareholders because the purpose of the proceeding is to benefit themselves personally or some individual shareholder or some group of shareholders at the expense or to the detriment of the shareholders as a whole. A board of directors resorting, for example, to forfeiture with the intention of disposing of the forfeited shares by selling them to themselves or their nominees with the object of obtaining or maintaining control of the company would be committing a breach of trust in respect of which the company would be entitled to relief against the directors as well as against the collusive purchasers. It does not necessarily follow (as between the company, or the liquidator in a winding-up proceeding, and the forfeited shareholder, against whom the proceeding was an adverse pro-

(1) (1864) 34 L.J. Ch. 321, at 330. (2) (1854) 43 E.R. 879, at 885.

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ceeding founded upon a valid call and who was entirely innocent and ignorant of the wrongful design of the directors,) that the validity of the forfeiture could be impeached and the forfeited shareholder held liable as a contributory. On principle it would appear that the shareholder, being at arm's length with the directors, could not be prejudicially affected by the breach of trust in respect of which he was completely ignorant and innocent.

In virtually all of the numerous judgments in the liquidation to which reference has been made the collusiveness of the transaction is insisted upon. Here, there is not the slightest evidence of collusion. Having regard, however, to the conclusions of fact above stated, I do not base my decision upon this ground.

The argument of the appellant mainly rests upon *Spackman* v. *Evans* (1) and *Common* v. *McArthur* (2), but, before entering upon a discussion of these cases, it is convenient, I think, to reproduce textually sections 59 and 60 of the Quebec *Companies Act*, R.S.Q. 1925, c. 223. I make use of the English version because in that version sections 59 and 60 correspond (with one immaterial discrepancy) word for word with sections 75 and 76 of the Dominion *Companies Act*.

59. If, after such demand or notice as is prescribed by the letters patent, or by resolution of the directors, or by the by-laws of the company, any call made upon any share is not paid within such time as, by such letters patent or by resolution of the directors or by the by-laws, is limited in that behalf, the directors, in their discretion, by vote to that effect duly recorded in their minutes, may summarily declare forfeited any shares whereon such payment has not been made; and the same shall thereupon become the property of the company and may be disposed of as, by the by-laws of the company or otherwise, they prescribe; but notwithstanding such forfeiture, the holder of such shares at the time of forfeiture shall continue liable to the then creditors of the company for the full amount unpaid on such shares at the time of forfeiture, less any sums which are subsequently received by the company in respect thereof.

60. The directors may, if they see fit, instead of declaring forfeited any share or shares, enforce payment of all calls, and interest thereon, by action in any court of competent jurisdiction; and in such action it shall not be necessary to set forth the special matter, but it shall be sufficient to declare that the defendant is a holder of one share or more, stating the number of shares, and is indebted in the sum of money to which the calls in arrears amount, in respect of one call or more, upon one share or more, stating the number of calls and the amount of each call whereby an action has accrued to the company under this Part.

(1) (1868) 3 E. & I. 171. (2) (1898) 29 Can. S.C.R. 239.

A certificate under the seal of the company, and purporting to be signed by any of its officers, to the effect that the defendant is a shareholder, that such calls have been made, and that so much is due by him thereon, shall be received in all courts as evidence to that effect.

Counsel for the appellants relied upon certain passages in the judgment of Lord Cranworth in *Spackman* v. *Evans* (1). In that case the House of Lords had to pass upon the question whether the appellant was properly placed upon the list of contributories in the winding up of a joint stock company which had been incorporated by deed of settlement under the statute of 7 & 8 Vict. By the deed of settlement the directors were invested with power to declare the forfeiture of shares for the non-payment of calls. Dealing with the articles of the deed under which the power of forfeiture arose, Lord Cranworth (at p. 186) used these words:

The deed, it is true, gives to the directors the power of declaring a forfeiture of shares the holders of which refuse or neglect to pay their calls. But it is plain that this is a power intended to be exercised only when the circumstances of the shareholder may make its exercise expedient for the interests of the company, not a power to be exercised for the interest, or supposed interest, of the shareholder. This is plain from the very nature of the power, and it is made even more obvious from various provisions and stipulations contained in some other clauses in the deed. In the 125th clause, which confers the power of declaring a forfeiture, it is expressly stipulated that the directors, instead of declaring a forfeiture, may, if they think fit, enforce payment of the instalment, meaning obviously by means of legal proceedings. In the next clause (the 126th) they are empowered to restore the forfeited share to the holder on payment of a fine; and by the 182nd clause, the directors are empowered to sell forfeited shares, but only so many of them as shall be sufficient to raise the sum for non-payment whereof the forfeitrue was incurred and the expenses, and all shares not so sold are to revert and be restored to the person who held them at the time of the forfeiture.

These provisions are strong to shew that the power to declare shares forfeited was intended only to give to the directors additional means of compelling payment of calls, or other money due from the shareholder to the company by virtue of the deed. The shares are, in substance, made a security to the company for the money from time to time becoming due from the shareholder. The duty of the directors, when a call is made, is to compel every shareholder to pay to the company the amount due from him in respect of that call; and they are guilty of a breach of their duty to the company if they do not take all reasonable means for enforcing that payment. In the present case it has never been even suggested that the appellant was insolvent, that he was not perfectly able to pay the full 30s. per share, which was the amount of his call; and it was a plain breach of trust in the directors to take, in discharge of money due from the appellant, shares over which they had power as a security only for the money due, but which shares they knew to be valueless. They were bound, as trustees for the body of shareholders, to enforce payment of

(1) (1868) 3 E. & I. 171.

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the whole 30s. per share, and for that purpose to take all proper legal proceedings, unless they *bona fide* believed that he was not in circumstances which would enable him to pay the sum for which he was sued, and there has never been even a suggestion that this was the case.

I have quoted this passage in full for reasons which will appear as I proceed.

In *Common* v. *McArthur* (1), this Court appears to have thought that these observations of Lord Cranworth govern the application of the provisions of the Dominion *Companies Act* (now sections 75 and 76 of that statute). If the question were entirely *res nova,* I should have said without hesitation that these observations of Lord Cranworth could not be properly resorted to as affording in all cases a rule governing proceedings under the statute now before us or under the corresponding provisions of the Dominion *Companies Act;* but it is necessary to consider *Common* v. *McArthur* (1).

As Lord Cranworth himself points out, by the provisions of the deed of settlement which dictated the decision in that case, the directors might enforce payment of the call by means of legal proceedings; but they were empowered to restore the forfeited share to the holder on the payment of a fine; and although the directors were empowered to sell the forfeited shares, the sale of such shares was restricted so that the proceeds should, as far as practicable, not exceed the sum for the non-payment of which the forfeiture had been incurred, and all forfeited shares not so sold had to be restored to the person who held them at the time of the forfeiture. In view of these provisions, the conclusion was inevitable that the power of forfeiture was intended only to give an additional means of compelling the payment of calls and that the shares were, in substance, merely a security to the company for the payments from time to time becoming due from the shareholder; and, further, that it was a plain breach of trust in the directors to take, in discharge of money due from the appellant (a solvent person), shares over which they had power as security only for the money due, but which shares they knew to be valueless.

The provisions of the statute before us contain no enactments corresponding to these stipulations of the deed of settlement mentioned. The power given by the statute is

(1) (1898) 29 Can. S.C.R. 239.

to forfeit summarily on the proper notice any share in respect of which the call has not been paid. The directors are invested with discretion as to the exercise of the power. Upon the declaration of forfeiture, all shares becoming the property of the company may be disposed of "as by the by-laws of the company or otherwise they prescribe." There is nothing in this section authorizing a remission of the forfeiture by the directors; nor is there anything limiting the power of the company in prescribing the manner in which forfeited shares shall be disposed of. There is nothing requiring the company to return the surplus of the proceeds of any sale over and above the amount due in respect of the call and expenses to the shareholder, nor to return unsold shares after the company has, by sale of some of the forfeited shares, realized sufficient to pay the call and such expenses. It may be that it would be competent for the company by by-law so to direct, but in the absence of such direction, there would appear to be no justification for holding that the shares must in this connection be considered merely as security for moneys due to the company in respect of calls.

I think, subject to *Common* v. *McArthur* (1), that under the statute with which we are dealing, it may be said that the object of the power of forfeiture with which the directors are invested is that the directors, as representing the company, shall be enabled for the benefit of the company and adversely to the shareholder to forfeit his shares if he fails to pay his calls. The enactment does not contemplate a cancellation such as those in question in the cases arising out of the liquidation of Agriculturist Cattle Insurance Company where cancellation was made in each case at the request of the subscriber and not by adverse forfeiture.

In *Common* v. *McArthur* (1), Mr. Justice Sedgwick, delivering the judgment of this Court, applied the passages already quoted from Lord Cranworth's judgment to a case governed by the provisions of the Dominion *Companies Act*. The observations of Mr. Justice Sedgwick on this point, however, do not appear to have formed part of the *ratio decidendi* because the decision really proceeded upon the point that there was no forfeiture, or that the forfeiture was fictitious because the resolution declaring the forfeiture,

(1) (1898) 29 Can. S.C.R. 239.

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reciting that McArthur had failed to pay calls "made on said stock," was in this respect stating something which was contrary to the fact. The transaction in question in *McArthur's* case (1) was one entered into at McArthur's request and the manifest purpose of it was to relieve him from responsibility as a shareholder. The company was hopelessly insolvent and there appears to have been no doubt about the solvency of McArthur. I cannot regard *Common* v. *McArthur* (1) as an authority requiring us to hold that, in exercising the power of forfeiture under the Dominion *Companies Act*, or in the statute now before us, a board of directors is in all cases bound to follow in detail the course indicated by Lord Cranworth's remarks in the passage quoted above from his judgment in *Spackman* v. *Evans* (2). These remarks, it is proper to observe, concerned a case in which it was presumed that the shareholders were solvent and admitted that the shares were worthless.

I must not be understood to say that the failure to pursue the personal remedy, coupled with the forfeiture of the shares, may not, where the shareholder is a solvent person and the shares are valueless, be evidence in support of an allegation that the directors have been aiming at ulterior and improper ends inconsistent with their fiduciary character in declaring the forfeiture or, if the shareholder is implicated, establish a valid ground for treating the forfeiture as ineffectual.

On the other hand, doubts have unquestionably arisen upon the question whether or not, under the statutes we are now considering, the respective remedies of forfeiture and recovery by action of the amount of the call from the shareholders are not mutually exclusive. Where a share has been forfeited, of course, the shareholder is no longer a shareholder as respects that share and cannot be required by the company to pay a call in respect of it.

The language of section 60 is, perhaps, susceptible of the construction suggested, viz., that if the company sues a shareholder for payment of a call and pursues its suit to judgment, the company loses the alternative remedy of for-

(1) (1898) 29 Can. S.C.R. 239. (2) (1868) 3 E. & I. 171.

feiture; and that is a circumstance which may have influenced the directors in the case before us.

The appeal should be dismissed with costs.

The judgments of Crocket and Kerwin JJ. were delivered by

KERWIN J.—The appellant is the liquidator of the Crédit Canadien Incorporé. Pursuant to an order of the Superior Court permitting it so to do, the liquidator instituted proceedings by petition in which it sought a decree that a certain forfeiture of shares of the company, declared by resolution of the directors on December 10th, 1929, had not been "légalement, régulièrement et justement prononcée." It also asked a declaration that in passing that resolution and two others, dated respectively February 14th, 1928, and March 27th, 1928, the directors had acted *ultra vires* and against the interests of the company. Apparently it was deemed advisable to have the questions in dispute determined before a list of contributories should be settled but, as will be pointed out, it was by the resolution of February 14th, 1928, that a call of ten dollars per share had been made and the real attack is not upon that call but against the declaration of forfeiture. Accordingly and notwithstanding the form of the petition, the only point argued before us was whether the forfeiture was *ultra vires* the company.

The company was incorporated August 5th, 1912, by letters patent of the province of Quebec, granted under the provisions of the Quebec *Companies Act*. By these letters patent the company was authorized to issue ten thousand shares of the par value of one hundred dollars each. The capital had been fully subscribed by 1919, but prior to 1928 it had been found necessary to make but one call, and that of ten dollars per share. However, from time to time bonuses totalling seven dollars per share had been declared, which had been credited to the shareholders' stock accounts, and some of the shareholders had paid in advance on account of their shares the sum of $76,171. At the end of December, 1927, the paid up capital was $266,171.

While at first the business of the company had been profitable, losses were subsequently suffered and it was found necessary to provide further working capital. Early

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in 1928 it was decided to endeavour to reorganize the capital structure and correspondence with the Attorney-General's Department ensued. All of this correspondence is not produced but sufficient appears from a letter from the department to indicate that the directors had been considering reducing the capital. No further steps were taken in connection with this proposal, but on February 14th, 1928, at a meeting of the directors, a call was made of ten dollars per share, payable March 20th, 1928. On March 27th, 1928, the directors passed the following resolutions:—

Résolu:—Il a été proposé, dûment secondé, et unanimement résolu:—

Attendu que le 14 février 1928, une résolution a été adoptée par les directeurs de cette compagnie décrétant qu'un appel de 10% serait fait aux actionnaires de la compagnie, cet appel devant être payable le 20 mars 1928;

Attendu que certains actionnaires ont fait défaut de payer cet appel de 10%, et

Attendu que la dite résolution du 14 février 1928 a été portée à la connaissance des dits actionnaires avec avis d'avoir à s'y conformer dans le délai prescrit.

Qu'il soit en conséquence résolu que les actions de ceux qui n'auront pas payé le dit versement avant le 21 avril 1928 soient sommairement confisquées, et qu'à compter de ce moment, elles appartiennent à la compagnie qui pourra en disposer selon que les directeurs l'ordonneront, et qu'avis de la présente résolution soit donné sans délai par le secrétaire de la compagnie.

The owners of 7,163 shares had paid the call so that any forfeiture would affect the holders of only 2,837 shares. It is true that some time previously there had been negotiations for the sale of the assets of the company, or, at any rate, endeavours by some of the directors to sell their holdings with a view of securing further capital. It was contended that the result of the evidence was to indicate that these directors, if not all, were really using the power of forfeiture in order to reduce the capital of the company and endeavour to sell their own holdings but such a finding is not warranted. There is no suggestion of fraud on the part of the directors or any of them. There could not very well be as not one of the directors was the holder of any of the forfeited shares, and on December 9th, 1930, a further call of ten per cent was made on the holders of the remaining 7,163 shares.

In order to complete the narrative attention must be called to the resolution of December 10th, 1929, by which, after referring to the call made on February 14th, 1928, it was specifically declared that the shares, the holders of

which had not paid the call, should be forfeited. It was explained that the delay between March, 1928, and December, 1929, was because the directors, until they were advised by the company's solicitors that a formal declaration of forfeiture was necessary, had overlooked the matter.

A forfeiture of shares is invalid if it is not made for the company's benefit, and in every instance where, as here, there is no suggestion as to the absence of any formality, the inquiry must be limited to a consideration of this problem.

In view of all the circumstances, it is impossible to conclude that the forfeiture was not in the interests of the company. Section 59 of the Quebec *Companies Act*, R.S.Q., 1925, chapter 223, imposes an obligation upon those who held forfeited shares to pay the debts of the company which existed at the time of the forfeiture but this obligation is not in question in these proceedings. While the effect of the forfeiture is that, subject to this provision, the holders of the forfeited shares are relieved from their liability for the amount unpaid on the shares and thus a heavier burden is cast upon those who have paid the calls and are still the holders of shares not fully paid for, the court has no power to declare the forfeiture *ultra vires* unless it is able to determine that the action of the directors was a fraud upon the power to forfeit. It is true that the directors made no effort to ascertain whether the holders of the shares they were about to forfeit were solvent but the position must be the same as if the company had prospered and the holders of such shares had then sought to set aside the forfeiture. To state the problem in this way is on the evidence to indicate but one answer.

In view of some observations in the reasons for judgment in the courts below, it is advisable to refer to two cases mentioned therein, *Spackman* v. *Evans* (1), and *Common* v. *McArthur* (2). The majority judgment in the case first mentioned has always been considered as authoritatively determining that a power to forfeit may not be exercised for the benefit of a shareholder, and it was so treated in this Court in the *Common case* (2). These decisions are binding and, where the circumstances warrant it, should be followed. Sections 58 and 59 of the Quebec

(1) (1868) L.R. 3 H.L. 171. (2) (1898) 29 Can. S.C.R. 239.

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Companies Act, R.S.Q., 1925, chapter 223, dealing with the power of the directors to forfeit and enforce payment of calls by action, are, except for a few immaterial changes, the same as sections 41 and 42 of the Dominion *Companies Act*, R.S.C., 1886, chapter 119, which were in force when the *Common* case (1) was decided. The mere fact that by the first of these sections a discretion is given to the directors to forfeit and that by the later section

> the directors may, if they see fit, instead of declaring forfeited any share or shares, enforce payment of all calls

does not absolve the directors from obeying the established rule that a forfeiture can be declared only when it is in the interests of the company and not when it is for the benefit of the shareholders whose shares are declared to be forfeited.

As already indicated, however, the circumstances of this case take it out of the operation of the rule. The appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Mercier, Blain & Fauteux.*

Solicitor for the respondents: *Lionel Forest.*

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* Mar. 1.

VIVIAN MacMILLAN (PLAINTIFF).....APPELLANT;

AND

J. E. BROWNLEE (DEFENDANT).....RESPONDENT.

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

Seduction—Action by the woman alleged to have been seduced—The Seduction Act, R.S.A., 1922, c. 102, s. 5—Construction—Cause of action—Nature of damage—Basis of damages—Sufficiency of evidence of damage to support action—Verdict of jury.

Sec. 5 of *The Seduction Act*, R.S.A., 1922, c. 102, enacts that "notwithstanding anything in this Act an action for seduction may be maintained by any unmarried female who has been seduced, in her own name, in the same manner as an action for any other tort and in any such action she shall be entitled to such damages as may be awarded."

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

(1) (1898) 29 Can. S.C.R. 239.

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At the trial the jury found that the present appellant, an unmarried female, and a plaintiff in the action, was seduced by defendant, and that she suffered damage in an amount of $10,000. The trial judge (Ives J.) dismissed her action, on the ground that damage is the gist of the action, that the damage necessary to found a right of action in the woman must be of the same character as gave the master his right of action, i.e., loss of service, or at least an interference with the woman's ability to serve, and that there was no evidence of such damage ([1934] 2 W.W.R. 511). The dismissal of the action was (by a majority) affirmed by the Appellate Division, Alta. ([1935] 1 W.W.R. 199). On appeal to this Court:

Held (Davis J. dissenting), that the appeal be allowed, and appellant have judgment for the amount of the jury's verdict.

Per Duff C.J., Rinfret and Kerwin JJ.: In view of the decisions of the Appellate Division, Alta., in *Gibson* v. *Rabey*, (1916) 9 Alta. L.R. 409, and *Tetz* v. *Tetz*, (1922) 18 Alta. L.R. 364, concerning the construction of said s. 5 as it stood prior to its reproduction without material alteration in R.S.A. 1922, c. 102, that reproduction must be taken to have given legislative sanction to the construction put upon the section by those decisions (*Barras* v. *Aberdeen Steam Trawling & Fishing Co.*, [1933] A.C. 402), and, having regard to the effect of those decisions (discussed), any construction is precluded by force of which the determining factors in the trial of an action of seduction under s. 5 are to be deemed essentially or substantially the same as those in the trial of an action of seduction under the other (preceding) sections of the Act or at common law. Starting from this point, it follows that s. 5 should be construed according to the ordinary meaning of the words and that damage of the special character which is the gist of the action under the other sections of the Act—damage actually or presumptively entailing some loss of service or some disability for service—is not of the gist of the action under s. 5. (*Per* Kerwin J.: A consideration of the language of s. 5 leads to the same conclusion. The language analyzed and discussed).

There was sufficient evidence of damage to support the action. Further, the jury's verdict must stand unless, examining the evidence as a whole, the Court was clearly of opinion that it was one which no jury, acting judicially, could give; and this had not been established by argument. So also as regards damages. It was for the jury to determine whether appellant's evidence, or how much thereof, should be accepted as correct; and on her evidence it could not be said that, if it was accepted, the sum awarded was such as no tribunal of fact acting reasonably could have awarded.

Per Davis J. (dissenting): Even accepting the appellant's story, she could not, on the facts of the case and upon the broadest possible interpretation most favourable to her of s. 5, succeed unless s. 5 be reduced to giving a cause of action for fornication *per se*. If the cause of action in s. 5 (excluding necessarily the relation of master and servant) is the same as in the other sections of the Act, the birth of a child or pregnancy or at least some physical disability as a direct result of the conduct complained of is an essential element of that cause of action, and the illness that was proved in this case was too remote and insufficient to sustain the action. If, on the other hand, the cause of action in s. 5 is to be regarded as a new and independent tort, separate and distinct from the action for seduction referred to in the other sections, then, whatever be the essential elements of this new

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cause of action, there must be at least something in the nature of negation of choice. Taking either interpretation of s. 5, the action failed upon the evidence.

In interpreting s. 5, the statute should be read as a whole and s. 5 interpreted, not as an isolated piece of legislation to be given a new meaning and significance, but as part of an entire statute dealing with the same subject-matter. The other (preceding) sections (discussed) necessarily import as an essential ingredient of the cause of action an illegitimate child born or conceived as a result of the relations complained of; and that has always been the common understanding in Canada of the cause of action for seduction. The language of s. 5 analyzed and discussed, and with reference to the language in the other sections. Sec. 5 should not be interpreted so as to import into the words used therein a different quality or meaning from that which the same words have in the other sections. In the cause of action under s. 5 there is necessarily excluded the relation of master and servant as an essential, and with it the necessity for proof of loss of service; but the substance of the cause of action, the birth of a child or at least the condition of pregnancy, remains. The re-enactment of the statute in the revision of 1922 does not touch the point as to the substance of the cause of action, because the fact of birth of a child or pregnancy in the Alberta cases prior to the revision was admitted or accepted by counsel and those cases did not turn upon that question. The evidence in the present case disclosed no cause of action.

APPEAL by the female plaintiff from the judgment of the Appellate Division of the Supreme Court of Alberta (1) dismissing her appeal from the judgment of Ives J. (2).

The action was brought by the present appellant and her father for damages for alleged seduction of her by the defendant. At the trial before Ives J. and a jury, the jury found that the defendant seduced the present appellant and found damages for $10,000 in her favour and for $5,000 in favour of the other plaintiff. Upon announcement of the verdict by the jury, plaintiffs' counsel moved that judgment be entered in accordance therewith and defendant's counsel moved for dismissal of the action, submitting that there was no cause of action shewn. Ives J. reserved judgment and later delivered judgment dismissing the action (2). His grounds were stated as follows:

Upon the verdict being announced by the jury, counsel for the defendant moved for dismissal of the action on the ground that there was no evidence of any interference with the daughter's services to the parent to which he was entitled and no evidence that the seduction in any way interfered with the daughter's ability to serve.

It is quite clear that the daughter left her home in Edson with the consent and approval of her parents and was accompanied to Edmonton by her mother. It is equally undoubted that no illness resulted from the

(1) [1935] 1 W.W.R. 199; [1935] 1 D.L.R. 481.
(2) [1934] 2 W.W.R. 511.

seduction and no evidence that the ability of the daughter to render services was in any way interfered with.

In my opinion the law is well settled that damage is the gist of the action and I am also of the opinion that the damage necessary to found a right of action in the woman must be of the same character as gave the master his right of action, that is, loss of service, or at least an interference with the woman's ability to serve. I see nothing in our statute to convey a contrary intendment of the Legislature.

In my view of the law the action must be dismissed with costs, * * *

An appeal by the plaintiffs to the Appellate Division was dismissed (Clarke and Lunney, J.J.A., dissenting as to the appeal of the present appellant) (1). The present appellant then appealed to this Court.

The operative sections of *The Seduction Act,* R.S.A. 1922, c. 102, read as follows:

PERSONS ENTITLED TO MAINTAIN ACTION

2. The father or, in case of his death, the mother (whether she remains a widow or remarries) of any unmarried female who has been seduced and for whose seduction the father or mother could maintain an action in case such unmarried female was at the time dwelling under his or her protection may maintain an action for the seduction, notwithstanding such unmarried female was at the time of her seduction serving or residing with another person upon hire or otherwise.

[1903 (2), c. 8, s. 1.]

3. Upon the trial of an action for seduction brought by the father or mother it shall not be necessary to prove any act of service performed by the party seduced but the same shall in all cases be presumed and no evidence shall be received to the contrary; but in case the father or mother of the female seduced had before the seduction abandoned her and refused to provide for and retain her as an inmate then any other person who might at common law have maintained an action for the seduction may maintain such action.

[1903 (2), c. 8, s. 2.]

4. Any person other than the father or mother who by reason of the relation of master or otherwise would have been entitled at common law to maintain an action for the seduction of an unmarried female may still maintain such action if the father or mother is not resident in Alberta at the time of the birth of the child which is born in consequence of the seduction or being resident therein does not bring an action for the seduction within six months from the birth of the child.

[1903 (2), c. 8, s. 3.]

5. Notwithstanding anything in this Act an action for seduction may be maintained by any unmarried female who has been seduced, in her own name, in the same manner as an action for any other tort and in any such action she shall be entitled to such damages as may be awarded.

[1903 (2), c. 8, s. 4.]

(1) [1935] 1 W.W.R. 199; [1935] 1 D.L.R. 481.

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N. D. Maclean K.C. for the appellant.

A. L. Smith K.C. for the respondent.

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

DUFF C.J.—This appeal raises an important question as to the construction of section 5 of *The Seduction Act* of Alberta (Cap. 102, R.S.A. 1922) which was first enacted as Cap. 8 of the Ordinances of the North West Territories, 1903.

There is undeniably force in the argument that the "action for seduction," which an unmarried female is by that section given the right to institute, rests "in its essentials" upon the same cause of action as the "action for seduction" which the parents are entitled to bring under sections 2 and 3 of the statute. This is the view which prevailed with the majority of the Appellate Division and is supported by the Chief Justice of Alberta in a powerful judgment.

Each part of the statute ought, it may fairly be argued, to be read with each of the other parts; and, reading sections 2 and 3 with section 5, and section 5 with sections 2 and 3, and construing each of these parts of the enactment by the light of the other, and having regard to similarity of language in sections 2 and 5, the contention is by no means without substance that, *prima facie,* section 5 presupposes a cause of action capable of being asserted by the parents, if (at all events) living in Alberta, and that, given such a cause of action vindicable by the parents, a cause of action having the same constitutive elements (the parental relations being, of course, in this case irrelevant) is, by section 5, bestowed upon the seduced woman.

It follows from this, it is said, that damage of the kind which is the gist of the action under sections 2 and 3 (disability for service resulting from childbirth, pregnancy or physical illness directly due to the sexual intercourse) is also of the essence of the cause of action under section 5.

The other view of the section, which was, I think, in effect accepted by Mr. Justice Clarke and Mr. Justice Lunney, may be summarily stated thus:

Sections 2 and 3 are concerned exclusively with conduct that constitutes a wrong to the parents, and, in point of

law, the essence of this actionable wrong consists in the fact that it results in some loss of the services of the daughter, or illness entailing (presumptively or actually) some disability for service; while section 5, on the contrary, is concerned exclusively with the wrong which the law, by the parent enactment passed by the Legislature of the North West Territories in 1903, first recognized as effecting a prejudice to the interests of the seduced female herself, in respect of which she is entitled to legal protection, and that the sole purpose of the enactment in section 5 is to provide redress for this wrong.

Then, it is said, in construing the enactment in which this novel rule and principle of liability are embodied, one would not appear to be justified in imputing to the words employed by the Legislature for that purpose alone, a rather artificial signification derived from the earlier sections which, notwithstanding the similarity of language, do deal with a subject-matter that is widely different; and, it is added, there is less likelihood of frustrating the legislative intention if one gives effect to this enactment according to the commonly understood meaning of the words, having regard, of course, to its manifest purpose. The cause of action under section 5 arises, no doubt, out of an occurrence or occurrences which, assuming the conditions to subsist as to resulting damage, might form the foundation of an action by the parents of the woman. But the action under section 5 is bestowed upon a person who, *ex hypothesi*, is a voluntary participant in the acts which are the essential basis of her right to redress; and, in consequence, in passing upon a claim for damages under section 5, the tribunal of fact is faced with issues and with considerations of an order totally different in their nature from anything that can arise in considering or adjudicating upon a claim under sections 2 and 3. That circumstance alone, it is said, sharply differentiates, in substance, the cause of action under the later section from that under the earlier.

First of all, it is said that in an action under sections 2 and 3, on the question whether or not the cause of action has been constituted (as distinguished from the assessment of damage), the conduct of the seduced woman is irrelevant; while leave and licence by the parents, which might be established by proving consent either by words or con-

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duct, would be an answer to the action. In an action under section 5, on the other hand, the conduct of the woman as well as her character both enter into the determination of the existence of the cause of action. The relief given by section 5 presupposes, it is said, that the woman seduced was, at the time she was corrupted by the defendant, a woman of virtuous life and habits; and, moreover, that the words of the section, read according to the meaning they bear in the common language of men, imply that some enticement has been employed by the defendant, or some unfair advantage taken, through which he has induced the woman to have intercourse with him. All this, as has been said, would be irrelevant in an action under the earlier sections, which would lie even in a case in which it appeared that the advances of the woman seeking the gratification of her own desires were the preponderating factor in bringing about the common act. Again, no consent, no enticement or manœuvring on the part of the parents could be relevant in determining the existence of a cause of action under section 5.

In this view, since the action under section 5 has nothing to do with the parental relation, nothing to do with the relation of master and servant, nothing to do with loss of service or service, there is, it is contended, no *a priori* probability that section 5 contemplates relief conditioned upon the seduction being followed by childbirth or pregnancy or illness directly traceable to physical act of copulation and giving rise to some disability for service; and it is not susceptible of dispute that the language of the section (assuming damages to be of the essence of the cause of action) when read alone, and without colour derived from the preceding sections, neither expresses nor implies such a condition.

In passing upon these rival views we are not without assistance from judicial decisions. The ordinance of the North West Territories of 1903 was reproduced in its entirety (with the addition of the heading "Persons entitled to maintain action") by Cap. 102 of the R.S.A. 1922, which came into force on the 19th January, 1923, by virtue of a statute which was assented to on the 9th day of March, 1923.

Before that date, two decisions were pronounced by the full court of Alberta, one in 1916 and one in 1922, both in

the same sense. The decisions are concerned with the construction of section 5 of the North West Territories Ordinance; and, in so far as they involve a construction of that section, they must, we think, be taken to have received legislative sanction when section 5 was reproduced without material alteration in R.S.A. which came into operation in 1923. (*Barras* v. *Aberdeen Steam Trawling & Fishing Co.*) (1).

I turn now to the decisions. The first in *Gibson* v. *Rabey* (2). Two judgments were delivered, one by Scott J., another by Beck J., in which Stuart J. concurred. Scott J. proceeded upon the ground that seduction in section 5 has its ordinary meaning and implies some enticement on the part of the seducer by which a virtuous woman is induced to give herself to him. That appears conclusively from the sentence:

> In my view the evidence was sufficient to support the conclusion the trial judge must have reached that she was enticed and persuaded by

the defendant to commit the act. Beck J., in the course of his judgment, observes at p. 414 that,

> The section of the ordinance already quoted, though awkwardly drafted, inasmuch as in giving the woman herself a right of action it does away with the whole idea of service and loss to a master, by the clearest necessary intendment constitutes the seduction, not mere seduction but seduction followed by damages consequent upon the seduction, the cause of the action. For I think that damage was the "gist" of the action in the case, and at all events the ordinance itself, I think, makes it the gist of an action by the woman seduced. It was contended that, in an action by a woman for her own seduction, the word should be interpreted as it appears to be very generally by the American authorities to involve an enticing by the defendant. The history of the action shews that so long as the action was based on loss of service, seduction was ultimately taken to mean no more than having carnal intercourse with. The reason, however, was that damage by way of loss of service was the gist of the action and consent by the servant was no answer to an action by the master.

He proceeds, at p. 415:

> Now that the woman herself is enabled to be the plaintiff, I think her action is subject to a like defence, that is, if she be the tempter or even if she deliberately consents from lasciviousness or even from the strength of mere natural passion, provided her consent has not been brought about by enticement of the defendant, she cannot recover.
>
> In this way, I come in effect to the same conclusion as my brother Scott.
>
> I think, however, that in the absence of evidence of loose behaviour on the part of the woman, the presumption is that there was enticement on the part of the defendant in cases of this sort and that the burden

(1) [1933] A.C. 402. (2) (1916) 9 Alta. L.R. 409.

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of shewing that the plaintiff cannot succeed on the ground that she was at least equally morally guilty is on the defendant.

Although it does not appear from the report, it seems that in this case pregnancy supervened, and, consequently, although it is stated by Beck J. that damage is of the gist of the action, no question arose as to the character of the damage necessary to sustain the action.

The second decision was pronounced in *Tetz* v. *Tetz* (1) by the Appellate Division of the Supreme Court of Alberta (Scott C.J, Stuart, Beck, Hyndman and Clarke JJA.) The judgment of the Court was delivered by Beck J.A., and in the course of his judgment he summarizes the judgment of Stuart J. and himself in *Rabey's* case (2) at pp. 365 and 366, thus:

> In that case I said that, in my opinion, it would be a *defence* to an action for seduction if it were shown, (1) that the woman was the tempter, or (2) even if she deliberately *consented* from lasciviousness or even from the strength of mere natural passion, *provided* her *consent* had not been brought about by the enticement of the defendant. To this I added that, in my opinion, in the absence of evidence of loose behaviour on the part of the woman, the presumption is that there was enticement on the part of the man and that the burden of showing that the plaintiff could not succeed on the ground that she was at least equally morally guilty is on the defendant. Stuart J. concurred with me and Scott C.J. (the Court being composed of three members) was evidently of the same opinion.

Now, it is clear that some points were decided in these two cases touching the construction and effect of section 5. In each it is declared that the plaintiff's right to recover under that section is conditioned in certain specified respects. When the facts are ascertained, it is held, the plaintiff cannot succeed if certain propositions of fact are established concerning the conduct of the plaintiff and defendant towards one another; and the investigation, when the plaintiff's right to recover is disputed, will involve the assignment to one or other of the parties the preponderating role in bringing about the result, the investigation of the part played by the woman's natural passion, and, it may be, the determination of the relative moral guilt of the pair.

These decisions, in other words, recognize that, in examining a disputed claim for relief under section 5, the court must deal with issues and considerations which could not arise and would not be relevant in the trial of an action under sections 2 and 3. It is of no importance that the

(1) (1922) 18 Alta. L.R. 364. (2) (1916) 9 Alta. L.R. 409.

matters mentioned in the judgment of Beck J.A. are said to be matters of defence; the investigation of these matters necessarily results, the judgments recognize, from the fact that the right to relief under section 5 is given to the seduced woman herself.

Seduction, as Beck J.A. says, at common law and in the earlier sections of the Act signifies nothing more than carnal intercourse. Enticement on one side or the other, relative moral responsibility, and so on, are matters which, as already observed, have no bearing upon the issue as to the existence of the cause of action. Under section 5, according to the decisions, such matters are the determining factors; and, in view of these decisions, since the re-enactment of the statute in 1922, any construction is precluded by force of which the determining factors in the trial of an action of seduction under section 5 are to be deemed essentially or substantially the same as those in the trial of an action of seduction under the earlier sections or at common law.

These decisions have nothing to say as to the nature of the damages which must be proved by the plaintiff under section 5, although in the first of them it was definitely stated that under that section damage is the gist of the action.

Starting from this point, it follows, we think, that section 5 should be construed according to the ordinary meaning of the words and that damage of the special character mentioned—damage actually or presumptively entailing some loss of service or some disability for service—is not of the gist of the action under that section.

Neither have we any doubt that there was sufficient evidence of damage to support the action.

There remains the question raised by the able argument of Mr. Smith in support of his contention that the judgment of the Appellate Division should not be disturbed on the ground that, on the evidence, the only reasonably admissible finding would be one against the plaintiff, or, in the alternative, that there should be a new trial on the ground that the verdict is against the weight of the evidence and particularly that the damages awarded are unreasonably excessive. This argument presents a question of a type with which the courts are very familiar.

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It is no part of our duty to ask ourselves what verdict we should find upon the evidence as presented to us in the record without the advantage of hearing and seeing the witnesses. The settled rule is that the verdict of the jury must stand unless, examining the evidence as a whole, the court is clearly of opinion that it is one which no jury, acting judicially, could give. This, in our opinion, has not been established by argument. So also as regards damages. It was for the jury to determine whether the evidence, or how much of the evidence, of the appellant should be accepted as correct; and we find ourselves unable to say that if her evidence was accepted the sum awarded was such as no tribunal of fact acting reasonably could have awarded.

The judgment of the Appellate Division should be vacated and in lieu thereof it will be ordered that judgment be entered for the amount of the verdict. The appellant will have her costs throughout.

Kerwin J.—I agree with the judgment proposed by my Lord the Chief Justice and with the reasons therefor given by him, but I think I should add that a consideration of the language of section 5 of the Act leads me to the same conclusion.

The section does not provide that "*the*" action of "*seduction*" may be maintained, but the expression used is "*an* action *for* seduction." In the old action of seduction at common law, the master was required to prove an act of service. A parent as master or mistress would not be able to prove that act where the daughter was serving or residing with another person, and, it being deemed that the parent should have a right of action under those circumstances, the first change in the common law, made by statute, was to provide that the parent might maintain an action for seduction notwithstanding the daughter was serving or residing with another person, and it was also provided that the parent need not prove any act of service performed by his daughter for the parent. Then in 1903 when the Ordinance was passed, the intention was to give to the woman, by section 5, a right of action of some sort even though a parent could by statute maintain the ordinary action for seduction notwithstanding the absence of the daughter from home, etc. Hence the expression "notwithstanding anything in this Act."

The decisions as to the effect of the first alteration by statute in the common law are clear that, when the new right of action was given to the parent, while the statute provided that evidence of service need not be given, the Act did not dispense with the necessity of proving loss of service. There is no provision in section 5 that in the action thereby given "it shall not be necessary to prove any act of service performed by the party seduced." If the contention that section 5 is speaking of the old form of action be correct, there would appear to be as much reason for the plaintiff to prove actual service (to someone) as the loss of that service.

The learned Chief Justice of Alberta was of opinion that the words "in the same manner as an action for any other tort" dealt with a mere matter of procedure, but, with respect, it seems to me rather that they are part of the substantive provisions dealing with the right of action thereby given and lend weight to the argument that the unmarried female may maintain a new action and not the old action of seduction.

The section concludes that "she shall be entitled to such damages as may be awarded." It does not say that she is entitled to "*the*" damages, thus indicating that the damages in an action brought by her may be on a different basis from the damages that could have been given in an action by a parent.

Hudson J. concurred in the result.

Davis J. (dissenting)—The appellant, an unmarried female, brought an action for seduction in the Supreme Court of Alberta against the respondent, a married man. The appellant's own story may be shortly but I think fully stated. From October, 1930, until July, 1933, she says she had frequent sexual intercourse with the respondent who she knew from the beginning was a married man with a wife and family. When the relations first commenced she was a girl of about 18 years and 4 months of age. During the summer of 1932 she consulted a physician, as she had lost weight during the two prior years. She says she had "stomach trouble brought on by nerves" and she felt "very tired all the time," and that the pills she had been taking to avoid pregnancy had upset her. The physician,

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who was called by her counsel as a witness at the trial, described her then condition as "irritable colon," an irregular function which "might be produced by any systemic condition which causes fatigue or running down of the patient by the use of cathartics to correct constipation which had existed"—and which condition, he said, is frequently associated with a nervous condition. He said that there was no doubt that she was suffering from constipation. At that time she went home to the country to her parents for 5 or 6 weeks' rest. Upon her return to Edmonton, she admits she continued her relations with the respondent. In January, 1933, she says she told with a good deal of remorse a young man of her own age who, she says, was proposing marriage to her, of her relations with the respondent. But she admits she continued thereafter the same relations. In May, 1933, she says that at the instance of the young man she consulted a solicitor. Obviously this was with a view to taking some action against the respondent. But she admits again that she continued thereafter the same frequent relations with the respondent down to July 3rd, 1933. On the evening of July 5th, 1933, she says the young man and the solicitor pursued in a motor car the car in which she and the respondent were driving about the city, and that the respondent became aware that his car was being followed. The respondent was a man prominent in the public life of the province and the episode of that evening appears to have put an end to the relations between the parties, if there ever were any such relations as the appellant describes. Shortly thereafter the writ in this action was issued. It is admitted that there was not a child, or even pregnancy, resulting from the alleged relations. Nor is the action founded upon any misrepresentation, coercion or deceit. It is a suit upon section 5 of the Alberta *Seduction Act,* being chap. 102 of the Revised Statutes of 1922.

In my opinion, one has only to state the facts of this case to see, and I say it with the greatest deference to those from whom I differ, that the appellant cannot succeed upon the broadest possible interpretation, most favourable to the appellant, that can be put upon section 5 unless it be reduced to giving a cause of action for fornication *per se.*

If the cause of action in section 5 (excluding necessarily the relation of master and servant) is the same as in the other sections of the statute, the birth of a child or pregnancy or at least some physical disability as a direct result of the conduct complained of is an essential element of that cause of action, and the illness that was proved in this case was too remote and insufficient to sustain the action. If, on the other hand, the cause of action in section 5 is to be regarded as a new and independent tort, separate and distinct from the action for seduction referred to in the other sections of the statute, then, whatever be the essential elements of this new cause of action, there must be, it seems to me, at least something in the nature of negation of choice. Taking either interpretation of section 5, the action, in my opinion, fails upon the evidence.

The proper method of interpretation of section 5, in my view, is to read the statute as a whole. Section 5 is part and parcel of the entire statute. The statute is a very short one, there being only four operative sections. It was enacted in its entirety as an ordinance of the North West Territories in 1903 and became part of the statute law of the province of Alberta when that province was formed out of a part of the Territories. The statute has remained unchanged except that in the revision of 1922 a heading in large type "Persons Entitled to Maintain Action" was inserted at the commencement of the operative provisions of the statute. Section 5 therefore ought to be interpreted, not as an isolated piece of legislation to be given a new meaning and significance, but as part of an entire statute dealing with the same subject-matter.

In examining the statute, it is to be observed that the right of action is given firstly to the father or, in case of his death, to the mother, notwithstanding that the unmarried daughter was at the time of her seduction serving or residing with another person upon hire or otherwise; and proof of acts of service in such case is dispensed with and no evidence shall be received to the contrary. Secondly it is provided that in case the father or mother had before the seduction abandoned the daughter and refused to provide for and retain her as an inmate, then any other person who might at common law have maintained an action for the seduction may maintain such action. Thirdly it is pro-

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vided that any person other than the father or mother "who by reason of the relation of master or otherwise" would have been entitled at common law to maintain an action for the seduction of an unmarried female may still maintain such action (and the following words are very significant),

if the father or mother is not resident in Alberta at the time of the birth of the child which is born in consequence of the seduction or being resident therein does not bring an action for the seduction within six months from the birth of the child.

Those are all the provisions of the statute save and except the last section, section 5. Now those provisions necessarily import as an essential ingredient of the cause of action an illegitimate child born or conceived as a result of the relations complained of. And that, I believe, has always been the common understanding in Canada of the cause of action for seduction. It is not without its own significance that counsel have not been able to find any case in Canada where an action for seduction has succeeded without proof of at least pregnancy, and no reported case in England since *Manvell* v. *Thomson* (1). Not only was the question not raised in that case, but the case was prior to the legislation enacted in Upper Canada in 1837, being 7 William IV, chap. 8, "An Act to make the remedy in cases of seduction more effectual, and to render the fathers of illegitimate children liable for their support," which statute without substantial change became the law of the province of Ontario at Confederation and (except that the provisions for the maintenance of illegitimate children were carried forward in a separate statute) remained substantially unchanged until 1903, when the North West Territories enacted the Ontario statute verbatim and added thereto the section which is now section 5 in the Alberta revised statute.

Section 5 uses the same words as used throughout the other sections of the statute. "Any unmarried female who has been seduced" are the same words as used in section 2. The words "an action for seduction" in section 5 are substantially the same as "an action for the seduction" that are used throughout the statute. Then there is the general heading: "Persons entitled to maintain action." The words in section 5, "Notwithstanding anything in this

(1) (1826) 2 C. & P. 303.

Act," mean, I think, that notwithstanding that the action for seduction may be maintained by the several classes of persons referred to in the preceding sections, the unmarried female may herself maintain the action, and the words "in the same manner as an action for any other tort" refer to the procedure for maintaining in her own name the right of action and are not words creating the substance of a new cause of action.

It is a safe rule of statutory interpretation to assume, in the absence of an expressed intention to the contrary, that a Legislature when it uses the same words in different sections of the same statute, particularly a very short statute, uses the words in the same sense throughout the statute. Are we to interpret section 5 so as to import into the words used in that section a different quality or meaning from that which the same words have in the other sections of the statute? If the Legislature had intended that the words in section 5 should mean something different from what they mean in the other sections, the Legislature could have said so. Of course, where the right of action is given to the unmarried female herself there is necessarily excluded the relation of master and servant as an essential in the cause of action and with it the necessity for proof of loss of service; but the substance of the statutory cause of action, the birth of a child or at least the condition of pregnancy, remains. Again, with the greatest deference to those from whom I differ, I cannot see that the re-enactment of the statute in the revision of 1922 touches the point as to the substance of the cause of action, because the fact of the birth of a child, or pregnancy, in the Alberta cases prior to the revision has been admitted or accepted by counsel and those cases did not turn upon that question.

In the view I take of this appeal, it becomes unnecessary to examine minutely the evidence at the trial, as we were invited by counsel for the respondent to do, to ascertain whether or not the jury was justified in arriving at its verdict of guilt against the respondent. In my opinion, the evidence discloses no cause of action and therefore the action was properly dismissed.

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*Feb. 22.

The appeal, in my opinion, should be dismissed with costs.

Appeal allowed with costs.

Solicitor for the appellant: *N. D. Maclean.*

Solicitor for the respondent: *M. M. Porter.*

WILLIAM OSGOODE LANGDON (DEFENDANT) ..... } APPELLANT;

AND

HOLTYREX GOLD MINES LIMITED (PLAINTIFF) ..... } RESPONDENT;

AND

THE MUNICIPAL CORPORATION OF THE TOWNSHIP OF TISDALE, AND THE TREASURER OF THE MUNICIPAL CORPORATION OF THE TOWNSHIP OF TISDALE (DEFENDANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Assessment and Taxation—Sale of land for taxes—Action to set it aside—Assessment Act, R.S.O. 1927, c. 238—Failure of treasurer of municipality to give proper notice under s. 174, as amended in 1933, c. 2, s. 14—Applicability of s. 181 to bar right of action.

Land of the plaintiff in a township municipality in Ontario was, on February 28, 1934, sold for taxes which at the time of sale had been in arrear for more than three years. The sale was (as found) openly and fairly conducted. The treasurer of the municipality did not send the notice (as to fact and date of sale and right to redeem) required by s. 174 of the *Assessment Act,* R.S.O. 1927, c. 238, as amended by 23 Geo. V (1933), c. 2, s. 14, but gave notice as required before said amendment. The land was not redeemed within one year after the sale, and the official deed of the land was delivered to the purchaser. Plaintiff sued to have the tax sale set aside.

Sec. 181 of said Act provides: "If any part of the taxes for which any land has been sold * * * had at the time of the sale been in arrear for three years * * * and the land is not redeemed in one year after the sale, such sale, and the official deed to the purchaser (provided the sale was openly and fairly conducted) shall notwithstanding any neglect, omission or error of the municipality or of any agent or officer thereof in respect of imposing or levying the said taxes or in any proceedings subsequent thereto be final and binding * * *, it being intended by this Act that the owner of land shall be

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

required to pay the taxes thereon within three years after the same are in arrear or redeem the land within one year after the sale thereof; and in default of the taxes being paid or the land being redeemed as aforesaid, the right to bring an action to set aside the said deed or to recover the said land shall be barred."

Held: The treasurer's neglect, omission or error in not giving the proper notice was that of an officer of the municipality within the contemplation of the words "agent or officer" in s. 181; and s. 181 applied to bar plaintiff's right to bring an action to set aside the deed or to recover the land. The sending of the notice required by s. 174 is not a condition precedent to the right of the proper officials to execute the deed.

Judgment of the Court of Appeal for Ontario, [1936] O.R. 409, reversed.

Cummings v. *Township of York,* 59 Ont. L.R. 350, and *Cruise* v. *Town of Riverside,* [1935] O.R. 151, discussed. This Court did not read those decisions as deciding that the treasurer when he gives or omits to give the notice after sale provided by s. 174 is not an officer of the municipality within s. 181, but if they intended to lay down that proposition, this Court could not accept them.

There is no element of forfeiture or confiscation in legislation enabling a municipality to realize upon its statutory lien given to secure payment of its taxes.

City of Toronto v. *Russell,* [1908] A.C. 493, at 501; *Cartwright* v. *City of Toronto,* 50 Can. S.C.R. 215, at 219, cited.

APPEAL by the defendant Langdon, the purchaser at the tax sale in question, from that part of the judgment in the Court of Appeal for Ontario (1) which held that the proceedings purporting, by reason of arrears of taxes due to the Municipal Corporation of the Township of Tisdale, to effect a sale of certain lands in the Township of Tisdale, in the Province of Ontario, were irregular and that the sale must be set aside.

The material facts of the case, for the purposes of the judgment of this Court now reported, are sufficiently set out therein, and are indicated in the above headnote. The appeal to this Court was allowed and the action dismissed with costs throughout.

Section 181 of the Ontario *Assessment Act,* R.S.O. 1927, c. 238, dealt with in the judgment now reported, is set out (in part) in the above headnote.

Wilfrid Heighington K.C. for the appellant.

J. J. Gray for the (plaintiff) respondent.

Peter White K.C. for the respondents the Municipal Corporation of the Township of Tisdale and the Treasurer thereof.

The judgment of the court was delivered by

(1) [1936] O.R. 409; [1936] 3 D.L.R. 194.

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DAVIS J.—This is an action to restrain the registration of a tax deed and to have the tax sale set aside. Mr. Justice Jeffrey, the learned trial judge, dismissed the action. He found as facts that the taxes for which the land had been sold had been at the time of sale in arrear for more than three years, that the sale had been "openly and fairly conducted," that the land had not been redeemed within one year after the sale and that the official deed of the land had been executed and delivered to the purchaser. These findings of fact were affirmed by the Court of Appeal.

Within sixty days from the day of the sale, the municipal treasurer should have sent by registered mail to the plaintiff as registered owner and to any incumbrancer a notice stating that the land had been sold for taxes, the date of the sale, and that the incumbrancer or owner was at liberty within one year from the day of sale, exclusive of the day of sale, to redeem the estate sold by paying to the treasurer the amount of the purchase money together with ten per centum added thereto and other petty charges, as provided by sec. 174 of the Ontario *Assessment Act* as amended by 23 Geo. V (1933), ch. 2, sec. 14. The sale was on February 28, 1934, and the treasurer, being unaware of this amendment to the statute, made in 1933, followed the provisions of sec. 174 of the statute which had stood unchanged for many years before the amendment, and gave notice as thereby provided, stating that the incumbrancer or owner was at liberty within thirty days from the date of the notice to redeem the estate sold by paying to the treasurer the amount of the purchase money together with fifteen per centum thereon added thereto and other petty charges. The learned trial judge came to the conclusion that sec. 181 of the *Assessment Act* applied to a case such as this and that notwithstanding the neglect, omission or error of the treasurer in not complying with the amended provisions of sec. 174, in default of the taxes being paid or the land being redeemed, the right to bring an action to set aside the deed or to recover the land had been barred. The Court of Appeal, on the other hand, did not think that the provisions of sec. 181 applied, and reversed the trial judge. That is the real point in this appeal. Other alleged irregularities and objections to the sale raised by the plaintiff were determined against the plaintiff by both courts below

and although pressed again upon this Court they are in their very nature such as will not induce this Court to consider an interference with the concurrent conclusions of the courts below in this respect.

We may observe at once that it is an entire misconception of the right of a municipality to enforce payment of its taxes by realizing its statutory lien upon the land to speak of that right in terms of either forfeiture or confiscation. There is no element of either in legislation which enables a municipality to realize upon a lien which the statute has given to the municipality to secure the payment of its taxes. The sole question here is whether or not the provisions of sec. 181 apply to the neglect, omission or error of the treasurer in not giving the notice required by sec. 174 as amended. The intention of the Legislature in enacting sec. 181 is expressly stated in the section to be

> that the owner of land shall be required to pay the taxes thereon within three years after the same are in arrear or redeem the land within one year after the sale thereof; and in default of the taxes being paid or the land being redeemed as aforesaid, the right to bring an action to set aside the said deed or to recover the said land shall be barred.

The Court of Appeal, however, felt bound to follow the decision of Logie J. in *Myers* v. *Cochrane* (1), affirmed with a variation by the Court of Appeal (2), where it was held that the sending of the notice required by sec. 174 is a condition precedent to the right of the proper officials to execute the deed. We cannot accept that proposition of law. Section 174 is not open to any such construction. No such sanction or penalty for non-performance is imposed by the section. A general provision imposing a penalty upon any treasurer, clerk or other officer who refuses or neglects to perform any duty required of him by the Act is provided by sec. 209.

Moreover, the Court of Appeal came to the conclusion that the neglect, omission or error on the part of the treasurer in this case was not covered by the provisions of sec. 181. That Court treated the treasurer as *persona designata* and denied that he was an agent or officer of the municipality within the meaning of sec. 181, relying on two

(1) (1925) 28 Ont. W.N. 165. (2) (1925) 29 Ont. W.N. 3.

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Ontario decisions—*Cummings* v. *Township of York* (1) and *Cruise* v. *The Town of Riverside* (2). In the former case, it was not open to the plaintiff to have the tax sale in question set aside because it had been validated and confirmed by statute; the plaintiff's claim was based upon the failure of the treasurer of the municipality to give the notice required by sec. 174 (then sec. 171) and was a claim for the amount he had been forced to pay to the purchaser at the tax sale in order to obtain a reconveyance of the property to him. Wright J. expressed the view that it was doubtful whether a municipal corporation would be liable for failure to observe or perform a statutory duty where the statute creating such duty does not either directly or by inference give a remedy to the person aggrieved through its non-performance, the cases appearing to him to establish that a municipal corporation is only liable for acts of nonfeasance where the statute expressly gives a right of action. But the learned Judge put his conclusion that the action failed upon the ground that the treasurer in selling the land for taxes had acted solely in pursuance of the statutory duties imposed upon him by the provisions of the *Assessment Act* and had not acted as an agent for or on behalf of the defendant corporation and therefore the defendant corporation was not liable for any of the acts of its treasurer relating to the said tax sale. "While it is true," he said, that the defendant corporation appointed the treasurer, yet, so far as the duties of the latter under the Assessment Act are concerned, the same are defined by the statute and are not prescribed by the defendant corporation, so that, in that view, the treasurer is *persona designata* and in the performance of his duty is acting as such and not as servant or agent of the municipality.

Cruise v. *The Town of Riverside* (3) was an action brought by a purchaser of lands at a tax sale against the municipality to set aside the purchase and for the return of the purchase price paid by him. The plaintiff, who had purchased three different parcels of land which had been advertised for sale as one parcel, alleged that the treasurer had informed him that if the lands were sold together as one parcel they could only be redeemed as one parcel. The owner redeemed one of the three parcels and the plaintiff thereupon sought to rid himself of his purchase at the tax

(1) (1926) 59 Ont. L.R. 350. (2) [1935] O.R. 151.
(3) [1935] O.R. 151.

sale of the three parcels. The trial judge set aside the sale and directed the municipality to repay the purchase moneys upon the ground that each parcel of land should have been individually put up for sale and that the parcels could not be sold as one block. The defendant appealed and the appeal was allowed and the action dismissed without prejudice to any other action which the plaintiff might be advised to bring. It was said that the plaintiff had no right to recover the moneys unless and until the sale was set aside and, further, that the sale could not be set aside except in an action to which the treasurer was a party. Mr. Justice Riddell said,

> It must be clearly understood that the only point decided by us is that the plaintiff is not now entitled to maintain this action.

but he did say in the course of his judgment

> that the treasurer in selling was not the agent of the defendant, but was acting under his statutory duty and, consequently, the contract of purchase was not made with the defendant.

We do not read those decisions as deciding that the treasurer, when he gives or omits to give the notice after sale provided by sec. 174, is not an officer of the municipality within the meaning of sec. 181, but if those decisions intended to lay down any such proposition, we cannot accept them.

The sale of the land for taxes was here an accomplished fact and the execution and delivery of the deed of conveyance or transfer of the land became thereafter a corporate act of the municipality, even though specific officers are designated by the statute to execute the deed. By sec. 177 the deed shall be according to statutory form XI, or to the same effect, and the form provides for the seal of the municipality to be affixed. Notwithstanding that the treasurer through neglect, omission or error failed to give the notice after sale within the time and containing the statement required by sec. 174 as amended, the expressed intention and effect of sec. 181 is that the right of the former owner to bring an action to set aside the deed or to recover the land shall be barred where the owner has not paid the taxes on the land within three years after the same became in arrear or has failed to redeem the land within one year after the sale. The purpose of sec. 181 is very plain. While the treasurer in selling the land acted in pursuance of a statutory power vested in him, and in that sense may be

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regarded as *persona designata,* he did not cease to be, in any proper sense of the words "agent or officer" within the contemplation of sec. 181, an officer of the municipality.

In *City of Toronto* v. *Russell* (1), the Privy Council had occasion to consider the provision of a section of a remedial Act (sec. 8 of 3 Edw. VII, c. 86) passed to cure defects in tax sales which had taken place in the City of Toronto. The section read as follows:

> All sales of lands within the said city, up to and including the one held in the year 1902, and purporting to be made for arrears of taxes in respect of the lands so sold are hereby validated and confirmed, notwithstanding any irregularity in the assessment or other proceedings for imposition of any taxes so in arrear, or any failure to comply with the requirements of *The Consolidated Assessment Act, 1892,* or of *The Assessment Act* in regard to the manner in which any assessment roll, or collector's roll of the said city has been prepared, * * *

Their Lordships at p. 501 expressed their opinion

> that, since the main and obvious purpose and object of the Legislature in passing the Act 3 Edw. 7, c. 86, was to validate sales made for arrears of taxes in the carrying out of which the requirements of the different statutes as to the mode in which they should be conducted had not been observed, and to quiet the titles of those who had purchased at such sales, the statute should, where its words permit, be construed so as to effect that purpose and attain that object.

Their Lordships continued:

> The council can only act through its officers. The notice to be given by the council must be given by or through one of its officers. The omission to give it may therefore be fairly held to be "a failure or omission on the part of an official of the said city" to comply with the requirements of the *Consolidated Assessment Act, 1892,* and the *Assessment Act,* within the words of this statute.

In *Cartwright* v. *City of Toronto* (2), the present Chief Justice of this Court, in discussing the decision in *City of Toronto* v. *Russell* (1), said:

> I see no reason to doubt that the passages of the judgment at page 501 form a part of the *ratio decidendi.* The effect of these passages, in my judgment, is to explode the notion which appears to have been founded on some decisions of this court, that statutes of this character are subject to some special canon of construction based, apparently, upon the presumption that all such statutes are *prima facie* monstrous. The effect of the judgment of the Judicial Committee is that particular provisions in such statutes must be construed according to the usual rule, that is to say, with reasonable regard to the manifest object of them as disclosed by the enactment as a whole.

We are all of opinion that the neglect, omission or error of the treasurer in this case comes within the provisions of sec. 181 and that the right to bring an action to set aside

(1) [1908] A.C. 493.

(2) (1914) 50 Can. S.C.R. 215, at 219.

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the tax deed in question or to recover the land is barred by the statute.

The appeal is allowed and the action dismissed with costs throughout.

Appeal allowed with costs.

Solicitors for the appellant: *Symons, Heighington & Shaver.*

Solicitor for the (plaintiff) respondent: *J. J. Gray.*

Solicitor for the (defendants) respondents: *Gauthier & Platus.*

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* Feb. 24.

D. McCANNELL (DEFENDANT).....APPELLANT;

AND

F. C. McLEAN (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Negligence—Motor vehicles—Collision—Verdict of jury—Appeal—Discussion of principle acted upon in setting aside, on appeal, the verdict of a jury as against the weight of evidence.

This Court dismissed the defendant's appeal from the judgment of the Court of Appeal for Ontario affirming (by a majority) the judgment at trial on verdict of a jury in favour of the plaintiff in an action for damages resulting from a collision of motor vehicles.

Discussion of the principle on which this Court acts in setting aside the verdict of a jury as against the weight of evidence. Authorities cited.

The verdict of a jury will not be set aside as against the weight of evidence unless it is so plainly unreasonable and unjust as to satisfy the Court that no jury reviewing the evidence as a whole and acting judicially could have reached it.

APPEAL by the defendant from the judgment of the Court of Appeal for Ontario dismissing his appeal from the judgment of Jeffrey J. on the verdict of a jury, in an action (and counterclaim) for damages suffered through a motor vehicle collision.

The collision occurred on September 5, 1935, about 9.30 p.m. The defendant had been driving a truck in a northerly direction when there was a break-down in its electrical equipment and its lights went out and its motor stopped. Defendant and some men to whom he had been giving a lift pushed the truck some distance along the highway and then

* PRESENT:—Duff C.J. and Rinfret, Crocket, Davis and Kerwin JJ.

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partially off the travelled portion, on the east (right hand) side of the road, but part of the truck projected on to the paved part. On the opposite side of the highway there were a store and a gasoline station. There was a space at the gasoline station where there would have been room for the truck to have been placed clear of the travelled portion of the highway. Leaving the truck parked as aforesaid, the defendant went into the store to telephone for assistance. There were no lights (there was a reflector) on the rear of the truck and no steps were taken to warn oncoming traffic. It was a clear moonlight night. The highway was straight. The plaintiff in a motor car, travelling also in a northerly direction, collided with the truck. There were other factors or alleged factors in the situation, as, the position in which the truck was parked, and whether or not at an angle, interference with outlook by reason of lights at the gasoline station, lights from a motor car coming behind the plaintiff.

At the trial questions were given to the jury and answered as follows:

1. Were the injuries of which the parties complain caused by the negligence of the defendant? Answer: Yes.

2. If so, in what did such negligence consist? Answer: In not taking proper precaution, as he and the men were able to move the truck along highway, he should have moved truck to the clear space at left hand of highway, where it would have been clear of pavement at store or station.

3. Was the plaintiff guilty of negligence which caused or contributed to cause the injuries and damages of which the parties complain? Answer: No.

4. If so, in what did such negligence consist? Answer fully: [No answer.]

5. Could the plaintiff notwithstanding the negligence of the defendant, if any, by the exercise of reasonable care, have avoided the accident? Answer: No.

6. Q. If you answer question 5 "Yes," say what he should have done or failed to do? Answer fully. [No answer.]

The jury found damages for the plaintiff in the sum of $3,300. Judgment was entered for the plaintiff for that sum and costs.

The defendant's appeal to the Court of Appeal for Ontario was dismissed with costs, Fisher J.A. dissenting (who would allow the appeal and dismiss the action, with costs). The defendant appealed to the Supreme Court of Canada (and, by special leave granted by the Court of Appeal for Ontario, also appealed as to the dismissal of his counterclaim).

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On behalf of the defendant (appellant) it was claimed (*inter alia*) that the jury's answer to the second question was not supported by the evidence and further that it was not a finding of negligence in law and did not support a judgment for the plaintiff; and that the jury's answers to the third and fifth questions were perverse and unreasonable and not such as a reasonable jury might find on the evidence and should be set aside.

By the judgment of this Court, now reported, the appeal was dismissed with costs.

J. R. Cartwright K.C. for the appellant.

M. A. Miller K.C. and *R. B. Hungerford* for the respondent.

The judgment of the court was delivered by

DUFF C.J.—We are all agreed that the questions involved in this appeal are questions of fact and that the majority of the Court of Appeal were right in their conclusion that the findings of the jury are sufficient and that the verdict could not properly be set aside.

We do not consider it necessary to review at large the questions raised in the able argument of Mr. Cartwright which were fully discussed on the hearing of the appeal. It seems desirable, however, to add a word or two in respect of the principle on which this Court acts in setting aside the verdict of a jury, as against the weight of evidence, with a view to granting a new trial or giving judgment in favour of one of the parties.

The principle has been laid down in many judgments of this Court to this effect, that the verdict of a jury will not be set aside as against the weight of evidence unless it is so plainly unreasonable and unjust as to satisfy the Court that no jury reviewing the evidence as a whole and acting judicially could have reached it. That is the principle on which this Court has acted for at least thirty years to my personal knowledge and it has been stated with varying terminology in judgments reported and unreported. It will be sufficient to refer to the judgments in one of the most recent decisions, *C.N.R.* v. *Muller* (1). In the course of the

(1) [1934] 1 D.L.R. 768.

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reasons delivered by the majority of the judges who heard the appeal (p. 769) there occurs this passage:

> We premise that it is not the function of this Court, as it was not the duty of the Court of Appeal, to review the findings of fact at which the jury arrived. Those findings are conclusive unless they are so wholly unreasonable as to show that the jury could not have been acting judicially (C.C.P., Arts. 501 and 508 (3); *Metropolitan Ry. Co.* v. *Wright* (1)). In construing the findings, moreover, one must not apply a too rigorous critical method; if, on a fair interpretation of them, they can be supported upon a reasonable view of the evidence adduced, effect should be given to them.

Mr. Justice Lamont, who delivered a separate judgment, said this (p. 772):

> The same principle was followed in *Metropolitan Ry. Co.* v. *Wright* (2). There, as in the case at bar, there was evidence given on both sides and on all the issues proper to be submitted to and considered by a jury. In neither case could the trial judge properly have withdrawn the evidence from the consideration of the jury who are the proper judges of the facts. In both cases the jury found negligence on the part of the company.
>
> In the *Wright* case (2) the House of Lords held that, under these circumstances, the well established rule should apply, namely, that the verdict should not be disturbed unless it appeared to be not only unsatisfactory, but unreasonable and unjust, so unreasonable and unjust as to justify the court in concluding that the jury had not really performed the judicial duty cast upon them.

That the guide indicated in these judgments is precisely the guide by which judges in England have governed themselves in considering such questions is plain from the judgment of Lord Wright delivered in the recent case, *Mechanical and General Inventions Co. Ltd. and Lehwess* v. *Austin* (3), a judgment which, as to form and as to substance, was adopted by Lord Atkin and Lord Macmillan. In view of what was said in the Court below, it is, perhaps, desirable to transcribe the following passage (p. 374):

> The objection in *Wood* v. *Gunston* (4) was that the damages were excessive, and a new trial was there ordered. The use of the phrase "miscarriage of juries" is significant. It indicates what there must be to justify the appellate Court in interfering with or controlling the verdicts of juries. Since then many cases have been reported on these matters, but I think most useful guidance to help the appellate Court is to be found in *Metropolitan Ry. Co.* v. *Wright* (2). Lord Fitzgerald (5) states the question to be "whether the evidence so preponderates against the verdict as to show that it was unreasonable and unjust": and he adds that the onus is on the appellants to establish that this condition is fulfilled. But the most illuminating statement is, I think, to be found in the observations of Lord Halsbury (6). He refers to the case of *Solomon* v.

(1) (1886) 11 App. Cas. 152, at 156.
(2) (1886) 11 App. Cas. 152.
(3) [1935] A.C. 346.
(4) (1665) Style, 466.
(5) 11 App. Cas. 152, at 155.
(6) 11 App. Cas. 152, at 156.

Bitton (1), where the question according to the report (the correctness of which was afterwards disputed in *Webster* v. *Friedeberg* (2) was stated to be "whether the verdict was such as reasonable men ought not to have come to." Lord Halsbury said (3) that was an erroneous statement of the principle. "If a Court,—" he proceeded, "not a Court of Appeal in which the facts are open for original judgment, but a Court which is not a Court to review facts at all,—can grant a new trial whenever it thinks that reasonable men ought to have found another verdict, it seems to me that they must form and act upon their own view of what the evidence in their judgment proves. That, I think, is not the law. * * * I think the test of reasonableness, in considering the verdict of a jury, is right enough, in order to understand whether the jury have really done their duty. If their finding is absolutely unreasonable, a Court may consider that that shows that they have not really performed the judicial duty cast upon them; but the principle must be that the judgment upon the facts is to be the judgment of the jury and not the judgment of any other tribunal. If the word 'might" were substituted for 'ought to' in *Solomon* v. *Bitton* (1) I think the principle would be accurately stated."

Lord Halsbury in these valuable observations is, I think, going back to the test applied in *Wood* v. *Gunston* (4), which was whether there was a miscarriage of the jury. Thus the question in truth is not whether the verdict appears to the appellate Court to be right, but whether it is such as to show that the jury have failed to perform their duty. An appellate Court must always be on guard against the tendency to set aside a verdict because the Court feels it would have come to a different conclusion.

This, as we have observed, is the principle on which this Court has always acted in dealing with such questions, but the principle is so completely settled and so well known that in many cases it has not been considered necessary to state it in terms.

There being some evidence for the jury, that is to say, the evidence being of such a character that the trial judge could not properly have withdrawn the issue from the jury, the question whether, in such circumstances, a jury, considering the evidence as a whole, could not reasonably arrive at a given finding may be, it is obvious, a question of not a little nicety; and the power vested in the court of appeal to set aside a verdict as against the weight of evidence in that sense is one which ought to be exercised with caution; it belongs, moreover, to a class of questions in the determination of which judges will naturally differ, and, as everyone knows, such differences of opinion do frequently appear.

In exercising this power under the guidance of the general principles stated in the judgment of Lord Wright, the court has not the advantage of more specific rules of general

(1) (1881) 8 Q.B.D. 176.
(2) (1886) 17 Q.B.D. 736.
(3) 11 App. Cas. 152, at 156.
(4) (1655) Style, 466.

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application; and it may be worth while to advert to the risk of treating decisions dealing with controversies touching its exercise in relation to the facts of a particular case and expressions found in judgments as binding authorities constraining other courts to a particular course in dealing with a different case involving different facts. It would, perhaps, not be entirely without value to cite a passage from the judgment of Lord Macnaghten in *Colls* v. *Home and Colonial Stores Ltd.* (1). The judgment, it is true, concerns generally an entirely different head of law, but the passage has, we think, no little relevancy to the topic now under discussion. It is in these words:

* * * Speaking for myself, I doubt very much whether it is a profitable task to retry actions which depend simply on questions of fact, or to review and endeavour to reconcile or distinguish a number of cases that naturally enough contain some statement which, taken by themselves and apart from the context, may seem to be contradictory, but which must all proceed upon the same principle. It would only be another link in the embarrassing chain of authority, or, if I may venture to say so, only another handful of dust to be cast into one scale or the other when the claims of opposing litigants come to be weighed in the balance. I think there is much good sense in the observations of Brett L.J. in *Ecclesiastical Commissioners* v. *Kino* (2). "To my mind," said his Lordship, "the taking of some expression of a judge used in deciding a question of fact as to his own view of some one fact being material on a particular occasion as laying down a rule of conduct for other judges in considering a similar state of facts in another case, is a false mode of treating authority. It appears to me that the view of a learned judge in a particular case as to the value of a particular piece of evidence is of no use to other judges who have to determine a similar question of fact in other cases where there may be many different circumstances to be taken into consideration."

I do not think Lord Macnaghten means to say that the course taken by judges of great experience in applying a principle to particular facts may not be exceedingly instructive and helpful as illustrating the practical working of the principle; but it is a very different matter to treat such expressions and such decisions as absolving the judges who are called upon to exercise this power to set aside verdicts as against the weight of evidence from the responsibility of determining in each particular case whether or not the conditions have arisen under which the power can properly be put into effect.

It is, perhaps, advisable to observe that what has been said above does not contemplate cases in which there is

(1) [1904] A.C. 179, at 191. (2) (1880) 14 Ch. D. 213.

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some valid objection to directions given by the court to the jury in respect either of insufficiency or impropriety, or where the court may have to consider some circumstance connected with the conduct of the proceedings at the trial as having a bearing upon the question whether, consistently with justice, the verdict can be allowed to stand.

Appeal dismissed with costs.

Solicitors for the appellant: *Smith, Rae, Greer & Cartwright.*

Solicitors for the respondent: *Miller & Hungerford.*

1936

* Nov. 25, 26.

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* Feb. 2.

G. F. GLATT, THE TRUSTEE OF THE PROPERTY OF WILLIAM D. TRENWITH, A BANKRUPT (PLAINTIFF)..... APPELLANT;

AND

G. F. GLATT, THE TRUSTEE OF THE PROPERTY OF STEWART GODDARD, A BANKRUPT (DEFENDANT)..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Judgment—Action to set aside judgment—Charge of fraud not established against party obtaining judgment attacked—Judgment attacked on allegation of facts different from facts alleged in defence in first action—Facts established by newly discovered evidence as ground for setting aside judgment.

The action was brought to set aside a judgment. The trial Judge, Rose C.J.H.C. ([1935] O.R. 410), held that, though the judgment attacked could not successfully be impeached on the ground of fraud, yet plaintiff should succeed on the ground that newly discovered evidence, of which it could be said that it could not by the exercise of due diligence have been discovered before the judgment attacked was pronounced, established that the judgment attacked was one to which the party obtaining it was not entitled. The judgment of Rose C.J.H.C. was reversed by the Court of Appeal for Ontario ([1936] O.R. 75) which dismissed the action. The grounds taken by Middleton J.A. in that Court were: that fraud in obtaining the judgment attacked, charged as the basis of the present action, was not proved; also that a defendant who allows an action to go to trial upon a certain defence of facts set up which fails, cannot by bringing an action to set aside the judgment set up another and inconsistent defence of facts. The plaintiff appealed to this Court.

Held that the appeal should be dismissed, on said grounds taken by Middleton J.A. and also on the following ground:

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* PRESENT:—Duff C.J. and Rinfret, Crocket, Davis and Kerwin JJ.

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A judgment cannot be set aside on the ground of facts established by newly discovered evidence, unless it is proved that the evidence relied upon could not have been discovered by the party complaining by the exercise of due diligence. This is a rule which must be applied with the utmost strictness, otherwise the finality of judgments generally would be gravely imperilled. In the present case the plaintiff was bound to establish in the most entirely convincing way that the rule had been met, and this had not been done in the case presented at trial.

APPEAL by the plaintiff from the judgment of the Court of Appeal for Ontario (1) which (reversing the judgment of Rose C.J.H.C. (2)) dismissed the action.

By an order of McEvoy J. dated November 9, 1934, "in the matter of the bankruptcy of William D. Trenwith," leave was given (upon terms) to Margaret Trenwith, the wife, and a creditor, of said William D. Trenwith, to commence proceedings in the name of the Trustee (G. F. Glatt) at her own expense for the purpose of setting aside a judgment obtained in the Supreme Court of Ontario on December 27, 1932 (for $5,186.94) by G. F. Glatt, Trustee of the Estate of Stewart Goddard, against said William D. Trenwith.

The action was brought, and was tried before Rose, C.J.H.C., who gave reasons for judgment in which the facts are discussed at length (2). He held that, though the judgment atacked in the action could not successfully be impeached on the ground of fraud, the relief claimed by the plaintiff could be granted upon the ground that newly discovered evidence established the fact that the judgment was one to which Goddard (or his trustee) was not entitled; that the evidence was new and convincing and it could be said that the evidence could not by the exercise of due diligence have been discovered before the judgment was pronounced; and that the plaintiff was entitled to succeed. He thought that plaintiff's pleading was sufficient to justify the judgment upon the ground taken, but would allow any amendment deemed requisite. By the formal judgment it was declared and adjudged that the said judgment of December 27, 1932, was null and void, and the defendant was restrained from taking any action upon or in any manner enforcing that judgment.

(1) [1936] O.R. 75; [1936] 1 D.L.R. 387.

(2) [1935] O.R. 410; [1935] 4 D.L.R. 99.

The defendant appealed to the Court of Appeal for Ontario. That Court allowed the appeal and dismissed the action (1). In his reasons, Middleton J.A. (with whom Mulock, C.J.O., in that Court, and with whom also this Court, in the judgment now reported, agreed) stated that the action as brought was to declare that the judgment in the original action was procured by fraud. He referred to the holding of the trial Judge; also to the fact that no amendment in plaintiff's pleading had been made; and held that plaintiff's pleading, which charged fraud, was not sufficient to justify the judgment of the trial Judge. He then proceeded to say, in part, as follows (including a short outline of facts):

Taking the narrow view of this appeal, it appears to me that the judgment cannot stand. Fraud is charged and fraud is not proved. It follows that the action fails.

But I prefer to place my judgment upon broader grounds and so it is necessary to very shortly outline the facts giving rise to the litigation. In the original action Goddard claimed that he was liable upon a covenant in a mortgage upon certain Florida lands; that he sold the lands to Trenwith who as part of the consideration undertook to assume and pay off the mortgage made by Goddard; that Trenwith had failed in this duty and that the mortgagee had recovered against him, Goddard, upon his covenant. He therefore sought a judgment to indemnify him as covenanted and agreed. In this action Trenwith denied that he was a purchaser of the lands in question and that he had covenanted as alleged. When a deed was produced bearing apparently his signature he denied his signature and charged that it was a forgery. The action was tried before the Honourable Mr. Justice Logie and he found on this issue against Trenwith, the signature was his and judgment followed. An appeal was had from this judgment and the judgment was affirmed.

This action was to set aside the earlier judgment. In it Trenwith changes his front entirely. He now says that the signature is his signature, but that it was obtained to the document fraudulently by Stephens, Inc., a real estate agent in Florida, that he signed the document in blank intending it to be filled up and to be used by Stephens, Inc., to aid in the carrying out of altogether another transaction concerning other lands not in the same township. The trial Judge has found this to be established and that it is sufficient to entitle Trenwith to the relief sought. It is to be observed that the fraud proved was not that of Goddard, or of the present defendant, his assignee, but it was fraud of a third party. It is also to be observed that it is not a discovery of new facts, or of new evidence. It is a discovery by Trenwith of the fact that his own evidence at the earlier trial was erroneous and the telling by him of an entirely different story. It is perhaps not material but the issue raised by Trenwith was supported by substantially the same witnesses as those who testified on his behalf at the former trial, but these witnesses gave entirely different evidence at the two trials. It does not necessarily follow that Trenwith and these witnesses are guilty of perjury. It is certain that he and they testified

(1) [1936] O.R. 75; [1936] 1 D.L.R. 387.

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to two totally and irreconcilable stories and the Judge who heard this evidence is convinced that on the latter occasion the story told is true.

I quite agree with the learned trial Judge that Goddard in the first action was guilty of no fraud or perjury, and *a fortiori* Glatt as his trustee in bankruptcy, and who had been substituted as plaintiff before the date of the trial, was innocent, and I assume that in that action Trenwith would have been entitled to succeed had he put forward the story which he now tells.

It is I think clear beyond possibility of a doubt that a defendant who is sued must in the action in which he is sued put forward all defences which he has to the plaintiff's claim. He cannot allow the action to go to trial upon a certain defence which he sets up and when that defence fails set up another and inconsistent defence by bringing an action to set aside the judgment. If in the original action he applies for some relief, his application will be scrutinized with the greatest of care, but there would be no end to litigation if proceedings such as these received the sanction of the court. I can find no trace of any similar action ever having been brought.

* * *

The plaintiff appealed to this Court. By the judgment now reported the appeal was dismissed with costs.

A. C. Heighington K.C. and *H. G. Steen* for the appellant.

G. R. Munnoch K.C. and *F. A. Brewin* for the respondent.

The judgment of the court was delivered by

DUFF C.J.—This appeal should be dismissed.

I should be satisfied to put my judgment upon the grounds stated in the judgment of Mr. Justice Middleton in the court below. There is, however, a supplementary ground which I think it is desirable to state.

Admittedly, the appellant could not succeed on the ground that the judgment was procured by fraud. The learned trial Judge held, however, that certain

newly discovered evidence establishes the fact that the judgment is one to which Goddard (or his trustee) was not entitled.

It is well established law that a judgment cannot be set aside on such a ground unless it is proved that the evidence relied upon could not have been discovered by the party complaining by the exercise of due diligence. The importance of this rule is obvious and it is equally obvious that the finality of judgments generally would be gravely imperilled unless the rule were applied with the utmost strictness.

The appellant was bound to establish this proposition in the most entirely convincing way. On this point, the case presented by the appellant to the trial Judge was not,

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Duff C.J.

in my judgment, satisfactory. I mention only one circumstance,—the solicitor who had the conduct of the proceedings on behalf of Goddard leading to the judgment in question was not called and no explanation is offered of the failure to call him.

The appeal will be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Symons, Heighington & Shaver.*

Solicitors for the respondent: *McRuer, Mason, Cameron & Brewin.*

TAYLOR *v.* THE KING

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Criminal law—Carnal knowledge of girl under age of 14 years (s. 301 (1), Cr. Code)—Corroboration.

1937

* Feb. 11.

APPEAL from the judgment of the Court of Appeal for Manitoba (1) affirming (Robson J.A. dissenting) the conviction of the appellant for the offence under s. 301 (1) of the *Criminal Code,* of carnal knowledge of a girl under the age of 14 years.

On the appeal to the Supreme Court of Canada, after hearing the argument of counsel for the appellant, and without calling on counsel for the respondent, the Court delivered judgment orally, dismissing the appeal. The Chief Justice stated that the only point open, on a fair construction of the judgment of the dissenting judge, Mr. Justice Robson, was the question whether or not there was corroboration in point of law; and stated that, with the greatest respect for Mr. Justice Robson, this Court had come to the conclusion that his view as to that could not be sustained.

Appeal dismissed.

C. N. Kushner for the appellant.

R. B. Baillie for the respondent.

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

(1) [1936] 3 W.W.R. 555; [1937] 1 D.L.R. 258; 67 Can. Cr. Cas. 172.

1937

*Feb. 23.

IN RE THE ESTATE OF MAY HOOPER, DECEASED.

HAMM v. HOOPER ET AL.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Will—Construction—Person or persons intended to benefit—Extrinsic evidence of testator's intention.

APPEAL from the judgment of the Court of Appeal for Ontario (1) which reversed the judgment of Rose, C.J.H.C., in proceedings brought by originating notice by the executor of the estate of May Hooper, deceased, for an order declaring what person or persons is or are entitled to share in the residue of said estate under a certain name or names contained in the last paragraph of the will of said deceased.

On the appeal to the Supreme Court of Canada, after hearing the argument of counsel for the appellant, and without calling on counsel for the respondent Hooper (except as to costs), the Court delivered judgment orally, dismissing the appeal; costs of all parties, as between solicitor and client, to come out of the estate.

Appeal dismissed.

A. J. Holmes and *A. M. Ferriss* for the appellant.

G. Hamilton K.C. for the respondent Hooper.

R. E. Grass K.C. for the respondent Toronto General Trusts Corporation (executor of the estate).

*PRESENT:—Duff C.J. and Rinfret, Crocket, Davis and Kerwin JJ.

(1) [1936] O.R. 533; [1936] 3 D.L.R. 545.

GRINNELL COMPANY OF CANADA LIMITED AND LEGGATT v. WARREN

1937
*Feb. 8.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Negligence—Automobile collision—Finding of jury—Form of finding—Construction—Evidence.

APPEAL by the defendants from the judgment of the Court of Appeal for British Columbia (1), dismissing, on equal division of the court, the defendants' appeal from the judgment of Robertson J., on the verdict of a jury, that the plaintiff recover from the defendants the sum of $11,572.70, in an action for damages for personal injuries and damage to his automobile sustained by the plaintiff through alleged negligence of defendants whereby an automobile owned and operated by the defendant company and driven by the defendant Leggatt collided with plaintiff's automobile.

On the appeal to the Supreme Court of Canada, after hearing argument for the appellants, and without calling on counsel for the respondent, the Court delivered judgment orally, dismissing the appeal with costs. The Chief Justice stated that Mr. Farris, though presenting a very able and forceful argument, had not satisfied the Court that the judgment of the British Columbia Courts ought to be set aside; that his main proposition really was that the form of the finding of the jury was a sufficient evidence that the finding rejecting Leggatt's evidence as to Warren's left hand turn was founded upon a radical misconception; the Court was not satisfied that this was so; the Court thought that the finding of the jury rejecting the evidence of the defendants on that point really concluded the case in substance. The Chief Justice called attention to the judgment of the Privy Council in *Pronek* v. *Winnipeg, Selkirk & Lake Winnipeg Ry. Co.* (2) (on appeal from this Court) in which there is a warning given against construing too narrowly and too critically the

*PRESENT:—Duff C.J. and Rinfret, Crocket, Davis and Hudson JJ.

(1) 50 B.C. Rep. 512; [1936] 2 W.W.R. 600; [1936] 4 D.L.R. 544.
(2) [1933] A.C. 61.

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GRINNELL CO. OF CANADA LIMITED v. WARREN

language of the jury in the answers they give to questions submitted to them.

Appeal dismissed with costs.

J. W. deB. Farris K.C. for the appellants.

E. A. Lucas for the respondent.

1937

* Feb. 11, 12.
* March 19.

IN THE MATTER OF THE ESTATE OF EDWARD ROBERSON, DECEASED

STANLEY CAMERON AND ANOTHER (DEFENDANTS) ..... } APPELLANTS;

AND

FRANCIS LONGWORTH HASZARD TRUSTEE, ETC., (COMPLAINANT) AND OTHERS (DEFENDANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL IN EQUITY OF PRINCE EDWARD ISLAND

Will—Interpretation—Persons entitled—Vested interest.

The testator died in 1883, leaving his widow and three daughters, G., H. and L. By his will he devised and bequeathed all his property to his executors and trustees upon trusts. The will set aside three specific funds, one for each of the daughters for life, and, subject thereto, gave to the widow a life interest in the estate. She was also given a power of appointment, which she exercised, as to one-half of the residue of the estate, and this was not now in question.

The daughter G. died in 1885, ten days after the birth of her only child, who died within two months later, leaving his father as next of kin. The daughter H. died without issue in 1907. The widow died in 1909. The daughter L. died, unmarried, in 1934.

Questions then arose, under provisions in the will, and in the above circumstances, as to who were now entitled to (1) that half of the residue of the estate over which the widow was not given a power of appointment, (2) the fund set aside for the daughter L. during her life, and (3) the fund set aside for the daughter H. during her life.

As to said half (in question) of the residue, the will directed the trustees to pay the income thereof to the testator's wife during her life and, on her death, then to pay the income to G. during her life, and upon her death to pay the principal "to the lawful issue of my said daughters L. and G. or should only one of them have children, then to the lawful issue of such daughter, share and share alike."

Held: G.'s child took at birth a vested interest in the principal of said half of the residue. Though vesting in possession was postponed until the expiration of the life interest of the widow and of the subsequent life interest of G. had she survived her mother, the vesting of an interest in G.'s child was not dependent or expectant upon the prior

* PRESENT:—Duff C.J. and Rinfret, Crocket, Davis and Kerwin JJ.

life interest or interests; it did not depend on his being alive at the time of distribution. (*Brown* v. *Moody*, [1936] A.C. 635; *Hickling* v. *Fair*, [1899] A.C. 15, at 35; and *Duffield* v. *Duffield*, 3 Bligh's New Reports, 260, at 330-331, cited).

As to the fund set aside for L. during her life, the will directed the trustees, upon the death of L. having issue, to pay it to such issue, and in default of issue then to pay it "to my daughter G., should she survive my daughter L., or should my said daughter G. not be living at the death of my said daughter L., then to pay [the fund] to the lawful issue then living of my said daughter G., share and share alike."

Held: The words "then living" clearly related to the last antecedent, the date of L.'s death, and, there being no issue of G. living at that date, the fund fell into the residue of the estate, half of which passed under the widow's appointment and the other half to those entitled through G.'s child's vested interest.

As to the fund set aside for H. during her life, the will directed the trustees upon her death to pay it to her issue and in default of issue to pay it to G. if living "and should she not be then living to pay the same to the lawful issue of my daughters L. and G. share and share alike or should there be but one child of either of my said daughters then to such child absolutely."

Held: The fund became (for the same reasons as those for the above conclusion as to the residuary clause) vested in G.'s child at birth, and there was no intestacy. The court could not insert such words as "then living" after the words "to pay the same to the lawful issue." (*Re Litchfield; Horton* v. *Jones*, 104 L.T. 631).

Judgment of the Court of Appeal in Equity of Prince Edward Island, [1936] 4 D.L.R. 443, reversed.

APPEAL from the judgment of the Court of Appeal in Equity of Prince Edward Island (1) affirming (except in a matter of costs, the variation made in this respect not being appealed against) the judgment of Saunders M.R. (2) in a suit brought by the surviving executor and trustee of the last will and testament of Edward Roberson, deceased, by bill of complaint in the Court of Chancery of Prince Edward Island, asking for a declaration as to who are the persons now entitled to the assets of the estate of the said deceased which still remain in the hands of said executor and trustee and for an order for payment over or distribution and for an order and direction regarding further administration.

The determination of what persons are now entitled to the assets of said estate involved the interpretation of certain clauses in the will of said deceased and their effect in the events which have occurred.

(1) [1936] 4 D.L.R. 443.

(2) [1935] 4 D.L.R. 44 (*sub. nom. Haszard* v. *Winchester et al.*)

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The material facts and circumstances, the relevant clauses of the will, and the questions for consideration, are sufficiently stated in the judgment of this Court now reported, and are indicated in the above headnote. The appeal to this Court was allowed, the judgments of the Courts below set aside, and judgment directed to be entered declaring the rights of the parties in accordance with the reasons for judgment of this Court now reported; the costs, as between solicitor and client, to all the parties throughout to be paid out of the residue of the estate.

A. A. McLean K.C. and *Donald McKinnon K.C.* for the appellants.

E. K. Williams K.C. and *W. E. Bentley K.C.* for the respondents.

The judgment of the court was delivered by

DAVIS J.—This litigation is to determine the proper interpretation and effect of the will of Edward Roberson, late of the province of Prince Edward Island, who died in 1883, in respect of the final distribution of certain substantial portions of the estate. The principal difficulty arises out of the fact that the only grandchild of Edward Roberson was not born until 1885 and lived less than two months. The real contest is between those persons who claim through the grandchild on the basis that the grandchild acquired at birth a vested interest in those portions of the testator's estate now involved in this litigation and those persons who claim through those who were the next of kin of Edward Roberson at the date of the latter's death on the basis that in the events which have occurred since the death of the testator there is an intestacy in respect of the said portions of the estate.

The grandchild's mother was a daughter of Edward Roberson. She died ten days after the birth of the child and on the child's death a few weeks later his father became the only next of kin. In later years the father remarried and had three sons by his second marriage. He died in 1921, his second wife having predeceased him, and the three sons survived him and are still alive. In reality, the three sons by the second marriage, who are, of course, strangers to Edward Roberson, are claiming through their father against those persons who claim through those who

were the next of kin of Edward Roberson at the date of his death.

Three separate portions of the estate of Edward Roberson are involved in this litigation and they have been described throughout, for convenience, as funds A, B and D. The main point is whether or not the corpus of all, or of any, of these funds became vested in the grandchild. No real difficulty will be met in the ascertainment of the persons now beneficially entitled to the corpus of the funds, or of the shares in which they will take, once it is determined, upon the proper interpretation and effect of certain provisions of the testator's will, whether or not the grandchild acquired at birth a vested interest.

Before turning to the language of the will it is convenient to set out certain facts and dates. The testator was survived by his widow and three daughters. All his property, real and personal, was by his will expressly devised and bequeathed to his named executors and trustees upon certain trusts and, broadly speaking, the will set aside three specific funds, one for each of the daughters for life, and subject thereto the widow was given a life interest in the estate. The widow and the three daughters are now dead. The questions raised in these proceedings concern the disposition of the corpus of two of the specific funds and of one half of the residue of the estate, and the alleged improper payment by the trustees of some of the income from these funds over a period of years. The daughter Georgianna died February 10, 1885. Her child was born on February 1, 1885, and died on March 26 of the same year. The daughter Hannah Louisa married and died without issue on April 9, 1907. The widow of the testator died on November 28, 1909. The daughter Lucy Jane never married and lived until January 13, 1934. Alexander Cameron, who married Georgianna and who was the father of the grandchild, died on July 16, 1921, leaving all his property by will to his three sons, share and share alike.

What is described as fund A is the specific fund set apart by the will for the daughter Lucy Jane during her lifetime; what is described as fund B is the specific fund that was set aside for the daughter Hannah Louisa during her lifetime, and what is described as fund D is that half of the residue of the estate over which the widow was not given a power

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Davis J.

of appointment. The other half of the residue was duly appointed by the widow, by virtue of a power vested in her by the will, to her daughter Lucy Jane who survived her. The same problem is raised in respect of the corpus of each of these funds, A, B and D, that is, whether it became vested in the grandchild or is there an intestacy? The executors of the father of the grandchild are the appellants in this Court and the respondents represent next of kin of Edward Roberson. Counsel for the respondents contended that there was an intestacy in respect of funds A and B and admitted that if that contention was sound those funds had fallen into the residue. They further contended that there was an intestacy in respect of half the residue, i.e., fund D.

We may conveniently turn at once to the provisions of the will relating to the residue. Omitting those parts that gave a power of appointment to the widow with respect to the disposition after her death of one half of the residue, the residuary clause reads as follows:

> And the said trust premises shall be held by my said trustees upon the further trust to pay the net annual interest and income of all the residue of my said estate * * * to my said dear wife during the term of her natural life, and on the death of my said wife * * * then to pay the annual income * * * of the remaining moiety of the residue of my said estate to my daughter Georgianna during the term of her natural life, and upon the death of my said daughter Georgianna to pay the principal money to the lawful issue of my said daughters Lucy and Georgianna or should only one of them have children, then to the lawful issue of such daughter, share and share alike.

The widow died, as we have stated, in 1909. Her daughter Georgianna had predeceased her. The only issue of the daughters Lucy and Georgianna was the child of Georgianna. Much stress is laid by counsel for the respondents upon the fact that the grandchild was not alive at the date of the death of the testator and was not alive at the date of the death of the widow.

The contention on behalf of the respondents is that there was a mere direction to pay and that by force of the repetition of the word "then" in the language of the residuary clause the gift to the issue was contingent upon being alive at the date of distribution. In other words, the contention of the respondents in effect is that we should read into the language of the clause the words "then living" after the words "lawful issue" so that the provision shall require that the issue be "then living," i.e., at the date of distribution.

The respondents treat the provision as disclosing an intention on the part of the testator to create a contingent gift to a class to be ascertained at the date of distribution, and contend that, there having been no one of the class then alive, there is an intestacy. Further, the respondents point to the power of appointment given to the widow in respect of one half of the residue of the estate and contend that, as that half of the residue was plainly not to become vested in any one until the death of the widow provided she exercised the power, it may fairly be implied that the testator did not intend any part of the residue to vest before the date of his widow's death. But the two halves of the residue are subject to separate and different trusts and are quite independent one from the other and it is a forced construction to import the contingency with respect to the disposition of one half of the residue into the provisions governing the disposition of the other half.

The questions of interpretation were raised by a bill of complaint in the Court of Chancery of the province of Prince Edward Island. Saunders J., the Master of the Rolls of that Court, came to the conclusion in a carefully considered judgment that the gift of half the residue to the issue of Lucy and Georgianna was contingent upon such issue being alive at the date of distribution. The learned Judge relied mainly upon decisions in this Court of which *In re Browne* (1) was then the latest. An appeal was taken to the Court of Appeal in Equity of the province of Prince Edward Island and the judgment was affirmed by the members of that Court (Mathieson C.J. and Arsenault J.) who also put the ground of their decision principally upon the authority of the decision of this Court in the *Browne* case (1). But subsequently the Judicial Committee delivered judgment in an appeal that had been taken from the judgment of this Court in the *Browne* case (1). Their Lordships reversed the judgment (*Browne* v. *Moody* (2)). We have no doubt that if the Judges in the Courts below had had the advantage of the judgment of the Judicial Committee in the *Browne* case (2) they would have reached a different conclusion in this case. It will be sufficient if we quote two passages from the judgment delivered by Lord Macmillan in the Privy Council:

(1) [1934] S.C.R. 324. (2) [1936] A.C. 635.

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Davis J.

Their Lordships observe, in the first place, that the date of division of the capital of the fund is a *dies certus*, the death of the son of the testatrix, which in the course of nature must occur sooner or later. In the next place, the direction to divide the capital among the named beneficiaries on the arrival of that *dies certus* is not accompanied by any condition personal to the beneficiaries, such as their attainment of majority or the like. The object of the postponement of the division is obviously only in order that the son may during his lifetime enjoy the income. The mere postponement of distribution to enable an interposed life-rent to be enjoyed has never by itself been held to exclude vesting of the capital.

The law, their Lordships said, had been correctly stated by Sir William Page Wood, V.C., in *In re Bennett's Trust* (1) as follows:

> It is clear that the use of the words "pay and transfer," as the only words of gift, does not make such a bequest contingent. The true criterion is that which is mentioned in *Leeming* v. *Sherratt* (2), namely, whether the postponement of the payment or division was on account of the position of the property, or of the person to whom the deferred interest is given. If the reason is simply, that a life interest is previously given to another person, so that the fund cannot be divided or paid over until his death, and is not a reason personal to the legatee of the absolute interest, such as his attaining twenty-one, it is treated as a gift to one for life, with a vested remainder to the legatees who are to take subject to the life interest.

Mr. E. K. Williams, in his very clear and direct argument on behalf of the respondents, naturally sought to escape from the force and effect of the *Browne* case (3) and he really rested his argument that there was no vesting in the grandchild in the present case upon the fact that there was no issue of the daughters Lucy and Georgianna alive at the date of the death of the testator, and he contended that there must be a vesting, if at all, *a morte testatoris*, and therefore the direction to pay to the issue of Lucy and Georgianna must be interpreted as creating only a contingent, as distinguished from a vested, interest. Mr. Williams did not refer us to any authority in support of this contention and it appears to us to be such an artificial construction of the settled rule as not to justify our acquiescence in it. No doubt the distinction is not without importance and in certain circumstances may well be an element in determining whether vesting has or has not taken place. There are, however, in this will no conditions or contingencies attached to the gift to the issue and no

(1) (1857) 3 K. & J. 280 at 283. (2) (1842) 2 Hare 14.
(3) [1936] A.C. 635.

clause of survivorship or gift over. Lord Davey in the course of his speech in the House of Lords in *Hickling* v. *Fair* (1), said:

> It is an elementary principle in the construction of wills that a gift to a class after a life interest or life-rent includes all persons within the description of the class who were alive at the testator's death, or have come into being during the lifetime of the life tenant or life-renter. That principle is common to Scotland and England, and is applicable, I should suppose, wherever the English language is used. I think it is equally clear that when the gift is made to depend on the happening of a contingency, that contingency is not imported by implication into the description of the class so as to confine the gift to those members of the class who survive the contingency.

In approaching the construction of a will and the question of vesting of legacies, the courts have often cited, with approval, the language in *Duffield* v. *Duffield* (2) (which case Lord Eldon expressed the hope would be a leading case (3)):

> The rights of the different members of families not being ascertained whilst estates remain contingent, such families continue in an unsettled state, which is often productive of inconvenience, and sometimes of injury to them. If the parents attaining a certain age, be a condition precedent to the vesting estates by the death of their parents, before they are of that age, children lose estates which were intended for them, and which their relation to the testators may give them the strongest claim to.
>
> In consideration of these circumstances, the judges from the earliest times were always inclined to decide, that estates devised were vested; and it has long been an established rule for the guidance of the Courts of Westminster in construing devises, that all estates are to be holden to be vested, except estates, in the devise of which a condition precedent to the vesting is so clearly expressed, that the Courts cannot treat them as vested, without deciding in direct opposition to the terms of the will. If there be the least doubt, advantage is to be taken of the circumstance occasioning that doubt; and what seems to make a condition, is holden to have only the effect of postponing the right of possession.

The grandchild born in 1885 was the only issue of Lucy or Georgianna and as such, in our opinion, took at birth a vested interest in one half of the residuary estate which, though it was not to vest in possession until the expiration of the life interest of the widow and of the subsequent life interest of Georgianna had she survived her mother, was not dependent or expectant upon the prior life interest or interests. The vesting of the ultimate gift was independent of any prior life interest.

(1) (1899) A.C. 15, at 35.
(2) (1829) 3 Bligh's New Reports 260, at 330-331 (H.L.).
(3) *Ibid* at 339.

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Turning now to the language of the will with respect to the specific fund set apart for the benefit of the daughter Lucy during her life, fund A:

> And upon the death of my said daughter Lucy Jane having lawful issue to pay over the said sum of seven thousand dollars to such issue share and share alike and in default of issue then to pay over said sum of seven thousand dollars to my daughter Georgianna, should she survive my daughter Lucy, or should my said daughter Georgianna not be living at the death of my said daughter Lucy, then to pay over said principal sum of seven thousand dollars to the lawful issue then living of my said daughter Georgianna, share and share alike.

The daughter Lucy Jane, as already stated, did not die until 1934 and Georgianna died in 1885. The pertinent words therefore are

> should my said daughter Georgianna not be living at the death of my said daughter Lucy, then to pay over said principal sum of seven thousand dollars to the lawful issue then living of my said daughter Georgianna, share and share alike.

The words "then living" clearly relate to the last antecedent, i.e., the date of the death of Lucy. There was no issue of Georgianna living at that date and the fund fell into the residue of the estate, half of which passed under the widow's appointment and the other half passed to those entitled through the grandchild's vested interest.

Directing now our attention to the words employed by the testator respecting the specific fund set apart for the benefit of the daughter Hannah Louisa during her life, Fund B:

> And upon the death of my said daughter Hannah Louisa to hold the said sum of seven thousand dollars upon trust to pay the same to her lawful issue share and share alike, and in default of such issue then upon trust to pay the said principal sum of seven thousand dollars to my said daughter Georgianna if living, and should she be not then living to pay the same to the lawful issue of my daughters Lucy and Georgianna share and share alike or should there be but one child of either of my said daughters then to such child absolutely.

Hannah Louisa died in 1907 without issue and her sister Georgianna had predeceased her. The effect of this provision of the will is that if Georgianna should "be not then living," i.e., at the date of the death of Hannah Louisa, the fund is to be paid over to the lawful issue of Lucy and Georgianna, share and share alike, or should there be but one child of either of the said daughters, "then to such child absolutely." We are not entitled to insert such words as "then living" after the words "to pay the same to the lawful issue." See *Re Litchfield;*

Horton v. *Jones* (1). For the reasons given for our conclusion as to the residuary clause, this fund also became vested in the grandchild at birth, and there was no intestacy.

This disposes of the questions raised respecting the disposition of the corpus of each of the funds A, B and D, but a further question is raised in the proceedings as to the alleged improper disposition of some of the income from these funds. A proceeding of this kind is not, however, a convenient procedure for determining such a question and our judgment will be without prejudice to that question. If the parties cannot now agree upon an adjustment and settlement of their differences in respect of the impeached payments of income, that part of the bill of complaint should be remitted to the Court of Chancery. The facts in connection with the payments of income from these funds are not at all complete in the record before us but there is sufficient to indicate that there may well have been such an acquiescence on the part of the late Mr. Cameron, the father of the grandchild, who was himself one of the executors of the testator's will, as to preclude those now claiming through him from recovering against the surviving executor income which has been actually paid out by him, though, perhaps, to persons for the time being not strictly entitled to this income upon the construction which we have now put upon the provisions of the will respecting the funds in question. A great many years have elapsed since many of the payments were made, the surviving trustee obviously acted throughout in absolute good faith, and many matters of fact and questions of law may arise for consideration if the question of the actual payments of income is pressed. The evidence before us is quite insufficient to enable us to deal with the dispute.

The judgment below should be set aside and a declaration made in accordance with the foregoing conclusions. The costs, as between solicitor and client, of all parties throughout should be paid out of the residue of the estate.

Appeal allowed.

Solicitor for the appellants: *A. A. McLean.*

Solicitors for the respondents: *W. E. Bentley, D. L. Mathieson,* and *A. J. Haslam* (respectively).

(1) (1911) 104 L.T. 631.

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* Feb. 22.
* Mar. 19

BILTRITE TIRE COMPANY (DEFENDANT) ..... } APPELLANT;

AND

HIS MAJESTY THE KING, ON THE INFORMATION OF THE ATTORNEY-GENERAL OF CANADA (PLAINTIFF)..... } RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Sales tax—Excise tax—Special War Revenue Act (R.S.C. 1927, c. 179, and amendments), ss. 86 (1) (a) ("goods produced or manufactured"); 80 (1) (b) and Schedule II, item 3 ("tires manufactured or produced")—Old tires bought, treated and retreaded, and retreaded tires sold—Liability to said taxes.

Appellant purchased in bulk lots, by the pound, old and worn-out motor vehicle tires and put them through a process of repair, treatment and retreading, and sold the retreaded tires. Throughout the process the sidewall of the tire was not dismantled or destroyed, the numerical identification of the original tire was not destroyed, the name of the manufacturer of the original tire was still clearly marked upon its sidewalls, upon which appellant also marked a serial number.

Held: What appellant sold after said process were "goods produced or manufactured" by appellant within the meaning of s. 86 (1) (*a*) of the *Special War Revenue Act* (R.S.C. 1927, c. 179, and amendments) and were "tires manufactured or produced" by appellant within the meaning of s. 80 and Schedule II (item 3) of said Act; and appellant was liable to pay in respect thereof the sales tax and excise tax imposed by said sections respectively.

APPEAL by the defendant from the judgment of Angers J. in the Exchequer Court of Canada whereby the plaintiff recovered judgment against the defendant for $5,318.46 and costs.

The action was brought in the Exchequer Court of Canada by information filed by the Attorney-General of Canada on behalf of His Majesty the King, to recover sums alleged to be due from the defendant (a firm carrying on business in Toronto, Ontario) for sales tax and excise tax under the *Special War Revenue Act* (R.S.C. 1927, c. 179, and amendments), by reason of the alleged manufacture or production, and sale, of tires or tubes. Plaintiff also claimed penalties and licence fees. The defendant claimed that it was not a "producer or manufacturer," within said Act, of tires or tubes and that the provisions in question of said Act did not apply to it.

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

A statement of facts was agreed upon, the material parts of which are set out in the judgment now reported. The appeal to this Court was dismissed with costs.

Wilfrid Heighington K.C. for the appellant.

J. E. Day K.C. and *B. Matthews* for the respondent.

The judgment of the court was delivered by

KERWIN J.—Section 86 of the *Special War Revenue Act* (R.S.C. 1927, chapter 179, and amendments) provides:—

86. 1. There shall be imposed, levied and collected a consumption or sales tax of six per cent. on the sale price of all goods,—

(*a*) produced or manufactured in Canada, payable by the producer or manufacturer at the time of the delivery of such goods to the purchaser thereof.

The first question arising for determination on this appeal is whether the appellant produced or manufactured goods within the meaning of this enactment and is therefore liable for the payment of sales tax.

Section 80 of the same Act, so far as applicable, enacts:—

80. 1. Whenever goods mentioned in Schedules I and II of this Act are imported into Canada or taken out of warehouse, or manufactured or produced in Canada and sold, there shall be imposed, levied and collected, in addition to any other duty or tax that may be payable under this Act or any other statute or law, an excise tax in respect of goods mentioned

(*a*) * * *

(*b*) In Schedule II, at the rate set opposite to each item in the said schedule.

Item 3 of Schedule II referred to reads as follows:—

3. Tires and Tubes:

(iii) Tires in whole or in part of rubber for automotive vehicles of all kinds, including trailers or other wheeled attachments used in connection with any of the said vehicles—two cents per pound.

The second question is whether the appellant manufactured or produced tires within the meaning of this section and schedule and is therefore subject to the payment of excise tax.

The matter was presented before the Exchequer Court on an agreed statement of facts from which it appears that the appellant "purchased, in bulk lots, by the pound, old and worn-out motor vehicle tires," generally from "junk dealers or storage yards" in Canada and the United States. Furthermore, "any duty that was exacted upon the articles when brought into Canada was paid on entry." After receipt of the tires by the appellant at its place of business,

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Kerwin J.

the first step was to place them in a heater where "all dampness was taken from the tires, both inside and out." Each tire was next placed upon a rack where the holes or "blow-outs" in it were buffed and cleaned. The tire was then placed in a frame against which a sharp dented wheel revolved and the tread was removed.

Following this the tire was cemented on the inside and the holes patched with cord material and the tire was then cemented on the outside. After being placed in another machine, each tire received an application of "callendered-tread stock," a plastic preparation.

As to the subsequent steps, the statement of facts continues:—

> The tire was then taken to what was termed the "cure-room," where it was placed first in an iron mould which was firmly clamped about it. The mould was in the shape of a wheel and the mould, complete with its encased tire, was placed flat on a press inside a large boiler. A number of tires, each in a clamp as stated, were piled one on top of the other until the boiler was filled with twenty tires or so. A lid was then placed upon the boiler and firmly sealed. Hydraulic pressure was then applied for an hour or an hour and a half. This had a squeezing effect upon the clamped tires, they were firmly held and cooked into a state in which the repairs to the holes and blow-outs, the cementing inside and without, and the new tread, were firmly and permanently affixed to the carcass, i.e., the fabric and side walls of the original tire. In no part of these steps, including the final one, was the numerical identification of the original tire destroyed. The name of the manufacturer of the original tire was still clearly marked upon its side walls upon which the defendant company also marked a serial number.

The only other feature, and one upon which the appellant lays particular stress, is that throughout all the steps taken by it "the sidewall of the tire was not dismantled or destroyed."

So far as the claim for sales tax is concerned, what the appellant sold, after these proceedings in its establishment, would undoubtedly be termed "goods." Are they goods manufactured or produced by appellant? What the appellant did was to remove part of the old or worn-out tire and add to the remnant the plastic rubber preparation. It would appear that the position is the same as if the appellant had purchased an old or worn-out tire which had already been treated by the vendor in the manner described above, down to and including the cutting off of the old tread. If then the appellant had purchased from a third party the rubber preparation and had applied the latter and continued with the subsequent steps, could it be suggested

that the article in its final condition had not been produced or manufactured by the appellant? The definitions of the words "manufacture" and "produce" as nouns or verbs, in the standard dictionaries, clearly indicate that such proceedings would constitute the appellant a manufacturer or producer. And the mere fact that the appellant has itself performed the defined operations on the old tire cannot exclude it from the operation of the section.

The point for determination in connection with the claim for excise tax is a little different from that involved in the question of the liability for sales tax. Is the appellant a manufacturer or producer of tires? It is suggested that the old or worn-out tire did not lose its identity *qua* tire and that, therefore, the appellant could not be said to have manufactured or produced a tire. However, when one bears in mind the various steps taken by appellant and particularly the state of the article when the tread was removed, it would appear that appellant cannot be any less the manufacturer of a tire because it started with something that had once been a usable tire than if, as suggested in the preceding paragraph, it had commenced with two substances purchased from different sources.

The liability of the appellant for licence fees follows from what has been said, and, since we understand no question is raised as to the proper amount for which judgment should go, the appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Symons, Heighington & Shaver.*

Solicitor for the respondent: *W. Stuart Edwards.*

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* May 5.
* June 1.

JOSEPH HALLÉ (PLAINTIFF IN WARRANTY) ..... APPELLANT;

AND

THE CANADIAN INDEMNITY COMPANY (DEFENDANT IN WARRANTY).... RESPONDENT;

AND

ROLLAND HALLÉ, MIS-EN-CAUSE.

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

Insurance—Automobile—Public liability—Undertaking by insurance company to indemnify other persons than the insured—Automobile driven by third person with consent of owner—Accident—Action in warranty against insurance company by driver sued for damages by person injured—Liability of company—Stipulation in favour of third person valid under civil law of Quebec—Insurable interest—Articles 1029, 2468, 2472, 2474, 2476, 2480 C.C.

The respondent company issued an automobile insurance policy in favour of the *mis-en-cause* whereby it undertook to indemnify the latter for all losses and damages resulting from his legal responsibility towards third persons as a consequence of bodily injuries or of the death sustained by the latter and caused to them through the maintenance or the use of a certain automobile described in the policy; and, under another clause of the same policy, the respondent company also undertook "à indemniser, en la même manière et aux mêmes conditions auxquelles l'assuré y a droit, d'après les présentes, toute personne transportée dans l'automobile ou la conduisant légitimement ainsi que toute personne légalement responsable de la conduite du dit automobile, à condition que permission en soit donnée par l'assuré." On August 27, 1934, the *mis-en-cause* lent his automobile to his brother, the appellant, and while the latter was driving the automobile on that day, having with him two passengers, he met with an accident in the course of which his two companions were seriously injured. One of them brought an action against the appellant to recover the damages sustained by him as a result of the accident which he attributed to the fault and negligence of the appellant. The appellant, alleging that he was protected against the liability thus incurred under the policy above mentioned, brought, in his own name, an action in warranty against the respondent insurance company.

Held that, under the terms and conditions of the insurance policy, the respondent company was liable to indemnify the appellant for all losses or damages resulting from the accident.

The appellant was legitimately in possession of the automobile, was driving it with the permission of the insured and was legally responsible for the manner in which the automobile was being driven. He was, therefore, one of the persons whom, under the terms of the policy and in consideration of the premium paid to it by the *mis-en-cause*, the respondent insurance company undertook to indemnify. He was

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

not therein mentioned by name; but, according to the law of Quebec, as expressed in the French doctrine and jurisprudence, it is not necessary for its validity that the stipulation for the benefit of third parties should be made in words definitely ascertaining these persons; it is sufficient if they are ascertainable on the day when the stipulation takes effect in their favour. Therefore the respondent company cannot escape the obligation of indemnifying the appellant unless it is shown that its stipulation is prohibited by law. But the clause in favour of third persons invoked by the appellant against the respondent company is valid and enforceable, because stipulations in favour of third parties are valid and enforceable in civil law. They are expressly authorized by article 1029 C.C.; and no special rule exists, in the chapter of the code dealing with insurance, of a nature to exclude insurance contracts from the application of the general principle enacted in article 1029 C.C. And this view is strengthened by the enactments of article 2480 of the above chapter, where the civil code expressly singles out a class of policies which are declared prohibited. —The definition of "insurance" as contained in article 2468 C.C. adapts itself to the policy issued by the respondent company: it applies both to the main obligation undertaken for the benefit of the *mis-en-cause* and to the undertaking towards the other persons ascertainable under the above-cited clause.—The fact that up to the moment of the accident the appellant had not yet signified his assent to the stipulation made in his favour by the *mis-en-cause* is not a bar to the action: his assent was not necessary to bind the insurance company and it was sufficient if he manifested his intention to avail himself of the stipulation as soon as the event happened which made the stipulation effective in his favour. In civil law, a valid stipulation in favour of a third person creates a contract (*viniculum juris*) between the third person and the person who has agreed to be bound by the contract.

Vandepitte v. *Preferred Accident Insurance Corporation* ([1933] A.C. 70) not applicable to this case.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec, affirming a judgment of the Superior Court, Laliberté J., and dismissing the appellant's action in warranty with costs.

The respondent is a Casualty Insurance company who had issued to Rolland Hallé, the *mis-en-cause,* an automobile accident liability insurance policy containing the so-called omnibus clause whereby the insurance company agreed to protect from liability persons driving Rolland Hallé's car with his consent. On August 27, 1934, the appellant, who is a brother of Rolland Hallé, was driving the automobile covered by this policy when he met with an accident in which one Louis Bourget was seriously hurt. The latter claiming that this accident was due to the driver's fault, brought on December 26, 1934, an action in damages against Joseph Hallé, the appellant, claiming $14,500. The writ was sent to the respondent, who re-

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turned it to the appellant with a letter disclaiming any responsibility. Thereupon, Joseph Hallé, the appellant, brought an action in warranty against the insurance company, invoking the omnibus clause and praying that the insurance company be declared bound to defend the principal action and indemnify the appellant from any condemnation up to the limit stated in the policy, namely, $10,000 for personal damages and $1,000 for damages to property.

Ls. St-Laurent K.C. for the appellant.

Aimé Geoffrion K.C. and *V. A. De Billy K.C.* for the respondent.

The judgment of the court was delivered by

RINFRET J.—Mr. Rolland Hallé, of the city of Lévis, on the 11th day of May, 1934, took out an insurance policy issued by the company respondent and whereby, in consideration of the payment of the agreed premium, the company undertook to indemnify him for all losses or damages resulting from his legal responsibility towards third persons as a consequence of bodily injuries or of the death sustained by the latter and caused to them through the maintenance or the use of a certain automobile described in the policy.

Under another clause of the same policy (about which more will have to be said later), the company also undertook to indemnify certain other persons in respect of similar liability incurred through their use of the same automobile.

On August 27, 1934, Rolland Hallé lent his automobile so insured by the respondent to his brother, Joseph Hallé, who is the appellant in this case.

While the appellant was driving the automobile on that day, having with him as passengers in the car the Messrs. Louis and Antoine Bourget, he met with an accident in the course of which his two companions were seriously injured. Louis Bourget, one of them, brought an action against the appellant to recover the damages sustained by him as a result of the accident which he attributed to the fault and negligence of the appellant.

The appellant, alleging that he was protected against the liability thus incurred, under the policy issued by the re-

spondent to his brother Rolland Hallé, brought, in his own name, an action in warranty against the respondent insurance company. The company repudiated any obligation towards the appellant in the premises, for several reasons later to be stated in detail. The action in warranty was dismissed by the Superior Court of Quebec, and that judgment was upheld by a majority of the Court of King's Bench in appeal (Bernier, Hall and Barclay JJ.; Sir Mathias Tellier C.J. and Galipeault J. dissenting).

The case is now submitted to this Court; and the decision is of exceptional importance, because the point on which it was rendered in the courts below admittedly affects practically all liability insurance policies on automobiles in the province of Quebec.

Of the several grounds of defence raised by the defendant insurance company, two only were upheld by the trial judge and relied on by one or the other of the judges forming the majority in the Court of King's Bench. In our view, it will be sufficient to deal with those two points, more particularly since, on the other matters, the respondent, for its success, had to depend upon questions of fact which have been decided against it by the trial judge and also inferentially by the appeal court. It may be added that, before this Court, counsel for the respondent did not press these other points.

The first point held against the appellant was that the stipulation in the insurance policy on which the present suit is based was void because the *mis-en-cause* Rolland Hallé, who took out the policy, had no insurable interest in any liability that his brother, the appellant, might incur.

For the purpose of discussing this point, it will be necessary to analyse the insurance policy itself and to quote from it the material clauses having reference to the matter.

The document is called: "Police Automobile Combinée." It begins by reciting in full the application of Rolland Hallé. It then comes to what forms the essential part of the contract ("Conventions d'assurance") upon which the parties have agreed and which reads thus:

En considération du paiement de la prime stipulée et des déclarations contenues dans la proposition, le tout sujet aux limites, termes et conditions des présentes, * * * cette convention fait foi des stipulations suivantes:

* * *

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Section A.—L'assureur s'engage à indemniser l'assuré pour toute perte ou dommages entraînant la responsabilité du dit assuré, à la suite de blessures corporelles (y compris mort en résultant) subies par toute personne, à raison du droit de propriété, de l'entretien ou de l'usage de l'automobile.

Section B.—L'assureur s'engage à indemniser l'assuré pour toute perte ou dommages entraînant la responsabilité légale du dit assuré à raison de la destruction ou de dommages (y compris la perte d'usage en découlant) aux biens de toute personne, à raison du droit de propriété, de l'entretien ou de l'usage de l'automobile.

Et relativement aux sections A et B précédentes, l'assureur s'engage de plus:—

(1) Sur réception d'avis de blessures corporelles ou de dommages matériels, de se mettre au service de l'assuré en faisant enquête, négociant avec le réclamant ou réglant toute réclamation en résultant, en la façon que l'assureur jugera appropriée;

et (2) A contester, au nom de l'assuré, toute action au civil intentée contre lui en tout temps, à raison de telles blessures corporelles ou dommages matériels, le tout aux frais de l'assureur;

et (3) A acquitter les frais taxés contre l'assuré dans toute action au civil contestée par l'assureur, ainsi que les intérêts accordés par jugement sur telle partie du dit jugement qui n'excède pas la limite de responsabilité de l'assureur;

et (4) A rembourser l'assuré des dépenses encourues pour tous secours chirurgicaux urgents nécessaires au moment de l'accident causant les blessures corporelles;

et (5) Si l'usage de l'automobile est spécifié par les mots 'Usages privés' ou 'Usage privé et visites d'affaires' (livraison commerciale exceptée) seulement, à indemniser, en la même manière et aux mêmes conditions auxquelles l'assuré y a droit, d'après les présentes, toute personne transportée dans l'automobile ou la conduisant légitimement ainsi que toute personne, société ou corporation légalement responsable de la conduite du dit automobile, à condition que permission en soit donnée par l'assuré, ou si l'assuré est un particulier, que telle permission provienne d'un membre adulte de sa maison autre qu'un chauffeur ou serviteur domestique; pourvu, toutefois que l'indemnité payable en vertu des présentes soit appliquée d'abord à la protection de l'assuré, et le reste, s'il en est, à la protection d'autres personnes y ayant droit en vertu des présentes et ce, en conformité aux instructions que l'assuré en donnera par écrit. * * *

The balance of subsection (5) has no bearing in the circumstances of the case.

Obviously, in support of his right to bring the action in warranty, the appellant relies on that portion of subsection (5) of section B above quoted. And it is that stipulation in his favour which has been declared illegal and void by the judgments appealed from, on the ground that Rolland Hallé, who was held to be the insured (and the only insured) in the policy, had no insurable interest in the liability provided against in the clause in question.

It may be well first to ascertain the purport and the extent of the clause under discussion.

That clause constitutes one of the obligations undertaken by the insurance company ("l'assureur s'engage de plus") in the contract it has made with Rolland Hallé and in consideration of the premium paid by the latter to the company ("en considération du paiement de la prime stipulée").

The obligation thus assumed by the respondent is:

à indemniser, en la même manière et aux mêmes conditions auxquelles l'assuré y a droit, d'après les présentes, toute personne transportée dans l'automobile ou la conduisant légitimement (which is the case here), ainsi que toute personne * * * légalement responsable de la conduite du dit automobile, à condition que permission en soit donnée par l'assuré

There is no question that, in the insurance policy, Rolland Hallé, who made the application for it, is styled "l'assuré"; and that, wherever the word "assuré" occurs in the document, it is intended to refer to Rolland Hallé ("ci-après dénommé l'assuré"). But, of course, it does not follow that, because the parties adopted that word for the purpose of designating Rolland Hallé in the policy, the other persons who may rightfully come under it are, for that sole reason, to be excluded from the benefits deriving to them, and that they are not to be regarded as insured, merely because they have not been described by that term in the document. The question is not how they have been described, but whether, by force of the stipulations in the policy, they have the rights of insured persons.

Now, the policy expressly states that, in addition to its engagements towards the "assuré," Rolland Hallé, the company obliges itself

à indemniser * * * toute personne conduisant légitimement (l'automobile) ainsi que toute personne * * * légalement responsable de la conduite du dit automobile, à condition que permission en soit donnée par l'assuré.

In this case, there is no doubt that Joseph Hallé, the appellant, was legitimately in possession of the automobile, that he was driving it with the permission of the "assuré," and that he was legally responsible for the manner in which the automobile was being driven. The appellant was, therefore, one of the persons whom, under the terms of the policy and in consideration of the premium paid to it by Rolland Hallé, the respondent insurance company undertook to indemnify. He was one of the persons who, in the intention of both contracting parties, was to be insured against loss or liability from the risks described in the policy. He was not therein mentioned by name; but,

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according to the law of Quebec, as expressed in the French doctrine and jurisprudence, it is not necessary for its validity that the stipulation for the benefit of third parties should be made in words definitely ascertaining these persons; it is sufficient if they are ascertainable on the day when the stipulation takes effect in their favour (*Vide:* Pardessus, *Droit commercial,* 6e édition, 1856, tome 2; Colin & Capitant, tome 2, pp. 324 et suiv., referred to by Sir Mathias Tellier, C.J., in his reasons for judgment).

Planiol (*Traité Elémentaire de Droit Civil,* 9e édition, tome 2, p. 418, nos. 1236 & seq.) puts the question:

> Peut-on stipuler au profit de personnes indéterminées? Oui, à la condition que les bénéficiaires de la stipulation, actuellement indéterminés, soient déterminables au jour où la convention doit recevoir effet à leur profit. Ce qui peut mettre obstacle à l'efficacité d'une stipulation pour autrui, ce n'est donc pas, à proprement parler, la simple indétermination actuelle de ces bénéficiaires, si l'on possède un moyen de les reconnaître quand il le faudra; c'est leur indétermination future, devant persister d'une manière indéfinie, autrement dit leur indéterminabilité.

And in the following number 1237, he gives, amongst other illustrations ("applications"):

> 1° l'assurance contractée "pour le compte de qui il appartiendra", qui est assez fréquente, tant en matière d'assurance terrestre qu'en matière d'assurance maritime,

in which he says that

> La jurisprudence a admis dans (ces) hypothèses la stipulation au profit de personnes indéterminées.

We find the same doctrine in Planiol & Ripert, *Traité Pratique de Droit Civil Français* (1930, tome 6, p. 502, no. 367):

> La stipulation au profit de personnes indéterminées n'est pas valable lorsque le contrat ne permet pas de les déterminer au jour où il doit recevoir effet à leur profit. Il n'y a pas d'obligation sans un créancier déterminable. Mais il n'est pas nécessaire que dès le moment du contrat il soit déterminable nominativement. La jurisprudence a admis la validité de stipulations au profit de personnes indéterminées dans de nombreuses hypothèses.

The appellant undoubtedly comes within the description of the persons whose liability is covered by the undertaking of the company. Consequently he is one of the persons insured under the policy and towards whom the respondent has assumed the obligation of indemnifying in accordance with the terms of the policy. The company cannot escape that obligation, unless it is shown that its stipulation is prohibited by law.

And such is the contention of the company. It submits that the stipulation could be valid only if Rolland Hallé,

who took out the policy, had himself an insurable interest in the liability of his brother, the present appellant, or, in other words, that an insurance policy is allowed by the law of Quebec only if the person who applies for the policy and pays the premiums therefor has a personal insurable interest in the subject-matter of the policy. Under that contention, it does not matter if the person really insured has an insurable interest; the argument proceeds on the assumption that the only person who may become insured under the law is the person who applies for the policy and who pays the premiums therefor.

We must say that we cannot admit that contention, as the law stands in the province of Quebec; and our reasons for holding that view are already so well and so ably exposed in the reasons for judgment in this case of the Honourable the Chief Justice of the province that we do not find it advisable to develop them at the same length as we might otherwise have found necessary.

In the Civil Code of Quebec, insurance is defined as follows:

2468. Insurance is a contract whereby one party, called the insurer or underwriter, undertakes, for a valuable consideration to indemnify the other, called the insured, or his representatives, against loss or liability from certain risks or perils to which the object of the insurance may be exposed, or from the happening of a certain event.

We find no difficulty in applying the definition to the policy issued by the respondent. It applies both to the main obligation undertaken for the benefit of Rolland Hallé and to the obligation undertaken towards the other persons ascertainable under subsection 5 of section B. In the terms of the document, the insurer or underwriter, The Canadian Indemnity Company, undertakes for a valuable consideration to indemnify both Rolland Hallé personally and the persons coming within the description in subsection 5 (who may be called the insured)

against loss or liability from certain risks * * * or from the happening of a certain event.

There is nothing in the definition of the code to the effect that the person "called the insured" must be the person who applies for the policy or who pays the premium.

In the article just quoted, we see nothing to prevent a person requesting the issue of an insurance policy for the benefit of another person. And there is nothing to that effect in any other article of the code.

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Article 2472 C.C., pointed to by counsel for the respondent, enacts that

> All persons capable of contracting may insure objects in which they have an interest and which are subject to risk;

and counsel argued from this that only the actual contracting party may take out an insurance policy for his benefit upon objects in which he has an interest.

We cannot agree with that narrow interpretation.

It should be noticed, at first, that the article is permissive only and that it should be construed in accordance with article 15 of the code:

> The word "shall" is to be construed as imperative, and the word "may" as permissive.

Article 2472 C.C. does not mean that only the contracting party may insure objects in which he has an interest, or which are subject to risk. We agree with Chief Justice Tellier, when he says:

> Tout ce que signifie la disposition de l'article 2472, c'est qu'on ne peut avoir d'assurance que sur des objets dans lesquels on a un intérêt assurable et qui sont exposés à quelque risque.
>
> Où prend-on que, lorsqu'il m'est permis de prendre ou d'avoir une assurance, je ne pourrais la recevoir par les soins d'un intermédiaire, c'est-à-dire d'un mandataire, d'un gérant d'affaires, ou, dans un des cas prévus par l'article 1029, d'un parent ou ami bienfaisant ou obligeant, la stipulant à mon profit, comme condition ou charge d'un contrat qu'il fait pour lui-même, ou d'une donation qu'il fait à un autre?
>
> Une telle règle n'existe nulle part dans le Code.

Far from there being in the code a prohibition against a stipulation of the nature stated by the learned Chief Justice, the validity of such a stipulation is expressly recognized in article 1029 referred to by the Chief Justice:

> 1029. A party in like manner may stipulate for the benefit of a third person, when such is the condition of a contract which he makes for himself, or of a gift which he makes to another; and he who makes the stipulation cannot revoke it, if the third person have signified his assent to it.

The stipulation made by Rolland Hallé and agreed to by the Canadian Indemnity Company in subsection 5 of the policy now in question is a valid stipulation under article 1029 C.C. Rolland Hallé has made it a condition of the contract which he made for himself; and the premium which he paid to the company was the consideration for it. That premium was paid as well for the insurance in his favour as for the insurance for the benefit of the third persons. It is well understood in the legal doctrine that the word "condition" in the text of article 1029 C.C. is meant to connote a charge imposed upon the other con-

tracting party and which the latter assumes as part of his obligations under the contract. The Chief Justice asserts as being now quite beyond dispute that it is looked upon as a "charge obligatoire et exigible"; and in support of that proposition, he cites Larombière, art. 1121, no. 2; Laurent, t. 15, no. 552; Aubry et Rau, t. 4, par. 343 ter. note 15; Mourlon, t. 2, no. 1075.

No difficulty lies in the fact that up to the moment of the accident Joseph Hallé had not yet signified his assent to the stipulation made in his favour by Rolland Hallé. His assent was not necessary to bind the insurance company. It was sufficient if he manifested his intention to avail himself of the stipulation as soon as the event happened which made the stipulation effective in his favour. The notice of the accident given by him to the insurance company was already an indication to the latter that Joseph Hallé was availing himself of the protection afforded by the policy. In his action in warranty against the company, he expressly declared that intention. It will be noticed that, under article 1029 C.C., the only effect of the assent of the third person is to make the stipulation irrevocable by the person who has made it.

And in civil law a valid stipulation in favour of a third person creates a contract between the third person and the person who has agreed to be bound by the contract. It establishes a *vinculum juris* between the latter and the third person.

Speaking particularly of the present case, the policy confers an independent right upon the third person who is insured under it. Planiol & Ripert (*Traité Pratique de Droit Civil Français*, t. 6, p. 496, no. 362) say on this subject:

> C'est le but et l'effet essentiel de la stipulation. Pour réaliser cette acquisition conformément à l'intention du stipulant qui normalement doit procurer au tiers le bénéfice à l'exclusion de tous autres, on a été amené à dire que le tiers a contre le promettant un droit direct et personnel remontant aux sources du contrat.

This Court has accepted the principle of that doctrine in the case of *The Employers' Liability Assurance Company* v. *Lefaivre* (1).

Article 1029 of the Civil Code is of general application in the law of contracts in Quebec; and it applies as well

(1) [1930] S.C.R. 1.

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to the contract of insurance, unless some special rule should be found in the particular chapter specifically dealing with insurance.

Together with the learned Chief Justice of Quebec, we have already stated that no such special rule exists excluding from the insurance contract the application of the article. We have also observed that article 2472 C.C. is merely permissive. Incidentally it may be pointed out that this article, in terms, would appear to contemplate only insurance upon objects, while, by force of the definition of insurance given by article 2468 C.C., not only the perils to which an object may be exposed are stated to be valid subject-matter of an insurance contract, but also the "liability from certain risks * * * from the happening of a "certain event."

Be that as it may, the true interpretation of article 2472 C.C. is that one may become insured against loss or liability from certain risks or perils only if he has an interest in the objects exposed to such risks or perils, or in the happening of the event from which such risks or perils result. For article 2472 C.C. must necessarily be read together with article 2468 C.C.; and they must complete one another. In the insurance world as well as in legal parlance, the rule laid down in article 2472 C.C. is that, in order to be legally and validly insured, one must have an insurable interest in the object or the risk insured against for his benefit. That rule is, of course, rudimentary in insurance law; and it is significant that, in the Civil Code, it is nowhere stated as essential to the validity of a policy, unless it is to be found in article 2472 C.C., and, in our view, that is precisely where the codifiers and the legislature intended to lay down the rule.

"Insurable interest" is defined in article 2474 C.C. as follows:

> A person has an insurable interest in the object insured whenever he may suffer direct and immediate loss by the destruction or injury of it.

There, again, it may be pointed out, the article speaks only of insurance upon an "object" ("la chose"), while it must be beyond dispute that the definition also applies to an insurance against the risks resulting "from the happening of a certain event," and that here also article 2474 C.C. must be read with article 2468 C.C.

It cannot be questioned that, so far as insurable interest is concerned, the third persons described in subsection 5 of section B of the policy now in issue, and Joseph Hallé in particular, have such interest in the risks insured against, within the definition given by article 2474 C.C. Joseph Hallé has so much an insurable interest in the risk against which he was insured by Rolland Hallé that he might well have taken out a valid insurance policy in his own name against that risk.

So far, therefore, we find that the clause in favour of third persons, invoked by the appellant against the respondent, is valid and enforceable, because stipulations in favour of third parties are valid and enforceable in civil law. They are expressly authorized by article 1029 C.C. of the Civil Code; and no special rule exists, in the chapter of the Civil Code dealing with insurance, of a nature to exclude insurance contracts from the application of the general principle enacted in article 1029 C.C. But we think article 2480 C.C., of the same chapter, serves to strengthen the view already stated; for, in that article, the Civil Code expressly singles out a class of policies which are declared prohibited. The article begins by reciting that the contract of insurance is usually witnessed by an instrument called a policy of insurance; that the policy either declares the value of the thing insured, and is then called a valued policy, or it contains no declaration of value and is then called an open policy. The article then prescribes:

> Wager or gaming policies, in the object of which the insured has no insurable interest, are illegal.

It is better, we think, to quote also from the French version; for it appears to be susceptible of a clearer meaning of the intention of the legislature:

> Les polices d'aventure et de jeu, sur des objets dans lesquels l'assuré n'a aucun intérêt susceptible d'assurance, sont illégales.

In connection with that article, it is interesting to read the report of the codifiers (vol. 3, p. 240) concerning that section of the Title of Insurance embracing articles 2468 to 2484 C.C. The report says:

> This section consists of seventeen articles.
>
> Article 1 is a definition of the contract of insurance, prepared upon the authority of the best writers, under the several systems of law, indicated by the citations. There is an advantage in giving a clear and precise definition in this instance, in order to make prominent the essential characteristic of insurance, viz: that it is a contract of indemnity for loss or liability; thus distinguishing the legitimate contract from that class of

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transactions which sometimes assume its form, but are in their nature mere bets or wages.

The passage is illuminating in that it distinguishes that class of transactions which sometimes assume the form of insurance but which, states the report, "are in their nature mere bets or wagers," from what the codifiers call the "legitimate contract," which they describe as "a contract of indemnity for loss or liability."

And, in order to define the "legitimate contract" of indemnity for loss or liability, the codifiers have, in their own words, made "prominent the essential characteristic of insurance," which is that the insured must have an insurable interest (articles 2472 and 2480 C.C.) and that the contract should otherwise comply with the requirements of the definition contained in article 2468.

The wager or gaming policies are those which are prohibited by the code: The policies issued in conformity with the definition proposed by them (and which has been embodied in the code) against risks in respect to which the insured has an insurable interest are those which the codifiers call the "legitimate contracts," because they contain the "essential characteristic" exposed in the "seventeen articles" of the section.

This result would seem also to follow from article 2476 C.C., whereby

> Insurance may be made against all losses by inevitable accident, or irresistible force, or by events over which the insured has no control; subject to the general rules relating to illegal and immoral contracts.

In our view, the policy issued by the respondent, including the clause invoked by the appellant, well comes within the definition of the code; it contains the essential characteristics prescribed by the legislature; it is not prohibited by any article of the code; and the particular stipulation in favour of the third persons (and in favour of Joseph Hallé amongst others) is well grounded on and well justified by article 1029 C.C.

It may be interesting to note further that article 1121 of the French Civil Code corresponds to article 1029 of the Quebec Civil Code and that, in the French doctrine and jurisprudence, the stipulation for the benefit of the third person in insurance policies is held to be valid and enforceable. May we quote from the *Pandectes françaises,* vbo *Assurances en général,* no. 361:

> Mais il va soi que l'assurance est valable s'il établi que le tiers a agi comme gérant d'affaires et pour le compte du principal intéressé.

Elle le serait également si elle était faite conformément à l'article 1121 C.C., c'est-à-dire, pour une personne stipulant à la fois, tant en son propre nom pour un risque personnel, qu'au nom du tiers exposé à un autre risque.

The second objection upheld by the Superior Court against the action of the appellant is only subsidiary. Indeed, it does not go to the merits of the claim. It is only to the effect that the action was brought prematurely. The point was not discussed by Bernier and Barclay JJ. because, in the view they took of the first question, it was unnecessary for them to pass upon this second one. Sir Mathias Tellier C.J., and Galipeault J., both rejected it; Hall J. alone approved the trial judge upon it.

The objection is the following: Subs. (5) of section B of the policy, after having provided that the company undertakes to indemnify, "en la même manière et aux mêmes conditions auxquelles l'assuré y a droit, d'après les présentes," the third persons described in the section, contains the following proviso:

pourvu toutefois que l'indemnité payable en vertu des présentes soit appliquée d'abord à la protection de l'assuré, et le reste, s'il en est, à la protection d'autres personnes y ayant droit en vertu des présentes et ce, en conformité aux instructions que l'assuré en donnera par écrit.

In this case, the "assuré," Rolland Hallé, has given no such written instructions; and it was argued on behalf of the respondent that the giving of these instructions was a condition precedent to its liability towards third persons under the policy, and that, failing those instructions, the rights of the appellant had not yet accrued.

But the proviso must be construed in light of the law of Quebec, as we understand it, in accordance with the views already expressed in our discussion of the first point raised in this appeal; and it must also be construed in light of the tenor and purport of the whole insurance policy envisaged from the viewpoint of that law.

From that standpoint, the insurance company has subscribed an absolute undertaking to pay the third persons coming under the description of the policy, in the events insured against for their benefit. The obligation so undertaken by the insurance company creates an independent right accruing to the third persons as soon as they have manifested their intention to avail themselves of it. That right, by force of art. 1029 C.C., is no longer subject to the will of the "assuré," Rolland Hallé, when once the third person has "signified his assent to it" (art. 1029 C.C.).

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Interpreted in that sense, the proviso comes into play only if there are concurrent claims for loss or liability either on behalf of the "assuré" and the other third persons or on behalf of several other third persons. It qualifies the obligations of the insurer and, as a consequence, the rights of the several insured persons, only as regards distribution of the amount payable. The text of the policy is quite clear: "pourvu, toutefois, que l'indemnité payable en vertu "des présentes soit appliquée etc." First, the indemnity must have become "payable"; and it is in the distribution of the money so payable that the proviso regulates that: 1st. The money shall be applied towards the "protection de l'assuré"; 2nd. The balance, "à la protection d'autres personnes y ayant droit en vertu des présentes."

The insurer is liable under the policy only up to a certain limited amount for each accident. The proviso declares how that amount is to be distributed if the limit of that liability be reached as a result of each accident. The contracting "assuré" is to be paid first. Then, the other person, out of the balance, if any. And if there are several other persons and they cannot all be paid out of the balance, the distribution is to be made "en conformité aux instructions que l'assuré en donnera par écrit."

That interpretation agrees with that of Chief Justice Tellier and of Mr. Justice Galipeault.

In this case, there was no occasion for written instructions on the part of Rolland Hallé, for the situation contemplated in the proviso did not arise.

But, moreover, Rolland Hallé was *mis-en-cause*. The *mise-en-cause* is resorted to either for the purpose of securing a judgment personally against the third party so called in, or

en déclaration de jugement commun, quand on ne le cite que pour voir dire qu'il y a chose jugés, à la fois, contre lui et contre le défendeur principal.

(Garsonnet, *Traité de Procédure*, 3e. édi., tome 3, p. 197, no. 574). The latter purpose was obviously the reason here for adding Rolland Hallé as a party. He has not raised a word of objection. He shall be bound by the judgment ordering that the indemnity be paid to his brother, Joseph Hallé. That consequence, in the premises, meets any purpose derived from the proviso with regard to written instructions.

Now, the policy further contains some statutory conditions; and one of them reads as follows:

Aucune action aux fins de recouvrer le montant d'une réclamation en raison de cette police ne pourra être intentée contre l'assureur à moins que les exigences ci-haut n'aient été observées et que telle action ne soit entamée après détermination du montant de la perte soit par un jugement contre l'assuré après audition du litige, soit par convention entre les parties avec le consentement écrit de l'assureur, et, de toute façon, aucune telle action ne pourra être intentée à moins qu'elle ne soit entamée avant l'expiration d'une année subséquemment.

When the action in warranty was brought by the appellant, no judgment had yet been recovered against him on the principal action, nor of course had any amount been determined by agreement with the written consent of the insurer. And the respondent, therefore, contends that, for this second reason, the action in warranty was premature.

It will be observed that the restriction put upon the right of the insured by the statutory condition, is that he may not bring an action to recover the amount of his claim under the policy, before the measure of his liability towards the victim has been determined by judgment or by agreement. The right to bring an action in warranty is not touched. Under the policy, the insurer is obliged

à indemniser en la même manière et aux mêmes conditions auxquelles l'assuré y a droit, d'après les présentes, toute personne etc.

That provision gave "toute personne" (and, therefore, Joseph Hallé) all the rights of Rolland Hallé. The words are most comprehensive and they are wide enough to include all the obligations enumerated in subsections 1, 2, 3 and 4 of section B. The respondent was, therefore, obliged to contest, on behalf of Joseph Hallé, the action brought against the latter by Louis Bourget, and to do so at its own costs. As the respondent refused to comply with that obligation, the appellant rightly brought the action in warranty to compel it to fulfil its undertaking.

As for the incidental demand, it was not probably necessary, for we think, as already stated, that the statutory condition above quoted does not prevent the insured from bringing the action in warranty at once—though, in practice, the occasion for it will rarely happen, because the insurer generally takes up the *instance* and contests the principal action in the name of the insured. However, the incidental demand appears to have been justified, in the circumstances; it was filed after judgment rendered in the principal action and it has been regarded in the provincial courts as a procedure rightly taken under paragraphs 2 and

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3 of art. 215 of the Code of Procedure. This is not a circumstance where this Court may be asked to interfere.

We have purposely avoided in these reasons to refer to the case of *Vandepitte* v. *Preferred Accident Insurance Corporation of New York* (1) expressly relied on by the trial judge and also, to a certain extent, by one of the learned judges forming the majority in the Court of King's Bench.

It will not be necessary to repeat that the courts ought always to be careful, even when the texts are apparently the same, in accepting as authority for a proposition of law under one system, a judgment rendered under a different system of jurisprudence.

As pointed out by the Honourable the Chief Justice of the province of Quebec in the present case:

> Le jugement du Comité Judiciaire du Conseil Privé de Sa Majesté, dans la cause *Vandepitte* (1) ne peut nullement être opposé au demandeur: d'abord parce que cette cause-là était bien différente de celle-ci, et ensuite parce qu'elle dépendait d'une loi différente de na nôtre.

With those remarks we fully and completely agree. The *Vandepitte* case (1) was decided under the *Insurance Act* of British Columbia. The statutory law and the general legal principles to be applied differed in most material respects. Even where certain language of the statutes or of the policies might in some respects have appeared to correspond with the language now in issue, it had to be interpreted and to be applied according to different conceptions of the legal doctrine. Moreover, in the *Vandepitte* case (1), the victim of the accident was himself suing the insurance company. Neither the insured nor his daughter (as third person) was asserting any right. We ought to repeat what was said in this Court *re Desrosiers* v. *The King* (2):

> This case affords an excellent illustration of the danger of treating English decisions as authorities in Quebec cases which do not depend upon doctrines derived from the English law.

The appeal ought to be allowed, and the action in warranty and the incidental demand should be maintained with costs throughout.

Appeal allowed with costs.

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

Solicitors for the respondent: *Dupré, De Billy, Prévost & Home.*

(1) [1933] A.C. 70.

(2) (1920) 60 S.C.R. 105, at 119.

WILLIAM S. MACPHEE AND ELMORE H. POINTER (PLAINTIFFS) ..... APPELLANTS;

AND

JEAN BOX, ELIZABETH BOX, TOM BOX, THE STERLING COLLIERIES CO. LTD. AND THE MINISTER OF NATURAL RESOURCES OF THE PROVINCE OF SASKATCHEWAN (ADDED BY ORDER OF COURT AT TRIAL) (DEFENDANTS) ..... RESPONDENTS.

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* Oct. 20.
1937
* April 21.

ON APPEAL FROM THE COURT OF APPEAL OF SASKATCHEWAN

Mineral claims—Lapse of, through failure of recorded owner to do work required—Same person subsequently staking them on behalf, and having them recorded in names, of others (defendants)—Others (plaintiffs) subsequently staking them, refused a record, and bringing action attacking validity of said former staking and recording as not done according to regulations—Right or status of latter (plaintiffs) to do so—Regulations for the Disposal of Quartz Mining Claims, approved by order in council (Dom.) dated January 19, 1929, and made applicable by order in council (Sask.) dated November 27, 1931.

The defendant T.B. had become the recorded owner of six mineral claims near Beaver Lodge, Saskatchewan. In 1933 the claims lapsed through T.B. failing to perform the work required under the mining regulations (Regulations for the Disposal of Quartz Mining Claims, approved by order in council (Dom.) dated 19th January, 1929, and made applicable by order in council (Sask.) dated 27th November, 1931). In August, 1934, T.B. staked three of the claims on behalf of the defendant J.B. and the other three on behalf of the defendant E.B., and had them recorded in the names of J.B. and E.B. respectively. Subsequently the plaintiff M., personally and on behalf of the plaintiff P., purported to stake the same claims, believing that said staking as done by T.B. was not in accordance with the regulations. He applied for a record of the claims, but this was refused because the claims were already recorded as aforesaid

The affidavit in form "A," required on an application to record a claim, contains the statement "that to the best of my knowledge and belief the ground * * * is unoccupied and unrecorded by any other person as a mineral claim." M. varied this by "excepting" J.B. or E.B. respectively and inserting: "That I claim that the staking and recording by [J.B. or E.B. respectively] of said ground was illegal and that the said ground was open for staking at the time that I staked the same."

Plaintiffs brought action for a declaration that the alleged claims of J.B. and E.B. to the claims were null and void and that plaintiffs were the holders or owners of the claims and were entitled to have records in their names, and other relief. MacDonald J. dismissed the action on the ground that plaintiffs had no status to maintain it ([1935] 3 W.W.R. 226). An appeal was dismissed by the Court of Appeal

* PRESENT:—Duff C.J. and Rinfret, Crocket, Kerwin and Hudson JJ.

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for Saskatchewan ([1936] 2 W.W.R. 129). Plaintiffs appealed to this Court.

Held: Plaintiffs' appeal should be dismissed.

The case was not one contemplated by ss. 7 and 8 of the regulations (requiring certain procedure and permission as to relocating). Ss. 7 and 8 contemplate a case where, a claim having been abandoned or forfeited (and assuming, but not deciding, that this embraces a case in which the claim has lapsed by reason of failure to perform the representation work), the owner wishes to relocate the claim for himself. The question whether or not in point of fact T.B. was not acting on behalf of J.B. and E.B. but under some understanding, express or tacit, was making an unlawful use of their licences for the purpose of acquiring the ground for himself, was not a question upon which it was competent to the mining recorder to enter.

The claims having been staked out and the mining recorder having accepted the staking as *bona fide* and sufficient, there were records of them in the names of J.B. and E.B. *ex facie* valid which the mining recorder could not treat as nullities. Plaintiffs could not, when they staked their claims, make the affidavit in form "A," and, such being the case, they could not lawfully either stake out the ground as a mineral claim or obtain a record of it as such.

Osborne v. *Morgan*, 13 App. Cas. 227, *Hartley* v. *Matson*, 32 Can. S.C.R. 644, and other cases discussed. To what extent the principle of those decisions is applicable for the protection of a holder of a record of a mineral claim under the regulations now in question, it was not necessary to determine for the purposes of the present appeal. This Court did not endorse, or decide on, the view that the existence of a record in itself precludes a licensee from all remedy against the holder of the record where the facts of the particular case bring it within a class of cases in which the regulations expressly or by necessary implication enact that the ground within the limits of the claim described in the record is open to location generally by the holders of miners' licences.

APPEAL by the plaintiffs from the judgment of the Court of Appeal for Saskatchewan (1) dismissing their appeal from the judgment of MacDonald J. (2) dismissing their action.

The action was brought for a declaration that alleged claims of the defendants Jean Box and Elizabeth Box to certain mineral claims in the vicinity of Beaver Lodge, Saskatchewan, were null and void and for a declaration that the plaintiffs were the holders or owners of said mineral claims and were entitled to have records in their names thereof, and other relief.

In the year 1930 the claims (six in number) were recorded in the names of certain persons who subsequently trans-

(1) [1936] 2 W.W.R. 129; [1936] 3 D.L.R. 286.

(2) [1935] 3 W.W.R. 326.

ferred or assigned them to the defendant Tom Box who registered the transfers and became the recorded owner of the claims. In November, 1933, the claims lapsed through Box failing to perform the work required to be done under the mining regulations (Regulations for the Disposal of Quartz Mining Claims, approved by Dominion order in council dated 19th January, 1929, and made applicable by Provincial order in council dated 27th November, 1931).

In August, 1934, Box purported to restake three of the claims on behalf of the defendant Jean Box and the other three on behalf of the defendant Elizabeth Box. In so doing he made use of the stakes previously placed, placing the new inscriptions below the inscriptions already there; he did very little reblazing and relied upon the old lines. He then made application for records of such claims, and orally made known to the acting mining recorder just what he had done by way of staking and marking. The acting recorder recorded the claims in the names of said Jean Box and Elizabeth Box respectively on October 15, 1934.

Subsequently, in May, 1935, the plaintiff MacPhee, personally and on behalf of the plaintiff Pointer, purported to stake the same mineral claims. He had knowledge of what had been done by Box, but thought that it was contrary to the mining regulations and that the records issued were invalid and void. He later applied for a record of said mineral claims, which application was refused because the claims were already recorded in the names of Jean Box and Elizabeth Box as aforesaid.

Paragraph 9 of the affidavit in form "A," required to accompany an application, is as follows:

> 9. That to the best of my knowledge and belief the ground comprised within the boundaries of the said claim is unoccupied and unrecorded by any other person as a mineral claim; that it is not occupied by any building or any land falling within the curtilage of any dwelling house or any orchard, or any land under cultivation or any land reserved from entry under the Quartz Mining Regulations.

The affidavit of MacPhee varied this by inserting after the words "is unoccupied and unrecorded by any other person" the words "excepting Jean Box" (or "excepting E. Box") and by adding at the end of the paragraph the words: "That I claim that the staking and recording by said Jean Box [or "by said E. Box"] of said ground was illegal and that the said ground was open for staking at the time that I staked the same."

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The plaintiffs then brought the present action. They made the Sterling Collieries Co. Ltd. a party defendant on the ground that, by virtue of an agreement with the defendant Tom Box dated December 14, 1934, and subsequently recorded in the Department of Natural Resources, the company claimed an interest in the claims.

Besides alleging that the mineral claims recorded in the names of the defendants Jean Box and Elizabeth Box were invalid and null and void by reason of non-compliance with the mining regulations in the staking thereof, the plaintiffs alleged in the alternative that the defendant Tom Box relocated the mineral claims by and on behalf of himself and that such relocation was invalid and null and void by reason of his failing to comply with the regulations as to staking, etc., and also by reason of his failing to obtain permission from the mining recorder to relocate and also failing prior to so relocating to post a notice of the abandonment or forfeiture of the claims and also failing to file a statutory declaration of posting notice.

Sections 7, 8, 53, and (in part) 65, of the regulations, read as follows:

7. If a mineral claim has been abandoned or forfeited by any person, the mining recorder may, in his discretion, permit such person to relocate such mineral claim or any part thereof; Provided that such relocation shall not prejudice or interfere with the rights or interests of others.

8. No claim shall be so relocated by or on behalf of the former holder thereof within thirty days of its being so abandoned or forfeited, nor until after notice of such abandonment or forfeiture has been posted up for at least a week in a conspicuous place on the claim and in the office of the mining recorder, nor until a statutory declaration has been filed with the mining recorder that the notice has been so posted.

* * *

53. If, however, the amount of work is not done and duly recorded, as prescribed in section 52, the claim shall, at the expiration of the period of one month provided for, lapse, and shall forthwith be open to relocation under these regulations, without any declaration of cancellation or forfeiture on the part of the Crown, subject, however, to the provisions of section 65 of these regulations.

* * *

65. Where forfeiture or loss of rights has occurred,—

* * *

(*b*) by reason of failure to submit evidence that the prescribed work has been performed, as provided in subclause 4 of section 52:

* * *

the Minister may, within three months after such default has occurred, upon such terms as he may deem just, make an order relieving the person in default from such forfeiture or loss of rights, and upon compliance with the terms, if any, so imposed, the interest or rights forfeited or lost shall be revested in the person so relieved, * * *

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The trial Judge, MacDonald J., dismissed the action, on the ground that the plaintiffs had no status to maintain it (1). An appeal to the Court of Appeal for Saskatchewan was dismissed (2).

By the judgment now reported, the plaintiffs' appeal to the Supreme Court of Canada was dismissed with costs.

O. M. Biggar K.C. for the appellants.

S. W. Field K.C. for the respondents.

The judgment of the court was delivered by

DUFF C.J.—This appeal presents questions of no little difficulty. I have reached the conclusion that the appeal must be dismissed; and that conclusion rests upon a rather limited ground which can be explained without much elaboration. I prefer to express no opinion upon some questions suggested by the judgments in the Saskatchewan courts which, in the view I take, it is unnecessary to decide.

The purpose of the Regulations under examination is to regulate the location of mineral claims upon lands which, by the provisions of the Regulations, may be "located for such purposes." One of the cardinal features of them is found in sections 12, 13 and 14 which provide for the grant of miners' licences; and which make it perfectly clear that no person who is not and has not been the holder of a miner's licence can lawfully prospect for minerals upon the lands affected by the Regulations, or acquire any interest of any description in any mineral claim for which a lease or a patent "has not been issued."

Section 65 authorizes the Minister to relieve a person who has suffered loss of rights or forfeiture by reason of the failure to renew his miner's licence; but there is no authority under the Regulations, and, so far as I know, no authority derived from any source, vested either in the Minister or in any official to recognize any person who has never held a miner's licence as the occupant of mineral lands governed by the Regulations; or, indeed, to recognize anybody as entitled to mine upon lands governed by the Regulations except in pursuance of the Regulations themselves. The holder of a miner's licence is entitled, subject to s. 16, to enter, locate, prospect and mine upon

(1) [1935] 3 W.W.R. 326.

(2) [1936] 2 W.W.R. 129; [1936] 3 D.L.R. 286.

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"vacant Dominion lands" for minerals defined by the Regulations, and also to mine for gold and silver on land in respect of which the right to mine for such minerals has been reserved to the Crown. By section 16, the licensee is excluded from certain defined classes of lands, which classes include "any land lawfully occupied for mining purposes."

There are some enactments in the Regulations, which it is convenient to notice at the outset, that provide, either expressly or by necessary implication, for cases in which lands that have been lawfully occupied for mining purposes under the Regulations cease to be lands within that category, and become subject to location under the provisions contained in sections 18 to 36 inclusive. By section 37, for example, a claim which has not been recorded within the appropriate period prescribed shall be deemed to be abandoned or forfeited without any declaration of abandonment or forfeiture on the part of the Crown.

Section 49 provides for the abandonment of a mineral claim by the holder, which is effected by giving notice in writing to the Mining Recorder.

By section 53, where the holder of a mineral claim has failed within the prescribed periods to do the work required by section 52 upon his claim and to file evidence of it with the Recorder, the claim lapses and becomes "forthwith * * * open to relocation under" the Regulations "without any declaration of cancellation or forfeiture on the part of the Crown."

By section 60, failure to make application for a certificate of improvements within the prescribed period results in the lapsing of the claim as under section 53, subject always to the authority of the Minister to grant relief under section 65.

Section 37 deals with the recording of mineral claims and provides that application for a record shall be made within fifteen days after the "claim has been staked out"; or a more extended period according to the circumstances as defined by the section. This section contains a vitally important provision which is to the effect that the application shall be made in "the prescribed form."

By section 40, no claim can be recorded unless the application is accompanied by an affidavit or solemn declaration

in form A of the Regulations. Form A includes, in paragraph 9, this affirmation:

> That to the best of my knowledge and belief the ground comprised within the boundaries of the said claim is unoccupied and unrecorded by any other person as a mineral claim; that it is not occupied by any building or any land falling within the curtilage of any dwelling house or any orchard, or any land under cultivation or any land reserved from entry under the Quartz Mining Regulations.

It is plain, when sections 37 and 40 are read in light of the terms of form A, that the Regulations do not contemplate the granting of an application for a record where the applicant knows he cannot truly affirm that

> the ground comprised within * * * [his] claim is unoccupied and unrecorded by any other person as a mineral claim.

This language is very sweeping and in *Wekusko Mines Ltd.* v. *May* (1) the Manitoba Court of Appeal seems to have thought that where a claim has lapsed and, by section 53, has become "forthwith" open to "relocation" under the Regulations, the ground cannot, if the former holder of the lapsed claim remains in possession, be located and recorded as a mineral claim by another licensee, in consequence of the fact that such licensee cannot, in such circumstances, truly make this affirmation; and, if the owner of the lapsed claim remains in possession with the intention of applying within three months for relief under section 65, this view is, perhaps, not without plausibility, although not easy to reconcile with the explicit words of section 53.

By section 49,

> * * * Upon any forfeiture, abandonment, or loss of rights in a mineral claim, the mining recorder shall forthwith enter a note thereof, with the date of entry, upon the record of the claim, and shall mark the claim "lapsed."

It is unnecessary for the purposes of this case to consider whether we should be forced to hold, in virtue of the terms of form A and the provisions of sections 37 and 40, that a claim which has been staked out, and is still, to the knowledge of the applicant, in the physical occupation of the locator, can be located or recorded as a mineral claim by another licensee in circumstances in which the Regulations, either expressly or by necessary implication, declare that the claim first located never came into existence as a mineral claim (where, for example, the locator has never held a miner's licence); or has ceased to exist in the eye of

(1) [1926] 1 W.W.R. 225.

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the law by reason, for example, of failure to obtain a record within the period prescribed by s. 37, or by reason of failure to do and file evidence of the work required by section 52. It is not necessary to enter upon these questions because, in the view I take of sections 7 and 8, the claims now in question having been "staked out," and the Mining Recorder having accepted the staking as *bona fide* and sufficient, there were records of them in the names of Elizabeth and Jean Box *ex facie* valid which the Mining Recorder could not treat as nullities.

The effect of sections 7 and 8 is, I think, when they are read together, this: where a claim has been forfeited or abandoned, the owner of the claim is not entitled to relocate the ground embraced within the claim for himself, either personally, or by the agency of another. Section 7 makes it quite clear that the cases contemplated are such cases. By that section the permission authorized is a permission given to the person who has lost a claim by abandonment or forfeiture, not a permission given to a licensee as agent of somebody else.

It follows, therefore, that the locations in the name of Elizabeth Box and Jean Box were valid locations on their face. The question whether or not in point of fact Tom Box was not acting on behalf of these persons but under some understanding, express or tacit, was making an unlawful use of their licences for the purpose of acquiring the ground for himself, was not a question upon which it was competent to the Mining Recorder to enter. He had no means at his command of investigating such a question and the Regulations give him no authority to make any such investigation.

Some elucidation may, perhaps, be useful at this point. The holder of a miner's licence, by section 15, is given the right "to enter, locate, prospect and mine," as already observed, "upon any vacant Dominion lands," but that section makes it quite clear that this right of the licensee must be exercised by him "personally, but not through another" except in the cases provided for by section 20. Section 20, in so far as pertinent, is in these words:

> 20. A licensee may, in any one licence year in any one mining division, stake out and apply for:—
>
> (*a*) Not more than three mineral claims on his own licence;
>
> (*b*) Not more than three claims each for not more than two other licensees, being nine claims in all;

By section 26, it is the duty of the locator to place upon "post No. 1" not only his own name and the number of his licence as the person staking the claim, but also, where the claim is staked on behalf of another licensee, the name of such other licensee; and, by section 37, the licensee who stakes a claim on behalf of another is authorized to make application for a record of such claim, and it is the duty of the applicant, when the application is made on behalf of another, at the time of the application, to produce, not only his own licence, but also the licence of the licensee on whose behalf the application was made. And it is the duty of the recorder to endorse upon this last mentioned licence, and not upon the licence of the staker, a note in writing of the record of claim; and no such record is "complete or effective until such endorsement has been made."

In paragraph 1 of form A the applicant gives the number and date of his own licence and in paragraph 11 he gives the residence, the post office address, the number and date and the place of issue of the licence of the person in whose name the claim is to be recorded. From these provisions of the Regulations and paragraphs 2 and 11 of form A, it is plain that section 20 contemplates the use by one licensee of the licence of another; and that the first mentioned licensee is acting on behalf of the second.

Now, there is a general principle of law stated very clearly and forcibly by Sir George Jessel in *In re Hallett's Estate* (1) which comes into play here. The passage is in these words:

> Now, first upon principle, nothing can be better settled, either in our own law, or, I suppose, the law of all civilized countries, than this, that where a man does an act which may be rightfully performed, he cannot say that that act was intentionally and in fact done wrongly. A man who has a right of entry cannot say he committed a trespass in entering. A man who sells the goods of another as agent for the owner cannot prevent the owner adopting the sale, and deny that he acted as agent for the owner. It runs throughout our law, and we are familiar with numerous instances in the law of real property. A man who grants a lease believing he has sufficient estate to grant it, although it turns out that he has not, but has a power which enables him to grant it, is not allowed to say he did not grant it under the power. Wherever it can be done rightfully, he is not allowed to say, against the person entitled to the property or the right, that he has done it wrongfully. That is the universal law.

(1) (1880) L.R. 13 Ch. D. 696, at 727.

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Therefore, Tom Box, having, in recording the claims in question in the names of Elizabeth and Jean Box, professed to act as their agent, would not be permitted to aver as against them that he, and not they, was the owner of the claims recorded in their names. In an adverse proceeding by the Crown, or by any other party having a status to take such a proceeding, based upon allegations that Tom Box was not acting for his wife and daughter but for himself or some other person, it would be necessary to establish in fact that there was some arrangement, express or tacit, between Elizabeth Box, Jean Box and Tom Box and the alleged beneficial owner other than Tom Box (if there should be such) which had the effect of making Tom Box's use of the miners' licences of his wife and daughter illegal. That would, probably, be a very difficult proposition to establish.

The case in this respect is very different from the case in which a claim is staked out for a person who is not the holder of a miner's licence. That is a matter upon which it is the plain duty of the Mining Recorder to satisfy himself in performing his duties under section 37; the record, by the explicit terms of the section, is incomplete until the licence is produced and the proper endorsements are made upon it. Nor is it at all like the case in which a claim has lapsed by reason of the failure of the owner of the claim to do and record his representation work. That again is a matter with which the Mining Recorder is officially concerned because, as above pointed out, by sections 49 and 53 it is his duty in such a case forthwith to mark the claim "lapsed."

In the circumstances before us, it seems to me that the appellants could not, when they staked their claims, make the affidavit in form A and, such being the case, they could not lawfully either stake out the ground as a mineral claim, or obtain a record of it as such.

I am assuming, I should observe, for the purposes of this discussion that section 7 embraces a case in which the claims have lapsed by reason of failure to perform the representation work. It must be understood, however, that I am not deciding the point or expressing an opinion upon it. I assume in favour of the appellants that such is the case; and on that assumption Tom Box's procedure on its face

and that of the Mining Recorder were not obnoxious to the enactments of sections 7 and 8 for the reasons I have mentioned.

The respondents rely, and the Saskatchewan courts largely, if not entirely, proceeded, upon the authority of *Osborne* v. *Morgan* (1); *Hartley* v. *Matson* (2); *St. Laurent* v. *Mercier* (3), and *Seguin* v. *Boyle* (4). I am not going to express any decided opinion upon the question whether, when a record has been obtained ostensibly under these regulations, there is any general rule by which the holder of the record is protected under a principle analogous to that which was applied in these cases. It is unnecessary to pass upon this point for the purposes of this appeal; but one or two observations upon these decisions may not be entirely valueless.

As regards *St. Laurent* v. *Mercier* (5), one is not entitled to assume (it should be noticed) that the reasons given by Mr. Justice Mills in his judgment were the grounds upon which the Chief Justice and Mr. Justice Sedgwick proceeded in deciding that the appeal should be dismissed. In that case, when Mercier received his renewal grant the original Hill claim had lapsed and the lands were vacant. As the present Chief Justice of British Columbia, then Martin J., pointed out in his judgment in *Voight* v. *Groves* (6), the Privy Council held in *Chappelle* v. *The King* (7) that the placer miner (that is to say, Mercier)

> on renewal holds under an annual grant in substitution for, but not in continuation of, his original grant.

The Chief Justice and Sedgwick J. may very well have taken the view that the invalidity of Mercier's original grant did not affect the validity of the renewal grant and, besides, counsel for the respondent contended that on the facts the ground was open for location in 1899 when Mercier staked out his claim. In truth, *St. Laurent* v. *Mercier* (5) ought never to have been reported. Anybody familiar with the process of reporting decisions of this Court in those days will readily realize that in the circumstances the headnote cannot safely be relied upon.

(1) (1888) 13 App. Cas. 227.
(2) (1902) 32 Can. S.C.R. 644.
(3) (1903) 33 Can. S.C.R. 314.
(4) [1922] 1 A.C. 462.
(5) (1903) 33 Can. S.C.R. 314.
(6) (1906) Martin's Mining Cases, Vol. 2, 357 at 361.
(7) [1904] A.C. 127, at 134-135.

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In *Osborne* v. *Morgan* (1) (*supra*) the Privy Council held two things: first, that no land within the boundaries of a lease for any purpose other than pastoral purposes fell within the category of "Crown lands"; and, consequently, that the rights conferred by "miners' rights" did not affect such land; second, they held also that the lease, if impeachable at the suit of the Crown, was, even in such a proceeding, voidable only, and not void.

In *Hartley* v. *Matson* (2), this Court had to consider a case in which an hydraulic mining lease had been granted to the defendants by the Minister of the Interior, and the decision was that holders of free miners' licences could not, by "staking claims" within the boundaries of the lease, acquire a right to impeach the lease upon the ground that it had been obtained by misrepresentation; a sufficiently obvious conclusion when the regulations governing the granting of such leases are considered. That such cases as *Osborne* v. *Morgan* (1) and *Hartley* v. *Matson* (2) are generally applicable in protection of the person who has obtained a record from a mining recorder professing to act under the Regulations before us is a proposition not obviously deducible from these decisions. *Seguin* v. *Boyle* (3), in so far as pertinent, involved the same question as that raised by *Hartley* v. *Matson* (2).

It is perfectly plain, of course, that if the holder of a miner's licence has staked a claim on lands open for location in complete conformity with the requirements of sections 18 to 36, the Mining Recorder has no discretion to refuse his application for a record when it is made within the proper time. The licensee in such circumstances has a statutory right to a record. On the other hand, the Mining Recorder has no discretion to dispense with statutory prerequisites generally. He has no authority to grant a record in response to an application by a person who by the Regulations is disqualified from locating mineral claims generally, or locating a mineral claim upon the ground to which the application relates.

In *Osborne* v. *Morgan* (1), the lessee held under a formal lease granted by the Governor of the colony in the name of Her Majesty, and the regulations provided the machin-

(1) (1888) 13 App. Cas. 227. (2) (1902) 32 Can. S.C.R. 644.
(3) [1922] 1 A.C. 462.

ery by which lands in *de facto* occupation under the Crown, but liable to forfeiture, could be purged of any such occupation and thrown open to location by free miners.

The regulations under consideration in *Hartley* v. *Matson* (1) affecting the granting of hydraulic leases vested a discretionary authority in the Minister of the Interior whose duty it was to satisfy himself that the provisions of the law had been complied with. The lessee held under a formal lease and by the regulations he had the exclusive right to enter upon and occupy the leased premises for the purpose of mining thereon with the exception of quartz mining and, subject to the right of any free miner to enter upon the premises to locate and mine for minerals in veins and lodes. Free miners were excluded from mining in such location by the express terms of the regulations except in pursuit of quartz mining. Such a formal lease, if obtained by misrepresentation, might have been voidable at the suit of the Crown, but it is difficult to understand on what principle the holder of a free miner's licence, which could be obtained by anybody on payment of the specified fee, could attack the validity of the lease as a hindrance to the exercise of the rights of such licence holders in placer mining. So long as the lease subsisted, licence holders were excluded from placer mining within the leased premises and no such licence holder had any title to maintain an action in the interests of all persons who might hold a free miner's licence or who might obtain one on the payment of the specified licence fee.

To what extent the principle of these decisions is applicable for the protection of a holder of a record of a mineral claim under these Regulations it is not necessary to determine for the purposes of the present appeal; and I am not endorsing (I wish to make it quite clear) the view that the existence of a record in itself precludes a licensee from all remedy against the holder of the record where the facts of the particular case bring it within a class of cases in which the Regulations expressly or by necessary implication enact that the ground within the limits of the claim described in the record is open to location generally by the holders of miners' licences. While I am not endorsing that view, I am giving no decision upon the point involved.

(1) (1902) 32 Can. S.C.R. 644.

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It is, perhaps, advisable to add that, although these Regulations were originally based upon the British Columbia *Mineral Act* of 1896, the provisions for recording mineral claims in their present form differ in several material respects from the corresponding provisions of British Columbia statutes upon which the Regulations were originally founded. Under the B.C. Regulations the duty of the free miner who has located a claim is to record it within the time specified. Under these Regulations, his duty is to apply for a record. Under the B.C. statutes, no such affirmation as that contained in paragraph 9 of form A is required; and it may be added that the duty of passing on the *bona fides* and sufficiency of the locator's proceedings in staking his claim by these Regulations devolves, within rather broadly defined limits, upon the Mining Recorder, while under the B.C. statutes it devolves upon the courts of law. Moreover, the B.C. statute contains no provision corresponding to section 65.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *MacPherson & Leslie.*

Solicitors for the respondents: *MacKenzie, Thom, Bastedo, Ward & McDougall.*

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* May 6, 7.
* June 1.

IMPERIAL TOBACCO COMPANY OF CANADA LTD. AND WM. WRIGLEY JR. COMPANY LTD. (PLAINTIFFS) ... } APPELLANTS;

AND

ROCK CITY TOBACCO COMPANY LTD. (DEFENDANT) ..... } RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Patent—Validity—Subject-matter—Prior art.

Plaintiffs sued because of alleged infringement of two patents, relating to means for conveniently removing wrappers (particularly of cellophane) from small packages of such articles as cigarettes and chewing gum, the alleged invention consisting in the combination of the wrapping material and a tearing strip or ribbon of the same material, though in a different colour, affixed to the wrapper, and a tab or tongue com-

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

posed of a little piece of the wrapper and ribbon, the effect of the arrangement being that when the tab is grasped the wrapper proper is readily torn and may conveniently be removed from the package.

Held: The patents were invalid for lack of subject-matter—the general idea of the alleged invention was old and, as to the means employed, it was reasonably clear that a person competently skilled in the art of devising wrappers for packages to be placed on the market for sale and faced with the problem presented could hardly fail, on reverting to the devices and methods employed in the prior art and publications, to hit upon the use of the ribbon and the tab; any difference that might exist between the patents sued upon and the disclosure in a certain prior (British) patent (Boyd) particularly referred to, was so trifling as to be of no substance in a patent sense.

Judgment of Maclean, J., President of the Exchequer Court of Canada, [1936] Ex. C.R. 229, dismissing the action, affirmed in the result.

APPEAL by the plaintiffs from the judgment of Maclean J., President of the Exchequer Court of Canada (1), dismissing the action, which was brought for an injunction, damages, etc., by reason of alleged infringement of two patents. The material facts of the case are sufficiently stated in the judgment now reported. The appeal to this Court was dismissed with costs.

R. S. Smart K.C. for the appellants.

A. Taschereau K.C. and *J. T. Richard* for the respondent.

The judgment of the court was delivered by

DAVIS J.—This is an appeal from the judgment of the President of the Exchequer Court of Canada (1) which dismissed the appellants' action against the respondent for infringement of two patents, one no. 349,299, issued to the appellant Imperial Tobacco Company of Canada, Limited, April 2, 1935, on the application of one Van Sickels, and the other, no. 349,983, issued to the appellant Wm. Wrigley Jr. Company Limited, April 30, 1935, on the application of one Lindsey and under which patent the appellant Imperial Tobacco Company holds an exclusive licence in respect of the sale of tobacco in any form.

Both patents provide means for conveniently removing wrappers from small packages of such articles as cigarettes and chewing gum. There is a very slight difference between the patents. The alleged invention consists in the combination of the wrapping material and a tearing strip or ribbon of the same material, though in a different colour,

(1) [1936] Ex. C.R. 229; [1937] 2 D.L.R. 11.

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affixed to the wrapper, and a tab or tongue composed of a little piece of the wrapper and ribbon. In the Lindsey patent the tab projects from one side of the package. In the Van Sickels patent the tab, instead or projecting, is formed by two small slits cut into the wrapper, one on each side of the ribbon. In both patents the effect of the arrangement is that when the tab is grasped the wrapper proper is readily torn and may conveniently be removed from the package.

For the purposes of this litigation counsel for the appellants treats the patents as relating to small packages that are wrapped in cellophane instead of in paper. Cellophane, so far as the record shows, is a trade name for a grainless, transparent, moisture-proof material made of regenerated cellulose that has become of popular use as a wrapping material. This material exhibits great tenacity against rupture, but, when once a break has been made in it, it tears very readily, though in all directions. A small package of chewing gum or cigarettes that has been wrapped in cellophane and sealed offers considerable resistance to any effort of the fingers to open it, and the patents in question are alleged to disclose a new and useful device for assisting in the breaking open of such a package.

The respondent denies the validity of the patents upon the ground of lack of subject-matter and upon the ground of anticipation and alleges that in any event it has not infringed. Its cigarettes are sold in small packages wrapped in cellophane with a ribbon tab flush with the outer edge and with a slit in the wrapper along the edge of the ribbon. In the view we take of the appeal, it will be unnecessary for us to consider the question of infringement.

The appellants support the patents upon the ground of combination—the combination of the cellophane wrapper, the ribbon and the tab. Considering the patents as if they were limited in their claims to the use of cellophane as the wrapping material, which is the basis upon which the action has been fought out (although the claims are broad enough to cover a wrapper of any readily tearable material), the combination has artistic advantage and undoubtedly is attractive to purchasers of chewing gum and cigarettes. Packages wrapped according to the Lindsey patent were not put on the market in Canada by the Wrigley Company

until July, 1934, and by the time of the trial of this action in March, 1936, the company had wrapped in Canada over eighty millions of packages in this manner, and the Imperial Tobacco Company had up to the date of the trial used two hundred and sixteen millions of wrappers of the type shown in the Van Sickels patent. Though no evidence was directed to show any increase in the sales of these well-known products attributable to the use of the new wrapper, it may be assumed that there was some commercial advantage in the adoption of the idea.

The result sought to be attained through the combination is the convenient removal of the cellophane wrapper. If, however, the use of the ribbon is eliminated, the learned trial judge has assumed, and the evidence rather points to the conclusion, that the use of the tab alone would enable one to rupture the wrapper. Then the problem to which the alleged invention is addressed, viz., to make use of cellophane as a wrapper in such a manner as to avoid the difficulty of rupturing it with the fingers, with consequent irritation and annoyance to the customer, ceases to be a problem. The rupture having been effected, the wrapper can easily be removed with the fingers. In answer to this, it is said that the presence of the ribbon enables one to tear the wrapper in a straight line. This unquestionably is a neater method of unwrapping a package but if it be the sole advantage to be derived from the combination of the ribbon with the tab, as distinguished from the use of the tab alone which is not claimed as invention in the patents sued upon and was admittedly old, it is difficult (since, as we shall proceed to point out, the general idea of the alleged invention was not new) to regard the combination of the ribbon and the tab as producing an improved result of sufficient substance to establish invention.

However that may be, the general idea of the appellants, it is admitted, does not differ from that exemplified by the old, well-known method of tearing open a package of cigarettes wrapped in paper by the use of a string attached to the inside of the paper wrapper with a loose end projecting from it. Then, as to the means employed, it would appear to be reasonably clear that a person who was competently skilled in the art of devising wrappers for packages to be placed on the market for sale, and who was confronted

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with the problem that the witness Thomas says presented itself to the patentees, could hardly fail, on reverting to the devices and methods employed in the prior art and to the publications disclosed in the exhibits, to hit upon the use of the ribbon and the tab as providing an easy solution for that problem. Reference need only be made to the Boyd patent (British no. 8873—1901). That was an improvement in wrappers. Boyd used "a tape or ribbon of any suitable material, one end of which may or may not extend slightly beyond the end of the sheet" of paper or of other material suitable for wrapping. The tape or ribbon was by means of an adhesive sealed to the wrapper.

> Before covers or wrappers are put round articles to be protected a slit or notch should be made on them on each side of the end of the tape or ribbon unless such tape or ribbon extends slightly beyond one end of the covers or wrappers * * * This enables any one to take hold of the tape or ribbon and by pulling it to open covers or wrappers instantly without the slightest difficulty and without injury to goods covered.

But it is contended by counsel for the appellants that the evidence establishes that the idea of the combination claimed was only hit upon after investigation and experiment extending over a year. Neither of the inventors was called as a witness and Thomas, the sole witness who was called in support of this allegation of fact, had, apparently, as the learned trial judge thought, no personal knowledge of any such investigations or experiments. We agree with the learned trial judge in his conclusion that the evidence adduced by the appellants upon this point is not satisfactory.

If the patents sued upon are not the identical thing disclosed in the Boyd patent, the difference is so trifling as to be of no substance in a patent sense.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Smart & Biggar.*

Solicitor for the respondent: *J. T. Richard.*

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*April 28, 29.
*June 1.

IN THE MATTER OF A REFERENCE TO THE SUPREME COURT OF NOVA SCOTIA FOR HEARING AND CONSIDERATION UNDER CHAPTER 226 OF THE REVISED STATUTES OF NOVA SCOTIA, 1923, OF THE MATTER OF THE CLAIM OF THE PROVINCIAL TREASURER OF NOVA SCOTIA THAT CERTAIN FINES OUGHT TO BE PAID OVER TO HIM UNDER SECTION 1036 OF THE CRIMINAL CODE.

THE ATTORNEY-GENERAL OF NOVA SCOTIA ..... APPELLANT;

AND

THE ATTORNEY-GENERAL OF CANADA ..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA IN BANCO

Criminal law—Constitutional law—Application of fines—Whether payable to the Province or to the Dominion—Cr. Code, s. 1036—Proceeding instituted at the instance of a Department of the Government of Canada in which that Government "bears the cost of prosecution" (exception (b) in s. 1036 (1), Cr. Code).

The question was whether certain fines in question should be paid to the Treasurer of the Province of Nova Scotia or to the Minister of Finance for Canada.

An information was laid at Halifax, Nova Scotia, at the instance of the Department of National Revenue of the Government of Canada, against certain persons as having conspired to commit specified indictable offences against the *Excise Act* and the *Customs Act*, and contrary to s. 573 of the *Criminal Code*.

The accused were, on a preliminary inquiry at Halifax, committed for trial, were subsequently admitted to bail, later they surrendered to the gaol keeper, they were granted writs of *habeas corpus* and *recipias corpus* to bring them before the stipendiary magistrate in and for the City of Halifax, before whom they were brought and charged, they consented to be tried by him under Part XVI of the *Criminal Code*, pleaded guilty, were convicted and adjudged to be imprisoned and to pay the fines now in question, aggregating $16,000, which were paid to the treasurer of the City of Halifax.

Counsel for the informant, on instructions of the Department of National Revenue, appeared at the preliminary inquiry, on the applications for bail and for writs of *habeas corpus*, etc., and at the trial. The prosecuting officer for the County of Halifax, or his assistant, appeared on behalf of the Attorney-General of Nova Scotia on the same proceedings except the preliminary inquiry.

The Province or the Municipality of the County of Halifax made no disbursements. The Department of National Revenue paid direct to the parties concerned the fees of informant's counsel, costs of stenogra-

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pher's notes, and other costs, and fees of witnesses for the prosecution and fees and allowances of the justice of the peace on the preliminary inquiry. Witnesses' fees or the justice's fees and allowances were never certified to be correct nor produced or presented to the treasurer of the municipality in manner prescribed under *The Costs and Fees Act*, R.S.N.S. 1923, c. 252 (which provides for payment thereof) and no claim for fees by witnesses or the justice was made to the treasurer of the municipality. The Dominion Government did not pay for the services of the said prosecuting officer (or his assistant) or of the stipendiary magistrate (who each receive remuneration annually from the Government of Nova Scotia or the municipality).

Held: The fines in question were imposed in a proceeding instituted at the instance of the Government of Canada or of a department thereof, in which that Government bore the cost of prosecution, within the meaning of exception (*b*) in s. 1036 (1) of the *Criminal Code*, and were payable to the Minister of Finance for Canada.

Judgment of the Supreme Court of Nova Scotia *in banco*, 11 M.P.R. 335, affirmed on above ground.

Per Duff C.J., Rinfret, Kerwin and Hudson JJ.: The words "in which that Government bears the cost of prosecution" in said exception (*b*) in s. 1036 (1) do not relate to what may take place in a particular prosecution; they connote something broader than the mere casual occurrence of the payment of the costs in an individual case; they imply a consistent course of action sanctioned by law or by custom. The existence of *The Costs and Fees Act* of Nova Scotia cannot affect the construction nor preclude the true effect of s. 1036 of the *Criminal Code*, which is essentially federal legislation. As to custom or practice, the Government of Canada had full right to institute the proceedings and to conduct the prosecution in question; and the costs thereof were such as would usually and properly be borne by the Dominion of Canada; and, moreover, they in fact were so borne.

The provinces establish and maintain the ordinary criminal courts and, for this reason in itself, the "cost of prosecution" referred to in said exception (*b*) must be of a character apart from the ordinary costs of maintenance of those courts.

The said words "cost of prosecution" which the "Government bears" are necessarily referable to cost specially incurred in connection with the proceeding it has instituted. The fact that the trial was presided over by a stipendiary magistrate who is not paid by the Government of Canada, or the participation by the prosecuting officer, or his assistant, who are not paid by that Government, does not affect the situation. When acting in the premises, said magistrate and prosecuting officer (who receive their remuneration annually as aforesaid) are doing so merely as part of their regular duties; they were not paid specifically in connection with the prosecution in question.

Per Davis J.: Without attempting to define the full scope and extent of the statutory condition that the Government of Canada "bears the cost of prosecution," it is plain that in this case that Government did bear such cost within the meaning of that condition; and this is sufficient for the purpose of deciding the present question.

Quaere, as to the jurisdiction of this Court to entertain the appeal (on noting the language of the relevant provisions—ss. 1 and 6 of c. 226, R.S.N.S. 1923, under which the Reference was made to the Supreme Court of Nova Scotia, and s. 43 of the *Supreme Court Act*, R.S.C 1927, c. 35)

APPEAL by the Attorney-General of the Province of Nova Scotia from the judgment of the Supreme Court of Nova Scotia *in banco* (1), holding that the amount of certain fines which the Provincial Treasurer of Nova Scotia claimed should be paid over to him by the City of Halifax or the Treasurer of the City of Halifax under s. 1036 of the *Criminal Code*, and which claim was referred to that Court by order in council under and by virtue of R.S.N.S. 1923, c. 226 (*Of the Decision of Constitutional and Other Provincial Questions*), was not payable over to the Provincial Treasurer under s. 1036 of the *Criminal Code* in the circumstances set forth in the statement of facts contained in the order in council, but that the same was payable to the Minister of Finance of Canada.

The material facts are sufficiently stated in the judgments now reported, and are indicated in the above headnote. The appeal to this Court was dismissed.

J. H. MacQuarrie K.C. for the appellant.

H. P. MacKeen K.C. for the respondent.

The judgment of Duff C.J., Rinfret, Kerwin and Hudson JJ. was delivered by

RINFRET J.—By order in council dated the 12th day of June, 1936, the Lieutenant-Governor of Nova Scotia, by and with the advice of the Executive Council of Nova Scotia, and acting under chapter 226 of the Revised Statutes of Nova Scotia 1923 (Entitled: "Of the Decision of Constitutional and other Provincial Questions"), referred this matter to the Supreme Court of Nova Scotia for hearing and consideration.

The Provincial Treasurer claims that the amount of certain fines hereinafter mentioned should be paid over to him by the City of Halifax, or the Treasurer of that city, under section 1036 of the *Criminal Code;* and the question to be decided in this appeal is whether the fines in question belong to the Province, represented by the Provincial Treasurer, or to the Dominion of Canada, represented by the Minister of Finance, under the following circumstances set forth in the order in council:

(1) 11 M.P.R. 335; [1937] 1 D.L.R. 534.

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On the 10th day of June, 1935, an information was laid in the city of Halifax, before a justice of the peace in and for the county of Halifax, by Frank E. McGowran, a corporal of the Royal Canadian Mounted Police, on the instructions of the Commissioner of the Royal Canadian Mounted Police at the instance of the Department of National Revenue of the Government of Canada.

The information and complaint were to the effect that certain persons therein named and domiciled respectively in the provinces of Nova Scotia, New Brunswick and Prince Edward Island had, at Halifax and elsewhere, between the 1st day of January, 1927, and the 8th day of June, 1935, conspired together and with one another to commit the following offences:

1. The indictable offence of having in their possession without lawful authority spirits unlawfully imported contrary to section 181 of the *Excise Act* 1927, and section 169 of the *Excise Act*, 1934, and section 573 of the *Criminal Code* of Canada.

2. The indictable offences of harbouring, keeping, concealing, purchasing and selling without lawful excuse alcoholic liquor unlawfully imported into Canada of a value for duty exceeding two hundred dollars, to wit, of a value of upwards of one millions dollars, without paying the duties lawfully payable thereon contrary to section 217 (3) of the *Customs Act*, 1927, and section 573 of the *Criminal Code* of Canada.

3. The indictable offence of smuggling and clandestinely introducing into Canada alcoholic liquor subject to Customs Duty of a value for duty of over two hundred dollars, to wit, of a value of upwards of one million dollars, contrary to section 203 (3) of the *Customs Act* as amended, and section 573 of the *Criminal Code* of Canada.

4. The indictable offence of by deceit or falsehood or other fraudulent means defrauding His Majesty the King in the Right of the Dominion of Canada of Customs and Excise duties to the extent of upwards of one million dollars.

The several persons charged in this information appeared before the justice of the peace in the city of Halifax to answer the charge; and a preliminary inquiry was held, as a result of which they were committed to the common gaol at the city of Halifax for trial on the said charge.

At the preliminary inquiry, the prosecution was conducted by counsel for the informant on instructions of the Department of National Revenue.

The persons charged were subsequently admitted to bail by a judge of the Supreme Court of Nova Scotia. On the application for bail counsel appeared on behalf of the informant, again on the instructions of the Department of National Revenue. On that occasion, the assistant to the

prosecuting officer for the county of Halifax appeared on behalf of the Attorney-General of Nova Scotia.

Later on, on the 27th day of September, 1935, the persons charged surrendered to the keeper of the common gaol and applied to a judge of the Supreme Court of Nova Scotia for writs of *habeas corpus* and *recipias corpus* to bring them before the stipendiary magistrate in and for the city of Halifax. On the application for these writs both the prosecuting officer for the county of Halifax appeared on behalf of the Attorney-General of Nova Scotia and counsel appeared on behalf of the informant on instructions of the Department of National Revenue.

The writs were granted, and by virtue thereof the accused were brought before the stipendiary magistrate and charged with the offence set forth in the information (then amended as will be mentioned later). They consented to be tried before the stipendiary magistrate under Part XVI of the *Criminal Code*. The amendment to the information consisted in striking off paragraphs 2 and 3 the words: "to wit, of a value of upwards of one million dollars"; thus leaving the "value for duty" of the alcoholic liquor unlawfully imported, or introduced, into Canada as exceeding two hundred dollars, without stating any definite amount. The information was further amended by striking out paragraph 4 thereof.

The accused pleaded guilty and they were convicted and adjudged to be imprisoned for terms varying in length, and also to forfeit and pay certain fines to be "applied according to law," the aggregate of which amounted to $16,000.

At the trial, the prosecuting officer appeared on behalf of the Attorney-General of Nova Scotia, and counsel appeared on behalf of the informant on the instructions of the Department of National Revenue.

The fines imposed by the stipendiary magistrate were paid to the Treasurer of the City of Halifax, who has since held the same; and, in effect, the question submitted to the Supreme Court of Nova Scotia was: To whom, of the Provincial Treasurer or of the Minister of Finance of Canada, the amount of the fines should now be paid over by the Treasurer of the City of Halifax?

The judges of the Supreme Court of Nova Scotia were unanimous in the opinion that the amount of the fines were

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not payable over to the Provincial Treasurer under section 1036 of the *Criminal Code,* in the circumstances set forth in the statement of facts contained in the order in council; but that the same were payable to the Minister of Finance. Their reasons, however, for reaching that conclusion differed in the following respects: The Chief Justice (Mr. Justice Carroll and Mr. Justice Doull concurring) was of opinion that the fines should go to the Dominion Government, both because they have been "imposed in respect of the breach of the revenue laws of Canada" and also because they were imposed "in a proceeding instituted at the instance of the Government of Canada, or of a department thereof, in which that Government bore the cost of prosecution." Mr. Justice Ross (with whom Mr. Justice Hall concurred), while sharing the opinion on the second point and, therefore, on the result, stated that he was "not prepared at the moment to agree that the fines were imposed in respect of a breach of the revenue laws of Canada."

The matter is now referred to us under section 43 of the *Supreme Court Act,* in view of the fact that, by section 6 of chapter 226 of the Revised Statutes of Nova Scotia, 1923, the opinion of the Supreme Court of Nova Scotia upon the reference, although advisory only, is, for all purposes of appeal to this Court, to "be treated as a final judgment of the court between parties."

The answer to the question put by the Lieutenant-Governor in Council of Nova Scotia must result from the interpretation of the first paragraph of section 1036 of the *Criminal Code.*

That paragraph is as follows:

1036. Whenever no other provision is made by any law of Canada for the application of any fine, penalty or forfeiture imposed for the violation of any law or of the proceeds of an estreated recognizance, the same shall be paid over by the magistrate or officer receiving the same to the treasurer of the province in which the same is imposed or recovered, except that

(*a*) all fines, penalties and forfeitures imposed in respect of the breach of any of the revenue laws of Canada, or imposed upon any officer or employee of the Government of Canada in respect of any breach of duty or malfeasance in his office or employment, and the proceeds of all recognizances estreated in connection with proceedings for the prosecution of persons charged with such breaches or malfeasances; and

(*b*) all fines, penalties and forfeitures imposed for whatever cause in any proceeding instituted at the instance of the Government of

> Canada or of any department thereof in which that Government bears the cost of prosecution, and the proceeds of all recognizances estreated in connection with such proceedings, shall belong to His Majesty for the public uses of Canada, and shall be paid by the magistrate or officer receiving the same to the Minister of Finance and form part of the Consolidated Revenue Fund of Canada.

(N.B.—We omit the last part of the paragraph which concerns exclusively the province of Ontario.)

By force of the enactment, as will be observed, the general rule is that fines are payable over to the Treasurer of the province. They belong to His Majesty for the public use of Canada, they are to be paid to the Minister of Finance and to form part of the Consolidated Revenue Fund of Canada only in some particular cases which are exceptions to the rule.

The Dominion government claims that the fines here in question come within either of two of the exceptions prescribed in the enactment. It is contended by the Attorney-General of Canada that they were "imposed in respect of the breach of any of the revenue laws of Canada," and that they were "imposed * * * in a proceeding instituted at the instance of the Government of Canada or of a department thereof in which that Government bore the cost of prosecution." The Dominion, to succeed, must establish that the fines came within one of the exceptions mentioned; but, on the other hand, the Province cannot succeed unless it is able to eliminate both exceptions.

For that reason, we find it sufficient to examine the question submitted in its relation to the second exception relied on by the Attorney-General of Canada. Our reason for doing so is obvious: it was the ground upon which all the learned judges of the Supreme Court of Nova Scotia agreed in their answers upon the reference; and, moreover, if we should reach the same conclusion as they have, it becomes unnecessary to deal with the respective claims of the parties in their relation with the first exception.

It is conceded that the proceeding as a result of which the fines were imposed was instituted at the instance of a department of the Government of Canada. It remains only to be seen whether it was a proceeding in which "that Government bears the cost of prosecution," within the meaning of subsection (*b*) of section 1036.

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The order in council states in terms that "no disbursements in connection with the said prosecution have been made by the Province of Nova Scotia or by the municipality of the county of Halifax." It is also therein stated that the fees of counsel who appeared on behalf of the informant on instructions of the Department of National Revenue, the amount of the account of the stenographer for taking shorthand notes of the evidence on the preliminary inquiry and for transcribing the same, and any other costs, fees, charges or expenses there may have been in connection with the said prosecution, were paid direct to the parties concerned also by the same Department of National Revenue. This Department likewise paid direct to them the sums of money required to the witnesses for the prosecution on the preliminary inquiry, or to the justice of the peace for fees and allowances claimed by him for his services in respect of the preliminary inquiry. No claim or demand by or on behalf of the witnesses or of the justice of the peace was ever made to the Treasurer of the municipality of the County of Halifax.

But, on behalf of the Province, the Attorney-General of Nova Scotia points out that, of course, the services of the prosecuting officer and those of the stipendiary magistrate were not paid by the Dominion Government. It is further asserted that, although the fees and allowances claimed by the justice of the peace and the witnesses' fees were paid by the Dominion, that was on the latter's part a purely voluntary and gratuitous payment, because these fees, charges and expenses are already provided for in a provincial statute, *The Costs and Fees Act* (ch. 252 of the Revised Statutes of Nova Scotia, 1923); and that such fees and charges were never certified to be correct, nor produced and presented to the Treasurer of the municipality of the county of Halifax in the manner prescribed in the schedule to Part II of that provincial statute; whereas, if the prescriptions of that statute had been followed by the justice of the peace and the witnesses, their fees and charges would have been met and paid as provided for therein.

The respective rights of the parties, however, must be determined in accordance with the true construction of the section of the *Criminal Code* which applies; they cannot be made to depend upon what may have happened in this

particular instance. It may not be left to the option of one party to act in a certain way and later to claim the fines on the strength of the procedure it has elected to follow. The answer which the court must give must flow essentially from the language of the statute. And when the statute enacts that the fines are to belong to the Government of Canada in a proceeding "in which that Government bears the cost of prosecution," that language does not relate to what may take place in a particular prosecution.

The phrase in the enactment: "in which that Government bears the cost of prosecution" connotes something broader than the mere casual occurrence of the payment of the costs in an individual case; it implies a consistent course of action sanctioned by law or by custom.

Moreover, the words "cost of prosecution" which, so it is enacted, the "Government bears" are necessarily referable to cost specially incurred in connection with the proceeding it has instituted and resulting in the imposition of the fines which, under the exception, become payable to the Minister of Finance.

For that reason, the fact that the trial was presided over by a stipendiary magistrate, who is not paid by the Government of Canada; or the participation of the prosecuting officer and his assistant, who are not paid by that Government, does not affect the situation. The magistrate and the prosecuting officer are receiving their remuneration annually either from the municipality or from the Government of Nova Scotia; and, when acting in the premises, they are doing so merely as part of their regular duties; they were not paid specifically in connection with the prosecution with which we are concerned, or with the proceeding herein instituted at the instance of the Government of Canada.

It cannot be questioned, as stated moreover in the order in council, that all the "costs, fees, charges or expenses there may have been in connection with the said prosecution" have been incurred and paid by the Government of Canada, and the question is whether they were costs which the Government of Canada bore within the meaning of section 1036.

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Rinfret J.

Whether the stipendiary magistrate could or could not have ordered the costs to be paid otherwise, it is sufficient to note that, in the convictions adjudging the payment of the fines, no order was made as to costs.

We have said that subs. (*b*) implied a consistent course of action sanctioned by law or custom. As to the law, there are no provisions in the *Criminal Code* expressly dealing with the matter in issue. Of *The Costs and Fees Act* of Nova Scotia, it is sufficient to say that, in our view, its existence cannot affect the construction, nor preclude the true effect, of section 1036 of the *Criminal Code,* which is essentially federal legislation. As to custom or practice, it cannot be doubted that the Government of Canada had full right to institute the proceedings and to conduct the prosecution before the court.

The provinces establish and maintain the ordinary criminal courts and, for this reason alone, we think that the costs of prosecution referred to in section 1036 of the *Criminal Code* must be of a character apart from the ordinary costs of maintenance of these courts.

As stated by Chief Justice Chisholm in his reasons for judgment in the present case:

> It has always been the practice to permit counsel for the Government of Canada to act in revenue cases, nominally under the Attorney-General of the Province. The Attorney-General has the nominal, the counsel for the Government of Canada has the virtual conduct of such prosecutions. In no other way can the revenues of Canada be adequately or at all protected unless the Dominion is represented and given the conduct of the case.

We have no doubt that this statement of the learned Chief Justice, concurred in by the other judges of the court, rightly represents the situation.

In our view, the costs of prosecution in this case are such as would usually and properly be borne by the Dominion of Canada and, moreover, they here in fact were borne by the Dominion of Canada. For these reasons, we think that the amount of the fines in question is not payable to the Provincial Treasurer but is payable to the Minister of Finance of Canada.

The appeal should, therefore, be dismissed. There will be no order as to costs.

DAVIS J.—I agree that this appeal should be dismissed, but it is sufficient, in my opinion, to rest that conclusion upon the sole ground that the particular facts stated in the Reference satisfy the condition of section 1036 (*b*) of the *Criminal Code* that the Government of Canada "bears the cost of prosecution," it being admitted that the proceedings were instituted at the instance of a department of that Government.

The facts are not in dispute. It is stated in the Reference that the information was laid by a member of the Royal Canadian Mounted Police on the instructions of the Commissioner at the instance of the Department of National Revenue of the Government of Canada; that the preliminary inquiry before a Justice of the Peace in the City of Halifax extended to eleven days during the months of July and August, 1935; that at the said preliminary inquiry the prosecution was conducted by two counsel for the informant, on instructions of the said Department of National Revenue; that on the application before a Judge of the Supreme Court of Nova Scotia of the several accused for bail, counsel appeared on behalf of the informant, on the instructions of the said department, and that an assistant to the prosecuting officer for the County of Halifax (receiving an annual salary from the Government of Nova Scotia) appeared on behalf of the Attorney-General of Nova Scotia; that subsequently on the return of writs of *habeas corpus,* counsel appeared on behalf of the informant, on instructions of the said department, and the prosecuting officer for the County of Halifax appeared on behalf of the Attorney-General of Nova Scotia; that at the trial counsel appeared on behalf of the informant, on instructions of the said department, and the said prosecuting officer for the County of Halifax appeared on behalf of the Attorney-General of Nova Scotia; that no disbursements in connection with the said prosecution have been made by the Province of Nova Scotia or by the Municipality of the County of Halifax, but the said prosecuting officer was receiving an annual salary from the Provincial Government; that the fees of counsel for the informant in connection with the said prosecution and the amounts of the account of a stenographer for taking shorthand notes of the evidence on the said preliminary inquiry and tran-

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scribing the same, and any other costs, fees, charges or expenses there may have been in connection with the said prosecution (other than those prescribed in the Schedule to Part II of *The Costs and Fees Act,* ch. 252 of the Revised Statutes of Nova Scotia, 1923) were paid direct to the parties concerned by the said Department of National Revenue; that the said department paid sums of money direct to the witnesses for the prosecution on the said preliminary inquiry, as fees claimed by them and prescribed in the said Schedule to said Part II of *The Costs and Fees Act* for their travel and actual attendance; that the said Department of National Revenue paid sums of money direct to the said Justice of the Peace as the fees and allowances claimed by him and prescribed in the said Schedule to said Part II of *The Costs and Fees Act,* for his services in respect of the said preliminary inquiry.

Without attempting to define the full scope and extent of the statutory condition that the Government of Canada "bears the cost of prosecution," it is plain, I think, in this case that the Government of Canada bore the cost of the prosecution within the contemplation of the statutory condition. It would, in my opinion, entirely defeat the object of the provision of sec. 1036 (*b*) if the facts of this case were held not to come within the language of the provision. That being so, there is no necessity to consider whether or not the Dominion could recover by virtue of the provision of sec. 1036 (*a*).

As the appeal is to be dismissed, it is not necessary to discuss the question of the jurisdiction of this Court to entertain the appeal, but it may be observed that sec. 43 of the *Supreme Court Act* gives a right of appeal to this Court

> from an opinion pronounced by the highest court of final resort in any province on any matter referred to it for hearing and consideration by the Lieutenant-Governor in Council of such province whenever it has been by the statutes of the said province declared that such opinion is to be deemed a judgment of the said highest court of final resort and that an appeal shall lie therefrom as from a judgment in an action.

The provincial statute under which this Reference was made by the Lieutenant-Governor of Nova Scotia in Council to the Supreme Court of Nova Scotia is chapter 226 of the Revised Statutes of Nova Scotia, 1923. The relevant sections, 1 and 6, are as follows:

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1. The Governor in Council may refer to the Supreme Court of Nova Scotia, for hearing or consideration, any matter which he thinks fit to refer, and the court shall thereupon hear and consider the same.

6. The opinion of the court upon any such reference, although advisory only, shall, for all purposes of appeal to the Supreme Court of Canada, or to His Majesty in Council, be treated as a final judgment of the court between parties.

Had we reached a different conclusion on the merits of this appeal, the question of the jurisdiction of this Court to entertain the appeal would have presented some difficulty.

Appeal dismissed.

Solicitor for the appellant: *F. F. Mathers.*

Solicitor for the respondent: *H. P. MacKeen.*

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* Mar. 1, 2.
* April 21.

DANIEL SASS (PLAINTIFF) .....APPELLANT;

AND

ST. NICHOLAS MUTUAL BENEFIT ASSOCIATION OF WINNIPEG, UKRAINIAN MUTUAL BENEFIT ASSOCIATION OF SAINT NICHOLAS OF CANADA, THEODORE STEFANIK AND OTHERS (DEFENDANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Fraternal benefit society—Society incorporated under Charitable Associations Act, R.S.M. 1913, c. 27—Action brought by member attacking acts done in contemplation of or in connection with incorporation of a Dominion society, the establishment of lodges outside the province, and transfer of moneys to Dominion society—Powers of the provincial society—Manitoba statute, 1917, c. 12 (An Act respecting the Capacity of Companies), s. 1—Status of plaintiff to bring the action.

The plaintiff sued as a member of the defendant provincial society, incorporated in 1915 under the Manitoba *Charitable Associations Act* (R.S.M. 1913, c. 27), claiming declarations that certain by-laws of the society, passed (as alleged) in contemplation of extending its objects and powers throughout Canada and obtaining a Dominion charter, were invalid, as were also the establishment of lodges or branches outside of Manitoba, the method of electing trustees or directors, the use of moneys of the society to obtain a Dominion charter, and the application of its funds to the objects and purposes of the defendant Dominion society (incorporated by Dominion Act, 1930, c. 71, revived or continued by amending Act, 1933, c. 64), and asking for injunctions, accountings and restitution.

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

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The powers of the provincial society included (*inter alia*) powers "to pass by-laws to regulate the powers and duties of the officers of the association, the amount and manner of the payment of contributions * * * the manner of choosing officers * * * and * * * of admission of new members, and generally such other by-laws as may be necessary for the purpose of effectually carrying out the objects of the association" and "to amalgamate or affiliate with any other society existing at the date hereof or which may be incorporated or formed in the future, and whose aims and purposes are similar" to those of said provincial society.

Held: (1) Ch. 12 (s. 1) of the Statutes of Manitoba, 1937 (*An Act respecting the Capacity of Companies*) applied to the provincial society. Though that statute was repealed by the *Consolidated Amendments, 1924,* it was then re-enacted, by s. 24 of c. 35 thereof, in exact terms. Said s. 24 of c. 35, though included in a chapter entitled *An Act to amend "The Companies Act,"* cannot be said to have been repealed by the *Companies Act,* 1932. In any event, most of the things of which plaintiff complained were done prior to the coming into force of the *Companies Act,* 1932, and the proceedings leading up to amalgamation of the provincial society with the Dominion society were under way, and defendants invoked s. 31 of the *Manitoba Interpretation Act,* R.S.M. 1913, c. 105.

(2) Under its charter and the above provisions of the statutes of Manitoba, the provincial society had power to pass the by-laws attacked by plaintiff, and also to establish branches outside the province and to amalgamate with or transfer its assets to another body having similar powers. The only provision in the Dominion incorporating Act claimed to be dissimilar from the powers held by the provincial society—a certain restriction in qualification for future membership—was not a sufficient departure from the purposes of the provincial society as to prevent it from amalgamatnig with or transferring its assets to the Dominion society.

(3) As it was not suggested that plaintiff's case rested upon fraud or oppression attempted against the minority of the society's members, plaintiff's right to sue as a member of the provincial society in respect of its acts was limited to the purpose of preventing it from commencing or continuing the doing of something which was beyond its powers.

(4) In view of the above and for reasons aforesaid the plaintiff had no status to bring the action.

(5) Further, in view of the fact that all of the assets of the provincial society were actually transferred to the Dominion society, which had been in full operation for over three years with the approval of governmental authorities, both federal and provincial, the judgment appealed from dismissing the action should not be interfered with under the circumstances.

Judgment of the Court of Appeal for Manitoba, 44 Man. L.R. 280, dismissing the plaintiff's action, affirmed in the result.

APPEAL by the plaintiff from the judgment of the Court of Appeal for Manitoba (1) dismissing his action. He brought the action as a member of the defendant provincial society, incorporated in 1915, under the Manitoba *Charit-*

(1) 44 Man. L.R. 280; [1936] 3 W.W.R. 305; [1936] 4 D.L.R. 474.

able Associations Act, R.S.M. 1913, c. 27, and (as so alleged) on behalf of himself and all members of the defendant provincial society other than the individual defendants; in which action he claimed declarations that certain by-laws of the society passed (as alleged) in contemplation of extending its objects and powers throughout Canada and obtaining a Dominion charter, were invalid, as were also the establishment of lodges or branches outside of Manitoba, the method of electing trustees or directors, the use of moneys of the society to obtain a Dominion charter, and the application of its funds to the objects and purposes of the defendant Dominion society (incorporated by Dominion Act, 1930, c. 71, revived or continued by amending Act, 1933, c. 64), and he asked for injunctions, accountings and restitution.

The plaintiff's claims and the facts and issues appear more extensively in the reasons for judgment now reported and are discussed at some length in the reasons for judgment delivered in the Court of Appeal for Manitoba (1). By the judgment now reported the appeal to this Court was dismissed with costs.

H. A. Bergman K.C. and *Wasyl Swystun* for the appellant.

F. Heap K.C. and *J. W. Arsenych K.C.* for the respondents.

The judgment of the court was delivered by

HUDSON J.—The plaintiff brings his action as a member of St. Nicholas Mutual Benefit Association of Winnipeg, hereinafter referred to as the "Provincial Society," and in this action he has joined a number of individuals as well as Ukrainian Mutual Benefit Association of Saint Nicholas of Canada, a body incorporated by Dominion statute for the purpose of taking over the assets and liabilities and carrying on the work of the Provincial Society. The plaintiff claims—

(*a*) a declaration that certain by-laws passed by the Provincial Society are invalid;

(*b*) a declaration that the acts of the said society in establishing lodges or branches outside of Manitoba were *ultra vires* of the society;

(1) 44 Man. L.R. 280; [1936] 3 W.W.R. 305; [1936] 4 D.L.R. 474.

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(*c*) a declaration that the method of electing trustees or directors of the society is and always has been illegal;

(*d*) an accounting of moneys spent by the said society in securing a charter under the Dominion Companies Act;

(*e*) an injunction against the expenditure of further moneys for such purposes;

(*f*) an accounting of moneys transferred by the Provincial Society to the Dominion Society;

(*g*) an injunction restraining the Dominion Society from further use of the moneys transferred;

(*h*) an injunction restraining the defendants from surrendering the charter of the Provincial Society, except in accordance with the statutes in that behalf.

The defendant, the Provincial Society, in its defence set up various defences, among others, objections to the plaintiff's status to bring the action, alleging in particular that he was a party to such acts and, further, that by reason of laches and delay the situation has been so changed that it would be inequitable and unjust to grant the relief claimed. Subsequently, an order was made by the Referee in Chambers

that all personal objections against the plaintiff to commence, maintain and prosecute this action and of the issues more particularly set out in paragraphs 18, 19 and 21 of the defence of the defendants be tried before the other issues herein.

The issues so set forth were tried before Mr. Justice Taylor of the Court of King's Bench and, as usually happens in cases of a partial trial, nearly all of the facts relating to the cause of action were explored. Mr. Justice Taylor held that the plaintiff was entitled to bring the action but expressly disclaimed any disposition of the question of *ultra vires,* holding that this was a matter which could only be properly settled when the action was tried out on its merits.

From this decision the defendants appealed to the Court of Appeal and that court allowed the appeal, set aside the judgment of Mr. Justice Taylor and dismissed the action (1). From this decision the plaintiff now appeals to this Court.

The St. Nicholas Mutual Benefit Association of Winnipeg was incorporated in 1915 under the *Charitable Associa-*

(1) 44 Man. L.R. 280; [1936] 3 W.W.R. 305; [1936] 4 D.L.R. 474.

tions Act of Manitoba. It was given powers, two of which require special mention. The first was a power—

To pass by-laws to regulate the powers and duties of the officers of the association, the amount and manner of the payment of contributions, dues and assessments to be paid by the members of the association, the payment of sick, funeral or other benefits by the association to its members, the manner of choosing officers to succeed the present officers and trustees and the manner of admission of new members, and generally such other by-laws as may be necessary for the purpose of effectually carrying out the objects of the association.

and secondly—

To amalgamate or affiliate with any other society existing at the date hereof or which may be incorporated or formed in the future, and whose aims and purposes are similar to the above.

The charter did not otherwise limit the powers of the association to make by-laws in regard to membership or otherwise.

The Statutes of Manitoba, 1917, chap. 12, sec. 1, applied to this corporation and provided that:

unless otherwise expressly declared in the Act or instrument creating it, have and be deemed to have had from its creation the capacity of a natural person to exercise its powers beyond the boundaries of the Province to the extent to which the laws in force where such powers are sought to be exercised permit, and to accept extra provincial powers and rights and shall, unless otherwise expressly declared in the Act or instrument creating it, have and be deemed to have had from its creation the general capacity which the common law ordinarily attaches to corporations incorporated by Royal Charter under the Great Seal.

In *Bonanza Creek Gold Mining Co. Ltd.* v. *The King* (1), Lord Haldane, in referring to a corporation created by charter, states:

In the case of a company created by charter the doctrine of *ultra vires* has no real application in the absence of statutory restriction added to what is written in the charter. Such a company has the capacity of a natural person to acquire powers and rights. If by the terms of the charter it is prohibited from doing so, a violation of this prohibition is an act not beyond its capacity, and is therefore not *ultra vires*, although such a violation may well give ground for proceedings by way of *scire facias* for the forfeiture of the charter.

The 1917 Statute of Manitoba was repealed by the *Consolidated Amendments* of 1924, but then re-enacted in exact terms: chapter 35, section 24. It is said that this provision was repealed by the Manitoba *Companies Act*, 1932. We are not of this opinion. Although section 24 of chapter 35, Consolidated Amendments, is included in a chapter entitled *An Act to Amend "The Companies Act,"* it is not stated anywhere specifically to be part of the *Companies*

(1) [1916] 1 A.C. 566, at 583-584.

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Act; nor does it appear to have been repealed by implication. In any event, most of the things complained of in the plaintiff's statement of claim were done prior to the coming into force of the *Companies Act,* 1932, and the proceedings leading up to amalgamation of the Provincial Society with the Dominion Society were under way and the defendants invoked the aid of section 31 of the *Manitoba Interpretation Act,* chapter 105, R.S.M. 1913, as follows:

> All things lawfully done and all rights acquired and liabilities incurred under any repealed Act shall remain valid and may be enforced, and all proceedings and things lawfully commenced under any repealed Act may be continued and completed under the repealing Act.

We are of opinion that under its charter and the above provisions of the Statutes of Manitoba the Provincial Society had power to pass the by-laws attacked by the plaintiff in his action, and also to establish branches outside the province of Manitoba and to amalgamate with, or transfer its assets to, another body having similar powers. It is not contended that the Dominion Act, Chapter 71, Statutes of Canada, 1930, gave the Dominion Society any powers dissimilar from those held by the Provincial Society, except in one particular, viz., that by section 5 of the Dominion Act

> Only persons considered by the Society to be of Ukrainian origin and who are of the Greek-Catholic faith, in communion with the Holy See of Rome, shall be admitted as members of the Society. Provided that the Society shall, upon the conclusion of any agreement such as provided for in section 17 hereof, admit as members all persons who are then members in good standing of the Provincial Society as at that time constituted.

In our opinion this restriction on future membership is not a sufficient departure from the purposes of the Provincial Society as to prevent the Provincial Society from amalgamating with, or transferring its assets to, the Dominion Society.

The plaintiff's right to sue as a member of the society in respect of its acts is limited to cases—

(*a*) to prevent the corporation from either commencing or continuing the doing of something which is beyond its powers;

(*b*) to prevent the corporation carrying out something which purports to be a corporate act but which is in fact an attempt by the majority of its members to practise fraud or oppression against the minority.

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It was not suggested that the appellant's case rested upon fraud or oppression.

We are of opinion that the plaintiff has no status to bring this action. Having come to this conclusion, we do not think it necessary to consider the objections to the plaintiff's status on the ground of his acquiescence, which objections were dealt with in the court below.

In view of the fact that all of the assets of the Provincial Society were actually transferred to the Dominion Society, which society has been in full operation for a period of over three years with the approval of governmental authorities, both federal and provincial, we ought not now to interfere with the judgment appealed from under the circumstances. The appeal is dismissed with costs. There will be no costs of the motion to quash.

Appeal dismissed with costs.

Solicitors for the appellant: *Lamont, Layton & Swystun.*

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

PATRICK CANNING .....APPELLANT;

AND

HIS MAJESTY THE KING .....RESPONDENT.

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* April 28.
* June 1.

ON APPEAL FROM THE COURT OF APPEAL OF BRITISH COLUMBIA

Criminal law—Evidence—Charge of conspiracy to distribute drug—Evidence of accomplice—Corroboration.

The appeal was from the affirmance by the Court of Appeal of British Columbia of appellant's conviction for conspiracy to distribute morphine contrary to the *Opium and Narcotic Drug Act, 1929,* (Dom.). There was a dissent in the Court of Appeal on the ground of lack of corroborative evidence and misdirection with regard thereto.

The evidence against appellant was almost wholly that of one F., named as a co-conspirator of appellant but who had previously been tried and convicted. F.'s story set out conversations and dealings with appellant as to the sale of morphine and in particular an occasion when he had met him at a certain house and went with him out of a room there where others were gathered, and had a private conversation with him as to delivery of morphine. A police agent gave evidence that he was present on said occasion, that the place was one where dealings in morphine were being carried on by some of those

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

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involved in the conspiracy, and that he had seen F. and appellant leave the room together. Appellant in evidence admitted being present at the place at the time, but denied that he had any private conversation with F.

In the course of charging the jury the trial judge stated that, while it is open to a jury to convict upon the uncorroborated testimony of an accomplice, it is dangerous to do so; that "corroboration is such evidence as confirms not only the circumstances of the crime as related by the accomplice, but also the identity of the prisoner; by that I do not mean that it will not be corroboration unless every circumstance is confirmed; it will be corroboration if there is confirmation as to a material circumstance of the crime and of the identity of the prisoner; evidence to amount to corroboration need not be direct evidence that the accused committed the crime, it may amount to corroboration if it is confirmation of a material circumstance and it connects the accused with the crime." Referring to the police agent's evidence, he said it "amounts to only this: it is a confirmation, if you accept it, of F.'s evidence as to the conspiracy on the part of the others outside of [accused]; he does appear to corroborate him on substantial points"; and that "all that amounts to is this: it is proof of a fact, if you accept what F. tells you, that it did occur; if you accept that, then you have [the police agent's] corroboration of nothing more or less than that the conference which F. says occurred, did occur; that is all it corroborates, and the inference there is for you, * * *." He further stated: "If you think that corroboration is necessary then it is for you to say whether you have corroboration which falls within the definition I have given you."

Held (Kerwin J. dissenting): On consideration of the summing up as a whole and in view of all the circumstances, there was no material misdirection or non-direction on the point of corroboration. The appeal should be dismissed.

Per Kerwin J. (dissenting): As the police agent's testimony indicated merely an opportunity on accused's part to discuss with F. the delivery of morphine, the trial judge was wrong in telling the jury that the police agent's evidence, if believed, was corroboration. There were no circumstances surrounding the particular episode that would tend to implicate accused in the commission of the crime charged (the house in question being a boot-legging establishment where those desiring beer, etc., might be served). Opportunity by itself is not sufficient (*Burbury* v. *Jackson*, [1917] 1 K.B. 16).

Kerwin J. criticized as improper the fact that, while F. had pleaded guilty to a charge of conspiracy under the same Act, he had not been sentenced at the time he gave evidence at appellant's trial.

APPEAL from the judgment of the Court of Appeal of British Columbia affirming (Martin J.A. dissenting) the conviction of the appellant (on trial before Manson J. with a jury) for conspiracy with others to commit the indictable offence of distributing a drug (morphine) contrary to s. 4 (*f*) of the *Opium and Narcotic Drug Act, 1929* (Dom.) and amendments thereto. By the judgment now reported the appeal to this Court was dismissed, Kerwin J. dissenting.

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L. Clare Moyer K.C. for the appellant.

Gordon S. Wismer K.C. for the respondent.

The judgment of the majority of the Court (Duff C.J. and Rinfret, Davis and Hudson JJ.) was delivered by

HUDSON J.—The appellant Canning was convicted at the trial before Mr. Justice Manson of the Court of King's Bench of British Columbia and a jury, of unlawfully conspiring to distribute morphine contrary to the *Opium and Narcotic Drug Act, 1929*. From this decision he appealed to the Court of Appeal of British Columbia and in that court the appeal was dismissed by a majority of 2 to 1. In the formal judgment the reasons for dissent by Mr. Justice Martin are stated to be that

there is no evidence to corroborate the witnesses for the prosecution; and that there was misdirection and non-direction amounting to misdirection respecting said corroboration and also respecting the consequences of the erroneous direction that there was such evidence.

No written reasons for dissent appear to have been delivered.

Under section 1023 of the *Criminal Code* our jurisdiction in this case is confined to any question of law in which there has been dissent in the court of appeal. Neither in the language of the formal judgment nor in the notice of appeal is there a clear statement of the point or points of law upon which dissent rests, and it is questionable whether or not there is sufficient to give jurisdiction. However, we have not thought it necessary in the present instance to decide this question.

The evidence against Canning was almost wholly that of a man named Furumoto who was named in the indictment as a co-conspirator of Canning but who had previously been tried separately and convicted. Furumoto gave a detailed story setting out various conversations and dealings with Canning in regard to the sale of morphine and, in particular, that on one occasion in the course of the negotiations he had met him at the house of one Ferraro and while there went out of the room where others were gathered and had a private conversation with Canning in regard to the delivery of a quantity of morphine. A man named Morley Fisher, an agent of the Mounted Police, was called as a witness on behalf of the Crown and stated that he was present on the occasion above mentioned, that the place

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was one where dealings in morphine were being carried on by some of the parties involved in the conspiracy and that he had seen Furumoto there in conversation with Canning and that they had gone out together. Canning was called as a witness on his own behalf and admitted being present at this place on the evening in question but denied that he had any private conversation with Furumoto.

The learned trial judge in his charge to the jury correctly stated the law in regard to the danger of accepting the evidence of an accomplice without corroboration and expressly gave to the jury the necessary warning as stated in the judgment of this Court in the case of *Vigeant* v. *The King* (1). It was contended before us that in this instance the trial judge should not only have stated the law and given the warning as to the danger of accepting the evidence of an accomplice, but also should specifically have charged that the evidence of Fisher put forward on behalf of the Crown did not amount to corroboration.

The learned trial judge in his charge stated:

> Corroboration is such evidence as confirms not only the circumstances of the crime as related by the accomplice, but also the identity of the prisoner. By that, I do not mean that it will not be corroboration unless every circumstance is confirmed. It will be corroboration if there is confirmation as to a material circumstance of the crime and of the identity of the prisoner. Evidence to amount to corroboration need not be direct evidence that the accused committed the crime—it is important to bear that in mind here. Let me repeat it. Evidence to amount to corroboration need not be direct evidence that the accused committed the crime, it may amount to corroboration if it is confirmation of a material circumstance and it connects the accused with the crime. I repeat: while it is open to a jury to convict upon the uncorroborated testimony of an accomplice, it is dangerous to do so.

He further stated:

> Now you will remember what I said about corroboration. Corroboration is always important, whether the question of an accomplice arises or not, particularly when you have a flat contradiction, as you have here. Fisher says he was there on the famous Saturday night. It is urged upon you, and it is something for you to consider, that as Fisher said he did want to get Canning—there is no denying that he said he was the very man he wanted to get—it is suggested to you in the defence that Fisher is not telling the truth. Now how far does Fisher go, taking his own statement: "I knew about this man Canning and wanted to get him." What evidence have you that he wanted to get him? The only evidence he gives is the evidence that on this Saturday night he saw the accused call Furumoto away from the kitchen for a conference. He says they went to the foot of the stairs in the front room, and he said at one point that they went upstairs, but obviously he did not actually see them go

(1) [1930] S.C.R. 396.

upstairs. He perhaps, giving him credit for truthfulness, if you so desire, he probably was giving a conclusion there from what he saw them do, rather than an actual statement of fact, because he says in cross-examination he did not see them go upstairs, although he said so before, and he then said "the living room and the foot of the stairs were out of my range of vision." Furumoto says definitely they did leave the kitchen at the accused's request and did go upstairs. Fisher's evidence amounts to only this: it is a confirmation, if you accept it, of Furumoto's evidence as to the conspiracy on the part of the others outside of Canning. He does appear to corroborate him on substantial points.

At the conclusion of the charge, counsel for the prisoner asked this question:

Did I understand your lordship's instructions to be the jury might consider Morley Fisher's statement that he heard Canning ask Furumoto to go upstairs, to be corroborative evidence—that they might consider it as such?

The Court:

Yes, I think so. The charge is that this conspiracy was between certain dates, and it is not confined to the sale of these two particular half pounds, if sale there was, by Furumoto to Canning. The charge is not confined to these two particular incidents. It says he did conspire between the 15th day of August, 1934, and the 1st day of March, 1936. Now then if it be that Furumoto and the accused conferred at a time and place within these dates—Fisher does not say, of course, and you know this perfectly well, members of the jury, Fisher does not say he overheard the conversation. He does not know what the conversation was. It might have been as to the weather. All that amounts to is this: it is proof of a fact, if you accept what Furumoto tells you, that it did occur. If you accept that, then you have Fisher's corroboration of nothing more or less than that the conference which Furumoto says occurred, did occur. That is all it corroborates, and the inference there is for you, as I pointed out.

Then, after some further discussion, the learned trial judge said:

I think the best thing I can do for you is to read again what constitutes corroboration. It may be just as well that I should read that to you now so that you will have it fresh. Corroboration is such evidence as confirms not only the circumstances of the crime as related by the accomplice, but also the identity of the prisoner. By that I do not mean that it will not be corroboration unless every circumstance is confirmed. It will be corroboration if there is confirmation as to a material circumstance of the crime and of the identity of the prisoner. Evidence to amount to corroboration need not be direct evidence that the accused committed the crime, it may amount to corroboration if it is confirmation of a material circumstance and it connects the accused with the crime. Then you will remember with what I concluded. I told you it is open to a jury to convict upon the evidence of an accomplice alone if they are so advised—if that is their opinion—but it is dangerous to do so without corroboration. If you think that corroboration is necessary then it is for you to say whether you have corroboration which falls within the definition I have given you.

On consideration of the summing up as a whole and in view of all the circumstances, we do not think that there

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was material misdirection or non-direction on the point of corroboration. The appeal should be dismissed.

KERWIN J. (dissenting)—The appellant was convicted of unlawfully conspiring to distribute morphine contrary to the *Opium and Narcotic Drug Act, 1929*. The only direct evidence against him was given by one Furumoto, who testified that on a certain occasion a conversation took place between him and the accused, and that at a subsequent date, in the house of one Ferraro, another conversation occurred between them. It is of this latter date that the witness Fisher, a Mounted Police agent, spoke, and he testified that he saw the two leave Ferraro's kitchen together. Furumoto's evidence was that they went upstairs and that it was there a conversation occurred in regard to the delivery of a quantity of morphine. Fisher, of course, could not, and did not, attempt to speak of what transpired between Furumoto and the accused.

The learned trial judge told the jury that Fisher's evidence, if believed, was corroboration within the meaning of the rule. With this I cannot agree, as Fisher's testimony indicated merely an opportunity on the part of the accused to discuss with Furumoto the delivery of morphine. There were no circumstances surrounding the particular episode that would tend to implicate the accused in the commission of the crime charged, as Ferraro conducted a boot-legging establishment, according to all the evidence, where those who desired to obtain beer and other refreshments might be served.

Opportunity by itself is not sufficient. *Burbury* v. *Jackson* (1). The main judgment in that case was delivered by Lord Reading, who had delivered the judgment of the Court of Criminal Appeal in *The King* v. *Baskerville* (2). At page 18 of the *Burbury* case (1), the Lord Chief Justice states:

> The evidence here shows nothing more than that it was possible to have committed the misconduct at the material date. That is not enough. The evidence must show that the misconduct was probable. If the parties were seen in the neighbourhood of a wood or other dark place where they had no occasion to be, that might possibly be corroborative evidence. So in the case cited of *Harvey* v. *Anning* (3) the fact of persons of different social positions being seen together in lanes was held enough.

(1) [1917] 1 K.B. 16. (2) [1916] 2 K.B. 658.
(3) (1902) 87 L.T. 687.

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Whether there was other evidence in which the jury could, if properly directed, find corroboration, is immaterial as the trial judge did not refer to it in his charge but on the contrary directed the jury that Fisher's evidence, if believed, was corroboration. *Hubin* v. *The King* (1).

While not open on this appeal, there is a matter that should, I think, be referred to. That is, that while Furumoto had pleaded guilty to a charge of conspiracy, under the same Act, he had not been sentenced at the time he gave evidence at the trial of the present applicant. This is a practice that should not be tolerated.

In my opinion, the appeal should be allowed and a new trial directed.

Appeal dismissed.

Solicitor for the appellant: *William J. Murdock.*

Solicitor for the respondent: *Gordon S. Wismer.*

THE ATTORNEY-GENERAL FOR ALBERTA (INTERVENANT)..... APPELLANT;

AND

BERY KAZAKEWICH.....RESPONDENT;

AND

MARY KAZAKEWICH (RESPONDENT IN THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA).

1937

*April 27.
*May 3.
*May 19.

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

Appeal—Jurisdiction—Status to appeal.

On an appeal to the Appellate Division of the Supreme Court of Alberta from a District Court judgment dismissing an appeal from an order of a police magistrate under s. 26 of *The Domestic Relations Act, 1927* (c. 5) (Alta.), finding that B.K., being able wholly or in part to maintain his wife, M.K., did wilfully neglect to do so and did desert her, and ordering him to pay her the sum of $4 a week, the Appellate Division (by a majority) held ([1936] 3 W.W.R. 699) that the province was without legislative authority to confer upon the magistrate the powers purported to be granted to him by said s. 26, and set aside the magistrate's order.

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

(1) [1927] S.C.R. 442.

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Before the Appellate Division the Attorney-General for Alberta intervened to support the constitutionality of the Act.

Special leave to the Attorney-General and to M.K. to appeal to this Court was granted by the Appellate Division; but M.K. failed to perfect her appeal.

Held: On an appeal to this Court by M.K., the Attorney-General would, in the ordinary course, have the right to appear in order to support the validity of the legislation; but he had no status to appeal to this Court; and, as M.K. had not perfected her appeal (a delay for opportunity to do so having been given by this Court but her application under s. 66 of the *Supreme Court Act* for leave now to perfect her appeal having been dismissed by the Appellate Division), this Court had not jurisdiction to hear the appeal.

MOTION by way of appeal from the order of the Registrar affirming the jurisdiction of this Court to hear the appeal.

The appeal was from the judgment of the Appellate Division of the Supreme Court of Alberta (1).

By an order of a police magistrate under s. 26 of *The Domestic Relations Act, 1927* (c. 5) (Alta.), as amended in 1928, c. 25, and 1933, c. 14, it was found that Bery Kazakewich (the present respondent in this Court), being able wholly or in part to maintain his wife, Mary Kazakewich, did wilfully neglect to do so and did desert her and he was ordered to pay her the sum of $4 per week.

An appeal from said order was taken to the District Court and His Honour Judge W. A. Macdonald gave judgment dismissing the appeal. From his judgment an appeal was taken to the Appellate Division of the Supreme Court of Alberta (by leave granted under *The Summary Convictions Act,* 1935, c. 9, s. 15) on two questions of law, one of which was the claim that the provisions of *The Domestic Relations Act, 1927,* and, in particular, s. 26 as amended, are *ultra vires* the Provincial Legislature. On the appeal to the Appellate Division, the Attorney-General for Alberta intervened to support the constitutionality of the Act. In the Appellate Division, the majority of the Court (Harvey C.J.A., Ewing J., and McGillivray J.A.) held (Clarke and Lunney, J.J.A., dissenting) that the province was without legislative authority to confer upon the magistrate the powers purported to be granted to him by Part IV (which includes said s. 26) of *The Domestic Relations Act, 1927,* and the appeal was allowed and the police magistrate's

(1) [1936] 3 W.W.R. 699; [1937] 1 D.L.R. 548.

order set aside (1). The judgment of the Appellate Division was pronounced on December 17, 1936.

The Appellate Division granted (by order dated January 13, 1937, and on certain terms) special leave to the Attorney-General for Alberta (intervener) and to the said Mary Kazakewich to appeal to the Supreme Court of Canada.

The Attorney-General for Alberta applied to the Registrar of the Supreme Court of Canada to affirm the jurisdiction of this Court to hear the appeal. The Registrar, dealing with the matter as presenting the question whether or not the appeal was one in a "criminal cause" within the exception in s. 36 of the *Supreme Court Act* (R.S.C. 1927, c. 35), held that the appeal was not in a criminal cause and affirmed the jurisdiction. On the appeal from his order coming on to be heard before this Court, on April 27, 1937, it appeared that the said Mary Kazakewich had not perfected her appeal. Judgment was reserved, and later, on May 3, 1937, the direction of the Court was delivered by the Chief Justice as follows:

THE CHIEF JUSTICE: The judgment of the Appellate Division of the Supreme Court of Alberta was a judgment reversing that of His Honour Judge W. A. MacDonald and setting aside the order of the Magistrate, D. C. Sinclair, dated the 31st of January, 1936. The Magistrate's order was an order directing certain payments to be made by the respondent Bery Kazakewich to his wife Mary Kazakewich on a finding that the respondent was able to support his wife and had neglected to do so, contrary to section 26 of the *Domestic Relations Act* of 1927.

The Attorney-General intervened on the hearing of the appeal in the Appellate Division and, having obtained leave to appeal to this Court, applied to the Registrar for and obtained an order affirming the jurisdiction of this Court to hear his appeal.

We have no doubt that the Attorney-General had no status to appeal to this Court from the judgment of the Appellate Division which, as already mentioned, was a judgment setting aside an order of the Magistrate direct-

(1) [1936] 3 W.W.R. 699; [1937] 1 D.L.R. 548.

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ing the respondent to pay to his wife certain sums of money; but, on appeal to this Court by the wife, Mary Kazakewich, against this judgment of the Appellate Division, the Attorney-General for Alberta would, in the ordinary course, have the right to appear in order to support the validity of the legislation which the Appellate Division by its judgment has declared to be *ultra vires*.

The Appellate Division has granted to the wife, Mary Kazakewich, leave to appeal to this Court, but she has not taken the necessary steps to perfect her appeal by providing security and having that security allowed, as required by the statute.

We think the proper course is to make no formal order for the present on the appeal from the Registrar in order to give the wife, Mary Kazakewich, an opportunity to perfect her appeal. The appeal from the Registrar's order must be disposed of before the final termination of the present sittings of this Court, and it may be spoken to after the hearing of the appeals has been concluded.

On the matter coming on again before the Court on May 19, 1937, and it appearing that the Appellate Division of the Supreme Court of Alberta had dismissed an application (made under s. 66 of the *Supreme Court Act*) by the said Mary Kazakewich for leave now to perfect an appeal to the Supreme Court of Canada, the appeal from the Registrar's order affirming jurisdiction was allowed.

Motion by way of appeal allowed.

R. V. Sinclair K.C. for the motion.

D. K. MacTavish contra.

SOPHIE KUCZERYK (PLAINTIFF).....APPELLANT;

AND

TORONTO TRANSPORTATION COMMISSION (DEFENDANT).....RESPONDENT.

1937

*May 6.
*June 1.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Negligence—Street railways—Passenger injured by a passing automobile after alighting from street-car which, to allow her to alight, had been stopped suddenly at a place other than a usual stopping place—Liability of street railway company—Evidence—Findings of jury.

Plaintiff was a passenger in defendant's street-car and, desiring to alight, signalled to stop, and went to the exit door at the side of the car. As the motorman did not slow down to stop at the usual car stop, she rang again. The motorman, noticing her at the exit door, quickly stopped the car at a point which was not a usual stopping place, and then caused the door to open. She alighted and was almost immediately struck and injured by an automobile driven by S. from the rear. She sued for damages. At the trial the jury found that defendant's motorman was negligent "in stopping the tram too suddenly at other than a customary car stop without taking proper precaution for the safety of passengers"; they negatived negligence in S. and the plaintiff. Judgment was given to plaintiff for damages, which was reversed by the Court of Appeal for Ontario ([1937] O.R. 256). Plaintiff appealed to this Court.

Held: The judgment for plaintiff at trial should be restored.

There is no absolute rule that the duty of a street railway company towards its passengers ends when they alight and that it is not responsible for any mishap that may overtake the passenger making his way to the sidewalk. Each case must depend on its own circumstances. There is a duty on the company not to place its passenger in danger at the moment of alighting or immediately thereafter. There were precautions that might have been taken by the motorman, which the jury, no doubt, took into account.

Per Duff C.J.: Defendant's duty was to exercise reasonable care for the safety of its passengers. What constitutes reasonable care (where no special rule of law comes into play) is a question of fact, to be determined according to the circumstances.

Sec. 37 (1) of the Ontario *Highway Traffic Act* (as to vehicles not passing a street-car which is stationary for taking on or discharging passengers) was intended to provide a specific safeguard for (*inter alia*) passengers leaving street cars. It imposes a duty upon drivers of motor cars directly, but has significance in relation to a street railway company's execution of its duty to exercise reasonable care in the carriage of passengers. The conduct of a company, which stops its car for the discharge of passengers at such a place and in such a manner as to render nugatory said statutory safeguard, is a circumstance not irrelevant in determining whether it has acquitted itself of its obligations to them. *Ex facie*, it is not a wholly unreasonable con-

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

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clusion that the company is not sufficiently attending to the safety of passengers if it acts in disregard of the contingency (when the emergence of that contingency ought to be foreseen as a practicable possibility) that a motor car may at the moment be in the act of passing and may, if the street-car is too suddenly stopped and the doors too suddenly thrown open, be carried through the place where passengers are alighting. In the absence of circumstances implying assumption of the risk by the passenger (which in itself in most cases would probably be an issue of fact for the jury; and which assumption of risk could not be affirmed in the present case) it is a question of fact for the jury whether, in managing its street-car in such a manner as to deprive descending passengers of the safeguard contemplated by the statute, the company is fulfilling its duty to take reasonable care for its passengers' safety.

Further, in the present case, it was, upon the evidence, open to the jury to take the view that the sudden stopping of the street-car might set up motions in the car itself, which, when the doors were opened almost simultaneously with the application of the brakes, might cause the plaintiff, in descending, to lose her balance and distract her attention from street traffic; and that such things did occur and had that effect upon the plaintiff; and in such view it would be a natural and proper conclusion that defendant was not reasonably entitled to assume that no precautions on its part were necessary

There was evidence from which the jury might not improperly find that the situation of danger from the passing automobile was one created by the unreasonable and imprudent stopping of the street-car in the manner in which and at the place where it was stopped; and that this situation of danger ought to have been anticipated as a reasonably possible contingency; and that defendant could not reasonably assume that, in the circumstances, plaintiff, without negligence on her part, would not be unaware of the risk involved in defendant's acts or of the actual danger from the approaching motor car.

APPEAL by the plaintiff from the judgment of the Court of Appeal for Ontario (1) which (reversing the judgment at trial in her favour on findings of a jury) dismissed her action. In the action the plaintiff claimed damages for personal injuries received by being struck by an automobile after alighting from defendant's street-car (a "one-man" operated street-car, south bound on Bathurst street, Toronto) which, to allow her to alight, had been stopped suddenly at a place which was not a usual stopping place.

At trial, on verdict of a jury, the plaintiff recovered judgment for $2,000. This was reversed by the Court of Appeal (Fisher J.A. dissenting) which dismissed the action (1). Special leave was granted by the Court of Appeal to the plaintiff to appeal to the Supreme Court of Canada.

(1) [1937] O.R. 256; [1937] 1 D.L.R. 756.

The material facts of the case are sufficiently stated in the judgments now reported, and are indicated in the above headnote. The appeal to this Court was allowed and the judgment at trial restored, with costs throughout.

R. Roy McMurtry and *B. J. Spencer Pitt* for the appellant.

Irving S. Fairty K.C. and *A. H. Young* for the respondent.

DUFF C.J.—I am in complete agreement with the reasons and the conclusion of my brother Hudson; but there are some additional observations which may, I think, be not without value.

The duty of the respondents is to exercise reasonable care for the safety of their passengers. What constitutes reasonable care (where no special rule of law comes into play) is a question of fact, to be determined according to the circumstances.

Before proceeding to discuss the facts it will be necessary to state briefly a consideration which would appear to be of some importance. By section 37 (1) of the Ontario *Highway Traffic Act:*

> 37. (1) Where a person travelling or being upon a highway in charge of a vehicle, or on a bicycle or tricycle, or on horseback or leading a horse, overtakes a street-car or a car of an electric railway, operated in or near the centre of the travelled portion of the highway which is stationary for the purpose of taking on or discharging passengers, he shall not pass the car or approach nearer than six feet measured back from the rear or front entrance or exit, as the case may be, of the car on the side on which passengers are getting on or off until such passengers have got on or got safely to the side of the street, as the case may be. Provided, however, that this subsection shall not apply where a safety zone has been set aside and designated by a by-law passed under the provisions of paragraph 48 of section 399 of *The Municipal Act,* but no vehicle or horse shall pass such safety zone at a speed greater than is reasonable and proper and in no event greater than ten miles an hour and with due caution for the safety of pedestrians.

The terms of this enactment sufficiently evince its purpose. It was intended to provide a specific safeguard for (*inter alia*) passengers leaving street cars, in respect of the peril (well recognized by everybody concerned with such matters) to which such persons were not uncommonly subjected from the incompetence or inattention of drivers of automobiles passing a street car on the side from which passengers are in the habit of leaving it.

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The statute is not designed principally for the protection of the careful, the alert, the circumspect. It is within the experience of everyone that for diverse reasons people emerging from a vehicle do not infrequently, by reason of inattention due to commonly operating causes, fail to take into account risks which would be obvious to a person on the alert for the dangers of the street.

The framers of the statute, no doubt, had in mind the ordering of traffic for the general convenience, but that one of its main objects is to secure the safety of persons intent on getting on or leaving street cars is indisputable.

The statute imposes a duty upon the drivers of motor cars directly; but it does not necessarily follow that the enactments of the statute are without significance in relation to the execution by the owner of the street car of his duty to exercise reasonable care in the carriage of his passengers. The statute having provided a specific safeguard for the protection (*inter alia*) of passengers alighting from street cars, the question whether the conduct of the street car owner, who stops his vehicle for the discharge of passengers at such a place and in such a manner as to render nugatory this statutory safeguard, is a circumstance not irrelevant in determining whether he has acquitted himself of his obligations to them as carrier of passengers, is a question which ought not to be lightly dismissed.

The legislation has, in effect, declared that passengers on street cars ought to enjoy the protection of the safeguard prescribed. *Ex facie*, it is not, I think, a wholly unreasonable conclusion that the street car owner is not sufficiently attending to the safety of his passengers if he acts in disregard of the contingency (when the emergence of that contingency ought to be foreseen as a practicable possibility) that a motor car may at the moment be in the act of passing him, and may, if the street car is too suddenly stopped and the doors too suddenly thrown open for the exit of passengers, be carried, in spite of the driver's efforts, through the place where passengers are alighting, with consequent molestation of, and injury to, such passengers.

It is conceivable, of course, that the passenger may, by his words or conduct, assume the risk; but that, as we shall presently see, cannot be affirmed in this case. In the absence of circumstances implying assumption of the risk

by the passenger (which in itself in most cases would probably be an issue of fact for the jury), it would appear to be a question of fact for the jury whether, in managing his street car in such a manner as to deprive descending passengers of the safeguard contemplated by the statute, the owner is fulfilling his duty to take reasonable care for the safety of his passengers.

But the conclusion I have reached may be put also upon a narrower ground.

There is evidence from which the jury might conclude that the sudden stopping of the car in the manner in which it was effected in this case might not improbably set up motions in the car itself which, when the doors are opened, as here, almost simultaneously with the application of the brakes, may deprive a descending passenger of full control of his movements, completely distracting his attention from the possible proximity of approaching motor cars. I find myself unable to accept the view that the appellant must be held upon her own evidence to have been in a position immediately before leaving the steps to observe the approaching car. Her English is very imperfect and whatever doubt there may be upon other points, she is attempting to say, it seems to be quite clear, that she was thrown off her balance and lost, in consequence, control of her movements. She says the car was *still moving* when the door was opened and "I like fly from the car." In cross-examination she says:

Q. Now, you did not fall off the street car?

A. I didn't fall; just like somebody threw me out, and I fell on my feet.

* * *

Q. He stopped the car?

A. Yes, and the door was open, and I held it in my hand and he started the car sudden and it like threw me out * * *

Q. You lost your balance?

A. Yes.

On re-examination she says:

A. No, when the car try to stop, and move, I try to make the step, and it threw me off.

The witness Wojonski in cross-examination says:

A. I see her when the door is open from the street-car, and the lady is gone.

* * *

Q. Did she fall?

A. She fall.

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Q. Did she fall out of the street-car?
A. Yes.
Q. She fell out of the street-car?
A. She fell down on the road.

* * *

Mr. JUSTICE MCFARLAND: * * * Would she have fallen down on the road if there had not been any automobile there at all?
A. Yes, she fall.

The witness Saracini in examination in chief says:

When you put the brakes on a car *so quick* there will be a certain amount of sway.

The evidence of the appellant and Wojonski that, in leaving the street car, she lost her balance, is supported by Saracini's evidence that the street car was still swaying when his car and the appellant came into contact; and continued to sway until the door was closed. Saracini says the sudden stopping of the car would set up a swaying motion and that such was its effect on the occasion in question. Moreover, Saracini says that, after reaching the ground, the appellant was "staggering." The motorman says he stopped the car as quickly as he could. Saracini says that when a car is brought to a stop as abruptly as on this occasion a swaying motion will be set up. He was for some years a conductor in the employ of the respondents; and there is no apparent reason why the jury might not, on this point, properly accept his evidence.

There was, therefore, evidence for the jury that such a sudden stopping of the car would be calculated to embarrass the passenger in the attempt to descend and to distract her attention from the traffic in the street; and that it, in fact, had such affect upon the appellant. It is impossible to affirm as a proposition of law that, in the circumstances, the respondents were entitled to act upon the assumption that she was in a situation to take care of herself. She had rung once without response; she rang a second time before the usual stopping place was reached and, although she, no doubt, observed, before alighting, that the car had passed the usual stopping place, it was not necessarily inconsistent with reasonable conduct on her part that she should not have anticipated the suddenness of the motorman's action or its effects, either on the motions of the street car itself, or in rendering it impracticable for the driver of a motor car in the situation of Saracini to stop in time to enable her to pass on to the sidewalk unmolested.

These were all matters within the special cognizance of the respondents. The argument that a jury might not properly think that such matters, in the circumstances, would not probably present themselves in all their practical significance to the mind of a passenger (especially one disturbed in mind as they may very well have supposed the appellant to have been in view of the possibility of being carried on to the next stopping place) is not, to me, a very convincing one. Nor can I endorse the proposition of law, that, the facts being such as I have stated, the passenger must be taken, by ringing the bell a second time, to have assumed the risk of what happened in consequence of the ill-advised sudden stop and immediate opening of the doors.

The views of Mr. Justice Middleton are, I think, summed up in this passage:

> From this evidence it is clear that what happened was that the plaintiff succeeded in reaching the pavement. She was then entirely free from the street-car. She took one step upon the pavement and looked and saw the automobile approaching. She attempted to step back towards the street-car and did take one step backwards, but, this not being sufficient, she was struck by the approaching automobile and so injured.
>
> It will be noticed that, at the trial, notwithstanding the endeavour of the plaintiff's counsel to get her to say that she fell from the street-car, she adhered to her former statement that she did not fall until struck, that she was safely on the pavement and off the street-car, took one step towards the sidewalk and, thinking of cars, she turned around to see if any automobile was approaching, tried to step back to a position of safety and was hit by the automobile.
>
> At the trial she endeavoured to show that, at the time she alighted from the car, the car was yet moving and did not come to rest. On the examination for discovery, she had taken the position that the car had been stopped and that she was thrown out of the car by reason of the motorman "started the car sudden," thus causing her to lose her balance.
>
> The jury found the driver of the automobile was not negligent, but they found the motorman was negligent "In stopping the tram too suddenly at other than a customary car stop without taking proper precaution for the safety of passengers." No explanation was had of this somewhat ambiguous and enigmatical answer. In the light of the proceedings at the trial I think its meaning becomes clear. It was not unlawful for the motorman to stop his car for the convenience of passengers at other than a regular stopping place. It was suggested that here a stop was made too quickly, made so quickly that it did not afford Saracini in his motor-car an opportunity of getting it under control. When the car had passed the usual stopping place Saracini was justified in assuming that it would not again stop until Queen street was reached and so was off his guard, and the car stopping suddenly at other than a customary car stop, he was excused and not subject to any adverse comment. The jury apparently thought that when stopping at other than a usual stopping place there was an obligation on the part of the railway company to take some pre-

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caution for the safety of passengers from the risk of passing automobiles. What precautions precisely should have been taken the jury have not intimated.

We think that the duty of the street railway company towards its passengers ends when they alight from the car, and that the railway is not responsible for any mishap that may overtake the passenger making his way to the sidewalk. The operation of these one-man cars is authorized by the law, and it is obvious that a motorman who is located at the front of the car discharges his entire duty to the passenger when he brings the car to a standstill and opens the door, thus permitting the passenger to alight. The passenger when alighting must take all precautions necessary to ensure his own safety and must observe whether there is any danger from a passing automobile. The motorman would not be justified in starting up the car until he had seen that the passenger had safely reached the ground. His duty was to observe this through the mirror provided for that purpose. The jury having by the answers given in effect negatived all other charges of negligence, the action must, as a result, be dismissed.

As will appear from what I have said, I am, with the greatest possible respect, unable to agree that the view stated in this passage as to the effect of the evidence is one which the jury was bound to accept and act upon. There is some confusion, no doubt, in the evidence of the appellant, but, as I have said, she adheres firmly to the statement that she lost her balance and was involuntarily ejected from the car. This evidence is supported by Wojonski and corroborated by the statement of Saracini repeated more than once that, after reaching the ground, she "staggered" towards his car. Wojonski says, "One moment decided everything." If the jury took the view (which was open to them on the evidence) that the sudden stopping of the car would cause it to sway and that the motions of the car after the opening of the door did in fact cause the appellant to lose her balance, then the conclusion that the respondents were not reasonably entitled to assume that no precautions were necessary would be a natural and proper one.

There was evidence from which the jury might not improperly find that the situation of danger from the passing automobile was a situation created by the unreasonable and imprudent stopping of the car in the manner and at the place where it was brought to a stop. The jury were also entitled to hold that this situation of danger ought to have been anticipated as a reasonably possible contingency; and that the respondents could not reasonably assume that, in the circumstances, the appellant would not, without negligence on her part, be unaware of the risk involved in the

respondents' acts or of the actual danger itself from the approaching motor car.

HUDSON J. (all the other members of the Court concurring)—This is an appeal from a judgment of the Court of Appeal of Ontario allowing, by a majority of 2 to 1, an appeal from the judgment pronounced by the Honourable Mr. Justice McFarland, after trial with a jury, awarding the plaintiff $2,000 damages against the defendant, the Toronto Transportation Commission. The action was brought against the Commission and one Saracini for personal injuries arising under the following circumstances:

The plaintiff was a passenger in one of the defendant's street cars. Desiring to alight, she signalled the motorman and arose and went to the exit door at the side of the car. The motorman not slowing down to stop at the usual car stop, she rang again. The motorman, then noticing her at the exit door, quickly stopped his car at a point which was not a usual stopping place. He then did what was necessary to open the door, in order to enable her to alight. She did alight and was almost immediately thereafter struck and injured by an automobile driven by Saracini and approaching from the rear. The following questions were put to and answered thus by the jury:

1. Was the motorman negligent?

Answer: Yes.

2. If so, in what did such negligence consist?

Answer: In stopping the tram too suddenly at other than a customary car stop without taking proper precaution for the safety of passengers.

3. Was Saracini negligent?

Answer: No.

5. Was the plaintiff negligent?

Answer: No.

10. At what amount do you assess the plaintiff's damages? If any?

Answer: $2,000.

The majority of the Court of Appeal took the view that the duty of the street railway towards its passengers ends when they alight from the car and that the railway is not responsible for any mishap that may overtake the passenger making his way to the sidewalk, and that, therefore, as a matter of law, according to the answer of the jury to question 2 there was no negligence on the part of the motor-

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Hudson J.

man. With this view I cannot agree and, in my opinion, there is no such absolute rule. Each case must depend on its own circumstances. There is a duty on the street railway not to place a passenger in danger at the moment of alighting or immediately thereafter. The question has been asked: What precautions might have been taken by the motorman? It is not difficult to suggest a number. In the first place, he might have brought his car to a stop more slowly and in this way given warning to the driver of the approaching motor car. In the second place, he might have kept the door closed after stopping for a few seconds, which would have enabled any motor car approaching from the rear to pass before the passenger was permitted to alight.

The jury, having expressly negatived negligence on the part of Saracini and contributory negligence on the part of the plaintiff, no doubt took into account precautions which might have been taken such as above suggested.

I would allow the appeal and restore the judgment of the trial court with costs here and below.

Appeal allowed with costs.

Solicitor for the appellant: *B. J. Spencer Pitt.*

Solicitor for the respondent: *Irving S. Fairty.*

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THE B.V.D. COMPANY, LIMITED (PLAINTIFF) ..... APPELLANT;

AND

CANADIAN CELANESE LIMITED (DEFENDANT) ..... RESPONDENT.

*April 27.
*May 3.
*June 1.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Patent—Judgment of trial judge declaring patent valid and infringed—Reversed by Supreme Court of Canada—Patent declared void as claims too broad and embracing more than alleged invention described in specifications—Disclaimer subsequently filed in the Patent Office—Motion by losing party, before formal entry of judgment, for a rehearing of the appeal to give effect to the disclaimer or for a reference back to trial court—Sections 50, 53, 60, Patent Act, 1935, 25-26, Geo. V, c. 32.

In an action brought by the appellant under section 60 of the *Patent Act* praying for a declaration that the respondent's patent was void or that, in the alternative, it was not infringed by the manufacture of certain shirt collars by the appellant, the Exchequer Court of Canada held that the respondent's patent was "valid and infringed by the" appellant and dismissed the action. On appeal, this Court reversed this judgment and declared the respondent's patent void, the judgment proceeding upon the sole grounds that the claims were too broad and embraced within their scope more than the alleged invention disclosed in the specifications; and, further, that the claims, properly construed, had been anticipated by certain United States and British patents, this Court not finding it necessary to consider the issue of infringement or any of the other grounds upon which the appellant attacked the validity of the respondent's patent. Before the judgment of this Court had been formally drawn up or entered, the respondent filed a disclaimer in the Patent Office, stating that through mistake, accident or inadvertence and without any wilful intent to defraud or mislead the public, the specification had been made too broad, asserting a claim to more than that to which the inventor was entitled. The respondent, arguing that the disclaimer had the effect of correcting the fault in the claims as found by this Court and that it should have an opportunity under sections 50 and 53 of the *Patent Act* to establish the validity of the patent as amended by the disclaimer, then moved for an order directing a rehearing of the appeal "in order to meet the new conditions that have arisen since the delivery of the judgment and to provide in the formal judgment of the Court for the filing already made of the disclaimer * * * ." On the hearing of the application, leave was given to the respondent to move that, in lieu of a rehearing of the appeal, the judgment of this Court should be varied by directing a reference to the Exchequer Court of Canada to determine whether effect ought to be given to the disclaimer, and whether relief ought to be given to the respondent under subsection 2 of section 53 of the *Patent Act*.

Held, that the respondent's application should be dismissed; under the circumstances of this case, neither a rehearing of the appeal nor a

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

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reference back to the Exchequer Court of Canada ought to be directed.

The direction the respondent is asking for could not be given (without disregarding the appellant's legal rights) unless this Court is prepared to rehear the appeal and enter upon a full examination of all the grounds of appeal advanced by the appellant. At the time of the hearing of the appeal, this Court then had power to amend the pleadings and, if necessary, to hear fresh evidence in order to dispose of all the issues raised by the appeal as well as those which the respondent is submitting by its motion; but the respondent then insisted on maintaining the judgment of the trial judge, declaring its claims, as framed, to be valid claims. Having lost on that issue of validity, the respondent is now seeking a rehearing in order to take up a new position never before suggested by it, with all the attendant delay and inconvenience. By its conduct, the respondent has definitely elected against taking the position which it is now endeavouring to take and, on grounds both of justice and convenience, the application should fail.

MOTION by the respondent (after a judgment of this Court had declared its patent void for being too broad and embracing more than the alleged invention disclosed in specifications) for an order directing a rehearing of the appeal in order to give effect to a disclaimer filed in the Patent Office before formal judgment had been entered and, upon leave of the Court, for an order directing a reference back to the Exchequer Court of Canada to determine whether effect ought to be given to the disclaimer and whether relief ought to be given to the respondent under subsection 2 of section 53 of the *Patent Act*. The motion was dismissed with costs.

W. F. Chipman K.C. and *H. Gérin-Lajoie K.C.* for motion.

O. M. Biggar K.C. contra.

The judgment of the court was delivered by

DUFF C.J.—The Exchequer Court of Canada (1), on the 26th of March, 1936, delivered judgment declaring that the defendants' patent "is valid and infringed by the plaintiff" and dismissing the action of the appellants under section 60 of the *Patent Act*, 1935, praying for a declaration that the patent was void or that, in the alternative, it was not infringed by the manufacture of certain shirt collars by the plaintiffs.

The plaintiffs appealed and this Court delivered judgment on the 19th day of March, 1937 (2), allowing the

(1) [1936] Ex. C.R. 139. (2) [1937] S.C.R. 221.

appeal and declaring the patent of the respondents void. The judgment proceeded upon the grounds that the claims in the patent were too broad and embraced within their scope more than the alleged invention disclosed in the specification and, further, that the claims, properly construed, had been anticipated by certain United States and British patents.

On the 31st of March, 1937, the respondents filed a disclaimer in the Patent Office in the following terms:

Whereas, the undersigned Canadian Celanese Limited, a body politic and corporate, having its head office and principal place of business in the city of Montreal, in the province of Quebec, Canada, is the owner of Canadian letters patent no. 265,960 granted on the 16th day of November, 1926, for an invention entitled fabrics and sheet materials and the manufacture thereof.

And whereas, through mistake, accident or inadvertence, and without any wilful intent to defraud or mislead the public, the specification has been made too broad, asserting a claim to more than that of which Camille Dreyfus was the inventor.

Now therefore, the undersigned disclaims from the scope of claims 1 to 6 inclusive, and 25 the the use of a fabric or fabrics containing a thermoplastic derivative of cellulose except where such thermoplastic derivative of cellulose is in the form of yarns, filaments or fibres.

It further disclaims from the scope of claims 7 to 12, inclusive, the use of a fabric or fabrics containing an organic derivative of cellulose except where such organic derivative of cellulose is in the form of yarns, filaments or fibres.

It further disclaims from the scope of claims 13 to 18, inclusive, the use of a fabric or fabrics containing a cellulose ester except where such cellulose ester is in the form of yarns, filaments or fibres.

It further disclaims from the scope of claims 19 to 24, inclusive, the use of a fabric or fabrics containing cellulose acetate except where such cellulose acetate is in the form of yarns, filaments or fibres;

and on the 27th of April, they moved for an order directing a rehearing of the appeal in which, as already mentioned, this Court has pronounced judgment

in order to meet the new conditions that have arisen since the delivery of the judgment and to provide in the formal judgment of the Court for the filing already made of the said disclaimer, the whole upon such terms and conditions as to this honourable Court may seem just.

On the hearing of this application, leave was given to the respondents to move that in lieu of a rehearing of the appeal, the judgment of this Court, which had not been formally drawn up or entered, should be varied by directing a reference back to the Exchequer Court of Canada to determine whether effect ought to be given to the disclaimer, and whether relief ought to be given to the respondents under subsection 2 of section 53.

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We have fully considered the application of the respondents and have come to the conclusion that neither a rehearing of the appeal nor a reference back to the Exchequer Court can properly be directed.

The grounds upon which the appellants appealed from the judgment of the Exchequer Court are summarized in their factum thus:

(1) that the defendant's patent 265,960 is void on the grounds:—

(*a*) that the patent claims do not specify what is admittedy the "all important feature" of the alleged invention, namely, that the cellulose derivative used should be in the form of yarns woven or knitted into a fabric;

(*b*) that as they stand the claims are anticipated by the United States patent to Van Heusen and the British patents to Green and H. Dreyfus;

(*c*) that if, in the process the patent covers, the cellulose derivative need not be made to flow by taking advantage of its thermoplastic quality, the claims are also anticipated by the United States patents to Kennedy, Oliver and Weidig, the British patents to Berard and Miller, and the Swiss patents to Le Faguays and Nachmann;

(*d*) that if, on the other hand, it is essential that the cellulose derivative should be made to flow by heat and the claims extend beyond this, they assert a monopoly to more than the patentee invented;

(*e*) that claims 7-18 do so extend and are therefore invalid;

(*f*) that claims 19-24 either do so extend or are unnecessary;

(*g*) that the product claim (25) is anticipated;

(*h*) that the specification discloses no invention having regard to the state of the art;

(*i*) that the specification is misleading in respect of the directions given as to the use of cellulose acetate, nitrocellulose and methyl cellulose;

(*j*) that either the specification is ambiguous on the point of the impermeability of the resulting composite sheet or the claims assert a monopoly of more than the relatively impermeable sheets to the production of which the invention is confined; or

(2) that the process used by the plaintiff is not an infringement of the patent on the grounds:

(*a*) that the claims extend only to a process in which a thermoplastic cellulose derivative is made to flow by the application of heat and that this does not occur in the plaintiff's process;

(*b*) that the expression "softening agent" does not include volatile solvents and that in the plaintiff's process only a volatile solvent is used.

This Court, in disposing of the appeal, did not find it necessary to consider the issue of infringement, or any of the grounds upon which the appellants attacked the validity of the patent other than those indicated in paragraphs 1 (*a*) and 1 (*b*). Upon these grounds, and these grounds alone, we allowed the appeal and held the patent void.

It is necessary to set out the relevant statutory provisions. They are sections 50, 53 and 60 of the *Patent Act*, 1935, which are textually in these words:

50. (1) Whenever, by any mistake, accident or inadvertence, and without any wilful intent to defraud or mislead the public, a patentee has

(*a*) made his specification too broad, claiming more than that of which he or the person through whom he claims was the first inventor; or

(*b*) in the specification, claimed that he or the person through whom he claims was the first inventor of any material or substantial part of the invention patented of which he was not the first inventor, and to which he had no lawful right;

he may, on payment of the fee hereinafter provided, make disclaimer of such parts as he does not claim to hold by virtue of the patent or the assignment thereof.

(2) Such disclaimer shall be in writing, and in duplicate, and shall be attested by one or more witnesses. One copy thereof shall be filed and recorded in the office of the Commissioner. The other shall be attached to the patent and made a part thereof by reference. The disclaimer shall thereafter be deemed to be part of the original specification.

(3) No disclaimer shall affect any action pending at the time when it is made, except as to unreasonable neglect or delay in making it.

(4) In case of the death of the original patentee or of his having assigned the patent a like right to disclaim shall vest in his legal representatives, any of whom may exercise it.

(5) The patent shall, after disclaimer as in this section provided, be deemed to be valid for such material and substantial part of the invention, definitely distinguished from other parts thereof claimed without right, as is not disclaimed and is truly the invention of the disclaimant, and the disclaimant shall be entitled to maintain an action or suit in respect of such part accordingly.

53. (1) A patent shall be void if any material allegation in the petition or declaration of the applicant in respect of such patent is untrue, or if the specifications and drawings contain more or less than is necessary for obtaining the end for which they purport to be made, and such omission or addition is wilfully made for the purpose of misleading.

(2) If it appears to the court that such omission or addition was an involuntary error, and if it is proved that the patentee is entitled to the remainder of his patent *pro tanto,* the court shall render a judgment in accordance with the facts, and shall determine as to costs, and the patent shall be held valid for that part of the invention described to which the patentee is so found to be entitled.

(3) Two office copies of such judgment shall be furnished to the Patent Office by the patentee. One of them shall be registered and remain of record in the office and the other shall be attached to the patent and made a part of it by a reference thereto.

60. (1) A patent or any claim in a patent may be declared invalid or void by the Exchequer Court of Canada at the instance of the Attorney-General of Canada or at the instance of any interested person.

(2) If any person has reasonable cause to believe that any process used or proposed to be used or any article made, used or sold or proposed to be made, used or sold by him might be alleged by any patentee to constitute an infringement of an exclusive property or privilege granted thereby, he may bring an action in the Exchequer Court of Canada against the patentee for a declaration that such process or article does not or would not constitute an infringement of such exclusive property or privilege.

(3) Except the Attorney-General of Canada or the Attorney-General of a province of Canada, the plaintiff in any action under this section shall, before proceeding therein, give security for the costs of the patentee in such sum as the Court may direct, but a defendant in any action for

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the infringement of a patent shall be entitled to obtain a declaration under this section without being required to furnish any security.

Before proceeding further, it is convenient to point out that the respondents from the outset took the position that their invention in its essence consisted in the

use of thermoplastic yarns of a cellulose derivative woven into the fabric. That was the new and all-important feature of the invention. We are not concerned with the uniting of fabrics otherwise than in the presence of a cellulose derivative in the form of yarn woven into the fabric;

this was stated by counsel at the beginning of the trial on being invited by the trial judge to outline the nature of his case. In answer to a question put by the trial judge,

You are limiting to yarns, are you?

Mr. Lajoie: I am not limiting, but the patent limits it very definitely, there can be no doubt about it.

This Court, in allowing the appeal, held that, on the true construction of the claims, the monopoly claimed was not limited by reference to this feature of the alleged invention disclosed; and that the claims on their true construction were anticipated by the United States and British patents of Van Heusen, Green and H. Dreyfus; and that, consequently, the patent was invalid.

The respondents urge that the effect of the disclaimer is to correct this fault in the claims and that they should have an opportunity, either on a rehearing, or on a reference back to the Exchequer Court, to show that the claim of excessive monopoly was due to

mistake, accident or inadvertence and without any wilful intent to defraud or mislead the public

within the meaning of section 50, or to "involuntary error" within the meaning of section 53; and to establish the validity of the patent as amended by the disclaimer.

We shall not enter upon an examination of the precise meaning of subsection 1 of section 53 and we postpone for the present any reference to section 50 (3); we shall assume that, in an action under section 60, if a claim to relief under section 53 (2) were advanced at the proper stage by a prayer, for example, in the statement of defence for a declaration in the sense of that subsection, or where a disclaimer has been filed, in the sense of section 50 (5), it would be competent to the Court to grant such relief.

Assuming, then, that in the action out of which this appeal arises (in which the respondents by their statement of defence ask for a declaration that their patent, as it stood before the filing of the disclaimer, was a valid patent)

it would have been competent to make a declaration in the sense of section 53 (2) or in the sense of section 50 (5); it is, of course, quite indisputable that no such declaration could be made in this action, first, until all the grounds of invalidity advanced by the appellants had been considered and rejected; or, second, without disposing of the issues relating to infringement.

It is important at this point to notice that relief of such character involves—where, a disclaimer having been filed, a declaration is prayed under section 50 (5)—a declaration in the terms of that subsection that the

> patent * * * is valid for such material and substantial part of the invention, definitely distinguished from other parts thereof claimed without right, as is not disclaimed and is truly the invention of the disclaimant, and the disclaimant shall be entitled to maintain an action or suit in respect of such part accordingly.

Where a declaration is prayed under section 53 (2), there are two essential conditions of this relief: first, an adjudication that "the addition" which would otherwise render the patent void under section 53 (1) was not "wilfully made for the purpose of misleading"; and, second, an adjudication that such addition was "an involuntary error" and "that the patentee is entitled to the remainder of his patent *pro tanto*." The Court, having adjudicated in this sense, may pronounce "the patent valid for that part of the invention to which the patentee is so found to be entitled."

Now, as will appear from what has already been said, this Court did not find it necessary to pronounce upon the questions whether the specification did disclose any invention for which the patentee, under claims properly framed, would be entitled to protection. Counsel for the respondents did on this application refer to some expressions in the reasons for judgment which, he suggested, pointed to an intention to pronounce a decision upon that issue; but this Court did not intend to pass on the question, and did not in fact decide it.

On the appeal, the appellants contended that they were entitled to judgment, not only on the ground on which they ultimately succeeded, but on all the other grounds designated above, including the ground numbered 1(*h*), that the specification discloses no patentable invention. It is their right to have these grounds of appeal considered and

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adjudicated upon before any judgment is pronounced establishing the validity of the respondents' patent qualified in the sense of the disclaimer. It is their right, moreover, to have such adjudication by this Court.

Further, if this Court, we repeat, should hold a view adverse to them on these grounds of appeal, it is their right to have this Court decide upon their contention that, assuming the patent to be valid, they do not by their manufacture infringe it.

It is plain, therefore, that we could not give the direction the respondents ask for (without disregarding the legal rights of the appellants) unless we are prepared to rehear the appeal and enter upon a full examination of all the grounds of appeal advanced by the appellants (except those upon which our judgment in the appeal is based), including the issue of subject-matter, as well as the determination of the issue raised by the allegation now for the first time submitted by the respondents, namely, that the excessive scope of the claims is due to "inadvertence" or "involuntary error."

The issues raised by the contentions upon which we have not passed and upon which it is now proposed that we shall adjudicate are substantial issues. We do not comment upon them further except to say this: Some of these contentions attack the claims as too broad in respects other than that in which we have held them to be excessive; and, as regards excessive scope in these respects, it would be necessary, also, if excessive scope in the pertinent sense were found to exist, that the respondents establish the existence of the preliminary condition of relief under sections 50 and 53 that such excess was due to "inadvertence" or "involuntary error."

It may be observed that, as regards excessive scope of the claims due to the absence of reference in them to the essence of the invention (the presence of cellulose derivative in the form of yarns, filaments or fibres woven into a fabric) the evidence now in the record presents facts casting upon the respondents a burden of explanation by no means trivial. The limiting words, for example, which the respondents have sought to introduce by their disclaimer are, in effect, found in the English patent and the United States patent, and there is no suggestion of a reason why they

were omitted from the Canadian patent, nor is there anything pointing to a satisfactory explanation of the terms of the licences granted by the respondents.

Our attention has, moreover, been called to the successful efforts of the respondents in resisting discovery in relation to matters which *prima facie* might appear to be not without bearing upon this issue, as well as upon the issues of misrepresentation, anticipation and subject-matter (the learned judge assumed that experiment had been necessary, notwithstanding his order sustaining a refusal to answer questions concerning the respondents' investigations on the examination for discovery). If we had been disposed to allow a rehearing, it might have been necessary to exact, as a condition, that complete discovery should be made.

The respondents urge that a refusal of their application will, in effect, deprive them of relief which the legislature intended patentees in their situation to have.

We are far from convinced that, in view of their conduct, the respondents have not disentitled themselves to such relief. They had notice from the particulars of objection that their patent was attacked on the ground that claims were excessive, and, moreover, on the ground that the claims, on their proper interpretation, had been anticipated by Van Heusen, Green and Dreyfus. They succeeded at the trial on this issue of anticipation because the trial judge held that the essence of their invention consisted in the presence in one of the component fabrics of cellulose derivative in the form of yarns, filaments or fibres, and that, in view of this, the patents mentioned in which this was not an element of the invention did not constitute anticipation. The amendment to which they now seek to give effect, if made by disclaimer filed before the statement of defence, could not have prejudiced their just rights because it could only result in bringing the claims into conformity with what they were insisting was the true character of their invention. Assuming their *bona fides*, they must have desired that the monopoly claimed should not extend beyond that to which they were entitled. If the respondents, instead of asking *simpliciter* by their statement of defence for a declaration that the patent was valid, had asked for a declaration under section 53(2) in the event of the Court holding the claims to be too broad, the issue of *bona fides*

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would have been raised and the litigation would have proceeded with full knowledge of all parties that the respondents intended to pray for relief under that section; the same result might possibly have been reached by filing a disclaimer and praying, in the statement of defence, a declaration in the sense of section 50 (5).

On the appeal to this Court, the respondents' counsel contented himself with answering the attack on the claims thus:

> In my submission, we are absolutely entitled to go back to the body of the specification to find out the meaning of those claims. My friend referred to the recent judgment of the House of Lords in the case of *Mullard Radio Corporation* v. *Philco* (1). In that case Lord Macmillan repeats what has been said over and over again, that, while each claim must be read independently, you look at the body of the specification to find out the meaning of each claim. Your Lordships have held time and again, in *Schweyer Electric and Manufacturing Co.* v. *New York Central R.R. Co.* (2) and in *Western Electric Co.* v. *Baldwin International Radio of Canada* (3), that the patentee is entitled to have his claims construed in the light of the dictionary he supplies in the body of the specification. In my submission, there cannot be the slightest question but that he is talking about cellulose derivative or cellulose acetate in the form of yarns. There can be no question about it.

At the stage at which this argument was made, this Court had power to amend the pleadings and, if necessary, to hear fresh evidence in order to dispose of the issues which the respondents now desire to litigate. Had the respondents then taken the position they now take (which, as already observed, could not have prejudiced their just rights) all the issues raised by the appeal could have been examined and disposed of as well as those which the respondents now for the first time ask us to consider and determine on a rehearing of the appeal.

The respondents, nevertheless, insisted on maintaining the judgment of the trial judge, declaring these claims, as framed, to be valid claims. Now, having lost on that issue of validity and judgment having been pronounced against them, the respondents seek a rehearing in order to take up a new position never before even suggested by them, with all the attendant delay and inconvenience already indicated.

We think that by their conduct they have definitely elected against taking the position which they are now endeavouring to take; and, however that may be, we are satisfied that, on grounds both of justice and convenience, the application should fail.

(1) [1936] 2 All E.R. 920. (2) [1935] S.C.R. 665.
(3) [1934] S.C.R. 570.

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We do not think it necessary to express an opinion upon the construction and effect of the third subsection of section 50. We decide nothing, moreover, as to the relation between the procedure authorized by section 60 and that contemplated by section 53. We have assumed (for the purposes of this judgment only) that a defendant in an action under section 60 can, by a proper and timely proceeding, obtain relief under subsection 2 of section 53 and, if there is a valid disclaimer, that the Court can in such an action take cognizance of that disclaimer; but we decide none of these points.

The application is dismissed with costs.

Motion dismissed with costs.

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* May 3, 4.
* June 1.

IN THE MATTER OF A REFERENCE AS TO THE APPORTIONMENT OF THE COSTS OF A HIGHWAY CROSSING DIRECTED TO BE CONSTRUCTED OVER THE CANADIAN PACIFIC RAILWAY COMPANY AT ANGLIERS, PROVINCE OF QUEBEC, BY THE MUNICIPAL COUNCIL OF ST. EUGÈNE DE GUIGUES.

Railways—Highway—Level crossing—Quebec Orders in Council—Crown grants—Provincial Acts—Reservation for highways—Costs of construction and maintenance—Practice of the Board of Railway Commissioners for Canada—Seniority—Re-hearing—Railway Act, sections 43, 51, 189, 256, 259.

On the application of the municipality of St. Eugène de Guigues, province of Quebec, for a level crossing over the Canadian Pacific Railway Company's tracks at Angliers, the Board of Railway Commissioners for Canada by a first judgment (43 Can. Ry. Cas. 84) held that, under the Quebec Order in Council of October 30, 1794, the Municipal Code and certain provincial Acts, the municipality was senior at the point of crossing and placed the cost of construction and maintenance on the railway company. The latter then applied under section 51 of the *Railway Act* for a re-hearing of the application and on the re-hearing, which was first refused and subsequently granted, both parties submitted additional evidence, and the case was re-argued. On April 8, 1936, the Board of Railay Commissioners for Canada rendered its decision, (45 Can. Ry. Cas. 208); but the Chief Commissioner, the Assistant Chief Commissioner and the Deputy Chief Commissioner (the latter differing from the Chief Commissioner in his view of the facts and of the law) were all of the opinion that a case should be stated in writing for the opinion of the Supreme Court of Canada on the following questions: 1. Whether the Chief

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

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Commissioner was right in holding that the Orders in Council of 1794 do not constitute a valid reservation for highways as against subsequent grantees of the Crown. 2. Whether the Chief Commissioner was right in holding that the grant from the Crown to the railway company in 1933 is sufficient in itself to rebut any presumption in favour of such a reservation which might otherwise arise either from the terms of the Orders in Council or by reason of the practice which has been followed for many years in the survey of Crown lands in the province of Quebec. 3. Whether the Chief Commissioner was right in holding that the railway company occupies a position of seniority in respect of the railway crossing, the subject of this application. 4. Had the Board jurisdiction under section 51 of the *Railway Act* to grant a re-hearing of the application?

Held that, as to the first and second questions the title of the railway company to the lands in question was not subject to any reservation in respect of highways; and as to the fourth question, that the Board of Railway Commissioners for Canada had jurisdiction under section 51 of the *Railway Act* to give a direction for, and to proceed with, the re-hearing of the municipality's application.

As to the third question, no answer was given to it, as, in the opinion of the Court, it was no part of its functions to define the practice of the Board in respect of the apportionment of cost of works upon an application to construct a railway crossing on a highway or a highway crossing on a railway.

REFERENCE by the Board of Railway Commissioners for Canada (1) to the Supreme Court of Canada of certain questions of law contained in a stated case in writing for the opinion of that Court, pursuant to the provisions of section 43 of the *Railway Act*.

The facts as set out in the stated case are summarized as follows: By grant from the Crown in the right of the province of Quebec of June 12, 1933, the Interprovincial and James Bay Railway Company (the railway now forming part of the Canadian Pacific Railway) became "the absolute owner" of a railway right of way through the lands of the Crown in certain townships, including the lands at the point of crossing here in question. The operative words of the instrument transfer and convey full ownership to the railway company subject to express reservations of minerals and of the right to retake any part of the lands situate on the shores of lakes and rivers. Two Orders in Council made in 1794, during Lord Dorchester's administration, were put in evidence. The first, dated 10th October, 1794, approves a diagram for a river township nine miles broad by twelve miles deep, to be adopted in the laying out of the ungranted lands of the

(1) (1936) 45 Can. Ry. Cas. 208.

Crown; and it directs that the Surveyor General make a diagram on the same principle for an inland township of ten miles square. The Order in Council refers in terms to the reserves for the Crown and church, and these reserves are shewn in red and black on the diagram, but there is no reference to road allowances. The second Order in Council, dated 30th October, 1794, adopts a similar diagram for an inland township, and quotes the report of the Land Committee to His Excellency that "it has been necessary in order to make each lot contain two hundred and ten acres (the allowance of five for every hundred acres for highways included) to make the township contain ten miles, five chains in length and ten miles, three chains and fifty-five links in breadth." The Township of Baby, in which the crossing in question is situate, is a river township. It was shown to be the practice of the Department of Lands, in making grants to settlers, to include in the grant 105 acres of land for each 100 acres bought and paid for by the settler subject to a reservation, commonly but not uniformly contained in the grants, for highways. In the forms of Crown grant the words "and the usual allowance for highways" form part of the description of the land granted, and are not inserted by way of reservation. The application for the crossing was originally made by letter from the municipality to the Board, which issued its order authorizing the crossing, and directed that the question of the apportionment of the cost should be reserved for further consideration. A judgment was subsequently delivered by the Deputy Chief Commissioner, concurred in by Commissioner Norris, and in part concurred in by the Assistant Chief Commissioner, directing that the crossing should be provided at the expense of the railway company, and a formal order was issued accordingly (1). The railway company thereupon applied for a re-hearing which was first refused but subsequently granted. The case was then set down for further hearing, additional evidence was put in by both parties and the case was re-argued before the Chief Commissioner, the Assistant Chief Commissioner and the Deputy Chief Commissioner. Subsequently a judgment was delivered by the Chief Commissioner in which he reached conclusions completely at variance with those reached by the Deputy Chief Commissioner, but expressing

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the opinion that a case should be stated for the opinion of this Court. In his opinion the Assistant Chief Commissioner and the Deputy Chief Commissioner (the latter differing from the Chief Commissioner in his view of the facts and the law) concurred (2).

G. A. Walker K.C. for the Canadian Pacific Railway Company.

R. Cannon K.C. for the municipality of St. Eugène de Guigues.

The judgment of the court was delivered by

DUFF C.J.—This appeal concerns three questions stated for the opinion of this Court by the Board of Railway Commissioners. The nature of the proceedings giving rise to the stated case appears in the first three paragraphs of that case, which are these:

1. On October 13, 1933, the municipality of St. Eugène de Guigues applied for a crossing over the Canadian Pacific Railway Company's tracks at Angliers, which is situate within the township of Baby.

2. On March 5, 1934, the Board authorized the construction of this crossing, and by its order no. 50814 reserved its decision in regard to the apportionment of the cost of construction and maintenance. Subsequently, by order no. 51463, of October 25, 1934, the cost of construction and maintenance was ordered to be borne and paid by the Canadian Pacific Railway Company.

3. On December 17, 1934, the Canadian Pacific Railway Company applied under section 51 of the *Railway Act* for a re-hearing of the application, and on the re-hearing, which was first refused and subsequently granted, both parties submitted additional evidence, and the case was re-argued by all parties interested.

The Board of Railway Commissioners has authority under section 259 to apportion the cost of works constructed pursuant to the authority of the Board given upon an application under section 256 for leave to construct a railway crossing on a highway or to construct a highway crossing on a railway. The authority under section 259 is a statutory authority the exercise of which is entrusted to the Board. It seems very clear that this Court has no power, by laying down a rule, nor has the Board itself power, by establishing a practice, to limit the discretion with which the Board is invested by that section (*Attorney-General* v. *Emerson*) (1).

It appears that in fact, when such applications are made to the Board, the determining circumstance, under the

(1) (1935) 44 Can. Ry. Cas. 84. (2) (1936) 45 Can. Ry. Cas. 208.
(1) (1889) 24 Q.B.D. 56.

practice of the Board, in respect of the apportionment of cost, is what is described as "seniority"; by which is meant, apparently, that when the railway is constructed on land over which the public have a right of passage by virtue of statute, dedication or otherwise, the incidence of the cost of the works necessary to provide a highway crossing over the railway, upon the site over which there existed these rights of passage, falls upon the railway company; while, if, when the railway was constructed, there were no such rights of passage, the cost of the works is borne by the municipality or other public authority applying for the order.

I do not profess to be stating with accuracy or completeness the practice of the Board; and, indeed, one of the questions submitted to us would seem to indicate that the practice is not so definitely settled as to enable one, with confidence, to sum it up in a precise rule.

It is, perhaps, unnecessary to say that it is no part of the functions of this Court to define that practice. Accordingly, we shall not attempt to do so, and no answer will be given to the third question.

While it is beyond our province authoritatively to define, or even to describe, the practice, still more to enunciate any rule supposed to be evidenced by the practice, yet there is one question upon which we think we may give our opinion with some advantage, and we proceed to do so.

We have come to the conclusion that the title acquired by the railway company under the grant by the province of Quebec designated in the stated case is not subject to any reservation of any highway or any right on the part of the Crown, or any other public authority, to construct a highway in or upon the lands which are the subject of the grant. We are also of the opinion that there is no right reserved to take lands without compensation from the area granted for the construction of highways.

The first two questions submitted are in these words:

1. Whether the Chief Commissioner was right in holding that the Orders in Council of 1794 do not constitute a valid reservation for highways as against subsequent grantees of the Crown.

2. Whether the Chief Commissioner was right in holding that the grant from the Crown to the railway company in 1933 is sufficient in itself to rebut any presumption in favour of such a reservation which might otherwise arise either from the terms of the Orders in Council or by

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reason of the practice which has been followed for many years in the survey of Crown lands in the province of Quebec.

The meaning of "reservation for highways" is not free from doubt, but we think that what we have just said constitutes an answer to these questions in substance.

We do not consider it necessary to determine the effect of the Orders in Council of 1794, upon which the appellant municipality relies; that is to say, we do not think it necessary to determine what effect these Orders in Council had at the time they were passed. Assuming they were legislative in character, and assuming they imposed a legal duty upon the officers of the Crown to include in each patent of Crown lands, of the character contemplated by the Orders in Council, a reservation for the benefit of the public of the right to take land for constructing highways in the premises granted up to the limit of the percentage mentioned, we are still unable to agree that these Orders in Council affect the rights of the railway company arising from the grant now under consideration.

The authority of the legislature of the province of Quebec in respect of the disposition of the Crown lands of that province is indisputable. In *St. Catherine Milling Co.* v. *The Queen* (1) Lord Watson said:

> By an Imperial statute passed in the year 1840 (3 and 4 Vict., c. 35), the provinces of Ontario and Quebec, then known as Upper and Lower Canada, were united under the name of the province of Canada, and it was, *inter alia*, enacted that, in consideration of certain annual payments which Her Majesty had agreed to accept by way of civil list, the produce of all territorial and other revenues at the disposal of the Crown arising in either of the united provinces should be paid into the consolidated fund of the new province. There was no transfer to the province of any legal estate in the Crown lands, which continued to be vested in the Sovereign; but all moneys realized by sales or in any other manner became the property of the province. In other words, all beneficial interest in such lands within the provincial boundaries belonging to the Queen, and either producing or capable of producing revenue, passed to the province, the title still remaining in the Crown.

His Lordship then discusses the terms of sections 108 and 109 of the *British North America Act* and proceeds (pp. 57, 58):

> The enactments of section 109 are, in the opinion of their Lordships, sufficient to give to each province, subject to the administration and control of its own legislature, the entire beneficial interest of the Crown in all lands within its boundaries, which at the time of the union were vested in the Crown, with the exception of such lands as the Dominion

(1) (1888) 14 App. Cas. 46, at 55.

acquired right to under section 108, or might assume for the purposes specified in section 117.

Before turning to the legislation of Quebec affecting the disposal of Crown lands, it is convenient to quote some of the recitals of the grant now in question as well as the operative words:

Whereas, under production of new plans supplied by said railway company, it was shown that the lands used by said railway company were not all included in the above Orders in Council;

Whereas said railway company required an absolute deed of ownership on and upon the Crown lands actually occupied by its railway line, in accordance with the plans supplied by said railway company respectively the twentieth day of May, the third day of April, the thirtieth day of April, the twenty-sixth day of June, the ninth day of July and the first day of August, nineteen hundred and thirty, and signed by F. Taylor, Quebec professional engineer, and Malcolm D. Barclay, Quebec land surveyer.

Whereas the railway company further required an absolute title of ownership on the additional lands that will be necessary for the carrying out of its said railway line, as figuring on the above-mentioned plans;

Whereas under the above-mentioned Order in Council no. 599, the Minister has been authorized to sign and execute in favour of said railway company, a deed of transfer and conveyance of the rights of property on and upon all said lands.

Now, therefore, it has been agreed and covenanted as follows, by and between the parties hereto:—

For the above purposes, the Minister does hereby by these presents, transfer and convey in full ownership, subject to the reservation clause hereinafter mentioned, unto the railway company, hereto present and accepting, for itself, its successors and assigns the following parcels of land, to wit:—

Then follows a description of the lands granted.

It sufficiently appears from this, and, indeed, it is not disputed that, at the date of the grant, the land affected by it was in possession of the railway company, that their railway had been constructed upon it, and that they were occupying it as their right of way. Under section 189 of the *Railway Act,* by consent of the Governor in Council, a Dominion railway company may take possession of Crown lands for the purposes of its right of way. That section prohibits the company taking possession of, using or occupying any lands vested in the Crown without such consent; and it must be assumed that consent was obtained. It has now been settled by a decision of this Court (*Reference re s. 189, Railway Act*) (1), affirmed by the Judicial Committee of the Privy Council on appeal (2), that this section embraces the Crown lands of a province. It follows that

(1) [1926] S.C.R. 163. (2) [1926] A.C. 715.

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the railway company was lawfully in occupation of these lands as part of the site of its railway at the date of the grant, and the grant must be construed, therefore, in relation to that circumstance.

Turning now to the pertinent provisions of the Quebec statutes. Section 24 of chapter 44 (R.S.Q. 1925) is thus expressed:

> 24. With the exception of lands subject to the *Mining Act* (chap. 80) the Lieutenant-Governor in Council may, when he deems it expedient, fix the price per acre of public lands, and the terms and conditions of sale and of settlement and payment.

It was not seriously disputed at bar, and we have no doubt upon the point that, by this section, combined with the provisions of chapter 43, the Lieutenant-Governor in Council is empowered to authorize the Minister of Crown lands for the province to convey to a Dominion railway company lands required by that company for use as its right of way upon such terms and conditions as may be decided upon by the Lieutenant-Governor in Council. We do not doubt that, in virtue of this power, the Lieutenant-Governor in Council may convey lands in absolute ownership without any reservation of any description in respect of highways.

Coming to the grant itself. The grant in our opinion sufficiently evidences an intention that the title of the railway company shall be affected by no reservation in respect of highways.

The answer to the first and second questions is:

The title of the railway company to the lands in question is not subject to any reservation in respect of highways.

As to the fourth question. It appears from the stated case that in fact a re-hearing was directed. We have no doubt of the jurisdiction of the Board under section 51 to give such a direction and to proceed with the re-hearing.

The fourth question is answered in the affirmative.

There will be no order as to costs.

THE ATTORNEY-GENERAL OF THE PROVINCE OF BRITISH COLUMBIA ..... APPELLANT;

AND

THE ROYAL BANK OF CANADA AND ISLAND AMUSEMENT COMPANY LIMITED ..... RESPONDENTS.

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*Feb. 8, 9
Apr. 27, 28.
*June 1.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Bona vacantia—Company—Dissolution—Company funds in bank—Striking off register—Subsequent order for restoration to register—Motion for declaration that moneys property of Crown—Companies Act, R.S.B.C., 1924, c. 38, ss. 167, 168; B.C. statute of 1929, c. 11, ss. 199, 200.

On the proper constructions of sections 199 and 200 of the British Columbia *Companies Act* of 1929 (c. 11), the doctrine of *bona vacantia* does not apply so as to include moneys of an incorporated company which had its name stricken from the register under the provisions of the *Companies Act* of 1924 (ss. 167, 168 of c. 38) and restored under the provisions of the 1929 Act—Such company, while "dissolved," cannot be considered to be dead for all purposes when, *inter alia*, by the very part of the Act that refers to dissolution (s. 199 (1) of the Act of 1929), provision is also made enabling the company to apply to the court for an order of revivor, with the express enactment that, upon the order being made, "the company shall be deemed to have continued in existence * * * as if it had not been struck off."

APPEAL from the judgment of the Court of Appeal for British Columbia (1), affirming the judgment of Robertson J. (2) and dismissing the appellant's action for a declaration that the moneys deposited in the respondent bank to the credit of the respondent company at the time said company was struck off the register, pursuant to section 167 of the *Companies Act* of 1924, was the property of the Crown as *bona vacantia*.

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

H. Alan Maclean for the appellant.

E. F. Newcombe K.C. for the respondent.

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

(1) (1936) 51 B.C. Rep. 241; [1937] 1 W.W.R. 273.

(2) (1935) 50 B.C. Rep. 268; [1936] 1 W.W.R. 168.

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The judgment of Duff C.J. and Rinfret, Kerwin and Hudson JJ. was delivered by

KERWIN J.—This is an appeal by the plaintiff, the Attorney-General of British Columbia, from the judgment of the Court of Appeal for British Columbia (1), affirming the judgment of Mr. Justice Robertson (2) which dismissed the plaintiff's motion for judgment upon admissions made in the pleadings. In the action the plaintiff claimed a certain sum of money on deposit with the Royal Bank of Canada standing in the name of Island Amusement Company, Limited, as *bona vacantia*. The courts below, with Mr. Justice Martin dissenting in the Court of Appeal, have disallowed this claim, and in my view they were correct in so doing.

Island Amusement Company, Limited, was incorporated in 1912 under the British Columbia *Companies Act* then in force. In 1917 the company went into voluntary liquidation and one A. S. Innis was appointed liquidator. On October 25th, 1928, the Registrar of Companies struck the company off the Register of Companies in pursuance of section 167 of the *Companies Act*, R.S.B.C., 1924, chapter 38, for failure on the part of the liquidator to make the returns required by the Act. This action of the Registrar followed the publication in the *British Columbia Gazette* of the required notice, and in accordance with subsection 4 of section 167 of the Act, the Registrar published notice of the striking of the company off the register, and according to the same subsection, upon the latter publication, the company was "dissolved." It will be necessary to revert to the provisions of the 1924 Act in order to determine the meaning and effect of this dissolution.

On July 2nd, 1933, Mr. Innis, the liquidator, died. Some time before the making of an order, April 5th, 1935, by the Supreme Court of British Columbia, the Crown made a claim to the moneys on deposit with the Royal Bank of Canada standing in the name of the company. No explanation is forthcoming as to how this deposit had been overlooked by the liquidator and those interested in the company. The order referred to was made on the appli-

(1) (1936) 51 B.C. Rep. 241; [1937] 1 W.W.R. 273.

(2) (1935) 50 B.C. Rep. 268; [1936] 1 W.W.R. 168.

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cation of three shareholders of the company pursuant to the terms of the *Companies Act* then in force, being chapter 11 of the British Columbia Statutes of 1929. That order is as follows:

Upon the application of Bernard Sigismund Heisterman, Joseph Eilbeck Wilson, and Joseph Charles Bridgman, members of the above-named company, by petition dated the 28th day of March, 1935, and upon hearing the solicitor for the applicants, and upon reading the affidavits of the said Bernard Sigismund Heisterman and of William Henry Langley, respectively, both filed herein, and it appearing that the Registrar of Companies does not oppose such application:

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 parties which may have been acquired prior to the date on which the company is restored to the register.

And it is ordered that the time within which an office copy of this order shall be filed with the Registrar of Companies and his lawful requirements (if any) in respect to the company fulfilled shall be thirty days from the date of this order.

While this order does not so state, we were informed that counsel for the Attorney-General of British Columbia appeared on the motion although we were also informed that the order was issued without having been approved by him.

On June 10th, the Attorney-General, suing on behalf of His Majesty the King in the right of His Province of British Columbia, brought action against the Royal Bank of Canada for a declaration that the money on deposit in the bank to the credit of Island Amusement Company, Limited, was *bona vacantia* and had been ever since October 25th, 1928, the date on which the company was struck off the register, and for an order directing the bank to pay to the plaintiff the said money. On June 19th, 1935, on the application of the defendant bank, it was ordered that the company be joined as a party defendant in the action. As the company was without a liquidator, no appearance was entered for the added defendant. On November 15th, 1935, the plaintiff's motion for judgment was dismissed and the plaintiff appealed to the Court of Appeal for British Columbia. The appeal first came before that court on January 24th, 1936, and then again on January 29th, May 14th, June 26th and October 13th. At

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some date prior to November 4th, 1936, when judgment was delivered by the Court of Appeal, a new order was made under the *Companies Act*, 1929, and while this order does not appear in the case, we were informed that it was made in terms similar to the order of April 5th, 1935. The Court of Appeal had found it impossible to determine the real matter in dispute by reason of the fact that Island Amusement Company, Limited, was not represented but by agreement, after a new liquidator had been appointed, the company was represented by counsel before the Court of Appeal, which counsel adopted the argument that had already been advanced on behalf of the defendant bank. The members of the court were unanimous that the appeal should be allowed as against the Royal Bank, and an order was made for payment of the money into court by the bank. As against the Island Amusement Company, Limited, the appeal was dismissed, and it was ordered that the money was the property of that company. Mr. Justice Martin dissented as to the latter provision, being of opinion that the plaintiff was entitled to succeed in its claim.

What is the nature of a claim to *bona vacantia?* This matter was discussed at length by the Court of Appeal in England in *In re Sir Thomas Spencer Wells* (1), where it was held that the doctrine of *bona vacantia* extended to leaseholds, and that the equity of redemption in the mortgaged premises there in question passed to the Crown as *bona vacantia* on the dissolution of the company. It was pointed out in the judgment of Lord Hanworth, the Master of the Rolls, at page 43 (1):

> The principle under which the Crown takes *bona vacantia* is badly stated in the argument of the Attorney-General in *Middleton* v. *Spicer* (2): "The King is the owner of everything which has no other owner."

The Master of the Rolls further pointed out that that view was accepted by Lord Thurlow in his judgment in that case and also by the Privy Council in *Dyke* v. *Walford* (3). At page 49 (1), Lawrence L.J. quotes Blackstone's definition of "bona vacantia" as "goods in which no one else can claim a property," and refers to the fact that

> the expression "goods" in this definition has admittedly a larger significance that "goods" properly so-called and has long since been construed and accepted by the Court as extending to personal property of every kind.

(1) [1933] Ch. D. 29. (2) (1782) 1 Bro. C.C. 201, at 202.
(3) (1846) 5 Moo. P.C. 434.

Romer L.J., at page 55 (1), states:

In my opinion it is established law that the Crown is entitled to all personal property that has no other owner,

and on page 56 emphasizes the point

that the rule at common law is that property must belong to somebody and where there is no other owner, not where the owner is unknown, that is the distinction, it is the property of the Crown.

The exact point for determination in that case was as to the applicability of the doctrine of *bona vacantia* to an equity of redemption in mortgaged leasehold premises. The company had been dissolved and there were no enactments in question, such as we have in the instant case.

The actual decision in *Russian and English Bank and Florence Montefiore Guedalla* v. *Baring Brothers and Company* (2), does not assist on the point that arises for determination here. The head-note of the report correctly sets forth the decision:—

A foreign company which after carrying on business in this country has been dissolved in the country of its incorporation may, notwithstanding its dissolution in that country, be wound up as an unregistered company under s. 338, ss. 1 and 2, of the *Companies Act*, 1929, although the dissolution took place before the passing of that Act; and, with the leave of the Registrar in Companies Winding-up, on the instruction of the liquidator with the approval of the committee of inspection, an action may be brought in the name of the foreign company to recover sums which at the date of its dissolution were due to the company and unpaid.

So held, by Lord Blanesburgh, Lord Atkin and Lord Macmillan, Lord Russell of Killowen and Lord Maugham dissenting.

At the conclusion of the report appears this note:—

Order appealed from reversed: Ordered that the stay of proceedings be recalled and that the action be allowed to proceed, and that the respondents do pay to the appellants their costs in the Court of Appeal and in this House.

From this it appears that the only point decided was that the action might be brought in the name of the company.

At page 422, Lord Blanesburgh states:—

I would only add, by way of a general observation, that any difficulties in this liquidation will, I doubt not, be met as they arise. It will be open to the Court completely to control the liquidator at every step. In the present action the Court will doubtless be vigilant to see that no order possibly affecting either the Attorney-General on behalf of the Crown or the Soviet Government is made without due notice to each.

Lord Atkin in his speech, at page 426, states that:—

On the assumption adopted by the judgments under appeal * * * there is the further difficulty that all that which had been the moveable property of the company has become vested in the Crown as *bona vacantia*.

(1) [1933] Ch. D. 29. (2) [1936] A.C. 405.

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And later, on the same page, in discussing the effect of the judgments under review, he points out:—

> What has been the property of the company now belongs to a third person, the Crown, and there is no power to vest the property of a third person in the liquidator;

but, on the assumption Lord Atkin preferred to adopt,

> the Crown acquired a defeasible title defeated upon the making of a winding-up order.

Lord Macmillan, the third member of the House, who concurred in allowing the appeal, refers at page 439 to sections 294 to 296 of the Act there in question and pointed out that the provisions of section 296 as to the property of a dissolved company becoming *bona vacantia* were in his view, inapplicable to the *Russian and English Bank* case (1).

> But (he continues), if the assets of the bank on its dissolution become *bona vacantia,* either at common law or by statute, the Attorney-General on behalf of the Crown was present when the winding-up order was pronounced and in acquiescing in that order he must be taken to have had in view all its consequences, including the consequence that it would involve the effective collection and distribution of the assets which belonged to the company.

I must confess that, with respect, I find it difficult to follow this last statement since the report of the decision on the petition for a winding-up order, *In re Russian and English Bank* (2), shows, at page 666, that the Crown took the position that "the Court has no power to accede to the present petition," and further,

> in the present case the Crown has a claim to the goods as *bona vacantia* if it is able to obtain possession of them.

However, I have referred to these extracts from the speeches of their Lordships who, comprising the majority, allowed the appeal, merely to show that each one took a different view as to the possible claim of the Crown to *bona vacantia.*

Of the dissenting Judges, Lord Russell of Killowen, at page 434, states:

> The property which it owned in this country thereupon became the property of the Crown,

and Lord Maugham at page 444:

> It would seem that unless the Crown waives its claim to the assets in question (as in the case of *In re Hendersons' Nigel Co.* (3) there will be no assets available for distribution. In the absence of the Crown I do not wish to be taken as expressing a final opinion on this question, but it seems to me to suggest a further difficulty in the way of the nominal plaintiff.

(1) [1936] A.C. 405. (2) [1932] 1 Ch. D. 663.
(3) (1911) 105 L.T. 370.

Except, therefore, for such assistance as may be gleaned from the expressions of opinion of their Lordships in the *Russian and English Bank* case (1), it would appear that one must find the solution to the problem in this appeal from a consideration of the extent of the doctrine of *bona vacantia* and of the sections of the Act itself. The case of *The King* v. *Attorney-General of British Columbia* (2), affords no guide since, as remarked by Lord Sumner at page 215:—

> All that need be noted about the actual subject-matter of the dispute is that as the parties have admitted it to be in itself *bona vacantia*, their Lordships have proceeded on the footing of this admission *inter partes* to consider the right to it.

And accordingly, on the basis of that admission, it was determined that *bona vacantia* are "royalties" within section 109 of the *British North America Act*, 1867, and belong to the Province and not to the Dominion. In view of the admission in that case, it is not important to consider how the company referred to in the proceedings had been dissolved.

The applicants for incorporation of Island Amusement Company, Limited, had filed a memorandum of association with the Registrar of Companies, and under the provisions of the *Companies Act* in force at that time, the company became incorporated upon the Registrar retaining and registering the memorandum. It has already been mentioned that the company went into voluntary liquidation in 1917 and thereupon it became the duty of the liquidator, from time to time, to make returns to the Registrar, and it was for failure in this respect that on October 25th, 1928, the Registrar struck the company off the register.

Section 167 (R.S.B.C., 1924, chapter 38) which is the section under which the Registrar acted, appears in Part IX of the Act which deals with "Dissolution." The first division of this Part is headed "Cancellation of Incorporation" and section 166, which is the only section in that division, empowers the Lieutenant-Governor in Council to revoke and cancel the incorporation of a company and declare the company to be dissolved. The second division,

(1) [1936] A.C. 405. (2) [1924] A.C. 213.

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headed "Removal from Register of Companies in Default or Defunct," comprises sections 167 to 171 dealing with failures to file certain returns. The third division is headed "Winding up," and it is interesting to note that by section 233 provision is made for the dissolution of a company at the expiration of three months from the receipt by the Registrar of Companies of a return showing how the property of the company had been disposed of. We are not concerned with the dissolution provided for by sections 166 or 233 but with the dissolution under section 167. That section (the underlining is mine) is as follows:

167. (1) Where a company or an extra-provincial company has failed to file any return, notice, or document required to be filed with the Registrar pursuant to this Act or any former *Companies Act* for two consecutive years after the return, notice, or document should have been so filed, or the Registrar has reasonable cause to believe that a company or extra-provincial company is not carrying on business or in operation, he shall send to the company by post a registered letter notifying it of its default or inquiring whether the company is carrying on business or in operation.

(2) If within one month of sending 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 have ceased to carry on business in the province.

(3) In any case where a company or extra-provincial company is being wound up, if the Registrar has reasonable cause to believe that no liquidator is acting or that the affairs of the company are fully wound up, or if the returns required to be made by the liquidator have not been made for a period of three consecutive months, after notice by the Registrar demanding the returns has been sent by post to the registered office of the company, or, in the case of an extra-provincial company, to the attorney of the company under Part VIII, and to the liquidator at his last-known place of business, the Registrar may publish in the *Gazette* a like notice as is provided in subsection (2).

(4) At the expiration of the time mentioned in the notice, and also in any case where a company has by resolution requested the Registrar to strike it off the register, and has filed with him a statutory declaration of two or more directors proving that the company has no debts or liabilities, 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 in the *Gazette* of this notice the company shall be dissolved, or in the case of an extra-provincial company, shall be deemed to have ceased to carry on business in the province: 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.

At the time the restoring order of April 5th, 1935, was secured, the *Companies Act* in force was chapter 11 of the statutes of 1929, sections 199 and 200 of which are as follows (the underlining again being mine):—

199. (1) Where a company or an extra-provincial company or any member or creditor thereof is aggrieved by the company having been struck off the register, the Court, on the application of the company or member or creditor, may subject to section 200 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:

(*a*) In the case of a company formed for the purposes of a club, without the written consent of the Attorney-General; or

(*b*) In the case of a company struck off the register at its own request without the written consent of the Registrar; or

(*c*) In the case of a public company incorporated before the first day of July, 1910, without the written consent of the Registrar.

(2) Where the period fixed for the duration of a company expired before the first day of September, 1921, without a grant of perpetual existence having been obtained by the company under any Act in that behalf, an application to restore the company to the register may nevertheless be made under this section, and if the Court makes an order restoring the company, the company shall be deemed to have been granted perpetual existence as from the date when its time of existence expired, but no member of the company shall be liable for anything done between the time when the company ceased to exist and the date of the order, unless he has consented in writing to the application under this section to restore the company.

(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, R.S. 1924, c. 38, s. 168.

200. (1) The Court may make an order restoring a company to the register for a limited period or for the purpose of carrying out a particular purpose, and after the expiration of that period or the execution of that purpose the company shall forthwith be struck off the register by the Registrar.

(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.

(3) The Court shall not make an order restoring a company to the register, unless notice of the application, together with a copy of the

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petition and any document filed in support thereof with the Court, has been sent to the Registrar, and, except where the application is for an order under subsection (1), notice of the application has also been advertised in two issues of the *Gazette*.

(4) The Court shall by the order restoring a company to the register fix a time within which an office copy of the order shall be filed with the Registrar and his lawful requirements (if any) in respect of the company fulfilled, and may extend such time, but no order shall take effect until an office copy is so filed and such lawful requirements are so fulfilled; and when the office copy is so filed and such lawful requirements are fulfilled, the Registrar shall issue under his seal of office a certificate that the company is restored to the register.

(5) Where the application is not made within one year from the date on which the company was struck off, and another company or extra-provincial company has been incorporated or registered, as the case may be, under the same or a similar name, and the Registrar objects to the restoration of the company to the register under its own name, the Court shall by the order provide that the company be restored under another name approved by the Registrar in writing and the order shall, subject to subsection (4), take effect in the same manner as if the company had changed its name and the Registrar had issued a certificate thereof in accordance with this Act, but in the case of an extra-provincial company the Court shall not make an order unless the company has changed or undertakes to change its name in accordance with its charter and regulations, but this provision shall not apply to a Dominion company.

(6) The expression "lawful requirements" in subsection (4) shall, in addition to any requirement of this Act, be deemed to authorize the Registrar to require a public company incorporated before the first day of July, 1910, to comply with sections 40 or 41 before it carries on business, and to require a company any of whose shares are of a nominal or par value of less than fifty cents for each share to consolidate and divide such shares into shares of a nominal or par value of not less than fifty cents for each share. R.S. 1924, c. 38, s. 168.

While the order restored the company to the register for a limited period and for a particular purpose, it seems plain that in determining the effect of the order regard must be had to the provisions of section 199 as well as the provisions of section 200.

Firstly, it is only section 199 which refers to those who may apply for an order.

Secondly, by subsection 3 of section 200 the court is not to make an order restoring a company to the register unless notice of the application has been sent to the Registrar and except where the application is for an order under subsection 1 notice of the application has also been advertised in two issues of the Gazette. The part underlined contains the provision for notice of the application appearing in the *Gazette* but excepts therefrom the case where an application is for an order under subsection 1 of section 200.

Thirdly, the provisions of subsections 4 and 5 must refer as well to a general order made under section 199 as to an order under subsection 1 of section 200 when it is borne in mind that the powers of the court to restore companies to the register were given in the Act of 1924 (chapter 38) in one section, 168.

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 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.

This view is strengthened by a perusal of the earlier legislation. In 1910 the *Companies Act* appeared as chapter 7, and section 265 thereof provides that where a company has failed for any period of two years to send or file any return, notice or document required to be made or filed or sent to the Registrar pursuant to this Act, or the Registrar has reasonable cause to believe that such company is not carrying on business or in operation, he shall send an inquiry as to whether such company is carrying on business or in operation and notifying it of its default (if any).

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By subsection 2, if within one month no reply to such letter is received, etc., the Registrar may at the expiration of another fourteen days publish in the *Gazette* and send to such company a notice that at the expiration of two months the name of such company will, unless cause is shown to the contrary, be struck off the register and the company will be dissolved. By subsection 3, at the expiration of the time mentioned in such last-mentioned notice, the Registrar shall, unless cause to the contrary is previously shown by such company, strike the name of such company off the register and shall publish notice thereof in the *Gazette* for one month, and on such last-mentioned publication the company shall be dissolved.

By subsection 4

> if any such company or a member or creditor thereof feels aggrieved by the name of such company having been struck off the register in pursuance of this section, the company or member or creditor may before the completion of the last-mentioned publication apply to the Court;

and the court may order the name of the company to be restored to the register

> and thereupon the company shall be deemed to have continued in existence as if the name thereof had never been struck off.

By subsection 6:—

> (6) Where a company is being wound up, and the Registrar has reasonable cause to believe either that no liquidator is acting or that the affairs of the company are fully wound up and the returns required to be made by the liquidator have not been made for a period of three consecutive months, after notice by the Registrar demanding the returns has been sent by post to the registered address of the company and to the liquidator at his last known place of business, the provisions of this section shall apply in like manner as if the Registrar had not within one month after sending the letter first mentioned received any answer thereto.

It seems therefore that subsection 2 and the other subsections would then apply so that in the case of a winding up, as well as other cases where default occurred, the company or member or creditor were obliged to apply to the court, before the completion of the month's notice in the *Gazette*, giving notice that the name of the company had been struck off the register. That is, under the Act of 1910 the court was empowered to act on an application to restore the company to the register only if such application were made within the time limited.

Then came the revision in the Revised Statutes of 1911, chapter 39, in which section 268 replaced section 265 of the 1910 Act except for an unimportant amendment made in 1911.

In 1913, by chapter 10, section 21, an important change was made. Subsection 4 of section 268 of the 1910 Act was repealed and a new subsection inserted. By it the application to the court could be made at any time but the new subsection provided that if the application was not made within one year any other company might change its name to the same or a similar name, etc. Subsection 3 was left as it was and it is that subsection which provides that the Registrar shall at a certain period strike the name of the company off the register and publish notice thereof in the *Gazette* for one month

> and on such last-mentioned publication the company * * * shall be dissolved.

Then in 1921, by chapter 10, these provisions were removed from Part IX of the 1911 Act, headed "Winding up," of which Part section 268 was the last, and incorporated in Part IX of the *Companies Act*, which Part is headed "Dissolution." Division I is headed "Cancellation of Incorporation"; Division II is headed "Removal from Register of Companies in Default or Defunct," and Division III is headed "Winding up." The important provisions are separated and appear in two sections, 167 and 168.

The amendments to the 1921 Act, by 1921 (Second Session), chapter 8, section 4, and by 1922, chapter 11 section 22, are not important. Then came R.S.B.C., 1924, chapter 38, sections 167 and 168, under the first of which the company was on October 25th, 1928, struck from the register.

It will, therefore, be seen that the legislature removed the time limit within which an application might be made to the court to restore the name of the company to the register, but the effect of any order so made was as it always was that

> thereupon the company shall be deemed to have continued in existence as if the name thereof had never been struck off.

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 "dissolu-

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tion" 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.

Counsel for the appellant, however, referred to the *Escheats Act,* R.S.B.C., 1924, chapter 81, as amended. The amendment of 1924, chapter 18, section 2, added section 3 (*a*) to the Act. Subsection 1 of section 3 (*a*) provides that where a corporation is dissolved, the lands, tenements and hereditaments, etc., shall for all purposes be deemed to escheat to the Crown in right of the province. By subsection 2 of section 3 (*a*) the Lieutenant-Governor in Council shall not within one year from the date of the dissolution of the corporation make any grant or other disposition of escheated lands. By subsection 3 of section 3 (*a*) where a corporation is within one year from its dissolution revived pursuant to any Act, by order of any court, the order shall have effect as if the lands, etc., had not escheated, and subject to the terms of the order such lands, etc., shall *ipso facto* vest in the corporation.

Section 7 of the *Escheats Act* as amended by section 3 of 1924, chapter 18, reads as follows, the words underlined being those which were inserted by the amendment:—

> 7. The Lieutenant-Governor in Council may make any assignment of personal property to which the Crown is entitled by reason of the person last entitled thereto having died intestate and without leaving any kin or other persons entitled to succeed thereto, or by reason of the same having become vested in the Crown as *bona vacantia,* or by reason of the same having become forfeited to the Crown, or may make an assignment of any portion of such personal property, 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 for carrying into effect any disposition thereof which such person may have contemplated, or of rewarding the person making discovery of the right of the Crown to such property, as to the Lieutenant-Governor in Council may seem meet.

While section 3 (*a*) deals with escheats, counsel adduced from its provisions the argument that the legislature having therein made definite provision for the case of a company being revived within one year of its dissolution and no

similar provision having been made in section 7 referring to personal property to which the Crown is entitled, "by reason of the same having become vested in the Crown as *bona vacantia,*" the Lieutenant-Governor in Council, under the last section, is the only authority to determine the disposition of the money. 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.

The appeal should be dismissed. When the matter first came on for argument before us no one appeared for the Island Amusement Company, Limited, and the hearing was adjourned to give an opportunity to the appellant to arrange that the company should be represented by counsel so that we might have the benefit of his argument. In view of this, we deem it unnecessary to make any order as to the costs of this appeal.

DAVIS J.—There can be no doubt of the right of the Crown to the personal property of an incorporated company which has become extinct by complete and effective dissolution and in this case we may well ask ourselves at the outset the question whether upon the proper construction of the statute under which the company was incorporated and under whose provisions its name was stricken from, and subsequently restored to, the register, there was at the time the company was stricken from the register an absolute and complete, or merely a qualified, dissolution because while section 167, which provides the machinery for the Registrar to strike a defaulting company from the register, says "and the company will be dissolved," section 199 enables the company subsequently to apply to the court for an order restoring it to the register and for the purposes of its restoration, to hold such meetings and take such proceedings as may be necessary as if the company

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had not been dissolved, and expressly enacts that upon the order being made

> the company shall be deemed to have continued in existence as if it had not been struck off (the register).

Cunnack v. *Edwards* (1) was the case of an unincorporated society, under the protection of the *Friendly Societies Acts,* which had lasted for nearly ninety years but had then become extinct. All the members were dead but a remnant of the common fund amounting to something over £1,200 remained. Chitty J. held that there was a resulting trust in favour of the personal representatives of those who had contributed to the fund but the Court of Appeal (Lord Halsbury L.C., A. L. Smith and Rigby L. JJ.) were all of the opinion that that view could not be maintained because the entire beneficial interest had been exhausted in respect of each contributor and the funds were *bona vacantia* and belonged to the Crown in that character. That case is easy to understand because all the members of the unincorporated society had been natural persons and they were all dead.

In re Higginson and Dean ex parte The Attorney-General (2) was the case of a corporation created by statute that had proved in the bankruptcy of a trading firm, along with other creditors. The corporation subsequently was dissolved by an order of the court under the *Companies Act.* Afterwards it was discovered that the bankrupts had been entitled to certain railways shares and the official receiver recovered the value of the shares and held the proceeds as trustee in the bankruptcy. Another creditor moved to expunge the proof of the dissolved corporation, claiming that the money to which the corporation had been entitled as a creditor, and which was then in the hands of the official receiver as trustee, was divisible among the still existing creditors. The county court judge made an order expunging the proof. On appeal by the Attorney-General on behalf of the Treasury, it was held by the court (Wright and Darling JJ.) reversing the order, that on the dissolution of the corporation the proceeds of the shares in the hands of the official receiver as trustee in the bankruptcy had passed to the Crown as *bona vacantia,* and the Crown was entitled to the amount. But the cor-

(1) [1896] 2 Ch. 679. (2) [1899] 1 Q.B. 325.

poration there was treated as one "who has become extinct without successor or representative." R. S. Wright J. at p. 331 said that in the 17th and 18th centuries corporations aggregate, constituted by charters or letters patent, were numerous and questions frequently occurred as to the effect upon their rights and obligations of dissolution, revival and reincorporation, with or without change of name or constitution.

I cannot find that in any case the rights or obligations of a corporation were held to be affected by a technical dissolution. Nor, on the other hand, can I find a case in which such a question has been decided, where the corporation had not been revived, or some provision made by statute or charter with reference to its obligations. In *Mayor, &c., of Colchester* v. *Seaber* (1), the revived corporation sued in its own name on a bond given to the dissolved corporation, and succeeded. Sir Fletcher Norton, for the plaintiff corporation, argued that the goods and chattels of the old corporation, including its choses in action such as the bond, had on its dissolution passed to the Crown, and that the Crown in granting a charter of revival had regranted them to the revived corporation. Mr. Dunning, on the other side, neither admitted nor denied this, and the Court is not reported to have expressed any opinion on this point, it being held that there was only a qualified dissolution, and no absolute break of continuity.

In *The King* v. *Pasmore* (2) Lord Kenyon speaks of a corporation being dissolved "to certain purposes" and in considering very old cases goes on to say that

by the new charter the King did not consider the old corporation as dissolved "to all purposes."

Lord Maugham (Maugham J. as he then was) in *In re Home and Colonial Insurance Company Limited* (3), says that it was settled by the decision in *In re Higginson and Dean* (4) that "on a company being dissolved in the strict sense" the whole of its assets undistributed at the date of dissolution passed to the Crown as *bona vacantia.*

Lord Macmillan in *The Russian and English Bank* case (5), said:

Now the purpose of pronouncing a winding-up order is to secure the collection and distribution of the assets of the company to which it relates. The logical inquirer may ask how a company which has ceased to exist can have any assets. But when the Legislature authorized the making of a winding-up order in the case of a dissolved company it must be presumed to have intended such order to be effective and to result in the collection and distribution of assets. To hold that the Legislature has authorized the collection of the assets of a dissolved company, but

(1) (1766) 3 Burr. 1866.
(2) (1789) 3 Term Rep. 199.
(3) (1928) 44 Times L.R. 718.
(4) (1899) 1 Q.B. 325.
(5) [1936] A.C. 405, at 437.

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has withheld the power of recovering these assets, would be to attribute a singular ineptitude to Parliament.

And again at p. 438:

> The truth is that the whole procedure is highly artificial. Once it is conceded, as it must be, that a non-existent company may be the subject of a winding-up order it is inevitable that anomalous consequences must ensue, some of which may not have been foreseen by the Legislature.

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 (1). 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.

But assuming that we are not entitled to regard the dissolution under section 167 as anything but a real and effective dissolution that in itself entitled the Crown to the personal property of the corporation, as property having no other owner, the subsequent order of the court restoring the company to the register enjoins us to treat the company, "in the words of the statute," as if it had "continued in existence" and "had not been struck off." In that view it might be held that the Crown acquired at the time the company was stricken off the register title to the personal property of the company as *bona vacantia* subject to being

(1) (1899) 1 Q.B. 325.

defeated upon the subsequent making of a restoration order. But personally I find it exceedingly difficult, dealing with the matter as one of practical administration, to think of the Crown's right to ownership of goods in the character of *bona vacantia* in terms of a qualified or defeasible title. It appears to me to be a contradiction in terms to regard the property of a company as being without an owner and at the same time to recognize the possibility that at some undefined period of time in the future the corporation may be revived and the title of the Crown defeated.

It is argued on behalf of the Crown, however, that on the assumption that the dissolution can be set aside and the Crown's claims defeated, the order of the court in this particular case preserved the Crown's right by the provision in the order that the company should be restored and continued in existence as if its name had never been struck off,

without prejudice, however, to the rights of any parties which might have been acquired prior to the date on which the company is restored to the register.

But when one considers the scheme of the statute as a whole and the various methods provided for the final winding up of a company (*a*) by voluntary winding up, or (*b*) by a court order in winding-up proceedings, and the provisions of the statute for the effectual collection of the assets and the distribution of them among the creditors and the final certificate to the Registrar of winding up whereby the company becomes ultimately dissolved (in the strict sense I take it of the word) in contradistinction to the dissolution referred to in section 167 (which precedes the special machinery set up for reviving the company and the carrying out of its liquidation in the ordinary course), it becomes apparent that the without prejudice clause in the statute, and which is found in the order restoring the respondent company, is intended to preserve legitimate claims of third parties which have arisen subsequent to the date that the company was stricken off the register because officers and agents of the company may not have heard of the striking of the name of the company from the register and may have gone ahead for some time carrying on the operations of the company in absolute good faith without notice or knowledge that the Registrar had stricken the name of the company off the register. That I believe is

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a fair interpretation to be put upon the without prejudice clause. I cannot bring myself to the view urged upon us that those words, properly construed, apply to such a claim as the claim of the Crown under the rule of *bona vacantia*.

Lord Blanesburgh in *Morris* v. *Harris* (1) in the House of Lords observed the apparent reason for the difference in phraseology and effect between section 223 and subsection 6 of section 242 in the *Companies (Consolidation) Act*, 1908:

> A dissolution under sec. 242, as I have said, is preceded by no winding-up, and the section had to envisage a dissolution which might have taken place without the knowledge of any one concerned in the company. Hence the wide powers given to the Court by subsection 6. Section 223, on the other hand, is confined to cases where the dissolution succeeds the complete winding up of the company's affairs and cannot take effect at all except at the instance or with the knowledge of the liquidator, the company's only executive officer. The Legislature has not seen fit to make provision for validating any intermediate acts done on behalf of such a company so dissolved.

Adapting the language of Lord Blanesburgh to this case, the Legislature has seen fit in section 200 to make provision for validating any intermediate acts done on behalf of a company so dissolved. I cannot read the provision as intended to validate a vesting of all the personal property of the company in the Crown as a vesting which automatically took effect at the moment of the dissolution of the company under the provisions of section 167.

The appeal must be dismissed.

Appeal dismissed.

Solicitor for the appellant: *H. Alan Maclean.*

Solicitors for the respondent The Royal Bank of Canada: *Crease & Crease.*

Solicitor for the respondent Island Amusement Co. Ltd.: *W. H. Langley.*

(1) [1927] A.C. 252, at 269.

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and have them remedied as they occur); and if the defects complained of were such as the architect would observe if he gave the requisite supervision to the work, then it could not fairly be said that the defects were not apparent within the contemplation of article 16 before the completion and acceptance of the work. The date of the "appearance" of faulty workmanship or materials (if any) was important; and the case against B. had not really been dealt with, at trial, from that point of view. Further, if there was liability upon B. under article 16, it rested upon plaintiffs to establish upon a proper measure of damages what were in fact the actual damages; and the evidence was not such as could establish that. The principle of measuruing damages on the basis of the cost of repairing the building as it stood at the date of the trial (February, 1934) was clearly wrong, quite apart from the very unsatisfactory nature of the evidence adduced even on that basis. It was impossible to say from the evidence whether any liability had been incurred under article 16. (4) For reasons aforesaid, the judgment against B. should be set aside; with liberty to plaintiffs to proceed to a new trial on the issue arising out of article 16. (5) The action as against the surety should be dismissed. Acts of the plaintiffs in connection with the contract (anticipatory payments, the arrangement aforesaid for payment direct to sub-contractors owing to B.'s financial difficulties in completing the work, the settlement covered by said undertaking of September 28, etc.) which, under all the special circumstances of the case should have been, but were not, done with the knowledge and consent of the surety, operated to discharge the surety. (The law as to the effect of alterations in a contract as affecting a surety's liability, discussed, and *Holme* v. *Brunskill*, 3 Q.B.D. 495; *Calvert* v. *London Dock Co.*, 2 Keen's Rep. 638, *General Steam Navigation Co.* v. *Rolt*, 6 C.B. (N.S.) 550, and other cases, referred to. Any agreement or transaction between the principals in variation of the contract without the surety's consent, unless it is self-evident that the variation is unsubstantial or necessarily beneficial to the surety, operates to discharge the surety. The application of this principle with regard to the circumstances of the present case discussed). (6) After B.'s bid had been accepted, he notified plaintiffs that he had made two substantial omissions in estimating costs for the purpose of it, and requested release or an increased

contract price, which plaintiffs refused. B., faced with threatened forfeiture of deposit and loss of materials on the site of the work, decided to proceed with the work. It was subsequent to this that the surety delivered its bond in the blanket form in which plaintiffs required it. When these facts had come out at the trial (which had then proceeded for a week) counsel for the surety asked leave to plead non-disclosure thereof by plaintiffs to the surety and consequent release of the surety, which request was refused except on terms of adjournment and payment by the surety in any event of all costs of the trial up to that time, which latter term was declined. The majority of this Court expressed the opinion that under all the circumstances the surety should have been allowed to amend its pleadings unfettered by such an onerous term as to costs; and that, had judgment not been given for dismissal, on other grounds, of the action against it, a new trial would have been necessary to determine the issue sought to be raised. The questions involved in such an issue were to some extent discussed. *Per* Rinfret J. (dissenting in part): The trial judge's finding that leakages were attributable to faulty workmanship of B. which did not "appear" until within one year after the completion of the work, within the contemplation of article 16, was fully warranted on the evidence. But in any case the undertaking of September 28, 1931, created a new and independent obligation on B., which was not qualified by restrictions in article 16, to repair the defects; and directions within the meaning of said undertaking were given by the architect. The judgment against B. should be affirmed. But said undertaking of September 28 was a material alteration in the contract, and the surety was thereby released of its liability under its bond, and the judgment of the Court of Appeal dismissing the action as against it should be affirmed. *Per* Kerwin J. (dissenting): Upon the evidence, the trial judge's findings against B. should not be interfered with. The leaks arose through B.'s failure to comply with the specifications. The conditions in the building shortly before the trial of the action, shewn in evidence, were, upon the evidence, substantially unchanged from those existing within a year after completion of the building; and the defects had arisen within that year. There was ample justification for the amount fixed as damages by the trial judge. Directions were given to B. to repair, within the meaning of the undertaking

CRIMINAL LAW—*Continued*

corpus, etc., and at the trial. The prosecuting officer for the County of Halifax, or his assistant, appeared on behalf of the Attorney-General of Nova Scotia on the same proceedings except the preliminary inquiry. The Province or the Municipality of the County of Halifax made no disbursements. The Department of National Revenue paid direct to the parties concerned the fees of informant's counsel, costs of stenographer's notes, and other costs, and fees of witnesses for the prosecution and fees and allowances of the justice of the peace on the preliminary inquiry. Witnesses' fees or the justice's fees and allowances were never certified to be correct nor produced or presented to the treasurer of the municipality in manner prescribed under *The Costs and Fees Act,* R.S.N.S., 1923, c. 252 (which provides for payment thereof) and no claim for fees by witnesses or the justice was made to the treasurer of the municipality. The Dominion Government did not pay for the services of the said prosecuting officer (or his assistant) or of the stipendiary magistrate (who each receive remuneration annually from the Government of Nova Scotia or the municipality). *Held:* The fines in question were imposed in a proceeding instituted at the instance of the Government of Canada or of a department thereof, in which that Government bore the cost of prosecution, within the meaning of exception (*b*) in s. 1036 (1) of the *Criminal Code,* and were payable to the Minister of Finance for Canada. Judgment of the Supreme Court of Nova Scotia *in banco,* 11 M.P.R. 335, affirmed on above ground. *Per* Duff C.J., Rinfret, Kerwin and Hudson JJ.: The words "in which that Government bears the cost of prosecution" in said exception (*b*) in s. 1036 (1) do not relate to what may take place in a particular prosecution; they connote something broader than the mere casual occurrence of the payment of the costs in an individual case; they imply a consistent course of action sanctioned by law or by custom. The existence of *The Costs and Fees Act* of Nova Scotia cannot affect the construction nor preclude the true effect of s. 1036 of the *Criminal Code,* which is essentially federal legislation. As to custom or practice, the Government of Canada had full right to institute the proceedings and to conduct the prosecution in question; and the costs thereof were such as would usually and properly be borne by the Dominion of Canada; and, moreover, they in fact were so borne. The provinces establish

CRIMINAL LAW—*Continued*

and maintain the ordinary criminal courts and, for this reason in itself, the "cost of prosecution" referred to in said exception (*b*) must be of a character apart from the ordinary costs of maintenance of those courts. The said words "cost of prosecution" which the "Government bears" are necessarily referable to cost specially incurred in connection with the proceeding it has instituted. The fact that the trial was presided over by a stipendiary magistrade who is not paid by the Government of Canada, or the participation by the prosecuting officer, or his assistant, who are not paid by that Government, does not affect the situation. When acting in the premises, said magistrate and prosecuting officer (who receive their remuneration annually as aforesaid) are doing so merely as part of their regular duties; they were not paid specifically in connection with the prosecution in question. *Per* Davis J.: Without attempting to define the full scope and extent of the statutory condition that the Government of Canada "bears the cost of prosecution," it is plain that in this case that Government did bear such cost within the meaning of that condition; and this is sufficient for the purpose of deciding the present question. *Quaere,* as to the jurisdiction of this Court to entertain the appeal (on noting the language of the relevant provisions—ss. 1 and 6 of c. 226, R.S.N.S., 1923, under which the Reference was made to the Supreme Court of Nova Scotia, and s. 43 of the *Supreme Court Act,* R.S.C., 1927, c. 35). *Re* CLAIM UNDER S. 1036, CRIMINAL CODE, TO CERTAIN FINES; ATTORNEY-GENERAL OF NOVA SCOTIA *v.* ATTORNEY-GENERAL OF CANADA..... **403**

3——*Evidence—Charge of conspiracy to distribute drug—Evidence of accomplice—Corroboration.*] The appeal was from the affirmance by the Court of Appeal of British Columbia of appellant's conviction for conspiracy to distribute morphine contrary to the *Opium and Narcotic Drug Act, 1929,* (Dom.) There was a dissent in the Court of Appeal on the ground of lack of corroborative evidence and misdirection with regard thereto. The evidence against appellant was almost wholly that of one F., named as a co-conspirator of appellant but who had previously been tried and convicted. F.'s story set out conversations and dealings with appellant as to the sale of morphine and in particular an occasion when he had met him at a certain house and went with him out of a room there

EVIDENCE—*Broker and client—Marginal trading transactions—Accounts by mother and two daughters — Verbal agreement by mother with broker to treat all three accounts as one and as her own — Oral evidence — Whether commencement of proof in writing — Whether "commercial matters"—Necessary elements to constitute "commencement de preuve par écrit" — Trial judge's decision on the matter—Article 1233 C.C.—Article 316 C.C.P.*] The appellants were stock brokers in Montreal and had a branch in the city of Sherbrooke, where the respondent resided. In the month of August, 1926, the latter entered upon the operation of a marginal trading account at that branch. About a year later, two daughters of the respondent opened similar accounts of their own at the same branch office. These became very large and most active accounts until came the break in the stock market in October, 1929. The accounts went under the margin and even under the market, and the respondent and her daughters were continually called upon to supply funds or securities to support their accounts. The respondent, after her daughters had given all they had for that purpose, was able to support them for a certain period. Finally, having tried and failed to raise funds to provide for further margins required by the branch manager, the respondent expressed to the latter the desire to have an interview with one of the appellants, Mr. Johnston, in Montreal. The interview took place; and, after a long discussion about the exact position of all the accounts, the respondent, according to Mr. Johnston's version, authorized the latter verbally to treat all three accounts as one, and to close them, agreeing to hold herself responsible for them and that any balance due on the other accounts should be charged against her account. The respondent brought an action against the appellants asking, *inter alia*, that the latter be condemned to pay her the sum of $58,793.98, being the total of two debit balances in the accounts of one of her daughters charged

EVIDENCE—*Continued*

to the respondent in the final statement of account sent to her by the appellants; the respondent specifically denying the fact of her alleged authorization to treat all accounts as one and arguing further that this alleged agreement was not susceptible of being proven by oral testimony. The trial judge held that the agreement on which the appellants relied was susceptible of being proven by oral testimony as he found sufficient commencement of proof in writing, and that the evidence had established the existence of such agreement. The appellate court held that such evidence was not legal and maintained the respondent's action in part. *Held* that verbal proof of the agreement alleged by the appellants was admissible, as, upon the facts and circumstances of this case, sufficient commencement of proof in writing under article 1233 (7) C.C. could be found in order to let in oral evidence of the particulars of such agreement. *Held* also that, whatever may be the correct legal description of the agreement alleged to have been made by the respondent, it does not come within the transactions made by stock brokers in the ordinary course of their business; and, therefore, verbal evidence was not admissible as constituting proof of "facts concerning commercial matters" within the meaning of those terms in paragraph 1 of article 1233 C.C.—The decision of *Forget* v. *Baxter* ([1900] A.C. 467) is not applicable to the present case. The expression "commencement of proof in writing," although no definition of it is contained in the Civil Code, connotes a writing emanating from the party against whom it is to be used which tend to render probable (in French "vraisemblable") the existence of the fact which is desired to be proved—It is not necessarily required that the writing should be in the hand of the party against whom it is sought to be used or that it should be signed by that party; it is sufficient if it "emanates" from him.—The writing required for the commencement of proof may be replaced by the evidence of the party (article 316 C.C.P.)—The question whether there is a writing and the further question whether that writing emanates from the party against whom it is sought to be used are questions of law; but the question whether the writing, or the evidence of the party against whom it is used, tends to render probable the existence of the fact which it is desired to be proved, is a question of fact. The trial judge's finding, in this case, was in favour of the appel-

them recorded in the names of J.B. and E.B. respectively. Subsequently the plaintiff M., personally and on behalf of the plaintiff P., purported to stake the same claims, believing that said staking as done by T.B. was not in accordance with the regulations. He applied for a record of the claims, but this was refused because the claims were already recorded as aforesaid. The affidavit in form "A," required on an application to record a claim, contains the statement "that to the best of my knowledge and belief the ground * * * is unoccupied and unrecorded by any other person as a mineral claim." M. varied this by "excepting" J.B. or E.B. respectively and inserting: "That I claim that the staking and recording by [J.B. or E.B. respectively] of said ground was illegal and that the said ground was open for staking at the time that I staked the same." Plaintiffs brought action for a declaration that the alleged claims of J.B. and E.B. to the claims were null and void and that plaintiffs were the holders or owners of the claims and were entitled to have records in their names, and other relief. MacDonald J. dismissed the action on the ground that plaintiffs had no status to maintain it ([1935] 3 W.W.R. 226). An appeal was dismissed by the Court of Appeal for Saskatchewan ([1936] 2 W.W.R. 129). Plaintiffs appealed to this Court. *Held:* Plaintiffs' appeal should be dismissed. The case was not one contemplated by ss. 7 and 8 of the regulations (requiring certain procedure and permission as to relocating). Ss. 7 and 8 contemplate a case where, a claim having been abandoned or forfeited (and assuming, but not deciding, that this embraces a case in which the claim has lapsed by reason of failure to perform the representation work), the owner wishes to relocate the claim for himself. The question whether or not in point of fact T.B. was not acting on behalf of J.B. and E.B. but under some understanding, express or tacit, was making an unlawful use of their licences for the purpose of acquiring the ground for himself, was not a question upon which it was competent to the mining recorder to enter. The claims having been staked out and the mining recorder having accepted the staking as *bona fide* and sufficient, there were records of them in the names of J.B. and E.B. *ex facie* valid which the mining recorder could not treat as nullities. Plaintiffs could not, when they staked their claims, make the affidavit in form "A," and, such being the case, they could not lawfully either stake out

the ground as a mineral claim or obtain a record of it as such. *Osborne* v. *Morgan,* 13 App. Cas. 227, *Hartley* v. *Matson,* 32 Can. S.C.R. 644, and other cases discussed. To what extent the principle of those decisions is applicable for the protection of a holder of a record of a mineral claim under the regulations now in question, it was not necessary to determine for the purposes of the present appeal. This Court did not endorse, or decide on, the view that the existence of a record in itself precludes a licensee from all remedy against the holder of the record where the facts of the particular case bring it within a class of cases in which the regulations expressly or by necessary implication enact that the ground within the limits of the claim described in the record is open to location generally by the holders of miners' licences. MACPHEE *v.* BOX **385**

MOTOR VEHICLES — *Negligence — Automobile collision—Finding of jury—Form of finding — Construction — Evidence.* GRINNELL CO. OF CANADA LTD. AND LEGGATT *v.* WARREN **353**

2——*Negligence—Collision — Verdict of jury — Appeal — Discussion of principle acted upon in setting aside, on appeal, the verdict of a jury as against the weight of evidence* **341**

See APPEAL 1.

3——*See* INSURANCE (AUTOMOBILE).

MUNICIPAL CORPORATIONS — *Sale of land for taxes*..... **334**

See ASSESSMENT AND TAXATION 2.

NEGLIGENCE—*Automobile collision—Finding of jury—Form of finding—Construction—Evidence.* GRINNELL CO. OF CANADA LTD. AND LEGGATT *v.* WARREN. **353**

2——*Passenger injured by a passing automobile after alighting from street-car which, to allow her to alight, had been stopped suddenly at a place other than a usual stopping place—Liability of street railway company — Evidence — Findings of jury.*] Plaintiff was a passenger in defendant's street-car and, desiring to alight, signalled to stop, and went to the exit door at the side of the car. As the motorman did not slow down to stop at the usual car stop, she rang again. The motorman, noticing her at the exit door, quickly stopped the car at a point which was not a usual stopping place, and then caused the door to open. She alighted and was almost immediately struck and injured by an automobile driven by S.

NEGLIGENCE—*Continued*

from the rear. She sued for damages. At the trial the jury found that defendant's motorman was negligent "in stopping the tram too suddenly at other than a customary car stop without taking proper precaution for the safety of passengers"; they negatived negligence in S. and the plaintiff. Judgment was given to plaintiff for damages, which was reversed by the Court of Appeal for Ontario ([1937] O.R. 256). Plaintiff appealed to this Court. *Held:* The judgment for plaintiff at trial should be restored. There is no absolute rule that the duty of a street railway company towards its passengers ends when they alight and that it is not responsible for any mishap that may overtake the passenger making his way to the sidewalk. Each case must depend on its own circumstances. There is a duty on the company not to place its passenger in danger at the moment of alighting or immediately thereafter. There were precautions that might have been taken by the motorman, which the jury, no doubt, took into account. *Per* Duff C.J.: Defendant's duty was to exercise reasonable care for the safety of its passengers. What constitutes reasonable care (where no special rule of law comes into play) is a question of fact, to be determined according to the circumstances. Sec. 37 (1) of the Ontario *Highway Traffic Act* (as to vehicles not passing a street-car which is stationary for taking on or discharging passengers) was intended to provide a specific safeguard for (*inter alia*) passengers leaving street-cars. It imposes a duty upon drivers of motor cars directly, but has significance in relation to a street railway company's execution of its duty to exercise reasonable care in the carriage of passengers. The conduct of a company, which stops its car for the discharge of passengers at such a place and in such a manner as to render nugatory said statutory safeguard, is a circumstance not irrelevant in determining whether it has acquitted itself of its obligations to them. *Ex facie,* it is not a wholly unreasonable conclusion that the company is not sufficiently attending to the safety of passengers if it acts in disregard of the contingency (when the emergence of that contingency ought to be foreseen as a practicable possibility) that a motor car may at the moment be in the act of passing and may, if the street-car is too suddenly stopped and the doors too suddenly thrown open, be carried through the place where passengers are alighting. In the absence of circumstances implying assumption of the risk

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by the passenger (which in itself in most cases would probably be an issue of fact for the jury; and which assumption of risk could not be affirmed in the present case) it is a question of fact for the jury whether, in managing its street-car in such a manner as to deprive descending passengers of the safeguard contemplated by the statute, the company is fulfilling its duty to take reasonable care for its passengers' safety. Further, in the present case, it was, upon the evidence, open to the jury to take the view that the sudden stopping of the street-car might set up motions in the car itself, which, when the doors were opened almost simultaneously with the application of the brakes, might cause the plaintiff, in descending, to lose her balance and distract her attention from street traffic; and that such things did occur and had that effect upon the plaintiff; and in such view it would be a natural and proper conclusion that defendant was not reasonably entitled to assume that no precautions on its part were necessary. There was evidence from which the jury might not improperly find that the situation of danger from the passing automobile was one created by the unreasonable and imprudent stopping of the street-car in the manner in which and at the place where it was stopped; and that this situation of danger ought to have been anticipated as a reasonably possible contingency; and that defendant could not reasonably assume that, in the circumstances, plaintiff, without negligence on her part, would not be unaware of the risk involved in defendant's acts or of the actual danger from the approaching motor car. KUCZERYK *v.* TORONTO TRANSPORTATION COMMISSION **431**

3——*Jury trial—Answers to questions—Whether "special, explicit and articulated"—Findings of the jury—Arts. 483, 501, 502 C.C.P.* **76**
See PRACTICE AND PROCEDURE 1.

4——*Landlord and tenant—Evidence—Fire occurring in building occupied by lessee—Claim by lessor against lessee for amount of loss—Fire starting during cleaning operations in which gasolene used—Cause of fire uncertain—Res ipsa loquitur* **294**
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5——*Motor vehicles—Collision—Verdict of jury—Appeal—Discussion of principle acted upon in setting aside, on appeal, the verdict of a jury as against the weight of evidence* **341**
See APPEAL 1.

6——*See* SHIPPING **1.**

PATENT—*Damages for infringement—Matters and items of damages—Sale of product of infringing machine—Invention for manufacturing stringers to be used in fasteners—Loss caused from sales of completed articles (fasteners) made from stringers made on infringing machines—Damages for loss of profit on sales lost—Damages by way of royalty—Damages for loss from reduction in sale price—Pleadings—Raising question of right under s. 47 (6) of Patent Act (R.S.C., 1927, c. 150) on assessment of damages after judgment, when facts relied on not pleaded and proved in the action for infringement.*] The sale of the product of an infringing machine is not too remote upon which to found a claim in damages, under s. 32 of the *Patent Act* (R.S.C., 1927, c. 150), by the owner of the patent of the machine infringed. The object of the patented invention was to manufacture stringers to be used in fasteners. *Held:* Plaintiff (owner of the patent) could not be properly compensated for infringement by reference only to the manufacturer's cost and sale price of the stringers and without regard to the cost and sale price of the completed articles (fasteners); the stringers were of importance only in their use in fasteners and what plaintiff lost was sales of fasteners; the principle set forth in *Meters Ld.* v. *Metropolitan Gas Meters Ld.*, 28 R.P.C. 157, should be applied; plaintiff was entitled to damages for loss sustained by reason of defendant's sales of fasteners from stringers made on infringing machines. *Held*, further: On the evidence (and applying the "broad axe" referred to by Lord Shaw in *Watson* v. *Pott*, 31 R.P.C. 104), had defendant not sold such fasteners, plaintiff would have sold 60 per cent. of the number actually sold by defendant; and plaintiff was entitled by way of damages to the profit it would have made on what it would have sold as aforesaid. It was so entitled, even were it shown that in the period of infringement it did not manufacture stringers on its patented machine; it was deprived of the opportunity of using its patented machine to produce stringers for the said 60 per cent. As to the 40 per cent. of defendant's sales which plaintiff would not have made, plaintiff was entitled to damages by way of royalty (*Watson* v. *Pott*, 31 R.P.C. 104, at 120; *United Horse Shoe & Nail Co.* v. *Stewart*, 5 R.P.C. 260, at 267). Damages were awarded also for loss to plaintiff by reason of reduction by defendant in the sale price of such fasteners (forcing reduction by plaintiff) (*American Braided Wire Co.* v. *Thomson*, 7 R.P.C. 152); but not where

PATENT—*Continued*

plaintiff was the first to act, even were plaintiff induced to act by its representatives having been told, falsely, by prospective or actual customers that they could purchase more cheaply from defendant—a claim for damages in such a case was too remote. In the interval between lapse of plaintiff's patent for non-payment of fees and publication of notice of application to restore it, defendant shipped into Canada fasteners (not taken into account in plaintiff's statement of damages) made in the United States on machines identical with machines held to constitute infringement of the patent. On an assessment of damages, after judgment had been given for plaintiff in an action for infringement, defendant claimed that by virtue of the operation of s. 47 (6) of the *Patent Act*, it obtained the right to use the invention in Canada. *Held*, that the facts should have been pleaded and proved in the patent action as a defence, and it was now too late to raise the question on the assessment of damages. COLONIAL FASTENER CO. LTD. ET AL. *v.* LIGHTNING FASTENER CO. LTD. **36**

2——*Validity—Anticipation—Prior art—Specification—Definite claims—May be so broad as to be invalid—Their construction by the courts—The Patent Act, 13-14 Geo. V, c. 23, s. 14, ss. 1; 25-26 Geo. V, c. 32, s. 35, ss. 2.*] The appellant company is manufacturing a collar of the same material as used in a soft shirt, made semi-stiff and yet comfortable for personal wear and sufficiently porous to absorb perspiration and to be easily washed and ironed. The appellant's process for making that collar is as follows: Two plies of the particular shirt material, forming outside and inside layers of the collar, are taken and there is placed between them a ply of other woven material in which all the weft threads and two out of three of the warp threads are cotton, the remaining one in three of the warp threads being of cellulose acetate. These cellulose threads are partly dissolved by a volatile (acetone-alcohol) solvent applied through one of the outer fabrics after the collar is partly finished. The result of the rapid driving off of the volatile solvent is that the dissolved cellulose acetate does not spread; the knuckles only of the cellulose actate yarn melt and form an adhesive which united all three plies at a series of spaced spots, staggered on opposite sides of the lining material, the result being a semi-stiff composite fabric. This process was put into use in Canada by the appellant about June, 1935. The respondent then alleged that the process

PATENT—*Continued*

infringed the Dreyfus Canadian patent no. 265,960, granted November 16, 1926, on an application filed December 18, 1925, and owned by the respondent, and the present action was brought before the Exchequer Court of Canada, the patent not appearing to have been put into commercial use prior to the adoption by the appellant of its process. The patent is recited to be an invention of "certain new and useful improvements relating to fabrics and sheet materials and the manufacture thereof." The invention is stated to concern the manufacture of new fabrics or sheet materials having waterproof to gas-proof properties or capable of other applications. According to the invention, a fabric or sheet material is made by uniting under appropriate conditions of temperature and pressure, woven, knitted or other fabrics, composed of or containing filaments or fibres of thermoplastic cellulose derivative or derivatives with woven, knitted or other fabric composed of or containing filaments or fibres of non-thermoplastic or relatively non-thermoplastic material. In this way the fabrics are united and a composite sheet material is obtained in which the pores or interstices are reduced to extremely minute dimensions, or closed completely, by the melting or softening effect produced by the heat and pressure upon the filaments and fibres of the thermoplastic cellulose derivative or derivatives and by the uniting of the fabrics under the heat and pressure. Further specifications are fully described in the judgment reported. The invention of Dreyfus was, in effect, to make an ordinary fabric or sheet material waterproof or gas-proof without detracting from the appearance of the orignial material. Although there were some twenty-five claims set up the appellant's arguments were confined to claims 1 and 4 which were as follows: "1. A process for the manufacture of composite sheet material which comprises subjecting a plurality of associated fabrics, at least one of which contains a thermoplastic derivative of cellulose, to heat and pressure, thereby softening said derivative and uniting said fabrics. * * *. 4. A process for the manufacture of composite sheet material which comprises treating a fabric containing a thermoplastic derivative of cellulose with a softening agent, associating it with another fabric, and uniting the fabrics by subjecting them to heat and pressure." The inventor, Dreyfus, in defining his claims in his British application, expressly mentioned "woven, knitted or other fabric composed of or containing filaments or fibres of a thermoplastic cellulose derivative or derivatives," and in defining his claims in the United States application also expressly mentioned "a fabric containing yarns comprising a thermoplastic derivative of cellulose"; but he entirely omitted such words in his subsequent application in Canada. Amongst many British and United States patents referred to by the parties, the Van Heusen, which was granted in the United States January 1, 1924, was the most relevant one to this case. It disclosed the manufacture of a three-ply collar consisting of a lining and two outer plies which caused to combine into a single composite sheet by the application to the lining of a cellulose derivative in solution to act as a "cementing agent," whereupon the outer piles and the lining were treated "* * * by heat and pressure to cause the cementing material to be converted into its final form and thereby secure the separate layers of fabric together." One of the grounds upon which the validity of the Dreyfus patent was challenged by the appellant company was that the claims were not confined and limited to the use of the cellulose in yarns, filaments or fibres, woven, knitted or worked into the intermediate material, but extended to the use of a cellulose derivative in any form. The Exchequer Court of Canada upheld the validity of the patent. *Held*, reversing the judgment of the Exchequer Court of Canada ([1936] Ex. C.R. 139), that the patent was invalid. Unless the claims in the Canadian Dreyfus patent can properly be narrowed by the introduction of a limitation to the use of the cellulose derivative in the form of yarns, filaments or fibres, they have been clearly anticipated by the United States patent of Van Heusen and two other British patents referred to in the judgment. Van Heusen clearly disclosed the process of taking the separate pieces of fabric and securing them together "into what is in effect an integral composite fabric" by the use of an intermediate binding layer containing solutions of cellulose derivatives. It constitutes a complete anticipation of the claims of the respondent unless those claims can be modified by incorporating the limitation that the thermoplastic derivative of cellulose be in the form of yarns, filaments or fibres woven into the intermediate fabric. As a general rule, the ambit of the invention must be circumscribed by definite claims. It is a question of law, then, whether or not the claims in this case read in the light of

the specification may be limited. If they cannot, the claims remain so broad as to be invalid because of the prior art. If limited, they have not been anticipated. Throughout the specification of the Dreyfus patent, there is a continuous reference to the use of the thermoplastic derivative of cellulose in the form of yarns, filaments or fibres and it is plainly the very essence of the disclosure in the specification; but the inventor did not state in his claims the essential characteristic of his actual invention. The Court is invited to read through the specification and import into the wide and general language of the claims that which is said to be the real inventive step disclosed. The claims are unequivocal and complete upon their face; it is not necessary to resort to the context and as a matter of construction the claims do not import the context. In no proper sense can it be said that though the essential feature of the invention is not mentioned in the claims the process defined in the claims necessarily possesses that essential feature. The Court cannot limit the claims by simply saying that the inventor must have meant that which he has described. The claims in fact go far beyond the invention and upon that ground the patent is invalid. The *Patent Act* specifically requires that the specification shall end with a claim or claims stating distinctly the things or combinations which the applicant regards as new and in which he claims an exclusive property and privilege. *The Patent Act,* 1923 (13-14 Geo. V, c. 23, s. 14, ss. 1); *The Patent Act,* 1935 (25-26 Geo. V, c. 32, s. 35, ss. 2). B. V. D. COMPANY LTD. *v.* CANADIAN CELANESE LTD. **221**

3——*Validity—Prior public knowledge and prior use—Subject-matter—Breadth of claims.*] It was *held* that the letters patent in question, for alleged new and useful improvements in incubators, were invalid and void, and they were declared cancelled and set aside (reversing judgment of Angers J. in the Exchequer Court of Canada, [1936] Ex. C.R. 105), on grounds as follows: The subject-matter of the alleged invention and the validity in that respect of the patent must be envisaged within the ambit of the claims accompanying the specification. As to the "method" claims (those relating to the "method of hatching"): Bearing in mind that, in order to have the character of an invention in the patentable sense, it would not be sufficient for the patentee's conception to consist in the adoption of the principle of air circulation in a room for the purpose of maintaining in it

uniformity of temperature (which principle was not new), that a further step was required, viz., a novel method of utilizing air circulation (involving "a degree of ingenuity * * * which must have been the result of thought and experiment"—*Thomson* v. *American Braided Wire Co.,* 6 R.P.C. 518), it was to be noticed that nowhere in the claims was there claimed precisely as material any particular method of utilizing the air circulation, except, perhaps, the statement that the current of heated air is "created by means other than variations of temperature"; also that there was nothing in the claims to restrict the patent to any particular order of arrangement of the eggs or any particular direction or means of control of the current of air, other than its velocity, and nothing to estop the patentee from asserting that the claims were not restricted by such features; and it followed that, in view of the operations of one Hastings and prior public use (as established in evidence) at Muskogee, Oklahoma, in 1912 (the date of the alleged invention now in question carried back to 1915), the patentee's claims in question were too wide; also the greater part of them, if not all, were already anticipated and precluded by Hastings' public use. The Supreme Court of the United States in *Smith* v. *Snow* (294 U.S. R. 1), dealing with the first of the method claims, held it to be valid, but the record before that Court lacked evidence of Hastings and evidence of what his prior use had been, and the record before this Court in the present case was so widely different that a different conclusion must be reached. As to the claims relating to the apparatus: Upon the evidence, it was impossible to regard the advance, if any, over the prior knowledge and prior user as good and sufficient subject-matter of a patent. Any difference that might exist between the structure now in question and that of Hastings consisted only in mechanical details. The apparatus claims were defeated by Hastings' prior public use; they must be regarded as invalid and void, as embracing more than the patentee could claim as new; and, indeed, as claiming something which, having regard to Hastings' prior public use, did not amount to an invention in the pertinent sense. THE KING *v.* SMITH INCUBATOR CO. ET AL..... **238**

4——*Validity—Claims—Construction of claims — Determining scope of patent monopoly — Matter embraced in the claims — Specification — Infringement.*] The action was for damages, etc., for alleged infringement of the same patent

SEDUCTION—*Continued*

tially the same as those in the trial of an action of seduction under the other (preceding) sections of the Act or at common law. Starting from this point, it follows that s. 5 should be construed according to the ordinary meaning of the words and that damage of the special character which is the gist of the action under the other sections of the Act—damage actually or presumptively entailing some loss of service or some disability for service—is not of the gist of the action under s. 5. (*Per* Kerwin J.: A consideration of the language of s. 5 leads to the same conclusion. The language analysed and discussed.) There was sufficient evidence of damage to support the action. Further, the jury's verdict must stand unless, examining the evidence as a whole, the Court was clearly of opinion that it was one which no jury, acting judicially, could give; and this had not been established by argument. So also as regards damages. It was for the jury to determine whether appellant's evidence, or how much thereof, should be accepted as correct; and on her evidence it could not be said that, if it was accepted, the sum awarded was such as no tribunal of fact acting reasonably could have awarded. *Per* Davis J. (dissenting): Even accepting the appellant's story, she could not, on the facts of the case and upon the broadest possible interpretation most favourable to her of s. 5, succeed unless s. 5 be reduced to giving a cause of action for fornication *per se*. If the cause of action in s. 5 (excluding necessarily the relation of master and servant) is the same as in the other sections of the Act, the birth of a child or pregnancy or at least some physical disability as a direct result of the conduct complained of is an essential element of that cause of action, and the illness that was proved in this case was too remote and insufficient to sustain the action. If, on the other hand, the cause of action in s. 5 is to be regarded as a new and independent tort, separate and distinct from the action for seduction referred to in the other sections, then, whatever be the essential elements of this new cause of action, there must be at least something in the nature of negation of choice. Taking either interpretation of s. 5, the action failed upon the evidence. In interpreting s. 5, the statute should be read as a whole and s. 5 interpreted, not as an isolated piece of legislation to be given a new meaning and significance, but as part of an entire statute dealing with the same subject-matter. The other (preceding) sections (discussed) necessarily import as an essential ingredient of the cause of

SEDUCTION—*Concluded*

action an illegitimate child born or conceived as a result of the relations complained of; and that has always been the common understanding in Canada of the cause of action for seduction. The language of s. 5 analysed and discussed, and with reference to the language in the other sections. Sec. 5 should not be interpreted so as to import into the words used therein a different quality or meaning from that which the same words have in the other sections. In the cause of action under s. 5 there is necessarily excluded the relation of master and servant as an essential, and with it the necessity for proof of loss of service; but the substance of the cause of action, the birth of a child or at least the condition of pregnancy, remains. The re-enactment of the statute in the revision of 1922 does not touch the point as to the substance of the cause of action, because the fact of birth of a child or pregnancy in the Alberta cases prior to the revision was admitted or accepted by counsel and those cases did not turn upon that question. The evidence in the present case disclosed no cause of action. MACMILLAN *v.* BROWNLEE **318**

SHIPPING—*Damage to goods—Peril of the sea—Negligence—Fault of carrier or of his agent or servant—Burden of proof—Barbados Carriage of Goods by Sea Act, 1926—Clause q, rule 2, article 3, of the schedule of the Act.*] Upon an action against a carrier for damages to goods shipped under bills of lading which specifically stated that the vessel should not be liable for damage caused by perils of the sea, the grounds of defence were, first that, the carrier having established at the trial a *prima facie* case of loss by a peril of the sea, the burden of proving negligence consequently rested on the respondent, and secondly, that the carrier had discharged the burden of proof resting on him under clause *q*, rule 2, article 3, of the schedule of the Barbados Carriage of Goods by Sea Act, 1926, which was made applicable to the contract. *Held* that, the issue raised by the first ground being an issue of fact, it was incumbent upon the carrier to acquit himself of the onus of showing that the weather encountered during the voyage was the cause of the damage and that it was of such a nature that the danger of damage to the cargo arising from it could not have been foreseen or guarded against as one of the probable incidents of the voyage—In this case, the concurrent findings of fact, on that issue, by the trial and appellate courts in favour of the respondent must stand. *Held*, also, that under clause *q*,